Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pele Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant entered into service with the Organisation on 1 February 2000 at the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and was deployed in February 2003 to the United Nations Transitional Administration in East Timor (UNTAET) at the P-3 level before joining the United Nations Operation in Burundi (ONUB) on 20 October 2004 as Chief, Joint Logistics Operations Centre (JLOC) at the P-4 level.

2. Following allegations made against him by a staff member working under his supervision ("the Complainant"), the Applicant was charged with misconduct and summarily dismissed from ONUB. The Applicant is contesting the decision dated 9 January 2008 summarily dismissing him from service effective 17 January 2008 on the basis of the following charges:

a. Sexual and general workplace harassment of the Complainant;

b. Attempted abuse of authority as the Complainant's former supervisor and retaliatory conduct;

c. Interfering with an official investigation into the allegations made against him;

d. Failing to follow directions and instructions properly issued by his supervisors; and

e. Acting in a manner unbecoming of his status as an international civil servant.

Facts

3. On 2 November 2004, the Applicant recommended the recruitment of the Complainant to fill the vacant post of a Logistics Assistant within his unit. The Complainant was appointed to the post on 15 February 2005 under the Applicant's supervision.

4. The Complainant served in JLOC for three months. On 21 May 2005, she made a complaint against the Applicant alleging harassment following which she was transferred to another unit on 23 May 2005.

5. Prior to this complaint, two other ONUB staff members in the Office of the Special Representative of the Secretary-General (SRSG), whose identities were not revealed by the Office of Internal Oversight Services (OIOS) investigators ("the Anonymous Complainants"), brought a complaint of Sexual Exploitation and Abuse (SEA) against the Applicant based on information that they had obtained from the Complainant.

6. On 21 May 2005, the Chief of the ONUB Conduct and Discipline Unit (CDU) visited the Complainant's home. Also present during the visit were the Anonymous Complainants. The visit was planned by a female work colleague with whom the Complainant was sharing living accommodation.. At that visit, the Anonymous Complainants and the ONUB Chief of CDU heard accounts of the Applicant's conduct from the Complainant.

7. By a memorandum dated 26 May 2005, the Complainant filed a complaint of sexual harassment against the Applicant with the ONUB CDU and thereafter filed further details of the alleged sexual harassment on 2 June 2005.

8. In July 2005, the then SRSG of ONUB requested the Investigation Division of the Office of Internal Oversight Services to conduct an investigation into the several allegations against the Applicant.

OIOS Investigations

9. OIOS commenced an investigation into the allegations in September 2005. The Applicant was interviewed on 9 September and 3 October 2005. In the course of the interviews, OIOS provided the Applicant with some information on the substance of the complaints and the email correspondence between him and the Complainant. The Applicant provided his responses to the complaints both orally and in writing.

10. OIOS finalized their Investigation Report on 26 January 2006. In the said Investigation Report, the OIOS investigators concluded that the Applicant had not subjected the Complainant to sexual harassment but was had engaged in workplace harassment against her. They also found that the Applicant had neither sexually exploited nor abused any other women residing in Bujumbura, Burundi. OIOS also concluded that the Applicant had utilized his position for personal reasons to prejudice the Complainant's employment by speaking to

her new supervisor and by expressing an interest to have input into her performance appraisal.

11. OIOS further concluded that the Applicant had failed to follow the directions and instructions properly issued to him by his supervisors by contacting the Complainant and her husband and that the Applicant had therefore failed to uphold the highest standards of integrity expected of United Nations staff members.

12. On 21 February 2006, ONUB submitted comments on the Investigation Report to the Assistant Secretary-General for Peacekeeping Operations which was transferred together with the Investigation Report to the Assistant Secretary-General for the Office of Human Resources Management (ASG/OHRM).

13. On 18 July 2006 the Director of the Division for Organizational Development, OHRM sent charges of misconduct to the Applicant which he received on 27 July 2006. The Applicant submitted his response to the ASG/OHRM on 8 August 2006 followed by an amended response on 11 October 2006.

JDC Review

14. The ASG/OHRM referred the matter to the former Joint Disciplinary Committee (JDC) on 8 January 2007. The Applicant submitted his comments to the JDC on 29 January, 6 and 12 February 2007. On 19 March 2007 the SRSG submitted comments on the Applicant's submission. The JDC panel was established on 2 May 2007.

15. The JDC found that:

a. The preponderance of evidence submitted did not establish that the elements required for action under the Organization's sexual harassment policies were present, although the evidence was sufficient to establish aggravating circumstances in light of other charges established.

b. The Applicant's conduct with regard to his friendship with the Complainant ultimately amounted to workplace harassment. He also abused his authority by seeking to discuss with the Complainant's new supervisor and make an input into her performance appraisal for the period he supervised her.

c. There was no evidence that the Applicant interfered or attempted to interfere with the investigation of the allegations against him. The Administration disposed of the requisite burden of proof to show that the Applicant failed to follow duly authorised instructions.

d. The Administration violated the Applicant's rights under ST/AI/379 (Procedures for Dealing with Sexual Harassment) of 29 October 1992 by giving him a copy of the complaint only after the investigation and after the charges were submitted to him although the Applicant was ultimately able to defend himself and availed himself of numerous opportunities to do so.

16. The JDC issued its report on 10 January 2008 and recommended that the Applicant be separated from service with notice or compensation in lieu thereof.

The Secretary-General's decision and the Applicant's appeal to the former UNAT

17. On 19 December 2007 (sic) the Secretary-General concluded, in light of the JDC report, that the Applicant's actions in relation to the Complainant constituted sexual and workplace harassment. The Respondent also accepted the findings of the JDC that the Applicant abused his authority as the Complainant's supervisor in retaliation for her lodging the complaints against him and that he failed to follow instructions properly given by his supervisors. He, however, did not accept the finding that the Applicant's rights under ST/AI/379 were violated.

18. The Secretary-General, accordingly, pursuant to his discretionary authority in disciplinary matters, decided that the Applicant be summarily dismissed in accordance with staff rule 110.3(a)(viii).

19. On 31 March 2008, the Applicant submitted the present Application to the former United Nations Administrative Tribunal. The Respondent filed his Reply on 28 October 2008. On 28 January 2009 the Applicant filed "Observations on Respondent's Answer". As a result of the transitional measures related to the introduction of the new system of administration of justice, the case was transferred from the former United Nations Administrative Tribunal to the United Nations Dispute Tribunal ("the Tribunal") on 1 January 2010.

20. On 16 June 2010, the Applicant submitted to the Tribunal a request for confidentiality with regard to the publication of his name and that of the Complainant in any orders or judgment resulting from the Application. On 21 July 2010, the Parties attended a directions hearing to discuss, inter alia, all issues having a bearing on the readiness of the case for hearing. The Tribunal heard this Application on 18 August 2010. During the hearing, the Tribunal received oral testimony from the Applicant and an OIOS Investigator who gave evidence for the Respondent.

Applicant's Case

21. The Applicant's case is summarized as follows:

22. The branding of this case from the outset as one of sexual and workplace harassment is incorrect. The matters arising from the complaint were purely between him and the Complainant and were neither related to nor had an impact on the workplace. The mischaracterization of the case/dispute led to his actions being incorrectly categorized as serious misconduct.

23. The original request made by the Complainant was for a transfer away from the Applicant's unit coupled with a generalised allegation of harassment. The more detailed claims of sexual harassment based on private correspondence were made much later and were never verified by OIOS.

24. There was no indication over the course of several years that he ever used his authority to adversely affect the Complainant's career. On the contrary, he assisted her in job-hunting and facilitated her assignment to ONUB. There was never any intention to retaliate against the Complainant and the assumption of *vindictive animus* is an interpretation not based on his actions.

25. Regarding the charge of failing to follow instructions, the Respondent relies on the JDC's assumption that the '*advice*' given by the respective '*supervisors*' was in fact self-evident and understood by the Applicant to mean '*instructions*'. The Applicant contends that this argument is unsustainable in the face of the evidence given to the OIOS investigators by each of the respective supervisors, which clearly indicates that they themselves believed that they had issued advice rather than instructions.

26. Throughout the handling of the case and the deliberations of the JDC Panel, the adverse evidence as to the Complainant's character, motivation and credibility as a witness was not given due consideration or credence.

27. The Respondent acted in breach of his due process rights and violated his right to privacy in the manner in which the disciplinary charges against him were levelled.

28. The Respondent abused his authority in permitting the use of the Organization's resources in pursuance of a personal grievance arising out of conduct that was entirely private. The Respondent improperly interfered in personal matters between international civil servants and took sides in a personal and private relationship to his detriment.

29. The Applicant argues that the imposition of summary dismissal was neither warranted nor justified in this matter and that a lesser penalty could have been imposed in keeping with the particular circumstances of the case.

30. This Application to the Tribunal is made not only in the hope of obtaining full exoneration and restoration of his good name and reputation, but also in order to impress upon the Respondent the importance of scrupulously respecting the rights of staff members in disciplinary proceedings.

31. In view of the foregoing, the Applicant requests that the contested decision to be rescinded and a recommendation for exceptional compensation be made for violations of his rights and for emotional distress resulting from the Respondent's actions.

Respondent's Case

32. The Respondent case is summarized thus:

33. There was sufficient evidence to support the decision to dismiss the Applicant as his conduct was inconsistent with the requisite standard of integrity required of an international civil servant and of a severity incompatible with continued service in the Organization.

34. The Applicant was accorded due process pursuant to relevant administrative issuances and was able to defend himself at all stages during the investigation and disciplinary proceedings in the case.

35. There was no prejudice, improper motive or other extraneous factors behind the decision to summarily dismiss the Applicant.

36. The Applicant's misconduct was established and amounts to serious misconduct. Consequently, the disciplinary sanction of summary dismissal was proportionate to the offence committed by the Applicant.

37. On the basis of the foregoing, the Respondent requests the Tribunal to dismiss each and all of the Applicant's pleas.

Issues for Determination

38. The Tribunal formulates following issues for consideration in this case:

a. Whether the charge of sexual harassment was established;

b. Whether a case of workplace harassment was made out;

c. Alleged attempted abuse of authority as the Complainant's former supervisor;

d. Alleged retaliatory conduct and *vindictive animus* of the Applicant;

e. Interference with an official investigation on the part of the Applicant;

f. Whether the Applicant failed to follow the proper instructions of his supervisors;

g. Why the informal approach to dealing with incidents of sexual harassment was bypassed;

h. Were the due process rights of the Applicant breached at any stage?

i. Was there bias or the appearance of it on the part of the ONUB Administration in this case?

j. The transmutation of an initial complaint of sexual exploitation that could not be proven; and

j. Did the Applicant's conduct amount to serious misconduct?

Considerations

Sexual Harassment

39. In paragraph 2 of ST/AI/379, sexual harassment is defined as:

> Any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by any official who is in a position to influence the career or employment conditions (including hiring, assignment, contractual renewal, performance evaluation or promotion) of the recipient of such attentions.

40. The European Commission Recommendation of 27 November 1991 (92/131/EEC) addresses the subject of sexual harassment as an intolerable and unacceptable violation of the dignity of workers. It further recommends that men and women respect one another's human integrity and defines the subject as conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work including conduct of superiors and colleagues where:

> a. Such conduct is unwanted, unreasonable and offensive to the recipient;
>
> b. A person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or
>
> c. Such conduct creates an intimidating, hostile or humiliating work environment for the recipient.

41. In her memorandum of 8 January 2007 to the JDC, the ASG/OHRM at paragraph 41(i) regarding the charge of sexual harassment against the Applicant states:

> By his conduct prior to and following [the Complainant's] recruitment to ONUB, [the Applicant] implied to the Complainant that a sexual relationship with him was a condition of her ongoing employment in the Joint Logistics Operation Centre. [The Applicant's] conduct also created an intimidating, hostile and offensive work environment for [the Complainant] which affected her physically and emotionally.

42. OIOS which had conducted an investigation in this case analysed and summarised what had happened between the Complainant and the Applicant in light of a sexual harassment allegation thus:

> For the past five years [the Applicant] had been trying to initiate sexual relations with [the Complainant]. She had made it quite clear that she was not interested, but there is no clear evidence to suggest that his requests for sexual favours interfered with her work, was a condition of employment or that they created a hostile or offensive working environment. There is also no evidence to indicate his sexual advance (attempted kiss in his hotel room) or his conduct of a sexual nature (the emailing of the photograph of his penis) had any detrimental impact upon the workplace. [The Complainant's] comments regarding J and A on 15 March 2005 read more of a joke than anything and put into perspective her response to the photograph. Her MSN Messenger communication with [the Applicant] following the incident indicates a rather jovial working and personal relationship that had not been negatively impacted by the attempted kiss and/or receipt of the penis photograph. Collectively the evidence indicates the Complainant was a willing participant in a five-year relationship with numerous sexual overtones that were of limited significance to her and did not encroach upon the ONUB workplace.

43. In every definition or examination of the subject of sexual harassment, it is the unwelcome and unwanted nature of the conduct on the part of the recipient which makes it a prohibited conduct capable of constituting misconduct on the part of the staff member engaging in such conduct.

44. It does not bear repeating the conclusions of the OIOS that the Complainant was a consenting partner in an intimate adult relationship where no holds were barred as far as topics for discussions were concerned. She felt perfectly comfortable living next door to the Applicant at the Hotel Botanika for over two months; riding with him to work every day in a vehicle assigned to him by the Mission and making jokes about his sexual partners on receiving the penis photograph.

45. While there is no doubt that the relationship between the Applicant and Complainant was totally inappropriate given the fact that they worked closely together, laying the blame entirely at the doorstep of one of them or characterising one of the parties as sexually harassing the other cannot stand any honest scrutiny.

46. In an interoffice memo from the ASG/OHRM to the JDC in which she sought to make out a case of sexual harassment against the Applicant, part of an email dated 23 January 2005

from the Complainant to the Applicant was reproduced to support the case that the Complainant had told the Applicant she did not want to have sex with him or with anyone else but that the Applicant actively pursued a sexual relationship with her upon her arrival in ONUB. It is proper to examine the said email in its entirety so that the context in which it was written and received and then responded to can be better appreciated. In the said email the Complainant had also complained to the Applicant that:

> Only one person with whom I wanted to have sex did not wont (sic) to have sex with me, more correct is not willing to have sex with me anymore, so I have a bad luck with my love life and sex in general.

47. In another email two days before, that is, on 21 January 2005, the Complainant expressed concerns about getting malaria at the new Mission and how she feared that such an ailment could affect her ability to have another child later if she found the right man to do so with. She had written:

> And about malaria, if like in a bad scenario I get malaria my major concer (sic) was how it could reflect to my maternity later on if I will wish in 3 or 5 or 10 years from now to have another babe (if I find a right man for that), like will babe be ok? I am silly I know but that is me again!

The Applicant had promptly responded to allay her fears about malaria and offer help with conceiving a baby. It must be appreciated too that both the Applicant and Complainant were married and knew each other's spouse at the time of these emails.

48. It is therefore my finding of fact that the charge of sexual harassment against the Applicant cannot be sustained in the circumstances. To the extent that she was willing and happy to engage in sex talk in emails, via telephone text messages and in person with the Applicant, the Complainant cannot blow hot and cold by deciding after the fact and several months later after they had had other disagreements that she was sexually harassed based on incidents she had at the time they occurred joked about

49. It must be pointed out that even while purporting to resist unwanted sexual attention from the overly eager Applicant, the Complainant saw nothing wrong in confiding to him in writing her sadness over her unwilling former lover. She saw nothing wrong in telling him in an email that she wanted another baby if she found the right man for that even while she remained married to the knowledge of the Applicant. Much as the personal moral standards

of the Complainant were not in issue before the Tribunal, her conduct with the Applicant in this regard becomes relevant for the purpose of determining the truth in a sexual harassment allegation in this case.

50. Indeed while she was still on leave on April 29 2005 and less than four weeks before she would be reassigned based on her complaint against the Applicant, he had wanted to know what she thought about moving temporarily to the procurement section. In spite of her being recently upset about an airport incident barely a week before in which the Applicant had exhibited his bad habit of prying into her private friendships with others and possessiveness towards her, the Complainant refused the opportunity of a reassignment from JLOC when asked by the Applicant. Part of her email to his suggestion read "what matters to me most is I do not wont to let U (sic) down…I know how important I am for you in JLOC and how much you relay(sic) on me there."

51. She went on to ask that he put everything on hold until she returned and proceeded to discuss some other issues. She definitely did not find the workplace intimidating or hostile up until that point due to the actions of the Applicant and she was not afraid that her employment was at risk.

52. A person who claims that a particular workplace became intimidating, hostile or offensive in addition to affecting her emotionally and physically would not, in the face of a possible reassignment, choose to remain in such a workplace.

53. There is no evidence that established that the work place had become intimidating, hostile or offensive for her. The *ipse dixit* of the Complainant on this issue without more, is certainly not enough to establish the allegation. The emails between the parties do not reveal a sexually harassed supervisee and there is no evidence from any work colleague that has testified to this allegation. The charge of sexual harassment cannot be sustained in the circumstances.

Workplace Harassment

54. The Applicant was also charged in this case with general workplace harassment. It was also stated in the charge that the Applicant's conduct "created a hostile and offensive work environment for the Complainant which affected her physically and emotionally."

55. On 11 February 2008 the Secretary-General published a bulletin ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority) dealing with and defining the prohibition of harassment among other unacceptable types of conduct. In section 1.2, harassment is defined as:

> Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. It may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment.

56. As at 2005 when the incidents that gave rise to the charges against the present Applicant occurred however, these definitions were not yet in place although ST/AI/371 (Revised Disciplinary Measures and Procedures) of 2 August 1991 in its section 2(d) cited "harassment" against other staff members as a conduct for which a disciplinary measure may be imposed. Staff Rule 101.2(d), then in force, prohibited discrimination or harassment of any kind and is actually relied upon and forms the basis for the present charge by the Respondent. The staff rule states that "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."

57. Inasmuch as the 2008 Secretary-General's Bulletin clarified the elements of harassment in defining it, nothing has changed in the way the Tribunal would view the subject as it pertains to whether an alleged harassment took place before or after the 2008 promulgation.

58. Workplace harassment will necessarily arise in a situation in which the common thread that links the harasser to the victim is the fact that they work together. The harassment complained of must be occasioned by the singular fact of a working relationship between the parties which is then exploited by the perpetrator.

59. Workplace harassment must consist of improper and unwelcome conduct. Such conduct must be unwelcome in the sense that the alleged victim did not solicit, incite or court the conduct and regarded it as undesirable and offensive. Another element of workplace harassment is that the conducts complained of must have the purpose or effect of unreasonably interfering with the Complainant's work performance or creating an offensive, hostile, intimidating or abusive work environment. In other words, such conduct must

interfere with the employee's ability to perform the job, causing work performance to suffer or negatively affecting job opportunities.

60. It is necessary to consider in this case the totality of the circumstances in ascertaining whether the work environment was rendered hostile, abusive or offensive and also that the conduct complained of was based on a work relationship and was unwelcome if a charge of workplace harassment is to be sustained.

61. In her 8 January 2007 report to the Joint Disciplinary Committee on allegations of misconduct against the Applicant, the ASG/OHRM in parts of paragraphs 60-64 stated with regard to the subject of workplace harassment as follows:

> 60. In the present case, the friendship between [the Applicant] and [the Complainant], or the issues surrounding its breakdown, clearly impacted on their mutual workplace at ONUB**. Indeed,** [the Complainant's] **recruitment to ONUB as an international staff member was directly linked to her relationship with** [the Applicant] **and his desire that they should work together again…**
>
> 61. Given [the Applicant's] intense and possessive attitude towards [the Complainant], his conduct in actively recruiting her to work under his supervision was particularly problematic, as he was in a position to influence her career, including matters such as her assignment, contract renewal, performance evaluation and promotion. **Under these circumstances, it would have been apparent to** [the Complainant] **that her continued employment was conditional upon the maintenance of her close relationship with** [the Applicant]**, in the context in which requests for sexual favours had already been made.**
>
> 62. According to ID/OIOS, there was evidence that [the Applicant's] harassment of [the Complainant] occurred in the workplace. ID/OIOS point to the considerable email traffic between the parties during working hours, which was frequently of a sexual nature and included sexual overtones and connotations, and observe that this necessarily impacted upon their workplace and the parties' productivity and performance.
>
> 63**. These and other incidents came to the attention of the Organization as the deterioration of the parties' relationship "spilled over" into the workplace, leading to the involvement of colleagues and the ultimate intervention of the Administration in reassigning** [the Complainant] **from JLOC and in initiating an investigation into her complaint of sexual harassment because the situation had become untenable.**
>
> 64. The intervention of ONUB Administration was therefore appropriate and in the interest of the Organization**, especially as the issues between the parties had come to involve staff members apart from** [the Applicant] **and** [the Complainant]**, and to impact generally upon the workplace environment…**(Emphasis added)

62. There is no basis for determining that the friendship between the Applicant and the Complainant or that its breakdown impacted on the workplace at ONUB as reproduced above. The explanation that the Complainant's recruitment was linked to her relationship with the Applicant does not justify this assertion especially when it is borne in mind that while her recruitment may have been owing to the Applicant's efforts, she was not recruited by him but by the Organisation. Even if it can be established that he wanted to work with her, it is not proof that their working together had impacted negatively on the workplace.

63. While the working together of the Applicant and the Complainant who were also in an intense friendship was bound to be problematic, nothing suggests that the Complainant considered her continuing employment as being conditional upon that relationship or the granting of sexual favours to the Applicant. Available evidence attest to a woman in a relationship in which she had a voice and could tell the Applicant off at times when she felt he had crossed the line. Over a long period, she had happily indulged in discussions of sexual nature with him as a special friend and felt comfortable enough on some occasions to visit his hotel room in her night clothes after working hours as claimed by the Applicant in his interview with OIOS which claim was never challenged.

64. The double-faced approach of the Complainant on different occasions as these relate to her complaint against the Applicant cannot be ignored except at great cost to the justice of this case. It is necessary to separate a genuine situation in which a complainant suffers harassment at work from one in which the said complainant blows hot and cold, manipulating the good mechanisms in place for ensuring respect for gender and for staff members at work in the United Nations system.

65. On 29 March 2005, while chatting on MSN Messenger online while the Applicant was on leave, the Complainant wrote that she could hardly wait for him to come back so that they could have a beer together. In the same forum, on 2 April 2005, she again stated that her moving out of the hotel would not be an obstacle to them seeing each other and socialising regularly. It was observed earlier that only three weeks before she would make the complaint of harassment against him, the Complainant refused a reassignment to another unit when the Applicant suggested it in an email.

66. Why did the Complainant prefer to remain with the Applicant in JLOC in spite of the constant jealousy and possessiveness he exhibited towards her while at the same time telling

her friend and housemate that she was afraid that the Applicant would sack her and that her family would suffer as a result? Was it because as she professed to him, she did not want to let him down, was very important to him at work and he relied on her for the unit to function and in what way? Why did she refuse to grab with both hands the opportunity of a reassignment away from her workplace harasser on 29 April 2005? Why did she invite the Applicant and his wife for drinks on 15 May? Why did she refuse the Applicant's offer on the phone on 20 May 2005 to speak to the CISS for her to be transferred to another section? What agenda did the Complainant want to complete at JLOC before she would leave the unit only three days later?

67. When she spoke to OIOS investigators, the Complainant had told them that in her email reply to the Applicant following the "penis email", she made the comment about his two lady friends because she hoped that his reply would show he was sleeping with them. The Applicant said they made jokes about the photograph the next morning at breakfast with the Complainant telling him that it was well shaved. It can be deduced also from later communication between them that their friendship continued nevertheless and that she did not find the photograph unwelcome or offensive. The explanation given by the Complainant to investigators about her email comments to the Applicant concerning his lady friends following the penis photograph provides a window into the mind of someone with intent on gathering enough documentary information to do harm if and when such a need arose.

68. On 23 April 2005, the Applicant had emailed the Complainant stating that their friendship was over and had gone on to suggest that they minimise contact in the office and avoid socialising and sharing of transport to work. The Complainant responded the same day with a strong rebuke. In part she stated:

> I am your assistant no mater do you like it or not and professionally I have no problems with you on the same ground. U have no any right to influence my work on negative way do to your personall(sic) matters or ignore me in my work in all meanings of this term.

Meanwhile, only eleven days earlier she had written to a friend " ***I fear every day that he will suck*** (sic) ***me from work and that my family will stay without bread…this is way too much for me*.**"

69. At paragraph 73 of its report, the JDC while making a finding of workplace harassment observed that *"there is evidence that the conflict more likely than not spilled over into their work environment*." In the same paragraph, the Panel also found that:

> While there is no indication of ill will towards her continued employment at the mission, it does indicate that the situation had reached a point (even if their colleagues in the office failed to notice it) where the matter could not but affect their professional environment given the proximity at which they worked. … Under these circumstances, there is no reason to presume that this would affect their situation during non-working hours only.

70. The OIOS stated in its report that on occasions emails were exchanged at work. At paragraph 15, the said report stated that the Complainant told investigators that the Applicant's jealousy had begun to negatively impact on their working relationship. She told them also that she was afraid to open her email at work as there would often be an email from the Applicant wanting to know who she was with the night before and that at the end of the work day, he would often ask her to stay behind to discuss work-related matters but would soon confront her concerning her activities the previous night.

71. If indeed the Applicant had put the Complainant in fear of opening her email at work because he would email to ask who she had been with or confront her at work with such a question, this Tribunal will make no hesitation in concluding that he had made the workplace hostile or intimidating for her and had committed workplace harassment against her.

72. With regard to the claim that emails were exchanged at work, the Applicant pointed out that the email referred to by the OIOS was one he had sent the Complainant on 22 April 2005 while she was on leave from work and this has not been contradicted. For someone who appeared to be in possession of mountains of emails and other documentary evidence against the Applicant and who would send a humorous response about his girlfriends when he emailed her his naked organ in order to get him to make admissions about the women he slept with in his written reply; it speaks volumes that the Complainant was unable to produce any email in which she was questioned by the Applicant about who she was with on any night. How true then was her claim that she was afraid to open her email at work or that she was confronted at work over whose company she kept? These claims have not been established and the only conclusion that can be drawn is that they are untrue.

73. In submissions in which it was sought to establish the Applicant's guilt of workplace harassment, the ASG/OHRM had stated to the JDC that "[w]hile they had both agreed to keep their relationship after hours and out of the workplace, on 12 April 2005 their relationship began to take up time and thought during work hours, clearly affecting the workplace and their productivity".

74. This sweeping submission evidently refers to a coffee break on 12 April 2005 by the two of them which was taken at the Complainant's house at her invitation to discuss their personal disagreements. They were not at work and it is not shown how the incident affected the workplace and their productivity.

75. It must be borne in mind at all times that a relevant element to sustaining the charge of workplace harassment against an alleged perpetrator is the fact of him or her engaging in conduct that renders the workplace hostile, offensive or intimidating for the victim or complainant or conduct that gives rise to a situation in which her performance at work was negatively and unreasonably affected. Did this happen here? To this question, the Tribunal's answer is NO! Even the JDC after hearing this matter was only able to arrive at a presumption that the working hours of the Applicant and the Complainant ***would*** be affected by their relationship.

76. While it is recognised that a rebuttable presumption of fact or even law may exist where a certain set of facts are present, there is definitely no room for making a finding not based on any facts but on ***presumptions about what would likely be the case*** in a given situation. The JDC conclusions of the Applicant's guilt of workplace harassment are entirely based on untenable deductions, guesswork, speculation, conjecture and the likelihood that the conflict would have spilled over into the workplace even if workmates did not notice.

77. The Applicant at pages 10 and 11 of his submissions of 6 February 2007 to the JDC quotes from witness interviews which were not made available to the Tribunal. The said quotes which largely attest to the absence of a hostile workplace at JLOC during the times material to this application were not challenged by either the Respondent or in the JDC report. It is curious and unfortunate that OIOS witness statements were excluded from materials presented in this case. It does not bear restating that all materials gathered in the course of investigating a case whether incriminating or exculpatory ought to be placed before the Tribunal. It amounts to a deliberate misleading of the Tribunal to pick and choose what

evidence can be shown to it. It is also unprofessional and unfair and undermines the entire justice process.

78. The JDC completely ignored the question as to whether the workplace was rendered hostile, offensive, abusive or intimidating for the Complainant by the Applicant at any time material to this Application. It is unfortunate that the Applicant was adjudged guilty of workplace harassment by OIOS and the JDC leading to his summary dismissal in considerations where the elements of the offence were ignored while personal morality was elevated to the rank of a Staff Rule.

Alleged attempted abuse of authority as the Complainant's former supervisor

79. The third offence with which the Applicant is charged is: "attempted abuse of authority." In its brief to the JDC in support of this charge, the ASG/OHRM submitted that the Applicant abused his authority and sought to damage the Complainant's reputation in the eyes of her supervisors and the Organization**.**

80. It is on record that after the Complainant had been reassigned following her oral and written complaints against the Applicant, the Applicant approached her new supervisor to apprise him of facts regarding the transfer. While the new supervisor denied that they discussed issues concerning the Complainant, the Applicant told investigators that his purpose was to advise the new supervisor of the facts regarding the reasons for her transfer in order to forewarn him to avoid similar difficulties with the staff member based on his own experiences as she had a history of making sexual harassment claims.

81. Abuse of authority is a prohibited conduct under section 1.4 of ST/SGB/2008/5. It is defined as:

> The improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes but is not limited to, the use of intimidation, threats, blackmail or coercion.

82. There are two issues to be considered here. The first is whether an offence of "attempted misconduct" exists within the Organization's Rules, Regulations and issuances.

The second issue is whether the Applicant's conduct in discussing the Complainant amounts to abuse of his authority under the relevant Rules.

83. As to the matter of "attempt", this is an offence known only within national jurisdictions in the province of criminal liability. The law of attempts deals with inchoate or incomplete criminal offences. Neither in national civil jurisdictions, International Administrative law nor in the United Nations Staff Rules, Regulations or any manner of issuances does a law of attempts exist.

84. There is however one exception. Following the report of the OIOS and a similar report by an Inter-Agency Standing Committee on the issue of sexual exploitation and abuse of refugees by aid workers both issued in 2002, the General Assembly made a Resolution (57/306) at its 83rd plenary meeting requesting the Secretary-General to, in addition to other measures, issue a bulletin on the subject; ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) was issued.

85. Section 1 of ST/SGB/2003/13 defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another."

86. It is clear that the offence or misconduct of sexual exploitation is viewed and treated by the Organization from a standpoint of its most reprehensible criminal nature. Much as the Organization is not equipped to hand out criminal sanctions, it has gone so far as to provide that where sexual exploitation has occurred, the offending staff member shall be handed over to national authorities for criminal prosecution. It also understandably characterises the "attempt" to engage in sexual exploitation as misconduct. But this is as far as a law of attempts exists anywhere in the Organization's laws.

87. Abuse of authority under ST/SGB/2008/5 is within the class of prohibited conduct. This class of misconduct by its very nature contemplates that there would be a victim or victims for each prohibited conduct. An examination of the elements of abuse of authority therefore presupposes that a person in authority within the Organization misuses such authority or position to the detriment of another who is in a subordinate position. There is thus created a perpetrator and a victim. In addition, any efforts to create the offence of

attempted abuse of authority will necessarily need to define how far a perpetrator would have proceeded in his preparatory acts before an attempt would be deemed to have taken place. Most importantly, the bulletin did not create the misconduct of attempt within the class of prohibited conduct.

88. It is a trite and basic legal principle that no one can be charged with, tried or indeed punished for an offence unknown to law. Within the United Nations Organization, no staff member can be charged with, adjudged to have contravened and or punished for an offence or misconduct unknown to its Rules, Regulations or other issuances. It is both unprofessional and reckless for ONUB and OHRM to recommend and level a charge of attempted abuse of authority against the Applicant as this does not exist anywhere within the Organization's legal and internal justice systems.

Abuse of authority in approaching the Complainant's new supervisor?

89. In paragraph 30 (ii) of the 18 July 2006 memorandum by OHRM, the Applicant was charged with "attempted abuse of your authority and retaliatory conduct." The particulars of this charge are then stated as follows:

> You approached the Complainant's new supervisor for the purpose of engaging in a discussion about the Complainant's personal life and reputation. Further you made persistent attempts to have input into the Complainant's performance appraisal reports, even after you were told by the Chief Civilian Personnel Officer that this would be inappropriate. In doing these things, you sought to damage the Complainant's professional reputation as a consequence of her having made a complaint of sexual and general workplace harassment against you.

90. The inapplicability of the law of attempts as misconduct has been discussed above in relation to United Nations Rules, Regulations and administrative issuances. The definition of abuse of authority under section 1.4 of ST/SGB/2008/5 has also been reproduced above. It must be borne in mind however that this bulletin was not in existence at the times material to this Application and therefore the said conduct was not defined by the Organization before 2008. The 1966 definition of abuse of authority in the workplace based on the policy of the federal Department of Justice of Canada is reproduced hereunder as an additional aid to the examination of the charge of abuse of authority levelled against the Applicant.

> Abuse of authority means improperly taking advantage of a position of authority to endanger an employee's job, undermine an employee's job performance,

> threaten an employee's livelihood or interfere with or influence his or her career. It may include behaviour such as yelling, belittling an employee's work, reprimanding an employee in front of other staff members, arbitrarily withholding or delaying leave approval, favouritism, unjustifiably withholding information that the employee needs to perform his or her work, demanding overtime without reason, justification or prior notice and asking subordinates to take on personal errands.

91. In examining the charge of abuse of authority brought against the Applicant, the first hurdle to cross in this inquiry is to determine whether at the time that the Applicant is said to have approached the Complainant's new supervisor, he was a person in authority with regards to the Complainant? The clear answer is NO! At the time that he is alleged to have approached the Complainant's new supervisor, the Applicant was no longer a person in authority where she was concerned. The new supervisor at the time of their meeting was the person in authority with regards to the Complainant.

92. It is of the utmost importance that in applying United Nations Staff Rules, Regulations and other administrative issuances and especially in seeking to establish the purported misconduct of a staff member, those who have such a duty must perform their task with sufficient detachment, objectivity and sense of responsibility. Under no system of law does the prohibition of abuse of authority in the workplace anticipate or intend that a person who is not in authority over another in the workplace can abuse an authority which he or she does not possess. For this misconduct to occur, a supervisor/supervisee or other relationship in which one party is placed in a position in which he or she can make or contribute to the making of a decision that may adversely affect the other party's career must exist in the workplace between the perpetrator and the staff member who suffers abuse of authority.

93. For instance if after the reassignment of the Complainant to another unit, the Applicant at some time in the future found himself on an interview panel which interviewed the Complainant for a promotion or he was appointed a member of a committee to evaluate staff members of which the Complainant was one; either for the purposes of retention, abolition of post, training or some other purpose that would necessarily affect her career, he then becomes a person in authority who is in a position to abuse his authority regarding her evaluation.

94. In stating the case against the Applicant before the JDC, the ASG/OHRM at paragraph 81 defined abuse of authority as follows:

> An abuse of authority is constituted by the improper use of power or authority inherent in a position to endanger or undermine the position of another, and may include actions which interfere with or otherwise influence the performance or advancement of any person. In short, it is an improper exercise by a person of his or her responsibilities.

95. Even going by this definition, it is difficult to see where the Applicant in approaching the Complainant's new manager to talk about her is exercising any responsibility of his properly or improperly. The point is that at the material time, he had no responsibility to exercise regarding the Complainant! There is simply neither power nor authority that a former manager can exercise to endanger or undermine the position of a former supervisee except where the said manager is in a position to make an official evaluation of work done in the past by the supervisee.

96. To the extent that the Applicant merely approached the Complainant's new supervisor to perhaps give him a prejudiced view of his relationship and problems with her or to even unduly discuss her personal life, he at the very worst had indulged in gossip or back-stabbing as the case may be. Much as such an indulgence might be in bad taste, it cannot by any stretch of the imagination be elevated to the misconduct of abuse of authority. It is however possible that a new supervisor who is liable to be influenced by idle gossip would go on to abuse his authority as regards the Complainant based on the fact that she had been bad-mouthed by the Applicant. If this had happened, the new supervisor would have exhibited incompetence and would have been the one liable for the abuse of authority.

97. Any effort to sustain a charge of abuse of authority against the Applicant in this case must go further than merely showing that he had told tales about the Complainant. His capacity to influence another manager who is not his subordinate on the basis of some other relationship between them in order to cause the said manager to abuse his authority in relation to the Complainant and the evidence of the said abuse are vital matters that must be placed before the Tribunal to prove this charge. This has not been done.

98. The OIOS was in fact unable to establish exactly what the Applicant and the new manager had talked about or how much was said. It was not established that the Applicant had any kind of influence over the new manager as to cause him to abuse his authority over the Applicant or that she had suffered any form of abuse of authority from any source since her recruitment to ONUB and subsequent reassignment from JLOC. Can there be an abuse of

authority where none has been suffered? In these circumstances, it is difficult to understand why OHRM had brought a charge of abuse of authority against the Applicant whose authority over the Complainant had ceased with her reassignment to a new unit and while the Complainant had not been shown to suffer any abuse of authority by any manager.

Alleged retaliatory conduct and "vindictive animus" of the Applicant

99. It is on record that after the reassignment of the Complainant from JLOC where the Applicant was the chief of section, the said Applicant sent an email to the Chief of Civilian Personnel requesting to make an input on her performance evaluation. Part of this email read:

> [The Complainant] has served 6 months in this mission. She is now due either a special report or FOPA. As she worked directly for me for 3 months, it is appropriate that I have an input to this report. Would you please make arrangements for my comments to be taken into account by whomever is tasked with producing the report.

100. He repeated this request in another email of 31 August 2005 but it was refused. He later met with the Chief of Civilian Personnel, and on 1 September he wrote on the issue thus:

> I do not wish to provide an assessment of [the Complainant's] performance and I agree that this might be inappropriate. I merely ask that some consideration be given to the individual's behaviour during her time in JLOC; this should not be "glossed over" as this could create difficulties for her future managers.

101. An email said to have been sent by the Applicant to another colleague after meeting the Complainant's new supervisor was adjudged by OIOS to show a **"vindictive animus"** on the part of the Applicant. Part of the email read: "Incidentally, I went to the 3rd floor Claims Office to take Charles to one side and enlighten him…should have seen her face when I arrived! Made my day! Am told I may have to write her FOPA, as Charles is declining…what joy?"

102. At paragraph 77 of its report the JDC stated that investigators concluded by these actions that the Applicant used his office for personal reasons to prejudice the position and employment of the Complainant. The same JDC at paragraph 79 found and concluded that the Applicant had engaged in retaliatory conduct on the reasoning that:

> Irrespective of whether he acted out of indignance or malice, it is apparent that **the complaint triggered his motivation**, and as such his actions were retaliatory. Moreover, whether he sought to damage her professional reputation or simply

> offer what he considered to be an accurate portrayal, the resulting damage would have been the same. (Emphasis added).

103. The JDC further concluded that: "in taking a suspect and potentially damaging course of action, the staff member abused his position as the Complainant's former supervisor in retaliation for the lodging of the complaint."

104. It is the Organization's rule on performance appraisals that managers must formally appraise staff under their charge during the course of a reporting period. At least, *prima facie*, the Applicant was right to request that he make the necessary input as this is a requirement of the Rules on staff appraisals. These performance appraisals are not written in stone and there is provision for the officer reported upon to agree or disagree with his or her manager's appraisal and may in fact rebut it. There is a fairly elaborate mechanism for such rebuttals. The Complainant's right to employ the rebuttal mechanism if she thought her appraisal by her former supervisor against whom she had brought a complaint of harassment was incorrect, was definitely not in question.

105. While this Tribunal is not concerned with how the Complainant was eventually appraised during the period that she worked under the Applicant, the question that arises is: what is this **"suspect and potentially damaging course of action**" that constituted abuse of authority and retaliation here? Also how did an official request by the Applicant to do what he ought to do under normal circumstances, and which request had been refused, constitute retaliatory action?

106. These questions are relevant to determine when a "request" even if it appeared to carry a "*vindictive animus"* or bad faith without more, transforms into the prohibited conduct of abuse of authority and retaliation. What is this action on the part of the Applicant that constitutes the misconduct? Is it in the number of emails in which he expressed the view that he or some other manager in JLOC ought to make an input to the appraisal of the Complainant or in the email he is said to have written to another ONUB colleague, celebrating as it were, an opportunity to make the appraisal and which appraisal he never was allowed to write?

107. The attitude of charging a staff member for an "**intention to retaliate**", "a vindictive animus" and sundry other actions against other staff members where none had been victimized and then characterising these as abuse of authority is as shocking as it is high-

handed and intolerant. The charge in itself is irresponsible, fictitious, farfetched and irrelevant. It is easy to see that those who were led to institute disciplinary proceedings against the Applicant were unduly overzealous in their commitment to nail him so much so that a request he made to perform his official duty and which had been perhaps, rightly refused became characterized as misconduct.

Interference with an official investigation

108. A charge of interfering with an official investigation into the allegations made against him by the Complainant was levelled at the Applicant. The particulars of the charge were as follows:

> You met with staff at the Joint Logistics Operations Centre and informed them of [the Complainant's] complaint, as well as specifically seeking the support of certain colleagues. You also sought out former UNMIBH colleagues now working in ONUB and informed them of [the Complainant's] complaint. These actions represented a breach of confidentiality, and attempt by you to influence the outcome of the investigation in your favour and to discredit [the Complainant] with her colleagues.

109. After the oral complaint of harassment made against the Applicant by the Complainant, she was reassigned from JLOC where she had hitherto worked under the Applicant. On 26 May 2005, the Complainant submitted a written version of her complaint. It is in evidence that shortly after the said reassignment, the Applicant who was Chief of JLOC had in one of his daily staff briefings mentioned to JLOC staff that the Complainant had been reassigned and that she had made a complaint against him. The Applicant also admitted to investigators that he had told his family members, friends and some former colleagues about the complaint.

110. In seeking to establish this charge, the ASG/OHRM in paragraph 74 of her submissions to the JDC submitted that by making statements about the complaint, the Applicant prejudiced the forthcoming investigation by compromising its ability to collect objective and impartial evidence from staff in JLOC, in that staff may have been persuaded to take a particular view in order to show allegiance and protect their position at the Centre.

111. The Administration further submitted that it is well established that the substance of a report of misconduct is made in confidence and should not be discussed or divulged to third parties without first obtaining the consent of the Complainant. The Administration continued

that in sexual harassment cases, confidentiality attaches to all communications for the benefit of the Complainant and the alleged harasser and cannot be waived unilaterally by one party. Further, that it is reasonable to expect that a senior staff member such as the Applicant would handle the situation with appropriate discretion in order to preserve the integrity of the investigative process by not discussing the case.

112. In its consideration of this charge, the JDC found that the assumption underlying the Respondent's arguments is that staff members do not need to be given any notice of confidentiality or advice to avoid discussing such cases and should know that such discussion is prohibited. In this instance, the Applicant was said to have failed to observe the prohibition and that this amounted to a form of interference with an investigation. The JDC found that there was no evidence showing an actual interference and that this charge had not been established.

113. In support of the charge, the ASG/OHRM relied on the provisions of former staff rule 101.2(e) which states:

> Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official duties.

114. It is not disputed that there was no official investigation of the complaint at the time that the Applicant divulged to his colleagues, friends and family the existence of the said complaint. Even the Respondent who brought this charge appears not to be certain about which former colleagues the Applicant had told of the complaint or the substance of what he told his staff concerning the complaint at their section's meeting. It is somewhat curious that the report of this particular allegation was made by the Complainant's housemate who worked in the SRSG's office and who had made the original unsustainable report of SEA against the Applicant.

115. The instant charge is that the Applicant interfered with an official investigation against him. In the particulars of the same charge, it is asserted that his actions in divulging the complaint to others amounted to an attempt to influence the outcome of the investigation in his favour and to discredit the Complainant. The charge here is definitely bad not only for its uncertainty but also for not being based or grounded on any known rules governing the

actions of staff members. It betrays the confusion of an accuser who is merely on a fishing expedition. Is it a case of interference or an attempt to interfere? It is unnecessary to restate that there is no general law of attempts in the United Nations staff rules and regulations.

116. Again, in light of the reliance placed by the Administration on staff rule 101.2(e) reproduced above, it is pertinent to determine how an investigation which had not even been ordered at the time became an official activity that was interfered with by the Applicant. Also, how did a breach of confidentiality on the part of the Applicant come about because he told others that a complaint was made against him? What confidentiality? Whose confidentiality? In other words which staff rules or regulations or issuances require such confidentiality? Which rules prescribe that a staff member against whom a complaint is made must not "discredit" the Complainant?

117. The charge of interfering with official investigations against the Applicant is totally irrelevant and without any basis and ought never to have been brought by the Respondent as there is no evidence that even remotely points in such a direction. Moreover, such a finding was never made by the investigators. Let it be restated that when officers of OHRM are required to draft charges against staff members who have been investigated for misconduct, they must bear in mind that such duties are to be discharged with a high sense of responsibility, fairness and accountability. It is not in their liberty to run amok with useless charges in the hope that something sticks to bring the charged staff member down.

Alleged failure to follow the proper instructions of his supervisors

118. In the particulars of this charge, the Applicant was alleged to have been verbally instructed by three managers in ONUB, namely the Chief of Integrated Support Services (CISS), the Chief Administrative Officer (CAO) and the Chief of CDU not to contact both the Complainant and her husband after the complaint was filed. Staff Rule 101.2(b) is alleged to have been breached in this regard by the Applicant. The said rule provides that "[s]taff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors."

119. In the document notifying the Applicant of the charges against him, it is stated at paragraph 22-24 that the Chief of CDU had **informed** him, following a complaint from the Complainant on 14 June 2005 that he was continuing to contact her, that he was to refrain

from having any further contact with her. The date on which this information was given to the Applicant was not stated.

120. The Applicant was said to have emailed the Complainant on 5 July 2005 and called her four days later on 9 July to tell her that he had received several messages from her home telephone number in Bosnia. She thereafter reported to the Chief of CDU that her husband told her he had spoken to the Applicant who related offensive and insulting stories about her. The Chief of CDU then verbally instructed the Applicant not to contact the Complainant or her family. The same instruction was verbally given by the ONUB CAO in the presence of the Applicant's supervisor, the Chief of ISS.

121. In the OIOS conversation record of 16 September 2005 with the Chief of CDU, she told investigators that the Complainant phoned her on the morning of a Saturday, which could have been 7 July 2005, crying and telling her that her husband had spoken with the Applicant and was distressed by their conversation. The Chief of CDU thereafter contacted an OHRM officer in the Administrative Law Unit (ALU) in New York to seek advice. The officer advised her that the Applicant must avoid all contact with the Complainant.

122. The said conversation record showed that upon being advised by the ALU officer, the Chief of CDU phoned the CAO asking that he urge the Applicant not to contact the Complainant at all costs. The CAO then spoke to the Applicant in the presence of his supervisor, the CISS about the issue on 11 July which was the same day the Chief of CDU also spoke to the Applicant advising him that the matter was serious and that he must refrain from contacting the Complainant. He accepted the advice although he complained that the Complainant was speaking to everyone about the matter. The Chief of CDU had indicated that the Applicant was only verbally advised not to contact the Complainant.

123. In another OIOS conversation record of 15 September, the CAO confirmed that he verbally advised the Applicant to refrain from contacting the Complainant after the Chief of CDU had spoken to him about it although he could not recall the date.

124. On 4 October 2005, the OIOS interviewed the Applicant and asked him whether he was told not to contact the Complainant. According to the conversation record of that interview, the Applicant replied that both the CAO and the Chief of CDU told him not to contact her. Before then, he had contacted her and she complained to the Chief of CDU who

then told him it was not a good idea to contact her. Thereafter her husband called the Applicant and left messages on his phone and he called back after seeing the messages and had a talk with the Complainant's husband. It was after he had spoken with the Complainant's husband that both the CAO and the Chief of CDU told him he was not to contact the Complainant. There were no written directions on the issue of contact and he could not remember the dates that these discussions took place. He never contacted her or any of her family members thereafter.

125. In the Investigation Report, OIOS concluded that the Applicant failed to follow the directions and instructions properly issued to him by his supervisors. The investigators then recommended that in the future, written instructions be issued to any person who is the subject of a complaint under ST/AI/379 to ensure clarity as to the handling of the case while being investigated.

126. In the JDC report at paragraph 85, it is stated that this charge arose because the Applicant ignored the request of the Complainant and the subsequent instruction by the Chief of CDU and the CAO not to contact the Complainant and had contacted the Complainant's husband after notifying her of her husband's phone messages requesting to talk to him. The JDC found that the commentary to Rule 101.2(b) in ST/SGB/2002/13 (Status, Basic Rights and Duties of United Nations Staff Members) which states that "staff do not have to follow instructions that are manifestly inconsistent with their official functions… or have nothing to do with their official activities since such instructions are not proper" was inapplicable as argued by the Applicant.

127. The JDC found that the Applicant was under an obligation to comply with the instructions of the Chief of CDU and CAO while agreeing that written instructions should be issued in such cases to ensure clarity. The JDC was of the view that the Applicant's arguments on this charge showed that he well understood the message to be an instruction rather than a suggestion.

128. It is not expressly stated in OIOS records that the Chief of CDU had before he spoke to the Complainant's husband suggested to the Applicant that he was not to contact the Applicant in view of the complaint she had brought against him. It is worthy of note that the Chief of CDU saw that the matter of the Applicant making contact with the Complainant needed official reaction only after the complaint of his discussion with the Complainant's

husband was made to her and following a decision to seek advice from ALU/OHRM in New York as to what to do. It was when she got the needed advice from ALU/OHRM that she enlisted the support of the CAO who was clearly the Applicant's superior to give the information an official flavour. Thereafter, the Applicant ceased contact with Complainant as he was advised.

129. If the Chief of CDU was clear and certain that she had issued an official instruction or directive to the Applicant as an agent of the Secretary-General and that such a directive was within her competence to give, would she have needed an officer in New York to advise her in this instance? Would she have needed the CAO to assist in urging the Applicant to comply? Nothing on the records suggests that the Chief of CDU had any authority to instruct a staff member not to speak to another staff member. It appears that such instructions in this case were given piece meal and only to one party. In receiving and dealing with the Complainant's harassment complaint made in May 2005, the Tribunal finds that whatever earlier advice had been given the Applicant by the Chief of CDU with regards to it and before the later report that he returned the call of the Complainant's husband, were not regarded as official instruction by the Chief of CDU or the Applicant. When he was officially advised on 11 July, the Applicant refrained from making the prohibited contact.

130. Above all, the necessity for putting official instructions in writing both for the sake of clarity and for the avoidance of any doubt as to the nature of the communication has been emphasised not only in the OIOS report but also by the JDC in this case. Why did the OIOS investigators and the JDC panel, after their recommendations that such instructions should be in writing, turn around to find that although the said instructions to the Applicant were not in writing, it was proper to adjudge the Applicant liable on this charge? Especially where the issuer of the directive is not in a direct reporting line to a staff member, putting such instructions in writing is of the utmost importance. In the case of *Schook* 2010-UNAT-013, the United Nations Appeals Tribunal (UNAT) underscored the necessity for putting important matters in writing it held that in a case of non-renewal of contract, a written decision or notification is necessary. If it had been shown that the Chief of CDU had lawful authority to issue instructions and directions to the parties to a pending complaint and that she had in accordance with such authority presented both sides with written instructions as to what they could not do during the pendency of the complaint, a breach of such instructions by

any of the parties would without doubt have made the party in breach liable on a charge like this. This was not the case here.

131. The CDU has the role of providing technical advice to a field mission and advising the mission leadership on United Nations rules and procedures for the handling of cases of misconduct of all categories. It is therefore up to the team or office to identify the procedures to be adopted in handling the different types of cases and present same to the mission leadership to endorse. It is not to be expected that the CDU will issue instructions to a party to a complaint as it likes or merely as a way of protecting the interests of one of the parties who complains to it as it did in this case. It must be borne in mind that even in the face of a pending harassment complaint between the Applicant and Complainant; both parties needed protection from having their families and other colleagues escalating things by engaging in discussions on the complaint.

132. This Tribunal is of the view that the initial advice by the Chief of CDU to the Applicant not to contact the Complainant was not an official instruction as contemplated by the provisions of staff rule 101.2 (b) and that the CDU had no authority to issue such an official instruction to the Applicant. In the absence of a clearly laid down procedure endorsed by the mission leadership to deal with such situations, it is evident that the CDU as an office did not have any authority to instruct a staff member not to contact another staff member because of a pending complaint of misconduct. When instructed by his supervisors, the Applicant complied. The Tribunal disagrees totally with the conclusions reached by both the JDC and the OIOS investigators that the Applicant was liable on this charge.

Informal approach to dealing with incidents of sexual harassment

133. The Organization's procedures for dealing with reports of sexual harassment are governed by ST/AI/379 of 1992. The Administrative Instruction sets out both formal and informal approaches in this regard. Section 6 and part of section 8 of the document provide that:

> S.6 The aggrieved individual may also seek advice and help from his or her Personnel Officer, or from a senior member of the department or office, who is in a position to discuss the matter discreetly with the individual and with the alleged harasser with a view to achieving an informal resolution of the problem, where appropriate.

> S.8 In circumstances where informal resolution is not appropriate or has been unsuccessful, the individual may make a written complaint to the Assistant Secretary-General for Human Resources Management…

134. The Applicant had consistently asserted in interviews with OIOS and in his written submissions that he had been in a very close friendship with the Complainant for a period of five years. Available documentary evidence attests to this. The families of both parties, according to the records, appeared to be quite well known to each other and related as friends during this period.

135. Email traffic between the parties over a period of five years show that they had engaged in a consensual, adult relationship with sexual overtones. At the ONUB Mission, they spent considerable time in each other's company after work hours until the Complainant began to make other friends and spend time with them which the Applicant resented. The OIOS Investigation Report observed that while both parties state that they had not had a sexual relationship; they had shared life experiences that go well beyond most friendships. They had an intimate, but volatile relationship which was neither typical nor appropriate between a supervisor and his/her subordinate.

136. Investigators had asked the Chief of CDU whether the Mission had attempted to resolve the matter informally as provided for by the sexual harassment procedures to which she replied that no informal resolution had been attempted. According to the conversation record, the reason given by the Chief of CDU as to why an informal resolution had not been attempted was that the matter was already 'so far gone' and that they had evidence that the Applicant did not keep away from the Complainant despite her making it clear that she did not want a sexual relationship with him.

137. While recognising the need for sexual equality in the workplace and legislating against sexual and other forms of harassment, the Organization also provides for the informal resolution of cases falling within this category. An informal approach offers an opportunity to resolve such a complaint amicably and in a non-threatening manner. Of course as provided, where an informal resolution is not appropriate or has failed, there would be no need to pursue this option.

138. There is no evidence to suggest that the Complainant did not want an informal approach at the time she was guided by her housemate and another staff member to speak

with the Chief of CDU about her perceived harassment by the Applicant for the first time on 21 May 2005. There is evidence however in the emails before the Tribunal that the Applicant tried to contact her and appeal to her that they resolve the matter as friends and as they had done on many past occasions even after she had submitted a written report to the Chief of CDU.

139. At paragraph 91 of the Applicant's written submissions to the JDC dated 6 February 2007, he refers to the desire of the Complainant for an informal resolution stated to her housemate on 18 May 2005 and quotes it as follows: "I would like to solve this problem without any scandal/broadcasting through the ONUB, more correct I would be happy if things are taken care off (sic) on low profile ground. I do not wont (sic) to upset anybody… all I wont (sic) is to protect myself." The Applicant also refers to a conversation with the Complainant after her reassignment in which she told him that all she wanted was a letter of apology from him.

140. The existence of the email from which the Applicant claims to be quoting is neither disputed by the Respondent nor the Complainant. Moreover, the answer given by the Chief of CDU that the matter was already 'so far gone' and that they had evidence that the Applicant did not keep away from the Complainant despite her making it clear that she did not want a sexual relationship with him, is at the very least unconvincing. Unfortunately, the investigators did not ask what was meant by "the matter being so far gone".

141. As to the Applicant not keeping away from the Complainant, it is in evidence that even up till 15 May 2005, a mere six days before the complaint was first made, the Complainant had met for drinks with the Applicant and his wife at the invitation of the Complainant herself. Further, both on 29 April 2005 and 20 May, the same Complainant had continued to refuse offers of reassignment away from the JLOC where the Applicant was Chief. In other words, it is evident that even the Complainant did not keep away from the Applicant after telling him she did not want to a sexual relationship with him.

142. In the submissions sent to JDC by the ASG/OHRM, it is argued that ST/AI/379 does not impose a requirement upon the alleged victim to pursue an informal approach prior to utilizing formal procedures. According to the ASG, paragraphs 5 and 6 indicate that the alleged victim has the option to initiate and seek informal resolution of the complaint by approaching other staff members such as colleagues, the Staff Counsellor Personnel Officer

or even senior members of the staff members department. The argument continued that this was subject to the proviso in paragraph 7 that incidents that may constitute misconduct must be reported by appropriate officials to the ASG.

143. The above argument is grossly misleading. Paragraphs 5 and 6 of ST/AI/379 are not meant to be read together. In other words, paragraph 5 stands separate and distinct from 6. When an aggrieved staff member adopts the option in paragraph 5 by approaching a colleague, staff counsellor, a member of the panel of counsel, a member of the panel on discrimination and others mentioned in the said paragraph, he or she continues on the path of an informal resolution until it fails or it is determined to be inappropriate for good reasons.

144. Under 6, the aggrieved staff member may seek advice and help from other categories of officials – namely his/her personnel (HR) officer or a senior officer in the department who can discuss the matter discreetly with both the Complainant and the alleged harasser with a view to an informal resolution where it is appropriate. It is the officers here when approached, who may decide to take the matter further by reporting to the ASG.

145. It is the view of the Tribunal that the provision in paragraph 7 that incidents which may constitute misconduct will be reported to the ASG by the officers named in 6 is not meant to circumvent the informal procedure for dealing with sexual harassment reports. Clearly, the intendment of ST/AI/379 is not to offer the informal procedure option with one hand while taking it away with the other. Even though the Complainant had confided in her housemate who was a staff member, it was not up to the said housemate to bring the Chief of CDU to the residence and to see to it that the informal process was bypassed without a clear position taken by the Complainant as to how she preferred to resolve her complaint or reasons shown as to why the informal process was not appropriate to her case. Why did the Chief of CDU need to go to the Complainant’s house? Was the visit to elicit her story part of the Administration’s efforts to coerce the Complainant into bringing the complaint? Was the Complainant too indisposed to go to the Conduct and Discipline office or simply reluctant to do so?

146. In the instant case, OIOS records state that the Complainant and the Chief of CDU met for the first time when the said Chief of CDU was taken to the Complainant’s residence and was introduced by one of the original anonymous complainants and the Complainant’s housemate and confidante who worked in the office of the SRSG. The narration of the

allegations to the Chief of CDU took place on that occasion in the presence of the two anonymous complainants. Evidently from that point on, the Chief of CDU embarked on the formal procedure by asking the Complainant to put the complaint in writing which she then received and acted upon prompting the SRSG to order OIOS to investigate.

147. The Organization as a matter of principle respects the rights of association between staff members and the individual's right to privacy. Where such an association between staff members causes problems that impact on work, it has a duty to step in to resolve the situation as appropriate. To this end, there are several mechanisms available. The Ombudsman deals with the informal method of resolving disputes between staff members or between a staff member and the Organization.

148. There are of course situations or instances in which the informal approach may be inappropriate to resolve a conflict. Where for instance the allegation is one of a criminal nature such as rape or physical assault, an informal approach ought not to be encouraged as this might be akin to compounding a felony, if established. Otherwise, it is expected that where a complaint is made, as in this case, there must be good reason provided for not attempting an informal approach. I do not find such good reason here as nothing on the records show that an informal resolution or settlement would have been inappropriate.

149. In a memorandum dated 4 June 2007 from the USG, Department of Peacekeeping Operations at the Secretariat and addressed to all peacekeeping missions, the roles of all actors with regard to conduct and discipline were clarified. The role of Conduct and Discipline teams as laid bare by that memorandum is "to provide technical advice and guidance to senior mission leadership on United Nations rules, policies and procedures relating to conduct and discipline, and receive, assess and refer allegations of misconduct for appropriate action."

150. The same memorandum further rather tellingly observed as follows:

> In receiving complaints, mission conduct and discipline teams receive reports from staff members which are more appropriately to be addressed to the office of the Ombudsman. The office of the Ombudsman is an informal mechanism for dispute resolution created to provide assistance to work-related problems to all staff members. Issues that may be handled by the Ombudsman include matters pertaining to conditions of employment, administration of benefit matters and relations between staff members.

151. The memorandum advised that "mission conduct and discipline teams are requested to encourage staff members to address issues that can be addressed informally to the office of the Ombudsman." In the instant case, the Chief of CDU had gone the extra mile to elicit the information on which the charges against the Applicant are based and had unilaterally ruled out informal resolution as inappropriate without good reason.

152. It is obvious that in dragging this case through the United Nations disciplinary system rather than attempting an informal resolution, the complaint was exacerbated rendering the Complainant, the Applicant and their respective families, who knew each other, victims of the said complaint. This Tribunal is of the view that an informal resolution would have been appropriate and expeditious given the unusual and close relationship that had existed between the parties. It is also in light of the blunder made by rushing to the formal process and its resulting backlash on the Complainant that the ONUB Administration turned around to wrongfully charge the Applicant with not obeying the lawful instructions of his supervisor for returning the telephone call of the Complainant's husband.

Were the due process rights of the Applicant breached at any stage?

153. In making out his case, the Applicant had alleged the breach of his due process rights as follows:

a. Failure to comply with the provisions of ST/AI/379 by not providing him with a copy of the complaint against him until fourteen months after the complaint was filed;

b. The intervention of the Organization in a private dispute amounted to an invasion of his privacy; and

c. The Administration had prejudicially presumed the guilt of the Applicant.

154. With regard to the failure of the Administration to make available a copy of the complaint to the Applicant or to apprise him of the nature of the allegations against him, the Respondent submitted that the Applicant had no such rights. According to the Administration, the JDC erred in stating that ST/AI/379 "*requires the ASG for HR to submit a copy of the complaint or a written version of the report submitted to HR prior to the end of*

the investigation and then proceed in accordance with ST/AI/371(including release to a charged staff member of documentation relevant to the investigation and the charge)."

155. The Administration had submitted that paragraph 9 of ST/AI/379 requires that the initial fact-finding in sexual harassment cases are to be conducted in accordance with paragraphs 3-5 of ST/AI/371. In other words, the investigations would first be conducted, including the interviewing of the Applicant by investigators and the charging of the Applicant with misconduct, before he can be given a copy of the complaint against him.

156. In the instant case, a written complaint was received by the Chief of CDU on 26 May 2005. Investigations commenced sometime in September nearly four months later. When the Applicant was first interviewed by OIOS investigators on 9 September 2005, the conversation record noted that the Applicant was apprised that the primary purpose was to inform him of the allegations and that a subsequent interview would be conducted. The Applicant was told that he was free to provide any information he wished. While the Applicant was aware of the sexual harassment allegations and the apparent Complainant, he was not told who actually initiated a complaint regarding SEA against him.

157. In the Applicant's testimony, he told the Tribunal that he first learnt that there was a complaint against him by the Complainant on 24 May 2005 when his direct supervisor mentioned it without giving any details. No one wrote to tell him about the formal complaint. There was no indication before his interview by OIOS investigators what the purpose was. At his first OIOS interview in September 2005, the Applicant was told that allegations of sexual harassment and SEA had been made against him.

158. The minimum international standards that guarantee fairness whether in determining the rights and responsibilities of an individual or his criminal liability are certainly not served by withholding from him an official complaint of sexual harassment made against him. Sexual harassment in some national jurisdictions is a criminal offence. Especially considering the quasi-criminal nature of the allegations, it is not sufficient that investigators "apprise" the individual of such a complaint while advising him that he is free to provide any further information he wished. How does a person who is not aware of the scope of the criminal complaint made against him provide information in his defence? In *Buendia* UNDT/2010/176, the UNDT upheld a submission that the Respondent could not impose a

disciplinary sanction on the basis of evidence that was improperly obtained in breach of an Applicant's due process rights.

159. Also in the former United Nations Administrative Tribunal Judgment No. 815 *Calin* (1997) case, the former United Nations Administrative Tribunal rightly held that procedural propriety and the protection of fundamental rights is a central theme pervading not only the Charter of the United Nations, but various issuances of the Secretary-General and the General Assembly. It further held that disciplinary findings and penalties imposed as a result or as a consequence of a breach of this fundamental principle cannot be regarded as fair. A breach of the right to due process is both procedurally and substantively unfair.

160. Whatever the Rules or Administrative Instructions relied upon here, there is no justification for withholding the written complaint against the Applicant while he was interviewed by OIOS personnel. It was clearly a breach of his due process rights to have withheld the said written complaint from him up till the time he was interviewed about it and beyond. To have failed to transmit the complaint to him for fourteen months is undeniably contrary to the intent and spirit of Article 14(3) (a) and (b) of the International Covenant on Civil and Political Rights (ICCPR) which states that,

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

161. In the case of *Applicant* UNDT/2011/054, the Tribunal found that there were a number of procedural deficiencies one of which was a failure to provide the applicant in that case with all relevant information before his interview by investigators to enable him to fully assess the case against him.

162. When counsel for the Applicant during cross-examination wanted to know if the OIOS draft report containing adverse findings against the Applicant were shared with him before the report was finalized, an OIOS investigator, the Respondent's lone witness, answered that it appeared that the Applicant only saw it after it was finalized. In the case of *D'Hooge* UNDT/2010/044, the Tribunal was of the view that when allegations are made against a staff member, it is a necessary element of due administration that any resulting decision must be based upon adequate inquiry. This involves seeking information from the staff member both

as to the allegations and, ultimately the findings or recommendations affecting him or her. Such a standard was not met in this case.

163. Was the intervention of the Organization in this case an invasion of privacy as claimed by the Applicant especially as such intervention also involved the wide circulation of personal and intimate emails he had sent to the Complainant? There is no doubt that the relationship between the Applicant and the Complainant started out as a private friendship when they first met in UNIMBH. The said friendship continued when the Complainant also with the assistance of the Applicant went to work with him at ONUB. ST/SGB/2002/13 at paragraph 38 deals with personal conduct as follows:

> The private life of international civil servants is their own concern and organizations should not intrude upon it. There can be situations, however, in which the behaviour of an international civil servant can reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization

164. Although the Applicant and the Complainant enjoyed a private friendship which was their own concern and perhaps the concern too of their respective spouses, the Tribunal finds that the Organization was acting within its proper boundaries in entertaining what appeared at least to be a harassment complaint. To this extent, there was no invasion of privacy on the part of the Organization in this case.

Was there bias or the appearance of it on the part of the ONUB Administration in this case?

165. Part of the Applicant's case is that ONUB Administration had demonstrated bias in their handling of the complaint against him. Some of the issues that merit consideration in this regard include:

a. The level of assistance provided the Complainant by the Chief of CDU at ONUB;

b. Removing the Applicant from his SEA delegation visit duties even before any fact-finding exercise of the complaint made against him; and

c. Non-investigation of the Applicant's claim that the recruitment of a new female staff member in his unit annoyed the Complainant and motivated her complaint.

166. In response to this, the ASG/OHRM submitted that it was appropriate for ONUB to assist and facilitate the Complainant in submitting her case. This assertion readily raises the question of the proper role of Management or the Administration in disputes between staff members. Why does the Organization get involved in disputes between staff members especially when a complaint is made to it? As a responsible employer, the Organization has a duty to provide a safe and conducive work environment. In this regard, it makes necessary legislation to guide staff members and regulate conduct in the workplace and in relation to work in order to ensure respect, the absence of discrimination, harassment and abuse among others.

167. Where a staff member engages or is alleged to engage in conduct prohibited by the Organization, the matter crosses the threshold of the personal and private life of the staff member. It becomes the business of the Organization to resolve. This resolution may be made by either the informal or formal process depending on what is appropriate in the circumstances.

168. The CDU is the adviser of the SRSG on matters of conduct and discipline. As head of the particular Mission, it is expected that the SRSG represents the interests of both the Organization and staff members remaining neutral in any dispute until at least an initial fact-finding exercise points to a prima facie case. It is the role of the CDU to receive, assess and refer allegations for appropriate action and not to assist and facilitate a complaint by one staff member against another.

169. ST/AI/379 made ample provisions in its sections 5 and 6 for the individuals who may assist a Complainant. As the officer whose duty it was to receive complaints and to categorise them, it was not ethical for the same officer to go to the house of the Complainant on the invitation of some others outside work hours to listen to her account and to coach her. This Tribunal had asked the question earlier why it was important to visit the house of a staff member, who was neither ill nor incapacitated, to hear the stories that gave rise to this case at the invitation of others who were present throughout that visit at which confidentiality was

not treated as important. There is certainly a measure of bias in descending to the facilitation of the case of one party and refusing to hear from the other.

170. The Applicant had submitted that his facilitation of the recruitment of a new female staff member to JLOC had angered the Complainant who promised that if the recruitment occurred, she would leave the unit. The Applicant stated that he had reported this conversation with the Complainant to another staff member of JLOC. This claim appeared to have been ignored by investigators.

171. The Tribunal had also earlier highlighted the apparent rush to the formal process of dispute resolution in this case which the Chief of CDU tried to explain away to OIOS investigators. The reasons given by her are untenable and illogical and totally represent her own opinion. The Complainant had not been shown to directly or indirectly shun an informal resolution to the dispute. The Tribunal cannot but come to the conclusion that the office of the SRSG through the CDU appeared to have taken an undue interest and exhibited uncommon zeal in escalating this dispute by practically coercing the Complainant into bringing the complaint that gave rise to the Applicant's summary dismissal and the institution of this case.

172. Impartiality on the part of ONUB management represented by the Chief of CDU must necessarily require that a level playing field and even-handedness ought to have been maintained in the handling of this case. Equal treatment of parties is not the preserve of Tribunals and Courts alone. It is not acceptable that the Applicant was "instructed" to avoid contact with the Complainant while a similar instruction to avoid contact was not given to the Complainant. It is also unfortunate that in the written complaint, the Complainant irrelevantly and unnecessarily mentioned the names of the Applicant's wife and children and the ages of the said children.

173. Even though it can be argued that the allegations leading to the present case were strictly speaking not treated as criminal offences during the disciplinary process, their quasi-criminal nature and categorisation as serious misconduct with the attendant implications cannot be denied. To this extent, it was imperative that Management presume the Applicant innocent until the contrary was proven. The action of removing the Applicant from his duties in preparation for the then impending visit of the ASG to the mission did not foster the presumption of innocence on the part of Management.

174. Not only did ONUB appear to adopt the complaint, its Management somewhat argued unreasonably that the JDC in assessing the emails of the Complainant "create[d] a standard that would make it inherently impossible to ever establish a case of sexual harassment." This kind of reasoning failed to appreciate that the purpose of law is the due regulation of human conduct, not the establishing of cases against individuals. The argument itself also favoured a standard whereby the role played by the alleged victim of a sexual harassment case is irrelevant for determining whether the offence was committed. Additionally, the argument sought to redefine the offence of sexual harassment by ignoring what the relevant Administrative Instructions had provided, and in a way that even if the conduct complained of was shown to be welcome, the offence would still be established.

The transmutation of an initial complaint of sexual exploitation that could not be proven

175. The complaint to the Organization against the Applicant was made and initiated by two ONUB staff members whom the Complainant had confided in. The identities of these staff members were withheld by the OIOS investigators for reasons of confidentiality. It is evident from the testimony given before the Tribunal by the OIOS investigator that the complaint made and initiated by the said staff members was one of SEA.

176. The subject of SEA of local populations in peace-keeping and special political Missions had become a worrying issue for the United Nations which maintains a zero tolerance policy in this regard. The Organization's policy on SEA forbids sexual relations with prostitutes and with any persons under the age of eighteen years whilst also discouraging relations with beneficiaries of assistance such as refugees and other vulnerable persons. These standards are enshrined in ST/SGB/2003/13. Breach of any of the standards set out in this bulletin is a serious misconduct and a Category 1 offence that would attract disciplinary sanctions including summary dismissal.

177. Section 3.2(e) of ST/SGB/2003/13 provides that where a United Nations staff member develops concerns or suspicions regarding SEA by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms. It was no doubt against this backdrop that the Complainant's confidences with respect to her relationship with the Applicant and other things she appeared to know about the Applicant's sex life at the Mission seemed like an open and shut case of sexual exploitation. It was in line with this thinking that the

Complainant's confidantes tried to convince her to overcome her unwillingness to meet with the ONUB Chief of CDU to tell her story. It was also due to the unwillingness of the Complainant that it became necessary to bring the officer to the house which one of these staff members shared with her on a Saturday.

178. The conversation record of OIOS with the Chief of CDU refers to the Complainant telling her story for over two hours in her residence at the invitation of others after which the concept of sexual harassment was explained to her. This meeting took place on 21 May 2005 (a Saturday). The following Monday, the Complainant went to see a doctor and asked for a day's sick leave after informing the doctor she had been sexually harassed by the Applicant and cited the penis photograph of two months previously. She was granted a day's certified sick leave by the doctor who observed to investigators that she seemed organized and looked more tired than stressed and was not prescribed any medication. Thereafter she was reassigned and asked to put her story or what was now transformed into her complaint in writing which she did on 26 May 2005.

179. It is easy to see why there were no efforts at an informal resolution of the complaint. This Tribunal had determined earlier that the reasons given by the Chief of CDU as to why no effort was made to resolve the complaint informally are untenable. From the outset of the initiation of the complaint whose subject was actually SEA, there was absolutely no intention of an informal resolution. It is understandable that SEA is not a subject for informal resolution but by the time that the OIOS found that they could not establish SEA; ONUB Administration unduly pursued a sexual harassment case among others rather than have no case at all.

180. The Tribunal does not need to restate the obvious fact that due to the hasty efforts by third parties to prove an SEA offence against the Applicant by using the Complainant to provide the evidence, both he and the Complainant and their respective families became the ultimate victims of this unfortunate saga. It is hoped that in future cases, those officers saddled with upholding the Organization's commendable zero tolerance policy on SEA will find better ways of dealing with reports and allegations of suspicion of such conduct without compromising due process and exacerbating resolvable conflicts.

181. In this case, the Organization had been initially invited to deal with a suspected SEA offence but rather found itself in the territory of a personal and intimate feud between two

consenting adult staff members. While the Organization is entitled to look into the complaints brought before it, it cannot constitute itself into a guardian of staff member's personal morals. It must be careful to see that its commendable policies and initiatives for the protection of women and other vulnerable persons are not misused or misapplied.

Did the Applicant's conduct amount to serious misconduct?

182. It has been established that the Applicant and the Complainant had had an unusually close relationship for a period of five years. Although both parties claimed it was a platonic relationship the evidence shows that it was unduly intimate and totally inappropriate between a manager and his supervisee.

183. While the said intimacy evidently went unnoticed by other work colleagues and had not impacted adversely on the workplace, it had the potential for creating problems in the said workplace. Although the Applicant had made effort to keep the relationship out of the workplace, his managerial competency and professionalism were in question for allowing such a state of affairs to exist.

184. The relationship that existed between the parties in itself betrayed a lack of professionalism on the part of both the Applicant and Complainant and the exercise of poor judgment by the Applicant.. This Tribunal must restate that poor judgment or even inappropriate conduct engaged in by a manager with his supervisee will not necessarily amount to workplace harassment of the said supervisee. While all managers and all staff members must be expected to behave responsibly and with professionalism, efforts must be made to avoid the situations where moral judgment takes over the proper application of Staff Rules, Regulations and other relevant Administrative issuances.

185. Even though the Applicant had exhibited a certain level of managerial incompetence, he cannot be held to have fallen short of the standards expected for an international civil servant. The conduct of the Applicant did not amount to serious misconduct as found by the Secretary General.

186. The Tribunal finds therefore that the imposition of summary dismissal on the Applicant was wrongful. The Applicant's managerial short comings was deserving of a reprimand at the very worst but certainly not summary dismissal.

Findings/Conclusions

187. The summary of the Tribunal's findings and conclusions are as follows:

a. The charge of sexual harassment against the Applicant cannot be sustained in the circumstances. To the extent that she was willing and happy to engage in sex talk via emails, telephone, text messages and in person with the Applicant, the Complainant cannot blow hot and cold deciding after the fact and several months later after other disagreements that she was sexually harassed based on incidents she had at the time they occurred joked about.

b. There is no evidence that establishes that the workplace had become intimidating, hostile or offensive for the Complainant at any time material to this Application.

c. While it is recognised that a rebuttable presumption of law or fact may exist where a certain set of facts are present, there is definitely no room for making a legal finding based on *presumptions about what would likely be the case* in a given situation. A presumption based on another presumption has no legs to stand on and cannot establish any fact or law.

d. The JDC conclusions of the Applicant's guilt of workplace harassment are entirely based on untenable deductions, guesswork, speculation, conjecture and the likelihood that the conflict would have spilled over into the workplace even if workmates did not notice.

e. Poor judgment or even inappropriate conduct engaged in by a manager with his supervisee will not necessarily amount to workplace harassment of the said supervisee.

f. It is a trite and basic legal principle that no one can be charged with, tried or indeed punished for an offence unknown to law. Within the United Nations Organization, no staff member can be charged with, adjudged to have contravened and or punished for an offence or misconduct unknown to its Rules, Regulations or other issuances. It is both unprofessional and reckless for ONUB and OHRM to recommend and level a charge of attempted abuse of authority against the Applicant

as this does not exist anywhere within the Organization's legal and internal justice systems. The only relevant misconduct in this regard is abuse of authority not an attempted abuse of authority.

g. Under no system of law does the prohibition of abuse of authority in the workplace anticipate or intend that a person who is not in authority over another in the workplace can abuse an authority which he or she does not possess.

h. There is simply neither power nor authority that a former manager can exercise to endanger or undermine the position of a former supervisee except where the said manager is in a position to make an evaluation of work done in the past by the supervisee.

i. It was not established that the Applicant had any kind of influence over the new manager as to cause him to abuse his authority over the Complainant or that she had suffered any form of abuse of authority from any source since her initial recruitment to ONUB and subsequent reassignment from JLOC.

j. The charge of interfering with official investigations against the Applicant is totally irrelevant and ought never to have been brought by the Respondent as there is no evidence that even remotely points in such a direction. Moreover, such a finding was never made by the investigators. When officers of OHRM are required to draft charges against staff members who have been investigated for misconduct, they must bear in mind that such duties are to be discharged with a high sense of responsibility and fairness.

k. If it had been shown that the Chief of CDU had lawful authority to issue instructions and directions to parties to a pending complaint and that she had in accordance with such authority presented both sides with proper written instructions as to what they could not do during the pendency of the complaint, a breach of such instructions by any of the parties would without doubt have made the party in breach liable on a charge like this. The Chief of CDU had no such authority and was wrong to issue piecemeal instructions and only to the Applicant in order to protect the Complainant's interest.

l. The conclusions reached by both the JDC and the OIOS investigators on the liability of the Applicant on the charge of failure to follow the proper instructions of his supervisors were incorrect.

m. An informal resolution would have been appropriate and expeditious given the unusual and close relationship that had existed between the parties. It is also in the light of the blunder made by rushing to the formal process and its resulting backlash on the Complainant that the Administration turned around to wrongfully charge the Applicant with not obeying the lawful instructions of his supervisor for returning the telephone call of the Complainant's husband.

n. Although the Applicant and the Complainant enjoyed a private friendship which was their own concern and perhaps the concern too of their respective spouses, the Organization was acting within its proper boundaries in entertaining what appeared at least to be a harassment complaint. To this extent, there was no invasion of privacy on the part of the Organization in this case.

o. The Tribunal cannot but come to the conclusion that the office of the SRSG appeared to have taken an undue interest and exhibited uncommon zeal in escalating this dispute.

p. The due process rights of the Applicant were breached in the failure to provide him with a copy of the complaint against him by the time he faced investigators.

q. The universal principle of presumption of the innocence of the Applicant was not observed in this case thereby further breaching his due process rights.

r. In this case, the Organization had been invited to deal with a suspected SEA offence but rather found itself in the territory of a personal and intimate feud between two consenting adult staff members. While the Organization is entitled to look into the complaints brought to it, it cannot constitute itself into a guardian of people's personal morals.

s. The Organization must be careful to see that its commendable policies and initiatives for the protection of women and other vulnerable persons are not misused or misapplied.

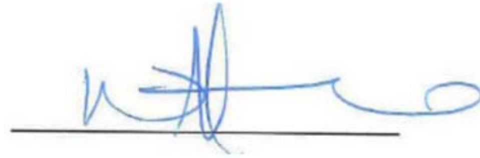
t. It must be further restated that due to the hasty efforts by third parties to prove an SEA offence against the Applicant by using the Complainant to provide the evidence, both the Applicant and the Complainant and their respective families became the ultimate victims of this unfortunate saga. It is hoped that in future cases, those officers saddled with upholding the Organization's commendable zero tolerance policy on SEA will find better ways of dealing with reports and allegations of suspicion of such conduct without compromising due process and exacerbating resolvable conflicts.

u. In spite of the evidence that point to certain elements of managerial incompetence on the part of the Applicant, he cannot be held to have fallen short of the standards expected of an international civil servant.

v. The actions of the Applicant did not amount to serious misconduct as found by the Secretary General and therefore the imposition of summary dismissal on him was wrongful. The Applicant's managerial incompetence was deserving of a reprimand at the very worst but certainly not summary dismissal.

Remedies

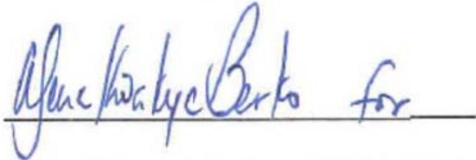
188. All aspects regarding remedies are adjourned for agreement between the Parties, or, failing that for a hearing and final decision by the Tribunal.



Judge Nkemdilim Izuako

Dated this 23rd day of June 2011

Entered in the Register on this 23rd day of June 2011



Jean-Pelé Fomété, Registrar, UNDT, Nairobi