UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2010/002/ UNAT/1566
Judgment No.:	UNDT/2012/034
Date:	9 March 2012
Original:	English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

PERELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant has appealed against the decision of the Secretary-General to uphold her summary dismissal for engaging in sexual harassment of her staff.

Issues

2. The main legal issue in this case is whether the decision to summarily dismiss the Applicant for misconduct was lawful.

Preliminary matters

3. The Applicant was summarily dismissed by letter dated 2 December 2005. Her case was later reviewed by the Joint Disciplinary Committee ("JDC"), which recommended, in its Report No. 188 ("JDC Report"), to rescind the dismissal. On 6 December 2007, the Secretary-General decided to reject this recommendation and maintain the dismissal.

4. The Applicant filed two appeals with the former United Nations Administrative Tribunal, one on 30 January 2008, and the next approximately eight months later, on 20 August 2008. The parties agreed at a case management hearing that the Dispute Tribunal would hear and determine the first case. The Tribunal will consider the second case, including whether it is receivable, if required.

5. In the first appeal, the Applicant identified the contested administrative decision as that made on 6 December 2007. She relied extensively on the JDC Report and requested the Tribunal to find that "the findings of the JDC were based on a thorough and comprehensive review" and should have been relied on by the Secretary-General. In the parties' joint submission of 4 August 2010, the Applicant stated that she was "prepared to adopt the facts contained in paragraphs 64 to 290 of the JDC Report". The Applicant also told the Tribunal at the hearing that she agrees with the factual findings made by the JDC.

6. Based on these submissions, the Tribunal finds that the scope of the Applicant's first appeal encompasses the entire process leading up to her dismissal, including the decisions of 2 December 2005 and 6 December 2007.

7. The Tribunal considered whether it should re-assess the evidence collected during the fact-finding investigation and the JDC process. In view of the parties' acceptance of the JDC Report's factual findings, that course of action was not necessary to do justice in this case. The role of the Tribunal in disciplinary cases is to conduct a judicial review of the administrative decision in question to determine, as stated by the United Nations Appeals Tribunal in *Sanwidi* 2010-UNAT-084, if it was "reasonable and fair, legally and procedurally correct, and proportionate".

8. A hearing was held on 2 and 3 February 2012, at which both parties called witnesses. The following facts are taken from the JDC Report which was adopted by both parties, documents produced by the parties, and evidence given at the hearing.

Facts

9. The Applicant, Ms. Carina Perelli, was employed by the United Nations from 1996, first as Deputy Director of the Management and Governance Division, United Nations Development Programme ("UNDP"), and, since August 1998, as the Director the Electoral Assistance Division ("EAD"), Department of Political Affairs ("DPA"), at the D-2 level. She was based at the United Nations Headquarters in New York.

Mannet Report

10. In December 2004, Mr. Kieran Prendergast, Under-Secretary-General for Political Affairs, engaged an outside consulting firm, Mannet S.a.r.l. ("Mannet"), to conduct a management review of the EAD due to "concerns that emerged during a process of organisational and management development within DPA". Mannet commenced the review on 6 January 2005 and, by 14 February 2005, had conducted 29 interviews with current and former staff members.

11. Mannet issued its report ("Mannet Report" or "Report") on 16 February 2005. It was critical of the management style and work environment in the EAD. Specifically it found that "a case for [professional] harassment may exist, in connection with the management style of one staff member with managerial supervisory responsibility" and recommended that "these concerns, which were raised by a very large percentage of those interviewed, appear to be sufficiently significant to warrant further investigation by competent authorities".

12. On pages 14 and 15, the Report discussed allegations of sexual harassment. It stated that there was "little doubt that the work environment is considered offensive by current and former staff of the division" and that "a constant sexual innuendo is part of the 'fabric' of the division". The Report further provided a number of examples of alleged offensive behaviour by the Applicant and other staff members, including:

- A constant stream of sexual references, jokes and innuendo;
- Unwelcome advances/sexually suggestive behaviou[r];
- References to and inquiries into the most intimate details of the sex lives of staff members, including public humiliation with respect to their responses to those inquires;
- Unwelcome sharing of sexual behaviou[r] and exploits;
- The frequent use of sexually explicit, coarse language;
- Going so far as to include sexual innuendo in written examinations developed within the division, such as devising scenarios which make reference to "a dominatrix";

13. The Report observed that although many of those interviewed indicated that there was an offensive work environment, official complaints had not been made because staff feared potential repercussions.

Initiation of the fact-finding investigation

14. Mr. Prendergast met with the Applicant on 10 March 2005. He gave her a copy of the Mannet Report and requested a written reply in 10 days. He told her that Mannet had shared some surprising results about sexual harassment.

15. The next day, in a memorandum to Mr. Prendergast, the Applicant said that she considered the Report unacceptable and would provide a more detailed response "after careful consideration and consultation with [her] legal counsel". The deadline for her response was subsequently extended to 31 March 2005.

16. On 30 March 2005, Mr. Prendergast sent an email to all staff members of DPA. He said that it was "important that due process be followed" and he did not intend to make the Report available even though he knew that "bootleg copies are making the rounds". The Applicant told the Tribunal that she had circulated it to the EAD staff members on 10 March 2005 in order "to be transparent".

17. The Applicant replied to the Mannet Report on 31 March 2005. She rejected the Report's findings regarding the management issues and questioned the procedure and methodology used. She alleged that Mannet lacked understanding of the substantive and operational context within which the EAD operated. She asked for the Report to be retracted and requested for the allegations of misconduct in the Report to be referred without delay by Mr. Prendergast's office to a competent entity within the United Nations and "that they determine, according to established procedures and in observance of due process, whether or not such allegations have sufficient weight to merit a full and objective investigation". She pledged her willingness to cooperate with such an investigation.

18. On 6 April 2005, Mr. Prendergast replied to the Applicant, declining to retract the Mannet Report. He said that Mannet had been working in the United Nations system for over 10 years. With regard to the managerial issues highlighted in its Report, he said he had brought matters to the Applicant's attention on several

occasions since 2002 and asked her to deal with various issues. Mr. Prendergast also advised her that:

a. The allegations of "professional" (i.e., workplace) and sexual harassment were being forwarded to the Office of Human Resources Management ("OHRM") for investigation under ST/AI/371 (Revised disciplinary measures and procedures) and ST/AI/379 (Procedures for dealing with sexual harassment);

b. He had instituted a preliminary fact-finding investigation under ST/AI/371 by the Executive Office, DPA, into allegations of possible misuse of trust fund monies; and

c. As the Applicant had not dealt with the issues he had discussed with her in several conversations since 2002, she was instructed to undertake a series of actions in accordance with Mr. Prendergast's instructions and deadlines.

19. Mr. Prendergast forwarded a copy of the Mannet Report to Ms. Rosemary McCreery, Assistant Secretary-General, OHRM, to undertake an investigation. Mr. Prendergast retired from the Organization shortly after that in June 2005.

Fact-finding investigation

20. Ms. McCreery appointed two senior staff members to an investigation panel under ST/AI/371 to conduct a fact-finding investigation into the complaint of alleged sexual and professional harassment as described in the Mannet Report. Ms. Jan Beagle, who replaced Ms. McCreery as Assistant Secretary-General, OHRM, in September 2005, explained in her testimony that members of the investigation panel were selected because of their level and experience within the Organization as managers, as well as their maturity, and that they were given some guidance on how to conduct such a fact-finding investigation.

21. The instruction memorandum to the members of the investigation panel specifically referred them to pages 14 and 15 of the Mannet Report (see para. 12 above) and stated:

> 2. Your task is to establish the facts. You are not required to make any determination on what conduct legally qualifies as sexual or professional harassment. I would appreciate a full picture of what occurred so that we may determine whether sexual, professional and/or general workplace harassment, or another kind of inappropriate behavior, took place as alleged.

22. The Applicant was advised about the fact-finding investigation by memorandum of 10 May 2005 from Ms. McCreery, in which she referred the Applicant to pages 14 and 15 of the Mannet Report. Ms. McCreery informed her that if, based on the results of the investigation, it was decided to pursue the case as a disciplinary matter, she would receive formal allegations of misconduct and a copy of the documentary evidence against her. She was also informed that she would have the right to respond in writing and to have the assistance of counsel.

23. The investigation panel informed all staff members of the EAD of its investigation and invited current and former staff to be interviewed if they wished. The panel conducted 26 interviews over a month with current and former staff, including the Applicant.

24. The first to be interviewed were Mr. Prendergast and the Deputy Chief and Officer-in-Charge, Office of Under-Secretary-General, DPA, followed by two EAD staff members. The Applicant was interviewed next and the rest of the interviews were conducted after that.

25. Each witness was provided with the investigators' record of her or his interview for review and signing. Of the 26 interviewees, three declined to sign. The rest, including the Applicant, signed and in many cases included their hand-written corrections. The Applicant told the Tribunal that she had asked the investigation panel to interview her again after its interviews with other EAD staff, and that the panel had agreed to her request. However, when she tried to arrange for a specific

time for this, she was told by one of the panel members that the second interview was no longer necessary.

26. The investigation panel issued its report on or about 7 July 2005. It said that most staff acknowledged that there had been a persistently sexually-charged atmosphere in the office. Many referred to the Applicant's use of crude language, sexual jokes, references and innuendo about her sex life, as well as inquiries and references to staff's sexual habits, often in front of others. None of the staff had directly complained about these matters to the Applicant, although some had indicated to her that they felt uncomfortable in these situations.

27. The investigation panel noted that witnesses referred to two specific instances of "overt sexual harassment", of which one was alleged against the Applicant. The complainant in this matter had not filed an official complaint but had shared the incident with other staff members. The panel found that the other alleged sexual and verbal harassment by another staff member was condoned by the Applicant and went unchecked. It also reported on allegations of "professional harassment, which took place over a period of time". It said that some current and former staff members expressed "deep-seated fear" of reprisal by the system if they complained.

Disciplinary charges

28. The investigation report and the supporting documentation, including all interview records, were provided to OHRM. Ms. Beagle testified that based on the substance of the witness statements, their number, consistency, level of detail, and varied sources of information, OHRM decided to charge the Applicant with sexual harassment, professional harassment, and abuse of authority.

29. The charges were presented to the Applicant at a meeting on 4 August 2005, attended by Ms. Beagle and Mr. Mark Malloch Brown, Chef de Cabinet of the Secretary-General. She was given a letter dated 3 August 2005, containing three charges of misconduct against her: "sexual harassment, professional harassment, and

abuse of authority", in violation of staff regulations 1.2(a) and (g), staff rule 101.2(d), and ST/SGB/253 (Promotion of equal treatment of men and women in the Secretariat and prevention of sexual harassment), dated 29 October 1992.

30. Attached to the charge letter were the investigation report and all records of witness interviews. The Applicant was requested to provide a written statement or explanation. In light of the findings of the investigation panel, she was warned against taking any reprisals against the witnesses. The Administration reserved the right to amend or expand the charges as laid on the basis of any subsequent findings in the context of the other investigations of the Applicant's conduct.

31. At that meeting, the Applicant was told that although it was logical to suspend a staff member to give the opportunity to respond to the charges, in view of the importance of the Applicant's work, it was in the interests of the Organization for her to continue with her functions during that period. She told the meeting that she would formally retain counsel, would consider taking leave and would ask for a full investigation.

32. On 18 August 2005, the Applicant submitted her initial comments. She made a general statement denying that any incidents of sexual harassment had taken place or that there had been a persistent sexually charged atmosphere or professional harassment in the office. She said the charge letter raised fundamental questions of due process and that she needed some basic clarifications from the Assistant Secretary-General, OHRM, before she could even enter into a discussion on the substance of what she described as unclear and unsigned assertions. She made several allegations of procedural irregularity and provided a list of matters to be clarified.

33. On 26 August 2005, Ms. Beagle replied in writing to the Applicant's request for clarification, including an extensive list of extracts from the witness interview records that were said to demonstrate patterns of verbal or physical conduct of a sexual nature that created an "intimidating, hostile and offensive work environment".

Ms. Beagle said in the letter that the Administration believed that the "examples and incidents provided by the witnesses contain sufficient detail for [the Applicant] to be in a position to comment on the charges of misconduct". She said that the witness interview records described a work environment that was characterized by "fear, distrust, arbitrariness, and lack of transparency" and demonstrated a pattern of favoritism towards certain staff, as well as a history of abuse of authority on the part of one of the Applicant's subordinates, which she is alleged to have condoned. The Applicant was invited to submit comments on the testimony provided to the investigation panel when responding to the charges.

34. The Applicant replied with a number of observations but made no comments on the specific allegations. She reiterated her previous allegation that the process had been violated and there were distortions in presenting the facts. She requested OHRM "in view of the time bar applicable to the alleged incidents, and in the absence of signed complaints to discard the [investigation panel's] report as a basis for a decision to pursue this matter". She repeated her request for clarifications.

35. On 8 September 2005, noting that the Applicant was about to depart on a two-week mission to Iraq, Ms. Beagle extended the time for her to respond until two weeks after her return from Iraq. There were difficulties in getting Ms. Beagle's letter to the Applicant, who was traveling at that time. On her return on 2 November 2005, the letter was hand-delivered to her by the office of Mr. Gambari, who had replaced Mr. Prendergast as Under-Secretary-General, DPA.

Applicant's response to the charges

36. Although the Applicant replied to the allegations on 17 November 2005 by a note addressed to Ms. Beagle, copied to the Secretary-General, Mr. Malloch Brown, and Mr. Gambari, she did not answer any of the specific allegations made in the interview records, but repeated her general denial of any kind of harassment. She explained that she still did not know the precise charges against her and stated that

this case was "singularly devoid of substantive allegations" and "lack[ed] specificity as to nature or timing" of alleged acts of misconduct.

37. She stated that "an accused person must be told clearly, specifically, and with adequate detail as to time, place, person, and manner [in] which particular rule has been transgressed" and unless "such time-specific charges have been formulated, no person can be asked to defend him/herself". She asserted that the witness interview records provided to her were self-contradictory and in most cases relied on hearsay.

38. The Applicant questioned the decision to initiate a fact-finding investigation based on the Mannet Report and questioned the basis for the investigation panel's selection of the persons to be interviewed. She also pointed out that the investigation panel did not interview her again at the end of its fact-finding investigation, contrary to what had been indicated to her at her interview on 31 May 2005.

39. The Applicant told the Tribunal that she made a strategic decision not to address any of the individual complaints raised in the interview records and in the investigation report but to deny all allegations by "blanket denial". She did not feel that there was sufficient detailed information in the report or the interview records to enable her to provide specific responses to any of the alleged incidents.

40. The Applicant also told the Tribunal that during her employment Mr. Prendergast had advised her to be careful when addressing her supervisors, but never raised any harassment-related issues. She said that when she joined the EAD, she found that "foul language was already in place" and that "sexual innuendo was important". She informed her staff at that time that she came from the field, that she was a "straight shooter" and that they should tell her if they were bothered by her language or style.

41. The Applicant testified that during the approximately seven years she was in the EAD, she was approached by one female staff member who was bothered by her use of coarse language. The staff member told the Applicant said she would prefer if she used softer language, and the Applicant complied. Apart from that she did not

receive a single indication that people were uncomfortable with any of her actions, but things changed when people did not get their promotions. The Applicant further told the Tribunal that she believed that the witnesses who made allegations against her did so because they were motivated by extraneous factors.

42. The Applicant also stated that while staff members told the investigation panel that they were offended by her behavior, the staff members never told her of this and at least one of the complainants used foul language himself.

Decision to summarily dismiss the Applicant

43. Ms. Beagle, OHRM, and the Office of Legal Affairs reviewed and assessed the Applicant's 17 November 2005 comments and the investigation report, including the witness interview records.

44. Ms. Beagle told the Tribunal that because the Applicant had not provided any comments on or responses to specific allegations in spite of many opportunities given to her, the Administration had to rely on the information available to it, including her blanket denial. In the absence of any detailed response the Administration felt that the correct recommendation was summary dismissal. In response to a question from the Tribunal, Ms. Beagle said that if the Applicant had provided detailed denials of the allegations she would likely have referred the case to the JDC for further proceedings before a decision was made.

45. Following the assessment, Ms. Beagle prepared a memorandum to the Secretary-General recommending summary dismissal of the Applicant for serious misconduct.

46. On 1 December 2005, Mr. Malloch Brown sent a memorandum to Ms. Beagle, stating that, having "carefully reviewed and considered the arguments presented in [her] memorandum", the Secretary-General decided to accept the recommendation.

47. On 2 December 2005, the Under-Secretary-General for Management informed the Applicant by letter that the Secretary-General had decided that she was to be summarily dismissed for serious misconduct. The Applicant received the letter on 6 December 2005. Her dismissal was effective immediately. The letter stated that the decision was based on the findings of the investigation panel that the Applicant had engaged in sexual and professional harassment of her staff and abused her authority as a manager.

JDC Report

48. On 16 March 2006, the Applicant submitted a request for review by the JDC of the imposed disciplinary measure.

49. The JDC held 15 days of hearings between 7 September and 9 November 2006. Twenty-seven witnesses appeared before the JDC, including the Applicant and her own witnesses and the staff members who had made allegations against her. The Applicant had the opportunity to cross-examine the witnesses called by the Respondent.

50. The JDC issued its Report on 12 June 2007, in which it addressed the three charges.

Professional harassment

51. The JDC noted the absence of a formal definition of the term "professional harassment", but, using the standard of what a "reasonable person would consider professional harassment", found that the Applicant's managerial style and decisions added to the stress and anxiety of many EAD staff members. However, the JDC found that "there was no evidence that the Requestor's actions were grounded in bad faith, malice, or any other motivation beyond the needs of the Organization". It concluded that the Applicant's conduct may have warranted the intervention of her superiors, but did not rise to the level of professional harassment or misconduct.

Abuse of authority

52. The JDC found no evidence that the Applicant circumvented the Organization's rules and regulations in managing the EAD and concluded that the charge of abuse of authority was unsubstantiated.

Sexual harassment

53. The JDC found that the Applicant "exhibited some (although not all) of the behaviour complained of [that] can reasonably be characterized as vulgar and, in some cases, definitely inappropriate in Headquarters office environment". Having expressly dismissed some allegations as not established by the facts, the JDC concluded that the following facts were established:

a. The Applicant routinely used coarse and profane language;

b. The Applicant made references to sexual matters and used sexual innuendo;

c. The Applicant on a number of occasions referred to bottoms of male staff members;

54. The JDC also found that it was more likely than not that there was at least one instance of physical contact with Mr. A, an EAD staff member. The contact was non-consensual. The JDC said that it was supported by "credible corroborating testimony [by two staff members] and less than categorical denial by the [Applicant]". This inappropriate physical contact was described as the Applicant leaning over Mr. A while he was sitting at his computer and touching his body with her breasts.

55. The JDC observed that no staff member had objected to the Applicant's language and sexual innuendos. Some said that they had never observed any objections or demonstrations of discomfort. However, the JDC also found and proceeded on the basis that some staff members believed in good faith that they were dealing with an offensive, hostile or intimidating environment in the EAD, created or

further aggravated by the Applicant. Some realised it at the time of certain incidents, others came to realise it or believe that they were offended later as a result of the Mannet Report or when they received information on the forms that sexual harassment may take.

56. The JDC found that the few EAD staff members who had raised grievances with the Applicant and senior officials did so in regard to managerial issues. They did not raise any sexual harassment issues. There was no indication that the Applicant had been put on notice that her conduct was unwelcome, or that she should reasonably have realised from the circumstances that her behaviour might be viewed by some staff members as being of a sexual nature and as creating an offensive working environment.

57. The JDC concluded that "[g]iven that such notice and/or realization are indispensable for a charge of sexual harassment … the [Applicant's] conduct as established did not constitute sexual harassment".

58. It also concluded that the Applicant's rights were violated in that "essential due process requirements were not met" since, in the view of the JDC, the investigation panel "did not seek to establish facts". As a result, the JDC found that the *prima facie* case against the Applicant could not be established, although the JDC noted that the Applicant's lack of responsiveness certainly added to this problem.

59. The JDC unanimously recommended that the decision to summarily dismiss the Applicant be rescinded.

Decision to maintain the summary dismissal of the Applicant

60. The Deputy Secretary-General informed the Applicant by a letter dated 6 December 2007 that the Secretary-General considered that the Applicant's actions constituted sexual harassment. In view of the seriousness with which the Secretary-General viewed sexual harassment by a manager, he decided not to accept the JDC's

recommendation to rescind her summary dismissal. The Secretary-General also found that due process requirements were met in the course of the investigation.

61. In maintaining the decision to summarily dismiss the Applicant, the Secretary-General relied only on the finding that the Applicant's conduct constituted sexual harassment. The charge of abuse of authority was dropped on the recommendation of the JDC for lack of evidence and the charge of professional harassment was not referred to in the relevant section of the letter of 6 December 2007.

Applicant's submissions

62. The Applicant's principal contentions may be summarised as follows:

a. The Mannet Report was improperly relied on to initiate the fact-finding investigation. ST/AI/379 indicates that the complaint of sexual harassment should originate from individuals who believe they are being harassed. However, no such complaints were filed prior to the fact-finding investigation;

b. The Applicant was not advised at the time of the Mannet review or at the time of the fact-finding investigation of the specific complaints that now form the "examples" used by the Respondent to support the case against her. Witness interview records were not provided to the Applicant until 4 August 2005. The specific acts of sexual and professional harassment were pointed out to the Applicant only on 26 August 2005;

c. The investigation panel consisted of two staff member who likely had little expertise or training in investigation but with a clear mandate to come up with a laundry list of complaints. They did not have specific criteria for evaluating the credibility of the various claims. There was no attempt to discuss the allegations with the Applicant or allow her to respond to them;

d. The disciplinary charges were based entirely on office gossip solicited from disgruntled staff members. The charges lacked specificity and relied on the lack of clearly articulated policy as to what constitutes harassment or abuse of authority;

e. The Applicant's response in the form of a blanket denial was appropriate given that the interview records were little more than opinions and office gossip. None of the examples of alleged incidents were properly identified. The concerns cited were about careers, not about harassment. Hurt feelings and bruised egos do not constitute proof of harassment. In every case in which objections were raised to the Applicant's style, not one individual stated that this affected her or his work adversely;

f. To the extent that any legitimate criticisms existed of the Applicant's behaviour as a manager, these are matters that ought to have been addressed in the context of her performance. There is no record that these issues were ever raised or discussed with her;

g. The evidence used to arrive at the decision of summary dismissal falls short of the required standard. The Respondent has not sustained a charge of serious misconduct that warrants the imposition of the penalty of summary dismissal, the most stringent of penalties. In the absence of any concrete rationale based on a serious review of the material, it can only be concluded that this decision was the result of a confluence of other extraneous motivations by the decision-makers that has resulted in a miscarriage of justice. The Organization wanted to make an example of the Applicant and was more concerned with how this case would look in the press than any intrinsic notion of justice;

h. The Applicant requests the Tribunal to take note of the exceptional circumstances under which these charges were publicised, the stressful effects

on the Applicant and her family, the delay in obtaining redress and the grievous injury to the Applicant's reputation, and order appropriate relief.

Respondent's submissions

63. The Respondent's principal contentions may be summarised as follows:

a. The procedures followed by the Organization were consistent with fundamental notions of fairness and due process. At each stage of this matter, the Applicant was on proper notice of the issues under consideration. The case was handled in accordance with the applicable rules and procedures, including ST/AI/371 and ST/AI/379, as well as with the Applicant's rights to due process. The Applicant was assisted by counsel throughout the process;

b. The decisions to initiate the fact-finding investigation, to charge the Applicant with misconduct, and to summarily dismiss her were taken by different impartial decision-makers in a reasonable manner on the evidence before them. The Applicant was provided with every opportunity to be heard and to rebut the evidence of misconduct;

c. The Applicant failed to rebut clear and convincing evidence of misconduct. The Applicant's established use of sexual innuendo and explicit sexual comments and jokes went beyond what any manager could reasonably consider acceptable in a United Nations workplace and created a hostile work environment in the EAD. Her conduct, as a senior manager, constituted particularly serious misconduct, which, on its own, was a sufficient basis for summary dismissal.

Consideration

64. Generally, in reviewing disciplinary cases the role of the Tribunal is to examine:[1]

a. whether the facts on which the disciplinary measure is based have been established;

b. whether the established facts legally amount to misconduct under the Staff Regulations and Rules;

c. whether the disciplinary measure applied is proportionate to the offence;

d. whether there were any procedural irregularities.

65. As the focus of the Applicant's case was mainly on alleged due process irregularities, the Tribunal will consider this issue first.

Whether there were any procedural irregularities

Disciplinary process generally

66. The disciplinary processes at the United Nations at the time were governed by ST/AI/371. Specific procedures for dealing with allegations of sexual harassment were at the time set out in ST/AI/379, which in turn relied on ST/AI/371 for investigation and disciplinary processes.

67. Under sec. 2 of ST/AI/371, where there is "reason to believe" that there has been unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer must undertake a fact-finding investigation. In

[1] See *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028, *Masri* 2010-UNAT-098.

such situations, the head of office or responsible officer has no residual discretion to refuse to conduct an investigation (*Guimaraes* UNDT/2011/116).

68. Sections 3 and 5 of ST/AI/371 provide that, if the fact-finding investigation appears to indicate that the report of misconduct is well-founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, OHRM, who will decided whether the matter should be pursued.

69. The procedures established by ST/AI/379 encourage staff members who believe they are being harassed to notify the offender or, recognizing the power and status disparities that make such confrontation difficult, encourage the staff member to discuss and report the behaviour within the Organization. Sections 5–7 of ST/AI/379 discuss the informal approach to cases of sexual harassment. Formal procedures are explained in secs. 8–12 of ST/AI/379. Section 9 provides that, upon receipt of a report of sexual harassment from an appropriate official, OHRM will promptly conduct "initial investigation and fact-finding" provided for in ST/AI/371.

70. ST/AI/379 provides for additional procedural protections afforded to a staff member who faces allegations of sexual harassment. Section 10 states that the alleged offender shall receive a copy of the complaint against her or him or a written version of the fact-finding report, and be given an opportunity to answer the allegations in writing and produce evidence to the contrary. The alleged offender shall also be informed of her or his right to the advice of another staff member.

71. Following completion of the initiation investigation and fact-finding, secs. 8 and 9 of ST/AI/371 require the matter to be considered by the Assistant Secretary-General, OHRM, to determine whether the case should be closed, referred to the JDC for advice, or, in cases of serious misconduct, whether a recommendation should be given to the Secretary-General to summary dismiss the staff member.

Initiation of the fact-finding investigation

72. One of the allegations made against the Applicant was sexual harassment. This is a very serious offence and the Organization has a responsibility to investigate claims of sexual harassment promptly and effectively (former United Nations Administrative Tribunal Judgment No. 805, *El Aoufi* (1996)).

73. ST/AI/379 envisages that there may be various avenues of reporting alleged sexual harassment. In this case there were no known complaints to the Administration by staff members prior to the Mannet Report.

74. The Mannet review was not commissioned as an investigation into misconduct, but the Tribunal finds that the Mannet Report provided sufficient information to give any reasonable manager reason to believe that there had been unsatisfactory conduct warranting an investigation into the facts. The Applicant herself requested a full investigation after the Mannet Report.

75. The Tribunal is satisfied that the allegations about the Applicant's behaviour and the alleged effect that behaviour had on the EAD staff members, which were first raised in the Mannet Report, were sufficient to give management good reason to believe that misconduct may have occurred and that the Organization was obliged to initiate a fact-finding investigation as required by sec. 2 of ST/AI/371.

Fact-finding investigation

76. The investigation panel was set up pursuant to sec. 2 of ST/AI/371 and sec. 9 of ST/AI/379. The Tribunal is satisfied that the appointment of the panel was proper. Both members of the panel were senior experienced staff members. The Applicant did not show that their appointment was contrary to any procedures at the time.

77. Before the Applicant was interviewed by the investigation panel, Ms. Beagle referred her to pages 14 and 15 of the Mannet Report, which the Applicant had possessed since March 2005. Those pages provided both a general statement of

allegations as well as a list of specific examples of concerning behaviours. Although this list did not include details of the names of the complainants or the dates of the alleged behaviours, the Tribunal finds that the Applicant had sufficient notice, under sec. 10 of ST/AI/379, of the scope of issues being investigated before she was interviewed by the investigation panel to enable her to prepare for the first interview.

78. However, the Applicant was interviewed before those EAD staff members who gave the details of the sexual harassment allegations to the investigation panel. Their testimony was more specific than that given to Mannet. Because she was not re-interviewed once that information was available to the investigation panel, she did not have the opportunity to answer the specific alleged incidents of sexual harassment that had been related to the investigation panel and which largely formed the basis for the disciplinary charges. Nor was she given the opportunity to answer the allegations in writing, as required by sec. 10 of ST/AI/379. This inevitably limited the ability of the investigation panel to provide a fully-balanced description of the facts that took account of the Applicant's version of specific events.

79. The Tribunal finds that it would have been appropriate for the investigation panel to interview the Applicant again after it had interviewed other EAD staff members and to seek her oral and written responses to the allegations made by them, as requested by her before reaching its factual conclusions. This failure amounted to a breach of due process.

80. In spite of this, the Tribunal finds that after she was charged and before the decision was made to summarily dismiss her, the Applicant was provided with sufficient information that fairly informed her of the allegations against her. By then she had not only the charges, which were generally stated, but also the detailed evidence that was relied on in support of those charges. She had a full opportunity to submit her responses to these, and was allowed several extensions of time for her response. At all stages of the process, the Applicant had access to her Counsel.

81. The Tribunal therefore finds that the fact-finding investigation was flawed because, after the full scope of allegations became known to the investigation panel, the Applicant was not re-interviewed or given the opportunity to answer the allegations in writing at the time. However, these flaws did not vitiate the Secretary-General's decision of 6 December 2007, as they were cured in the process that followed.

Commencement of disciplinary process

82. In spite of the procedural flaw in its method of enquiry, the Tribunal finds that the investigation report and the accompanying documents revealed sufficient evidence to indicate that the reports of misconduct made to Mannet were well-founded. The Tribunal finds that the investigation report and the accompanying documents justified the decision to initiate the formal disciplinary process by way of the charge letter of 3 August 2005.

83. The nature of sexual harassment is such that it may be difficult to provide the exact time and date of each alleged instance, particularly where it consists of an ongoing pattern of behaviour. The key question is whether the Applicant was provided with sufficient information regarding the allegations and the alleged incidents to exercise her right to defend herself against the allegations.

84. Read in isolation, the charges in the letter of 3 August 2005 were not sufficiently specific. If they had been presented alone they certainly would not have constituted fair advice of the allegations made against the Applicant. However, the investigation report was also attached to the charge letter. It had reached specific conclusions of fact and included copies of the interview records, which identified the complainants, the witnesses to some incidents, and the specific allegations in verbatim form. The Applicant was also provided, on 26 August 2005, with further clarification in the form of specific extracts from witness interview records that had been relied on by management to support the charges.

85. The Tribunal finds that the information contained in the charge letter and in the letter of 26 August 2005, as well as in the documents provided to the Applicant, was sufficiently clear to allow her to exercise her right of defense and to refute the allegations. The Tribunal concludes that the Applicant's due process rights were respected during the formal disciplinary process.

Decision to summarily dismiss the Applicant

86. In *Molari* 2011-UNAT-164, the United Nations Appeals Tribunal held that:

> [W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

87. The Tribunal finds that the Applicant's strategic decision not to rebut the specific allegations against her once the charges were laid meant that in the face of the findings made by the investigation panel and in the absence of a detailed conflict of evidence, the Organization had little choice but to proceed to summary dismissal. At that stage it had evidence pointing to a high probability of misconduct. The decision was taken after a serious review of the material that was before the Administration.

88. In the circumstances, the Tribunal finds that decision to discipline the Applicant was reasonable and lawful.

JDC Report and Secretary-General's response

89. The Applicant did not criticise either the procedure of the JDC or that adopted by the Secretary-General apart from the allegation that the Secretary-General was motivated by extraneous factors, including political disagreements, pressure experienced by the Organization as a result of its mishandling of sexual harassment cases, and the effect on the entire Organization of the scandal related to the Oil-for-Food Programme.

90. In spite of these allegations, there was no substantiated evidence upon which to base a finding that the decision was motivated by extraneous factors or any improper influence at any stage of the investigation or disciplinary process.

91. Ms. Beagle denied that there were any political considerations or any improper motivations involved in the review of the Applicant's case, and pointed out that a number of senior officials had been involved in the consideration of the Applicant's case at various stages. Mr. Prendergast, who transmitted the Mannet Report to OHRM, retired in June 2005. Ms. McCreery, who set up the fact-finding investigation, was replaced by Ms. Beagle in September 2005. Ms. Beagle was not involved in the JDC proceedings and, thereafter, the Secretary-General was represented by the Deputy Secretary-General and the Office of Legal Affairs.

92. The Tribunal notes that, following the issuance of the JDC Report, the Secretary-General took no steps in relation to the allegations of professional harassment and abuse of authority previously made against the Applicant and finds that the Secretary-General gave objective and unbiased consideration to the facts reached by the JDC.

93. The Tribunal therefore finds that the Applicant did not meet the onus of proving extraneous motivation.[2] The formal disciplinary process, including the JDC proceedings, and the decision of the Secretary-General to maintain the summary dismissal of the Applicant were not vitiated by any improper considerations.

Whether the facts on which the disciplinary measure is based have been established

94. Following the decision to dismiss, the JDC conducted an extensive fact-finding process, in the course of which the parties had the opportunity to examine and cross-examine 27 witnesses of their choice. The factual findings of the JDC are not challenged by the Applicant.

[2] See *Parker* 2010-UNAT-012, *Hepworth* 2011-UNAT-178, *Jennings* 2011-UNAT-184.

95. In light of the acceptance of the JDC Report by the Applicant, the Tribunal finds that the following facts were established, in part, by the investigation panel and then refined and substantiated by the JDC:

a. The Applicant routinely used coarse and profane language;

b. The Applicant made references to sexual matters and used sexual innuendo;

c. The Applicant on a number of occasions referred to bottoms of male staff members;

d. It was more likely than not that there was at least one instance of inappropriate physical contact with Mr. A.

e. Some staff members believed in good faith that they were dealing with an offensive, hostile or intimidating environment in the EAD, created or further aggravated by the Applicant.

96. The Tribunal therefore concludes that the facts on which the disciplinary measure is based have been established.

Whether the established facts legally amount to misconduct under the Staff Regulations and Rules

97. Any form of harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited. The relevant legal instruments are:

a. Staff regulation 1.2(a), which provides that "[s]taff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women";

b. Former staff rule 101.2(d), which stated that "[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited";

c. Secretary-General's bulletin ST/SGB/253, which states that sexual harassment "constitutes unacceptable behaviour for staff working in the United Nations".

98. The Appeals Tribunal and the Dispute Tribunal have confirmed the right of staff members to a harmonious work environment that protects their physical and psychological integrity (*Nwuke* 2010-UNAT-099, *Corbett* UNDT/2011/195).

99. Sexual harassment is defined in sec. 2 of ST/AI/379 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, contract renewal, performance evaluation or promotion) of the recipient of such attentions.

100. The basic elements of sexual harassment pursuant to ST/AI/379 are:

a. the conduct is unwelcome and of a sexual nature;

b. the conduct interferes with work, is made a condition of employment, or creates an intimidating, hostile, or offensive work environment;

101. In Judgment No. 707, *Belas-Gianou* (1995), the former United Nations Administrative Tribunal stated in the context of sexual harassment:

> [I]n the absence of some indication that the person whose conduct is drawn in question was either on notice or should reasonably have realised from the circumstances that the conduct was unwelcome, might be viewed as being of a sexual nature and as creating an

> offensive working environment, the Tribunal would have difficulty in finding that the individual involved had engaged in sexual harassment.

102. Culpability justifying summary dismissal for sexual harassment therefore requires evidence of actual or constructive knowledge by the perpetrator that the offending behaviours were unwelcome by the recipients or other staff members in the workplace.

103. A finding of actual knowledge requires evidence of continuing sexual behaviour in spite of the recipients making it clear to the harasser that it is unwelcome. That did not occur in this case. The Tribunal accepts that the Applicant was not directly put on notice of the offence caused to the staff members by her sexual references and bad language.

104. Constructive knowledge by a harasser is an alternative to the requirement for actual knowledge and as such is a necessary component of liability for sexual harassment in the workplace. It takes account of the dynamics of power, authority and hierarchy that may inhibit staff members from confronting a harasser. It ensures accountability for sexual harassment that is conducted out of thoughtlessness or irresponsibility but nevertheless creates problems for affected staff members.

105. The Applicant admits to behaviours that were of an overt sexual nature. The evidence established that several staff members found the behaviour unwelcome and that it resulted in an offensive, hostile or intimidating environment created or further aggravated by the Applicant. The evidence meets the standard of proof stated in *Molari*. The only question is whether the Applicant should reasonably have known that her behaviour was unwelcome. This is a matter of fact.

106. On the Applicant's account she advised staff at the beginning of her term to tell her if they were offended and one staff member did so on two occasions about different matters. The Applicant testified that she had modified her behaviour towards that person. She also relied on the fact that acceptance of such behaviours in the EAD

pre-dated her arrival and that in approximately seven years of the same behaviour no staff member complained to management about sexual harassment by her.

107. However, the Applicant was a senior manager and head of her division in a multicultural organisation. The workplace of the United Nations is governed by standards of conduct set by the Charter, staff regulations, rules and policies. Staff members have at least presumptive knowledge of these exacting standards, and, particularly given her position of seniority, the Applicant should have been aware that her conduct breached them. It was her responsibility to ensure that the workplace she managed was free of sexually explicit behaviour and that she did not contribute to or encourage it.

108. In view of the circumstances in this case, including the evidence given by the Applicant, the Tribunal finds that her behaviour towards her staff as established by the JDC was such that she should have and, indeed, must have known it was not only inappropriate but would have the effect of creating an intimidating, hostile, and offensive work environment.

109. The Tribunal therefore finds that the Applicant's actions amounted to sexual harassment of which she had constructive notice.

Whether the disciplinary measure applied is proportionate to the offence

110. The jurisprudence on proportionality of disciplinary measures is well-settled. The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary. Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure.

111. The Tribunal has considered the Applicant's evidence that the culture of the EAD at the time was such that her conduct was nothing out of the ordinary, but does not find this to be an excuse or a mitigating circumstance. ST/AI/379 states that conduct described in sec. 2 is particularly serious when it is engaged in by an official

in a position to influence the career or employment conditions of recipients of such conduct. The Applicant was a senior manager and was placed in a unique position of authority. She was directly responsible for ensuring that the staff members of the EAD were not working in an intimidating, hostile, or offensive work environment. As a senior manager, the Applicant was also expected to set an example of conduct to her staff. In both of these she failed.

112. The Tribunal finds that the imposed disciplinary measure was not disproportionate. The disciplinary measure of summary dismissal was within the range of what was reasonably available to the Secretary-General and was neither arbitrary nor unnecessarily harsh.

113. Although the initial decision was initially based on three charges (sexual harassment, professional harassment, and abuse of authority), the Tribunal finds that it was appropriate for the Secretary-General, in the circumstances of this case, to maintain the summary dismissal on the basis of the factual findings of the JDC on sexual harassment charges alone.

Conclusion

114. The Tribunal therefore finds that:

a. The preliminary fact-finding investigation was initiated properly, but was flawed, because the Applicant was not re-interviewed or given the opportunity to answer the allegations of sexual harassment in writing after the full scope of allegations became known to the investigation panel. However, these flaws did not vitiate the ultimate decision of 6 December 2007 as they were cured in the process that followed;

b. The findings of the fact-finding investigation report and the accompanying documents justified the decision to initiate the formal disciplinary process by way of the charge letter of 3 August 2005;

c. The Applicant's due process rights were respected during the formal disciplinary process;

d. The decision to discipline the Applicant was reasonable and lawful;

e. The formal disciplinary process, including the JDC proceedings, and the decision of the Secretary-General to maintain the summary dismissal of the Applicant were not vitiated by any improper considerations;

f. The Applicant's actions as established by the JDC and accepted by her amounted to sexual harassment of which she had constructive notice;

g. The disciplinary measure imposed on the Applicant was within the range of what was reasonably available to the Secretary-General and was not arbitrary or unnecessarily harsh.

115. The application is rejected.

(*Signed*)

Judge Coral Shaw

Dated this 9th day of March 2012

Entered in the Register on this 9th day of March 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York