UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NBI/2010/011/ UNAT/1587
	Judgment No.:	UNDT/2012/054
	Date:	18 April 2012
	Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Anita Saran, OSLA

Counsel for the Respondent:
Jorge Ballestero, Policy and Administrative Section, UNICEF

Introduction

1. The Applicant entered into service with the United Nations Children's Fund UNICEF, on 1 February 2006 as Chief of the UNICEF Southern Sudan Water and Environmental Sanitation Section. He moved into tented accommodation at the AFEX/OCHA camp on 17 February 2006 and was based there until he left Juba on 20 June 2006.

2. The Applicant contests a decision to summarily dismiss him from UNICEF, which took effect on 2 January 2007, based on allegations of sexual harassment made by two waiters and two security men working at the Africa Expeditions, United Nations Office for the Coordination of Humanitarian Affairs ("AFEX/OCHA") tented camp in Juba where he was living.

Facts

3. On 20 and 23 June 2006, oral allegations of sexual assault were made against the Applicant by four employees of the AFEX/OCHA premises in Juba, Sudan. None of the four were employees or agents of the United Nations.

4. A preliminary investigation was carried out by a Consultant hired by UNICEF to deal with cases of sexual exploitation and abuse ("SEA") on 20 June 2006. The SEA Consultant was in charge of interviewing and recording in writing the initial complaints made by the Complainants.

5. On 12 July 2006, the Director of UNICEF South Sudan sent an email to the Applicant attaching the statements from the Complainants in which they had made allegations of sexual assault against him. Other statements collected from other parties interviewed during the preliminary investigation were also sent to the Applicant. He responded to these allegations on 13 July 2006.

6. On 9 August 2006, a Human Resources Manager with UNICEF ("the Investigator"), was appointed to conduct an investigation into allegations of sexual harassment based on the statements taken from the Complainants and others. According to her, she was provided with guidelines, parameters and terms of reference to carry out the investigations. She knew the

Applicant previously by virtue of being the then desk human resources officer handling his recruitment for South Sudan including his appointment to the P5 post.

7. The investigation commenced, with a mission to Nairobi and Juba, from 8 to 16 September 2006 and she was assisted by a note taker. Follow-up activities were undertaken both in Nairobi and in UNICEF's, New York Headquarters. The Applicant was interviewed by the investigator on 8 and 15 September 2006 in Nairobi. She also interviewed the four complainants and six others in Juba in the course of her investigations.

8. Her investigation report dated 31 October 2006 concluded that there was clear and convincing evidence that sexual harassment took place. She recommended that the Division of Human Resources ("DHR") take appropriate action, including appropriate disciplinary measures, against the Applicant on the grounds that he had engaged in the sexual harassment of the Complainants.

9. The DHR informed the Applicant on 15 November 2006 that based on the investigation report, the findings indicated serious violations on his part of the basic requirement for international civil servants to uphold the highest standards of conduct in the performance of their duties which amounted to misconduct. The then Executive Director of UNICEF consequently charged the Applicant with engaging in sexual harassment against two waiters and two security guards at the AFEX/OCHA camp.

10. The Applicant responded to the charges on 5 December 2006 requesting that, in the interest of fairness, justice and professionalism, the charges be withdrawn and stating further that the Respondent had failed to provide sufficient credible evidence to support the allegations.

11. On 26 December 2006, the Deputy Executive Director ("DED") reviewed the Applicant's response to the charge letter and concluded that his actions constituted serious misconduct and that given the gravity of his conduct, the appropriate sanction was to summarily dismiss him effective 2 January 2007. The said decision was conveyed to the Applicant on 26 December 2006 and was received by him on 27 December 2006.

12. On 7 February 2007, the Applicant requested that a Joint Disciplinary Committee (JDC) be constituted to review the decision to summarily dismiss him from UNICEF.

13. On 10 April 2007, in accordance with UN staff rule 110.4(c) and Chapter 15 on Disciplinary Measures and Procedures of the UNICEF Human Resources Policy & Procedure Manual, an *ad hoc* JDC was constituted in Nairobi to review the Executive Director's decision to summarily dismiss the Applicant for serious misconduct.

14. The Report of the *ad hoc* JDC, dated 29 June 2007, concluded that a substantial case had been made and that there were no other material issues that required or warranted further investigation and/or clarification. On the basis of its review, the unanimous opinion of the *ad hoc* JDC was that the events alleged occurred and therefore the panel concurred with the decision of the Executive Director's Office to summarily dismiss the Applicant.

15. On 2 July 2007, the DED accepted the recommendation of the *ad hoc* JDC and maintained the decision to summarily dismiss the Applicant. The Applicant was informed, that in accordance with staff rule 110.4(d), he could appeal the decision directly to the former UN Administrative Tribunal.

16. On 19 March 2008, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed his Reply on 22 September 2008. 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 UN Administrative Tribunal to the United Nations Dispute Tribunal ("the Tribunal").

17. The Tribunal held a hearing via teleconference from Nairobi from 7-9 February 2011. During the hearing, the Tribunal, received testimonies from the Applicant for himself and from the Investigator who was a witness for the Respondent. Counsel for the Respondent and the Applicant filed their closing submissions on 24 and 28 February 2011 respectively.

Applicant's submissions

18. The Applicant's case is summarized below.

19. All the allegations of sexual harassment are false. The Complainants colluded to fabricate the allegations against him because he refused, on different occasions, to give them money that they had requested from him.

20. This case is quasi-criminal in nature. The Respondent had failed to meet the requisite standard of proof and as such, there should be a finding in favour of the Applicant. The Respondent must be subjected to a higher standard of proof than the 'balance of probabilities' test.

21. The Investigator was not qualified for the role assigned to her and the investigations were below standard. Several gaps existed in the investigation and the report produced from it. The Investigator conceded the following deficiencies in relation to her report:

a. She did not include a map of the AFEX Camp showing the relative and relevant distances;

b. She did not take any photos of the camp or the interior of the Applicant's tent or the dining room;

c. She did not take any photos of the Complainants for the Applicant to identify;

d. She did not take any photos of the Applicant for the Complainants to identify; and

e. She took contemporaneous handwritten notes during the course of her interviews with the Complainants which have now been shredded.

22. The Investigator failed to mention in her report numerous key inconsistencies in the evidence and she failed to draw any inferences regarding the credibility of the Complainants and other witnesses from those inconsistencies.

23. The dates of most of the alleged incidents are unknown and were not provided to the Investigator or the initial fact-finder who filled out the Complaints Referral Form ("CRF").

24. There were several material inconsistencies in the accounts given by the same Complainants regarding the same allegations to the initial fact-finder and later in their accounts to the Investigator.

25. Some of the Investigator's minutes of interview with some Complainants are vague, casual, imprecise, and identical to others and are definitely inaccurate.

26. The note-taker acted as a co-investigator when she conducted part of the investigations by herself and conveyed her opinions to the assigned Investigator as to the credibility of the evidence collected by her.

27. The failure of the Respondent to secure the attendance at the hearing of any of the 10 witnesses interviewed by the Investigator made it impossible to resolve the many material contradictions and inconsistencies and resulted in a process which was unreliable and also unfair to the Applicant who gave live evidence which was tested in cross-examination.

28. The note-taker, a UNICEF staff member, who not only conducted part of the investigation and gave her views on issues but also took minutes of interviews in which she recorded different witnesses as using identical language and expressions in some instances, was not produced at the hearing.

29. The investigator failed to investigate certain explanatory and exculpatory claims made to her by the Applicant. Even though she conceded during the hearing that she was not surprised that the Applicant would get money demands in Juba, she did not put such an opinion in her report.

30. The Investigator relied on the unsigned interview of a person who was not a Complainant to construct an irrelevant psychological profile of the Applicant as a person who generally socialized with young men.

31. The Applicant prayed the Tribunal:

a. To declare his summary dismissal to be null and void, having been decided by an authority that was acting *ultra vires* and in an arbitrary manner;

b. To order the payment of the termination indemnity payments to which he is entitled under the relevant rules;

c. To award compensation for his termination in the amount of four years' net base salary at the rate in effect when he was separated as there are exceptional circumstances warranting a higher amount;

d. To declare that his loss of income to date, and his reduced earning potential caused by the Respondent's decision constitute exceptional circumstances which merit exceeding the normal cap on compensation;

e. To award appropriate compensation for psychological distress resulting from the false allegations and charges made against him, and for violation of his rights as a UN staff member;

f. To order the removal from the Applicant's personnel file of any adverse material contained therein;

g. To further order that the Respondent send the Applicant written confirmation that he has actually done so, with the precise list of the documents concerned, within six months; and

h. To order a written apology to the Applicant from the Executive Director of UNICEF.

Respondent's submissions

32. The Respondent's case is summarized below.

33. The decision to dismiss the Applicant was a reasonable and legitimate exercise of the UNICEF Executive Director's discretion regarding misconduct by UNICEF staff members and that such a decision was required.

34. The allegations were true and substantiated.

35. There is no conspiracy against the Applicant by the Complainants. None of the victims had anything to gain by making their reports and further, they risked their jobs by reporting the Applicant's conduct.

36. The *ad hoc* JDC had determined that no other material issues required further investigation and that the sexual harassment alleged by the Complainants against the Applicant occurred. The role of the Tribunal is to examine the facts as formulated by the *ad hoc* JDC, determine whether they constitute misconduct, the seriousness of the misconduct and the proportionality of the sanction.

37. The absence of testimony by the alleged victims does not negatively impact on the Respondent's case.

38. The Applicant had every opportunity to contest the evidence provided by the victims.

39. The Complainants are covered by paragraphs 12 and 16 of the UNICEF policy on the prevention of sexual harassment.

40. The Applicant's due process rights were fully respected. The imperfections of the investigation process did not materially impact on the finding by the Investigator that the allegations were true. The investigations were fair and unbiased.

41. The Applicant admitted that he interacted with the four alleged victims. The alleged victims were disadvantaged young, black men and they reported to their supervisors what the Applicant did but the supervisors did not take up the matter at the times they occurred.

42. The report by Complainant 3 ("C3") that the incident involving him took place at 9.00 p.m. on 18 June 2006 even if not accurate as to time does not render his account untrue.

43. The Applicant has been inconsistent and given false testimony because he claimed that one Complainant asked him for money to do a computer course but before the Tribunal he claimed that it was a different Complainant.

44. The Tribunal is urged to accept that the two waiters who were allegedly victimized by the Applicant on different occasions had entered the Applicant's tent where the abuse then took place.

45. The Applicant exploited the disparity of power relations between him and the alleged victims to abuse them.

46. The Respondent requested therefore that the Tribunal find:

a. that the decision to summarily dismiss the Applicant for serious misconduct was a proper exercise of the UNICEF Executive Director's authority in disciplinary matters;

b. that the Applicant's due process rights were fully respected throughout the entire process; and

c. that the decision to summarily dismiss the Applicant was proportionate to the offence and was not vitiated by prejudice, improper motivation, mistake of fact, or other extraneous factors.

47. The Respondent further requests the Tribunal to dismiss the Application in its entirety and to order the Applicant to cover the expenses of the proceedings, as it is evident that he is acting in bad faith and abusing the process.

Considerations

48. In determining this Application, the main issues for examination are:

a. Role of the Tribunal in disciplinary cases;

b. Conduct of the investigation;

c. Credibility of the Complainants and witnesses interviewed by the Investigator;

d. The integrity of the investigative process;

e. The investigation report;

f. Relevance and admissibility of the Complaint Review Forms and the investigator's interview notes as to the facts in issue;

g. Standard of proof in disciplinary cases; and

h. The charge against the Applicant and the legal framework.

Role of the Tribunal in disciplinary cases

49. Part of the Respondent's case is that when, in a matter of a disciplinary sanction, the Tribunal has in evidence a report by a JDC panel, the role of the Tribunal is restricted to reviewing the facts as stated by the panel and to determining whether or not the said facts give rise to misconduct. The Tribunal would then evaluate the seriousness of such misconduct and may only proceed on the facts as found by the said JDC or other primary fact finding body. Where the Tribunal departs from this procedure, it ought to give justification for doing so.

50. In former UN Administrative Tribunal Judgment No. 941, *Kiwanuka* (1999), it was held that the imposition of disciplinary sanctions is an exercise of quasi-judicial power and that the Administration's interest in maintaining high standards of conduct and thus protecting itself must, therefore, be reconciled with the interest of staff members in being assured that they are not penalized unfairly or arbitrarily.

51. The question of any party attempting to draw the parameters or limitations for judicial adjudication by the Dispute Tribunal is as unnecessary as it is futile. Its true mandate is governed by legislation and this has been restated in earlier judgments. This Tribunal is competent to entertain applications as provided for by the Statute creating it. As a judicial body, the Tribunal is entitled to examine the entire case before it. In other words, it may consider not only the administrative decision of the Secretary-General imposing disciplinary measures but also examine the material placed before the Secretary-General on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the

investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and the decision maker[1].

52. In its jurisprudence, the Dispute Tribunal has affirmed that it shall not be constrained or limited in its judicial functions of granting full equality to the parties in a fair and public hearing, to be independent and impartial in the determination of rights and obligations of any party as required by the most basic of the United Nations instruments on human rights– the Universal Declaration of Human Rights[2].

53. Does the evidence in the present case justify the finding by the *ad hoc* JDC that the Applicant engaged in sexual harassment by his alleged unwelcome sexual advances and gestures of a sexual nature against two waiters and two security guards?

Conduct of the investigation

54. The Office of Internal Oversight Services ("OIOS") is an independent body within the United Nations Organization. In exercising its mandate of providing oversight, it not only investigates alleged misconduct, but lays down investigation standards in its investigations manual as a practical guide for United Nations staff members who are called upon at any time to conduct internal administrative investigations.

55. Much as the OIOS does not oversee the separately administered funds and programs of which UNICEF is one, it is a member of the Conference of International Investigators ("CII") which sets standards for best practices in internal administrative investigations in international organizations. Investigative standards laid down by the OIOS are derived from the CII uniform guidelines for investigations.

56. In this case, the Applicant challenged the credibility of the investigations and the competence of UNICEF's appointed investigator. The Applicant submitted on this score that there were several fatal deficiencies in the investigation process. Some of these deficiencies were:

[1] See *Sanwidi* UNDT/2010/036.at para. 7.1.4.
[2] *Ibid* at para. 7.1.3.

a. That there was no effort made to re-enact the alleged misconduct with the Complainants even though they were interviewed;

b. The Investigator did not assess the distances between one location and another within the AFEX/OCHA residential camp and the Applicant's offices as this was material and relevant to the allegations made and the explanations of the Applicant; and

c. That the Investigator did not visit and inspect the Applicant's *Khartoum* tent where it was alleged he had sexually assaulted two of the Complainants on different occasions in order to determine its size and location as a possible venue for the alleged misconduct.

57. An investigator must be trained and competent to conduct investigations. Other standards expected of investigators are objectivity, impartiality and fairness. An investigator must be committed to ascertaining the facts of the case through relevant inquiry involving the questioning of witnesses, forensic evidence where necessary and identification and collection of relevant documentary evidence. The investigator's findings should be based on substantiated facts and related analysis, not suppositions and assumptions. Factual accuracy is very important.

58. In her testimony, the Investigator told the Tribunal that she abided by the procedural steps and standards required during investigations and that she was fair, unbiased and objective. She stated that she obtained physical demonstrations from each Complainant interviewed as to how they were allegedly inappropriately touched by the Applicant, but under cross examination, she admitted that she did not enter *Khartoum* tent, the alleged scene of the sexual abuse against two of the Complainants. Her reason for not entering the tent was that *Khartoum* tent was at the time occupied by someone else and that "some people would put funny padlocks" on the entrance to the tents and would zip them up. She further stated that up to three people could comfortably fit in the tent with "space in the middle" and this notwithstanding the fact that she did not have the opportunity to enter the said tent.

59. The Applicant had testified that the two waiters had followed him on each occasion to his *Khartoum* tent in the evening and that the lighting was poor in the camp as there were only ground lights provided. He also explained that the inside of *Khartoum* tent was lit by a single

bulb while the main gate ("Bravo gate") where he was alleged to have sexually assaulted the guards was flood-lit at night making the likelihood of sexual abuse remote. When re-examined, the Investigator testified that she walked to *Khartoum* tent in order to understand its distance from the restaurant but did not state at what time of the day she walked to the tent nor did she testify as to whether she ascertained the visibility conditions that prevailed at the times of the alleged misconduct.

60. The Investigator's failure to ascertain the state of lighting and visibility in the AFEX/OCHA premises and the inside and surroundings of *Khartoum* tent raised by the Applicant is a material omission as there is no evidence to help the Tribunal determine whether there was sufficient visibility as to make it likely or unlikely that the alleged sexual abuses took place. Even if it was difficult to inspect the *Khartoum* tent because of its new occupant, evidence could have been elicited from the management of the tented camp as to the size, capacity and lighting of the tent in issue. She could also have obtained authority from Management at the camp to visit the said tent despite its being occupied at the time of the investigations. The Investigator did not investigate or establish that all the fifty tents were of the same size but was content to assess the size of *Khartoum* tent by the standards of another tent which she, the Investigator, had occupied while carrying out her investigations

61. In the same way, the walking distance between the Applicant's UNICEF office and the AFEX/OCHA Bravo gate including the lighting conditions of the said gate are material facts in this case for the purpose of determining how much time a walk from the office to Bravo gate would take the Applicant in view of the complaint by one of the guards. While the said guard had told the Investigator that the alleged abuse took place at around 9.00 p.m. on 18 June 2006, the Applicant had produced an email which he had sent from his office at the same date and time as the alleged abuse. He had told the Tribunal that his office from where he had sent the said email was a walking distance of about 30 minutes to Bravo gate, the location of the alleged sexual abuse of the guard. It was also his evidence that Bravo gate was floodlit at night making it an unlikely venue for a sexual encounter. In answer to a question in cross examination, the Investigator stated that her report was not concerned with distances as she did not consider that

relevant. She added that what was relevant to her at the time of investigation were the "issues that happened in a specific location", that is, *Khartoum* tent and Bravo gate.

Credibility of the Complainants and witnesses interviewed by the Investigator

62. Unfortunately, none of the five persons: two waiters at AFEX/OCHA premises and three security guards at the Bravo gate connecting the offices and residential area who allegedly made the complaints that gave rise to the Applicant's summary dismissal in this case, gave their testimony before the Tribunal. This was because the Respondent could not produce any of them.

63. In deciding on the credibility of the Complainants, the Tribunal is in the circumstances constrained to rely on an evaluation of the interview notes made by the Investigator when she spoke to them, the CRFs filled by the initial fact-finder who first recorded their complaints in writing and the submissions made on behalf of the parties.

The accounts of the waiters and their supervisor

64. Complainant 1 ("C1") is one of the two waiters who complained of what amounts to sexual assault by the Applicant. On 20 June 2006, he spoke to the SEA Consultant who filled a CRF on his behalf. According to information on the CRF, C1 stated that while at work at the AFEX/OCHA bar on an unspecified day in late April 2006 between 4.00 p.m. and 5.00 p.m., the Applicant greeted him and he mentioned to the Applicant that he had a toothache and asked for advice on medication.

65. Further, that the Applicant offered to give him some medication which he had in his tent and C1 followed him to the *Khartoum* tent where he gave him some medication and then caressed him on the neck, arms and chest. Feeling uncomfortable, he ran out of the tent and returned to the bar. Thereafter, the Applicant would greet him as if nothing had happened and it was not until 26 May 2006 when a story had gone round about a humanitarian worker who was deported from Sudan for homosexual activity with a young male, that he reported his incident with the Applicant to the AFEX Camp Manager who was his supervisor.

66. On 14 September 2006 when C1 was interviewed by the Investigator, he told her that the incident took place at night. The date and month of the incident was not stated. He said that the Applicant had approached him on the night in question, asked how he was and, on finding that he was unwell asked him to come to his tent for medicine. His colleague, Complainant 2 ("C2"), offered to go on his behalf but the Applicant insisted that C1 come by himself.

67. As soon as they got to the tent, the Applicant began to touch his arm, neck and chest as if massaging him. Feeling uncomfortable, he left the tent to return to his work. He told C2 about the incident and was told by C2 that he had had a similar experience with the Applicant. Between the two waiters, they kept these experiences secret until the incident involving the security guards when their supervisor asked him if he knew anything and he told her of the incident with the Applicant.

68. A second waiter who also complained about sexual abuse by the Applicant was C2. In the CRF, he stated that the incident with the Applicant took place at the beginning of May 2006. According to his account, the Applicant bought water from the AFEX bar and asked C2 to carry the water to his tent. As they walked down, C2 asked the Applicant if he knew a remedy for the rashes on his body. The Applicant said he would look at them and give advice.

69. At the tent, he showed the Applicant some rashes on his arm but was asked if he had them anywhere else. C2 removed his shirt to show the rashes on his back and was again asked if they were on any other part of his body. C2 unzipped his trousers to reveal more rashes on his thigh. He then felt uncomfortable to be looked at and touched in the groin area. He dressed up and asked for medication but the Applicant said he had none and told him to see a doctor. C2 felt humiliated that the Applicant was not able to help him and yet asked him to undress.

70. In the Investigator's interview notes, C2 repeated the facts substantially as they were recorded in his CRF. He said that he never officially reported the incident as he did not take it very seriously but instead told his colleague C1 who in turn told him that he had had a similar experience with the Applicant. The incident was kept secret between him and C1 until the incident involving the security guards became public and his supervisor asked him if he knew anything about it. It was then that he reported to her what had happened to him.

71. An email from the note-taker sent to the Investigator on 25 September 2006 revealed that she talked to C2 about the sum of USD 10 which the Applicant told the Investigator he gave C2 to treat his rash. According to the email, "he said to me that he forgot to tell, but he received $10 from [Applicant] to buy medicine for his rash".

72. In the CRF, it was recorded on behalf of the AFEX Camp Manager that some of the waiters had complained to her about the Applicant when a humanitarian worker was deported for homosexual activity with a local person. She said she reported these complaints to the OCHA Camp Manager although she did not name the Applicant. The OCHA Camp Manager, in the CRF, stated that she made a verbal report to him on 10 June 2006 concerning four complaints made by AFEX staff about being sexually harassed by tenants, both men and women. As the AFEX Camp Manager did not name the alleged perpetrator, he said that he could not take any action on the matter.

73. When interviewed by the Investigator, the AFEX/OCHA Camp Manager said that it was after an alert was raised by security guards who woke her up in the night of 19 June 2006 to complain about the Applicant's conduct to them that others made similar complaints. She said that the two waiters, C1 and C2 also spoke up about their experiences. In his interview with the Investigator, the AFEX/OCHA Camp Manager did not mention the report he claimed in the CRF that the complaint was made to him on 10 June 2006 or knowledge of any sexual harassment allegations before the incident of 18 and 19 June 2006 involving the security guard C3.

74. A review of the accounts given by the two waiters and the two supervisors to whom their reports were allegedly made raises a number of pertinent questions that address the credibility of some of the stories on which reliance was placed to summarily dismiss the Applicant. Some of these can be summarized thus:

a. C1 stated in the CRF that his abuse by the Applicant took place between 4.00 p.m. and 5.00 p.m. sometime in late April 2006. To the Investigator, he stated that the incident happened at night. In tropical South Sudan, 4.00 p.m.-5.00 p.m. cannot be described as night. Which version as to time of occurrence is true?

b. In his interview with the Investigator, C1 said that when the Applicant offered to give him medication, his colleague C2 had offered to go with the Applicant to his tent to collect it but the Applicant refused and insisted that C1 would have to come by himself. It suggests that C2 was present when discussion about medication for C1's toothache took place with the Applicant. This account of C2 offering to collect the medicine and the Applicant's refusal was not given in C1's CRF or by C2 at any time.

c. In the CRF, C1 said he reported his experience to the AFEX/OCHA Camp Manager during the weekend of 26 May 2006 when the story about a humanitarian worker who had been deported for homosexual activity was making the rounds. He then told the Investigator that he made the report after the security guards complained about the Applicant. The security guards complaint was on 20 June 2006, the same day that C1's CRF was filled. Which version is to be believed? Is it that C1 first reported that he was sexually assaulted by the Applicant on the day he had his CRF filled or that he did when he heard about the deported humanitarian worker in May 2006?

d. Similarly, in C2's CRF dated 20 June 2006, it is recorded that he had reported his assault by the Applicant to the AFEX Camp Manager earlier. To the Investigator, C2 claimed he never officially reported as he did not take it seriously until the incident of the security guards happened.

e. Both C1 and C2 told the Investigator that they only reported their separate sexual assaults by the Applicant to the AFEX Camp manager after the security guards incident when she asked them if they knew anything. Was the AFEX Camp Manager looking for stories from her supervisees to strengthen the case against the Applicant?

f. Why did C2 not take the incident of his sexual assault by the Applicant seriously until the AFEX Camp Manager asked? Did it mean he did not find it offensive at the time it happened? Was he only reporting it then because he was told it was serious?

g. Both C1and C2 said they confided in each other about their experiences at the hands of the Applicant. Who was the first to tell the other? If C1 had been sexually abused in the Applicant's tent in April 2006 on the day the Applicant refused that C2

should collect medicine on his behalf and had then confided in his co-worker C2, why did the said C2 ask the Applicant for help with his rashes in May 2006 and agree to have intimate parts of his body examined by him in the same tent?

h. Why did C2 state in his CRF that the Applicant was not able to help him and yet had asked him to undress in spite of the fact that he had collected USD 10 from the Applicant for treatment?

i. Why did C2 forget to mention that he received USD 10 from the Applicant both at the time of filling the CRF and when interviewed by the Investigator? Were both this forgetfulness and the claim that the Applicant did not help him treat his rashes only convenient lies to cast the Applicant in a bad light?

j. The AFEX Camp Manager, like her two supervisees, C1 and C2 stated in the CRF that she first knew of their encounters with the Applicant when a humanitarian worker was deported for homosexual activity with a local person. She then reported it to the OCHA Camp Manager. When she spoke with the Investigator, she said that it was after the alert was raised by the security guards on the night of 19 June 2006 that several people including "[C1] and [C2] also spoke up about their experiences." Which version is true about when C1 and C2 reported their experiences to her?

k. The AFEX Camp Manager's account in the CRF about when reports were made to her and those of her two supervisees, C1 and C2, in their CRF tally. Also her account on the same issue in her interview with the Investigator, although different from the CRF, tallied with what C1 and C2 told the Investigator. Does this not suggest collusion at worst or at best a rehearsal or coaching between the three every time they were interviewed on the subject?

l. The OCHA Camp Manager, in the CRF made on 22 June 2006, stated that the AFEX Camp Manager made an oral report to him, on 10 June 2006, about four complaints of AFEX staff "being sexually harassed by tenants, both men and women." The names of the perpetrators were not revealed to him and so he could not take any action at the time. When he spoke with the Investigator, the OCHA Camp Manager did

not mention receiving any report of sexual abuse until 20 June 2006 after the security guards incident. Why would he omit such a material piece of evidence during investigations?

m. Both C1 and C2 stated in their CRF and to the Investigator that apart from confiding in one another, they kept their experiences secret until the bigger problem with the security guards happened and the AFEX Camp Manager, asked them what they knew regarding the story that was making the rounds. It was only then that they revealed their abuse by the Applicant. Why would the AFEX Camp Manager, to whom the waiters had never complained, ask her supervisees if they knew anything? Was she trying to elicit reports from them in order to build up the case against the Applicant? Was it possible that C1 and C2 made false allegations about the Applicant in order to impress or even help their supervisor? Did the circumstances not render these allegations suspect?

75. The material questions that arise from accounts given by C1, C2 and the AFEX Camp Manager were not resolved by the Investigator. They are serious and sufficiently relevant to successfully strip these absent Complainants of the credibility needed to establish that the Applicant indeed sexually assaulted two of them. The Tribunal finds that the allegations of sexual assault by the Applicant against C1and C2 were not established by the Investigator.

The accounts of sexual assault by three security guards and their supervisor

76. Three security guards attached to GS Services of the KK Group of Companies in Juba, South Sudan made complaints which were recorded in the CRF on 23 June 2006. The three were C3, Complainants 4("C4") and 5 ("C5"). Apart from the AFEX Camp Manager, S1 who was a supervisor of the three complainant security guards, also filled the CRF relating the accounts of the alleged sexual abuse of the security guards.

77. C4's story was that on the night of 8 May 2006, the Applicant came to the Bravo gate where he was on duty to talk to him. The Applicant asked him if he was married and if he knew how to have sexual intercourse to which he replied in the affirmative. The Applicant then moved closer and asked him many questions related to sex. Although he was confused as to what the

Applicant intended, he shook hands with him but the Applicant held on to his hand for a long time.

78. While still holding his hand, the Applicant touched his arm muscles and asked if he played football. He then touched other parts of his body including his upper arm, chest and the groin area. The Applicant then invited him to his tent but he declined.

79. C4 went to report the incident to his supervisor. He was asked to write a report which he did and which was put in the report file at the main gate. C4 and his colleagues waited for the Applicant to come again so as to arrest him but he did not return. On how he felt after the incident, C4 said he was angry because of the way another man talked to him about sex. C4 was not interviewed by the Investigator as he had relocated at the time of the investigations.

80. C5 in the CRF stated that he was on duty at about 11.00 p.m. in April 2006 at the Bravo gate when the Applicant came to him and shook hands. He kept holding his hand and pressed his arm muscles saying he wanted to know if C5 was strong. The Applicant also lowered his hands, pressed his thighs and asked if he played football. He then extended his hand and touched C5's private parts. When C5 asked him what he was doing, he said he wanted to know how strong he was.

81. The Applicant then asked C5 what he would do if he saw a beautiful girl and if he would not have an erection. When C5 replied that he would be unmoved at the sight of a beautiful girl, the Applicant invited him to come for a discussion in his tent but C5 refused. The Applicant then pulled him and touched his private parts again. C5 warned him to stop doing so or he would take action against him. C5 did not report the incident until the same thing happened to C3 on 19 June 2006.

82. When interviewed by the Investigator on 11 September 2006, C5 stated that the incident took place at about midnight in June 2006 at the small gate. He substantially repeated his account as recorded in the CRF about being asked by the Applicant what he would do if he saw a beautiful girl and being invited to the Applicant's tent which he declined. C5 reported the incident to his supervisor C4 who told him that the Applicant had done the same to him. C4 told

him that he would record the incident in the log book. No record of the alleged incident was found in the log book.

83. C3 was the security guard who raised the alarm that gave rise to the complaints against the Applicant. His CRF records that on 18 June at about 9.00 p.m., the Applicant came to him at Bravo gate. He greeted him with his hand but held on firmly to the hand while touching his body from arm to chest and down to his organ. C3 said nothing to the Applicant as he was very shocked. He reported the incident to his supervisor.

84. The following night of 19 June 2006, the Applicant came by again and greeted him and held on to his hand. The Applicant then touched him on his hands, arms, chest and groin. When C3 pulled away, the Applicant offered him sweets which he refused. The Applicant then left. C3 called the senior guard C5 who then sent a radio message to S1, the supervisor. C3 and his colleagues looked for the Applicant that night but could not find him. They then reported the incident to the AFEX Camp Manager.

85. When interviewed by the Investigator, C3 related substantially the earlier account in his CRF. He, however, told the Investigator that he had not reported the incident of 18 June 2006 to his supervisor until the second incident of 19 June 2006.

86. In his CRF, S1 said that when he was called on the night of 19 June 2006 about the incident involving C3, he met an angry C3 who told him that the Applicant tried to romance him by touching his body and organ and offered him sweets.

87. On 13 September 2006, S1 spoke with the Investigator. He told her that the sexual assaults incidents involving three of his security guards all took place in June 2006. Each of the guards affected, he said, was working on night shift at Bravo gate. S1 did not know the Applicant but had received reports that he touched the private parts and bodies of the security guards.

88. The first report was made by C4. He had asked C4 to be patient and if the Applicant repeated his action, he would be confronted. He then removed C4 from the Bravo gate. C5 replaced him and a similar complaint was received from C5 about the Applicant. S1 swapped C5 with C3. Again a similar complaint against the Applicant was made by C3. S1 said that he

received the three separate reports from the three guards who did not know that the Applicant had had encounters with their other colleagues and so they could not have made up the complaints.

89. An examination of the accounts of the Applicant's encounters with the three security guards as given by the said guards and their supervisor, S1, also throws up some critical questions which cast serious doubts on the evidence relied upon by the Respondent. These are:

a. C4 in his CRF of 23 June 2006 gave the date of his encounter with the Applicant as 8 May 2006. The SEA Consultant, the initial fact-finder who filled the CRF on behalf of witnesses in this matter, had recorded that one S2, the KK Security Operations Manager had given her a report filed by C4 on 8 May 2006. C4 stated also that after writing a report of the incident, he waited with his colleagues for the Applicant to come again so that they could arrest him. This suggests that he told other security colleagues about the Applicant. Why did S1, his supervisor, tell the Investigator that the incident happened in June and that he had received reports from the three security staff who did not know it happened to others and so could not have collaborated or colluded in bringing the complaints?

b. C5 in his CRF, which was recorded on 23 June 2006, stated that the incident of his sexual assault by the Applicant happened in late April. When he spoke to the Investigator, he said the incident happened in June 2006. His supervisor S1 told the Investigator that all the incidents of the Applicant's sexual abuse of his supervisees happened in June 2006 and that it was because of the report by C5 that he was rotated from the Bravo gate. Which version is true? Why would C5 who filled his CRF in June 2006 claim that the incident happened two months earlier if it had just happened the same month that he made the CRF?

c. Is it possible that C5 was coached to tell the Investigator that he was abused by the Applicant in June 2006 in order that his account would tally with that of his supervisor S1?

d. In his CRF, C5 stated that he did not report his encounter with the Applicant until the case of C3 was reported on 20 June 2006. If C5 never made any report until the story of C3 which caused the Applicant to leave Juba by 21 June 2006, how could his supervisor, S1, claim that he had to rotate C5 from Bravo gate and post C3 there to replace him due to C5's complaint of the Applicant's abuse?

e. C5, who gave two different dates, one in April 2006 and another in June 2006 for the same incident, told the Investigator that he had reported the incident to C4 who told him that he had had a similar experience with the Applicant. This account also contradicts S1's claim that the guards did not know about each other's experiences with the Applicant until C3's report brought things to the fore.

f. In his CRF recorded only three days after his alleged encounter with the Applicant, C3 stated that he reported the incident of 18 June 2006 to his supervisor. When interviewed by the Investigator on 13 September 2006, he said he did not report the incident until 19 June 2006 after the second incident had taken place. Additionally, there was no record that he reported any such incident on 18 June 2006. Why did he lie during the recording of his CRF that he reported the 18 June 2006 alleged incident?

g. If the Applicant had approached and embarrassed C3 by inappropriate touching on 18 June 2006 at the Bravo gate, why did C3 allow the Applicant to repeat the same ritual of a handshake followed by feeling parts of his body the very next evening? It would be reasonable that on sighting his abuser of the previous evening, C3 would not even as much as allow him to come close or indulge him with a handshake on the second occasion.

h. Is it possible that nothing happened between the Applicant and C3 on 18 June 2006 and that C3 made up the story about the Applicant sexually abusing him on 18 June 2006 in order to strengthen his story of an incident on 19 June 2006?

i. Why did C3 state in his CRF and to the Investigator that the incident of 19 June 2006 took place at about 10.00 p.m. while it was recorded in the log book as happening at 11.15 p.m.?

j. If indeed S1 rotated his security staff on account of the Applicant's alleged sexual abuse of them, why did he fail to state so at the earliest opportunity, that is, the fact-finding or CRF stage? Why also did he not have any roster to show the posting and rotation since he claimed that the reports he got and his consequent rotation of security officers all happened in June 2006? Apart from his say-so, he did not have any records showing that the officers were replaced one after the other due to a problem as serious as sexual abuse. Was the story of frequent reassignment of security staff made up to strengthen the case against the Applicant?

k. If S1 had to change one security staff for another due to the alleged sexual assault, was it not reasonable that he would warn the staff who replaced another about a possible abuser who would inappropriately touch the officer's private parts after an unduly long handshake? If he did not, was it because his story about the changing of the security officers due to sexual abuse was untrue?

90. As in the examination of the stories told by the absentee waiters, the CRF and investigative accounts of the security guards and their supervisor show serious and material inconsistencies. They also show clearly in certain instances such, as in S1's story to the Investigator, that certain accounts which could be fictitious were treated as established facts and unduly formed part of the investigative findings against the Applicant for which he was summarily dismissed.

91. The foregoing analysis reveals that there were several discussions held between the waiters and the security guards amongst each other suggesting that there was a strong likelihood of collusion amongst them. Contrary to the Respondent's submission that "none of the victims had anything to gain by making their reports and further, they risked their jobs by reporting," there is no evidence in the CRFs, in the interview notes and in the investigation reports of such concerns on the part of the Complainants.

The integrity of the investigative process

92. The importance of the integrity of an investigation process cannot be overemphasised. Where an investigation lacks integrity, it goes without saying that it would be rendered unreliable and useless for the purposes for which it was intended. The importance of maintaining internationally accepted best practice standards in the conduct of internal investigation must be underscored. These standards include the competence of the investigator who must also maintain objectivity, impartiality and fairness throughout.

93. Deriving from the CII uniform guidelines for investigations, the OIOS investigations manual outlines that:

a. The conduct of the investigation should demonstrate the investigator's commitment to ascertaining the facts of the case;

b. Investigative findings should be based on substantiated facts and related analysis, not suppositions and assumptions; and

c. Recommendations should be supported by the investigative findings.

94. The Applicant had attacked the credibility of the investigation in this case on the grounds of a lack of competence on the part of the Investigator and an absence of objectivity and fairness. Some of the submissions made by the Applicant include:

a. The Investigator gave live evidence and accepted that she failed to include inconsistencies in the Complainants' accounts and in the evidence generally, in the investigation report.

b. These inconsistencies are so numerous and taken together, so significant, that the cumulative effect of not including them in her report was that an unfair, unbalanced and prejudicial report was presented.

c. The Investigator was inexperienced in conducting an investigation of this specific nature and as such, she failed to take account of very significant features of this case in her report.

95. For his part, the Respondent replied to the foregoing submissions as follows:

a. No doubt the investigation could have been improved. No investigation is perfect. Not even those made by experienced professional criminal investigators. This is an administrative case where an employer has to decide if it has enough evidence to terminate the contractual relationship with one of its staff members, someone who has been accused of abusing the position given by the Organization.

b. Seen in retrospect, one can always identify things that could have been done better. The investigator, a seasoned HR professional, has candidly acknowledged that if she had known what she knows now, she could have included additional comments or explanations and she did not. Nonetheless, it is unfair and inaccurate to say that the investigation was biased, subjective, tendentious or fatally flawed.

c. The gaps the Applicant identified during the hearing either as investigator 'faults' or as 'major inconsistencies' in the investigations report are mere details, which do not affect the final findings.

96. In the view of the Tribunal, some of the obvious flaws or shortcomings in the investigation are:

a. A failure by the Investigator to visit and inspect the alleged scene of the incidents reported by the two waiters, that is, *Khartoum* tent occupied by the Applicant at the material time in order to ascertain its size, layout and to observe the lighting conditions inside and outside the tent. Her efforts to describe the size of the inside of *Khartoum* tent by comparing it to another tent in which she resided during the investigations was incompetent especially as she had not provided any authoritative evidence that all or some of the fifty tents at the AFEX camp were identical in every respect.

b. The Investigator did not seek to ascertain whether the Complainant waiters were familiar with the inside of the *Khartoum* tent which they claimed they had visited at the invitation of the Applicant who then used the occasions to sexually abuse them. It was not enough to have the waiters point out the tent without entering it to assess distances and positions and to request some form of re-enactment of the serious sexual abuses they alleged had taken place there.

c. A failure to investigate whether any of the two waiters at AFEX camp had ever asked the Applicant for money by putting the Applicant's assertion on the issue to each of them. Their answers would have been helpful for forming an opinion as to the credibility of their allegations. It would also have shown that the Investigator investigated possible reasons proffered by the Applicant as motives for the allegations.

d. A failure at the earliest opportunity to ask C2 whether the Applicant gave him USD 10 for his rash and why he had not revealed the fact voluntarily either in the CRF or in his account to the Investigator.

e. A failure to identify and examine the numerous material inconsistencies between each witness' CRF and the accounts given by them during the investigations with a view to establish the truth and to test the credibility of the witnesses.

f. The Investigator's note-taker was not only allowed to conduct part of the investigation by solely administering questions to two witnesses, she was also allowed the liberty of expressing her views on how some evidence she had elicited from the waiter, C2, should not change impressions earlier formed. Her email of 25 September 2006 to the Investigator before the investigation report was produced suggested that she was privy to the contents of the report. Her role in this regard greatly compromised the integrity of such an important process.

g. The Investigator's interview notes of some witnesses were so poorly written, careless and unprofessional that it was dangerous to rely on them. For instance, in the 17-line notes recorded for each of the waiters C1 and C2, the last nine lines of the notes were identical and gave word for word descriptions of the Applicant and his habits. This state

of affairs presented the possibility of a made-up or a cut and paste job rather than a painstaking collection and summary of evidence given.

h. The Investigator did not attempt to inquire into any possible familiarity between the Complainants and the Applicant considering that two of them alleged that the Applicant had also engaged them in sexual conversations apart from touching them. She did not try to establish how well these Complainants had known the Applicant, or how friendly they were with him before the alleged incidents. While the extent of any previous familiarity would not excuse a sexual offence, it would provide some background and opportunity to it. She largely concentrated her efforts in merely recording their stories of how they were groped by the Applicant. Not only did this differ markedly from her probing style with the Applicant who, she wanted to provide for instance, reasons why he should be targeted by his accusers; she failed to appreciate that in offences with a sexual element, familiarity is an important issue.

i. The investigation as it concerned one young man from Uganda who was not a Complainant and who knew nothing about the allegations was misguided and diversionary. The fact that the said man was believed to be the Applicant's friend was irrelevant to the investigation. Did the Investigator in questioning the man about his relationship with the Applicant hope to unearth some dirt? If its purpose was to establish the Applicant's sexual orientation, it was irrelevant and a departure from the stated purpose of the investigation. Also irrelevant was the information gathered from one KR as to the Applicant being a loner who had the habit of walking around the AFEX camp at odd hours.

j. The Investigator exhibited bias and lacked objectivity. It was disconcerting to observe during the hearing of this matter how the Investigator continued to make excuses for the Complainants' inability to be consistent in their accounts especially with regard to times and dates. She continually referred to their poverty, their war-torn country and the place of power dynamics between poor waiters and an international staff member. She told the Tribunal about what she described as the reality of the aid environment in emergency settings which is known for exploitation of individuals being provided with

services or of those working at very junior jobs. These sentiments had evidently coloured what ought to have been a dispassionate investigation exercise.

k. The bias on the part of the Investigator is clearly seen in her question to the Applicant in the second interview of 15 September 2006 regarding AFEX rules about AFEX staff visiting the tents. Why did she not ask the Complainant waiters why they entered the Applicant's tent, contrary to the rules?

l. Similarly, the Investigator did not ask the Complainant waiters what their interactions with the Applicant were like before and after the alleged incidents which they did not report. She did not ask the security guards either although she posed the question to the Applicant.

m. In her report, the Investigator made a recommendation concerning how UNICEF should respond to the Complainants. This should be the business of UNICEF's administration and was clearly beyond the terms of reference of the investigation. Her engagement with this issue which had no place in her assignment compromised her role as an impartial and committed gatherer and assessor of facts.

n. The credibility of the entire investigation exercise which began with the summarizing of the allegations in the CRFs on behalf of the Complainants and some witnesses was seriously and adversely affected by the involvement of the SEA Consultant who had, only a few days before filling the forms, had a disagreement over accommodation matters with the Applicant.

The investigation report

97. The Applicant's counsel submitted that the investigation report was biased, unreliable and unfair for many reasons including that:

a. It failed to mention the many material inconsistencies and deficiencies in the accounts of each Complainant. These were sufficient to call the credibility and reliability of such accounts into question. For instance, C3 was recorded as having told the

Investigator that he noted the alleged incident of 18 June 2006 in the incident book. The Investigator conceded in cross examination that no such note was found. C3 had also stated in his CRF that he reported the incident to his supervisor. During the Investigation, he said he did not report it to his supervisor.

b. The Investigator did not obtain evidence properly but relied on evidence that was generalised and not credible. For instance, the Investigator did not ask C2 if he had asked the Applicant for money for a driving course or ask C1 if he had asked for money to visit his family as claimed by the Applicant. In cross examination, the Investigator rather stated that she was not surprised that the Applicant was asked for money as Sudan was a war-torn country. She failed to state this opinion in her report and to take it into account in assessing the Applicant's credibility.

c. The Investigator did not include in her report that C2 had failed both in the CRF and in his interview to mention that the Applicant gave him USD10. When cross-examined, she said it was a gap but not a significant one. While this issue raised the matter of the credibility of C2, the Investigator failed to assess such credibility.

98. The Respondent submitted that the Applicant had highlighted the same inconsistencies in his several submissions during previous proceedings and that these had been duly considered by the Deputy Executive Director of UNICEF and the JDC in making and reviewing their decisions. He continued that the behaviour under scrutiny was that of the Applicant, not the Investigator's.

99. The Tribunal wishes to underscore the importance and centrality of an investigation on which disciplinary proceedings are based and the report that is produced from it. While the Investigator may not be on trial, and it must be borne in mind that no-one is on trial in any proceedings before this Tribunal, the said Investigator must show competence and exhibit the standards and best practices that attend a good and reliable investigative process.

100. The Tribunal observed that the characterisation of certain facts was done in a manner intended to draw only inculpatory conclusions with regard to the Applicant. The mention of a few of such instances will suffice:

a. At page 6, paragraph 4, lines 8 and 9 of the investigation report, it was reported that: "[Applicant] confirmed that he gave [C2] US$10 for medical treatment." The true position as established in the investigation is that the Complainant C2 never revealed that he got USD 10 from the Applicant. The Applicant did not confirm that fact, rather, he asserted it at every opportunity until the Complainant was asked and admitted it. In other words, it was C2 who confirmed the Applicant's claim that he gave C2 USD 10 to treat his rash.

b. Again at page 5, paragraph 3 under the heading "Findings" the report states: "[S1] confirmed to the investigator that he already had to relocate several of his staff who had previously submitted a complaint of similar nature." S1 did not confirm any such fact to the Investigator, rather it was a claim made wholly by S1 to the Investigator and is not supported by any live or documentary evidence.

101. The report did not accurately and correctly state certain facts and thereby characterised them as having been initiated by the Complainants when they were not. An example is that in the last three lines of page 5, the report states:

> Following [C3] complaint to his supervisor, [C1] and [C2] from the AFEX cafeteria came forward with complaint about similar incidences that had occurred prior to 19 June 2006.

The two Complainants told the Investigator, according to her interview notes, that they made their complaints after the allegations of C3 on 19 June 2006. Their supervisor, the AFEX Camp Manager, asked each of them if they knew anything concerning the incident. A proper characterisation was important in helping the decision maker make the right considerations to arrive at a just decision. Stating that they "came forward" is a wrong characterization whereas they were invited to do so.

102. The investigation in part dwelt on irrelevancies, became diversionary and made hasty generalizations.

a. The investigation report at its page 11, paragraph (b), made a finding that the Applicant socialized with young men. This effort to profile the Applicant as a person who

> had interest and perhaps sexual interest in young men evidently went beyond the Investigator's terms of reference as she had clearly stated in the first page of the report that the aim of the investigation was "to ascertain the facts regarding the allegations."
>
> b. Similarly, the evidence gathered from one KR was irrelevant as it merely served to characterise the Applicant as a loner who had a habit of walking around the AFEX camp at odd hours with his quick run bag or sat with the guards at the gate into the early hours of the morning. Was this profiling of the Applicant as a person with the character of a sexual predator one of the facts relevant to the allegations? Certainly not!

103. In an effort to establish that the Applicant was not targeted over sexual orientation, the investigation made baseless findings about the absence of a homophobic environment in South Sudan. At page 11, paragraph (c), the report stated:

> However, it should also be clarified that although homosexuality was unacceptable there was not a homophobic environment in South Sudan. There was also no evidence that the allegations were made by the Security Guards and Waiters because of their perceived /possible sexual orientation of [Applicant].

This finding by the Investigator is at variance with an incident report dated 28 June 2006 made by the Operations Manager of the security company with regard to the allegations against the Applicant which was made available to her during investigations. In the second paragraph of the said incident report, reference is made to "a suspect alleged to have made homosexual advances" and in the penultimate paragraph it is further stated: "…it will be important to have him relocated to a different camp to avoid a nasty ending since the guards have an idea that he is gay."

104. In the Investigation report as well as in her testimony before the Tribunal, the Investigator turned witness for the non-homophobic environment of South Sudan. In the report, it is asserted that,

> the investigator is aware of at least two other UNICEF international professional staff who are homosexuals and are in same sex relationships, whom have not had any allegations or threats made against them.

It is necessary to state in this regard that an investigator gathers oral and documentary evidence from witnesses. She does not become a witness of fact herself except for facts relating to how she conducted her investigations.

How times and dates were treated in the investigation report

105. Paragraph 37 of CF/AI/2005-017 is one of the provisions concerning the conduct of formal investigations. It states as follows:

> The purpose of an investigation is to establish facts, which will, for the most part, be obtained by interviewing the victim, the alleged offender and other witnesses as deemed relevant by the investigating body. **The facts should establish the time, sequence and nature of the occurrences.** (Emphasis added.)

106. The accounts given by some of the Complainants and other witnesses in their CRF and in their interviews with the Investigator as to the times and dates of the alleged sexual assaults remarkably differed. Perhaps as a way of dealing with this important issue which was never resolved in the investigation, the Investigator while making conclusions in the investigations report, stated that there was clear and convincing evidence that "during 2006" C1 and C2 were "inappropriately touched" by the Applicant. The year 2006 is made up of twelve months. It was wholly wrong for the Investigator to arrive at such a ridiculous and timeless conclusion.

107. Also on the matter of times and dates, the Investigator consistently defended what the Complainants told her as the truth because, according to her, they were lowly educated individuals and time was a loose concept with them and some did not know their birth date and came across as very trusting. They were embarrassed to talk about the issue as they seemed humiliated.

108. Evidently, the conclusion that establishing the times and dates of the alleged incidents was immaterial was made because there was no convincing evidence from the two waiters as to times and dates of the allegations they had made. This is not acceptable because as submitted by learned counsel for the Applicant, at the very least, providing the date of an alleged misconduct affords the Applicant a better opportunity to rebut the allegation and present possible alibi. Not doing so means that he was unduly hampered in denying an allegation that is not substantiated in

any other way. Since justice is for both the party making the allegation and the party accused, objectivity dictates that no party to an allegation is allowed a lower threshold in establishing his case.

Relevance and admissibility of the Complaint Review Forms and the investigator's interview notes as to the facts in issue

109. It is important to briefly examine the relevance of the Complaint Review Forms or CRF and the interview notes of the Investigator to the consideration of this case instituted by the Applicant to challenge his summary dismissal.

110. The CRF as used by UNICEF is a document made by an initial fact-finder in which the account of a complainant or other witness to an alleged wrong-doing is recorded. The investigator's interview notes are summaries of the facts gathered by an investigator in interviewing a complainant or witness to an allegation. These documents are sometimes signed by the recorder and the witness. On some occasions, they are not.

111. Whether they are signed or not, the obvious shortcoming of merely relying on these is that if their maker or the person who provided the information recorded in them does not appear in the ensuing judicial proceeding, the truth of the contents of these documents cannot be tested by cross-examination in an open hearing and therefore have no probative value. This is compounded by the fact that the Applicant had not had any opportunity to challenge the Complainants or witnesses on whatever allegations they had made or stories they had told against him. If such evidence are admitted and not otherwise corroborated, their usefulness is limited to showing that they were gathered, not to prove an alleged fact.

112. The Respondent submitted that the absence of testimony by the alleged victims did not negatively impact on his case and that the Applicant had every opportunity to contest the evidence provided by the alleged victims. This cannot be further from the truth. Where an allegation is quasi-criminal in nature, is justice not denied the person against whom an allegation is made if he is not afforded an opportunity to challenge the one making the allegation? One of the well-worn rules of natural justice is the evidence rule. This requires that every piece of evidence presented by a party must be disclosed to the other who may attack, rebut or challenge

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

113. The importance of the adversary method of testing oral evidence was endorsed in *Liyanarachchige* 2010-UNAT-087, where it was held that "in disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence (Applicant) and the requirements of the adversary procedure."

114. It must be underscored that the practice of placing reliance upon recordings in initial fact-finding exercises and interview notes of appointed investigators in an effort to establish gross misconduct warranting summary dismissal before the Tribunal is grossly inadequate.

115. Considering that the sanction of summary dismissal is the equivalent of a death sentence on a staff member's professional and career prospects and to some extent, on his or her social life, a summary dismissal must be regarded only sparingly as the sanction of choice. Decision makers cannot rely on shabby, shoddy and amateurish investigations, as in this case, to deal that death blow as untested oral evidence summarized by investigators or individuals playing at such a role, cannot on its own establish a fact in issue.

Standard of proof in disciplinary cases

116. The Tribunal has on previous occasions emphasized that in disciplinary cases, where the charges against a staff-member are quasi-criminal in nature, the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred[3]. In the present case, the Respondent has fallen short of this standard. The Tribunal finds that the Respondent has failed to substantiate the charges of misconduct against the Applicant.

117. Whilst there is adequate evidence provided that it would no longer have been safe for the Applicant to continue working in Juba, this by itself does not lead to the conclusion that the Applicant was guilty of the allegations made against him.

[3] See *Borhom* UNDT/2011/067, para 90.

The Charge against the Applicant and the legal framework

118. On 15 November 2006, the Applicant was charged as follows:

> You engaged in sexual harassment by your unwelcome sexual advances, gestures of sexual nature against two waiters, AFEX Camp, Juba, South Sudan and two security guards, KK/GS, Juba, South Sudan, that caused them offence and humiliation which created an intimidating, hostile, and offensive work environment in violation of UNICEF's administrative instruction, *Working in respect in the UNICEF workplace, UNICEF's Policy on preventing harassment, sexual harassment and abuse of authority.* (CF/AI/2005-017), dated 16 December 2005.

119. While the charge is obviously brought pursuant to CF/AI/2005-017, "UNICEF Policy on Preventing Harassment, Sexual Harassment and Abuse of Authority", the said charge unfortunately, does not state or set out what article or section or paragraph of the said Administrative Instruction it is founded upon. However, paragraph 8 of the document defines "sexual harassment" thus:

> Any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. Sexual harassment may occur when it interferes with work, is made a condition of employment or creates an intimidating, hostile, or offensive environment. It can include a one-time incident or a continuous series of incidents. Sexual harassment may be deliberate, unsolicited and coercive. Both male and female colleagues can be either victims or offenders. Sexual harassment may also occur outside the workplace and/or outside working hours.

120. As stipulated above, the elements of sexual harassment include the following:

a. It is conduct, verbal, physical or gesture, that is of a sexual nature;

b. It is deliberate, unwelcome and unsolicited;

c. It is reasonably expected or perceived to cause offence or humiliation to another;

d. It interferes with work or is made a condition of employment or creates an intimidating, hostile, or offensive environment;

e. Both male and female colleagues can be victims.

f. It may occur outside the workplace and/or outside working hours.

121. Section 1 of CF/AI/2005-017, at paragraph 1, states the purpose of the legislation which is the fostering of a positive and motivating environment where all staff can work together with openness and trust. At paragraph 2, it is further emphasized that a respectful work environment requires that all staff treat each other with courtesy, dignity and respect. Its intendment obviously is that sexual harassment should have no place in a respectful work environment which must be conducive for all.

122. The Administrative Instruction defines for its purposes staff members and non-staff personnel. In this context, the prohibited conduct of sexual harassment necessarily applies in relation to all persons with whom the UNICEF work environment is shared even though they may not be staff members.

123. Going by the definition reproduced above, many questions arise as to whether the misconduct of sexual harassment is applicable here. Some of these questions present themselves as follows:

a. Was the AFEX/OCHA tented premises a work environment as anticipated by CF/AI/2005-017? It had been submitted that the AFEX/OCHA tented premises was a paid lodgings arrangement and therefore to all intents and purposes a hotel and not a UNICEF workplace or work environment. Evidence before the Tribunal which was not challenged is that the AFEX compound served as a hotel and that the practice was that any vacant tent was immediately leased out to any person who was looking for accommodation there.

b. Did the fact that other UNICEF staff inhabited some tents in the AFEX premises render the said premises a work environment for UNICEF? In the same way that the mere inhabiting of a hotel by UNICEF staff does not make the hotel in question a UNICEF work environment, the AFEX tented premises was not a UNICEF work environment for the purposes of the charge brought against the Applicant.

c. Were the Complainants "male or female colleagues" as envisaged by the definition in CF/AI/2005-017 and was the UNICEF work environment rendered offensive, hostile or intimidating for them? Neither the two waiters nor the security guards belonged, by any stretch of definition, in the UNICEF work environment and were therefore not work colleagues. Contrary to the Respondent's assertion that the Complainants are covered by paragraphs 12 and 16 of the UNICEF policy on the prevention of sexual harassment, they, in fact, do not fall under the class of non-staff personnel as they do not work with UNICEF under any arrangement at all. Since they were legally unknown to UNICEF and never inhabited the UNICEF work environment, it cannot be said that it was rendered offensive, hostile or intimidating for any of them.

124. It was the job of the Investigator not only to collect such evidence that would go to establish facts, the facts established must in turn establish the elements of the misconduct alleged or in other words be relevant to the said misconduct.

125. The charge letter which was sent to the Applicant referred also to art. 101 of the UN Charter and staff regulation 1.2(b) requiring staff members to uphold the highest standards of integrity. It also referred to staff rule 101.2(d) which prohibits discrimination, harassment, sexual or gender harassment as well as physical or verbal abuse in the workplace or in connection with work.

126. Staff regulation 1.2(b) commands staff members to uphold the highest standards of integrity. It further defines integrity as including but not limited to probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. This staff regulation is often wrongly cited as creating misconduct by itself. It is worth stating here that the said staff regulation is merely an omnibus provision which becomes efficacious or meaningful when a staff member is found to have committed misconduct, gross misconduct or has been proved to be liable following legal proceedings.

127. If the foregoing staff rules and regulations including the CF/AI/2005-017 provisions constitute the legal framework or applicable legal norms relied upon to charge and dismiss the

Applicant in the instant case, then the impugned administrative decisions were entirely without proper legal basis.

The drafter of the charge letter

128. The Tribunal held in *Applicant* UNDT/2011/106 that when the officers whose responsibility it is to draft charges against staff members who have been investigated for misconduct perform their functions, 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. In the present case, the drafter of the charge letter constituted himself into an assessor and judge of the evidence. This is seen in the following excerpts from the charge letter:

> If they [Complainants] were acting in retaliation against you for not giving them money, they would have been vigorous in their cooperation with the Investigator and would have collaborated together on their responses which may have resulted in more serious sexual allegations….The Investigator questioned why these men would choose you from all the other international professionals to file a complaint against unless there was credibility in their accusations and their identification of you as the harasser.

129. That the drafter of the charge went on to discuss possible sanctions against the Applicant in the charge letter, whereas his role was to transmit the charges to the Applicant, this in fact suggests that a conclusion had already been reached as to the Applicant's fate. He stated in the charge letter:

> The Executive Director reserves the right to take any disciplinary measure she deems appropriate as regards these charges and summary dismissal is one possible outcome of the disciplinary proceedings.

130. The foregoing wordings strike against the universal principle of presumption of innocence thereby breaching the Applicant's due process rights. It also suggests that the investigation and the subsequent charging of the Applicant were mere formalities carried out with the aim of ultimately summarily dismissing the Applicant. It is also not correct that the UNICEF Executive Director has the authority to "take any disciplinary measure she deems

appropriate" since the principle of proportionality requires, inter alia, that disciplinary action, where required, should not be more excessive than is necessary for obtaining the desired result

What would have been the correct procedure?

131. The Organization does not have jurisdictional competence with respect to the private conduct of a staff member especially where such conduct has no bearing on the work environment. As held in *Marshall* UNDT/2011/205," a staff member must be law-abiding. While the Organization is entitled to look into complaints brought to it, it must first do so with a view to determining whether such complaints are those it can lawfully and properly entertain. It was not within the province of the Respondent or his agents in this case to investigate conduct that had no bearing on the workplace and to convert the same to misconduct contrary to the afore-mentioned Administrative Instructions and Rules."

132. If the investigation had established a *prima facie* case of wrongdoing on the part of the Applicant, the correct procedure would have been for the Complainants to bring the relevant legal proceedings in the national courts against the Applicant after which a request for waiver of his immunity from legal process would be considered by the Respondent.

133. The difficulty of UNICEF or other international agencies operating in difficult environments where, as in this case, a staff member is accused of criminal acts must be acknowledged. The solution cannot lie in hastily dismissing such a staff member without sufficient credible evidence for political expediency or to save face and their projects because justice is for both accuser and accused. The Organization can find other ways of addressing such difficulties without sacrificing the career and livelihood of an otherwise hardworking staff member.

134. The Respondent requested the Tribunal to order the Applicant to cover the expenses of the proceedings, as it is evident that he is acting in bad faith and abusing the process. The Tribunal observes that notwithstanding the fact that the Respondent has failed to demonstrate bad faith and abuse of process on the part of the Applicant, there are sufficient evidence to establish that the Applicant's challenge of his summary dismissal was well-founded both in fact and in law.

Findings

135. The summary of the Tribunal's findings are as follows:

a. This Tribunal is competent to entertain applications as provided for by the Statute creating it. As a judicial body, the Tribunal is entitled to examine the entire case before it. In other words, it may consider not only the administrative decision of the Secretary-General imposing disciplinary measures but also examine the material placed before the Secretary-General on which he bases his decision in addition to other facts relevant to the said material.

b. The investigator's failure to ascertain the state of lighting and visibility in the AFEX/OCHA premises and the inside and surroundings of *Khartoum* tent and Bravo gate raised by the Applicant is a material omission as there is no evidence to help the Tribunal determine whether there was sufficient visibility as to make it likely or unlikely that the alleged sexual abuses took place especially as it was claimed by almost all the Complainants that the abuses took place at night.

c. The material questions that arise from accounts given by C1, C2 and the AFEX Camp Manager were not resolved by the Investigator. They are serious and sufficiently relevant to successfully strip these absent complainants of the credibility needed to establish that the Applicant indeed sexually assaulted two of them. The Tribunal finds that sexual assault by the Applicant against the waiters was not established by the Investigator.

d. An examination of the accounts of the Applicant's encounters with the three security guards as given by the said guards and their supervisor also throws up some critical questions which cast serious doubts on the untested evidence relied upon by the Respondent.

e. The CRF and investigative accounts of the security guards and their supervisor show serious and material inconsistencies. They also show clearly in certain instances, such as in S1's story to the Investigator, that certain accounts which could be fictitious

were treated as established facts and unduly formed part of the investigative findings against the Applicant for which he was summarily dismissed.

f. The investigation against the Applicant lacked integrity and credibility. The investigator was incompetent, exhibited bias and lacked objectivity and fairness. The Investigator's note-taker was not only allowed to conduct part of the investigation by solely administering questions to two witnesses, she was also allowed the liberty of expressing her views on how some evidence she had elicited from C2 should not change impressions earlier formed.

g. The investigation report was biased, unreliable and unfair. The characterisation of certain facts was done in a manner intended to draw only inculpatory conclusions with regard to the Applicant. The report did not accurately and correctly state certain facts and thereby characterised them as being voluntary when they were not. The investigation in part dwelt on irrelevancies, became diversionary and made hasty generalizations.

h. The effort by the Investigator to profile the Applicant as a person who had interest and perhaps sexual interest in young men evidently went beyond the Investigator's terms of reference.

i. In an effort to establish that the Applicant was not targeted over sexual orientation, the investigation made baseless findings about the absence of a homophobic environment in South Sudan. In the Investigation report as well as in her testimony before the Tribunal, the Investigator turned witness for the non-homophobic environment of South Sudan.

j. Where an allegation is quasi-criminal in nature, justice is denied the person against whom an allegation is made if he is not afforded an opportunity to challenge the one making the allegation.

k. The practice of not calling evidence but placing reliance entirely upon recordings in initial fact-finding exercises and interview notes of appointed investigators without

more in an effort to establish gross misconduct warranting summary dismissal before the Tribunal is grossly inadequate.

l. The Respondent has failed to substantiate the charges of misconduct against the Applicant and the charges were entirely without proper legal basis.

m. The Organization does not have jurisdictional competence with respect to the private conduct of a staff member especially where such conduct has no bearing on the work environment.

n. If the investigation had established a *prima facie* case of wrongdoing on the part of the Applicant, the correct procedure would have been for the Complainants to bring the relevant legal proceedings in the national courts against the Applicant after which a request for waiver of his immunity from legal process would be considered by the Respondent.

Remedy

136. The sanction of summary dismissal was based on unsubstantiated charges. Accordingly, the Tribunal:

a. Rescinds the Applicant's summary dismissal and holds that until the date of this judgment the Applicant remains lawfully in the service of UNICEF.

b. Orders the Respondent to reinstate the Applicant in service of the UNICEF with retroactive effect.

c. Since the Applicant's dismissal is a termination within the meaning of art. 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to the reinstatement of the Applicant. An appropriate compensation in lieu of reinstatement is to be the amount of two years' net base salary of the Applicant.

d. Irrespective of whether the Respondent elects to reinstate the Applicant or to pay him the above amount as an alternative, the Applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma arising from the imposition of the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at six months of the Applicant's net base salary.

e. Awards the Applicant six months' net base salary for the violation of his due process rights as a result of a most incompetent investigation.

f. Orders that all material relating to the Applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

(Signed)

Judge Nkemdilim Izuako

Dated this 18th day of April 2011

Entered in the Register on this 18th day of April 2011

(Signed)

Jean-Pelé Fomété Registrar, Nairobi