



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

COOKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Seth Levine, OSLA

Counsel for the Respondent:
Jorge Ballesterro, UNICEF

Introduction

1. The Applicant, a national of Liberia, is a former staff member of the United Nations Children's Fund ("UNICEF") where he worked as Deputy Representative in the Malawi Country Office ("CO"). He was summarily dismissed on charges of physical assault, sexual harassment and abuse of authority.

UNDT Orders and Judgment on preliminary Applications

2. The Applicant filed his Application with the Tribunal challenging his summary dismissal on 27 October 2010. The Respondent was served with the Application and its annexes on 29 October 2010 and advised to file a reply to the Application within 30 days as per the Tribunal's Rules of Procedure. The Respondent acknowledged receipt of the service of the Application.

3. On 14 December 2010, the Registry informed the Respondent that the 30 days within which to file a reply had elapsed and it had not received its Reply. The Respondent thereafter transmitted his Reply on the same day.

4. In a letter to the Registry dated 14 December 2010, the Applicant noted that the Respondent had been late in filing his Reply by 15 days. On the same date, the Respondent's Counsel filed a motion for leave to re-enter the proceedings since under the applicable Rules, he was effectively outside the proceedings due to his late Reply. In his motion for leave to be re-admitted to the proceedings, the Respondent's Counsel apologized for the lateness of the Reply stating that it was an oversight.

5. The Tribunal in determining whether to re-admit the Respondent into the proceedings noted that the Respondent's excuses that the Reply did not reach the Registry in a timely manner and at the same time apologizing for the oversight were antithetical and untenable and did not satisfy the requirement of Article 35 of the Rules of Procedure. The Tribunal found that "either the reply was sent and never reached the Registry or it was not sent, through oversight" but that it could not be

both. In the interests of justice and the fair and expeditious disposal of the case, the Tribunal applied the provisions of Article 19 of its Rules of Procedure and on 13 January 2011 issued *Cooke* Order No. 004 (NBI/2011) re-admitting the Respondent into the proceedings in spite of filing a belated reply.

6. On 8 December 2011, a hearing to determine the preliminary issues raised by the Respondent in an Application for Summary Judgment and Receivability was held.

7. In its Judgment *Cooke* UNDT/2011/216 of 28 December 2011, the Application for summary Judgment was denied as the Tribunal held that the case was not one in which such an application could be granted, the Respondent not having joined issues with the Applicant by filing his own pleadings. In finding the matter receivable, the Tribunal concluded that considering the nature of allegations against the Applicant on which his summary dismissal was based, it was in the interests of justice to waive time limits as was done for the Respondent.

8. It also held that in the spirit of developing a culture of dialogue rather than one of litigation, where a party attempts to initiate mediation as was the case with the Applicant, it behoves the other party to respond promptly by unequivocally accepting or refusing such overtures rather than meet the request with silence and delay his response until time runs out for the Applicant to file an Application.

9. Further, it was held that most importantly, it was the bounden duty of any employer and more particularly the United Nations Secretariat including any of its Funds and Programmes to advise a dismissed employee of his right to appeal the administrative decision in the same correspondence informing him/her of the decision. Especially considering that the sanction of summary dismissal is the death sentence to a staff member's career, the affected employee must be properly advised about the options open to him or her to challenge the summary dismissal before the Dispute Tribunal ("UNDT") and to seek legal representation by the Office of Staff Legal Assistance ("OSLA") if he or she so desired.

10. While the Staff Rules¹ setting out due process measures in the disciplinary process require that the subject be informed of his due process rights to have access to counsel in answering to charges against him or her, it is even more important to inform the dismissed staff member of his or her right to challenge his or her summary dismissal especially bearing in mind the extreme nature of the said sanction.

11. Even in the old peer review system, the concluding paragraph of the Secretary-General's letter conveying the decision to summarily dismiss a staff member, usually advised him or her of the right of appeal. The Respondent cannot hide behind his failure to promptly direct the Applicant to the options open to him after summarily dismissing him to plead that the Application is not receivable. As soon as he was properly advised, the Applicant in this case promptly and diligently filed his Application.

Hearing of the main Application

12. The Tribunal held a hearing *via* teleconference from Nairobi on 14, 15 and 22 March 2012. During the hearing, the Tribunal received testimonies from the Applicant for himself and from four witnesses for the Respondent, namely; Ms. Carrie Auer, the Resident Representative of the UNICEF Malawi CO; Mr. Kevin Curtis, Senior Investigator, Office of Internal Audit ("OIA"); Mr. Antonino Brusa, Regional Chief of Human Resources and Ms. Miriam Chipimo a former staff member of the UNICEF Malawi CO. Counsel for the Respondent and Applicant filed closing submissions on 19 and 20 April 2012 respectively.

Background facts

13. The Applicant first joined UNICEF in Liberia as a National Officer in 1992. He then worked for UNICEF in South Sudan, Nigeria and Pakistan in various capacities before joining UNICEF Malawi CO as a Deputy Representative at the P4 level in 2008.

¹ ST/SGB/2011/1; Rule 10.3

14. The Applicant arrived in Malawi to take up his responsibilities as a Deputy Representative of the Malawi CO in October 2008. Upon his arrival, he was the most senior staff member in the CO and therefore became the Officer in Charge (“OIC”) in the absence of the Resident Representative Ms. Auer, who was due to arrive later.

15. Ms. Auer arrived in Malawi in December 2008 for a short period and then left and fully resumed her duties in January 2009. Both Ms. Auer and the Applicant had a good and cordial working relationship.

16. As the Deputy Representative, all programme managers were supposed to report to the Applicant and they all did except one: Ms. Karen Manda who was heading the Orphans and Vulnerable Children (“OVC”) unit. Ms. Manda by-passed the Applicant and reported directly to Ms. Auer. This state of affairs created tensions between Ms. Manda, the Applicant and Ms. Auer to whom it fell to find a solution to the situation by properly delineating reporting lines. A meeting, which Ms. Auer promised to call between the three of them to settle the matter, never took place before this case unfolded leading to the summary dismissal of the Applicant.

17. Sometime in June 2009, Ms. Auer was away from the office and the Applicant was the OIC in her absence. During celebrations marking the Day of the African Child in Malawi in the same month, the Applicant met an official from the Ministry of Gender who requested audience with him but the Applicant directed him to make an appointment with his office so that they could meet there. When days later, the Ministry of Gender official turned up in his office, the Applicant could not reach or locate the section head Ms. Manda or any staff members from her OVC unit to be at the meeting.

18. The Applicant then met with the official who began immediately to complain about UNICEF’s relationship with the Ministry. As soon as the Applicant learnt that he was a junior officer at the Ministry, he ended the meeting and asked the official to follow protocol and discuss the matter with the Permanent Secretary of the Ministry (“PS”) who would then address the problem with him and the Representative.

19. Upon her return to the office on the following Monday, 21 June 2009, Ms. Auer invited the Applicant and wanted to know why he had met with the official from the Ministry of Gender a few days before. She stated that the PS had complained about it, she conveyed her disapproval and told the Applicant that he had met with a 'trouble maker'. In spite of feeling belittled, disappointed and frustrated by the remarks of Ms. Auer, he explained what had transpired to her.

20. The said encounter with Ms. Auer saddened the Applicant and the following morning he called the UNICEF Regional Office to ask Mr. Brusa to assist him in finding a new posting since he felt that his integrity was being undermined in the Malawi CO. On his way to see Ms. Auer that morning, the Applicant first entered Ms. Chipimo's office and discussed with her the meeting he had the previous day with Ms. Auer. Ms. Chipimo told him that Ms. Manda had also attended the lunch meeting that Ms. Auer had had with the PS and that it had been discussed at that meeting that the Applicant was in an extra-marital relationship with a female staff member.

21. When he later saw Ms. Auer that morning, the Applicant expressed his frustration that his work was not appreciated by her. He also told her that she had made conclusions about his meeting with the Ministry of Gender official before asking him what happened. The Applicant also remarked that in places like America, people who are pushed to the wall in the manner he was the day before may resort to jumping through windows.

22. He also told Ms. Auer that he had asked Mr. Brusa to help him find a new posting outside Malawi. He expressed disappointment that Ms. Auer attended the lunch meeting with the PS of the Ministry of Gender with Ms. Manda where he understood that his private life was discussed. Ms. Auer apologised and reassured the Applicant that she had confidence in him and that contacting the Regional Office with a request to be re-assigned was not the best thing under the circumstances.

23. After this incident, Ms. Auer arranged for a meeting with the PS and the Applicant to sort out the concerns about the junior ministry official. Thereafter, she went on home leave in July 2009 and left the Applicant as OIC. Sometime in August 2009, Ms. Auer returned, the Applicant handed over to her and proceeded on his own home leave, which would last into September 2009.

24. Ms. Auer attended, on 15 August 2009, a send-forth party for Ms. Chipimo who was leaving UNICEF Malawi to take up a new job. Ms. Chipimo took her aside at the party and reported three allegations against the Applicant. She alleged that the Applicant had told her that he had gone home after their encounter over the Ministry of Gender official to bring his gun in order to shoot Ms. Manda and Ms. Auer but that his wife had stopped him.

25. Ms. Chipimo also alleged that the Applicant had sexually harassed certain female staff members and had requested some staff members to help him with work towards his academic Leadership Development Initiative (“LDI”) project. She gave Ms Auer the names of those that could be asked about their roles in preparing the Applicant’s LDI project.

26. On or about Tuesday, 18 August 2009, Ms. Auer succeeded in contacting Mr. Brusa, an attempt to do so on the previous day having failed. She told him about the allegations made by Ms. Chipimo against the Applicant and told him also that the Applicant had stated in her office that he had wanted to shoot himself because of their encounter over the Ministry of Gender official. Mr. Brusa advised her to conduct a fact-finding investigation into the allegations and to send a report to OIA in New York.

27. Ms. Auer conducted the fact-finding investigation and sent a report to the OIA in New York and copied Mr. Brusa on 25 August 2009 detailing three allegations against the Applicant. In the report, she urged that if the allegations were to be investigated, advantage should be taken of the Applicant’s absence to do so before he was due to return from home leave. The very next day, she sent another report, this

time to Mr. Brusa in Nairobi, alleging that the Applicant received help with his LDI project from other staff members.

28. An investigation team made up of Mr. Curtis, the OIA Senior Investigator and Mr. Brusa, arrived in Malawi on Sunday, 6 September 2009. Before starting their assignment the next day, the duo conducted half-day training for UNICEF Malawi staff members in which Mr. Brusa dealt with issues of sexual harassment and abuse of authority among others. Mr. Curtis on the other hand spoke on investigations

29. While in Malawi, the investigators received the report of another allegation from Ms. Auer. This latest report alleged that in October 2008, shortly after the Applicant arrived in Malawi, he had assaulted a shopkeeper in a furniture store. They investigated this latest allegation including those of threats to shoot staff members, sexual harassment and requesting and receiving help with his LDI project.

30. Towards the end of his home leave, the Applicant was contacted by Ms. Auer who directed that he not report to work in Malawi but instead head to Nairobi to get medical clearance. No reason was given as to why he needed the medical clearance. Instead Mr. Brusa, who was one of the investigators, also contacted the Applicant by phone and instructed him to go to Nairobi. Mr. Brusa followed up this instruction with an email dated 4 September 2009 informing the Applicant that he was not medically cleared to return to his work in Malawi.

31. Following his arrival in Nairobi, the Applicant saw an email dated 9 September 2009 from Mr. Curtis in which he was informed that he was under investigation and invited to an interview with the investigators in Nairobi. The email stated that he was being investigated for contemplating suicide and for threatening to shoot other staff members in the UNICEF Malawi office. None of the other allegations against him were mentioned in the said email.

32. Before his interview with the investigators in Nairobi, the Applicant was escorted by Mr. Brusa to the Joint Medical Services office of the United Nations Office at Nairobi (“UNON”) where he was handed over to a medical officer. He was

made to undergo about 15 medical tests including a Magnetic Resonance Imaging (“MRI”) and some psychological tests. He was then declared fit for duty.

33. On 14 and 15 September 2009, the investigators interviewed the Applicant in Nairobi and apart from the allegations which the Applicant had been informed of regarding threats to kill certain UNICEF staff members and contemplating suicide, he was questioned about asking his supervisees to write his research paper, making sexual comments, sexual harassment and assaulting a store owner.

34. On 17 September 2009, the OIA requested the Director, Department of Human Resources (“DHR”) to place the Applicant on Administrative leave on the grounds that the Applicant’s conduct may pose a threat to other persons, staff members or to UNICEF interests and that there was a risk of evidence being tampered with, concealed or destroyed or witnesses intimidated.

35. On 17 November 2009 an investigation report was transmitted to the Director DHR and on 8 December 2009, the Applicant provided his comments on the report.

36. By memorandum dated 12 January 2010, the Director DHR charged the Applicant with misconduct and informed him that based on the investigation report and his comments on it; there was sufficient evidence to bring charges of misconduct against him. The charges were framed thus:

- (i) Assaulting Mr Shohel while using your privileged status as a UNICEF staff member for intimidation purposes in order to support private claims, thus at the same time discrediting UNICEF;
- (ii) Sexual harassment of three female staff members and;
- (iii) Requesting subordinates to prepare an academic paper for you, thus abusing your authority and misappropriating UNICEF resources for private purposes.

37. The Applicant responded to the charges on 27 January 2010 attesting his innocence and alleging that the charges against him were fabricated and that there was no reliable evidence other than hearsay.

38. The then Deputy Executive Director (“Mr. Omar Abdi”) reviewed the Applicant’s response to the charges and concluded that the Applicant’s actions in all the three separate charges constituted serious misconduct and given the grave nature of the charges, the Applicant’s actions warranted summary dismissal with immediate effect. The said decision was conveyed to the Applicant in a letter dated 15 April 2010 and was received by him on 21 April 2010.

The Applicant’s case is summarised as follows:

- a. The investigation and decision making processes were flawed in so far as they failed to afford the Applicant basic due-process protection including: the presumption of innocence, lack of independent investigators, the right to challenge witnesses, protection from contamination between witnesses’ evidence and the right to a fair and cogent interview based on the evidence;
- b. The charge of assault failed to meet the requisite standard of proof as a result of a flawed investigation and decision making process;
- c. The charge of sexual harassment is bad for duplicity to the extent that it conflates three separate allegations into one charge;
- d. Denial of all the allegations and inferences made with regard to sexual inappropriateness and;
- e. The Applicant did not abuse his authority when he sought assistance in the preparation of his LDI project and the research conducted was relevant to UNICEF work.

39. The Applicant prayed the Tribunal:

- a. To reinstate him, or award him damages for loss of earning, emotional harm and damage to his reputation; and

- b. To clear his name regarding the fabricated charges of possession of a gun and misconduct.

The Respondent's case is summarised as follows:

- a. The Applicant was accorded due process rights; he was presumed innocent, provided with a verbatim transcript of his interview, provided with the investigation report and its annexes upon being charged and the investigation was conducted by independent investigators;
- b. There is no written rule regarding disciplinary matters that offers the staff member suspected of misconduct a right to challenge witnesses;²
- c. There is no exact standard for the quantum of proof required and as such the standard of proof in disciplinary cases is clear and convincing evidence, that the truth of the facts asserted is highly probable³ and this was met in the case of the Applicant;
- d. Any material capable of rationally bearing on the issues in dispute is admissible including hearsay evidence and the crucial questions are relevance and cogency or weight;⁴ and
- e. The charges of assault, sexual harassment and abuse of authority against the Applicant were proved by clear and convincing evidence and his behaviour was unbecoming of a senior manager and an international civil servant and therefore the sanction of summary dismissal was fair and proportionate.

40. The Respondent prayed the Tribunal to find that:

² *Rasool* UNDT-2011-207

³ 2011-UNAT-164 *Molari*, 2010-UNAT-040 *Aqel*,

⁴ UNDT-2010-015 *Warren*

- a. 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. The Applicant's due process rights were fully respected throughout the entire process; and
- c. The decision to summarily dismiss the Applicant was fair and proportionate to the offence and the Application therefore should be dismissed in its entirety.

Issues

41. In determining the merits of this Application, the Tribunal will address the issues in relation to the allegations and charges brought against the Applicant, the conduct of the investigation and other facts relevant to the administrative decision to summarily dismiss the Applicant. The issues have accordingly been formulated as follows:

- a. Was the charge of assault against a storekeeper established?
- b. Did the Applicant sexually harass any of the three female staff members as alleged?
- c. Did the Applicant abuse his authority for the purpose of conducting his academic LDI project?
- d. Considering the background and events against which the allegations of contemplation of suicide and threats to shoot certain staff members arose, were those who initiated and reported these allegations motivated by extraneous factors and personal interests?
- e. Were proper investigative standards adhered to in this case?

- f. Were the principles of natural justice observed in the investigations?
- g. Were the procedures specified in UNICEF Executive Directive CF/EXD/2008-004 for conducting investigations followed?
- h. How did the role of the Regional Human Resources officer affect the investigative process?
- i. Were the Staff Rules on medical and psychiatric assessment properly applied to the Applicant in this case?

Was the charge of Assault against a storekeeper established?

42. The assault charge was framed as follows:

You are charged with the following misconduct: Assaulting Mr. Shohel while using your privileged status as a UNICEF staff member for intimidation purposes in order to support private claims, thus at the same time discrediting UNICEF.

Facts leading to the assault charge

43. Shortly after the Applicant had arrived in Malawi to take up his position as a Deputy Representative, he visited a certain furniture and household store and identified a couple of household items, which he needed to purchase. While at the store, the Applicant met with the store owner, an elderly man, who invited him to his office in the store to discuss his purchases and currency of payment.

44. The Applicant returned to the store to pay for the items he had selected and these were delivered to his house but some of them were faulty. The mattress was short and did not fit on the bed and the washing machine was not functioning. The store replaced the Applicant's mattress and sent a technician to attempt to fix the washing machine but without success.

45. It was returned and agreed between the store owner and the Applicant that he would go to the store to have the matter resolved.

46. When the Applicant thereafter returned to the store with his driver during lunch hour, the elderly store owner with whom he had transacted his purchases was not present. Instead there was a store attendant and someone else whom the Applicant assumed to be the son or nephew of the store owner but he was not helpful. The Applicant then began walking towards the store owner's office where he usually met with the store owner in order to wait for him.

47. The alleged assault of one Mr. Shohel took place when the Applicant was heading towards the store owner's office. There are different versions of the events, which are recounted and addressed below.

Applicant's Testimony

48. When the Applicant was walking towards the office of the elderly store owner to wait, the store keeper/attendant blocked his way by standing in front of him, pushed him on the chest and held onto his shirt and tie. While he struggled to have the store attendant release his hold on him, the Applicant used one hand to produce his identity card and identified himself to his assailant.

49. Someone at the store came to separate the Applicant and the store attendant who then apologised on learning who the Applicant was and said he thought that the Applicant was there to cause trouble. The Applicant's shirt was dirty and had lost two buttons during the scuffle and he threatened to call the Police, but the store attendant begged him not to.

50. The Applicant testified that he had left the driver outside in the car when he went into the store and his back was facing the door. He only saw the driver in the store afterwards. He denied using any threats during the incident.

51. He soon forgot the unpleasant incident, had his washing machine replaced and returned to the same store a couple of other times to buy other items. He also took some friends to the same store thereafter to purchase their household items.

The driver's statement

52. The driver did not testify before the Tribunal but a statement he had made to investigators was part of the Respondent's case. It stated that he drove the Applicant to the shop on three occasions but the shop had not delivered the goods the Applicant had paid for. It was further stated that:

When we arrived at the shop, we met with a shop attendant who was not helpful. [The Applicant] became impatient and said he wanted to see the manager of the shop. He walked toward the office of the management. However, the shop attendant stopped him by placing his hand on his chest. [The Applicant] then grabbed him with both hands, shaking him and shouting: "You do not know who I am, I am a diplomat, I am the deputy Representative of UNICEF."

I immediately rushed to split the two. Others in the shop also intervened. In pulling back [the Applicant] his shirt was teared (*sic*) off. After the incident I drove him back home, where he changed the shirt. We then drove to the Office. We went back to the same shop on other occasions. They were kind; they even replaced a malfunctioning washing machine that they had sold to him [the Applicant].

Note for the record on the incident at the furniture shop made by Mr Brusa

53. Mr. Brusa was part of the investigation team of two that went to Malawi to investigate the allegations against the Applicant. On being told by Ms. Auer during the investigations that the Applicant had been involved in a physical altercation in the furniture store nearly a year earlier, he visited the store to investigate the alleged incident after obtaining a statement from the UNICEF driver who had driven the Applicant to the store. At the furniture store, he interviewed a certain Mr. Shohel and two others who gave another version of the incident but declined to make a complaint or give a witness statement.

54. Mr. Brusa testified that at the store he had met with; the owner, Mr. Shohel, another co-owner and a shop attendant, two of whom claimed to have witnessed the incident. In his note for the record regarding the incident, he recorded:

They confirmed that a UNICEF staff member (they did not remember the name) came to see them to complain about a washing machine he had bought there. Mr Shohel met with him, but was not aware of the purchase nor of the problem so could not help promptly. The UNICEF staff member then became very angry, and shouted that he would “burn” the shop down. He then walked towards the Management Office (where there are computers, printers, files, etc.) with the apparent intention to damage it (there was nobody in the office at that time). Mr Shohel held him by the hand to stop him. The UNICEF staff member then grabbed Mr Shohel and later put his hands around his neck, trying to choke him. He yelled; “You do not know who I am”

Subsequently the two were separated and the issue was sorted out. The staff member went back other times to the shop with no further incidents reported.

Mr Shohel declined politely to sign the statement he said that they work with several embassies and other organisations, and this would affect negatively the image of their shop.

Considerations on the Assault Charge

55. Neither the shop attendant who was allegedly assaulted by the Applicant nor the UNICEF driver who was said to have witnessed the incident was called to testify before the Tribunal. When cross-examined by the learned counsel for the Applicant, Mr. Brusa told the Tribunal that although he had obtained the driver’s statement before going to the furniture store, he did not put the driver’s version of events to those he spoke to in the store. In answer to another question, he said he did not challenge what they told him but only tried to understand what they had to say.

56. The investigators stated in their report that the accounts of the driver and that of the men in the furniture store who Mr. Brusa spoke to about the incident were similar. They concluded in the said report that: “(The Applicant) lost his temper and acted in a manner unbecoming of an international civil servant.”

57. Assault is not only a criminal offence but can also give rise to liability in Tort. It is defined as:

The threat or use of force on another that causes that person to have a reasonable apprehension of imminent, harmful or offensive contact;

the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.⁵

58. Following from the above definition, the question arises as to whether the Applicant during the incident used force or threatened to use force such that the said store attendant was in apprehension of immediate violence to his person.

59. In the investigation report, the charges against the Applicant and the dismissal letter state that the Applicant assaulted Mr. Shohel. The driver, the store personnel to whom Mr. Brusa spoke and the Applicant are all in agreement that the Applicant while walking towards the store owner's office was stopped by the store attendant who blocked his way and pushed him or placed his hand on the Applicant's chest or held his hand. The driver and the Applicant are agreed that the action of the store attendant resulted in the Applicant losing buttons from his shirt, which became dirtied in the process.

60. What emerges clearly from at least two of three accounts is:

- a. the store attendant assaulted the Applicant by pushing him on the chest and holding on to his shirt;
- b. the Applicant held the store attendant's hand in an apparent bid to extricate himself;
- c. the Applicant took out his identity card (blue book) and stated or shouted that he was the UNICEF Deputy Representative; and
- d. The Applicant lost buttons from his dirtied shirt.

61. What precisely was this conduct engaged in by the Applicant that was unbecoming of an international civil servant? Why would UNICEF management state in charging the Applicant with assault that:

⁵ Garner A. B., (Eds), *Black's law dictionary*, 9th Edition, , (West Publishing Co - USA, 2009), p.130

The driver also stated that you were so angry and displayed excessive violent behaviour towards Mr. Shohel that in his effort to pull you back from assaulting Mr. Shohel, your shirt was ripped.

62. The same charge also stated that the Applicant assaulted Mr. Shohel,

while using your privileged status as a UNICEF staff member for intimidation purposes in order to support private claims, thus discrediting UNICEF.

63. Nowhere in the written statement of the UNICEF driver, was it recorded that the Applicant was angry or displayed excessive violent behaviour towards the storekeeper. If anything, the physical encounter was precipitated by the storekeeper who pushed the Applicant on the chest. Where did the drafter of the charges pick up an assertion that did not form any part of the records? How does it stand to reason that the Applicant's "excessive violent behaviour towards Mr. Shohel" resulted in his shirt being ripped? Did the Applicant rip his own shirt?

64. While the story told by the reluctant store personnel who were interviewed alone by Mr. Brusa went unchallenged and untested by an investigator who "just tried to understand what they had to say"; UNICEF management concluded that the Applicant had threatened to burn down the shop and had tried to choke the store attendant. This account attributed to the shop personnel was not corroborated by the UNICEF driver or anyone else.

65. Management further concluded that it had no reason to doubt the credibility of the shop personnel. What reason did Management have to doubt the credibility of the Applicant or the UNICEF driver? Why was the credibility of a storekeeper who "declined politely to sign a statement" or to make a report be believed without being challenged or put to the test in any way?

66. From the records before the Tribunal, the only reasonable finding is that if there had been an assault in the store on the day in question, the Applicant was the victim. The store attendant even declined to make a complaint or give a statement to the investigator who went to seek him out. While Mr. Brusa's note to file is the kind

of hearsay evidence that has no probative value, he cannot turn witness for the reluctant store attendant.

67. This is because while its accuracy cannot be determined, it cannot be established that those who told him the story witnessed the incident or were involved in it. They were not even identified by the UNICEF driver, the Applicant or anyone who was known to be present in the store at the material time. Moreover, Mr. Brusa's investigations into the incident took place nearly one year after it happened.

68. What is this privileged status that the Applicant used to intimidate the store attendant as stated in the charge? Not even in Mr. Brusa's note to file is it recorded that the store personnel were intimidated by the Applicant. Another account of a snooping journalist who was alleged to have contacted UNICEF communications section over the incident was part of Mr. Brusa's note to file.

69. The name of a communications officer who was said to have initiated this allegation and who claimed to have been contacted by the journalist was never given. She never volunteered a statement in writing to the investigators and neither did she testify. Ms. Auer who reported the allegation of assault testified that she had not arrived in Malawi at the time of the incident and only offered double inadmissible hearsay evidence on this charge.

70. UNICEF Management appears to have found it offensive that the Applicant identified himself and his official position when he was accosted by the store attendant. It is not alleged that the Applicant had misrepresented himself. The Tribunal takes judicial notice of the fact that when an international staff member finds him or herself facing an imminent threat of physical harm or is placed in some other peculiar position especially in a foreign country, it is only reasonable for one to identify him/herself as a UN Staff Member.⁶

⁶ United Nations Field Security Handbook, System-wide Arrangements for the Protection of United Nations Personnel and Property in the Field (January 2006)

71. It was not until the Applicant stated in his testimony before the Tribunal that it was his official identity card issued by the authorities of Malawi that he had produced during the incident in the store that the Respondent's claim that he had produced his United Nations *Laissez Passer* fell apart. Evidently, the investigators who appeared not to be interested in the Applicant's explanations had not established what the "blue book" referred to by the Applicant was.

72. Mr. Abdi in his dismissal letter to the Applicant referred to the furniture storekeeper as "Complainant" in at least twelve places in that letter. The true position is that there was no "Complainant". The store attendant did not file a complaint at the time of the incident and refused to do so even one year later at the request of Mr. Brusa. In fact in his testimony, Mr. Brusa stated that,

they were relieved to hear that I was there not to press charges against them but really to find out what happened and that I wanted to know more.

73. Why would a man who was assaulted be relieved that charges were not being pressed against him?

74. A charge of assault is a criminal charge. Was it within the competence of UNICEF to investigate a criminal offence or a tort alleged to have been committed against a non-staff member one year before? Even if the Organisation could engage in such an investigation, a lot more than a Note to File would be required to establish that the offence was committed. Walking into a store to simply ask people there to tell their version of an event that happened a year before does not amount to an investigation.

75. It is not in doubt that no proper identification of the *dramatis personae* in the incident being investigated was ever made. The store personnel did not even know the name of the Applicant, while no one identified the man who was in the encounter with the Applicant to the investigator. The version given by the store personnel to whom Mr. Brusa spoke was not tested or challenged and they refused to even give a statement.

76. The Tribunal finds and holds that the investigators did not at any time establish a case of assault of the store attendant against the Applicant. The allegation was totally outside the scope of the investigative mission but was hastily picked up during the course of the investigation, which was conducted with palpable bias.

Did the Applicant sexually harass any of the three female staff members as alleged?

77. The charge stated:

You are charged with the following misconduct: sexual harassment of three female staff members.

78. The charge letter further stated:

at least three female staff members reported several incidents of sexual harassment committed by you. These allegations are explained and documented in detail in the OIA report and its annexes. You claim that the allegations must be false because the victims did not raise written or formal complaints. However, the victims raised complaints in their oral and written statements to OIA investigators.

79. In the investigation report dated 17 November 2009, it is stated: “On numerous occasions [the Applicant] made inappropriate, unsolicited and suggestive sexual comments to female staff members.”

80. Sexual Harassment is serious misconduct within the United Nations. It is an offence that is treated with zero tolerance. It is ranked among a special class of misconduct known as prohibited conduct for which the Secretary-General has promulgated three separate Secretary-General’s Bulletins.⁷ It is additionally a felony in many national jurisdictions.

81. On 10 October 2008, UNICEF issued Executive Directive CF/EXD/2008- 004 in line with the Secretary-General’s Bulletin prohibiting discrimination, harassment,

⁷ See ST/SGB/2008/5; Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority, ST/SGB/2005/20; Prevention of Workplace Harassment, Sexual Harassment and Abuse of Authority and ST/SGB/2003/13; Special Measures for Protection from Sexual Exploitation and Sexual Abuse

sexual harassment and abuse of authority. The said Executive Directive 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, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

Allegations relating to the sexual harassment charge

82. The Applicant in this case was alleged to have sexually harassed three female staff members of UNICEF in the Malawi CO. It is important to examine the content and quality of the evidence relied upon by the Respondent in making a finding of guilt against the Applicant and on which the disciplinary action of summary dismissal was based.

Female 1

83. In a witness statement dated 11 September 2009; Female 1 stated that she is quite ambitious and so went to see the Applicant in his office. She told him that she was keen to progress in UNICEF and that if working in programmes would stand in the way of her ambition, she would look for a job elsewhere. The Applicant then advised her that she was smart, that she had potential and should not be discouraged. He pointed to a photograph displayed on his office wall in which there were many senior women in UNICEF and told her that it was not just their brains that got them to where they were, but that they all had to do a bit of something else to get there. He added that she had to be prepared to do something and that her future lay in his hands.

84. Female 1 stated in the statement that she felt uneasy at the Applicant's comments and that it seemed that he inferred that she had to sell her body to progress.

The response of the Applicant had so upset her that she started looking outside UNICEF for other positions.

85. In the interview records of the investigators, the Applicant was asked about a female staff member who came to him concerning her aspirations of promotion within the Organization to whom he showed a picture of senior women in UNICEF and purportedly told that her future lay in his hands. The identity of the said staff member was not disclosed to the Applicant.

86. While denying that he ever told anyone that their future lay in his hands, the Applicant explained that he had given similar advice on career progression to more than one person.

87. When the Applicant was led in evidence, he told the Tribunal that he recalled a conversation with a female staff member on career progression in which he pointed to senior UNICEF women in a photograph displayed in his office and advised the staff member that she had to have a plan for making career progress. Such a plan could include capacity development through online courses and acquisition of new skills in new areas. He also denied telling any woman that her future was in his hands.

Female 2

88. In an email dated 14 September 2009 to the investigators, Female 2 stated that the Applicant was her supervisor and had made many inappropriate comments in the past that made her feel uncomfortable.

89. According to her account in the email, the Applicant shared private stories that were not suitable for supervisees. The first time was an occasion when the Applicant told her in the presence of another woman colleague that in Lesotho there are more women than men and that six women picked him up at the airport upon his arrival there for an assignment and all six offered to have sex with him. He told them

he took up the offer and also slept the next day with a friend and sister of one of the women.

90. Female 2 also wrote that on another occasion, the Applicant had been asked by a male colleague to sign an approval for her to attend a workshop with the male colleague. The Applicant asked loudly in front of others in “a characteristically joking manner” why the male colleague wanted her to go when she was married and if it was because he wanted her for himself. She felt embarrassed although she knew it was a joke and she had laughed it off nervously and left.

91. The Applicant, she wrote, also shared other private stories about carrying condoms when he travelled and how his wife would jokingly ask him why.

92. On yet another occasion, she went to the Applicant’s office over a work-related issue and he asked her to shut the door unless her husband would mind. According to her, it was meant as a joke but she felt confused.

93. She concluded her email by stating that the Applicant may have been joking on those occasions and may not have known that she was uncomfortable since she did not tell him how she felt or ask him to stop.

94. When led in evidence, the Applicant denied all the allegations of Female 2 about making remarks about his sexual exploits or personal life in the presence of female supervisees or that he joked about a male colleague wanting to go on a trip with her.

Female 3

95. In a witness statement made on 11 September 2009, Female 3 alleged that one day in July 2009, the Applicant had asked for her by name. On seeing her later the same day, he told her that he wanted her to go on a field visit with him to the South. She did not give him an answer until he called her in the evening to find out what her decision was. She told him she could not go because her husband was sick.

96. On another occasion soon afterwards, the Applicant came to her office to collect some spread-sheets he had asked for. He found her alone in the office and came in and shut the door. He walked over to her desk and stood close behind her which made her feel extremely uncomfortable. She jumped out of her chair and stood up. Almost at the same time, a colleague, Mr. Nindi knocked and before he entered her office, the Applicant had sat on a chair beside her desk.

97. Mr. Nindi in his own witness statement confirmed that on a date in July 2009 he had gone to the office of Female 3 but the door was shut. When he entered, he saw Female 3 standing behind her desk and the Applicant sitting in a chair beside the same desk.

98. On another day at the beginning of August, Female 3 stated that she went to see the Applicant's Personal Assistant near the Applicant's office. On seeing her there, he called her into his office and asked her why she had gone on mission without telling him and that he was soon to go on a trip and wanted her to accompany him.

99. The Applicant in his interview with the investigators confirmed going to the office of Female 3 to pick up some documents. He denied closing the door and said the wind was heavy and may have blown shut the door.

100. Also under cross-examination, he maintained that the allegations of Female 3 were false and that he had never asked her to travel with him or harassed her in any way.

Considerations on the charge of sexual harassment

Did the Applicant engage in sexual harassment of any of the three female staff members?

101. While assessing the statements of the three witnesses and their accusations against the Applicant in the investigation report, the investigator stated that Female 1

said she felt degraded by the suggestion of the Applicant that she would have to do “certain favours” in order to progress.

102. Going by the set definition of sexual harassment as laid down in the relevant legislation, certain questions come to mind:

a. Did Female 1 ask the Applicant what he meant when he allegedly told her that she had “to be prepared to do something and your future lies in my hands”? The evidence is that she did not and merely assumed that by this vague remark, he was referring to sexual favours and consequently felt degraded.

b. Granted that her version of the facts are to be believed rather than that of the Applicant, was it not possible that in saying that her future lay in his hands, the Applicant had other ideas of what he expected of her rather than a sexual relationship? There is no evidence that the words allegedly spoken by the Applicant were accompanied by any suggestive actions or gestures as to lead to the singular conclusion that he wanted sexual favours from Female 1.

c. Was the fact of Female 1’s assumption as to what the Applicant meant and her feelings of being upset and degraded as a result thereof sufficient to establish that sexual harassment had occurred in this alleged singular encounter with the Applicant? My answer to this is No.

d. Assuming yet again that the account of Female 1 is to be preferred over the explanations of the Applicant, was the remark such that it would reasonably be expected or perceived to cause offence or humiliation? The alleged remark is so vague and unclear that any ordinary person may wonder at what the Applicant meant but would not feel degraded merely by the words spoken. It must be borne in mind that the standard of reasonableness to be adopted is the standard of the ordinary, reasonable man or woman on the United Nations corridors.

e. Did the words allegedly spoken to Female 1 by the Applicant at any time make the work environment intimidating, hostile or offensive for her? Although Female 1 said in her witness statement that the remark prompted her to start looking for work outside UNICEF, there is no evidence that points to the workplace becoming intimidating or offensive for her as a result. There is no evidence adduced to show that she was applying for other jobs outside UNICEF based on the said remark. Further, there is also no evidence as to when the alleged incident took place or that she reported it before the investigations against the Applicant commenced.

103. While assessing the evidence in respect of Female 2, the investigators stated in the investigation report that they asked the Applicant whether he had ever boasted of his sexual exploits in front of female staff. The explanation by the Applicant of the context in which the discussion about the Lesotho female population arose had evidently provoked the indignation of Mr. Curtis who in the course of the investigation interview delved into the propriety of the Applicant making light of the rape of an eight year old girl that had been the subject of newspaper headlines in Malawi.

104. The investigator's assessment here was clearly premised on the reasoning that if the Applicant could make light of the issue of the rape of an eight year old, then he must have sexually harassed Female 2. There is also the assessment in the investigation report that the Applicant had made "sexually charged comments" but there was no evaluation done to determine whether these amounted to sexual harassment of anyone.

105. Other questions that arise are:

- a. Did the Applicant make any sexual advance, request for sexual favour or engage in any behaviour of a sexual nature towards Female 2?
- b. Were the alleged sexual references unwelcome to Female 2?

c. Were the actions of the Applicant as alleged, such that they could reasonably be perceived to cause offence or humiliation to any woman?

d. Did the said actions render the workplace offensive, intimidating or hostile for Female 2?

106. The Applicant denied sexually harassing her while Female 2's evidence is that she was often shocked and sometimes confused at the very personal sexual stories about himself that the Applicant tended to tell in her presence. It was Female 2's evidence that his sexual remarks on another occasion caused her to feel embarrassed although her reaction was to laugh it off nervously. She also stated that she understood that the Applicant may have been joking and that she wished she had told him directly that she did not appreciate his jokes at the times they happened.

107. Although she also wrote in her email that the Applicant made inappropriate sexual comments to her on at least two occasions in the presence of other staff members, none of them corroborated her account by giving a statement to the investigators or testifying about it.

108. What comes out clearly, if the version of Female 2 is to be preferred, is that the Applicant on certain occasions had made sexual jokes in her presence. She was shocked and embarrassed at him but did not tell him that his jokes were not welcome and on at least one occasion laughed it off. She understood that he was only joking and wished, when she was approached to write a statement by the investigators, that she had told him at the time he made the jokes how she felt. There is no evidence that the work place was rendered hostile, offensive or intimidating for her because of the jokes of the Applicant.

109. During the investigation interview, the Applicant said that he had had a good relationship with Female 2 so much so, that when she became pregnant, she broke the news to him. According to the Applicant, he then took her to Ms. Auer to tell her the good news whereupon they were all jubilant. The Applicant and Ms. Auer advised Female 2 to take sufficient rest since it was a critical pregnancy. While he was OIC,

the Applicant would ask her to work from home because of her condition. His explanations were never contradicted.

110. If indeed Female 2 had such a familiar relationship with the Applicant that she would discuss such an intimate subject as her pregnancy with him, it was relevant to investigate the extent of that familiarity. This is because it is not usual that a woman who believes that she is sexually harassed would share such personal information with her harasser. It is highly likely that Female 2's account of the Applicant telling personal sexual stories to her was not relayed to the investigators in the context of the familiarity she shared with the Applicant.

111. It is noteworthy that Female 2 had emphasised in her email on the subject of sexual harassment, that even when the Applicant made sexual comments to her, she believed that he meant them as jokes. She also stated that she never told him that she did not like the jokes and on some occasions, would laugh at them.

112. The Tribunal does not find in the circumstances, that the allegations made by Female 2 against the Applicant amounted to sexual harassment.

113. With regards to Female 3, the summary of her allegation is that the Applicant had tried to persuade her to go on a field trip with him and she refused. On another occasion, he came to her office to pick up a document and then closed the door on entering and stood close to her behind her chair. These accounts of Female 3, without more, fall far below actions that would constitute sexual harassment.

114. Ms. Chipimo had testified that when Female 3 reported to her that the Applicant wanted to go on field trips with her, she confronted the Applicant over the matter in the presence of another staff member but this was never corroborated.

Conclusion on the sexual harassment charge

115. In the conclusion section of the investigation report on sexual harassment, it is stated that the Applicant had agreed that incidents similar to what the women making

allegations against him had suggested did occur but denied the sexual overtones. The concluding sentence reads:

On a number of occasions (the Applicant) has acted inappropriately in his approach to gender-sensitive issues and evidence confirms that he has sexually harassed staff members, Female 1, 2 and 3.

116. Do these conclusions derive from the evidence gathered by the investigators? Was the investigators' assignment aimed at establishing the Applicant's approach to gender-sensitive issues or was its object to establish that he had sexually harassed the three female staff members? What are these gender-sensitive issues about which the Applicant had been found to act inappropriately? Is it his discussion with the investigator on the rape of a young girl and his views on the high population of women in Lesotho?

117. It is evident that the tests to determine whether sexual harassment actually occurred in all three cases as defined by the relevant United Nations and UNICEF legislations were totally ignored by the investigators. Instead they descended into areas of personal morality that their investigative mandate did not allow.

118. Even going by the evidence said to have been collected by the investigators from witnesses who never testified before the Tribunal and who consequently never had their testimonies challenged and even without taking into account the Applicant's own case on the sexual harassment charge, it is clear that a case of sexual harassment of the three female staff members was never established.

119. Sexual harassment is a most serious misconduct which the Organization is right to treat with zero tolerance. UNICEF Executive Directive CF/EXD/2008-004 which sets out how a preliminary assessment of the prohibited conduct is to be done underscores the thoroughness that must attend its investigations. Such flawed investigations as had happened in this case tend unfortunately not to help any true victims of sexual harassment.

The Charge of Abuse of Authority

120. The charge of abuse of authority against the Applicant read:

Requesting subordinates to prepare an academic paper for you, thus abusing your authority and misappropriating UNICEF resources for private purposes.

121. The charge letter also stated that the research and writing assignments were extensive requiring many hours of work and that the Applicant requested the staff members to do this work during official UNICEF working hours. Large portions of the research submitted by the Applicant was claimed to have been written by staff.

Facts leading to the abuse of authority charge

122. In 2009, the Applicant was selected by UNICEF to participate in the LDI programme. The programme was facilitated in conjunction with the Gordon Institute of Business Science (“GIBS”) of the University of Pretoria in Johannesburg, South Africa. In addition to the formal training, participants in the course were required to identify a topic that was relevant to UNICEF work and to conduct a comprehensive research assignment which was to be submitted to the institution.

123. The Applicant chose as his research topic ‘The Prevention of Mother to Child Transmission and the child feeding programme’ (PMTCT). His thesis was entitled; ‘Report on the Assessment of integration of Prevention of Mother to Child Transmission and the child feeding programme (PMTCT) of HIV and Infant & Young Child feeding (IYCF) services in Malawi.’

Applicant’s testimony

124. The Applicant testified that during a programme meeting in the office, he explained to the staff members that he was undertaking the LDI project and that he would need some assistance from the staff in the various units and in the different projects to assist him. The Applicant continued that upon putting his ideas together,

he sought assistance from the technical persons in the various departments. He contacted Ms. Chipimo who provided him with more information and recommended that he talk to Mr. Chitekwe. He then approached Mr. Chitekwe, and requested his help with the LDI project and he offered to assist.

125. The Applicant denied ordering, forcing or coercing any of the staff members to assist him. Some of those he spoke to about assistance with the project refused because they were busy. The Applicant denied any allegations of plagiarism and said that he had acknowledged all those who assisted him in conducting his research.

Ms. Chipimo's testimony

126. The allegation that the Applicant sought and received assistance from staff members with his LDI thesis was first made and reported by Ms. Chipimo to Ms. Auer on 15 August 2009 along with other allegations. While she did not address this matter in her witness statement to investigators, she testified about it.

127. In her testimony, Ms. Chipimo stated that the Applicant approached her and sought her assistance but she turned him down and wished him luck since "there is no way I would have engaged myself in that kind of support." She testified that she insisted that her unit could not assist in his research. She continued that three of her supervisees Messrs' Chitekwe, Mathisen and Ng'oma later complained to her that the Applicant had asked them to write his thesis and also asked one of them to conduct field work in relation to his LDI project and she had advised them to refuse and to report the matter to the chief of section.

Witness statements

128. During Ms. Auer's fact-finding exercise, she contacted staff members whose names were provided by Ms. Chipimo as having been involved with the Applicant's LDI project. They each wrote back to Ms. Auer stating the extent of their involvement with the research.

129. Mr. Mathisen in his email response to Ms. Auer stated that the Applicant called him to his office and requested that he assist him in writing a portion of his LDI project. According to him, "I reported the incident to my first and second reporting officers at that time (Stanley Chitekwe and Miriam Chipimo as OIC). However, they had also experienced similar requests and provided similar inputs to his leadership assignment."

130. In an email response addressed to one of the investigators, Mr. Ng'oma stated that the Applicant explained that he was doing a course with a South African Institution and that it was a research project in the area of PMTCT and Infant and Young Child Feeding. The Applicant asked him to travel and assist with administering a questionnaire but he refused because he had an international travel to Uganda the following weekend and needed to prepare for it. He also added that he found it difficult and almost impossible to refuse assistance considering that the Applicant was his senior supervisor.

131. Another staff member Ms. Jama sent an email to one of the investigators explaining that she helped to review and edit the Applicant's paper. She further stated that she did not know that the paper was not for UNICEF but for the Applicant's LDI project and that she got to know about this just before she sent the edited work to Mr. Chitekwe who was also assisting the Applicant and that it was him who told her that it was towards the Applicant's LDI project.

132. In another statement, one Ms. Mlava, stated that the Applicant requested her to work on his proposal after he got approval from her immediate supervisor, Ms. Chipimo. She stated also that although she felt that the assignment was not part of her work plan within UNICEF, she could not refuse since it came through Ms. Chipimo and the assignment was from the Deputy Representative.

133. Another staff member Mr. Kazembe sent an email to Mr. Brusa regarding the Applicant's LDI. He stated that the Applicant requested him to modify the

questionnaire for his research paper. He assumed that the study was work related and so made a few changes and sent the document to the Applicant for finalisation.

134. In an email forwarded by Ms. Auer to Mr. Brusa received from Mr. Chitekwe, he stated that he re-wrote the gap analysis part of the thesis whose first draft was prepared by Ms. Chipimo, Mr. Mathisen and Ms. Mlava. He also re-wrote the research proposal. Again, he stated that the first draft was prepared by Ms. Chipimo, Mr. Mathisen and Ms. Mlava.

135. Mr. Chitekwe added that he was motivated to contribute to the Applicant's project due to his interest in research work as he was doing distance learning with the London School of Hygiene and Tropical Medicine. He saw the study as an attempt at evidence-based policy making/management and he had used his weekends and office provision for study time to work on the project.

136. During his testimony, Mr. Brusa stated that some staff members complained that they were asked by the Applicant to do research and provide inputs and that many of them did not know what it was about. He continued that some of the said staff members had to travel to the field using UNICEF vehicles and fuel and do so in their official time. They were asked to work at short notice and this conflicted with their official work and they were not happy about it.

137. Mr. Brusa who was also an investigator added that there were 'allegations of plagiarism' because some essays and papers that some of the staff members had written for their own learning and development outside the Organization had been copied into the Applicant's LDI research paper. According to the witness, some staff members went to the field to gather information, some wrote papers while others edited and formatted the document.

138. The main issue according to this witness was that the staff members could not say no to the Applicant and in some cases their supervisors were not even contacted. They were unhappy because they found it was not UNICEF official work and not

related to the country programme document. His view was that the Applicant ought to combine the LDI programme with his regular work and not involve others.

139. He testified that UNICEF resources should not be used to do the academic project although the Applicant could use UNICEF computer, data, paper and printer since it was an official learning programme. The work of others could not be plagiarised, UNICEF vehicles could not be used or DSA paid to staff to do research except with the approval of the Resident Representative.

140. In answer to a question in cross-examination, the witness admitted that part of leadership and development skills were delegation but added that it must be done with transparency. He further stated that it was an individual project and that the Applicant cannot delegate conceptual thinking to others and that there was no transparency in the Applicant's LDI project because the work of others was not acknowledged.

141. In answer to yet another question, the witness said he had seen parts of the Applicant's final thesis and that he had not studied it in detail because it was very technical and detailed. He said that he had seen the acknowledgments in the Applicant's thesis. He continued that plagiarism was committed when one takes an excerpt from a previous study even if done by the person. A cut and paste job was plagiarism, he said.

142. When Mr. Curtis was cross-examined on the abuse of authority allegation, he stated that none of the staff members he spoke to said that the Applicant threatened retaliation but that it was his view that often junior people felt they could not refuse a senior staff member like the Applicant. He added that although they did not tell him that the Applicant threatened them, they did not tell him why they were helping with his paper.

143. In the assessment portion of the investigation report, it was stated that in spite of acknowledging the help he got on the acknowledgment page of his thesis, the Applicant made no comment "on the fact that a large portion of his report was written

by other people as can be seen when his final report is compared by the one written by Mr. Chitekwe.” The investigators pointed out that Mr. Chitekwe had misspelt a word and that the same word was misspelt in the Applicant’s thesis. The foregoing, in their view, was proof that the Applicant had plagiarised.

144. The investigators also stated that the Applicant’s thesis contains a table whose accuracy is suspect because it did not correspond to a table in the report submitted to them by Mr. Chitekwe since it was not the Applicant who carried out the research. The investigators concluded that the Applicant had abused his authority by using staff members under his supervision to gather and provide him with documentary material for the purpose of furthering his LDI submission without having to do the study himself.

145. In the letter summarily dismissing the Applicant, Mr. Abdi stated that the charge of abuse of authority had been substantiated because the Applicant had requested staff members to undertake work on his academic research during official working hours which was not part of their duties. Further, the dismissal letter stated:

It is only reasonable to understand that if a supervisor and the Deputy Representative request some additional work from a staff member, he or she would hardly feel enabled to question such instruction without considering the risk of jeopardizing his or her professional career.

Considerations on the charge of abuse of authority

Did the Applicant abuse his authority in requesting his supervisees to assist him in his LDI research?

146. UNICEF’s legal framework for the prohibited conduct of abuse of authority is the Executive Directive of 10 October 2008 cited as CF/EXD/2008-004. In the said Executive Directive, the misconduct is defined as:

the improper use of a position of influence, power, or authority against another person. This is particularly serious when a person uses, or threatens to use, his/her influence, power, or authority to improperly

influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment, and such conduct can include (but is not limited to) the use of intimidation, threats, blackmail or coercion.⁸

147. From the foregoing definitions, the elements of the offence of abuse of authority are clear and unequivocal. They raise the following questions with regard to the Applicant's LDI project:

- a. Did the Applicant use his position or authority against anyone in conducting the LDI project?
- b. Did the Applicant threaten to use or in fact use his authority to improperly influence the career or employment conditions of any staff member as it related to appointment, assignment, contract renewal, performance evaluation or promotion on account of his LDI project?
- c. Did the Applicant by his request for help with his project create a hostile or offensive work environment for any staff members?
- d. Did the Applicant use threats, intimidation, blackmail or coercion against any of those from whom he requested assistance with his LDI study?

148. The simple answer to these questions is No. There is no evidence which shows or points to any staff member in the UNICEF Malawi CO being intimidated or suffering in any way on account of not wanting to help with the Applicant's LDI project. It is most unfortunate that the then UNICEF DED, Mr. Abdi found the charge of abuse of authority substantiated because the Applicant had asked some staff members to undertake the work which was not part of their official duties during working hours.

⁸ This definition is similar to ST/SGB/2008/5; Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority,

149. Mr. Abdi's reasoning that where a supervisor requested a staff member to do some additional work, the said staff member would feel unable to refuse in order not to jeopardize their career did not provide the required answer and did not establish that abuse of authority under the relevant rules occurred.

150. Ms. Chipimo had testified that she adamantly refused to help the Applicant when approached by him. Mr. Ng'oma had also stated that he could not administer some questionnaires on behalf of the Applicant as he was scheduled to attend an international conference and told the Applicant so. In fact, Mr. Chitekwe stated that he was interested in assisting with the project because he was engaged in other academic research himself. Certainly these staff members were not afraid to refuse the Applicant's request for help.

151. All of the staff members who contributed to the LDI project spoke about being 'requested.' The charge against the Applicant stated that he 'requested' his subordinates to help with his LDI. The word 'request' plainly means asking for a favour or privilege. By no stretch of the imagination does a request amount to an abuse of authority under UNICEF or the United Nations legal framework. There is ample evidence that some of those who assisted such as Ms. Mlava and Mr. Mathisen were cleared or permitted by their direct supervisors to do so.

152. Mr. Brusa stated during his testimony on the Applicant's LDI project that the Applicant had asked other staff members to do his conceptual thinking for him. He tried to distinguish what resources of UNICEF the Applicant could use and those that he could not use. He spoke at length about the Applicant having plagiarized work done by other staff members. He admitted in one of his answers in cross-examination that he had not studied the Applicant's thesis in detail because it was too technical and detailed.

153. His claims that the affected staff members were asked to work on the LDI project at short notice, that it conflicted with their official work, that their supervisors were not contacted and that their work was not acknowledged are not borne out by

the facts. Would it have made a difference to the charge if they had long notice? Of course the matter of the length of notice is irrelevant here.

154. There is no evidence that shows that helping with the LDI project conflicted with any work in the office. The claim that the supervisors of those who helped were not contacted is contrary to the statements of the staff members themselves. There is documentary evidence before the Tribunal showing that the Applicant acknowledged those who helped him.

155. What comes out clearly is that in an effort to nail the Applicant on the charge of abuse of authority with regards to his LDI project, the investigators had crossed the line into territory in which they had no competence. The determination of plagiarism is within the exclusive competence of an academic institution in the same way that the infringement of copyrights is exclusively for a competent court of law to determine. Regrettably, the investigators and in fact the UNICEF DED, Mr. Abdi, blundered into territory in which they had no jurisdiction and sought to re-write and re-interpret UNICEF and United Nations Rules based on their own individual brands of morality.

The allegations of contemplation of suicide and of threats to shoot certain staff members

Were those who initiated these and other complaints motivated by extraneous factors and considerations?

Did their motives in initiating the complaints impact on their credibility?

156. In order to better appreciate and understand the making and unfolding of this case, it is important to examine some of the events and the dynamics at the UNICEF Malawi CO which provide the background that birthed the allegations against the Applicant. This is necessary in spite of the fact that at the conclusion of the investigation, the Applicant was not charged with contemplating suicide and making threats to shoot others.

157. The Applicant, as already stated at the beginning of this judgment, commenced duties in UNICEF CO in Lilongwe, Malawi in October 2008. Ms. Auer who at the time was equally newly appointed assumed her duties in December of the same year. Before she would come on board, the Applicant was the OIC and ran the CO until she arrived.

158. Ms. Auer told the Tribunal that she worked well with the Applicant and that her work relationship with the Applicant was one of the better working relationships she had had with a deputy. She also stated that:

I felt that I had a very good working relationship with [the Applicant]. We were, you know, cordial. I think we had some good laughs. We both had a sense of humour. He was well liked by myself (sic), by other staff members, as far as I knew. Unfortunately it was a short time.⁹

159. According to her testimony, Ms. Manda who was a supervisee of the Applicant and head of the OVC unit had reported to her sometime in June 2009 that the Applicant was interfering in her section and undermining her ability to lead her team. He was said to be asking her team to do things without her prior knowledge or approval and she claimed that there was no guidance from him. Ms. Auer said she then advised Ms. Manda to make efforts at developing a good working relationship with the Applicant.

160. Thereafter, on Saturday, 20 June 2009, the PS in the Ministry of Gender called to invite her to lunch the next day. During the meal, the PS told her that the Applicant had met with a junior officer from her ministry who was being investigated for fraud and corruption and that the meeting was against protocol. She promised the PS that she would find out what happened and get back to her.

161. Ms. Auer said that on the Monday morning of 22 June 2009, she invited the Applicant and asked about the meeting he was said to have held with the junior ministry official. The Applicant explained to her that he could not find staff from the

⁹ Hearing on the Merits Transcript at p 8 of 93

OVC section at the time the ministry official came to see him. He had then asked the Ministry Official why he had come and the said official started to talk about UNICEF relationship with the ministry. The Applicant immediately ended the meeting.

162. She said that she later contacted the PS to explain what had happened. She further stated that the next morning, 23 June 2009, the Applicant who was visibly upset, came to her office and told her that he was so unhappy after she had spoken to him about the ministry official that he had thought of shooting himself that night and that if his wife was not there he would have done it.

163. The Applicant, she said, also told her that he had contacted the regional office to see if he could be reassigned to another location because he had never had his integrity questioned like that before. Ms. Auer told him that she believed in him and was not questioning his integrity and that she had spoken to the PS and explained to her what happened. She also offered to arrange for them both to meet with the PS and the Applicant felt better after their talk. They later met with the PS and thereafter continued to work well together. She went on home leave shortly thereafter in July 2009 and handed over the management of the office to the Applicant as OIC.

164. On 15 August 2009, after she returned from home leave and the Applicant had left Malawi for his annual leave, Ms. Chipimo met and told her about certain alleged incidents that had happened while she was away. One of the things she told her was that the Applicant had been in a rage and ranted about Ms. Auer and Ms. Manda. He was said to have used derogatory language and threatened that he would shoot Ms. Auer and Ms. Manda; the Applicant had been sexually harassing female staff in the office and had asked staff members to help with his LDI project. On 18, August 2009, Ms. Auer sought advice from Mr. Brusa, spoke to staff members of the Malawi CO as he advised and sent a report to the OIA prompting investigations into the allegations against the Applicant.

165. Ms. Chipimo for her part wrote in a witness statement to the investigators that an agitated Applicant came to her office on a date in late June 2009 and told her how

Ms. Auer had criticized him the day before about how he had handled some issues with the government and about a complaint brought to her by Ms. Manda. The Applicant also told her that Ms. Auer had not listened to his point of view and that he had gone home to get his gun to shoot some people but his wife talked him out of it.

166. The Applicant, she wrote, also said he would use his contacts in the Ministry to talk to the President so that action could be taken against Ms. Auer. He further boasted that while working in Nigeria, he took his gun to the office and showed it to his supervisor and that sorted the problem he had. She reported this to her acting chief of section but neither of them did anything about the threats made by the Applicant.

167. Ms. Chipimo also testified that she understood from Ms. Manda and later also from the Applicant that they were having problems over his managing of Ms. Manda's programs and that the Applicant was unhappy at the way Ms. Auer was handling it. According to her, the Applicant came to her office and said that Ms. Auer and Ms. Manda were obstructing his work and that he was going to address the issue by getting a gun, calling a meeting and shooting them. He had actually wanted to bring his gun to the office but his wife stopped him.

168. The witness said she reported this encounter to her acting chief of section who then promised to talk to the Applicant but did nothing. She also later told Ms. Manda about it who urged that the matter be reported to Ms. Auer when she returned from leave. On 15 August 2009, she reported the matter to Ms. Auer and also told her that the Applicant had sexually harassed certain female staff members and that he had asked some of the staff for help with his LDI project.

169. In response to a list of questions sent to her by Mr. Curtis, another staff member Ms. Kabembe who was a supervisee of Ms. Manda, stated in her email response that after the Applicant was confronted by Ms. Auer with regard to his conflict with Ms. Manda, he had said that if he had a gun, he would shoot Ms. Manda for telling Ms. Auer that he was having an affair with another staff member.

170. The Applicant sought to explain the circumstances that led to the allegations against him starting from his written statement right up to his interview with the investigators and also in his testimony. The summary of these explanations is that:

a. He had disagreed with Ms. Auer over Ms. Manda's reluctance to go through him as her first reporting officer;

b. Ms. Auer had on 22 June 2009, scolded him over an allegation said to have been made by the PS of the Ministry of Gender that he held a meeting with a junior officer from the ministry even before asking for his explanations. He had called Mr. Brusa after that encounter asking to be posted out of Malawi;

c. The next day he saw Ms. Chipimo in her office and she told him that Ms. Manda was at the Sunday lunch with Ms. Auer and the PS and that during the said lunch, it was discussed that the Applicant was engaged in an extra-marital relationship with a female staff member;

d. After seeing Ms. Chipimo, the Applicant went to see Ms. Auer. He told her that he was upset that she had scolded him like a little boy the day before. He also said that it was in such situations when people are pushed to the wall, that in places like America, they resort to jumping out of windows but that he was an African and would not do so. He revealed to her what Ms. Chipimo had told him about the Sunday lunch with the PS;

e. Ms. Auer was embarrassed that he knew about what transpired at the Sunday lunch meeting with the PS and told him she believed in him and further promised to arrange for the two of them to meet with the PS to clear things up. This was later done.

f. Ms. Chipimo had made up the allegations which she reported to Ms. Auer on 15 August 2009, as a way of getting back into the latter's good books

because Ms. Auer was unhappy with her for telling the Applicant what had been told her in confidence about the Sunday lunch with the PS.

171. In spite of stating in the investigation report that ‘three credible witnesses’ reported that the Applicant mentioned suicide and that he had a gun and threatened to shoot people, the investigators came to the curious conclusion that they had no corroborating evidence to confirm the allegations.

172. An examination of the entire evidence on this score reveals that the only person who reported a contemplation of suicide was Ms. Auer. Ms. Chipimo alleged that the Applicant told her that he wanted to shoot Ms. Auer and Ms. Manda but was stopped by his wife, while Ms. Kabembe’s email reply to investigators’ queries was that the Applicant said that if he had a gun, he would shoot Ms. Manda.

173. The accounts of the so called ‘three credible witnesses’ were totally different. While it appears that the colleague to whom Ms. Chipimo said she reported the Applicant’s threat to shoot people was not contacted by the investigators or did not confirm her story, it is unfortunate that the investigators would misrepresent the evidence in this way. The simple facts are that the three separate persons in the Malawi CO gave three different accounts of the allegations involving threats to shoot.

174. Unfortunately, the investigators did not investigate the Applicant’s claims that the allegations were untrue and merely concocted by Ms. Chipimo to ingratiate herself with Ms. Auer. With respect to the role played by Ms. Chipimo in initiating the allegations, the Tribunal is of the view that her motives and credibility ought to have been viewed critically and thoroughly investigated especially in the light of the Applicant’s explanations.

175. If indeed the Applicant had told Ms. Chipimo, a medical doctor and an international staff member, on 23 June 2009, that he owned a gun and intended to shoot Ms. Auer and Ms. Manda, it is to be expected that she would make a prompt report of such a serious matter to Ms. Auer or even to the Department of Safety and Security immediately after hearing it. Instead she was content to merely call the

Applicant later the same day to see if he had calmed down and to tell her acting chief of section who promised to talk to the Applicant but never did. Why did this acting chief of section not give a witness statement to confirm that such a matter was reported to him by Ms. Chipimo on the same day?

176. It is important to observe that Ms. Chipimo reported the alleged threats by the Applicant to Ms. Auer nearly two months later when she was told to do so by Ms. Manda who clearly had issues with the Applicant. Also, why would Ms. Manda who had been told of the Applicant's threat against her life sit back and ask Ms. Chipimo to tell Ms. Auer when she returned from leave? Was that because they both knew there was no truth or substance to it?

177. Why did Ms. Chipimo tell the Tribunal that she did not report the Applicant's threat to Ms. Auer at that time it was made because she was on home leave whereas in her statement to the investigators, she stated that the incident took place late in June 2009 which was before Ms. Auer went on leave in July 2009?

178. Ms. Chipimo had also reported that the Applicant sought and obtained help from other staff members for his LDI project. In spite of initiating this report and giving Ms. Auer the names of those who helped the Applicant with his project, Ms. Chipimo did not volunteer any information on this score in her witness statement to the investigators on 27 August 2009.

179. During her testimony before the Tribunal, Ms. Chipimo emphatically stated that when the Applicant approached her for help, she totally refused to render the requested help and that it was later that she heard that he had approached Messrs' Chitekwe and Mathisen. In a witness statement made on 11 September 2009, a staff member, Ms. Mlava, stated that she worked on the Applicant's LDI paper because she got approval from her direct supervisor, Ms Chipimo, to do so.

180. Mr. Mathisen also stated in his witness statement of 4 September 2009 that when the Applicant asked for his help, he reported to his supervisors Mr. Chitekwe and Ms. Chipimo both of whom he discovered had even provided inputs into the

same paper. In an email to Ms. Auer on the same subject on 25 August 2009, Mr. Chitekwe stated that the first draft of a re-written gap analysis was prepared by Ms. Chipimo and two others. Ms. Chipimo, he wrote, also took part in re-writing the research proposal.

181. In his oral testimony, the Applicant told the Tribunal that the first person whose help he sought with his LDI project was Ms. Chipimo who then went on to help him by sending him relevant materials and telling him to also ask Mr. Chitekwe for help. In the Applicant's thesis among others, he acknowledged the help given him by Ms. Chipimo. Why would the Applicant acknowledge her, if she did not assist him?

182. Why would Ms. Chipimo help the Applicant with his research, ask him to enlist the help of others, grant approval to her supervisee to help and then make the allegation that he sought help and that the affected staff members helped the Applicant out of fear? Why did she tell the Tribunal that she refused to help the Applicant when he approached her when clearly she had provided the requested help?

183. Ms. Chipimo in her witness statement stated that the Applicant is 'intellectually challenged' and not fit to be in the position of Deputy Representative. In her testimony at the Tribunal, she said she stood by her assessment of the Applicant who was her Second Reporting Officer ("SRO"), as not having the intellectual or moral capacity to be in such a senior position in UNICEF. She also spoke of sexual harassment which was engaged in by the previous Deputy Representative while staff members were not protected.

184. The fact that Ms. Chipimo would arrogate to herself the competence of assessing and attacking the intellectual capacity of her SRO where she was required to give a witness statement on the allegations she had initiated against him, spoke volumes of her arrogance and recklessness. The fact that she would irrelevantly and irreverently attack his ability to engage with governments and development partners in the same witness statement and further allege that on an occasion he had "annoyed

the NATCOM group because he was talking down at them,” ought to put anyone looking into this case on inquiry as to her credibility and motives.

185. After a holistic examination of her roles in this case, the Tribunal is convinced that Ms. Chipimo was not a responsible or reliable witness. While she ran with the hare, she clearly chased with the hounds! It is rather unfortunate that the investigators did not seek at least to find out why she had lied concerning her role in the Applicant’s LDI project.

186. Ms. Auer for her part saw fit to leave the Applicant, who she alleged told her that he had a gun and had considered taking his own life because of the way she spoke to him, in charge of the CO throughout the period of her annual leave. The fact that she did not find it necessary to report the incident and that the Applicant had been one of the better deputies she had worked with and that they both shared a good sense of humour and some laughter were sufficient factors for her to first demand an explanation from him before rushing a report to the OIA and asking for an official investigation to be done before he would return from home leave.

187. Was she partly motivated by Ms. Chipimo’s claims that the Applicant said he would use his contacts to get the Malawian President to push for action to be taken against her? Was she somehow motivated by a need to protect Ms. Manda who the Applicant claimed was her friend and country woman and who had been the source of the disagreement between them?

188. Did she feel that by asserting himself and asking Mr. Brusa for another posting, the Applicant was a “trouble-maker” and could put to question her leadership style in the Malawi CO? Why did she report a new allegation of the furniture shop incident during the course of the investigations? Did she do so because she wanted to bring as many allegations as possible against the Applicant in the hope that some wrong-doing would be established against him and make it easier to get rid of a deputy who was in the habit of embarrassing her and challenging her way of doing things?

189. It is equally difficult to believe that the Applicant would tell Ms. Chipimo about wanting to shoot Ms. Auer and Ms. Manda and that although his wife had stopped him, it was only a matter of time and he would do it; yet all she did was to tell it to another colleague who together with her did nothing about it for the next two months before she would report it to Ms. Auer at the prodding of Ms. Manda. The fact that she alleged that the Applicant told her of his intended shooting spree at a time Ms. Auer was in the office in Malawi and had not yet gone on leave and that she did not report it, seriously dents her credibility.

190. Clearly, the investigators knew that the gun allegations were wild and a joke. They knew that it would have been impossible for the Applicant or any staff member to bring a gun into the Organization's offices be it in Nigeria, Afghanistan, Somalia or anywhere else and successfully threaten their supervisor as the Applicant was said to have boasted doing in Nigeria. It would have been easy to find out if any such incident ever happened in Nigeria.

191. In view of the dynamics at play in the UNICEF Malawi CO at the time, it is not easy to dismiss the many questions that arise as to the origins of and reasons for the several allegations made against the Applicant and the real motives of those who made them. Many of these questions are not answered by the investigation for the simple reason that they were never asked.

192. In fact, the Applicant's version of events was never tested by putting it to those accusing him, instead, every other version was elevated to the status of truth and preferred to his. Even the story as told by the furniture storekeeper who refused to give a statement or file a report was accepted as true and the Applicant who evidently was attacked and came out with a torn shirt was adjudged to be the aggressor. This yawning gap exists because the investigators were not interested in what could amount to exculpatory evidence for the Applicant. These unanswered questions are fatal to the Respondent's case.

193. It was variously and strenuously canvassed by the investigators in their investigation report and in their testimonies before the Tribunal that staff members were afraid of the Applicant because he was the Deputy Representative of the CO. It was for this reason that, according to the investigators, the Applicant requested help with his LDI project and the staff members did not refuse even though they were inconvenienced. It was also for the same reason that the female staff members whom the Applicant allegedly sexually harassed could not report him at the times the misconduct happened.

194. No evidence was tendered to show why this kind of fear existed. Had the Applicant ever threatened, intimidated or mistreated any staff member in any way in the past? All the evidence pertaining to the Applicant's disposition in the workplace showed that he was overly friendly, that he visited the offices of his subordinates fairly frequent and that he was humorous and told many jokes.

195. If indeed staff members in the Malawi CO feared the Applicant because of his position, it is to be expected that they would be even more fearful of Ms. Auer, the Resident Representative herself! Since fear of those in high positions was part of the culture of the Malawi office, it stands to reason that the investigators and UNICEF Management ought to have treated the statements of those staff members who were approached by Ms. Auer when she undertook her initial fact-finding exercise and gave statements in support of the allegations against the Applicant with due suspicion. Were these witnesses minded to inculcate the Applicant to please Ms. Auer who was the most senior officer at the Malawi CO?

The investigation of the allegations in this case

196. An investigation has been defined in the Investigations Manual of the Office of Internal Oversight Services ("OIOS") of the United Nations as "a legally based

and analytical process designed to gather information in order to determine whether wrongdoing occurred and, if so, the persons or entities responsible.”¹⁰

197. Generally, an administrative investigation is aimed at gathering evidence which is relevant in order to determine whether a given misconduct has occurred and if disciplinary action is necessary.

198. An investigation is an independent function conducted primarily for the interest of the Organization rather than an individual. Some of the standards that must be maintained by an investigator in the conduct of an investigation include: (1) competency, (2) objectivity, (3) impartiality, (4) fairness and (5) the observance of the principles of natural justice.

199. The conduct of the investigation should demonstrate the investigator’s commitment to ascertaining the facts of the case. In other words, the investigator must be totally focused on the investigation he/she is carrying out. The results of the investigation are not his concern but that of the decision maker. In ascertaining the facts, he/she must consider all relevant evidence whether inculpatory or exculpatory.

200. In the instant case, the investigations commenced following the receipt of a report written sent by Ms. Auer, to Claus Andreasen, the then Director OIA, UNICEF. The said report detailed about three specific allegations against the Applicant who at the time was the Deputy Representative, UNICEF, Malawi. The said allegations included threats to kill certain UNICEF staff members, sexual harassment and abuse of authority.

201. In her sworn testimony before the Tribunal, Ms. Auer stated that following a report of allegations made to her on August 15, 2009 by Ms. Chipimo against the Applicant, she quickly contacted Mr. Brusa to seek advice on what to do in the circumstances. He then advised her to get more details from those involved and send a report to the OIA.

¹⁰ See Chapter 1.1 Investigations and Other Types of Inquiries, p.2 (March 2009)

202. Ms. Auer sent the report to OIA on 25 August 2009 and copied others including Mr. Brusa. On the same day, Mr. Brusa forwarded a copy of the said report to Mr. Curtis of the OIA who was to become the lead investigator in this case. In her report, Ms. Auer after detailing the three allegations against the Applicant stated that she would like for appropriate action to be taken as soon as possible. She stated further, that the Applicant was at the time on home leave until September 7 2009 and that if investigations were to be done, she preferred that they be done while he was still away from the office.

203. Mr. Curtis told the Tribunal that he discussed and agreed with the Director OIA that a mission be sent to Malawi to investigate the allegations. The Regional Director in Nairobi was contacted and he assigned Mr. Brusa as a co-investigator. Mr. Brusa told Mr. Curtis that he usually gave presentations on various topics to staff members when he visited country offices.

204. Upon the arrival of the investigative mission in Malawi, Mr. Brusa conducted a half-day workshop for all UNICEF staff members on ethics and standards of conduct. In that workshop, he explained the UNICEF zero-tolerance policies on sexual harassment, abuse of authority and reputation management. Mr. Curtis in the same workshop conducted a session on the work of the investigation office.

Were proper investigation standards observed or adhered to in this case?

1) Independence

205. An investigation must be independent of the complainant, the subject, witnesses and any third parties. The investigator's role is to establish the facts of the case. This he does through collecting and testing of evidence. While the relevant staff rules require that an investigation be carried out where misconduct is alleged, the investigation is not merely carried out with the aim of fulfilling such a requirement where conclusions had been reached as to the guilt of the staff member who is the subject of the investigation.

206. Section 8.1 of CF/AI/2009-004 provides that when a UNICEF manager has sent a report of misconduct to the Director OIA following a preliminary fact-finding, it is the responsibility of the said Director to review the information adduced and then decide whether further, detailed investigative steps are warranted.

207. In the present case, it is in evidence that Ms. Auer sent a copy of her report to the OIA Director and copied it to Mr. Brusa who on the same day forwarded it to Mr. Curtis, an investigator with the OIA who later became the lead investigator in this case. Mr. Brusa became a co-investigator. Considering that it was Mr. Brusa that had advised Ms. Auer to send the report to OIA, it is obvious that he was following up on the report when he personally took it upon himself to send the same report to Mr. Curtis of the OIA in spite of the fact that the OIA Director had received it.

208. Why did Mr. Brusa send a copy of the report to the man who would become the lead investigator? It was surely up to the Director OIA to forward it to the investigator in his office as he deemed fit. Why also did Mr. Brusa, a man who had advised and guided the writing and sending of Ms. Auer's report to OIA, end up becoming a co-investigator in a matter in whose outcome he clearly had an interest? Could he in the capacity of an investigator conduct an independent exercise?

209. In *Mmata* UNDT/2010/053, the Tribunal held that it was inappropriate for the UNICEF Human Resources officer who had reported an allegation to conduct part of the investigations on behalf of OIA. It was the view of the Tribunal that the same did not accord with the highest standards of independence and impartiality expected of an investigator especially since the Human Resources officer clearly had an interest in the outcome of the investigation.

210. It is difficult, in view of the foregoing circumstances, to conclude that the investigators had approached the exercise with an open mind devoid of any pre-determined agenda. The Tribunal is of the firm view that the apparent lack of independence on the part of the investigators had definitely compromised the investigation process.

2) *Competence*

211. An investigator must be competent. This means that he or she must possess the ability, knowledge and skills to conduct the investigation assigned to him. He must also study the allegations referred to him for investigation so that he can go about his task knowing what facts would be relevant to establish whether the alleged misconduct occurred or not. In order to establish a set of facts relevant to his assignment, the investigator must be familiar and in fact knowledgeable about the elements that constitute the misconduct he is investigating.

212. The investigators here appeared not to know the elements that constitute the misconduct of sexual harassment or abuse of authority which they were investigating. The misconduct is fully defined in CF/EXD/2008-004 of 10 October 2008. It is important that investigators are familiar with the relevant legislation that define the misconduct they investigate rather than using their own impressions or beliefs of what constitutes or ought to constitute the particular misconduct.

213. For instance, allegations that the Applicant had propositioned some female staff members or made lurid jokes in their presence; which actions were not shown to have rendered the workplace intimidating, offensive or hostile for them, even if believed, cannot establish the misconduct of sexual harassment.

214. In the same way, allegations of abuse of authority based on requests made to some of the Applicant's subordinates for help with his LDI project cannot establish the misconduct alleged. It was not shown that the Applicant improperly used his position or power against anyone. It was not shown either that he had employed threats, intimidation or blackmail to influence the career or the employment conditions of any of those supervisees to whom he made the request.

215. The investigators' incompetence was also apparent when they went to great effort in investigating and making findings as to whether the Applicant had plagiarized the works of others. The issue of plagiarism is totally outside the remit of the UNICEF investigators as only the relevant academic institution can make a

finding on plagiarism, in the same way that only a competent court invested with the relevant jurisdiction can pronounce on copyrights.

3) *Objectivity*

216. It is required that an investigator exhibit objectivity in the course of his work. The Tribunal is concerned that this requirement was jettisoned in what appeared to be an unusual zeal to establish misconduct against the Applicant.

217. Mr. Brusa had set out alone to investigate a story that the Applicant had one year before, had a physical encounter with a storekeeper over the supply of deficient merchandise to him. At page 5 of the investigation report, it was stated that the evidence of the UNICEF driver who drove the Applicant to the store was similar to the account of the incident by a certain Mr. Shohel, to whom Mr. Brusa had spoken at the store.

218. Documentary evidence consisting in the witness statement of the UNICEF driver and the note of Mr. Brusa's interview with Mr. Shohel and others in the store show that the two accounts are far from similar. While Mr. Shohel and others were said to have told the investigator that the Applicant was held by the hand to prevent him from entering an office in the store and that he then threatened to burn down the shop and then tried to choke Mr. Shohel; the driver stated that the storekeeper placed his hand on the Applicant's chest, who then grabbed the storekeeper's hands and shouted that he was a diplomat and UNICEF Deputy Representative. It was also the account of the driver that the Applicant's shirt was torn by the storekeeper.

219. In concluding that the Applicant had lost his temper and acted in a manner unbecoming of an international civil servant, the investigators had sought to characterize the Applicant as the aggressor. There was no effort made to test the account of the store personnel by confronting them with the account of the driver. These led to UNICEF Management agreeing with the investigators' conclusions and

finding that a charge of assault had been established against the Applicant and that he had used his position to intimidate the storekeeper.

220. With regards to the Applicant's LDI project, Mr. Brusa, after requesting and obtaining a copy of the Applicant's thesis from the academic institution, emailed Mr. Curtis with a comment that the Applicant had only acknowledged the staff members who assisted him with his project because he was under investigation. This posture, without doubt, betrays the state of mind of an investigator who would not credit the subject of the investigation with any modicum of respectability and who was not objective but rather had a set agenda.

4) *Impartiality*

221. Impartiality is the absence of bias. Impartiality is an ethical and professional requirement and it is not expected that investigators would embark on an assignment without a set terms of reference. In this case, the terms of reference appeared to have been the investigation of any wrongdoing that may be alleged against the Applicant at any time. It is appreciated that in the course of an investigation, the facts revealed could point to some other misconduct having occurred. This does not permit investigators to embark upon a fishing expedition against the subject of an investigation.

222. The investigators started their assignment on the basis of a report sent by Ms. Auer to OIA. In the course of the said investigation and while in Malawi, they began to collect new allegations against the Applicant.

223. For instance, Ms. Auer who had done a preliminary fact-finding and sent a report to OIA precipitating the investigation mission to Malawi, brought forward a new allegation during the investigation process about the Applicant intimidating a storekeeper with his position at a time when she had not yet arrived to take up her duties in the country office.

224. The investigators quickly added this new allegation to their repertoire of investigable misconduct. This style of collecting new allegations against the subject during an investigation, which new allegations are not relevant to the allegations being investigated, is laden with bias and simply conveys the wrongful message that whenever an investigation is launched, every means possible must be found to nail its subject.

225. One of the methods evidently employed by the investigators included at least the cajoling, if not the coercing, of some of the unwilling staff members in the Malawi office into giving witness statements that would inculcate the Applicant. Such a methodology is dangerous when employed by investigators in an administrative law setting. The reason is that the ordinary staff member would not like to find him or herself on the wrong side of an investigator who could one day be investigating allegations against him or her and would therefore readily oblige the investigator with information which may be untrue.

226. For instance, in an email dated 14 September 2009, Mr. Brusa after obtaining a written account of a female staff member's alleged encounters with sexual overtones regarding the Applicant, wrote to the said female staff member as follows:

Thank you. On behalf of the system, and on behalf of the future women that you have rescued tonight.....Please talk to the other women, fear enslaves us but truth will set us free.

227. On the same date, Mr Curtis also wrote to the same woman thus:

Thank you very much indeed for passing on this information. I am not surprised that you were shocked by such revelations and totally agree that it (sic) inappropriate behaviour...thank you for being so courageous. Please rest assured that I will do everything in my power to ensure that this matter gets the correct attention.

228. The afore-reproduced emails from the investigators to a witness, in practical terms, amounted to an affirmation that the Applicant was presumed guilty from the start and a funeral dirge for his professional career. The bias is unmistakable and the yet-to-be written investigation report was completed with the messages of the two

emails. It must be noted that on the date and time the emails were written, the Applicant had not even been interviewed by the investigators. Can it be said that the investigators were open to impartially hearing the Applicant's explanations since they appeared to have formed their impressions even before they would interview him?

229. What was the female staff member being thanked for? Who had she rescued? Why should she be appealed to by the investigator to make other women bring complaints? What correct attention was the investigator promising the female staff member who evidently was persuaded to bring a complaint? Why was he assuring her that the Applicant had behaved inappropriately at a time he had not interviewed or heard from the Applicant?

Fairness and the observance of the principles of natural justice

230. It is a principle of natural justice that anyone who is the subject of an investigation must have advance notice of the allegations and evidence against them. The person against whom allegations have been made ought to be able to respond in writing before the investigation interview. The subject of an investigation must be provided the opportunity to challenge the allegations and the evidence against him or her.

231. The evidence before the Tribunal is that Mr. Curtis sent an email to the Applicant on 9 September 2009 in which he informed him that he was the subject of an investigation. The relevant paragraphs of the said email read as follows:

After receiving a report from Ms Auer, your Representative, concerning your conversation with her that one evening, following a performance discussion, you had felt like committing suicide, the office of Internal Audit (OIA) investigation section launched a fact-finding mission to Malawi. I am now taking this opportunity to inform you that based on testimony received; you are now under investigation for threats to kill certain UNICEF staff in Malawi. The testimony states that you clearly said you had left work and gone home to get your gun with the intention of bringing it into the office and shooting people.

232. The report sent by Ms. Auer on 25 August 2009 to the OIA had included allegations that the Applicant engaged in sexual harassment and threatened to shoot staff members and to commit suicide. The next day, she had sent another report to Mr. Brusa, who later became an investigator in the case, alleging that the Applicant had abused his authority while doing his LDI study.

233. In his note for the record on the incident at the furniture store, Mr. Brusa had stated that he was informed during the investigations in Malawi that a physical clash had occurred in a furniture shop involving the Applicant. Why was the Applicant not given advance notice of all these allegations against him? Was this withholding of information meant to ambush the Applicant during the investigation interview?

234. In answer to a question put to Mr Curtis in cross-examination as to why the Applicant was not informed of the allegations in the email of 9 September 2009, he stated:

before that date, we didn't have any written allegation of sexual harassment, we had the information that there might be female staff members that had been sexually harassed but we certainly didn't have them in writing.¹¹

235. The investigator stated further:

at the time that we wrote to him to inform him that ...that we were going to interview him, that he was under investigation for threats to kill, at that moment in time, I had insufficient information to inform him about anything else that we were investigating...we also believed that he was in contact with, what we firmly believed to be his extra-marital girlfriend in Malawi who, I believed, ... he already knew...what the questions were gonna (sic) be ... then I would have to sort of think about how he could have known the subject areas that we were looking at. I don't think it came as a surprise to him during the interview.¹²

236. Mr. Curtis's sworn testimony on this issue was simply that he believed that the Applicant's girlfriend who worked in UNICEF Malawi had told him about the

¹¹ Hearing on the Merits Transcript at p 30 of 43

¹² Hearing on the Merits Transcript at p 32 of 43

allegations against him and the investigators therefore did not need to observe one of the core principles of natural justice during the investigation! This statement under oath by Mr. Curtis brings out in bold relief the “ambush method” adopted by the investigators in this case. It also gravely dents the credibility of the entire investigation process and shows it up as most unfair.

237. In spite of claiming that the Applicant was not informed about the allegations of sexual harassment because by 9 September 2009, when the email was sent to notify him of the investigation, the alleged victims had not given witness statements, the investigators had gone ahead to ask the Applicant about the sexual harassment allegations even when they did not have the relevant witness statements. The interview transcript at page 132-133 shows Mr. Brusa putting a question to the Applicant thus:

but when I had already heard from three women and one statement is even in writing. Then when I hear that three more of them had gone to see the ombudsperson, staff they have complained, you understand, they cannot all be wrong, you know. There must be some misunderstanding or whatever, although the grabbing of the breast, there is no misunderstanding.

238. Again during the investigation interview with the Applicant, questions were put to him about alleged sexual harassment of female staff members without revealing the names or identities of the alleged victims. For instance from pages 68-70 of the interview transcript, the Applicant was questioned about Female 1 without revealing her identity. He was also questioned as shown from page 71-74 of the transcript about the allegations made by Female 2 without telling him who he was said to have made the comments to about women in Lesotho.

239. Another question was put to the Applicant about trying to touch the breasts of a female staff member whose identity was not revealed to him. This method of telling the subject of an investigation that he had sexually harassed people without telling him who his alleged victims were not only amounted to an abuse of his rights but meant also that the allegations had not been properly addressed by the investigators.

The Appeals Tribunal has held that it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.¹³

240. For any investigator to claim that he or she had established certain alleged facts without allowing the alleged perpetrator to know and answer fully to what he was alleged to have done is unprofessional and a betrayal of the responsibility entrusted to the investigator.

241. Pages 79-103 and 134-137 of the Applicant's 138-page interview transcript were taken up with questions and answers on what personal relationship the Applicant had with a particular female staff member in the UNICEF Malawi CO, whether the Applicant had a sexual relationship with her and why he had made twice as many calls to her phone as to anyone else's. The questioning in this regard was meant to establish that the Applicant had engaged in an extra-marital relationship with the said staff member in spite of her witness statement denying such a relationship and the denials of the Applicant.

242. The concern that this line of questioning raises is: what allegation was this probing meant to establish? Why would an investigator in the United Nations be asking the subject of an investigation why his first marriage failed and if he was afraid of being caught cheating by his current wife?

243. If indeed the female staff member was the girlfriend of the Applicant, was it a matter that was relevant to the allegations made against him and was it a matter for investigation? Clearly, the Applicant's fundamental right to privacy and family life were being invaded here in an investigation which it appeared only had for its terms of reference - the total discrediting and humiliation of the Applicant.

244. One of the principles of natural justice is that the other side be heard. For an investigator, this means that apart from hearing those making accusations, he has a

¹³ See *Liyanarachchige* 2010-UNAT-087

duty to hear the subject of the investigation. Hearing the person accused involves considering and investigating his explanations.

245. The Applicant told the investigators that his problems started after he asked a critical question following Ms. Manda's presentation on the topic of deviance study. Since he appeared to imply from the question that the office had not taken any action on similar recommendations made in the past years, he had embarrassed the presenter and Ms. Auer, who wanted to protect her.

246. He also said that Ms. Auer felt embarrassed when he revealed that Ms. Chipimo had told him about the Sunday lunch with the PS and Ms. Manda and the fact that he was the topic of discussion. The Applicant further said that Ms. Manda who was his supervisee was in the habit of hiring consultants by bypassing him and getting approval directly from Ms. Auer even when he was OIC.

247. Not only were the Applicant's explanations not considered or investigated, the investigators used information that was not on the record when they interviewed the Applicant. Specifically at page 47 of the interview transcript, Mr. Curtis asked the Applicant "Have you ever referred to Karen (Ms. Manda) or Carrie (Ms. Auer) as that white woman?" When the Applicant denied it he persisted "...but we've been told that you referred to them both individually as that white woman."

Were the procedures specified in UNICEF Executive Directive CF/EXD/2008-004 for conducting investigations followed in this case?

248. The UNICEF Executive Directive on prohibition of harassment, sexual harassment and abuse of authority aside of defining the afore-listed misconducts that constitute the special class of prohibited conduct provides guidelines for reporting, preventing, correcting, investigating and monitoring them in the workplace.

249. Sections 5.10 through 5.15 specify how a complaint should be filed and provides for the protection of a complainant from retaliation under UNICEF whistleblower policy. When a formal complaint is made alleging that prohibited conduct has

occurred, a preliminary assessment of the complaint must be made by the OIA as provided for under section 5.16.

250. This preliminary assessment will include an interview of the complainant in person or by phone by the OIA with a view to: (a) clarify the allegation, (b) ensure that the complaint pertains to harassment, sexual harassment or abuse of authority, (c) make sure that all available evidence is submitted and (d) consider the possibility of informal resolution.

251. Section 5.18 provides that if the Director OIA concludes that the complaints are credible and merit a comprehensive review, the alleged offender is then notified and the details of the complaints and the names of the complainants are provided to him. He will then be invited to respond within fifteen days in writing including any explanations he may have, relevant materials and the names of any witnesses that might assist in the event of an investigation.

252. Where an investigation is found by the OIA Director to be warranted, it will begin as soon as possible but not later than one month following the alleged offender's reply.

253. In this case, a report containing allegations of a threat by the Applicant to shoot certain staff members and of engaging in sexual harassment was sent to OIA by Ms. Auer on 25 August 2009. The next day, 26 August 2009, she sent another report this time to Mr. Brusa stating that the Applicant had requested and got help from others in the office for an academic LDI course to which UNICEF had nominated him. It was upon this second report that the allegation of abuse of authority was based.

254. In the first report of 25 August 2009, Ms. Auer had stated that she wanted "appropriate action" taken "as soon as possible" and suggested that any investigations be done before the Applicant, who at the time was on home leave, would return. The apparent efforts to comply with Ms. Auer's wishes in this regard meant that the procedures laid down in the relevant Executive Directive of 2008 were breached.

255. By 6 September 2009, less than two weeks later, the duo of Messrs Curtis and Brusa had arrived in Malawi to start an investigation. Mr. Curtis told the Tribunal under oath that he was in contact with Ms. Auer and that he then discussed with the Director OIA who agreed that an investigation mission be sent to the Malawi office. This was totally against due process as provided for, by the Executive Directive.

256. In the investigation report, it is wrongly stated that Ms. Auer had only reported that the Applicant had, after being criticized by her, contemplated suicide and had gone home to pick a gun and shoot certain staff members but his wife had stopped him. The report went on to state that other allegations of prohibited conduct and assault “emerged” during the course of the investigations. This was certainly far from the true position.

257. Considering that alleged prohibited conduct formed part of the reports sent by Ms. Auer on 25 and 26 August 2009, why was a preliminary assessment of the complaints not made by the Director OIA as required under CF/EXD/2008-4? Even if it was true that the report of sexual harassment and abuse of authority were made while the investigative mission was in Malawi, a preliminary assessment, which is an essential part of the proper procedure for initiating an investigation into the allegations had to be followed. Why did the OIA and their investigators prefer to throw the legally required procedures overboard and take a shortcut instead?

258. A preliminary assessment as required by the Executive Directive would include proper clarification of the allegations by the OIA after speaking with the complainants. The Applicant must also be provided with the necessary information regarding the allegations and the identity of his accusers. He must additionally be given the opportunity to properly respond to the allegations in writing. The OIA had a duty to consider whether the allegations could be settled informally. Compliance with the proper procedures would have aided the OIA, whose duty it is to conduct investigations in deserving cases, towards properly scoping the investigation.

259. This failure to follow due process as provided for in the UNICEF Executive Directive, which legislation created the misconduct of prohibited conduct, rendered the investigations not credible, incurably flawed, an abuse of due process and the said failure is altogether fatal to the case for the Respondent.

Psychiatric medical assessment of the Applicant during the investigations

260. While replying to questions in cross-examination, Mr. Brusa spoke about the Applicant undergoing a number of medical tests and meeting with psychologists. When asked by the Tribunal as to the whereabouts of the Applicant during the investigations, his testimony in that regard is hereunder reproduced as follows:

He was on home leave, annual leave, he was on leave and then he was supposed to go back but we were so concerned about the threat to commit suicide, the threat to kill other people, that we offered him, of course on a voluntary basis, to see the medical chief of the medical services in Nairobi and he was here on DSA paid by the Organization for a number of days and during the period, he underwent a number of medical tests and met with psychologists and so on.¹⁴

261. In his testimony, Mr. Curtis spoke of the said medical tests which the Applicant was made to undergo as follows:

And during that period because of concerns and I think it was the regional office that had quite rightly grave concerns about the fact that he might harm himself or somebody else, there was some instruction for him to go to Nairobi to see the UN medical doctor and take some tests to see how, unstable he was. I think it was generally considered that if somebody is threatening suicide and you know, for all intents and purposes, we couldn't doubt that that's what had happened at that point, then it's certainly right, for their own benefit, they seek some sort of medical examination...¹⁵

262. The Applicant during his testimony-in-chief spoke of the medical examination which he was made to undergo thus:

Then he [Mr. Brusa] took me down to the medical centre.

¹⁴ Hearing on the Merits Transcript at p 90 of 93

¹⁵ Hearing on the Merits Transcript at p 8 - 9 of 43

I went to the medical office, met the doctor in the presence of Nino, [Mr. Brusa] Nino explained to the doctor why I was there, the doctor said just be seated, I will take care of him. Nino went back to his office and the doctor examined me, took some blood from wherever and we started talking and he said, what have you done? The doctor asked me what have you done? I said I don't know, I said I was just brought here, told to come for a medical clearance. He said do you know they have to do an MRI? I said do you mean scan my brain? He said yes, I said for what? He said well that is what they are requiring. I said sure, whatever is required do it. So they did up to 14 to 15 different tests including the MRI and after they got finished, I was cleared fit for work, nothing was wrong.

...there was a psychological test and that is what the doctor, in fact that was the first part. The doctor asked me some questions here and there. Every doctor I went to, had their own series of questions they had to ask... and then they did the blood, they did the MRI, whatever.¹⁶

263. Among the documentary evidence before the Tribunal is an email sent to the Applicant by Mr. Brusa on 4 September 2009. The subject of the said email is “Medical evacuation to Kenya.” The relevant portion of the email stated:

However, I understand that you have today informed the Malawi office that you have decided to change your plans: you have decided to travel back to Malawi directly from Liberia where you are currently on leave, and not to travel to Kenya on Sunday as requested. Please note that you are not medically cleared to travel to Malawi. You need therefore to travel to Nairobi (your return flight from Liberia to Nairobi on Sunday has a stop-over in Nairobi) and meet with Dr. Kituyi at the time indicated above. You need to abide by the rules on medical clearance and medical examination, a relevant excerpt of which is cited below for your ease of reference.

264. The “relevant excerpt” referred to in the email to support the medical evacuation instruction are sections 1.1 and 9.1 of ST/AI/2005/12 on Medical Clearances and Examinations.

¹⁶ Hearing on the Merits Transcript at p 24 - 25 of 78

265. While section 1.1 of the staff rule cited to support the Applicant's medical evacuation to Kenya for medical clearance explains the purpose of an initial medical clearance of candidates selected for employment, section 9.1 provides as follows:

All staff members may be required at any time to undergo medical examination, when requested by the United Nations Medical Director or a medical officer duly authorized by the Medical Director, to protect the health and safety of staff members or to follow up chronic medical conditions.

266. Under the above-quoted section, only the United Nations Medical Director or a medical officer duly authorized by him or her can request a serving staff member who has undergone an initial medical clearance at the time of first employment and who does not fall under section 4 of the Administrative Instruction to present himself for medical clearance.

267. Mr. Brusa who was a co-investigator in the case instead wrote to order the Applicant to present himself in Nairobi for medical clearance. In his testimony, he told the Tribunal that "we were so concerned" that they offered the Applicant on "a voluntary basis" to see the Chief of Medical Services in Nairobi. Mr. Curtis stated that it was the Regional office that gave instructions for the Applicant to get medical clearance.

268. The email from Mr. Brusa to the Applicant on 4 September 2009 was an order to proceed to Nairobi for medical clearance, not an offer made to him on a voluntary basis as Mr. Brusa sought to claim in his testimony. The Applicant was not even informed of the nature of the medical examination he was to submit to. An apparently confused and humiliated Applicant was led to the Joint Medical Service offices and handed over to medical doctors for psychiatric evaluation among other tests.

269. What is clear is that there was no request for this extreme procedure by the United Nations Medical Director or anyone authorized by him/her. It is to be expected that the Medical Director would make such a request when he/she is

provided with such information which upon evaluation and enough clarification would lead him/her to a conclusion that the procedure was necessary.

270. It is not within the competence of an investigator, as happened in this case, to usurp the functions of the United Nations Medical Director while investigating a case and resort to demeaning the subject of an investigation in the way that they have unfortunately done here. Obviously, Mr. Brusa was acting as investigator, human resources officer and medical director all rolled into one. The total lack of respect for the Applicant's person and the affront to his human dignity completely shows up the disciplinary process leading to his summary dismissal as cruel and nothing short of a hatchet job.

271. UNICEF is a humanitarian Organization. Its humanitarian mandate must be expressed in the way the Organization relates, not only to its intended constituents – vulnerable children and women, but also in its relationship with and treatment of the staff members who constitute its brains, hands and legs.

The peculiar role of Mr. Brusa in the process leading to the Applicant's summary dismissal

272. The Tribunal at this juncture finds it necessary to examine the significant role played by Mr. Brusa of the UNICEF Regional Office in Nairobi in the reporting and investigation of this case. This is with a view to determining how much influence he may have exerted on the entire process leading up to the summary dismissal of the Applicant and whether this role contributed in one way or the other to the credibility of the process.

273. When Ms. Auer first received a report from Ms. Chipimo about wrong-doings on the part of the Applicant, she immediately contacted Mr. Brusa on 18 August 2009 to discuss and seek his guidance. He advised her to conduct an initial fact-finding exercise and send a report to OIA in New York. Ms. Auer complied with this advice and sent the said report to the OIA barely one week later - on 25 August 2009.

274. The next day 26 August 2009, Ms. Auer sent another email to Mr. Brusa as a follow-up to an earlier discussion. In that email, she reported the allegation that the Applicant had asked staff members to write a paper for him for his LDI course. This allegation was to give rise later to a charge against the Applicant of the prohibited conduct of abuse of authority. The records do not show whether this allegation was ever sent to the OIA.

275. Meanwhile, on 19 August 2009, even before he was appointed a co-investigator in the matter, Mr. Brusa who had learnt from Ms. Auer that the Malawi CO ombudsman was in Nairobi, sent for him. During their meeting, they discussed the issue of reports of sexual harassment said to have been made to the said ombudsman by some female staff members against the Applicant.

276. Mr. Brusa was copied by Ms. Auer on the report against the Applicant to the OIA. It was he who sent Ms. Auer's report on the LDI allegation to Mr. Curtis before the decision was made to undertake an investigation. He followed up with Mr. Curtis to ensure that an investigation was commenced.

277. Less than two weeks after the report to OIA, Mr. Brusa was in UNICEF Malawi CO as a co-investigator of the allegations against the Applicant. Before starting the investigation in Malawi, he convinced Mr. Curtis that he needed to first make a presentation to staff of the country office on issues of ethics and prohibited conduct. About five hours (8.30am – 1.30pm) were spent on this presentation before the investigative mission would start. Mr. Curtis, who told the Tribunal in evidence that at first he was dubious about it, sat on the panel also and addressed the meeting on investigative processes.

278. While the investigations were underway, Mr. Brusa received the report of a new allegation from Ms. Auer who told him that the Applicant had engaged in a physical clash many months before in a furniture store in Lilongwe. Mr. Brusa personally undertook an investigation of this latest allegation by obtaining a witness statement from a UNICEF official driver who was said to have driven the Applicant

to the store. He then visited the furniture store alone and spoke to a Mr. Shohel and others in the store who gave him their own version of the incident although none of them agreed to make a complaint or sign a witness statement.

279. He however wrote a note for the record which was used by him and Mr. Curtis to find that the Applicant had assaulted the storekeeper. In response to a question under cross-examination, he stated that he did not challenge the store personnel as to why they did not want to give a statement, neither did he challenge them on the version of the facts as narrated by them and that all he tried to do was to understand what they had to say. This was in spite of being in possession of a witness statement whose version was different and which was made by the UNICEF driver who witnessed the incident.

280. When one of the three females in the Malawi CO who it was alleged the Applicant had sexually harassed sent an email detailing incidents with the Applicant to the investigators, Mr. Brusa wrote back to her on the same day and thanking her for having rescued other women, while encouraging her to talk to other women to bring reports against the Applicant.

281. During the investigations, Mr. Brusa wrote to officials of the Gordon Institute of Business Science of the Pretoria University, the institution offering the LDI course in which the Applicant was a participant, asking for a copy of the Applicant's thesis. When this was sent to him, he forwarded it to Mr. Curtis the same day with the following comment:

Dear Kevin, here we go....when he submitted he sensed and after he knew he was under investigation, hence the Acknowledgment: With grateful heart I wish to appreciate the support from the staff in the Health and Nutrition units in the Ministry of Health, UNICEF and the Hospital facilities for their willingness to respond to the interviews and questionnaires. Special thanks to Ms. Miriam Chipimo, Mr. Stanley Chitekwe, Ms. Grace Mlava, Ms. Ellubey Mananga, Mr. Benson Kazembe and Ms. Barbara Mtsuko for the extreme time and effort they spend in ensuring that this project is concluded timely.

282. Back in Nairobi following the investigative mission to Malawi, Mr. Brusa physically took the Applicant to the Joint Medical Services office in Nairobi to hand him over to doctors for a psychiatric evaluation. With regard to this, Mr. Brusa in answer to a question from the Tribunal said that “we offered him of course on a voluntary basis to see the chief of Medical Services in Nairobi...”

283. The Applicant for his part stated under oath that when he arrived in Nairobi as instructed by both Ms. Auer and Mr. Brusa on the phone and by email, he went to the Regional office to see Mr. Brusa who took him to the medical centre and in his presence explained to the doctor why the Applicant was there. When Mr. Brusa left, the doctor told the Applicant that he was required to undergo an MRI scan. He also underwent some 14-15 other tests.

284. When led in evidence by the Respondent’s counsel, Mr. Brusa spoke about allegations of plagiarism with regard to the Applicant’s LDI project. It is significant to note that he was the only witness that used the word on at least three occasions.

285. In reviewing the role of Mr. Brusa in this case, the Tribunal is disappointed at how his authority, influence and will are unwholesomely writ large in the entire process of report and investigation. The fact that he had held discussions with Ms. Auer and received reports from her about the Applicant’s alleged wrong-doings and had advised and then guided her to gather information and to quickly send a report to OIA had tainted him from the start. It is strange that he was appointed a co-investigator in this case and that he accepted the assignment in spite of his obvious interest in its outcome.

286. His appointment as a co-investigator completely corrupted the investigation process. Training of the staff members who were to give information on the allegations being investigated on ethics and prohibited conduct and the work of investigators as a prelude to starting an investigative mission was in very bad taste and utterly prejudicial to the process.

287. His bias and fore-gone conclusions even during the investigation are highly manifest in the email to Mr. Curtis stating that the Applicant had acknowledged staff members who helped him in producing his written project work because he knew he was being investigated. His email to a female staff member, who had alleged that the Applicant made some sexual remarks and jokes to her, thanking her for rescuing some future women is similarly laden with bias and judgment.

288. In Mr. Brusa's lone investigation of the furniture store incident where the storekeeper refused to make a complaint or give a witness statement, and where in spite of an earlier differing account by a UNICEF driver, he did not challenge the story of the storekeeper; there is so much bias that the question arises as to why he undertook the investigation alone. In fact what he achieved was the recording of inadmissible hearsay evidence.

289. In the absence of a properly documented authorization for a psychiatric evaluation of the Applicant, the Tribunal is not in any doubt that the said evaluation was unlawfully orchestrated and executed probably as part of a process to humiliate the Applicant by Mr. Brusa and Ms. Auer.

290. The involvement of Mr. Brusa as co-investigator stripped the process leading to the Applicant's summary dismissal of independence, objectivity and impartiality. Considering that in the case of *Mmata* cited earlier, Mr Brusa's un-called for involvement in the investigations against *Mmata* was frowned upon by the Tribunal, UNICEF management needs to critically examine its investigative processes and the apparent license of some of its officers in unduly influencing investigative outcomes.

Findings

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

On the Charge of Assault

a. The investigators did not establish a case of assault of the storekeeper against the Applicant. The allegation was totally outside the scope of the investigative mission but was hastily picked up during the course of the investigations and its investigation conducted with palpable bias.

Sexual Harassment Allegations

a. There is no evidence that the words allegedly spoken by the Applicant were accompanied by any suggestive actions or gestures as to lead to the singular conclusion that he wanted sexual favours from Female 1. The circumstances surrounding the allegations made by Female 2 against the Applicant did not amount to sexual harassment.

b. The accounts of Female 3 fell far below actions that would constitute sexual harassment. The case of sexual harassment of the three female staff members was never established.

c. The tests to determine whether sexual harassment actually occurred in all three cases as defined by the relevant United Nations and UNICEF rules were totally ignored by the investigators. Instead they descended into the arena of personal morality that their investigative mandate did not allow.

Abuse of Authority

a. There is no evidence which showed or pointed to any staff member in the UNICEF Malawi office being intimidated or suffering in any way on account of not wanting to help the Applicant with his LDI research.

b. A determination that the Applicant had engaged in plagiarism is within the exclusive competence of the relevant academic institution. The investigators had no competence or jurisdiction in this regard and unfortunately sought to re-write and re-interpret United Nations and UNICEF Rules based on their own individual brands of morality.

c. Mr. Abdi's reasoning that where a supervisor requested a staff member to do some additional work, the said staff member would feel unable to refuse in order not to jeopardize their career did not establish that abuse of authority under the relevant rules had occurred.

d. There is no evidence that shows that helping with the LDI project conflicted with any work in the office. The claim that the supervisors of those who helped were not contacted is contrary to the statements of the staff members themselves. There is documentary evidence before the Tribunal showing that the Applicant acknowledged all those who helped h in his thesis.

Motive and credibility

a. The accounts of the so called 'three credible witnesses' were totally different. While it appears that the colleague to whom Ms. Chipimo said she reported the Applicant's threat to shoot people was not contacted by the investigators or did not confirm her story, it is unfortunate that the investigators would misrepresent the evidence in this way. The simple facts are that the three separate persons in the Malawi CO gave three different accounts of the allegations involving threats to shoot.

b. The investigators did not investigate the Applicant's claims that the allegations were untrue and merely concocted by Ms. Chipimo to ingratiate herself with Ms. Auer.

c. The Tribunal is of the view that Ms. Chipimo's motives and credibility ought to have been viewed critically and thoroughly investigated especially in the light of the Applicant's explanations. She was not a responsible or reliable witness

d. No effort was made to investigate Ms Auer's motives for the allegations she continued to report even while investigations were underway. Her hurry to have investigations done before the Applicant would return from

home leave and her part in irregularly sending the Applicant to psychiatric assessment in Nairobi displayed probable existence of extraneous motives and negatively affected her credibility.

Investigative Standards

a. An investigation is an independent function conducted primarily for the interest of the Organization rather than an individual. The investigators in this case lacked competency, objectivity, impartiality, fairness and did not observe the principles of natural justice, this therefore compromised the investigation process.

b. For any investigator to claim that he or she had established certain alleged facts without allowing the alleged perpetrator to know and answer fully to what he was alleged to have done is both dishonest and a betrayal of the responsibility entrusted to the investigator.

c. Failure to follow due process as provided for in the relevant UNICEF Executive Directive, rendered the investigations incurably flawed, an abuse of due process and made the whole exercise altogether fatal to the case of the Respondent.

d. There are several gaps resulting from the investigation conducted and unanswered questions as to the origins and purpose of the several allegations made against the Applicant. This is attributed to the conduct of the investigation where the investigators were not interested in what could amount to exculpatory evidence for the Applicant.

Psychiatric Evaluation of the Applicant

a. There was no request for this extreme procedure by the United Nations Medical Director or anyone authorized by him/her. It is to be expected that the Medical Director would make such a request when he/she is provided with

such information which, upon evaluation and enough clarification, would lead him/her to a conclusion that the procedure was necessary.

b. It is not within the competence of an investigator, to usurp the functions of the United Nations Medical Director while investigating a case and resort to demeaning the subject of an investigation in the way the investigators did in this case.

c. In the absence of a properly documented authorization for a psychiatric evaluation of the Applicant, the Tribunal is not in any doubt that the said evaluation was unlawfully orchestrated and executed as part of a process to humiliate the Applicant.

d. UNICEF is a humanitarian Organization. Its humanitarian mandate must be expressed in the way the Organization relates, not only to its intended constituents – vulnerable children and women, but also in its relationship with and treatment of the staff members.

Role of Mr. Brusa

a. His appointment as a co-investigator completely corrupted the investigation process, stripping it of independence, objectivity and impartiality.

b. Training of the staff members who were to give information on the allegations being investigated on ethics and prohibited conduct and the work of investigators as a prelude to starting an investigative mission was in very bad taste and utterly prejudicial to the process.

Judgment

292. The Tribunal holds that the summary dismissal of the Applicant in the circumstances of this case was wrongful. The Application hereby succeeds.

293. One of the concerns that came across in the course of considering this case is the undue influence wielded in the investigations by officers outside the Office of Internal Audit. The Tribunal hereby enjoins the Director OIA to avoid such a situation in future cases by ensuring that his office takes full control and responsibility of investigative processes including ensuring strict compliance with the provisions of CF/AI/2009-004 and CF/EXD/2008-004 or any other applicable rules.

294. In the same vein, UNICEF Management is called upon to carefully and diligently give adequate consideration to investigative standards and reports in future cases to ensure that disciplinary measures are properly applied.

Remedies

295. The sanction of summary dismissal was based on unproven charges, a complete absence of due process and a tainted investigation process. 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 UNICEF;
- c. And in the event that reinstatement of the Applicant is not feasible, the Respondent to pay the Applicant as an alternative compensation in lieu of reinstatement the amount of **two years' net base salary**;
- d. In view of the fact that the Applicant suffered several due process violations in the course of investigations and disciplinary action, the Tribunal awards compensation to him in the amount of **six months' net base salary**;
- e. The Applicant's human rights to privacy and family life and his rights to human dignity were breached in the course of the investigations and the

Tribunal additionally awards him compensation in the amount of **six months' net base salary;**

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.

296. All the above compensation shall be computed at the Applicant's category and level of employment at the time of the contested decision.

297. The Applicant is entitled to the payment of interest on the awards from the date this Judgment is executable at the US Prime Rate until payment is made. If payment is not made within 60 days of the date that this Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 19th day of October 2012

Entered in the Register on this 19th day of October 2012

(Signed)

Jean-Pelé Fomété Registrar, Nairobi