United Nations AT/DEC/1299

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1299

Case No. 1381 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Julio Barboza;

Whereas, on 20 April and on 20 July 2004, a former staff member of the United Nations Population Fund (hereinafter UNFPA) filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 20 October 2004, the Applicant, after making the necessary corrections, again filed an Application containing pleas requesting the Tribunal, inter alia:

1. To rescind the decision to separate him from service, four days before he was due to retire.

2. To restore medical insurance plan benefits for himself and his wife.

3. To order compensation in the amount of US$ 45,000.

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2005 and once thereafter until 10 June;

Whereas the Respondent filed his Answer on 10 June 2005;

Whereas the statement of facts, including the employment record, contained in the report of the United Nations Development Programme (UNDP)/UNFPA/United Nations Office for Project Services Disciplinary Committee (DC) reads, in part, as follows:

"**II** ***Employment History***

[The Applicant joined the United Nations on a fixed-term appointment (Extended General Service) on 12 May 1975, as an Accounts Officer, and since March 1976, had been working in the UNFPA Office, New Delhi, India. He served the Organization for almost thirty years and was separated from service effective 27 January 2004 for misconduct.]

III ***Events leading to disciplinary charges***

… On 26 April 2002, a former UNFPA Accounts Clerk [, (the complainant),] filed a written complaint against [the Applicant] (her direct supervisor) with the Gender Advisor of the New Delhi UNDP office. She complained that [the Applicant] had created a hostile work environment and had also sexually harassed her. The complaint was then referred to the Local Grievance Panel on sexual harassment. After meeting individually with both [parties], the Panel referred the matter to an 'Enquiry Panel' to ascertain the true facts of the complaint. The three-member composition of the [Enquiry] Panel was in full accord with the tenets of [paragraph 4 (b) of Circular UNDP/ADM/93/26, dated 18 May 1993, on sexual harassment]. The [Enquiry] Panel interviewed a total of 19 persons ... Thereafter it issued a report of its findings.

… … [The] Secretary, UNDP/UNFPA Grievance Panel on Sexual Harassment, endorsed the report and decided that a second investigation (a normal requirement) was therefore unnecessary.

... The report stated that [the complainant,] who worked in an 'isolated corner of the [United Nations'] compound' with [the Applicant] and [another colleague,] was 'forced to witness and listen to the conversations held between [the Applicant and the male colleague]'. These conversations 'were often of … a sexual nature, obscene comments about women and vulgar jokes'. [The complainant] complained that she was offended and made 'extremely uncomfortable' by such conversations. When she later tried to raise the matter at a 'Gender Sensitization Workshop', she claims she was 'threatened' with the loss of her career by [the Applicant]. The [Enquiry] Panel found that ten of the witnesses corroborated the alleged use of obscene language and degrading remarks about women.

... The [Enquiry] Panel further found that [the Applicant] created a hostile work environment by watching 'blue' movies on his computer and 'habitually' visiting pornographic websites 'during office hours'. This was subsequently confirmed by an independent analysis of the daily internet logs of [the Applicant] for the period at issue.

... The [Enquiry] Panel finally found that [the Applicant] did make 'physical advances' toward [the complainant] because he 'would (allegedly) press or touch her breast and try to kiss her on the face'. [The complainant] was so horrified by this that she 'sought refuge' with a close confidante on two occasions.

... The [Applicant] **defended** himself against these allegations by contending …: (a) [that] it was other people who had accessed the pornographic websites on his

computer in his absence; (b) that the pornographic websites he visited were unintentionally accessed by him as a recipient of unsolicited e-mails; (c) that [the complainant's] allegations of harassment were actually 'acts of revenge' for the pending termination of her employment contract; (d) that the panel discriminated against him by not requesting the names of witnesses who were favourable to his cause; and (e) that … [the] inclusion [of one of the witnesses] in the Panel violated *due process* since he was mentioned in [the complainant's] written complaint.

… After reviewing [the Applicant's] response to the findings of the [Enquiry] Panel, the [Office for Legal and Procurement Support (OLPS)] determined that there was sufficient *prima facie* evidence to charge [the Applicant] with serious misconduct under staff rules 110.1 and 110.4 and Circular UNDP/ADM/97/17 [dated 12 March 1997, entitled 'Accountability, Disciplinary Measures and Procedures']. The case was then referred to the [DC in New York] for review on 31 July 2003.

…"

The DC adopted its report on 7 January 2004. Its findings, conclusions and recommendations read, in part, as follows:

"**VI *Findings***

15. The Committee formally determined that significant portions of [the complainant's] complaint jarred with many of the actions she took in her relationships with [the Applicant]. On the one hand she willingly enjoyed the protections and benefits her supervisor bestowed on her but occasionally felt the need to rebel against his off-colour remarks and business-like references to sexual matters. This was probably due to an overly sensitive personality or a purely cultural trait. … In the end she resigned from her post prematurely claiming that no mechanism for preventing sexual harassment 'existed in the Organization', and that even if one existed 'employees were not encouraged to come forward without any fear of retribution'. However, the Committee noted that it was incumbent on [the complainant] to take full advantage of the available mechanisms and the goodwill of senior staff members to redress the harassment she claimed to have suffered.

Conclusion and recommendations

16. The Disciplinary Committee determined that because there was evidence implicating [the Applicant and the other male colleague] in acts that bred a hostile work environment in the office, the Organization should reprimand them in some meaningful fashion. The Organization should also ensure that they are prevented from taking acts of reprisal against the persons interviewed by the Enquiry Panel, especially the other four women who testified about the 'hostile' behaviour of certain staff members. Before making its final decision, the Committee considered the longevity of [the Applicant's] service in the Organization and of the fact that he was at the tail end of his career

17. *IN CONCLUSION the Committee unanimously finds the charge of creating a hostile work environment to be well conceived and proven by the adduced evidence. It finds the second charge of harassment to be unsustainable for lacking substantiated facts. The Disciplinary Committee therefore unanimously recommends that [the Applicant] be censured under staff rule 110.3 (a) (i).*"

On 26 January 2004, the Administrator, UNDP, transmitted a copy of the DC report to the Applicant and informed him as follows:

> "The Disciplinary Committee concluded that you had been afforded due process through the entire disciplinary proceedings …
>
> …
>
> … [I]n view of the Disciplinary Committee's findings and taking into consideration your duties and obligations as a long-serving staff member with supervisory functions, I find that your actions and attitude towards your work colleagues, particularly [the complainant] committed over a number of years, to constitute misconduct under staff rule 110.1, contrary to staff regulation 1.4 and clear evidence that your conduct is unbecoming of an international civil servant.
>
> Accordingly, I have decided not to accept the Disciplinary Committee's recommendation of a written censure and have decided that, in light of the seriousness of conduct in question and consistent with the disciplinary sanctions imposed for misconduct of a similar nature and in accordance with the integrity requirement of the United Nations Charter article 101.3, you be separated from service with UNFPA.
>
> Consequently, effective at the close of business on the day you receive this letter, you are dismissed from service without notice or compensation in lieu thereof and without termination indemnity."

On 20 October 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. In view of the public lay-out of the Finance Section in the UNFPA Office in New Delhi, with five staff members in one room, it is impossible for anyone to create a hostile situation in the office.

2. At his retirement party, on 30 January 2004, attended by 40-45 staff members, including the UNFPA Representative, speeches made reflected on the Applicant's honesty, sincerity and dedication to the Office, which belie the accusation that he had ever "created … any hostile environment in the office".

3. The Applicant was allowed to work until the end of January, despite the letter of dismissal.

4. The finding that he was guilty of watching pornographic material on his personal computer was based on incomplete and incorrect evidence.

Whereas the Respondent's principal contentions are:

1. The decision to separate the Applicant from the Organization was properly taken as:

(a) The facts on which the disciplinary measure was based have been established;

(b) The Applicant failed to meet the standards of integrity required of staff members as international civil servants and his conduct amounted to serious misconduct;

(c) The Applicant's due process rights were not violated and there were no other substantive or procedural irregularities; and,

(d) The sanction imposed was not disproportionate to the offence committed by the Applicant.

2. The Applicant's request to reinstate health insurance coverage for himself and his wife is not receivable as the Applicant did not request the required administrative review of this issue. In addition, this matter was not submitted to a joint review body for consideration.

The Tribunal, having deliberated from 26 June to 28 July 2006, now pronounces the following Judgement:

I. The Applicant challenges a decision of the Secretary-General to separate him from service on the basis of misconduct and conduct unbecoming a United Nations staff member (see Article 101.3 of the United Nations Charter). That decision was communicated to him on 26 January 2004, just days before the Applicant's scheduled retirement on 30 January, and was made pursuant to the Administration's decision to reject the disciplinary sanction of censure as recommended by the DC tasked with the case.

II. On 26 April 2002, a former UNFPA Accounts Clerk filed a complaint against the Applicant with the Gender Advisor, the substance of which was, generally,

(1) that the Applicant had habitually viewed - and subjected her to viewing - pornographic movies on the internet in his office;

(2) that the Applicant habitually used obscene language, making coloured, degrading and suggestive remarks to the complainant, as well as other women in the office; and,

(3) that the Applicant habitually engaged in unwelcome touching, pinching and forcing of his person on the complainant and other women.

In addition, the complainant alleged that the Applicant threatened her with the loss of her job, following a "Gender Sensitization Workshop" at which she had raised her concerns about his behaviour.

Following her complaint, the UNDP/UNFPA Grievance Committee on Sexual Harassment constituted an Enquiry Panel pursuant to Circular UNDP/ADM/93/26 to establish the facts and determine whether sexual harassment had taken place. The Panel interviewed 19 people, and consulted an Indian Judge who had legal expertise in such inquiries. In addition, the Panel considered evidence confirmed by an independent analysis of the daily internet logs of the Applicant for the period at issue and determined that pornographic movies were indeed habitually accessed on the internet from the Applicant's computer. The Panel found that the behaviour engaged in by the Applicant fell within the definition of sexual harassment as set forth in the UNDP/UNFPA Guidelines on Sexual Harassment and that the Applicant was responsible for creating a hostile work environment vis-à-vis the complainant.

On 12 September 2002, a copy of the Panel's report was sent to the Applicant, who responded on 4 October. In essence, the Applicant refuted the charges, alleging that there was no way to trace the pornographic movies to him, even if they could be traced to his computer, because, he claimed, anyone could sign on and use his computer and, therefore, there was no proof that he was the individual watching the movies. The Applicant also alleged that the complainant was seeking revenge for a less than stellar performance review, that he was being singled out, and that others who had engaged in the same conduct were not being similarly investigated or charged. On 14 January 2003, the Applicant was charged with serious misconduct, and a DC was convened.

The DC concluded that the Applicant had indeed engaged in creating a hostile work environment, but rejected the complainant's charge of sexual harassment, based on conflicting and confusing evidence that the DC believed indicated a more consensual relationship between the parties than the complainant alleged. It was also clear that the Applicant had been afforded appropriate due process and that there were no procedural irregularities. The DC recommended that the Applicant be censured under staff rule 110.3 (a) (i). In his letter dated 26 January 2004, however, the UNDP Administrator rejected the DC's recommendation, deciding instead that "in light of the seriousness of the conduct in question and consistent with the disciplinary sanctions imposed for misconduct of a similar nature and in accordance with the integrity requirement of the United Nations Charter article 101.3", the Applicant was to be separated from service with UNFPA on the date he received the Administrator's letter. The letter was sent four days before the Applicant's scheduled retirement date.

III. The Applicant appeals the Administrator's decision to the Tribunal. He asks the Tribunal to (1) rescind the decision to separate him from service, on the basis that he is not guilty, has served the Organization faithfully and well for almost 30 years and that he is being singled out for discipline; (2) "restore the medical plan" for his wife and him; and, (3) award

him monetary compensation in the amount of US$ 45,000 for emotional damage and embarrassment.

IV. Article 101.3 of the United Nations Charter specifically provides that: "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". Staff regulation 1.1 (d) reiterates this standard.

The UNFPA sexual harassment policy is contained in Circular UNDP/ADM/95/6 of 16 January 1995. In relevant part, it defines sexual harassment as follows:

> "[A]ny unwelcome advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by an official who may be in a position to influence the career or the employment condition (including hiring, assignment, contract renewal, performance evaluation, working conditions, promotion) of the recipient of such attention.
>
> Sexual harassment can take many forms and may include, but is not limited to: unwelcome sexual advances, the forcing of sexual attention, verbal or physical, on an unwilling person; or the attempt to punish the refusal to comply. Specific examples are: verbal harassment or abuse, subtle pressure for sexual activities, unnecessary touching, patting, or pinching, leering at a person's body, constant brushing up against a person's body, demanding sexual favours accompanied by implied or overt threats concerning employment or advancement …"

Finally, at the time of the alleged events in question, UNDP's policy in India regarding the usage of the UNDP computer network and the internet (contained in a memorandum to all staff, dated 29 November 2001) provided guidelines to staff members regarding appropriate usage of the network and internet. In relevant part, this policy, which limits the use of the network and internet, provides that UNDP's computer network

> "must not be used to view, store or disseminate:
>
> - pornographic texts or images
> - entertainment music and video downloads or streams (…)
> - material promoting sexual exploitation or discrimination …
> - …
> - any other unauthorized material."

This accords with the reasonable practice of the United Nations; the Geneva intranet homepage of which, for example, includes the following warning about proper internet usage: "[s]taff members are reminded that personal computers and access to internet are provided to them by the Organization for the performance of their official duties".

V. The Tribunal first addresses the issue of the decision to separate the Applicant from service. As the Tribunal has previously held in Judgement No. 1244 (2005):

> "The Tribunal has consistently upheld the Secretary-General's broad discretion in disciplinary matters; specifically, in determining what actions constitute serious misconduct and what attendant disciplinary measures may be imposed. The Tribunal recognizes, however, that
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> > 'unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. The Administration's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of the staff in being assured that they are not penalized unfairly or arbitrarily.' (Judgement No. 941, *Kiwanuka* (1999).)
>
> Such review, and any findings of the Tribunal resulting therefrom, must be made based upon the unique facts and circumstances of each particular case.
>
> In reviewing such quasi-judicial determinations and in keeping with the general principles of law in disciplinary cases, in each case, the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (See *Kiwanuka (ibid.)*, para. III.)
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> As the Tribunal has held in its earlier jurisprudence, in determining whether the established facts legally amount to misconduct or serious misconduct, which is a matter of law,
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> > 'the Tribunal will in its review decide whether it agrees that the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization and imposed a sanction which is not disproportionate to the offence'. (*Kiwanuka* (*ibid*.))"

VI. In the instant case, the Tribunal turns first to whether or not the facts on which the misconduct is based have been established. The Tribunal finds that they have. In investigating this matter, the Tribunal notes that the Respondent convened not one, but two investigatory panels - the Enquiry Panel and the DC - to find facts relating to the alleged misconduct. While the Tribunal is mindful that the Enquiry Panel is a "first investigation panel", its findings are still relevant and were, in any event, corroborated by the findings of the DC. Both panels concluded that the Applicant engaged in behaviour that created a hostile working environment for the complainant. Specifically, both panels found that the Applicant had, inter alia, repeatedly and habitually viewed pornographic materials and websites while at work, habitually used obscene language in front of the complainant and made remarks that were sexually explicit and degrading to the complainant. The result was the creation of a hostile work environment

that the complainant could not bear, and which was the cause of her departure from the Organization's service. The Tribunal does not find credible the Applicant's allegations that it was not he using his own computer to access the pornographic websites, but that it was some unidentified person who had access to his office and his computer. Also, while the Tribunal is aware of the many positive letters written in support of the Applicant, it is clear that the DC, also having access to these letters, did not find them compelling. The Tribunal will not substitute its judgement for that of the DC, as the DC had the advantage of assessing the credibility of witnesses who spoke against the Applicant.

VII. While the Tribunal agrees with the factual findings made by the DC, it cannot abide by the DC's conclusion that the Applicant was guilty of creating a hostile work environment but not sexual harassment. It would appear that the DC panel either misread or misunderstood the very specific language of the UNFPA sexual harassment policy, which defines sexual harassment to include creating a hostile work environment. Thus, by finding that the Applicant created a hostile work environment, the DC necessarily should have found him also guilty of sexual harassment.

The Tribunal also takes note of the tone of the DC's discussion in the instant case. The Tribunal was concerned to note the inappropriate and pejorative language employed by the DC in its report. The use of such language as the complainant being "overly sensitive" to discussions of pornographic nature was unwarranted, as it was quite reasonable for the complainant to have objected to such conduct in the workplace and certainly did not amount to undue sensitivity on her part. The Tribunal sees no need for a DC to enter into such critical speculation on the character of a staff member who has lodged credible and sustainable complaints.

VIII. With respect to the issue of whether the established facts legally amount to misconduct, the Tribunal is also of the view that the Respondent's characterization is appropriate. The Applicant's conduct violated both the UNFPA policies on acceptable internet usage and sexual harassment. In addition, the conduct which is properly attributed to him based on the evidence presented to the DC, certainly was not that befitting an international civil servant who is expected to act with the highest standards of integrity and dignity. This is especially true of an individual who was a manager and, thus, was held to a higher standard of knowledge of the rules and policies of his employer and was expected to lead by example. There can be no doubt that the viewing of pornographic movies and other media, as well as engaging in the sexually lewd and explicit behaviours exhibited by the Applicant, constituted serious violations of the Organization's rules and guidelines. Thus, the Tribunal finds that the Secretary-General was

within his discretion in reaching his conclusion that the Applicant's conduct constituted misconduct.

IX. Next, the Tribunal turns to the issues of whether the sanction was legal and whether it was proportionate to the offence. The Tribunal finds in the affirmative for both questions. The sanction of separation of service based upon a finding of misconduct is clearly permissible under staff rule 110.3 (vii). Moreover, the Tribunal notes that, in light of the egregious behaviour of the Applicant, the sanction of separation from service, albeit within four days of his anticipated retirement, was not disproportionate. In this regard, the Tribunal notes that the Applicant was not penalized in a financial sense by the separation from service. In fact, the Applicant generally received all monies and entitlements, including vacation pay, spousal payments and accrued pay that he would have received had he not been separated from service and instead allowed to retire as planned. Only the 4 days of salary, from 27 to 31 January, were withheld from the Applicant's final payments. Given the nature of his conduct, this was a small price to pay and one that was not disproportionate to his conduct.

X. Next, the Tribunal turns to whether there have been any substantive or procedural irregularities and concludes that there were none. In addition, on the issue of whether the Respondent acted with improper motive, abuse of purpose or arbitrariness in sanctioning the Applicant in the manner in which it did, the Tribunal concludes that no such extraneous motivation existed. In this regard, the Tribunal notes its long-held jurisprudence that the "burden of proof is on the Applicant where allegations of such extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al* (1998).)" (Judgement No. 1069, *Madarshahi* (2002).) In such case, the Applicant must adduce with clear and convincing evidence his case. While the Applicant alleges that he was singled out in a discriminatory fashion and that others who engaged in the same conduct were not sanctioned, he offers no proof other than his bald assertions and does not meet the burden of proof in this respect. As the Tribunal held in Judgement No. 1234 (2005), "the mere repetition of such assertions does not, in and of itself, convince the Tribunal of their worth". In conclusion, the Tribunal finds that the Secretary-General was acting well within his discretionary authority when he decided to separate the Applicant from service four days prior to the date of his scheduled retirement.

XI. The Tribunal now turns to the Applicant's request that the Tribunal reinstate his medical insurance for his wife and him. First, the Tribunal is confused by this request from the Applicant, as the Applicant does not make clear how or why or whether his medical insurance has been affected or denied as a result of his separation from service. Notwithstanding its

confusion as to the nature of the Applicant's request however, the Tribunal cannot address the merits of this issue as it finds the issue not receivable; there is no evidence that the Applicant ever sought administrative review of any such alleged denial or diminution of benefits. The Tribunal addressed such procedural flaws in Judgement No. 1235 (2005), in which it stated as follows:

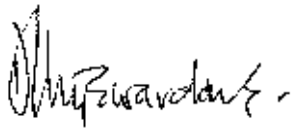
> "In Judgement No. 1106, *Iqbal* (2003), the Tribunal 'reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization'. Staff rule 111.2 (a) states:
>
> > 'A staff member wishing to appeal an administrative decision … shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing'.
>
> The Tribunal recalls Judgement No. 571, *Noble* (1992), wherein it held that 'the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision … renders any further consideration of that decision by the Tribunal beyond its competence'. Moreover, in Judgement No. 878, *Orfali* (1998), the Tribunal held that 'the JAB does not have the power to waive non-compliance with the requirement of requesting administrative review'. (See also Judgement No. 1196, *Maia-Sampaio* (2004).)"

As the Applicant in the instant case did not comply with the requirements of staff rule 111.2 (a) with regard to this plea, it is rejected as non-receivable, *ratione materiae*.

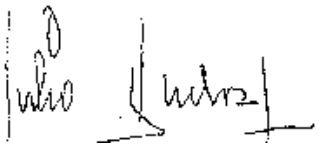
XII. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Jacqueline R. **Scott**
First Vice-President, presiding



Dayendra Sena **Wijewardane**
Second Vice-President



Julio **Barboza**
Member

Geneva, 28 July 2006

Maritza **Struyvenberg**
Executive Secretary