United Nations AT/DEC/1439

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1439

Case No. 1511 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Sir Bob Hepple;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 September 2006, and three times thereafter until 31 December;

Whereas, on 22 December 2006, the Applicant filed an Application in which he requests the Tribunal, inter alia:

"7. With respect to competence and procedure, …:

(a) *to find and rule* that it is competent to hear and pass judgement upon the present application under Article 2 of its Statute;

(b) *to consider* the present application receivable under Article 7 of its Statute;

(c) *to decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;

(d) *to order* the production of the report on the investigation into the charges brought against [a colleague by other colleagues].

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) to rescind the decision of the Secretary-General imposing the disciplinary penalty of demotion by one grade to the P-3 level for five years with no possibility of promotion on the Applicant and requiring his transfer from UNFICYP [United Nations

Peacekeeping Force in Cyprus] and participation in gender sensitivity and management training;

(b) to find and rule that the majority opinion of the Joint Disciplinary Committee [JDC] erred in matters of law and fact in reaching its conclusions;

(c) to find and rule that the Respondent violated the Applicant's rights by placing him on suspension with pay and maintaining him in that status for an unreasonable period of time (over ten months) and that he should therefore be compensated for the violation of his rights;

(d) to order that the Applicant be immediately reinstated to the P-4 level at the appropriate step with effect from 15 May 2006 and that he be given his former post or an equivalent assignment in a family mission; and he be considered for promotion to the next level at the earliest opportunity;

(e) to order the removal of all adverse material from his personnel records;

(f) to award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(g) to fix pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years net base pay in view of the special circumstances of the case;

(h) to award the Applicant as cost, the sum of $10,000.00 in legal fees and $500.00 in expenses and disbursements."

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 5 June 2007, and twice thereafter until 19 July;

Whereas the Respondent filed his Answer on 13 July 2007;

Whereas the Applicant filed Written Observations on 21 February 2008;

Whereas the Applicant filed additional comments on 9 February 2009;

Whereas, on 7 July 2009, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

"***II. Employment History***

… The staff member joined the Organization on 12 February 1993 as a Civil Affairs Officer at the P-3 level on a fixed-term contract with the United Nations Protection Force in the Former Yugoslavia (UNPROFOR). He has served on various peacekeeping missions, including the United Nations Preventive Deployment Force (UNPREDEP), the United Nations Mission in Bosnia and Herzegovina (UNMIBH). He received a P-4 effective 1 February 2000. He currently serves as a Senior Civil Affairs Officer at the P-4 level on a 100 series appointment….

III. Background

> … On 8 March 2005 ... a locally hired Information Assistant (IA), filed a complaint of sexual harassment against the staff member with [the] then-Assistant Secretary-General for Human Resources Management (ASG/OHRM). On that same day, [a] Civil Affairs Political Officer and Gender Focal Point [CAPO] sent a query via email to United Nations Headquarters regarding her responsibilities as gender focal point in light of [the IA's] complaint. On 11 March 2005 … OHRM responded to her query and submitted a copy of ST/AI/379 on "Procedures for Dealing with Sexual Harassment."
>
> … On 6 April 2005, an Investigative Panel (IP) was appointed by the ASG/OHRM. That same day, the ASG/OHRM informed the staff member of the allegations and the IP's appointment.
>
> … The report of the investigation (IR) was submitted to the ASG/OHRM on 17 June 2005. The investigation panel recommended that the matter be pursued further and that the staff member be suspended from duty due to his retaliatory conduct.
>
> … [T]he staff member was charged on 28 June 2005. He was requested to provide a response within two weeks of receiving the allegations. In addition, the letter notified the staff member of his suspension from duty with pay for the duration of three months, or until completion of the disciplinary proceedings, whichever was earlier. The suspension was extended effective 1 October 2005 for another three months, or until completion of the disciplinary proceedings.
>
> … On 13, 16 and 18 August and 12 September 2005, he submitted a response to the charges.
>
> … By a memorandum dated 12 October 2005 ... OHRM requested the JDC to advise the Secretary-General as to what disciplinary measure(s), if any, should be taken in connection with the alleged misconduct of the staff member."

The JDC adopted its report on 20 March 2006. Its considerations, conclusions and recommendation read, in part, as follows:

> ***"VII. Considerations***
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> ...
>
> **1. Sexual harassment**
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> 40. The [Applicant]] is alleged to have attempted to kiss his subordinate on the lips during a meeting to discuss her performance. Moments before that, according to [the IA], the [Applicant] is alleged to have said:
>
> > 'I remember thinking this is a very beautiful woman … I did not know whether you were married … The next time I saw you, you were with … [a colleague from the Weekly Review] very bubbly, open [ ]. I wasn't sure then what you thought of me you [sic] were a bit reserved but then you are a beautiful woman and men must fall over you all the time. I didn't hear a word she said or wasn't interested in a word she said. Then I wasn't sure what I wanted and I had to keep reminding myself I am a married man. Then I saw you with your friend who did her PHD in India … and again you were as beautiful as ever …'
>
> Such conduct, if established in fact, clearly falls under the definition in ST/AI/379 as physical conduct of a sexual nature. Given that the alleged conduct occurred in the course of a discussion about his concerns over her performance, the context in which the conduct occurred can

reasonably be considered to have interfered with work or to have created an intimidating or offensive work environment.

41. The Panel notes that, from the beginning, relations between the [Applicant] and the IAs suffered strain from a reporting structure that placed the IAs under the supervision of two masters – the Civil Affairs Branch and the Public Information Office. Evidently, the [Applicant] was unhappy with the amount of time which the IAs dedicated to Civil Affairs work, and the IAs were unhappy with a work environment in which they felt pulled by the conflicting requirements of both offices. The Panel also observes that, in 'he-said-she-said' situations such as the one arising in the first charge, the task of the fact-finder is problematic. Ultimately, the burden of proof rests with the Administration to show by a preponderance of the evidence that misconduct took place. The Panel's approach to its fact-finding task in this case was to evaluate the credibility of the divergent contentions from both parties, and the demeanour of the witnesses appearing before the Panel, as well as the voluntary statements submitted during the course of the hearings. The Panel examined the overall context at UNFICYP to consider whether any factors in that work environment otherwise extraneous to the case came into play in the events in question. In this light, a majority of the Panel finds that the Administration has established a prima facie case.

42. A majority of the Panel found [the IA's] testimony at the hearing to be credible. With relatively little time to review her statement prior to the hearing, her version of events remained very consistent with that related to the IP. Also significant was the fact that she related her version of events immediately after the incident to four of her [colleagues] ... whom the Panel had the opportunity to interview. A majority of the Panel, mindful of the friction [two staff members] shared in their relationship with the [Applicant], found no evidence or hint of ill-will in their demeanour at the hearing. While their misgivings with the [Applicant's] supervision of them were apparent and openly noted, their manner in testifying about what [the IA] had related concerning the event in question was straightforward and showed no particular bias. To [Mr. K.], the [Applicant] to some degree ascribes but fails to substantiate bias, in part because [Mr. K.] was apparently the complainant's 'mentor,' in part because of the [Applicant's] role in previously assisting one of [Mr. K's] supervisees who had a conflict with [Mr. K.].

43. His mentorship, if the description was accurate – does not automatically call into question his reliability. There is no evidence to show that [Mr. K.] took sides with the complainant in order to protect [the IA], or in reprisal against the [Applicant], or even that he took a position at all vis-à-vis the event in question. At the hearing, [Mr. K.] himself stated that some misunderstanding may have occurred during the 20 May meeting. Thus, there was no indication that his role in the case went beyond assisting the complainant with basic information and neutral sympathy. As the [Applicant] himself points out, [Mr. K.] continued to support him as temporary replacement for [Mr. C.], a fact that seems inconsistent with the bias for [the IA], or against the [Applicant], which the [Applicant] contends he had. A majority of the panel ascribes the same neutrality to [Ms. P.]'s statements in the case. The testimony of these witnesses does not, of course, constitute 'eye-witness' corroboration of the incident. However, it provides third-party verification of her physical and emotional state within some ten minutes following the 20 May meeting, and provides a consistent, credible account of the events taking place at that time.

44. With regard to the issue of consistency, the [Applicant's] contention that [the IA's] story changed with each telling: for example, the [Applicant] claims that [Mr. K's] version of what [the IA] recounted only hours later was altogether different from her own testimony: that she had initially started to cry not because she resented the criticism of her work, as she had stated herself, but because he had tried to kiss her. A majority of the Panel was struck more by the overall consistency in the facts recounted by witnesses at the hearing than with what it finds to be minor discrepancies at best.

45. Moreover, the Panel asked those witnesses who knew [the IA] whether she was considered – either by reputation or by their own impressions – as someone with a tendency to

misrepresent or exaggerate the truth; most of the witnesses considered her to be rather introverted, and none attested to the impression that she was prone to fabrication or overstatement.

46. Furthermore, there was testimony that the kiss itself was not entirely out-of-the-blue; the Panel heard evidence from [Mr. E.], who confirmed that the [Applicant] had expressed his physical attraction towards [the IA] prior to 20 May, at the time she was recruited. A majority of the Panel found [Mr. E.] credible in his testimony. While in no way dispositive of the events of 20 May, that testimony demonstrates a context for the [Applicant's] conduct, adding to the circumstantial evidence in the case.

47. At the same time, a majority of the Panel finds that the [Applicant] generally lacked credibility. Too often, his version of events differed radically from testimony of witnesses who had no particular conflict with him, unless one is to believe that there was an extensive conspiracy among the staff to 'get' the [Applicant], which the majority found no evidence to support. In addition to significantly different recollections from those of [the IA] and [the CAPO] – both of whom were interested witnesses – the [Applicant] denies that he ever referred to his physical attraction for [the IA] in conversation with [Mr. E.]; a majority of the Panel found [Mr. E's] disposition toward the [Applicant] was mainly neutral – in fact, the [Applicant] testified to feeling close to him, or at least closer to him than to the other IAs. In the absence of evidence of bias or ill-will, there seems little motivation to testify to a comment by a supervisor that might cast the supervisor in a negative light. Moreover, while memory of such a statement made so long ago might wane, that particular comment, made by his supervisor in a professional setting, would be memorable to a subordinate. [Mr. K.] stated that the [Applicant] had vaguely discussed the 20 May meeting with him several days later, while the [Applicant] insists that the discussion took place months later. While the date of the meeting was not necessarily dispositive in the case, the wide disparity in time in their testimonies seems anomalous when evaluating the witnesses' credibility. One would assume [Mr. K's] recollection would present a closer estimate of the date of a meeting on such a sensitive issue. [Mr. H.] testified as to a meeting he had had with the [Applicant] while he was his supervisor in Bosnia regarding an issue of the [Applicant's] conduct with another staff member; the [Applicant] in his testimony before the Panel had no recollection of the meeting taking place at all. [Mr. H.] could not corroborate the factual basis of the issue with the other staff member, which ultimately amounted to little more than hearsay. To the degree he could testify as to the meeting to discuss the issue, a majority of the Panel considered that, while certain details may have been obscured in memory, such a sensitive meeting would not be easily forgotten by either the witness or the [Applicant]. Here again, there was no evidence of malice or bias on [Mr. H's] part: in fact, his official evaluations of the [Applicant] at the time he supervised him were nothing if not glowing. The foregoing indicates that, overall, the [Applicant] put too much effort towards either explaining away events, such as the otherwise minor differences in [the IA's] discussion with her colleagues, or refuting them altogether, such as his discussions with apparently reliable witnesses on otherwise memorable topics.

48. The [Applicant] contends he kept a respectful distance from [the IA] throughout the meeting, reaching out only once to bend over and offer her a handkerchief. Yet the amount of space between them as indicated in the photograph of the conference room which he submitted as evidence was at variance with his own statement, showing that it was well over the distance he mentioned in his testimony to the IP. He claims that [the IA] did not accept his criticism of her performance well and exaggerated her subsequent allegations as a precautionary measure. If in fact she did fear for her contract, there is no evidence to support the claim that she was prepared to devise a wholesale fabrication and thereafter take it to the complicated lengths necessary to safeguard her renewal. The [Applicant] also contends that [the IA] 'acted in concert' with the other IAs. The testimony by the IAs interviewed by the Panel mirrored their IP statements and appeared straightforward, with no indication that they had orchestrated their responses. None of the other witnesses at UNFICYP interviewed by the Panel knowledgeable of the problems within the CAB [Civil Affairs Branch] found the 'acting in concert' theory plausible. In support of his contention that [the IA] exaggerated her claim, the [Applicant] contends that, several days after the 20 May meeting, [the IA] mentioned the incident to him, telling him only that he had made

inappropriate comments and making no mention of physical conduct. Yet if that was the extent of the conversation, it seems implausible that the [Applicant] would have left such a vague and cryptic remark without seeking further explanation from her. Moreover, some of his actions, such as his asking [Mr. E.] three different times on 21 May at a luncheon if [the IA] was 'OK', raise questions about his mental state at that time, implying a consciousness towards the effects of, and perhaps not a little concern about, his conduct at the 20 May meeting. While perhaps such concern might conceivably have arisen due to other reasons – as put forward by the [Applicant] – it is in the majority's view further circumstantial evidence as to his state of mind, that the [Applicant] exhibited abnormal concern about the misunderstandings that supposedly arose during a PAS discussion where, according to him, he had the intention of delivering a 'tough message' to [the IA].

49. The [Applicant] points out that [the IA] waited for almost a year to file her formal complaint. In the same vein, he raises the possibility that [the CAPO] coaxed her into submitting the complaint. Yet hesitation by a complainant in such matters, while potentially making a case more difficult to establish, is neither unusual in this kind of case nor indicative of the merits of the complaint. In the absence of any gender focal point at the duty station at the time the event took place, it seems plausible that a [Applicant] may lack both the knowledge and confidence to initiate the necessary demarches, particularly given the sensitive nature of such cases. Moreover, the evidence in the case is that she complained of the [Applicant's] behaviour to three people approximately ten minutes after the meeting, and to a fourth person about an hour later. In addition, she informally confided in [the CAPO] within three weeks of the incident.

50. With regard to [the CAPO's] role in the matter, there is no indication that the friction between her and the [Applicant] operated to improperly influence the factual basis of the complaint, the complainant's choice of action, the direction of the investigation, or the final disposition of the case. With [the CAPO's] formal appointment as gender focal point, it was incumbent on her to assist any staff member raising a harassment issue. This notwithstanding, the Panel considers that [the CAPO] was not well-placed to deal with the matter, given the potential conflict of interest involved with handling the complaint against her immediate supervisor. However, in this case, the friction with her supervisor, while raising a question as to a conflict of interest, did not limit her responsibility to assist her, and does not, without more evidence, erode the credibility of the complaint.

51. In light of the above considerations, ... the Panel finds that the Administration has made a prima facie case supporting the first charge.

2. Harassment of [the CAPO]

52. The Panel notes that, given his initial leave in summer 2004 and her subsequent maternity leave a short time later, the [Applicant] and [the CAPO] had actually worked together for a relatively short period of time prior to January 2005. Nevertheless, it appears that there was some degree of friction between the two almost from the beginning when [the CAPO] joined the CAB. However, the evidence shows that after January 2005 – after the [Applicant] became aware of [the CAPO's] involvement in the sexual harassment incident –the [Applicant's] approach to [the CAPO] became more hostile.

53. The [Applicant] contends that he never disparaged [the CAPO's] work, although he did offer well-founded criticism after first discussing the particular problem with her. A majority of the Panel believes that this hostility went beyond the normal reaction of a manager with misgivings about a staff member's work. There was evidence that his instructions to her became more arbitrary at the time of the events in question – for example, initially requesting that she not include any political analysis into a written project, only to later criticise her for her lack of political analysis. The evidence shows that he made disparaging remarks in front of colleagues during an April 2005 meeting regarding the management of a Civil Affairs Office outside of headquarters. At that meeting, he apparently raised his tone of voice progressively until he began

to shout at her. Such conduct goes beyond what is acceptable behaviour from a supervisor managing a staff member's performance. Moreover, the record shows and the [Applicant] states that he kept extensive records of their exchanges and of her work product, which he showed to others. This raised the implication that the [Applicant] was attempting to undermine and marginalize the staff member and her role within the office and that he may have been building up a case in support of a recommendation of non-renewal of appointment. According to [the CAPO], during a business trip on 25 February 2005, the [Applicant] initiated a discussion regarding her work. At that time, he allegedly referred to the ease with which a staff member could be terminated at the United Nations. He mentioned his close ties to the Chief of Mission, and told her he did not know if he could recommend the extension of her contract.

54. A majority of the Panel finds these allegations credible. The [Applicant] admits his belief that it was [the CAPO] who coaxed [the IA] into filing the complaint; implying that, after January 2005, he felt his position threatened by [the CAPO]. With regard to the [Applicant's] version of these events, again, a majority of the Panel questions his credibility. He made no attempt to take any of the formal measures to manage the performance process: there was no mid-point review of her work or plan put in place to assist her to improve her work which, even given her time away on maternity leave for a portion of the PAS period, would have been warranted under the relevant administrative instructions in light of any misgivings he might have had with her performance. These considerations lead a majority of the Panel to believe that his actions towards her were in reprisal for her assistance to [the IA] regarding the sexual harassment complaint and her general reference to the matter in the gender report to the Secretary-General.

3. Interference with the investigation

55. The Administration contends that the [Applicant] distributed the information from a confidential memorandum from the ASG/OHRM informing him of the investigation, and that he met CAB staff on the subject. The [Applicant] verifies that he did this, but claims that he was motivated by good faith: given that UNFICYP is a small duty station, the news would not be contained, and he considered it better for those who work closely with him to learn of the investigation from him. The meeting with CAB staff consisted of [the Applicant] and three others. These three were generally supportive of him, and cannot in any way be considered to have interfered with the investigation.

56. The Administration also contends that the [Applicant] tried to influence [Mr. E's] testimony. According to [Mr. E.], the [Applicant] called him on his cell phone one evening in April 2005 the day after he was notified that he would meet with investigators in the case. During that phone call, the [Applicant] told him about the sexual harassment investigation, and mentioned his belief in their friendship and [Mr. E's] integrity. It was [Mr. E's] impression that the [Applicant] was trying to influence his interview with the investigators, making a reference to the fact that [Mr. E.] was 'an honest man.' Several days later, the [Applicant] called again to tell him that [the] Chief, HRM, had informed him about the need for confidentiality, and asked [Mr. E.] to disregard the previous call. The [Applicant] claims he was unaware that [Mr. E.] would be called as a witness, and generally unaware of the confidentiality issue. At the hearing he explained that he had felt closer to [Mr. E.], and, because Cyprus is a small duty station where word spread quickly, he wanted to inform [Mr. E.] himself.

57. A majority of the Panel considered that the [Applicant's] version of these events lacked credibility. First, considering [Mr. E's] testimony that the [Applicant] had not phoned him in about three months, a majority of the Panel considers the timing of the phone call – coming as it did just a day after [Mr. E.] was called as a witness, after working hours, and over a weekend – suspicious. Secondly, even if staff at the mission discussed the allegations among themselves, the [Applicant's] background as a lawyer implies a general understanding of such matters, and of the negative appearance he risked by contacting staff members in an email, a meeting, or a phone call to discuss the pending investigation in any way. Even if the meeting he held with three people supportive of him was meant to brief them, even granting that he called [Mr. E.] because he

generally felt close to him and wanted to give him the news himself, with or without a briefing by [Mr. M.], his legal background would or should have put him on sufficient notice that the procedure in this regard is upheld not just to avoid the subversion of fact-finding, but the appearance of subversion as well. His statement to [Mr. E.] regarding his 'honesty' can be construed just as reasonably as an expression of the [Applicant's] faith in his honesty as an effort to manipulate it. His effort to inform staff who may be sympathetic to him can be construed just as easily as a good-faith act as it can be seen as an act to round-up that good faith and influence its direction in an interview with investigators. In confidential matters such as these, the Organization prohibits discussions of this kind precisely to avoid the need to later interpret them. In view of the foregoing, and taking into account its general concerns about the [Applicant's] credibility, a majority of the Panel finds that the Administration has established a prima facie case on the third charge.

4. Recommended sanction and mitigating factors

58. Given the context of events during the 20 May meeting, and in the absence of any evidence of a wider pattern of harassment on the part of the [Applicant], a majority of the Panel considers that the kiss was likely an impulsive act. Whatever its origin, that kiss was inappropriate and unacceptable. A majority of the Panel considers that the harassment and interference resulting in the second and third charges arose as a result of the first and, as such, serves to aggravate the overall gravity of the case.

59. The Panel is also mindful of the need to take into account any mitigating factors in considering an appropriate sanction, including the overall value of his service within the United Nations. Outside the circumstances in this case, Appellant's record of service speaks of a proven asset to the missions at which he has served. A review of the performance evaluations in the [Applicant]'s Official Status File (OS) reveals work either frequently or consistently exceeding expectations for most of his career. The Panel also notes that his OS file contains a number of letters from superiors and other colleagues who over the years have specially commended him for the diversity of his skills-set and his contribution to the work of the Organization.

60. Having examined the [Applicant's] total record, a majority of the Panel considers demotion by one grade to be an appropriate sanction. In this regard, given the events of the present case, the majority would recommend that he be transferred from UNFICYP to another duty station. In addition, the Panel would consider mandatory gender-sensitivity training appropriate within a reasonable time from the onset of his next assignment. Finally, the Panel would recommend that, prior to or at [the] very least simultaneous with the assumption of any future supervisory duties, the [Applicant] should be required to participate in management training.

5. Due process

61. The [Applicant] raises a number of procedural challenges to claim that the Administration violated his right to an impartial process. He contends that [Ms. M.] lacked the requisite degree of impartiality to conduct a neutral investigation, in part due to her previous work experience with [the CAPO], and in part due to her role as Gender Focal Point and her advocacy for women who allege sexual harassment. On the basis of their testimony, a majority of the Panel finds no conflict of interest from the nature of [Ms. M.] and [the CAPO's] relationship. While both worked at the mission in Haiti at the same time, the extent of the work relationship was minimal. [Ms. M's] role as an advocate would not require her to recuse herself in the instant case; by their very nature, it seems reasonable that cases of sexual harassment would require conversance with the issue by at least one member of an IP. Moreover, the record shows that [Ms. M.] had both a background in gender issues and experience in investigations with the New York District Attorney's Office. The [Applicant] argues she manifested her bias when she made a statement to the effect that: 'I will pack you home if you do anything to the witnesses. That is my job in NY.' Irrespective of whether [Ms. M's] notice regarding interference with witnesses lacked

finesse, the fact remains that it was her job to give him that notice. A majority of the Panel finds that these contentions, without more, do not indicate a lack of impartiality. The majority also notes that [Ms. M.] disclosed her prior acquaintance with [the CAPO], as did [Mr. M.] with regard to the [Applicant].

62. He further claims that the Administration failed to consider the facts in a thorough manner. The IP rejected a number of voluntary statements showing what the [Applicant] considers exculpatory evidence in the case, and accepted others with reticence. He contends that some of the salient documents were deliberately ignored, such that it abused its discretionary power by eschewing material documents.

63. Although the IP did in fact decline to interview several proposed witnesses and their voluntary statements, it nevertheless did accept a number of voluntary statements. Moreover, the present Panel accepted an even larger number of voluntary statements in the course of the proceedings. In general, those statements verify that the events and actors make up a case which is far from straightforward; however, no one statement, by itself or in the aggregate, presents the kind of material, exculpatory evidence vital to his exoneration. Statements offered to show his integrity and gender sensitivity in dealings with others are not probative as to what may or may not have occurred on 20 May 2004; statements offered to prove any lapses in performance and integrity by [the CAPO] after January 2005 are not dispositive as to whether by his motive and supervisory approach his own conduct constituted retaliation. A majority of the Panel finds that the [Applicant] has not adduced evidence to show bias by the IP.

VIII. Conclusions and Recommendations

89. In light of the above, a majority of the Panel finds that the Administration has established by a preponderance of the evidence a prima facie case for all three charges against the [Applicant].

90. Taking into account the nature of the charges and the mitigating factors, the majority recommends that

a. the [Applicant] receive a demotion by one grade for his conduct in the case;

b. the [Applicant] be transferred from UNFICYP to another duty station; and,

c. that he be required to participate in both gender sensitivity and management training in line with the majorities considerations above."

A dissenting member of the JDC concluded, in part, that:

"26. ... I *find* that the Administration has not established by a preponderance of the evidence a *prima facie* case for all three charges against the staff member. I find that the Administration has failed to establish the factual basis for the charges with even a prima facie case.

27. I *recommend* that

a) the case against the staff member be declared frivolous,

b) the belatedly pressed charges be dismissed in their entirety,

c) any negative comments deposited in the staff member's OSF in consequence to those unfortunate and unproven allegations be expunged forthwith,

d) on account of the staff member's longstanding career and outstanding performance as well as the wave of communications on his behalf by past and present work mates testifying to his gender sensitivity, his multifarious skills and excellent output, he be redeemed for any promotion opportunity he might have missed as a result of this unwarranted state of affairs which has stalled his career prospects and to which he has been unjustly and arbitrarily subjected,

e) his contract be renewed and he remain in UNFICYP with his current post since none of the complainants is under his supervision and no harm has been done to any of them due to his [alleged] putative misconduct, and

f) in case the staff member requests transfer to another mission, such transfer be effected with no strings attached or prejudice to the contractual rights due [to] him by virtue of the rules and regulations applicable in International Civil Service."

On 15 May 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the JDC's Report, as well as the entire record and the totality of the circumstances. He agrees with the majority's conclusions and notes that your actions, as found by the majority, constitute misconduct within the meaning of Staff Rule 110.1. Based on this conclusion, and in accordance with the majority's recommendation, the Secretary-General has decided that you be demoted by one level, as provided for in Staff Rule 110.3(aXvi). Having regard to the severity of your misconduct and pursuant to his discretionary authority in disciplinary matters, the Secretary-General has further decided that said demotion be for five years with no possibility of promotion during that time. He has also decided to accept the majority's recommendations that you be transferred from UNFICYP to another duty station and that you participate in gender sensitivity and management training as soon as possible."

On 22 December 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The majority opinion of the JDC erred in matters of law and fact in reaching its conclusions.

2. The Respondent violated his rights by placing him on suspension with pay and maintaining him on that status for an unreasonable period of time (over ten months) and that he should therefore be compensated for the violation of his rights.

3. The decision by the Secretary-General to impose the disciplinary measure of demotion was vitiated by mistake of fact and of law, by lack of due process, by bias, or other extraneous factors.

4. His procedural rights were violated.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting demotion. The decision of the Secretary-General to demote the Applicant by one grade for five years with no possibility of promotion

during that time, to transfer the Applicant from UNFICYP to another duty station, and to require that the Applicant participate in gender sensitivity and management training as a result of his misconduct was a valid exercise of his discretionary authority.

2. The decision by the Secretary-General to impose on the Applicant the disciplinary measures of demotion was based on facts and evidence properly adduced during the lengthy and thorough investigation by the Investigative Panel and the JDC into the charges against the Applicant. The decision was not vitiated by mistake of fact or of law, by lack of due process, by bias, or other extraneous factors.

3. The facts concerning the Applicant's misconduct were established and legally supported the finding that the Applicant had engaged in misconduct.

4. The facts legally amount to misconduct.

5. The Applicant's rights to due process were fully respected.

6. The disciplinary measures imposed upon the Applicant by the Respondent were not disproportionate or excessive.

7. There is no basis for the Applicant's claim for an award in respect of legal costs.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The Tribunal first addresses the issue of the decision to demote the Applicant by one grade. 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 '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.

II. In reviewing such decisions 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).

III. In the instant case, the Tribunal considers first whether or not the facts on which the misconduct charges were based had been established. The Tribunal finds that they have. The Respondent convened two investigatory panels - the IP and the JDC - to investigate the alleged misconduct. While the Tribunal is mindful that the IP is a "first investigation panel", its findings are still relevant and were, in any event, corroborated by the findings of the JDC. Both panels concluded that the Applicant engaged in behavior that created an environment of harassment and interference.

IV. Specifically, both panels found that the Applicant had sexually harassed a female staff member, one of his supervisees; harassed another female staff member, also under his supervision; and interfered with the IP's investigation into his actions. Both panels concluded that these actions constituted misconduct within the meaning of staff rule 110.1.

V. The Tribunal does not find credible the Applicant's contentions that "it was necessary to raise a number of criticisms of [Ms. K's] performance in Civil Affairs and that when he did so she became emotionally upset and started crying"; that he "then tried to calm her down by complimenting her and speaking of their previous acquaintance until she regained her composure"; and that "[h]e stood up and took out his handkerchief". The Applicant maintained that he did not attempt to kiss her. Although there were no other witnesses to that event, the Tribunal is satisfied that the JDC had adequate evidence to find that the Applicant intended to sexually harass Ms. K.

VI. While the Tribunal is aware of the dissenting opinion expressed in the JDC report, it is clear that the majority of the JDC found no credibility in the Applicant's allegations. On the contrary, the majority of the JDC found inconsistency to be a significant issue in relation to the Applicant's testimony and found that the Applicant lacked credibility as his version of events differed substantially from other witnesses' testimonies.

VII. The Tribunal next turns to consider whether the established facts legally amount to misconduct or serious misconduct. In this regard, the Tribunal needs to decide whether "the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization". (See *Kiwanuka* (ibid.)). The Tribunal will not substitute its judgement for that of the JDC, as the JDC has the advantage of assessing the credibility of witnesses who spoke against the Applicant. Therefore, 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 which is properly attributed to him based on the evidence presented to the JDC, 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,

held to a higher standard of knowledge of the rules and policies of his employer as well as expected to lead by example.

VIII. There can be no doubt that the Applicant's attempt to kiss Ms. K. constitutes an "unwelcome sexual advance" and "physical conduct of sexual nature" which created an intimidating, hostile or offensive work environment. (See ST/AI/379, para. 2).

IX. Moreover, the Applicant's attempts to use his position and influence to interfere with the ensuing investigation and exact revenge against Ms. C., whom he determined was behind the decision of Ms. K. to file her complaint of sexual harassment against him, is unacceptable and constitutes misconduct. Thus, the Tribunal finds that the Secretary-General properly exercised his discretion in concluding that the Applicant's conduct constituted misconduct.

X. The Tribunal next turns to consider whether the sanction was proportionate to the offence. The Tribunal finds in the affirmative. The sanction of demotion by one grade with no possibility of promotion for the period of five years was proportionate to the charges that were substantiated against the Applicant and the severity of his misconduct. Moreover, in Judgement No. 542, *Pennacchi* (1991), paragraph XIV, the Tribunal addressed the issue of severity of punishment as follows:

> "The Tribunal recalls, as it did in Judgement No. 300, *Sheye* (1982), paragraph IX, '... that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision'. In the present case, the Tribunal finds that such exceptional conditions do not exist. Therefore, the Tribunal cannot entertain the Applicant's claim for rescission of the Secretary-General's decision on the ground of the severity of the penalty."

XI. The Tribunal turns to examine whether there have been any substantive or procedural irregularities and concludes that there were none. As far as the case of substantive irregularity is concerned, the Tribunal has consistently held 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); and No. 1069, *Madarshahi* (2002)). In such case, the Applicant must present clear and convincing evidence supporting his claims of improper motive. In the instant case, the Applicant has not discharged his burden of proof to demonstrate that the Respondent acted with improper motive, abuse of purpose, or arbitrariness in sanctioning the Applicant.

XII. Turning to the issue whether a procedural irregularity occurred, the Tribunal is satisfied that the Applicant has been accorded due process. The Applicant was provided with a copy of the initial complaints against him and afforded an opportunity to respond to the allegations against him. Also, he was

represented by Counsel during the JDC proceedings. In particular, the Applicant alleges that his suspension for an extended period on full pay violated ST/AI/371, which provides:

> "As a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible."

The Tribunal has upheld the Administration's discretion to exceed the period of three months provided for in staff rule 110.2 (a), finding that:

> "[a]lthough staff rule 110.2(a) speaks in terms of suspensions 'normally' not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires". (See Judgement No. 615, *Leo* (1993)).

However, the Tribunal

> "has emphasized the significance of the Respondent's providing a reason when extending the suspension for more than three months. (Cf. Judgement No. 4, *Howrani* (1951))". (See Judgement No. 987, *Edongo* (2000)).

In *Edongo* (ibid.), the Tribunal found that the Respondent's decisions to suspend him for a total of five months with pay

> "were procedurally irregular since the Respondent failed to establish the requisite grounds necessary to impose a suspension under staff rule 110.2 and ST/AI/371."

XIII. In the present case, the Tribunal concludes that the Respondent did not take undue time in carrying out its investigations. The investigation proceedings lasted from 28 June 2005 until 20 March 2006, whereas the Applicant's final appointment expired on 30 April 2006. The Tribunal does not accept the Applicant's allegations that the delay had "the sole effect of prejudicing the outcome of the case by implying that the unfounded allegations of harassment and interference were real." The procedure was not unduly long and the Respondent did not exceed the time needed to examine this case.

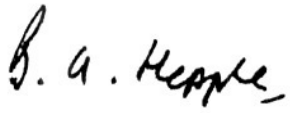
XIV. The Tribunal also notes that the Applicant suffered no financial loss due to this delay since he regularly received his salary.

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

(Signatures)

Spyridon **Flogaitis**
President

Brigitte **Stern**
Member



Bob **Hepple**
Member

Geneva, 31 July 2009

Tamara **Shockley**
Executive Secretary