



Administrative Tribunal

Distr. Limited
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1449

Case No. 1527

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

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 28 February 2007, and once thereafter until 30 April 2007;

Whereas, on 30 April 2007, the Applicant filed an Application requesting the Tribunal, inter alia:

“II. PLEAS

...

12. [T]o order:

(a) that the decision taken by the Executive Director, UNICEF [United Nations Children’s Fund] be rescinded and the Applicant be retroactively reinstated in her former position in UNICEF;

(b) that the Applicant be paid all salary and benefits retroactively from the date of her separation from service until the date of the Tribunal’s judgment;

(c) that the Applicant be issued a letter of apology for having been wrongfully dismissed; and

(d) that all negative remarks concerning the Applicant’s motive for filing the complaint against her supervisor, ... be expunged from her records.

or failing that:

- (e) that the Applicant be paid compensation in the amount of 2 years' net base salary;
- (f) that the Applicant be paid compensation in the amount of 6 months salary for moral and professional injury (including the retaliatory acts of UNICEF's management level staff, humiliation, and injury to the Applicant's personal and professional reputation, and health) suffered as a result of her wrongful termination;
- (g) that the Applicant be issued a letter of apology for having been wrongfully dismissed;
- (h) that all negative remarks concerning the Applicant's motive for filing the complaint against her supervisor, ... be expunged from her records;
- (i) that an attestation be issued to the effect that the Applicant's separation from UNICEF was voluntary; and
- (j) that a letter of referral stating that the Applicant served UNICEF well, that her services were professional and highly appreciated[,] ... neutral language that reflects that her contract was from her EOD [Entry on Duty] to the COB [Close of Business] dates, and that there be no reference to misconduct or dismissal."

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 17 October 2007, and once thereafter until 19 November;

Whereas the Respondent filed his Answer on 14 November 2007;

Whereas the Applicant filed Written Observations on 29 February 2008;

Whereas on 26 November 2002, the Applicant entered the service of UNICEF as a consultant with the Division of Human Resources (DHR). On 3 September 2003, she was granted a fixed-term appointment as Assistant Information Officer, P-2, with the Information Technology Division (ITD) at UNICEF Headquarters, where she was serving at the time of the incidents complained of. On 9 February 2006, the Applicant was summarily dismissed from service for serious misconduct.

Whereas the relevant facts of this case are contained in the report of the *ad hoc* Joint Disciplinary Committee (*ad hoc* JDC), which reads, in part, as follows:

"The *ad hoc* Joint Disciplinary Committee ('the Committee') met to review the Executive Director's decision dated 9 February 2006, to summarily dismiss ... [the Applicant], from service with UNICEF ('the Respondent') for serious misconduct. The [Applicant] was summarily dismissed on charges that '... motivated by personal interests, [she] made false and unsubstantiated allegations of sexual harassment against [her] supervisor, which resulted in defamation of character, causing her [supervisor] emotional distress, thereby failing to uphold the standards of integrity expected of [her] as an international civil servant.' The Committee was mandated ... DHR ... to review the decision to summarily dismiss the [Applicant] in light of the requirements of due process and [to determine] whether it was vitiated by a mistake of fact, bias or prejudice or a procedural error. Specifically, as per paragraph 41 of DHR's memorandum dated 7 June 2006 to

the Committee, [it was] charged to examine: '(i) whether the facts on which the disciplinary measures were based have been established; ... (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness.' The Committee met a total of seven times to review the case and fulfill its assigned Terms of Reference.

The Committee noted that in addition to [the Applicant's] initial response to the charge letter, [the Applicant] also took advantage of the opportunity afforded to her by UNICEF to be represented by counsel and to submit further written explanations or observations on her case

In its review, the Committee decided to enter into a substantive examination of the case by reviewing all of the materials submitted. Furthermore, the Committee specifically requested copies of the Interview Reports annexed to the Investigation Report.

... **Points (i) and (ii) of the *ad hoc* JDC's Terms of Reference: Whether the facts on which the disciplinary measures were based have been established; and Whether the established facts legally amount to misconduct or serious misconduct.**

... While noting that [the Applicant's] inconsistent and contradictory statements did not contribute to clarifying facts, the Committee agreed with what UNICEF itself stated, in the 2nd paragraph of page 11 of [the] dismissal letter of 9 February 2006 that: '... none of the witnesses could confirm or corroborate [the Applicant's] allegations that [her supervisor] had engaged in sexual harassment against [her] ...,' that is, the facts could not be independently verified. In analyzing the voluminous written material submitted to it, the Committee concluded that [the] facts of the case could not be fully established.

... UNICEF's conclusion that these allegations were in retaliation for a poor performance discussion was not substantiated by facts or evidence, and appears to be more of an assumption; the Committee noted that a correlation of events does not always imply causality.

... In short, in the view of the Committee, the facts as presented in the documentation on which disciplinary measures were based were not fully established. Therefore, the Committee could not conclude whether misconduct or serious misconduct occurred.

... **Point (iii) of the *ad hoc* JDC's Terms of Reference: Whether there has been a substantive irregularity (omission of facts or consideration of irrelevant facts).**

In its examination of the case, the Committee believes there have been substantive irregularities as follows:

... **The role of the Director, ITD.** The background documentation shows that in June 2005, the Director, ITD, was informed of an incident by the [Applicant] via e-mail dated 10 June 2005, to which [the Director] responded on the same date. In his interview report of 2 November 2005 by the Investigating Team, [the Director] acknowledged the e-mail exchange and informed the Investigating Team that '[the Applicant] never came back to him on any of the above even though she had full access [to] his calendar.' In the same interview report, it states that: 'In September 2005 ... [the Director] referred to a series of e-mail exchanges with [the Applicant] in relation to performance discussion issues ...' and '... [the Director] also informed the investigating team that ... [the Applicant] placed a few calls to him on his restricted office cell phone. He expressed concern ... [as to how the Applicant] got the number. 'The Committee concludes, from [the Director's] interview with the Investigating Team in which he gave no evidence at all of responding to the requests of the [Applicant], that [the Director] failed to appreciate the seriousness of the situation. The Committee is of the view that the Director should have taken appropriate action after the [Applicant's] repeated attempts to seek his intervention. Furthermore, the Committee noted that in an e-mail to [the Applicant], the Director ... stated: '... I have to tell you that You [sic] are making a disservice to yourself in the way you are dealing with the issues ...,' which could be open to misinterpretation, and certainly was not what one would expect from a manager fulfilling his responsibilities under paragraph 11 of CF/AI/1994-005 (UNICEF's former

policy on Sexual Harassment, which was in place at the time of the alleged incidents) which states: 'Managers and Supervisors are responsible for maintaining a harmonious work environment and must take prompt action to deal with any incidents of unacceptable behavior, including sexual harassment.'

... UNICEF, in its summary dismissal letter of 9 February 2006 ... state[d] that: '... most of the witnesses maintained to the Investigation Team that they did not recall [the Applicant] informing them that [she] had been the subject of sexual harassment ...' The Committee noted that 'most' is not 'all' [witnesses] and [that] indeed UNICEF overlooked the fact that both ... UNICEF FIR Officers, in their interview reports, acknowledged that they had been informally approached by [the Applicant] about the incidents months before she filed a formal complaint.

... Therefore, the Committee concludes that there was substantive irregularity because the inactive role of the Division Director was not taken into account, and that evidence supporting the [Applicant's] claims about reporting these incidents earlier were omitted in consideration of the case.

... **Point (iv) of the *ad hoc* JDC's Terms of Reference: Whether there has been a procedural irregularity.**

... First, there has been a procedural irregularity in allowing the allegations of sexual harassment to be investigated simultaneously with the allegations of defamation of character. While the two charges are linked, the Committee finds that they should have been treated separately. The Terms of Reference dated 27 October 2005 given to the Investigation Team did not include formal investigation of the counter-claim of defamation of character. The Investigating Team seemingly took it upon itself to include this counter-claim in their investigation and this was not done in a transparent manner.

... On page 10 of her 24 July 2006 submission to the Committee, [the Applicant] claims that a denial of due process occurred, since she was summarily dismissed prior to submission of her case to a JDC. The Committee finds no merit in this claim since paragraph 15.4.14 of the HR [Human Resources] Manual, under Summary Dismissal, states clearly that: 'If the Executive Director decides to summarily dismiss the staff member based on the seriousness of the misconduct and weight of the evidence, he/she will be notified in writing of the decision. The staff member may request a review of this decision as per UN [s]taff [r]ule 110.4(c), which states: 'In cases of summary dismissal imposed without prior submission of the case to a [JDC] in accordance with subparagraphs (b)(i) and (ii), the staff member or former staff member concerned may, within two months of having received ... [sic]' Therefore, it is within the prerogative of the Executive Director to summarily dismiss a staff member for serious misconduct without prior referral to a JDC.

... **Point (v) of the *ad hoc* JDC's Terms of Reference: Whether there was improper motive or abuse of purpose.**

The Committee could not establish any such motive or abuse of purpose.

... **Point (vi) of the *ad hoc* JDC's Terms of Reference: Whether the sanction is legal.**

The Committee concurred that the sanction to summarily dismiss the staff member was legal, since, as per UN [s]taff [r]egulation 10.2 and UN [s]taff [r]ule 110.4 (b) (ii), the Executive Director has discretionary authority in disciplinary matters to make such a decision. In the view of the Committee, the administration took this measure in good faith after considering the evidence as presented, and interpretation thereof.

... **Point (vii) of the *ad hoc* JDC's Terms of Reference: Whether the sanction was disproportionate to the offence.**

Based on the voluminous written materials that the *ad hoc* JDC reviewed, and the above-stated conclusions, the Committee is not in a position to determine whether the sanction was or was not disproportionate to the offence, because the facts for establishing the offence itself could not be determined.

... **Point (viii) of the *ad hoc* JDC's Terms of Reference: In the case of discretionary powers in general, whether there has been arbitrariness.**

The Committee is of the view that the administration took this decision in good faith based on its analysis of the evidence and, therefore, it concludes that [this decision was not taken arbitrarily].”

The *ad hoc* JDC submitted its report on 22 August 2006. Its conclusion reads, in part, as follows:

“Based on the above, and in careful adherence to its assigned Terms of Reference, the *ad hoc* [JDC], in its review of the Executive Director’s decision dated 9 February 2006, to summarily dismiss [the Applicant] from service with UNICEF ... although taken in good faith in the exercise of her discretionary authority in disciplinary matters, was vitiated by both substantive and procedural irregularities. Moreover, the Committee was unable to confirm all the facts after its thorough examination of the documentation.

The Committee considers that due process was not strictly adhered to in this case. After long deliberations, the Committee concludes that the case would benefit from a further review.”

On 13 September 2006, the Deputy Executive Director transmitted a copy of the *ad hoc* JDC report to the Applicant and advised her as follows:

“In reviewing the *ad hoc* JDC’s report, I have taken note of its conclusion that the Executive Director’s decision to summarily dismiss you from service with UNICEF for serious misconduct, although taken in good faith in the exercise of her discretionary authority in disciplinary matters, was vitiated by substantive and procedural irregularities; that despite thorough examination of the documentation, it was unable to confirm all the facts and considers that due process was not strictly adhered to.

After careful consideration of the *ad hoc* JDC’s report and with consideration of its reasoning and findings, I am unable to accept its conclusions on the review of the Executive Director’s decision to summarily dismiss you for serious misconduct...

...

In arriving at my decision, I have taken into account all of the circumstances of the case. I have given particular weight to the fact that you deliberately submitted false allegations which, are unverifiable by either yourself or any witness as sexual harassment, thereby misusing the complaints procedure under UNICEF’s Sexual Harassment Policy, in a manner which risks undermining the seriousness of such behaviour to the detriment of staff members pursuing genuine and verifiable complaints of sexual harassment. As a result, I maintain my conclusion that your actions constituted a serious violation of the highest standards of conduct and integrity expected of all international civil servants. Such serious misconduct is incompatible with continued service with the Organization.”

On 30 April 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss her from service, prior to submitting the case to a JDC, violated her rights.
2. The Respondent did not meet its burden of proving that she engaged in conduct that constituted serious misconduct.
3. The contested decision was based on errors of law and was vitiated by procedural and substantive irregularities.
4. Her allegations were not false, unsubstantiated, or motivated by personal interests.

Whereas the Respondent's principal contentions are:

1. The Executive Director of UNICEF has broad discretion with regard to disciplinary matters, which includes the determination of what constitutes serious misconduct warranting summary dismissal.
2. The decision to summarily dismiss the Applicant after thorough investigation, without prior reference to an *ad hoc* JDC, was not arbitrary, and did not violate the Applicant's due process rights.
3. The contested decision was not vitiated by procedural or substantive irregularity.
4. The contested decision was not improperly motivated, nor was it vitiated by bias, prejudice, or any other extraneous factor.

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

I. The Tribunal has reviewed the chronology of events leading to the contested decision and notes that on 3 September 2003, the Applicant was granted a two-year fixed-term appointment with UNICEF, as Assistant Information Officer, P-2. On 3 June 2004, the Applicant had her first performance appraisal-related meeting to discuss her PER for the period September 2003 to June 2004. At this meeting, she was informed by her supervisors; the Administrative Officer, ITD and the Deputy Director, ITD, that her performance did not meet expectations in five areas. On 13 September 2005, the Applicant met with her supervisors to further discuss her 2003-2004 PER. She was yet again informed that her performance did not meet the expectations of the post and that much improvement was required. On 16 September, the Applicant was requested to meet with her supervisors in order to continue discussing her PER and the renewal of her contract. She refused to attend this meeting but attended a meeting on 19 September. At that meeting, the Applicant was once more informed regarding the need for her to improve on "areas of concern and non-performance" as discussed in previous meetings, in addition to the need to finalize the 2003-2004 PER, and further discussion regarding her contract renewal.

II. The Tribunal notes that approximately one month later, on 17 October 2005, the Applicant formally charged the Administrative Officer, ITP, who at that time was her immediate supervisor, with three instances of sexual harassment. The Applicant's immediate supervisor is also a female. On 24 October, the Applicant's supervisor submitted a counterclaim against her for defamation and emotional distress. Thereafter, an investigation team was created to investigate the Applicant's claim. On 30 November, the investigation team submitted its final report where it concluded that the Applicant "wrongly and falsely" accused her supervisor of sexual harassment. The investigation team found no convincing evidence of harassment; on the contrary, it recommended that all three charges of alleged sexual harassment be dismissed as the allegations could not be substantiated, and further recommended that the Applicant receive appropriate disciplinary action. On 22 December, the Organisation charged the Applicant with having made wrongful allegations of sexual harassment, and on 9 February 2006, she was summarily dismissed for serious misconduct.

III. On 14 April 2006, the Applicant requested that the decision to summarily dismiss her from service be reviewed by a JDC. On 22 August, the *ad hoc* JDC submitted its report, wherein it determined that the contested decision was vitiated by procedural and substantive irregularities, and recommended further investigations because in its view the facts of the case could not be confirmed.

IV. On 13 September 2006, the Deputy Executive Director of UNICEF notified the Applicant that

"... the [*ad hoc* JDC] ... members failed to limit their deliberations to the mandated review of procedural due process on the disciplinary case which lead to [her] summary dismissal. Instead, the members of the *ad hoc* JDC took it upon themselves to enter into a substantive examination of the allegations of sexual harassment as [leveled] by [her] on 17 October 2005, against [her] supervisor, even though said allegations had already been thoroughly investigated by an authorised investigation which closed on 30 November 2005. By its actions the *ad hoc* JDC effectively substituted the findings of the authorised investigation for that of its own examination of the investigation materials, by forming the conclusion that the decision of summar[y] dismissal was vitiated by substantive and procedural irregularities ... In this context it is noteworthy that the *ad hoc* JDC drew its conclusions on the basis of a mere review of the documentation produced by the investigation, without availing itself of the opportunity to conduct interviews with any of the parties involved to support its dissenting conclusions ... Nonetheless, by entering into an extensive substantive examination of the case, the *ad hoc* JDC effectively transgressed beyond its mandate of review in this case.

The above notwithstanding, [the Deputy Executive Director] ... fully agree[d] with the *ad hoc* JDC's finding in paragraph I (a) that, despite its additional factual examination of the investigation materials, [her] allegations of sexual harassment ... against [her] supervisor, could still not be corroborated by conclusive evidence ..."

Consequently, UNICEF maintained its decision to summarily dismiss the Applicant on the grounds that she had deliberately submitted false allegations of sexual harassment, misused the Organization's complaints procedure, and that her actions constituted serious misconduct.

V. In its review of the Applicant's case, the Tribunal recalled Judgement No. 1244 (2005), wherein it stated that it "has consistently upheld the Secretary-General's broad discretion in disciplinary matters, particularly, in determining what actions constitute serious misconduct and what attendant disciplinary measures may be imposed". This discretion, however, is not without limit. (See Judgement No. 941, *Kiwanuka* (1999)).

VI. The Tribunal has taken account of the Applicant's contention that the Respondent erred in the decision to summarily dismiss her prior to referring her case to a JDC. The Tribunal notes, however, that paragraph 15.4.14 of the UNICEF Human Resources Manual states that the Executive Director may summarily dismiss a staff member for serious misconduct without prior referral to a JDC. Additionally, the *ad hoc* JDC itself agreed that prior referral was not required in decisions involving summary dismissal. The Tribunal also notes paragraph 24 of CF/AI/1994/005, which specifies that the Executive Director may summarily dismiss a staff member in a case involving sexual harassment, be that the accused or the accuser. The Applicant's contention in this regard is without merit.

VII. The Tribunal now turns to consider the grounds for which the Applicant was summarily dismissed and examines whether it included improper motives and/or reckless disregard for the truth on behalf of the Applicant for filing a claim against her supervisor alleging three instances sexual harassment. The Applicant claims that the three incidents of alleged sexual harassment were the following: (1) Sometime in the summer of 2004, the supervisor took the Applicant's pendant into her hand to observe it; or, in another version, her supervisor told her "that she was inappropriately dressed for the office; that her top was too low cut and she pulled at her top" and "reached into the neckline of her undershirt (camisole) and pulled it up, indicating to her that it was too low". (2) In the same summer of 2004, while the supervisor was sitting at her desk and the Applicant was standing by her, the supervisor allegedly took the fold of the Applicant's sarong skirt, "pulled up" opening it with both hands and exposing the Applicant's legs and undergarment; alternatively, this would have happened while they were sitting side by side; or, in a third alternative, the supervisor would have placed her hand under her skirt and touched the Applicant's leg, or only "opened her skirt"; or "lifted the edges of her wrap skirt and opened it, exposing her body". (3) Five months before the Applicant submitted her formal written claim, a third incident of harassment allegedly occurred in an office elevator, in front of a witness who observed them, when they were on their way to attend an office party. The supervisor was alleged to have touched the Applicant's breast, or pointed to it, or "pulled the neckline of her garment and put her hand inside... touching [the Applicant's] bra;" or "touched her chest trying to adjust her blouse (camisole);" or "only motioned with her hand and did not touch her". The Applicant then allegedly told her supervisor that "[i]f you touch me again, I will break your hand", a reaction which the Applicant herself admits to being "strong;" or, alternatively, she allegedly told her that "I don't want you to touch me again, [it's] inappropriate", in a normal voice: "[...] never raised her voice;" or not.

VIII. The Tribunal is perplexed by the variation of evidence presented by the Applicant and notes that the Applicant has partially modified or recanted her versions of the facts. By the same token, the witnesses have changed or recanted their testimonies, the last example of which is a new affidavit by a former witness, produced by the Applicant, which completely differs from this witness's statement to the investigation team. Additionally, the Applicant again changed her testimony when she stated to the Director, ITD, that "her supervisor had not touched her during the elevator incident", and also stated the same to the Ombudsperson, retracting an earlier accusation. The Applicant's defence is that such testimony "may in form have given the impression that the Applicant contradicted herself whereas in substance when read carefully and balanced with the facts and probabilities was not the case." From its review of the record, the Tribunal finds the Applicant's defence illogical as there were too many contradictions and varying versions by the Applicant and several witnesses of the same alleged incidents, which does not establish the facts as alleged by the Applicant or lends any credence to her claims. To the contrary, the arguments submitted in her defence substantiate the Respondent's contention that she had raised false allegations of sexual harassment against her supervisor.

IX. The Tribunal acknowledges the Applicant's assertion that after each incident she timely sought informal assistance from her spouse, colleagues, and her other supervisor, and notes the Applicant's admission that although in each case she was advised to timely put her complaint in writing, she decided not to do so. The Tribunal has consistently held that "[n]o justification can be found for an Applicant, who thinks [she] is being victimized, to wait ... before resorting to the proper procedural steps". (Judgement No. 498, *Zinna* (1990)). The Tribunal is mindful that harassment may be a difficult and painful experience and urges staff members who believe that their rights have been violated to protect themselves by formalizing their complaint in order to assure that any alleged violation of their rights is investigated and corrected. In the present case, given that the Applicant's allegations are full of contradictory and negating statements, which she herself has acknowledged, the Tribunal cannot but consider, as reviewed in paragraph one above, that it was only after the negative PER that the Applicant filed a formal complaint against her supervisor.

X. The Tribunal notes that in accordance with staff rule 110.4, Chapter 15 of UNICEF's Human Resources Policy & Procedure Manual, and UNICEF's policy "Sexual Harassment in the UNICEF Workplace", once the Administration was formally informed of the Applicant's complaint, it took proper and immediate action in response to the allegations of sexual harassment by ordering an investigation into the matter. The investigators reviewed written records and also interviewed the Applicant, her supervisor, and other witnesses. The investigators found contradictory interpretations of incidents, behaviours, and words, which led them to conclude that there was no evidence of sexual harassment or any other type of harassment by the Applicant's supervisor, and recommended that UNICEF should appropriately discipline the Applicant for submitting false charges. The Tribunal is satisfied that the investigation was thorough

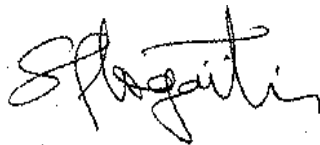
and has no cause to question the soundness of the investigators' conclusions. Therefore, the Tribunal finds that the Respondent acted within his discretionary authority when he decided to summarily dismiss the Applicant for serious misconduct upon the recommendation of the investigators that she be appropriately disciplined.

XI. The Tribunal now turns its attention to the *ad hoc* JDC, which was mandated to specifically examine "(i) whether the facts on which the disciplinary measures were based have been established; ... (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness". The *ad hoc* JDC's mandate is limited in scope in comparison with a JDC that is constituted to determine whether or not a staff member's behaviour is in violation of the United Nations Staff Regulations and Rules. In the present case, the *ad hoc* JDC intentionally went beyond its authority by admittedly "enter[ing] into a substantive examination of the case". The Tribunal concurs with UNICEF's assessment that this was equivalent to the *ad hoc* JDC substituting its findings and conclusions for that of the "authorised investigation", as reviewed in paragraph X above.

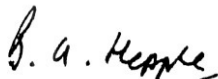
XII. The Tribunal believes that the decision to summarily dismiss the Applicant was grounded on the reckless falsity of her accusations, was proportionate to the serious misconduct involved in this case, and constituted a valid exercise of the Executive Director's discretionary authority. Therefore, the Tribunal concludes that the Applicant's due process rights were not violated, nor were there any procedural or substantial irregularities which could otherwise taint the contested decision.

XIII. For the foregoing reasons, the Tribunal upholds the Organization's decision to summarily dismiss the Applicant and rejects the Application in its entirety.

(Signatures)



Spyridon Flogaitis
President



Bob Hepple
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Sarahi **Lim Baró**
Associate Legal Officer