



Case No. UNDT/NBI/2009/61

Judgment No. UNDT/2011/054

UNHCR Budapest Services Centre which had been recently relocated from Geneva. He worked in the Personnel Administration and Payroll (PAPS) section of DHRM.

9. The Applicant had overall responsibility for the Headquarters, Europe and Americas Unit (HEA Unit) and had management responsibility for two sub-units. His immediate supervisor was the Chief of PAPS.

10. In January 2008 a group of Personnel Administration officers were locally recruited to work in the HEA Unit. The Applicant was their second level supervisor but until their direct supervisor arrived in March they worked under his direct supervision. They were employed on a 364-day fixed term contracts with an initial probationary period of 3 months. Three of these staff members were Ms M, Ms S and Ms T.

11. On 24 April 2008, the Chief of PAPS called a meeting with local and international staff to address their complaints about the way unit meetings were conducted, lack of technical support, and uncertainty about the nature of their contracts as the probationary period had expired. As a result of these complaints there was some subsequent re-arrangement of work and some staff were transferred.

12. In late April or early May 2008, Ms M approached a Human Resources Officer (HRO), to confide that she had been receiving SMS messages from the Applicant and that he was asking her out. She was emotional and crying. The HRO advised her of the procedures she could follow and, because they were serious allegations, advised her to tell the truth.

13. At about the same time but independently of Ms M Ms S spoke to the Assistant HR Officer in Budapest. She told him that she had been invited by the Applicant to come to his apartment to measure and choose curtains. She was embarrassed about being asked to do this after only one month of employment; she did not feel comfortable and did not want to go. She asked for advice. He advised her not to go. She did not feel comfortable but was also concerned about the security of

her job if she refused. The Assistant HR Officer printed out a document on sexual harassment for her.

14. Shortly after that Ms S spoke to the HRO about the Applicant. Ms S did not know of Ms M's complaint at that stage. Ms S said that the Applicant was angry with her for not wanting to go to his apartment, and that he was calling her into his office to speak about personal matters not just about work. The HRO advised her that she had to be sure of the truth of her allegations and told her of the channels she could follow if she wanted to pursue the matter. She also suggested that she speak to the Chief of PAPS before taking the matter further. Next, the HRO heard from Ms T that the Applicant had stopped talking to her because she had attended a meeting with the

for a number of months. He went on sick leave at that stage and did not return to work again before he was summarily dismissed.

The Preliminary Investigation

17. The Chief of PAPS and the IGO formally received the initial complaints in two e-mails.

18. The first from Ms S said that the Applicant was insulting her behind closed doors in his office, mostly with words but on one occasion physically. She clearly indicated to him that she did not feel comfortable in the situation and that she did not wish to go to his flat. She said this started in the last two weeks of February 2008. She asked for a formal investigation because, although he had stopped insulting her, she did not feel safe and comfortable and she received very negative treatment from him.

19. The second complaint, from Ms M said sexual harassment started almost immediately after his arrival in January 2008. He called her into his office and insulted her with words, and once touched her physically. She had clearly told him that his talk of sexuality and his attraction to her was making her uncomfortable.

20. Once advised of the allegations, IGO commenced an immediate investigation. An investigator was dispatched to Budapest between 18 and 20 June, and conducted 14 interviews with the complainants and other staff members. The investigator found the complainants to be spontaneous and coherent. She had no reason to suspect their truthfulness. The interviews were comprehensive, during which the complainants made more detailed allegations than in the original e-mails.

21. On 5 August 2008, the IGO advised DHRM that it had received two formal written complaints of sexual harassment from subordinates of the Applicant. On the same day the Applicant was advised that he was the subject of an investigation into allegations of misconduct and asked to attend an interview with the investigator. He was not told before the interview that the allegations concerned

messages that had passed between him and Ms S. He replied to the effect that he could not remember the details but he could come back to it later because “piece by piece like that I don’t remember the context.” He said he wanted to go back to his

28. The Applicant told the Tribunal that the reason he laughed during the interview was that he found the statements of the witnesses that were being told to him to be “too much”. He also said that he was very nervous during the interview and almost fainted. It was the first time he had heard about the sexual harassment and had not contacted a lawyer before the meeting as he thought it was going to be about his management style.

29. The investigator found his laughter unusual, and said he did not categorically deny anything. Both of these facts were influential in her assessment of the Applicant’s credibility.

30. At the end of the interview, the Applicant was given a suspension letter which had been written on 5 August 2008. It informed him that reports of possible misconduct required him to be suspended during a preliminary investigation. It said this was an administrative measure that did not prejudice any rights he might have as a staff member. It required him to return all UNHCR property, surrender his ground pass, refrain from entering any UN premises without permission and then only under escort, and to avoid contacting colleagues and UNHCR partners. The suspension was on full pay pending completion of the investigation – initially for a period of one month. This period was subsequently extended until his dismissal.

31. The investigator told the Tribunal that the reason the people suggested by the Applicant to speak on his behalf were not interviewed was because IGO did not conduct character interviews about people’s personalities. The only witnesses who they interviewed were people who could either prove or disprove the allegation or if they were witness to what the staff member was accused of.

32. The investigator interviewed one further staff member and on 13 August 2008 provided the Applicant with a copy of the draft preliminary investigation report (PIR). The report found that the evidence gathered in the investigation was sufficient to conclude that the allegations of sexual harassment were well founded but that there was not sufficient evidence to pursue the management issues as a disciplinary matter.

33. The Applicant was asked to submit his response to the draft PIR and return his signed interview record by 20 August 2008. He did not do that and the final PIR was forwarded to the DHRM on 22 August 2008.

The Disciplinary Procedure

34. On 3 September 2008, DHRM sent a letter to the Applicant enclosing the PIR which contained a summary of the investigation and allegations of sexual harassment. But it did not attach all the annexures which had been sent to the DHRM including the original complaints and the transcripts of the interviews of the

under protest also enclosed the Applicant's preliminary reply to the PIR. This was a comprehensive thirty-six (36) page document. It addressed his concerns about the conduct of the investigation such as being interviewed without notice of the allegations or the opportunity to take advice and then answered each of the complaints of sexual harassment. It reiterated his wish for other persons to be interviewed to give a different perspective and listed those people.

39. During the course of 2008, an independent review of UNHCR IGO was undertaken by OLAF (European Union Anti-Fraud Office). In November 2008 OLAF released its recommendations. Neither the investigator nor the DHRM revised the investigation in the light of that review.

40. In December 2008 Counsel for the Applicant wrote to DHRM. He noted he had no response to previous correspondence and reiterated his request for DHRM to be recused and questioned the procedure that led to the Applicant's suspension, amongst other matters. He drew the attention of the DHRM to the OLAF independent review and its criticisms of the UNHCR investigation process.

41. The Respondent did not reply to any of the letters or the issues raised by them. No action was taken by either UNHCR or IGO to interview the witnesses suggested by the Applicant or his counsel. DHRM told the Tribunal that the IGO would have followed up if anything new was raised in the Applicant's response but did not know if IGO had done so in this case. The investigator said that Counsel's letters were not sent to her but that she had received the Applicant's response to the charges and made comment to HRM about them but did not change the preliminary report recommendations. She was not asked to carry out any further investigation.

42. DHRM considered the PIR, the Applicant's responses, and the legal analysis of that, before writing to the High Commissioner with the recommendation that the Applicant be summarily dismissed. The Applicant was advised on 13 January 2009 that the High Commissioner had decided to summarily dismiss him for serious misconduct. A copy of the High Commissioner's decision was attached. This

outlined the allegations, the Applicant's responses at the interview and through his counsel, examined the legal issues including an analysis of misconduct by sexual harassment. It recommended that the Applicant be dismissed because he had behaved inappropriately as a UNHCR staff member by having sexually harassed three local staff members of UNHCR Budapest.

43. DHRM told the Tribunal that, in making his recommendations to the High Commissioner, he relied on the investigator's finding that the complainants were all credible. He said he applied the standard of proof in accordance with the UN standards, that is, on the preponderance of evidence.

Summary of the Complaints

44. The accounts given to the investigator and the Tribunal by the complainants were fuller than the initial complaints conveyed to the Chief of PAPS. In summary their allegations were as follows.

45. One alleged he had touched her breast while dancing at a salsa bar to which the c5.5pd82 0 TD-0. totvedfen he firived in an effoke
sc,254(feel welcom)8.4(e; that he had the inside)EUS 625 ed TDH 000s Tron 701 Tw[(d m)7.7(a)-15
and invtved her to have sex;he touched the inside of her thigh while commenting on

- iv) He was denied access to counsel before he was interviewed;
- v) Counsel cited Judgment No 1242 of the United Nations Administrative Tribunal (a sexual harassment case) in which “the failure to provide an opportunity for the Applicant to be meaningfully involved [resulted] in a fundamental defect which must vitiate the decision of summary dismissal” as well as the UNDT cases of *D’Hooge*², and *Valle Fischer*³ as to due process requirements and implications of the failure to meet these.

52. The Applicant referred to the fact that OLAF had identified that the rules and regulations governing the IGO’s investigations in certain respects did not meet international recognised standards of fairness. This included inadequate notice of the interview and its subject matter. Counsel submitted that the investigation of the Applicant should have been reconsidered in light of its recommendations before a final decision was made in his case.

53. The Applicant’s case is that the irregularities had an inevitable, direct and adverse impact on the decisions made which may not be retroactively cured.

Respondent’s submissions

54. The Respondent submitted that all due processes were respected in accordance with IOM/FOM 54/2005 and ST/AI 371.

55. The Applicant was given all evidence and an opportunity to respond to it when he was given the draft PIR on 30 August 2008.

² UNDT/2010/044

³ UNDT/2010/129

the misconduct warrants immediate separation for service and that the staff member should be summarily dismissed.

UNHCR IOM/54/2005, FOM/54/2005

67. These Inter Office and Field Office Memoranda concern the roles, functions and operational methods of the Inspector General's Office in relation to UNHCR including in disciplinary investigations. As the responsible officer under ST/AI/371, the IG has overall responsibility for ensuring that possible misconduct within UNHCR is investigated in a timely and appropriate manner.

68. The decision to institute disciplinary proceedings is made by the Director of DHRM in accordance with ST/AI/371.

69. Paragraph 5.1.3 provides that all investigations undertaken prior to any formal charge of misconduct against a staff member are considered preliminary. The purpose of a preliminary investigation is to determine whether or not the facts support a finding of misconduct that may ultimately be subject to disciplinary action. An investigation is a fact finding exercise not a punitive undertaking.

70. Paragraphs 5.10 to 5.14 cover the procedure for investigations into possible misconduct, responsibility for and principles governing the conduct of investigations, as well as suspensions and investigation findings.

71. The first step in an investigation under the IOM/FOM is an initial examination of possible misconduct. The staff member who reported the possible misconduct is to be advised of any decision to proceed and the name of the responsible officer.

72. Following this, Para 5.10.3 states that

The IGO will as soon as it is feasible without jeopardising the effectiveness or integrity of the investigation process itself, formally communicate to the subject of an investigation that s/he is under investigation.

point made in *Yapa*.⁶ It is incumbent on the Organisation strictly to observe those

original complaints in that none of the management issues were deemed suitable for disciplinary proceedings. The Applicant could not have been informed at the interview of the precise allegations which were to lead to his dismissal.

88. In any event, staff rule 110(4) and ST/AI/371 dictate that the allegations are specified in writing. A statement before the interview that the investigation is into possible misconduct is not sufficient.

89. Next is the question of disclosure of relevant matters to the Applicant before he was required to answer the allegations. The evidence is clear that the Respondent failed properly to disclose all relevant matters to the Applicant throughout the process. He had no access to the complainants' original statements or to those made at their interviews before his interview. He was only told verbally of their complaints in the course of his interrogation.

90. Nor did he receive all relevant documentation before the disciplinary proceedings were instituted, as required by Rule 110.4. The original complaints were not provided to him until ordered by the Tribunal prior to the hearing of this case.

91. The Tribunal is concerned that it is the Respondent's policy not to provide the accused staff member with all of the annexes to the PIR. UNHCR interprets paragraph 5.12.5 to mean that it is at the discretion of the organisation whether the draft PIR is shared with the staff member and in what manner. Such discretion must not be exercised in an arbitrary manner and must have consideration for the rights of the affected staff member to fair process.

92. A person facing serious allegations must be given all the facts and documentation relied on by the decision maker unless there are particular reasons of security or confidentiality. In those cases, the staff member should be advised of the nature of the documents withheld and the reasons for that. This did not occur in the Applicant's case. He was deprived of a fair opportunity to assess this evidence.

93. The next issue is whether the Applicant had a reasonable opportunity to answer the allegations and to present any countervailing evidence. The Respondent relied on the fact that the Applicant was given the opportunity to respond in writing once the allegations had been put to him and the disciplinary process was being pursued. Unfortunately the attempt to give him his due rights once he was advised in writing of the allegations was too late. This is because in making the decision to dismiss him great reliance was placed on his responses and demeanour during the verbal interview.

94. The interview conducted by the IGO was preliminary only in name. It was conducted over several hours; it subjected the Applicant to very close examination and was his only opportunity to verbally explain his position on a large number of allegations before he was dismissed. It was clear from the evidence of the investigator that the content and manner of the Applicant's responses at the interview were very influential in her assessment of his account. This meant that once the charges were formally made and the disc

witnesses. Her report to DHRM made no mention of the fact that the Applicant had suggested that other persons be interviewed and that the suggestion was not pursued at that time.

97. Once the formal allegations had been made, and Counsel became involved, he proposed that named persons be interviewed as part of the investigation. The request to interview these witnesses was again rejected and explained by the DHRM in his opinion to the High Commissioner. He cited the UNHCR Policy on Sexual Harassment and Abuse of Authority which states that

98. Both parties may suggest a list of persons to be interviewed by the Investigating Body. The Investigating Body will interview such persons at its discretion.

99. The DHRM wrote:

It is therefore at the discretion of IGO to decide which witnesses it should interview. The testimonies of character witnesses can be considered as not relevant and central to the allegation. The witnesses did not therefore have to be interviewed.

100. The witnesses suggested by counsel for the Applicant included Ms C who was called as a witness at the hearing by the Applicant. Her evidence was relevant. She had conducted the initial training sessions with the Budapest staff including the complainants. She worked in very close proximity to them and the Applicant from January to May 2008. She had observed the behaviour and interaction of all of them at close quarters and described something of the office dynamic at the time. Given that it has always been the Applicant's

witness at the hearing. A third was the Chief of PAPS, a person whose involvement in the matter as the Applicant's supervisor and the person dealing with all of the complaints including the management issues could hardly have been more relevant.

102. In an investigation of this sort, the IGO cannot be expected to conduct wide ranging interviews of witnesses of peripheral or no relevance, however, an impartial investigator should make thorough enquiries to ensure that witnesses suggested by an accused staff member are indeed relevant and the decision-maker should ensure that this important element of fair process has been complied with. The DHRM was in error in classifying all the suggested witnesses as character witnesses. He therefore did not exercise his discretion properly when the Applicant's request was rejected without what I find to be insufficient consideration.

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investigation. Given the extent to which the decision-maker relied on the evidence collected during the impugned preliminary investigation, nothing that was done at the later stages of the process could have remedied the initial procedural errors.

Conclusion on Issue 1

107. To give full effect to the requirements of staff rule 110(4) which embodies the elements of fair process in disciplinary investigations, the preliminary investigation undertaken pursuant to the AI and any related IOM/ FOMs should be treated as strictly preliminary. The disciplinary part of the process, including the interview of the alleged offender should only occur once all the preliminary evidence has been made available to the staff member and the specific allegations against him or her have been finalised. If there is to be an interview it should properly be the last step in the investigation as envisaged by paragraph 6(a-c) of the ST/AI/371.

108. In any event, in order for the Applicant in this case to have had a fair and reasonable opportunity to respond as referred to in all of the relevant instruments including in paragraph 5.12.5 of the IOM/FOM, he should have had the opportunity to see all the relevant information before making such a response regardless of what stage he was interviewed at.

109. There were a number of procedural deficiencies during the investigation of the allegations against the Applicant. These are:

- a) The decision to interview him before any formal charges had been made precluded him having the opportunity to take counsel before having to answer the serious allegations against him.
- b) The failure to give him any notice of the allegations before he was required to attend an interview.

- c) The failure to provide him before interview and before he was ultimately dismissed with all relevant information to enable him fully to assess the case against him.
- d) The failure properly to consider his request for witnesses specified by him to be interviewed.

Issue 2- Did the Respondent have sufficient well established facts to reach the conclusion that misconduct had been committed?

The Applicant's submissions

110. It is the case for the Applicant that there is an alternative to the position that the case depends on finding that either the complainants or the Applicant were lying in their accounts of what occurred. It was submitted that there was a disconnect between the DHRM and the IGO. Although the Applicant gave a detailed rebuttal, the issues raised were apparently not reconsidered by the IGO or DHRM. The Respondent gave no response to the letters before making its decision and the DHRM relied on the recommendation of the IGO which did not consider or evaluate the letters from counsel or the Applicant's 36 page rebuttal.

111. The Applicant was critical of the investigator's reliance on the nervous laughter of the Applicant to assess his credibility. The Applicant contends that the Respondent did not apply the high standard of proof required in investigations where the Applicant is facing the possibility of in

- i) It did not demonstrate that the alleged conduct interfered with work, was unwelcome at the time or created a hostile environment.
- ii) The reports of the “unwelcome” nature of the conduct was only reported long after it occurred and when the complainants became worried about their job security.

Respondent’s submissions

113. The Respondent relied principally on the credibility of the complainants. It was submitted that the appropriate standard of proof to be applied in investigations is whether there is adequate evidence and whether the preponderance of evidence supports the allegations. The former UNAT case of *Araim*⁷ was cited.

114. In the alternative, it is the Respondent’s position that even if the standard for serious cases, namely higher in summary dismissal cases but somewhat below the beyond reasonable doubt in criminal cases, there is sufficient evidence in this case to meet that test.

115. It was submitted that the complainants gave credible evidence unlike the Applicant who, it was suggested had denied physical contact and did not recall important matters in contention. The Respondent pointed to evidence of corroborating witnesses and to a pattern of behaviour.

116. In response to the criticism that the complainants delayed making their complaints, and made no notes, the Respondent submitted that they were new to the UN, could not be expected to know all the procedures to follow in the event of such conduct, and did not know how to deal with it. They were aware that the Applicant was a supervisor who was in a position of authority, and in any event the time delay was relatively short for this type of case

117. The Respondent's case is that on the evidence of the complainants the elements of sexual harassment were met. His behaviour was very unwelcome and embarrassing. UNHCR has mandatory training in sexual harassment and the Applicant ought to have known that his invitations were unwelcome especially when they were refused so often.

Discussion

118. When a person faces serious charges the standard of proof required to prove those must be equally serious. However, in the workplace, such allegations are not criminal charges: a staff member is not liable to criminal conviction and penalty. To that extent, in disciplinary procedures, the concept of proof beyond reasonable doubt is not appropriate. As the responsible officer who assesses the evidence and makes the preliminary decision is not acting as a lawyer or a judicial officer, the whole notion of the application of differing standards of proof may, in practice, be a matter more of expression than of correct application. It is easier for a lay person to say they are applying a certain standard of proof than it is properly to act in accordance with that standard.

119. However, ST/AI/371 sets the standard of proof at each stage. At the preliminary enquiry stage the responsible officer has to assess if the report of misconduct is well founded but need only be satisfied that the evidence appears to indicate that. This is not a high standard of proof. At the point of decision, the AI sets two separate standards. If the facts appear to indicate that misconduct has occurred then, under the previous system of Internal Justice, the matter could be referred to the JDC for a full enquiry. Alternatively, as stated by paragraph 6(c), should the evidence clearly indicate that misconduct has occurred and that the seriousness of the misconduct warrants immediate separation then summary dismissal may be recommended. This is a higher standard than that required of the preliminary investigation.

120. These are the statutory standards imposed by the UN.

121. The question in a case of summary dismissal is whether the ultimate decision-maker acted on the basis of evidence that clearly indicated that serious misconduct had occurred.

122. It is not necessary, in the light of the previous conclusions about breaches of process to canvas fully the allegations made by the complainants about the behaviour of the Applicant towards them. It must be stressed however that in their evidence to the Tribunal the two principle complainants from the Budapest office presented as truthful and sincere in relating the facts of the case as it appeared to them. The investigator had reason to be impressed with their credibility.

123. There is no doubt that in January 2008, their actions in welcoming the Applicant as a newcomer to Budapest, and their offers of assistance, were well meant and innocent of any improper motives on their part. They invited him to join them once for dancing at a salsa bar, gave him private phone numbers so he could send SMS messages if he needed help with shopping in a foreign language and engaged in discussions with him on subjects about after work activities.

124. From their account, the Applicant misinterpreted their behaviour as invitations to more intimate relationships and abused their friendly approach by making persistent demands on their private lives and talking inappropriately at work about personal topics in an offensive manner. They alleged three instances of inappropriate touching. Pc. Pc. Pd(1i1 d however that isT.0002 1 Tcinc(7-0.01)6nauUoy dis(ffers1 Tcin1(

126. On the basis of the evidence of the complainants, there were enough facts for the investigator to be satisfied that the evidence appeared to indicate that misconduct had occurred. However fairness dictates that the person accused of the misconduct is given a full and fair opportunity to both answer those allegations and have them properly evaluated. The Applicant did not have that chance at the preliminary investigation stage

127. Once witnesses were examined and cross-examined by all counsel and the Tribunal, some matters which had appeared to be well established became open to question.

128. For example, two witnesses were called by the Respondent to demonstrate a pattern of behaviour by the Applicant. Of these, one who alleged historical inappropriate behaviour by the Applicant at another duty station was revealed to have sent him several e-mails which, by their tone and expression, tended to contradict her characterisation of his behaviour as unwelcome. That evidence was unavailable to the Applicant at his interview and, although presented in the Applicant's rebuttal, there is no evidence that it was seriously considered before the decision to dismiss him.

129. Secondly, the Applicant's explanations for some other matters that had been counted against him gave rise to the possibility of a different interpretation.

130. For example the Applicant's offers of assistance and money when one of the complainants had her belongings stolen from the salsa club were described by the complainants as appearing unusually friendly. From his evidence to the Tribunal there is a real possibility that he was acting solely out of concern for a junior staff member who realised as she was about to leave the club late at night that she had lost not only her winter coat and her wallet, but also her house keys, and that his behaviour was misconstrued in hindsight. That behaviour was not mentioned in any of the original complaints to the Chief of PAPS, but it later became a factor in the assessment of his overall conduct towards the complainants.

131. In another example, he agreed in his evidence that he talked with the staff members about massages but he placed these conversations in the context of general talk on a Monday morning about what they had done during the weekend. It appears that he enthusiastically described what he regarded as therapeutic massages and suggested that they give it a try. He explained that he asked the staff members a lot of questions about Hungarian culture including about their backgrounds and careers. He agreed he talked about marriage with one of the complainants but suggested that she also asked him a lot of questions about his own mixed cultural upbringing. He denied that these conversations had a sexual connotation.

132. Having heard his evidence in court, there is some room for considering that the discussions about massages and other topics which he does not deny, could have been interpreted in more than one way. The Tribunal is

before a decision was made as to whether

Conclusion on Issue 2

142. The Respondent failed to give the Applicant a reasonable opportunity to present his case and countervailing evidence and have these treated with due deference. The evidence considered by the Respondent was limited to that given by witnesses the Respondent regarded as relevant. As a consequence the Tribunal cannot be satisfied that the facts relied on by the Respondent clearly indicated that misconduct had occurred and that the seriousness of the misconduct warranted immediate separation. Summary dismissal was not the inevitable consequence of the disciplinary procedure.

Decision

143. The dismissal of the Applicant was unlawful because it breached the UN legislative rules and procedures for disciplinary investigations as well as the general requirements of fair process. As the conclusion that the procedure followed in this case was not in accordance with the staff rule 110(4) or the SG/AI/371 and that the facts relied on by the High Commissioner were not sufficiently well established to justify summary dismissal, it is not necessary to rule on the third issue of proportionality or on the secondary points concerning the suspension of the Applicant.

144. It is important to add that these breaches not only prejudiced the Applicant but also the complainants who were deprived of their right to a full, proper and conclusive investigation of their complaints

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mitigation of those losses, including related questions such as the state of his health, will require further evidence.

146. The parties are invited to attempt to resolve these issues between them in the light of this decision. If this is not possible and a hearing is to be held this will occur in May or June 2011.

147. The Tribunal orders:

i)