



1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by Ms. Carina Perelli against Judgment No. UNDT/2012/034 and Summary Judgment No. UNDT/2012/100, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 9 March 2012 and 29 June 2012, respectively, in the case of Perelli v. Secretary-General of the United Nations .

Facts and Procedure

2. Ms. Perelli became Director of the Electoral Assistance Division (EAD) at the D-2 level with the Department of Political Affairs (DPA) at the Organization's Headquarters in August 1998. She was summarily dismissed effective 2 December 2005 for having engaged in sexual harassment, professional harassment and abuse of authority.

3. At a meeting organized by Mannet S.a.r.l (Mannet), an external consultancy firm, in June 2004, the staff of EAD expressed concerns about the management of their division. Subsequently, the Under-Secretary-General, DPA (USG/DPA), contracted Mannet to undertake a management review of EAD. Mannet issued a report dated 16 February 2005, in which numerous management problems within EAD were identified (Mannet Report). In addition, Mannet reported that Ms. Perelli might have engaged in, inter alia , sexual harassment and professional harassment, which required further investigation by competent authorities.

4. Ms. Perelli was provided with a copy of the Mannet Report and was invited to submit a written response. In her response dated 31 March 2005, Ms. Perelli rejected Mannet's findings regarding management issues and questioned the procedure and methodology used. Regarding the allegations of misconduct against her, Ms. Perelli requested that they be referred to the competent entity within the Organization for determination as to the need for a full investigation.

5. On 6 April 2005, the USG/DPA informed Ms. Perelli that he had decided to forward the allegations of sexual and professional harassment to the Office of Human Resources Management (OHRM) for investigation. A two-member investigation panel (IP) was subsequently appointed to conduct the initial investigation and fact-finding.

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17. Ms. Perelli submits that as there is not any concrete rationale based on a serious investigation, it can only be concluded that the contested decision was the result of a confluence of other extraneous motivations by the decision-makers that resulted in a miscarriage of justice.

18. Ms. Perelli requests that the Appeals Tribunal order the rescission of the contested decision, her reinstatement, back pay, and unspecified moral damages.

Secretary-General's Answer

19. The Secretary-General submits that the UNDT had a sufficient basis to conclude that the established facts legally amounted to misconduct. It was reasonable to expect Ms. Perelli, as a senior manager with presumptive knowledge of the standards regarding sexual harassment, to have been aware that the actions she was taking vis-à-vis staff members under her supervision were inappropriate.

20. The Secretary-General also submits that the UNDT had a sufficient basis to conclude that the disciplinary measure of summary dismissal was proportionate to the offence.

21. The Secretary-General submits that it is inconsistent for Ms. Perelli to assert that the facts were not established in accordance with the requisite standard, when all of the facts that the UNDT determined to have been established were reflected in the JDC's factual findings, which she accepted and had urged the UNDT to accept.

22. The Secretary-General maintains that a senior manager's use of coarse language and sexual innuendo with staff under his or her supervision is necessarily linked to the work environment, irrespective of when and where such conduct occurs. This is particularly the case in the context of the work of election assistance in which much work is performed outside of the office and outside of regular office hours.

In respect of Judgment No. UNDT/2012/100

Ms. Perelli's Appeal

23. Ms. Perelli submits that it was unfair and misleading for the UNDT to say that she was re-litigating Case No. 1. She merely requested that the consideration of Case No. 2 be deferred until the Appeals Tribunal had an opportunity to rule on Case No. 1, since the outcome of that appeal would be dispositive.

29. The Secretary-General maintains that for the UNDT to have separately dealt with some particular stage of the disciplinary process would have created an artificial and unnecessary separation of the issues, contrary to the principle of judicial efficiency and the jurisprudence of the Appeals Tribunal in Kamanou.² From the UNDT Judgment on Case No. 1, it is clear that the Dispute Tribunal did consider each element required in reviewing a disciplinary case.

Considerations

30. The Appeals Tribunal has considered the arguments raised in the course of the parties' written submissions and in the course of the oral hearing on 25 March 2013.

31. The first issue to be decided is whether the UNDT erred in law in finding that Ms. Perelli's due process rights were respected during the formal disciplinary process. For the purposes of clarity, we are deeming the formal disciplinary process to have been ongoing from 3 August 2005 to 6 December 2007.

32. By way of preliminary observation, the Appeals Tribunal finds that notwithstanding that there was no complaint to Management by staff members prior to Mannet, the UNDT correctly determined that the issues raised in the Mannet report were sufficient to give Management reason to believe that misconduct may have occurred and thereby justified the decision of Management to commence a fact-finding investigation pursuant to the provisions of ST/AI/371 and ST/AI/379: "Where there is reason to believe that a staff member has engaged in unsatisfactory conduct, for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation."³ "Upon receipt of a complaint from the aggrieved staff member ..., or upon receipt of a report of sexual harassment from an appropriate official ..., the Office of Human Resources Management will promptly conduct at Headquarters the initial investigation and fact-finding..."⁴

33. On the issue of her summary dismissal on 2 December 2005, Ms. Perelli submits that while the Dispute Tribunal took note of violations of due process at the initial stage of the investigation, which it concluded were later cured, it failed to address the central issue raised by Ms. Perelli, namely, that the IP never undertook to establish facts but merely to record

² Kamanou v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-113.

³ ST/AI/371, para. 2.

⁴ ST/AI/379, para. 9.

observations and opinions. Ms. Perelli thus submits that the decision of 2 December 2005 to summarily dismiss her from service was based on statements that had never been examined or verified in any way. Ms. Perelli further submits that the UNDT, in its Judgment, committed the same error as the IP itself, namely by relying on facts which the investigators admitted they could not vouch for as being true.

34. The record indicates that Ms. Perelli was provided with the Marnet report in March 2005. Following its investigations, the IP finalized its report on 7 July 2005. It reported, *inter alia*, as follows:

9. Most staff acknowledged a persistent sexually charged atmosphere in the office. Many referred to crude language, sexual jokes and references/innuendo to the Director's sex life and inquiries/references to staff's sexual habits, often in front of others

...

11. Two instances of overt sexual harassment have been reported...

12. It appears that this abuse of authority and lack of management skills of one staff

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42. As recorded at paragraph 40 of its report, the JDC did not question the discretionary authority of the Secretary-General to pronounce a staff member's act or acts as a failure to

46. Having regard to the admissions of the IP members, and applying our reasoning in Marshall ⁸, this Tribunal is satisfied that the IP report satisfied neither the remit given to it in May 2005 nor the statutory requirements set out in paragraph 3 of ST/AI/371.⁹

47.

the required standard of proof for dismissal for misconduct (as set out in *Molari*) was met.¹⁰ In view of the fundamentally flawed nature of the IP investigation, we are satisfied that the Secretary-General's rejection of the JDC's findings on due process tainted the decision made on 6 December 2007.

50. Whether the Secretary-General's rejection of the due process failures vitiated his 6 December 2007 decision in its entirety is an issue addressed by this Tribunal in conjunction with its considerations, as set out below, of the merit-based investigation conducted by the JDC.

The merit-based investigation conducted by the JDC

51. At paragraph 61 of its report, the JDC stated:

Given that the IP did not examine the veracity of witness statements nor analysed their consistency, the Panel had no alternative but to conduct the required analysis itself in order to find whether the evidence presented is "reasonably sufficient for legal action". Due to the complex nature of the charges, the Panel had to examine fully the surrounding circumstances in order to draw conclusions on both the factual basis and the basis for an assertion that they did or did not amount to misconduct of sexual harassment, professional harassment, and abuse of authority. The Panel conducted such analysis for each of the three charges separately.

52. In effect, the JDC took on the function which the IP ought to have assumed from May to July 2005, according to its remit and the provisions of ST/AI/371. The JDC described its modus operandi as follows:

Despite finding that essential due process requirements were not met in this case [...], the Panel, striving to present a well-reasoned recommendation, decided to go beyond this pivotal due process finding and to undertake a detailed examination of the merits of the case in its entirety. To this end, the Panel decided to analyse the factual basis for the allegations and charges, i.e. analyse the witness testimony as documented in the records of interviews with the IP and the Panel and other relevant documents,

¹⁰ "Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable." (*Molari v. Secretary-General of the United Nations* , Judgment No. 2011-UNAT-164, para. 2, footnote omitted.)

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57. Applying the definition of sexual harassment to the facts as established, the JDC found two of the elements of ST/AI/379 satisfied, namely, that there was conduct of a sexual nature and that it created an offensive environment.

58. After analyzing in depth witness testimonies and statements (including Ms. Perelli's and her superiors'), the JDC did not find that Ms. Perelli's conduct was "unwelcome" (the third mandatory requirement as set out in ST/AI/379) as the JDC was not satisfied that she was on notice as to the unwelcome nature of her conduct. The JDC stated:

The pertinent question before this Panel is, therefore, not why staff were allegedly

The JDC's conclusions

a. On the issue of due process, the [JDC] Panel finds that one of the indispensable steps in the process set out in ST/AI/371 and AI/379 – fact finding and investigation – had not been implemented since the Investigation Panel appointed by ASG/ORHM did not seek to establish facts. This finding leads the [JDC] Panel to the conclusion that essential due process requirements were not met in this and, as a result, the prima facie case cannot be considered established, although [Ms. Perelli's] lack of responsiveness certainly added to this problem. The [JDC] Panel thus finds that [Ms. Perelli's] initial contention of invalidity of the process that resulted in the decision to summarily dismiss her is supported.

b. On the charge of sexual harassment, based on the [JDC] Panel's examination of the record and its own fact-finding, during the proceedings, the [JDC] Panel finds that [Ms. Perelli] exhibited some (although not all) of the behaviour complained of which can reasonably be characterized as vulgar and, in some cases, definitely inappropriate in [the] Headquarters office environment. However, the [JDC] Panel finds that there was no indication that [Ms. Perelli] was put on notice, nor that she should reasonably have realized from the circumstances that the conduct was unwelcome, and might be viewed by some staff members as being of a sexual nature and as creating an offensive working environment. Given that such notice and/or realization are indispensable for a charge of sexual harassment, the [JDC] Panel concludes that [Ms. Perelli's] conduct as established did not constitute sexual harassment. (*Italics in original.*)

60. Thus, based on the foregoing and on the basis that professional harassment and abuse of authority had not been established, the JDC unanimously recommended "that the decision taken to summarily dismiss [Ms. Perelli] be rescinded".

The Secretary-General's response to the JDC's findings on the substantive issues

61. By and large, the Secretary-General accepted the JDC's findings on the charges of professional harassment and abuse of authority. However, he rejected the JDC's conclusion that sexual harassment was not established, and in the letter of 6 December 2007 to Ms. Perelli CID3(IJ0.5(re140207 T /P mmari)-7)311(t)2ipro -2.84vt the 3c4vt[u2(Ge)-5(r-5(believedTJO.

In view of the circumstances in this case, including the evidence given by [Ms. Perelli], the [Dispute] Tribunal finds that her behaviour towards her staff as established by the JDC was such that she should have and, indeed, must have known it was not only inappropriate but would have the effect of creating an intimidating, hostile, and offensive work environment.

63. The UNDT accepted that Ms. Perelli was not directly on notice of the offence caused to staff members by her sexual references and bad language. The issue for this Tribunal is whether the UNDT's conclusion, namely, that Ms. Perelli had constructive knowledge of the unwelcome nature of her actions, is factually and legally sustainable.

64. There is no dispute but that Ms. Perelli had a managerial position of high rank and that she operated in a multi-cultural environment. Several witnesses who testified before the JDC stated that Ms. Perelli was very sensitive to the need to observe cultural and behavioural rules, and the JDC noted that “[t]he fact that no allegation has ever been raised during [Ms. Perelli's] tenure with the United Nations that she displayed inappropriate behaviour in representing the Organization or interacting with outside officials or entities shows awareness of and a sensitivity to these matters.”

The JDC found, *inter alia*,

- Ms. Perelli did not introduce coarse language and profanity in EAD; such conduct existed before she joined the Division;
- No warning or request about Ms. Perelli's behaviour was ever communicated to her by her subordinates over the course of six years during which she served as Director of EAD;
- Numerous statements were made to the JDC to the effect that no objections were ever communicated to Ms. Perelli by staff who felt offended or by third parties on their behalf;
- One individual stated that he had never witnessed persons from other cultures to have been made uncomfortable by Ms. Perelli's behaviour or language;
- Body language was insufficient to demonstrate that Ms. Perelli was put on notice;
- Those who raised oral complaints with Ms. Perelli and other senior officials did so in regard to management issues and not sexual harassment issues;
- A senior official testified that while colleagues had spoken to him about Ms. Perelli over the years, none had raised allegations of harassment;
- A former Under-Secretary-General testified that no concerned staff member mentioned anything about sexual harassment to him;
- Ms. Perelli's professional evaluations were exceptional.

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67. In Mahdi,¹¹ the Appeals Tribunal stated that when reviewing disciplinary cases, the three factors to be examined are:

- Whether the facts on which the disciplinary measure was based have been established;
- Whether the established facts legally amount to misconduct under the Regulations and Rules; and
- Whether the disciplinary measure applied was proportionate to the offence.

68. For the reasons set out above, the facts in this case did not establish sexual harassment within the statutory definition. As the Secretary-General summarily dismissed Ms. Perelli for this reason on 2 December 2005 and for the same reason affirmed the dismissal on 6 December 2007, it follows that her dismissal is legally and factually unsustainable. In holding otherwise, the UNDT erred in law and fact, and Ms. Perelli's appeal against the dismissal is allowed.

Tapes Issue

69. In the course of her submissions to this Tribunal, Ms. Perelli raised the alleged failure of the UNDT to address the matter of the missing interview tapes. In view of our conclusions with regard to the other issues raised, as set out above, we do not consider it necessary to address the arguments made by Ms. Perelli with reference to the missing interview tapes.

Judgment

70. The appeal is allowed and the Judgment of the UNDT that the dismissal was lawful is reversed. Thus, we order Ms. Perelli's reinstatement or, if the Administration so chooses, the award to her of two years' net base salary at the rate in effect at the date of this Judgment in lieu of rescission of the dismissal.

¹¹ Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2010-UNAT-018.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Lussick

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar