Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/028 (UNAT 1625)
Judgment No.:	UNDT/2010/204
Date:	25 November 2010
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

ZOUGHY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marian Houk

Counsel for Respondent:
Mirka Dreger, UNOG
Susan Maddox, ALS/OHRM, United Nations Secretariat

Introduction

1. The Applicant contests the decision of the Secretary-General to summarily dismiss him for serious misconduct, which decision was notified to him on 21 March 2006 and confirmed on 3 October 2007.

2. He requests the Tribunal:

a. To rescind the contested decision as well as the previous decision to suspend him with pay during the investigation and disciplinary proceedings;

b. To order the Respondent to reinstate him in the post he occupied and make restitution, to include the salary, benefits and allowances he would have received if he had remained in the service of the Organization, from the date of his suspension to the date of the present Judgment;

c. To order the payment of USD500,000 in compensation for the moral damage he has suffered;

d. To award him USD25,000 as costs, and order the Respondent to pay him an amount of not less than USD5,000 as reimbursement of the costs incurred in enabling him and one of his Counsel to appear before the Joint Disciplinary Committee ("JDC") in New York;

e. To order the payment of interest on the amounts awarded at market rate with effect from 21 March 2006.

Facts

3. The Applicant, who has dual Moroccan and Swiss nationality, entered the service of the United Nations at Geneva in 1984. At the time of the events in question, he was working at the former Department for Disarmament Affairs as a Messenger, grade G-3, on a fixed-term contract expiring on 31 December 2006.

4. In the afternoon of 4 August 2005, Ms. X ("the complainant") made a complaint against the Applicant to the Security and Safety Section of the United Nations Office at Geneva ("UNOG"). She stated that the Applicant had committed acts of a sexual nature on her that day. On 5 August 2005, she supplemented the statement she had made the previous day to the Security and Safety Section, and filed a criminal complaint with the Geneva police.

5. On 8 August 2005, the Applicant was questioned by the Security and Safety Section as part of the investigation it had opened. At that interview, the Applicant denied having touched the complainant.

6. A little later that day, 8 August 2005, he was summoned to the police station in Geneva and, on his return to UNOG, he was informed that the Officer-in-charge, Division of Administration, had decided to suspend him from his duties immediately, with pay, for an initial period of one month, which period was subsequently extended.

7. On 10 August 2005, the Applicant returned to the UNOG Security and Safety Section. In a written record of the interview signed by the Applicant, it was stated that he wished to amend the statement he had given the Section on 8 August and that he partially admitted the facts alleged by the complainant.

8. By memorandum dated 24 August 2005 to which was annexed the report of 11 August 2005 of the preliminary investigation by the Security and Safety Section, the Officer-in-charge, the Division of Administration, UNOG, requested the Officer-in-Charge, Office of Human Resources Management ("OHRM") in

the United Nations Secretariat, New York, to initiate disciplinary proceedings against the Applicant and, in the light of the seriousness of the facts, recommended imposition of the sanction of summary dismissal.

9. By "sentence of condemnation" dated 5 September 2005, the Prosecutor-General of the Republic and the Canton of Geneva ("the Prosecutor-General of Geneva") found the Applicant guilty of "sexual harassment"[1] and gave him a suspended sentence of 15 days' detention with probation, and ordered him to pay court costs.

10. On 12 October 2005, the Officer-in-charge, the Division for Organization Development ("DOD"), OHRM, sent the Applicant the preliminary investigation report. In a memorandum annexed to the report, she notified him that his conduct, if established, would contravene staff regulation 1.2 and staff rule 101.2(d), and invited him to submit his observations in response to the allegations against him within two weeks.

11. The Applicant submitted his observations in writing on 7 November 2005.

12. By letter of 21 March 2006, he was informed of the Secretary-General's decision to summarily dismiss him, with immediate effect, for serious misconduct.

13. The Applicant referred the case to the JDC in New York by letter of 18 May 2006, which the JDC Secretariat received on 7 July 2006. The JDC held a hearing at the Organization's Headquarters on 6 July 2007. The Applicant and one of his Counsel attended the hearing in person, while his other Counsel took part via videoconference from Geneva. At the hearing, the JDC heard, by videoconference, the official from the Security and Safety Section who had taken the complainant's statement on 4 August 2005. It also heard the Applicant.

14. In its report dated 21 September 2007, the JDC concluded that the facts were established, that they amounted to serious misconduct, and that the

[1] See Article 198.5 of the Swiss Criminal Code, the title of which has been translated for information purposes by the Federal Authorities of the Swiss Confederation as follows : "Contraventions against sexual integrity. Sexual harassment".

Applicant's right to due process had been fully respected. It took the view, however, that given the circumstances, the sanction imposed on the Applicant was disproportionate. Consequently, it recommended that the decision to summarily dismiss him be rescinded and that the measure of separation from service be imposed instead of summary dismissal.

15. The Secretary-General declined to follow the conclusion of the JDC as to mitigating factors, but adopted its other conclusions and decided to uphold the measure of summary dismissal. This decision was notified to the Applicant by letter of 3 October 2007.

16. After obtaining several extensions of time, the Applicant filed an application with the former United Nations Administrative Tribunal on 9 July 2008 appealing against the decision to summarily dismiss him. On 18 February 2009, having requested, and been granted, two extensions of time by the former UN Administrative Tribunal, the Respondent submitted his answer to the application. The Applicant, after being granted three extensions of time, submitted his observations on 24 August 2009.

17. Pursuant to the transitional measures laid down in United Nations General Assembly resolution 63/253, the case, which could not be decided by the former UN Administrative Tribunal before its abolition on 31 December 2009, was transferred on 1 January 2010 to the Dispute Tribunal.

18. By letter of 30 September 2010, the Registry of the Tribunal notified the parties of the decision of the Judge in the case to hold a hearing, in French, on 16 November 2010.

19. On 6 October 2010, the Judge informed the parties that he intended to raise, *ex proprio motu*, the issue of the admissibility of the Applicant's claim for rescission of the decision to suspend him with pay during the investigation and disciplinary proceedings, and asked them to submit their observations on that issue in writing. Both parties submitted their observations on 20 October 2010.

20. On 25 October 2010, the Tribunal invited the complainant to attend the hearing, which invitation she declined by email of 2 November 2010.

21. On 31 October and 2 November 2010 respectively, the Applicant and the Respondent indicated to the Tribunal that they wished to call witnesses at the hearing. On 3 November 2010 the Judge requested the parties, by separate letters, to submit, in writing, the witness statements they wished to present, not later than 10 November 2010.

22. By email of 3 November 2010, the Applicant requested that interpretation into Arabic be made available at the hearing. The Judge rejected that request, and the Applicant was so informed on 4 November 2010.

23. On 8 November 2010, the Applicant placed on record a document drawn up by the Coordinator of the UNOG Staff Co-ordinating Council Working Group on Harassment in the Workplace, which repeated, in substance, an "investigation report" previously submitted to the JDC. On 9 November 2010, he placed on record the witness statement of a former UNOG staff member, a colleague of the Applicant, which referred to his "known difficulty in writing simple texts in French".

24. By letter of 9 November 2010, at the Applicant's request, the Judge ordered the Respondent to provide the Tribunal with a copy of the transcripts and sound or audiovisual recordings of the hearing of 6 July 2007 before the JDC. The following day, in reply to that demand, the Respondent stated that the items sought were no longer available, and forwarded to the Tribunal all the written submissions and documentary evidence he had submitted to the JDC. At the same time, the Respondent informed the Tribunal that he did not wish to submit any written witness statements.

25. On 15 November 2010, one of the Counsel for the Applicant informed the Tribunal that his power of attorney had been revoked and that the Applicant would thenceforth be represented by his other Counsel.

26. On 16 November 2010, the hearing was held at which the Applicant, his Counsel and one of the Counsel for the Respondent were present.

Parties' contentions

27. The Applicant submits that the decision to summarily dismiss him was taken in breach of the Staff Rules and Staff Regulations in force at the time, and the principles enshrined in the case law of the former UN Administrative Tribunal with regard to disciplinary matters, in particular in Judgment No. 941, *Kiwanuka* (1999). His contentions are:

a. The decision to summarily dismiss him is vitiated by procedural irregularities. At the time he was informed of his suspension, he was not notified in writing of the charges against him, nor was he informed of his right to be assisted by counsel. The measure of suspension was taken by a staff member who lacked the authority to do so, and the length of the suspension contravened staff rule 110.2. Moreover, the complainant was never heard by the JDC, thus depriving the Applicant of the "right to confront his accuser" and the opportunity to rebut the facts. He was unable to cross-examine witnesses at the preliminary investigation stage, or to call witnesses before the JDC. Lastly, in the absence of a full and impartial investigation, the decision appears arbitrary.

b. The facts on which the contested dismissal was based have not been established;

c. The Secretary-General was wrong to characterise the facts as serious misconduct. No account was taken of the absence of premeditation, the complainant's own attitude on 4 August 2005 or the fact that administrative instruction ST/AI/379 did not apply in the present case. Conversely, allegations previously made against him that the Administration had definitively held to be unfounded had wrongfully been taken into consideration;

d. The Secretary-General imposed a disproportionate sanction, when he should have taken account of the Applicant's many years in the service of the Organization and his repeated expressions of remorse. Furthermore, the contested decision was erroneously based on the criminal prosecution initiated following the filing of the police complaint on 5 August 2005;

e. The contested decision was based on improper motives, because it was intended as a response to media backlash at the time concerning cases of sexual harassment within the Organization.

28. The Respondent's contentions are:

a. The claim for rescission of the decision to suspend the Applicant with pay during the investigation and the disciplinary proceedings must be rejected as he failed to avail himself of the internal appeals procedure to contest that measure;

b. The procedure followed in this case complied with the provisions of Chapter X of the Staff Rules and administrative instruction ST/AI/371 of 2 August 1991 entitled "Revised disciplinary measures and procedures". During the preliminary investigation, the Applicant was questioned on two occasions, and at that stage he did not have the right to be assisted by counsel. As for the measure of suspension, the period laid down in staff rule 110.2 is subject to exceptions. Moreover, the Applicant was notified of the charges against him by the memorandum of 12 October 2005, which also informed him of his right of reply and his right to be assisted by counsel. On that date he was given the preliminary investigation report and given the opportunity to refute the allegations it contained. The Applicant's admission of the facts as set out by the complainant made it unnecessary to cross-examine her, and even if not all the witnesses put forward by the Applicant were called to appear before the JDC, he himself had the opportunity during the investigation to state his position on the accusations of misconduct. As to the length of the proceedings, the delays were not excessive and some of them were

attributable to the Applicant himself. Besides that, such delays would not give rise to an entitlement to damages, as he could not prove that he had suffered any harm. Lastly, there is no basis for the contention that the investigation was incomplete and lacked impartiality;

c. The Secretary-General has broad discretion with regard to disciplinary matters. It is for him to define what constitutes serious misconduct and determine the proper disciplinary measures to be imposed. In so doing, he is not bound by the conclusions or recommendations of the JDC. In the present case, the Secretary-General came to the conclusion that the Applicant had committed sexual harassment based on the contents of the file as a whole, in particular the Applicant's admissions, as well as the deliberations of the JDC. In characterising the Applicant's actions he took due account of the seriousness of the acts with which the Applicant was charged;

d. Contrary to what the Applicant maintains, the decision to summarily dismiss him was not based on allegations made previously;

e. The sanction imposed on the Applicant was proportionate to the misconduct. The Secretary-General declined to adopt the opinion of the JDC that there were mitigating factors. He took the view, on the contrary, that there was no ambiguity in the complainant's attitude on 4 August 2005, and that neither the Applicant's past service nor his admissions or remorse amounted to mitigating factors, because the former were irrelevant according to the case law and the latter had been retracted by the Applicant when he rectified his version of the facts;

f. The Applicant has produced no evidence in support of his contention that the decision to summarily dismiss him was based on improper motives or vitiated by bias;

g. The Applicant is not entitled to moral damages because he exposed himself to such damage by his own act. Furthermore, he has not shown

that any exceptional circumstances existed that would justify an award of USD500,000 in compensation, or the award of costs.

Judgment

29. Before ruling on whether the arguments put forward by the Applicant have merit, the Tribunal must, *ex proprio motu*, first examine the admissibility of his claim for rescission of the decision of 8 August 2005 to suspend him with pay during the investigation and the disciplinary proceedings.

30. According to staff rules 110.2(a) and 110.3(b) in force at the time the events took place, a measure of suspension during the investigation and disciplinary proceedings does not constitute a disciplinary measure but merely an administrative decision. In addition, under staff rule 111.2(a), "[a] staff member wishing to appeal an administrative decision … shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

31. The Tribunal finds that the Applicant did not appeal to the Secretary-General, in the time permitted, against the decision to suspend him with pay. The fact that he later contested that measure before the JDC when appealing against the measure of summary dismissal, as he states in his observations of 20 October 2010, has no bearing on the inadmissibility of his claim for rescission of the suspension, given that the contested measures and the respective remedies against them are distinct in nature. His claim for rescission of the decision to suspend him must therefore be rejected as irreceivable.

32. The Applicant applied to the Tribunal for witnesses to be heard at the hearing on 16 November 2010 and for the production by the Respondent of "any … evidence which …relates to the course of any investigation into the alleged conduct of the Applicant … [and] all… evidence, which the Respondent…relied upon in producing the impugned decision". With regard to the first request, the Tribunal invited the complainant to appear at the hearing, but

she declined. The Tribunal can only note that it has no means of compelling her to do so, as she is a person from outside the Organization. The Tribunal also requested the parties to submit witness statements in writing, which the Applicant did on 8 and 9 November 2010. The Tribunal moreover considered that the second request was not justified in this case, taking the view that it had sufficient material in the form of the written submissions and evidence on file.

33. Prior to the hearing, the Applicant requested the presence of an Arabic interpreter at the hearing on the grounds that Arabic was his mother tongue, and that Arabic interpretation had been made available to him before the JDC. The Judge assigned to the case rejected that request, as it was clear beyond dispute from the record as a whole that the Applicant understood French, the language used at the hearing, and was thus perfectly capable of following what was being said. The Applicant's ability to understand and express himself in French without difficulty was verified at the hearing of 16 November 2010 and the Applicant did not dispute it.

34. When the Tribunal is seized of an Application that challenges the lawfulness of a sanction imposed on a staff member, it must examine, first, whether there are any procedural irregularity; secondly, whether the facts alleged have been established; thirdly, whether those facts amount to misconduct; and, finally, whether the sanction imposed is proportionate to the misconduct (see Judgment UNDT/2010/169, *Yapa*, of this Tribunal and Judgments 2010-UNAT-022, *Abu Hamda* and 2010-UNAT-028, *Maslamani*, of the Appeals Tribunal).

Regularity of the procedure

35. The Applicant maintains, first, that during the preliminary investigation, he was not notified in writing of the charges against him, nor was he informed of his right to be assisted by counsel.

36. As the Tribunal has already had occasion to recall, relying on administrative instruction ST/AI/371 of 2 August 1991, "disciplinary proceedings only start when … the Administration informs the staff member in writing of the allegations against him and of his right of reply " (see Judgment UNDT/2010/169,

Yapa). In the present case, the disciplinary proceedings began on 12 October 2005, when the Officer-in-Charge, DOD, OHRM, notified the Applicant that his conduct, if established, would contravene staff regulation 1.2 and staff rule 101.2(d), and invited him to submit his observations in reply.

37. Administrative instruction ST/AI/371, which was in force at the time the events took place, lays down the procedure applicable to the preliminary investigation. It provides, *inter alia*:

> II. INITIAL INVESTIGATION AND FACT-FINDING
>
> 2. 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. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as … signed written statements by witnesses or any other document or record relevant to the alleged misconduct.
>
> …
>
> 5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued …
>
> 6. If the case is to be pursued, the appropriate official in the administration … shall:
>
> a) Inform the staff member in writing of the allegations and his or her right to respond; …
>
> c) Notify the staff member of his or her right to the advice of another staff member or retired staff member to assist in his or her responses …

38. It is clear from these provisions that, during the preliminary investigation prior to the disciplinary proceedings, the staff member has neither the right to be notified of the accusations against him, nor the right to be assisted by counsel.

39. Where the disciplinary proceedings are concerned, the Applicant maintains that, before the JDC, he was both deprived of the opportunity to cross-

examine the complainant and of the opportunity to call the witnesses who had been heard as part of the preliminary investigation.

40. Staff rule 110.7(b), in force at the time, provides:

> Proceedings before a Joint Disciplinary Committee shall normally be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing, but without delay. If the Committee considers that it requires the testimony of the staff member concerned or of other witnesses, it may, at its sole discretion, obtain such testimony by written deposition, by personal appearance before the Committee, before one of its members or before another staff member acting as a special master, or by telephone or other means of communication.

41. Administrative instruction ST/AI/371 supplements that provision, when it states:

> 17. The proceedings of the Joint Disciplinary Committee and its rules of procedure shall be consistent with due process, the fundamental requirements of which are that the staff member concerned has the right to know the allegations against him or her; the right to see or hear the evidence against him or her; the right to rebut the allegations and the right to present countervailing evidence and any mitigating factors. If the Committee decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses …

42. The Tribunal finds, first, that the Applicant was given the opportunity to ascertain what evidence had been produced against him as he had the complete file from 12 October 2005, including the preliminary investigation report and all the witness statements and evidence collected in the course of the investigation.

43. The Tribunal's second finding is that, like article 17 of administrative instruction ST/AI/371, staff rule 110.7(b) does not oblige the JDC to take witness testimony. It states that it is for the JDC to decide whether it is necessary to obtain testimony in the light of the circumstances. The JDC therefore had to decide whether the hearing of additional witnesses was necessary in this case, having regard to the evidence in its possession. Though the Applicant stated in his application to the Tribunal that the hearing of additional witnesses was necessary in order to guarantee his right to due process, he did not specify in what respect

the conclusions in the JDC report, or, consequently, the lawfulness of the Secretary-General's decision, were undermined by the fact that he had been unable to examine certain witnesses before the JDC.

44. Where the complainant is concerned, the Tribunal would point out that the JDC invited her on two occasions to take part in the hearing held in the course of the disciplinary proceedings, but she declined to do so. The JDC has no power to compel a person outside the Organization to appear before it as a witness.

45. The Applicant maintains that the JDC wrongly relied in its report on the conviction handed down by the Prosecutor-General of Geneva, while the proceedings under Swiss law were tainted by irregularities. But it is clear both from the JDC report and the letter of 3 October 2007, informing the Applicant that the sanction of dismissal was upheld, that the JDC stated that, on the contrary, it was not required to rule on the Swiss law proceedings.

46. While the Applicant contends that the decision to suspend him, taken prior to the sanction, was vitiated by irregularities, even assuming such irregularities had been shown to exist, they had no impact in any event on the lawfulness of the disputed sanction.

47. The Applicant also contends that the proceedings before the JDC were excessively lengthy, and states that the JDC gave its report more than two years after the events in the case. The evidence on file shows that the Applicant was notified of the decision to summarily dismiss him on 21 March 2006. The JDC received his letter dated 18 May 2006 only on 7 July 2006. It held a hearing on 6 July 2007 and issued its report on 21 September 2007. Thus, 14 months passed between the time the matter was referred to the JDC and the time it issued its report. Regrettable though this delay might be, it does not amount to an irregularity undermining the lawfulness of the contested decision.

48. Lastly, at the hearing of 16 November 2010, the Applicant reiterated his written request to obtain the sound or audiovisual recording of the JDC hearing. The Administration told the Tribunal that it was physically impossible to find that recording and, when questioned by the Judge as to what legal consequences he

derived from that fact, the Applicant did not specify in what way the failure to produce the recording prejudiced his rights or amounted to a procedural defect.

49. It is clear from the foregoing that the Applicant has not established that the procedure followed in determining the sanction was vitiated by irregularities.

Whether the alleged acts took place

50. The letter of 21 March 2006 gave as the grounds for the sanction of summary dismissal the fact that he had "engaged in unwelcome sexual advances, verbal and physical conduct of a sexual nature, and sexual harassment of [the complainant]".

51. At the hearing before the Tribunal, the Applicant denied all the facts with which he is charged with the exception of an attempt to kiss the complainant on the cheeks. It is, therefore, for the Tribunal to determine whether the facts on which the sanction was based have been established.

52. In the written record of her first statement to the Security and Safety Section on 4 August 2005, the complainant stated that she worked for a non-governmental organization and that she had gone to the UNOG premises that morning to hand out invitations. When approached by the Applicant, she had agreed that he could help her distribute the invitations. He had complimented her on her physical appearance and asked for her telephone number, which she gave him. A little later, he had asked her if he could kiss her and, despite her having refused, approached her and attempted to kiss her on the lips. He had then followed her and, when they were alone in the lift, suddenly put his hand on the complainant's upper thigh. She had protested and brushed his hand away. When they parted, the Applicant had asked the complainant to come and see him when she had finished. A short time later, he had come back to her and repeated his request, and, a few moments later, while she was continuing to distribute the invitations, approached her again and offered to help. The complainant had accepted his offer, and he had led her into the basement of the building. While they were walking side by side, he had taken hold of and kissed the complainant's arm, then put his hand on her back under her clothing. The complainant had

pushed the Applicant away. He had then come up to her and grabbed her around the waist, putting his hand under her skirt and underwear to touch her buttocks. The complainant had told the Applicant to stop. As they were going towards the lift he had caught her by the waist with one hand, pressing the other hand against her chest, and the complainant, who was scared, had repeated her protests. A moment later, once they were both in the lift, the Applicant had knelt down in front of her, holding her by the waist. When the lift doors opened and someone got in, the Applicant had got up and moved off to the side. As soon as the lift arrived at the first floor, the complainant had moved out at a quick pace, to go back to the people she knew. In the course of the afternoon, she had noticed a missed call on her mobile phone. She had called back the number, which was unknown to her, and found herself speaking to the Applicant, who had asked her to "go for drinks", to which she had replied: "whatever", before hanging up.

53. In the written record of her second statement to the Security and Safety Section, dated 5 August 2005, the complainant maintained her version of the facts and stated, among other things, that she was going to go to the police and file an official complaint.

54. In her statement to the Geneva police, the complainant stated that, on 4 August 2005, she had gone to the UNOG site. The Applicant had offered to help her and had accompanied her to the various offices she needed to visit. Though she spoke only English, she had understood that he was paying her compliments in French. When they found themselves in the lift, he had touched her on the cheek and then the thigh, and she had pushed him away. Shortly afterwards, when they were walking, alone, he had moved behind her and put his hand under her trousers and underpants to touch her buttocks. The complainant had told him to stop. A moment later, he had pushed her up against a wall and touched her breast. He had also tried to kiss her, and she had broken away and told him to stop. When they got into another lift, he had knelt down in front of her and put his hands around her waist. Shortly afterwards a woman had got in and the Applicant stopped what he was doing.

55. The Tribunal must note, at this stage of its examination of the facts, that on the one hand there is no contradiction between the different statements by the complainant, and on the other, that *a priori*, given the fact that the complainant and the Applicant had never met before 4 August 2005, there is no reason to believe she might be lying.

56. When interviewed for the first time by the Security and Safety Section on 8 August 2005, the Applicant merely acknowledged having met the complainant in the late morning of 4 August, offered to help her and accompanied her to the ground floor of the building, after which he had returned to his office. The Applicant stated that the complainant had come to his office, and that he had taken her to the one she was looking for. The complainant had come back to his office shortly before midday to ask for his help and he had accompanied her to the place where she wished to go, but had not seen her again after that. Thus, the first time he was interviewed, the Applicant denied having physically touched the complainant.

57. In his statement to the police on 8 August 2005, the Applicant said that, on 4 August, he had gone with the complainant to show her the location of various offices. The complainant had thanked him for his help, at which point he had kissed her on the cheek and then attempted to kiss her on the mouth. The Applicant said in his statement: "I didn't succeed because she turned her head away and said: 'No, no, no, I don't know you'". When asked whether he had touched the complainant on the buttocks, the Applicant replied:

> It's true that when we were standing in front of a lift, in the corridor, she asked me if I thought she was fat. I said no. At that moment, I first touched her thighs, then I put my hand under her skirt and into her knickers and touched her directly on the buttocks. If I behaved in that way, it was because I thought she was interested in me, but I sincerely regret it. The young woman then said to me: 'No, I don't know you, you mustn't touch me!' I took my hand away and said I was sorry".

The Applicant also admitted having touched her chest:

> This happened when I wanted to kiss her on the mouth. I put one hand behind her back and with the other I touched her breast,

> through her clothes. She did not react very strongly, but I noticed, all the same, that she was not pleased.

The Applicant then explained that he had apologised by kneeling down in front of her, and then by calling her on her mobile phone.

58. Following his interview by the police, the Applicant went of his own accord to the Security and Safety Section on 10 August 2005, to amend the original statement he had given to that Section. He stated that, during the morning of 4 August 2005, he had spent a certain amount of time with the complainant. While he was accompanying her to a part of the buildings, he had invited her to see him outside for a drink, and, in response to a comment by the complainant, he had paid her a compliment and then put his hand on her thigh without her showing any reaction. A little later, he had put his hand under her clothing and touched her right buttock, at which point he noticed that she was "upset"; he had apologised to her for what he had done. A short while later, when they were both in a lift, he had got down on his knees in front of her and put his hands on her hips to apologise. Once again, he saw that she was "upset". After they separated, the Applicant had tried to see her again to say he was sorry, and had seen her but could not approach her. In the course of the afternoon, he had contacted the complainant by telephone in order to apologise, and after a brief conversation she had hung up.

59. The written record of the Applicant's second interview also states:

> "In answer to your question whether I have ever committed similar harassment to what is described in this file, in the past … my answer is no … This is the first time I have been involved in this sort of problem, of harassment".

60. It is clear from the most recent statements by the Applicant, set forth above, that he has admitted having committed most of the acts described by the complainant.

61. At the hearing of 16 November 2010, the Applicant denied having committed any of the acts alleged, and said that he signed the statements in which he admitted the said acts because he had failed to understand the contents of those

statements. He explained, in effect, that although he could speak and understand French, he could neither read nor write it, as his mother tongue was Arabic.

62. At the hearing, the Judge provided to the parties, and placed on the record, a personal history form dated 18 July 1987, signed by the Applicant. The form stated that he wrote, spoke and understood French "easily". When questioned on this point by the Judge, the Applicant maintained that he could not read French, and gave no explanation as to how the form had been filled in by hand and signed by him. It should be emphasised, however, that on 10 August 2005, the date on which the Applicant admitted the facts to the UNOG Security and Safety Section, he had already been informed of the decision to suspend him and therefore, contrary to what he maintains, he must have understood the importance of the statements he was signing.

63. When asked by the Judge why, given the significance the case had assumed, he had not admitted to the Geneva police and the Security and Safety Section that he did not understand what he was being asked to sign, the Applicant simply said that he had failed to appreciate the consequences of those signatures.

64. Even assuming that the Applicant's claim to be unable to read French were true, that fact could only assist his defence if he were also able to show that the Geneva police and the UNOG Security and Safety Section that questioned him had drawn up false records that did not reflect the statements he had made. However, there is nothing in the record to suggest that they would have any reason whatever to act in such a way.

65. While the Applicant maintains that the Security and Safety Section were wrong not to have recorded his statements, he does not cite any instrument obliging that Section to record statements made by staff members during a preliminary investigation.

66. It does not avail him to maintain that he signed the records "at a time when he was under significant pressure and duress, in a state of shock". Besides the fact that he offers no evidence in support of that allegation, the Tribunal notes that he went to UNOG on his own initiative on 10 August 2005 to be interviewed afresh

by the Security and Safety Section, which tends to indicate that it was open to him to rectify his statements if he thought that their contents or accuracy were likely to have been affected by his state of mind.

67. The Applicant is wrong, too, in arguing that he should have been present when the witnesses were interviewed by the Security and Safety Section, as administrative instruction ST/AI/371 does not grant any such right at the preliminary investigation stage. The Tribunal has, moreover, already stated in Judgment UNDT/2010/169, *Yapa*, that the preliminary investigation is "not conducted in adversarial fashion". Furthermore, the allegation that the comments made by one of the witnesses during the preliminary investigation had racist connotations, thereby compromising the impartiality of the investigation, is not supported by the evidence on file.

68. The Applicant contests the use in evidence of a summary of his statement of 10 August 2005 on the grounds that he did not sign that document, which was drawn up by a staff member of the Security and Safety Section after he was interviewed. However, there is nothing to indicate that either the JDC or the Secretary-General took the said document into account, and neither the letter of 21 March 2006 nor that of 3 October 2007 make any reference to it.

69. The Applicant argues that the preliminary investigation lacked objectivity, but without presenting the Tribunal with any specific element in support of his statement. The fact that some staff members in charge of the investigation had been informed by the police that he had admitted certain facts in the statement he gave at the Geneva police station is not enough to support a finding of partiality.

70. The Applicant contends that, in the Swiss legal proceedings, he did not have the opportunity of being heard by a neutral judge or cross-examining the complainant, and he claims that, had he known that the Administration would rely, in part, on those proceedings to justify the decision to summarily dismiss him, he "would have … hired a … lawyer … to fight the unfounded charges against him in the Swiss courts". But the Tribunal need do no more than take note that neither the letter of 21 March 2006, nor that of 3 October 2007 are based on

the "sentence of condemnation" finding him guilty. Added to that, there is no reason why the Secretary-General or the Tribunal should not take account, in establishing the facts, of statements taken from the Applicant by the Geneva police, which form part of the record in the case.

71. The foregoing analysis of whether the acts took place shows that the complainant's various statements are precise, and that, having denied the acts alleged against him, the Applicant admitted them to the Geneva police and to the UNOG Security and Safety Section, then denied them again in the application he submitted to the Tribunal and at the hearing on 16 November 2010, without giving any credible reasons. The Tribunal therefore considers that the Administration has proven that the Applicant committed the acts alleged.

Characterisation of the acts

72. Staff rule 110.1 defines misconduct as follows:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.

73. Staff rule 101.2(d) mentions, among the specific instances of prohibited conduct: "Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work".

74. Paragraph 2) of administrative instruction ST/AI/371, which lists the acts in respect of which disciplinary measures may be imposed, mentions:

> a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
> …
> g) Acts or behaviour that would discredit the United Nations.

75. Furthermore, the basic rights and obligations of staff members are set forth in the following terms in staff regulation 1.2:

> b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.
> …
> f) … [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

76. The Tribunal must now rule on the question whether the Applicant's actions towards a person outside the Organization amount to misconduct within the meaning of the provisions cited above.

77. It should be recalled, first, that the Applicant, in particular at the hearing before the Tribunal, denied ever having committed the acts. The subsequent line of argument put forward in his written pleadings, to the effect that he was incited to commit the acts by the ambiguous attitude of the complainant and her failure to protest, is in contradiction with his earlier denials.

78. As to the Applicant's contention that his contacts with the complainant were consistent with "common social interactions within the bounds of decency", the Tribunal is quite unable to share that opinion; the said contacts could not be taken to be "common social interactions" as they were manifestly sexual in nature and, moreover, the Applicant has several times admitted that he was aware of having caused offence to the complainant.

79. In deciding whether acts committed by a member of staff amount to misconduct, the Tribunal, though bound by the facts as found against the official subject to the sanctions, is not bound by the Administration's chosen characterisation of those facts. Therefore, it is immaterial that the acts the Applicant is found to have committed have been characterised, successively, as sexual assault and later as sexual harassment, and the Applicant's argument to the

effect that administrative instruction ST/AI/379, which deals with sexual harassment within the Organization, does not apply, is in any event irrelevant. The only question the Tribunal has to answer is the following: do the acts of a sexual nature committed by the Applicant on the person of the complainant, and acknowledged above as having been established, constitute misconduct?

80. The Tribunal considers that, on the one hand, in committing such acts on a person against their will, the Applicant fell short of the standards of conduct expected of an international official, and that, on the other, given that the complainant came from outside the Organization, his behaviour was such as to bring discredit on the Organization. Misconduct is therefore established.

Proportionality of the sanction

81. At the time the events took place, staff regulation 10.2 read as follows:

> "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.
>
> The Secretary-General may summarily dismiss a member of the staff for serious misconduct".

82. Staff rule 110.3 then in force provided:

"(a) Disciplinary measures may take one or more of the following forms:

(i) Written censure by the Secretary-General;
(ii) Loss of one or more steps in grade;
(iii) Deferment, for a specified period, of eligibility for within-grade increment;
(iv) Suspension without pay;
(v) Fine;
(vi) Demotion;
(vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
(viii) Summary dismissal".

83. Although the Tribunal invited him, at the hearing of 16 November 2010, to comment on the severity of the sanction imposed on him, the Applicant declined to offer any argument on this point, explaining that he denied the facts themselves of which he was accused. However, since, in his Application, he challenged the

severity of that sanction, the Tribunal considers it necessary to examine whether the measure of summary dismissal was manifestly disproportionate.

84. The Tribunal recalls that in disciplinary matters, it has only limited powers to review the severity of the sanction imposed by the Secretary-General. The scope of this control has been determined by the Appeals Tribunal, which recalled that disciplinary matters are within the discretionary powers of the competent authority, and that the judge can only interfere with such power where there is shown to have been illegality, irrationality or procedural impropriety (see Judgments 2010-UNAT-022, *Abu Hamda*, 2010-UNAT-025, *Doleh* and 2010-UNAT-40, *Aqel*).

85. While the Applicant has maintained that the Secretary-General should have taken account of his many years spent in the service of the Organization, there is nothing to suggest that, in imposing the sanction, the Secretary-General was not informed of the Applicant's professional situation.

86. The Applicant contends that the Secretary-General wrongly took account of allegations previously made against him in relation to two incidents that had occurred in 1997 and 2002 involving his behaviour towards persons of the female gender, though they did not result in any disciplinary action. However, the letter of 21 March 2006 makes no reference to them. As for the letter of 3 October 2007, it states, on the contrary, that no action was taken on those allegations at the time and that they had no effect on the decision to summarily dismiss him.

87. The Applicant also maintains that the Secretary-General should have taken account of the fact that he had repeatedly expressed remorse for "any unintentional offense caused to [the complainant]". It must be noted at the outset that this expression of remorse is in total contradiction with the fact that, at the hearing, the Applicant denied having touched the complainant, except for one attempt to kiss her on the cheek.

88. The Applicant furthermore maintains that account should have been taken of the fact that his actions were unpremeditated, but whether or not any weight is

given to such a factor is entirely a matter for the Secretary-General's discretion and does not in any way show that the contested decision was arbitrary.

89. Lastly, on the Applicant's contention that the purpose of the sanction was to respond to criticisms appearing in the media at that time of cases of sexual harassment within the Organization, there is nothing in the record to show that the Secretary-General took a more severe decision with a view to responding to such criticism.

90. The Applicant has therefore not established that the Secretary-General made disproportionate use of his discretionary power in imposing on the Applicant the severest sanction, that of summary dismissal.

91. It follows from all of the foregoing that the Applicant has not shown that the sanction imposed on him was unlawful, and that, therefore, his application must be rejected in its entirety.

Decision

92. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(*signed*)
Judge Jean-François Cousin

Dated this 25th day of November 2010

Entered in the Register on this 25th day of November 2010

(*signed*)
Víctor Rodríguez, Registrar, UNDT, Geneva