

UNDT/2010/116, Messinger

UNAT Held or UNDT Pronouncements

Harassment allegations: People are entitled to their opinions, even unflattering or wrong-headed, about colleagues. It is only when those opinions are conveyed in ways that constitute harassment or abuse that they become problematical in a legal sense. A genuine opinion about a colleague's competence that happens to be adverse is not susceptible of criticism. While not placing the delays of the applicant in making complaints about the matters to which he has referred on the scales against him, those delays have made it much more difficult for him to prove they occurred quite as he alleges. Conduct of trial: It is incumbent on an accusing party to put an accusation to a relevant witness to provide an opportunity for an answer. The other party cannot be expected to anticipate and answer every conceivable case: that is both impractical and wasteful. Litigation should not involve making a general case with a number of potential elements, not all of which are specifically identified, in the hope that the other side might fail to see one and leave it unanswered at the end of the day. Fundamentally, it needs to be clearly understood that it is both good sense and consonant with principles of open justice that the primary arena for litigating a case is in the courtroom, not in a closing submission long after the relevant witnesses have departed. The submissions made by counsel on both sides betrayed an inappropriate lack of objectivity and professional courtesy. It is important that counsel feel free to make all submissions thought to be proper on their client's behalf, but they are not their client's mouthpieces and should not make allegations of serious moral turpitude unless the evidence, realistically considered, justifies them. Non-selection: Staff Rule 109.1(c) (preference in selection of retention for permanent staff) cannot be relevant to an evaluation of the comparative attributes of candidates: it cannot make the staff member who is entitled to invoke it a better candidate. Harassment investigation: There is no evidence that the Director or Deputy Director were involved in the discretionary granting of a benefit to one of the investigators which occurred while the investigation was ongoing, but the fact they were so senior and the reputation of the Department was thus engaged, combined with the fact that one of the investigators also applied during this time for

a post in the Department under investigation resulted in a reasonable apprehension of bias constituted by a conflict of interest. Although the investigating body is not a judicial entity, and merely finds facts, the integrity of the entire process depends upon not only the absence of bias or conflict of interest but the absence of any reasonable apprehension of bias or self interest. The existence of a conflict of interest is an objective fact and does not depend on any particular intention or motive. The question is not whether the respondent can “rely on” the report but whether the applicant has got the investigation that he is entitled to have. Outcome: The applications in respect of the abolition of the applicant’s post and his non-selection for the Chief/OLDS post are dismissed. The respondent breached his contractual obligations to provide the applicant a properly conducted investigation of his complaints of harassment. The investigation report is quashed and the applicant is entitled to a fresh investigation if he desires one, as well as USD5,000 for this breach.

Decision Contested or Judgment/Order Appealed

The applicant has filed two separate applications relating to three contested decisions, dealt with in this judgment following an order the cases be heard together. The contested decisions relate to the abolition of the applicant’s post, an alleged mishandling of the applicant’s harassment complaint against his supervisors (which was made some time after the fact) and the applicant’s non-selection for a post.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Messinger

Entity

UNICEF

Case Number(s)

UNDT/NY/2009/021/JAB/2008/035

UNDT/NY/2009/121

Tribunal

UNDT

Registry

New York

Date of Judgement

25 Jun 2010

Duty Judge

Judge Adams

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Disciplinary matters / misconduct

Harassment (non-sexual)

Non-renewal

Staff selection (non-selection/non-promotion)

Applicable Law

Staff Rules

- Rule 109.1(c)