

UNDT/2012/154, Cooke

UNAT Held or UNDT Pronouncements

The UNDT found that the decision to summarily dismiss the Applicant was wrongful.

Assault: A charge of assault is a criminal charge and it was not within UNICEF competence to investigate a criminal offence or a tort alleged to have been committed.

Identification of staff members: The Tribunal took judicial notice of the fact that when an international staff member finds him or herself facing an imminent threat of physical harm or is placed in some other peculiar position especially in a foreign country, it is reasonable to identify oneself as a UN Staff Member.

Sexual harassment: It is unusual that a woman who believes that she is sexually harassed would share personal information with her harasser.

Standard of reasonableness: It must be borne in mind that the standard of reasonableness to be adopted is the standard of the ordinary, reasonable man or woman on the United Nations corridors.

Abuse of authority: The charge against the Applicant stated that he 'requested' his subordinates to help with his LDI. The word 'request' plainly means asking for a favour or privilege. By no stretch of the imagination does a request amount to an abuse of authority under UNICEF or the United Nations legal framework.

Plagiarism: The determination of plagiarism is within the exclusive competence of an academic institution in the same way that the infringement of copyrights is exclusively for a competent court of law to determine.

Investigations: An investigation is an independent function conducted primarily for the interest of the Organization rather than an individual. Some of the standards that must be maintained by an investigator in the conduct of an investigation include: (1) competency (2) objectivity (3) impartiality (4) fairness and (5) the observance of the principles of natural justice. The conduct of the investigation should demonstrate the investigator's commitment to ascertaining the facts of the case. In ascertaining the facts, he/she must consider all relevant evidence whether inculpatory or exculpatory.

Independence: While the relevant Staff Rules require that an investigation be carried out where misconduct is alleged, the investigation is not merely carried out with the aim of fulfilling such a requirement where conclusions had been reached as to the guilt of the staff member who is the subject of the

investigation. Competence: An investigator must be competent. He or she must possess the ability, knowledge and skill to conduct the investigation assigned to him/her. He/she must also study the allegations referred to him/her for investigation so that he/she can go about his/her task knowing what facts would be relevant to establish whether the alleged misconduct occurred or not. In order to establish a set of facts relevant to his/her assignment, the investigator must be familiar and knowledgeable about the elements that constitute the misconduct he/she is investigating. Impartiality: Impartiality is the absence of bias. Impartiality is an ethical and professional requirement and it is not expected that investigators would embark on an assignment without a set terms of reference. It is appreciated that in the course of an investigation, the facts revealed could point to some other misconduct having occurred. This does not permit investigators to embark upon a fishing expedition against the subject of an investigation. Natural justice: It is a principle of natural justice that anyone who is the subject of an investigation must have advance notice of the allegations and evidence against them. The person against whom allegations have been made ought to be able to respond in writing before the investigation interview. The subject of an investigation must be provided the opportunity to challenge the allegations and the evidence against him or her. The investigation method of telling the subject of an investigation that he had sexually harassed people without telling him who his alleged victims were not only amounted to an abuse of his rights but also meant that the allegations had not been properly addressed by the investigators. Investigations: For any investigator to claim that he or she had established certain alleged facts without allowing the alleged perpetrator to know and answer fully to what he was alleged to have done is unprofessional and a betrayal of the responsibility entrusted to the investigator. An investigator has a duty to hear the subject of the investigation apart from hearing those making accusations. Hearing the person accused involves considering and investigating his explanations. Medical examination: only the United Nations Medical Director or a medical officer duly authorized by him or her can request a serving staff member who has undergone an initial medical clearance at the time of first employment and who does not fall under section 4 of the Administrative Instruction to present himself for medical clearance. It is not within the competence of an investigator, to usurp the functions of the United Nations Medical Director while investigating a case and resort to demeaning the subject of an investigation.

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF") where he worked as Deputy Representative in the Malawi Country Office at the P4 level, was summarily dismissed on charges of physical assault, sexual harassment and abuse of authority. He contested the summary dismissal on grounds that investigation and decision making processes were flawed in so far as they failed to accord him basic due-process protection and that charges against him were not proved.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

UNDT rescinded the summary dismissal, ordered reinstatement of the Applicant or compensation in lieu, awarded financial compensation and ordered that all material relating to the dismissal be removed from the Applicant's official status file with the exception of the Judgment and any subsequent action taken by the Administration to implement it.

Full judgment

[Full judgment](#)

Applicants/Appellants

Cooke

Entity

UNICEF

Case Number(s)

UNDT/NBI/2010/073

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

16 Oct 2012

Duty Judge

Judge Izuako

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Abuse of authority

Dismissal/separation

Harassment (non-sexual)

Retaliation

Sexual harassment

Termination (of appointment)

Applicable Law

Administrative Instructions

Secretary-General's bulletins

- ST/SGB/2003/13
- ST/SGB/2005/20
- ST/SGB/2008/5
- ST/SGB/2011/1

Staff Rules

- Rule 1.1
- Rule 10.3

UNDT RoP

- Article 19
- Article 35

UNICEF Administrative Instructions

- CF/AI/2009-004

UNICEF Executive Directives

- CF/EXD/2008-004

Related Judgments and Orders

UNDT/2010/053

UNDT/2011/216

2010-UNAT-087