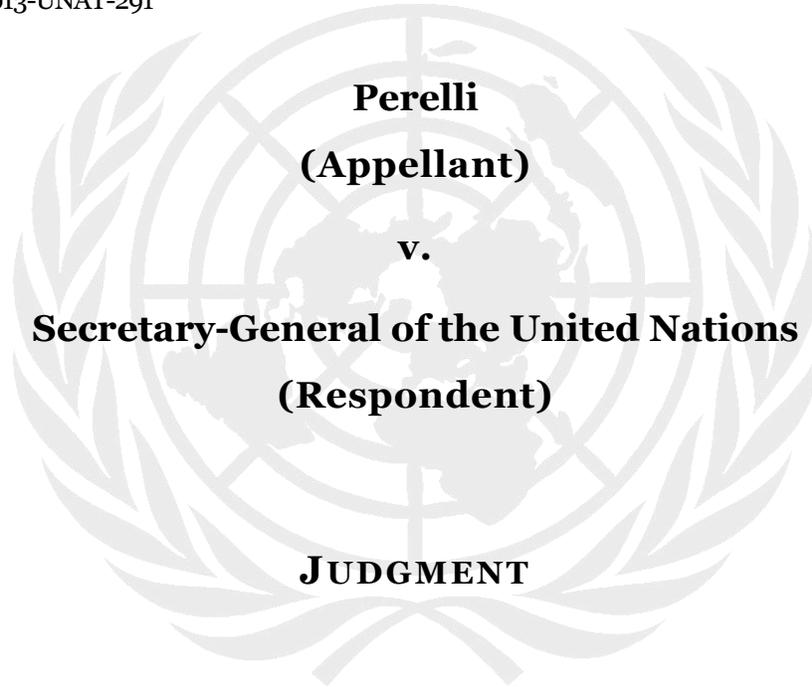




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-291



Before:	Judge Mary Faherty, Presiding Judge Inés Weinberg de Roca Judge Richard Lussick
Case Nos.:	2012-320 & 2012-366
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	John Stompor/Amy Wood

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.

6. In its report dated 7 July 2005, the IP found that there was a persistent sexually charged atmosphere within EAD characterized by “crude language, sexual jokes and references/innuendo to [Ms. Perelli’s] sex life and inquiries/references to staff’s sexual habits, often in front of others”. According to the IP, the EAD staff interviewed had also brought to its attention two instances of overt sexual harassment on the part of Ms. Perelli. On the issue of professional harassment, the IP reported that many of the staff members interviewed, including those whom Ms. Perelli had brought on board, complained about persistent professional harassment taking place over a period of time. The IP also reported that there was a “deep-seated fear among some of the current and former staff of reprisals”.

7. On 3 August 2005, Ms. Perelli was charged with sexual harassment, professional harassment and abuse of authority on the basis of the IP’s findings. She was requested to provide a written statement or explanation and admonished against any reprisal against the witnesses. Ms. Perelli provided her response to the allegations of misconduct on 17 November 2005. On 2 December 2005, the Under-Secretary-General for Management informed Ms. Perelli of the decision of the Secretary-General to summarily dismiss her from service for serious misconduct, with immediate effect.

8. On 16 March 2006, Ms. Perelli requested that the Joint Disciplinary Committee (JDC) at the Organization’s Headquarters review this decision. In a report dated 12 June 2007, the JDC unanimously recommended that the contested decision be rescinded, as it was not able to conclude that the Administration had made a case against Ms. Perelli on the basis of sexual harassment, professional harassment or abuse of authority. The JDC’s specific conclusions, as set forth in paragraph 291, read as follows:

- 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/379¹ – 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

¹ Administrative instruction ST/AI/371 entitled “Revised disciplinary measures and procedures” was issued on 2 August 1991. Administrative instruction ST/AI/379 entitled “Procedures for dealing with sexual harassment” was issued on 29 October 1992.

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.

c. On the charge of *professional harassment*, the [JDC] Panel notes that the absence of any official definition of the offence beyond generic dictionary terms hampered the analysis and classification of conduct in the instant case. Applying to the present case a yardstick encompassing the more obvious behaviours which a reasonable person would consider professional harassment, the [JDC] Panel finds that [Ms. Perelli's] managerial style and decisions taken in the circumstances under which EAD had to operate added to the stress and anxiety of many EAD staff. However, there was no evidence that [Ms. Perelli's] actions were grounded in bad faith, malice, or any other motivation beyond the needs of the Organization. The [JDC] Panel also rejected allegations of professional harassment on the part of [Ms. Perelli] based on her "condoning" of harassing conduct of one of the subordinates since there were no charges of misconduct against the subordinate in question. The [JDC] Panel concludes that [Ms. Perelli's] conduct may have warranted the intervention of her superiors in their function of administering her performance as a manager, but did not rise to the level of professional harassment or misconduct.

d. On the charge of *abuse of authority*, the [JDC] Panel finds no evidence that [Ms. Perelli] circumvented the Organization's rules and regulations in managing EAD. In terms of the allegations that [Ms. Perelli] engaged in favouritism – by favouring a particular EAD staff member by giving him the most visible assignments and higher supervisory authority than his level would justify – the [JDC] Panel finds here again that there was no evidence to believe that [Ms. Perelli's] decisions were motivated by anything other than operational necessity in fulfilling EAD's mandate. It therefore concludes that the charge of abuse of authority cannot stand. (Italics in original.)

9. In a letter dated 6 December 2007, the Deputy Secretary-General informed Ms. Perelli of the Secretary-General's decision not to accept the JDC's conclusions or its recommendation for rescission of her summary dismissal. In the view of the Secretary-General, Ms. Perelli's actions

constituted sexual harassment, and they were all the more serious given her level of seniority within the Organization.

10. Ms. Perelli subsequently filed two applications with the former United Nations Administrative Tribunal (former Administrative Tribunal). In her application filed on 30 January 2008 (Case No. 1), Ms. Perelli challenged the initiation of the disciplinary proceedings that led to her summary dismissal. Ms. Perelli asked the former Administrative Tribunal to rule that the JDC's findings of fact and conclusions "were based on a thorough and comprehensive review and absent any demonstrable errors, should be relied upon in arriving at a reasoned decision". She also sought a ruling from the former Administrative Tribunal that "the decision of the Secretary-General to summarily dismiss [her] was procedurally flawed, influenced by extraneous considerations and violated [her] due process rights". In another application filed on 20 August 2008 (Case No. 2), Ms. Perelli clarified that she was seeking the rescission of the Secretary-General's decision to reject the JDC's findings and recommendations and to maintain her summary dismissal.

11. Both applications were subsequently transferred to the Dispute Tribunal, which issued two Judgments. In Judgment No. UNDT/2012/034 in respect of Case No. 1, the Dispute Tribunal reviewed the procedural steps leading up to the summary dismissal. On due process, the UNDT found that, while the initial fact-finding investigation by the IP was flawed, the flaws were cured in the process that followed and did not vitiate the decision of summary dismissal. The UNDT further found that Ms. Perelli's due process rights were respected during the formal disciplinary process. Regarding sexual harassment, the UNDT concluded that Ms. Perelli was guilty of sexual harassment (coarse and profane language, sexual references/innuendo, references to bottoms of male staff members and at least one instance of inappropriate physical contact with a staff member), as she should, and must, have known, given her level of seniority and the dynamic of power, authority and hierarchy that may inhibit staff members from confronting a harasser, that her established behaviour towards her staff "was not only inappropriate but would have the effect of creating an intimidating, hostile, and offensive work environment". The UNDT upheld the summary dismissal decision, as, in its view, "it was appropriate for the Secretary-General, in the circumstances of this case, to maintain the summary dismissal on the basis of the factual findings of the JDC on sexual harassment charges alone".

12. In the second Judgment UNDT/2012/100 entitled “Summary Judgment”, the Dispute Tribunal dismissed Ms. Perelli’s Case No. 2 as “moot, not receivable, and manifestly inadmissible”, as Case No. 2 and Case No. 1 concerned the same decision and all of the legal and factual issues relevant to her summary dismissal had been dealt with during the course of its consideration of Case No. 1 in Judgment No. UNDT/2012/034, and no matters remained pending adjudication.

13. On 25 March 2013, the Appeals Tribunal held an oral hearing at the request of Ms. Perelli. Ms. Perelli’s Counsel and the Representatives of the Secretary-General attended the hearing in person. Ms. Perelli participated via telephone-link.

Submissions

In respect of Judgment No. UNDT/2012/034

Ms. Perelli’s Appeal

14. The UNDT committed an error in procedure affecting its decision when it ignored the issue of the Respondent’s failure to produce the tapes of the actual testimonies before the JDC and relied almost entirely on the JDC report for establishing the underlying facts, and when it first combined, then separated, but later again combined the elements of the two cases without allowing for a full adjudication of the issues and facts raised in Case No. 2.

15. The UNDT diverged from the JDC’s findings on sexual harassment when it concluded that Ms. Perelli’s conduct amounted to sexual harassment because she had admitted to certain behaviour of an overt sexual nature and she should have reasonably known that her behaviour was unwelcome. Ms. Perelli stresses that the UNDT’s conclusion on this issue is not supported by any contemporaneous evidence of complaint, criticism or warning, and its selective reliance on portions of the JDC report should be rejected.

16. Ms. Perelli maintains that there is no other example of a staff member having been summarily dismissed for his or her use of language. The allegations of misconduct against her do not involve requests for sex, retaliation, compulsion, intimidation or any of the more egregious forms of sexual misconduct. They concern only overly familiar behaviour and language that could be seen as offensive.

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.

24. Ms. Perelli maintains that although she had accepted the facts of the case as established by the JDC, those facts cover two different processes, one leading up to the decision of summary dismissal and the other examining the factual basis for the various allegations. This second set of facts has never been examined by the UNDT.

25. Ms. Perelli avers that as the tape recordings were not available, the full extent of the testimony including discrepancies and contradictions in some of the witness testimonies was not considered, leading to very different conclusions by the JDC and the UNDT over what that testimony established.

26. Ms. Perelli also submits that her arguments on proportionality in Case No. 1 are even more relevant in light of the JDC findings, the dropping of several charges and the UNDT's reliance on her use of language as the sole basis for its finding of sexual harassment.

Secretary-General's Answer

27. The Secretary-General submits that the UNDT properly found that Case No. 1 and Case No. 2 concerned the same decision and legal issues. Ms. Perelli's arguments made in Case No. 1 and Case No. 2 demonstrate the substantial similarity between the two cases.

28. The Secretary-General notes that the UNDT and the parties clearly understood that the UNDT would consider the contested decision and all aspects of the disciplinary process leading up to it under Case No. 1. No limitations to the contrary were established by the UNDT. Furthermore, the UNDT expressly explained to the parties prior to the hearing on the merits in Case No. 1 that Case No. 1 would be heard in full and, that the UNDT would subsequently consider Case No. 2 only if it was actually shown to be required. Additionally, Ms. Perelli made express reference to both Case No. 1 and Case No. 2 in her closing submissions in Case No. 1. The Secretary-General also notes that during the proceedings in Case No. 1, Ms. Perelli was provided a full opportunity to establish her allegations in relation to each of her claims concerning her summary dismissal.

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 Mallet 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 member (...), condoned by the Director and unchecked by the Departmental management, created many of the conditions for an unhealthy working environment ... It should be noted though that even many of the staff brought on board by the Director (...) complained of persistent professional harassment, which took place over a period of time.

...

14. There is a deep-seated fear among some of the current and former staff of reprisals...

35. On 3 August 2005, Ms. Perelli was charged with sexual harassment, professional harassment and abuse of authority in violation of Staff Regulations 1.2(a) and 1.2(g), Staff Rule 101.2(d) and Secretary-General's Bulletin ST/SGB/253 "Promotion of equal treatment of men and women in the Secretariat and prevention of sexual harassment". The report of the IP together with witness statement annexes was attached to the charge letter headed "Allegations of misconduct" issued to Ms. Perelli. On 26 August 2005, Ms. Perelli was provided with further clarifications by way of specific extracts from witness interview records which were set out in the charge letter and which were relied on by Management to support the charges outlined in the letter of 3 August 2005.

36. Between 3 August 2005 and September 2005, Ms. Perelli was invited to provide her response in writing to the allegations of misconduct and she did so on 17 November 2005 by way of a Note which comprised a 10-page memorandum and a 22-page annex. In the course of its Judgment, the UNDT noted as follows:

... However, the Applicant was interviewed before those EAD staff members who gave the details of the sexual harassment allegations to the investigation panel. Their testimony was more specific than that given to Mannet. Because she was not re-interviewed once that information was available to the investigation panel, she did not have the opportunity to answer the specific alleged incidents of sexual harassment that had been related to the investigation panel and which largely formed the basis for the disciplinary charges. Nor was she given the opportunity to answer the allegations in writing, as required by sec. 10 of ST/AI/379. This inevitably limited the ability of the investigation panel to provide a fully-balanced description of the facts that took account of the Applicant's version of specific events.

... The Tribunal finds that it would have been appropriate for the investigation panel to interview the Applicant again after it had interviewed other EAD staff members and to seek her oral and written responses to the allegations made by them, as requested by her before reaching its factual conclusions. This failure amounted to a breach of due process.

... In spite of this, the Tribunal finds that after she was charged and before the decision was made to summarily dismiss her, the Applicant was provided with sufficient information that fairly informed her of the allegations against her. By then she had not only the charges, which were generally stated, but also the detailed evidence that was relied on in support of those charges. She had a full opportunity to submit her responses to these, and was allowed several extensions of time for her response. At all stages of the process, the Applicant had access to her Counsel.

37. Given that Ms. Perelli had the opportunity from at least 26 August 2005 to rebut the allegations contained in the statement attached to the IP report (and which were summarized in the letter of 26 August 2005) and the opportunity to rebut the contents of the IP report, we find that these procedural steps as part of Ms. Perelli's due process entitlements, provided in ST/AI/371 and ST/AI/379, were afforded to her prior to the decision to summarily dismiss her taken on 2 December 2005. Therefore, to the extent that the UNDT found the Administration to have respected these procedural steps, we uphold that finding.

38. The UNDT held that on foot of the IP Report and the absence of a detailed conflict of evidence and because of Ms. Perelli's apparent strategic decision not to rebut the specific allegations against her, the Secretary-General "had little choice but to proceed to summary dismissal. At that stage it had evidence pointing to a high probability of misconduct. The decision was taken after a serious review of the material that was before the Administration."⁵

39. The process did not end with the decision to summarily dismiss Ms. Perelli on 2 December 2005. On 16 March 2006, Ms. Perelli sought administrative review of the decision to dismiss, pursuant to former Staff Rule 110.4(c), and challenged the decision to dismiss on substantive and due process grounds and contended that the decision was influenced by extraneous factors.

40. The JDC Panel charged with conducting the review was established on 1 May 2006. It held some 15 hearings between 7 September and 9 November 2006 and conducted interviews with 27 individuals, including Ms. Perelli.

41. The JDC described the scope of its review, concordant with the jurisprudence of the former Administrative Tribunal in the following terms: "[I]n disciplinary matters, the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors."⁶ The JDC recorded the pronouncement in *Sheye* and *Reid* that the former Administrative Tribunal had "established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision".⁷

⁵ In its report of 12 June 2007, the JDC Panel observed that Ms. Perelli "was not entirely blameless in the outcome of the consideration of her case in that she refused to respond to the substance of the allegations beyond a blanket denial of all allegations ... The [JDC] Panel believes that [Ms. Perelli] would have served herself (and probably the decision-makers) by providing the Administration a detailed response to the allegations as presented in 'examples and incidents' in ASG/OHRM letter. [Ms. Perelli's] silence on the substantive issues had an inevitable direct impact on the decisions in the subsequent stages."

⁶ Former Administrative Tribunal Judgment No. 583, *Djimbaye*, (1992), paragraph VI, cf. former Administrative Tribunal Judgments No. 351, *Herrera*, (1985), para. VII; No. 529, *Dey*, para. (1991) para. V; and No. 582, *Neuman*, (1992) para. III.

⁷ Former Administrative Tribunal Judgments No. 300, *Sheye* (1982), para. IX; and No. 210, *Reid* (1976), para. III.

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 observe the standards of conduct expected of an international civil servant, but the JDC saw itself as being under the obligation to find whether "an act or acts that constituted the alleged misconduct have been established".

43. At paragraphs 42 to 54 of its report in particular, under the heading "Due process", the JDC considered not so much the procedural steps which pertained to the fact-finding exercise the IP was obliged to conduct; rather it focused on the remit of the IP itself, as communicated on 10 May 2005, to wit, that the IP's "task is to establish the facts". The IP was further reminded by Management: "You are not required to make any determination on what conduct legally qualifies as sexual or professional harassment."

44. At paragraph 50 of its report, the JDC summarized the testimony, which the IP members gave to the JDC, in the following terms:

[I]n their testimony to the [JDC] Panel, both members of the IP, separately, stated categorically that they "just recorded the statements" and did not attempt to crosscheck or otherwise establish the veracity of the statements made to them. Neither did the IP seek to examine any documentation related to the allegations. Accordingly, they stated that they could not vouch that these statements were true. Both members presented their understanding of their principal task as "putting names to statements" contained in the Mannot report. One member of the IP told the [JDC] Panel that she believed that "an investigation was needed" to verify statements given to the IP.

45. By any standard, this latter concession was an extraordinary admission for the IP member to make, given that the remit of the IP was to establish facts. At paragraph 54 of its report, the JDC stated as follows:

Given that, as established by the Panel, the IP did not, in reality, conduct a fact-finding investigation and analysis of evidence, the Panel found that one of the indispensable steps in the process set out in ST/AI/371 and /379 has not been implemented. This finding led the Panel to a conclusion that essential due process requirements were not met in this case and, as a result, the *prima facie* evidence cannot be considered established. The Panel thus finds that [Ms. Perelli's] initial contention of invalidity of the summary dismissal is affirmed. This conclusion, in and of itself, could have been sufficient for a recommendation that the SG's decision to summarily dismiss [Ms. Perelli] be rescinded.

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. As already referred to, Ms. Perelli contends that the UNDT failed to address the IP's failure to establish facts. The UNDT did not, with any degree of particularity, consider the content of the JDC report on this issue. It noted: "[T]he JDC conducted an extensive fact-finding process" and "[t]he factual findings of the JDC are not challenged by [Ms. Perelli]". Significantly, however, the UNDT did not pronounce upon the contents of paragraph 54 of the JDC report. We are satisfied, given the particular circumstances of this case, that Ms. Perelli was entitled to a judicial review by the UNDT of the Secretary-General's decision to reject the JDC's findings on due process, given the very serious admissions made by the IP members to the JDC.

48. In the course of her 6 December 2007 letter to Ms. Perelli, the Deputy Secretary-General stated:

The Secretary-General, whilst noting the JDC's statement that your "lack of responsiveness certainly added to this problem", considers that the "Report to the Assistant Secretary-General for Human Resources Management on the Fact-finding investigation on allegations of sexual and professional harassment[,] Electoral Assistance Division, Department of Political Affairs[,] 23 May to 23 June 2005", which was prepared by the investigation panel appointed by OHRM, together with the supporting documentation and evidence, meets the requirements of ST/AI/371 and ST/AI/379. In this connection, it is noted that 26 individuals were interviewed. The Secretary-General, therefore, does not accept the JDC's conclusion that due process requirements were not met.

49. Given the nature of the Secretary-General's response, as outlined in the 6 December 2007 letter, to the very significant shortcomings in the methodology of the IP, the UNDT should have exercised judicial review of that response before satisfying itself that

⁸ *Marshall v. Secretary-General of the United Nations*, Judgment No. UNAT-2012-270.

⁹ Paragraph 3 of ST/AI/371 reads: "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 cheques, invoices, administrative forms, signed written statements by witnesses or any other document or record relevant to the alleged misconduct."

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.)

from the perspective of nature, consistency and veracity of statements. In other words, the Panel decided that it should itself examine evidence, define which facts it would consider established, find whether the established facts constitute a *prima facie* case and, if so, whether [Ms. Perelli] provided adequate explanations, and, ultimately, whether her conduct as established constituted sexual harassment, professional harassment and abuse of authority, as charged.

The sexual harassment charge

53. With regard to the sexual harassment charge, the JDC took as its starting point the “examples and incidents” presented in paragraph 17 of the 26 August 2005 letter sent to Ms. Perelli, which in turn was taken from the statement of 11 witnesses interviewed by the IP (nine of whom the JDC itself interviewed between 7 September and 9 November 2006).

54. A reading of the JDC’s report of this exercise (see paragraphs 64 to 88) satisfies this Tribunal that the JDC in effect carried out the fact-finding investigation which the Administration’s remit to the IP had contemplated. The JDC categorized the “examples and incidents” furnished to Ms. Perelli into three categories: (1) factual allegations; (2) expressions of opinion; and (3) statements of a vague and general nature. For the reasons set out in its report, the JDC quite properly, on due process grounds, focused on the factual allegations while taking into account “statements of opinion as cues to understanding interpersonal dynamics in the Division”.

55. The JDC examined both the “examples and incidents” and the information provided by those interviewed for veracity, consistency and corroborative value. As a result of its examination of the factual allegations related to the charge of sexual harassment, the JDC found the following facts established:

- Ms. Perelli routinely used coarse and profane language;
- Ms. Perelli made references to sexual matters and used sexual innuendo;
- On a number of occasions, [Ms. Perelli] referred to bottoms of male staff members; and
- There was at least one instance of physical contact with a named individual.

56. The Respondent in his submissions (and the UNDT) emphasized Ms. Perelli’s acceptance of the facts as set out in the JDC Report. What did she accept? At its height, Ms. Perelli accepted the methodology adopted by the JDC for its enquiry and its conclusions as to what that enquiry established.

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 reluctant to report incidents, but *whether* instances of alleged sexual harassment were brought to the attention of [Ms. Perelli] and/or of appropriate officials of the Organization. As shown above, the answer to this crucial question is a definite "no". (Italics in original.)

It went on to conclude:

Based on its careful analysis of the totality of circumstances, the Panel finds that, although a particular behaviour is found "inappropriate", no conduct automatically rises to the level of sexual harassment merely on the basis of its sexual overtones and lack of "appropriateness," no matter how reprehensible one finds that conduct to be, unless it involves the elements articulated in the relevant rules and jurisprudence. In the instant case, [Ms. Perelli's] conduct was definitely inappropriate, out of place and vulgar, often disgustingly so. However, absent any indication that [Ms. Perelli] had been put on notice or reasonably should have understood that some staff members considered that her conduct created an intimidating, hostile or offensive work environment, the conditions set out in the relevant SGB's and ST/AIs were not met. The Panel therefore finds that [Ms. Perelli's] conduct as established did not constitute sexual harassment.

Professional harassment and abuse of authority:

59. The JDC found neither of those charges established, being satisfied, with regard to professional harassment, that "the incidents as presented by the Administration did not rise to the level of professional harassment" and being satisfied, with regard to the issue of abuse of authority, "that the facts established [...] did not rise to the level of an abuse of authority".

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, it was stated that the Secretary-General believed that her actions constituted sexual harassment.

62. In reviewing the Secretary-General's decision not to accept the JDC's recommendation that the dismissal be rescinded, the Dispute Tribunal at paragraph 108 of its Judgment stated:

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.

With regard to the finding it made, as summarized above, the JDC stated:

The Panel categorically states that none of this is intended to excuse or condone vulgar and inappropriate behaviour, or to deny its effect on those staff who found offence and discomfort in their work environment. This analysis is related exclusively to the question whether [Ms. Perelli], given all these circumstances, should – or may indeed not – reasonably have known that her behaviour was seen as offensive by some staff. Based on the totality of circumstances, the Panel finds credible [Ms. Perelli’s] contention that, having received no clear warning signals from staff that her conduct was seen as offensive and/or inappropriate, and having consistently received during her six-year tenure with EAD laudatory evaluations from her superiors – despite explicit references in these same evaluations to her “unconventional behaviour” – she was unaware that her conduct was considered by some [as] inappropriate and unwelcome. The Panel also agrees that in such circumstances, a reasonable person would not necessarily have been aware, given differences in cultural backgrounds and professional work experiences.

65. Given that the fact-finding procedure put in place by the Assistant Secretary-General for OHRM in May 2005 had failed manifestly to carry out its remit (the IP members’ admissions that they had not established the facts refers), it was not, in our considered opinion, open to the Secretary-General to ignore the very thorough analysis conducted by the JDC on the issue of Ms. Perelli’s notice as to whether her conduct was unwelcome.

66. In light of the carefully-analyzed findings of the JDC, we are satisfied that the UNDT failed manifestly to attach sufficient weight to the findings of the JDC on the limitations which attach to Ms. Perelli’s constructive knowledge. In failing to take the factors outlined in the JDC’s report into account, the UNDT legitimized the Secretary-General’s unlawful rejection of the JDC findings and thereby allowed the dismissal of Ms. Perelli to be affirmed on foot of a charge of sexual harassment, which could not be sustained given the absence of the third required statutory element, namely, that the conduct complained of was unwelcome. Thus, in the present case, applying our jurisprudence in *Molari*, there was no clear and convincing evidence as a matter of high probability that Ms. Perelli had engaged in sexual harassment within the definition of ST/AI/379.

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