
UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1210



Appellant

(Appellant m8d(0T7t)TJCc Qw 2Td3t)TJV 435

Counsel for Appellant: George Irving

Counsel for Respondent: Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), the Appellant, a former United Nations staff member, contested the decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice, and

12. The Appellant wished to lead the evidence of Ms. XX, who had observed his conduct at the party, to establish that his conduct was unobjectionable and fell within acceptable limits. Likewise, he sought to lead the evidence of Mr. YY who was in attendance during the Appellant's interactions with BB and could cast doubt on her credibility in that he would testify that she appeared to be "having good fun" with the Appellant.

13. The Appellant also wished to call BB and CC on the grounds that due process required that he be afforded the opportunity to confront them in either direct examination or cross examination.

14. The UNDT declined to hear the evidence of AA, Mr. YY and Ms. XX. Only CC testified and BB declined to participate in the proceedings. The Secretary-General did not call any other witnesses.

why these women found the behaviour objectionable. The Appellant notes that, in contrast, AA, who originally expressed her concern over the Appellant's demeanour, never considered the incident as sexual harassment, accepted an apology and considered the matter closed.

19. The Appellant submits that BB did not appear in person, though available to testify, and that UNDT relied on her initial testimony to OIOS which was not amenable to cross-examination. The Appellant submits that BB was originally reluctant to formalise a complaint and that it was "doubtful" that she would have considered any of his behaviour as sexual harassment. The Appellant submits that the UNDT, rather than drawing "appropriate conclusions" from BB's failure to come forward, gave more weight to her interview by claiming there was a behavioural pattern. The Appellant submits that no deference was given to the fact that the Appellant was not provided with the possibility of cross-examining her.

20. The Appellant submits that, given all three women reacted differently and perceived the Appellant's conduct differently from other women at the party, the questions arise as to when "annoying or inappropriate" behaviour outside the office becomes harassment, and at what point does harassment become sexual harassment? The Appellant submits that the UNDT never considered these issues.

21. The Appellant submits that the UNDT concluded, without authority, that despite cultural differences, no person in the workplace should expect to be kissed. The Appellant submits that the UNDT's analysis overlooked the important distinction between inappropriate social behaviour and sexual harassment and whether the facts taken as a whole, including their context, amounted to serious misconduct.

22. The Appellant submits that the Respondent was required to determine whether the alleged acts were sexual in nature and it was incumbent upon the Respondent to rely on more than subjective assessment and conjecture.

23. The Appellant submits that insufficient attention was directed to the question of whether the alleged actions amount to serious misconduct and whether the penalty imposed was proportionate.

24. The Appellant submits that there is no evidence that his conduct had any negative impact on his work environment or professional relationships with colleagues. The Appellant submits that he is concerned that adverse publicity surrounding his case, caused by the "negligence" of the

32. The Secretary-General submits that the Appellant's conduct was work-related - the links between the event, the location and the people who were involved in the incident were all work-related and that thus, the Appellant's conduct was prohibited because of its "deleterious effect on staff members and affiliates and on the Organization's work environment".

33. The Secretary-General submits that the sanction was proportionate to the misconduct, recalling that UNAT has consistently held that it will only interfere in the Secretary-General's decision to impose a disciplinary measure in cases of obvious absurdity and flagrant arbitrariness.

Considerations

34. Section 1.3 of

37. A finding of sexual harassment against a staff member of the Organisation is a serious matter. Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT may only reach a finding of sexual harassment on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of sexual harassment have been established in accordance with the standard of clear and convincing evidence. In other words, the sexual harassment must be shown by the evidence to have been highly probable.

38. To ensure the satisfaction of the standard of proof in disciplinary cases, the UNDT ordinarily will be obliged to convene an oral hearing at which the alleged wrongdoer will be afforded an opportunity to face and cross-examine those who accuse him or her of misconduct. Article 16(2) of the UNDT Rules of Procedure provides that the UNDT shall normally hold a hearing in an appeal to it against an administrative decision imposing a disciplinary measure. Articles 17 and 18 of the UNDT Rules of Procedure therefore envisage the calling, examination and cross-examination of witnesses under oath before the UNDT and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing.

39. Article 25 of the UNDT Rules of Procedure in turn requires the UNDT to issue its judgment in writing and to state the reasons, facts and law on which it is based. It is incumbent on the judge in his or her judgment to set out the results of the fact-fi9.1 (679.1 (e)5.8 .1 (d

most certainly the right to call any witness that may be in a position to rebut or cast further doubt on the credibility and reliability of that hearsay.

41. The OIOS investigation report is hearsay evidence. It is admissible in the interests of justice. Whi

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48. Accordingly, the refusal to allow the Appellant to call AA was an error of procedure, such as to affect the decision of the case. The UNDT erred also on a question of fact, resulting in a manifestly unreasonable decision on this count. There was no basis for concluding that the Appellant sexually harassed AA.

49. In Order No. 153 (NY/2020), the UNDT directed the Secretary-General to call BB as a witness, but BB declined to testify against the Appellant. This is not disputed by the Secretary-General. BB is not a staff member of the Organisation and thus had no obligation to participate in the hearing. To the extent that BB was a witness adverse to the Appellant, the failure of the Secretary-General to secure her attendance before the UNDT permits an

adverse inference detracting from the reliability of the evidence. The failure of the Secretary-General to secure her attendance before the UNDT permits an adverse inference detracting from the reliability of the evidence.

51. In the Impugned Judgment, the UNDT referred to other hearsay evidence about a first report of the alleged harassment (possibly admissible evidence of a previous ~~case~~(e)-3.1 (n)17.9 ts

often be worse than a criminal conviction on equivalent misdemeanors. Before making such a finding, as already said, the UNDT should normally conduct a proper trial in accordance with appropriate rules of procedure and evidence.

56. The proceedings of the UNDT in this case, the nature of the evidence and the manner in which it was adduced barely resemble what might be expected for a judicial determination of sexual harassment. There has simply been no proper and fair trial of the relevant issues. The UNDT was faced with the two irreconcilable factual versions. Two complainants (not three) alleged sexual harassment. The Appellant strenuously denied it. In order to come to a conclusion on the disputed issues, it was necessary for the UNDT to satisfy itself on the credibility and reliability of the various witnesses to the alleged incidents of misconduct and to properly determine the probabilities. The relevant witnesses necessary to make that determination possible were not called to present their evidence in person. As a result, it was not possible for the UNDT to make appropriate findings on credibility and reliability, based on its impression about the veracity of any witness. The UNDT was not in a position to assess: i) the candour and demeanour of the witnesses; ii) any latent and blatant bias against the Appellant; iii) contradictions in their evidence; iv) the calibre and cogency of the performance of each witness when compared to that of other witnesses testifying in relation to the same incident; v) the opportunities the witnesses had to experience or observe the events in question; and vi) the quality, integrity and independence of the witnesses' recall of the events. Without that the UNDT had no proper opportunity to make an analysis and evaluation of the probability or improbability of the different versions on each of the disputed issues.

57. In determining the facts, the UNDT is required to keep the standard of proof uppermost in its mind. The Secretary-General bears the considerable onus to bring clear and convincing evidence before the UNDT proving that the misconduct was highly probable. There is no overall onus on the staff member to prove his innocence. If the version of the accused staff member is reasonably possibly true there will be a reasonable doubt, and there must be compelling evidence that counters that doubt before a finding of highly probable wrongdoing is made. An OIOS investigation report, given its limited fact-finding methodology, usually will provide no more than reasonable grounds to conclude that misconduct occurred, amounting to proof that is appreciably less than clear and convincing. If it were accepted that an OIOS investigation report, based solely on a written record of

interviews not observed or cross-examined by the Appellant, is adequate to determine whether sexual harassment occurred, then there would be little role for the UNDT. An investigative report, while useful, is no substitute for a judicial determination.

58. Thus, in summation, it was incumbent on the Secretary-General in this instance to lead the evidence of the complainants, other eyewitnesses who witnessed the alleged misconduct and the persons to whom the complainants made their first report, all of whom the Appellant in terms of Article 17 of the UNDT Rules of Procedure might have cross-examined. This did not happen. Likewise, the Appellant ought to have been allowed to call AA, Mr. YY and Ms. XX. He set out a reasonable basis for why their evidence would have been exculpatory, and, had such evidence been allowed, as it reasonably and fairly should have been, it might have assisted the UNDT properly assess the credibility and reliability of

Judgment

61. The appeal is upheld and the matter is remanded to the UNDT for the application to be re-heard and determined by a different judge in accordance with the direction in the preceding paragraph.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 29th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar