
UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1412



AAT¹
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before: Judge Kanwaldeep Sandhu,

Counsel for Appellant: Ron Mponda and Rodney Mkweza

Counsel for Respondent: Rupa Mitra

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. AAT, a Senior Protection Officer, contested the decision of the Office of the United Nations High Commissioner for Refugees (UNHCR) to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for sexual harassment of a United Nations Volunteer (Complainant) at the Quetta Sub-Office in Pakistan (contested decision).

2. By Judgment No. UNDT/2022/135 (impugned Judgment),² the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) upheld the disciplinary measure imposed on AAT and dismissed his application. The Dispute Tribunal made its determination based on the written material before it as the parties agreed to forego an oral hearing. AAT appeals.

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3. For reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the appeal and affirms the impugned Judgment.

4. As a preliminary matter, given that there was no challenge to anonymity by the Secretary-General, the UNDT order to anonymize AAT's name remains in effect, pursuant to Section

U.C.432 of Practice Direction No. 1 of the Appeals Tribunal (15 July 2015) [TJ0, Tc 0 Tf0 Tc 0 Tw 0T783 0 Td90.69/T2 1 Tf2

7. In Quetta, the Complainant and AAT both lived in a shared guest house which normally housed seven international UNHCR staff members. After a rest and recuperation cycle, during which she returned to Europe, the Complainant worked remotely in Europe due to the COVID-19 pandemic lockdown. She subsequently returned to Quetta in mid-

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2:57 a.m.: The Complainant responded: “Yes, I do” and “Like Drake says: I only love my mum and my bed.”

2:58 a.m.: AAT responded: “That’s drake and he said so because he doesn’t like and want the chick who said she love him.” The Complainant responded with five laughing emojis.

2:59 a.m.: AAT sent a message: “So that cannot become the standard.” The Complainant responded: “Drake is rubbish indeed.”

3:01 a.m.: AAT sent a message: “So just be truthful to your feelings and act accordingly. I know we have quite a lot in common but are all holding back.” The Complainant responded: “:).”

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could do regarding AAT's "harassment". She advised the C

23. On 12 November 2020, the IGO sent the draft of its Investigation Report to AAT. AAT submitted his comments on 19 November 2020.

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24. On 20 November 2020, the IGO issued its Investigation Report in which it considered that the following allegations were substantiated and supported a finding that AAT failed to fulfil his responsibilities as a manager, supervisor and UNHCR staff member:¹⁹

i) Calling [the Complainant] to his room on 1 August 2020 at 3:13 a.m.; C1 [l iA11.4 (i4.9 (n)82.6 (e-0.7 (i).5.9/Snm)-7

arrived at his room, AAT was lying in bed. When the Complainant placed herself some distance from AAT and the bed, he

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circumstances. It also observed that a “sexual harasser could not remain on the job in line with the Organization’s zero-tolerance policy”.²⁵

38. Last, the Dispute Tribunal concluded that AAT’s due process rights had been respected during the investigative and the disciplinary process. In this regard, it noted that AAT had not identified any procedural irregularity.²⁶

39. Therefore, the Dispute Tribunal upheld the contested decision and concluded that AAT was not entitled to any remedies.

Submissions

AAT’s Appeal

40. AAT requests that the Appeals Tribunal “reverse or modify the [Dispute] Tribunal’s findings of fact on the critical points identified in the appeal brief and (...) the [Dispute] Tribunal’s decision finding t741.902 (S) Fed. II) s. 0830684 Td (70) 437 (a) rH (6) - Id (F38 d) (S) d. (1) ch (5) - IS e.5 (4.41.1 ()]TJ-0.01D

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- (b) whether the established facts qualify as misconduct under the Staff Regulations and Rules,
- (c) whether the sanction is proportionate to the offence and the circumstances, and
- (d) whether the staff member's due process rights were observed in the investigation and disciplinary process (...).

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.

68. We find that the Dispute Tribunal correctly made its determination based on the above standard of review and did not err in the impugned Judgment for the reasons that follow.

Establishment of facts by clear and convincing evidence

69. AAT submits that the Dispute Tribunal erred in law by shifting the burden of proof from the Secretary-General onto him when it held that his submissions lacked "the minimum level of specifics to discharge his burden of proof".³⁶

70. There is no indication in the impugned Judgment that the Dispute Tribunal erred in law in its application of the burden of proof. Rather, the Dispute Tribunal correctly identified that the Administration has the burden to establish the alleged misconduct by clear and convincing evidence. It relied on relevant Appeals Tribunal jurisprudence as well as on the appropriate legal framework, namely Section 9.1(a) of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).³⁷

71. In applying the burden and having regard to the standard of proof, the Dispute Tribunal reviewed and considered the entirety of the evidence and the parties' submissions and made appropriate findings. In doing so, it correctly determined that the facts underlying the allegations were established by clear and convincing evidence, and, therefore, the Administration discharged its burden.

72. It appropriately recognized that AAT also bears the onus of proving his case and version of events. This is what the Dispute Tribunal refers to in paragraph 51 of the impugned Judgment. The Dispute Tribunal did not accept AAT's submissions and evidence and found that he had not met the

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ignored the nature of their relationship, including their social interactions throughout the eight months, such as gatherings in his room at the guest house to avoid causing offence to the other occupants due to their alcohol h e o t o r e k n h t - 8 (r e) 7 . 5 (

that “when a woman drinks, eats or talks to you, it doesn’t mean that she wants to have sex with [him]. [She] trusted [him] as [her] supervisor”.⁴³

84.

16 August 2020, and in her interview with the IGO always described the events in a detailed and specific manner.⁴⁶

88. As for determining the credibility of the parties in disciplinary cases, we note that in *Applicant*, this Tribunal stated that “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” but also that “an oral hearing and cross-examination will not be required in all disciplinary cases”.⁴⁷ Further, in *Shumba*, the Appeals Tribunal opined that whether an oral hearing will be required “will depend on the circumstances of the case before the UNDT. For example, there may be documentary, audio or video evidence or circumstances surrounding the parties or witnesses that may support not holding an oral hearing”.⁴⁸

89. In *Gonzalo Ramos*, the Appeals Tribunal stated that:⁴⁹

... Specifically with regard to the standard of evidence when dealing with cases involving sexual harassment, the Appeals Tribunal has already held that the credibility of the witnesses is of fundamental value. Moreover, it was undoubtedly enough for the Secretary-General to discharge his burden of proof by providing ‘the various evidentiary statements relay[ing] the version of the complainant with a conspicuous consistency that added to their credibility’.

90.

later was inappropriate and apologized for.⁵⁰ This included an “invite” for a night cap on 4 August 2020 at 11:02 p.m., which he admitted was not “appropriate”.

92. As for the 9 August 2020 WhatsApp messages, AAT

Establishment of misconduct

96. In

The onus is not on the recipient of the advances to signal that the advance is unwanted. Rather, the responsibility lies on the perpetrator to ensure that the advances or conduct are welcomed before engaging in such conduct, which responsibility is all the greater when there is a power imbalance involved between the parties.

102. In *Gonzalo Ramos*, the Appeals Tribunal found that:⁵⁵

... Sexual harassment can encompass numerous typee

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112. AAT argues that “some [other] disciplinary sanction” would be justified in the circumstances and that there were “strong mitigating factors” that should have been considered.

113. However, as we stated, the Secretary-General has broad discretion in determining the

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Judgment

115. AAT's appeal is dismissed, and Judgment No. UNDT/2022/135 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Savage

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 16th day of April 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar