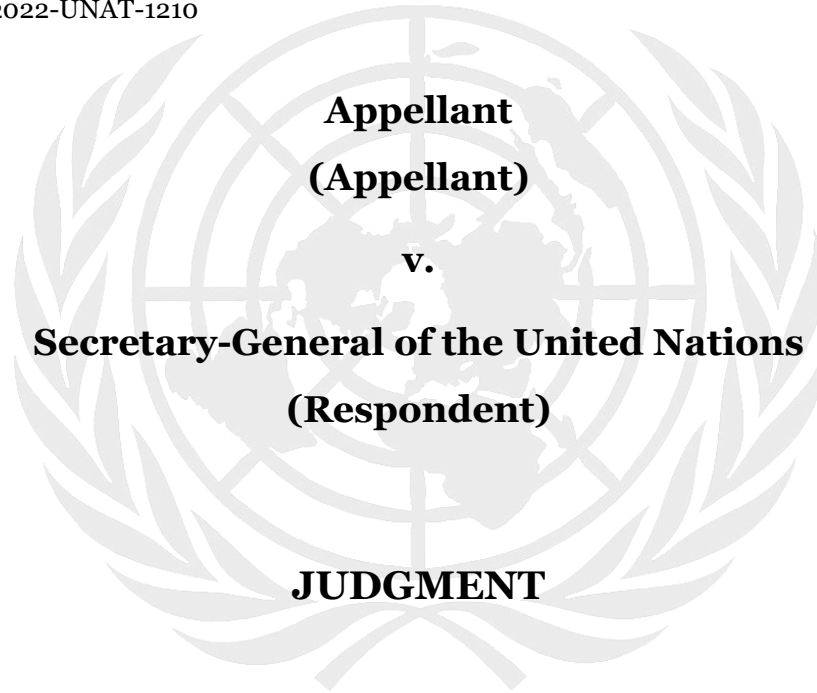




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1210



**Appellant
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2021-1541
Date:	18 March 2022
Registrar:	Weicheng Lin

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 with termination indemnity in accordance with Staff Rule 10.2(a)(viii). In Judgment No. UNDT/2021/007 (the Impugned Judgment), the UNDT dismissed his application. The Appellant appeals the Impugned Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).

2. For the reasons below, we remand the application to the UNDT to be re-heard and determined by a different judge.

Facts and Procedure

3. The Appellant joined the Organisation in 2012 as an Information Systems Officer at the P-4 level. Prior to his separation in March 2019, the Appellant held a fixed-term appointment at the P-5 level.

4. It was alleged that, on 8 November 2017 during a farewell party for a colleague at the offices of ERP-Umoja Project at the United Nations Headquarters in New York, the Appellant sexually harassed three female colleagues, referred to in the UNDT Judgment as AA, BB and CC. The six specific allegations against the Appellant were: i) he grabbed AA's face, held her closely, leaned forward and attempted to kiss her; ii) when AA resisted the Appellant kissing her, he forced her head down and kissed her on the forehead; iii) he grabbed BB's face, held her closely, leaned forward and attempted to kiss her; iv) he tried to move physically close to AA and BB while dancing, despite their attempts to keep him at a distance; v) he attempted to grab CC's face, when she blocked her face with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and vi) he took and pulled CC's hands to try to get her to dance, despite her resistance.

5. On 15 November 2017, CC reported the alleged harassment to the ERP-Umoja Project Director, who referred the matter to the Office of Internal Oversight Services (OIOS), which then initiated an investigation of the complaint. On 29 June 2018, OIOS concluded its investigation and transmitted an investigation report of the incident (the investigation report) to the Under-Secretary-General for Management. On 25 October 2018,

following a review of the investigation report, the Office of Human Resources Management issued a memorandum to the Appellant detailing allegations of misconduct leveled against him (the allegations memorandum).

6. On 13 December 2018, the Appellant provided his comments on the allegations of misconduct. He admitted that he had danced with the three complainants and had kissed AA on the forehead after dancing with her. He denied kissing or attempting to kiss BB and CC and denied completely the allegations of sexual harassment.

7. On 29 March 2019, the Assistant Secretary-General for Human Resources informed the Appellant that the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) had decided that the allegations against him had been substantiated by clear and convincing evidence and that she had decided to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

8. On 26 June 2019, the Appellant applied to the UNDT requesting that the contested decision be rescinded. The Appellant in his appeal brief states that the Tribunal initially proposed to decide the case on the papers without a hearing but allowed a hearing upon the motion of the Appellant over the objections of the Secretary-General.

9. The UNDT issued Order No. 138 (NY/2020) of 15 September 2020 wherein it requested the Appellant to state the identity of the witnesses which he wished to call and to set out the disputed facts to which these witnesses would testify.

10. In response, the Appellant submitted a detailed submission in compliance with that Order. In particular, he identified five witnesses he wished to call: AA; Ms. XX; Mr. YY; BB; and CC.

11. The Appellant explained in his submission that AA's testimony was relevant to establish whether his conduct towards her rose to the level of sexual harassment as contemplated in section 1.3 of ST/SGB/2008/5. He indicated that AA would testify that she considered the matter between them resolved and he thus submitted that her testimony was relevant to the question of whether his conduct caused offence or humiliation.

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.

15. On 3 February 2021, the UNDT issued its Judgment dismissing the Appellant's application. In making its findings the UNDT relied exclusively on the OIOS investigation report and (it would seem) on the evidence of CC of which there is limited discussion and analysis in the Judgment. The UNDT found that the Secretary-General had established the facts on which the imposition of the disciplinary measure were based on clear and convincing evidence, that these facts constituted misconduct in the form of sexual harassment, that the disciplinary measure was proportionate to the nature of the misconduct and that the Appellant's due process rights had been fully observed.

16. On 1 April 2021, the Appellant filed an appeal of the Impugned Judgment with the UNAT. On 5 April 2021, the UNAT Registry transmitted the Appeal to the Respondent. On 4 June 2021, the Secretary-General filed his answer.

Submissions

The Appellant's Appeal

17. The Appellant seeks rescission of the Impugned Judgment and the contested decision; reinstatement, or alternatively two years' net base pay; and compensation for harm.

18. The Appellant submits that, since it was affirmed and not contested that the Appellant had kissed or embraced a number of people (of both sexes) at the party and had danced separately in a group with many of the women at the party without incident, the question arises

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

Office of Administration of Justice, may have had an adverse impact, noting that his identity as well as that of the witnesses and evidence were all exposed in a highly prejudicial article. The Appellant notes that he has an unblemished record of service, which appears to have been ignored.

25. The Appellant submits that the proportionality of the penalty should be seen in terms of the consequences of being labelled as guilty of sexual misconduct in the United Nations system, foreclosing any possibility of re-employment in any United Nations or related organisation.

The Secretary-General's Answer

26. The Secretary-General requests that the UNAT uphold the Impugned Judgment and dismiss the appeal.

27. The Secretary-General argues that the UNDT correctly held that the facts established that the Appellant had engaged in sexual harassment.

28. The Secretary-General submits that, in view of the testimony of the three victims and additional witnesses, the Appellant's claim that his actions were not sexual in nature is untenable.

29. The Secretary-General submits that BB's non-appearance at the hearing does not invalidate the testimony she provided to OIOS. Due process does not always require that a staff member defending a disciplinary action for summary dismissal has the right to confront and cross-examine his accusers.

30. Further, the Secretary-General submits that, contrary to the Appellant's claim that each of the victims experienced the Appellant's conduct differently, their testimonies share many similarities. In light of the Respondent's inability to compel BB, a non-staff member, to appear before UNDT, and in light of the consistency between the testimony BB provided during her interview with OIOS and the testimony of the other witnesses, the Secretary-General submits that UNDT did not err when it relied on BB's testimony despite the fact that she was not present for cross-examination by the Appellant.

31. The Secretary-General submits that the testimonies of AA and BB corroborate CC's statements that the Appellant continuously made aggressive advances toward CC and that she was visibly shaken by his behaviour.

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 ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines sexual harassment as follows:

... Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

35. Hence, before concluding that there has been sexual harassment, there has to be sufficient, credible and reliable evidence proving a high probability that the perpetrator: i) made a sexual advance; ii) made a request for a sexual favour; iii) engaged in conduct or behaviour of a sexual nature; or iv) made a gesture of a sexual nature. In addition, the advance, request, conduct or gesture must be shown to have been unwelcome; might reasonably have been perceived to cause offence or humiliation to another; or have caused a hostile work environment.

36. The approach of the UNDT to the determination of the facts in this matter falls below what is required. It appears to have relied almost exclusively on the hearsay evidence in the OIOS investigation report, despite the existence of other better evidence which it declined to hear for unacceptable reasons.

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-finding exercise, the nature and content of the evidence and to make appropriate factual and legal findings in relation to it so as to demonstrate that the standard of proof has been attained. This involves an analysis of the admissibility of the evidence, its probative value (cogency, sufficiency, reliability and credibility) and its relevance to the issues in dispute (*facta probanda*) and/or the facts relevant to the facts in issue (*facta probantia*).

40. A staff member challenging a disciplinary measure before the UNDT should have a reasonable opportunity of presenting his or her case under conditions that do not place him or her at a substantial disadvantage. The staff member should normally be afforded an opportunity to challenge the substance, credibility and reliability of the evidence against him or her. Where, as in this case, the evidence is mostly hearsay, this may require at the very least an opportunity to challenge the reporter of the hearsay—the OIOS investigator—and

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. While the statements of fact contained in the investigation report were not in the personal knowledge of the investigator, they were recorded in the performance of a duty to record information supplied by persons with personal knowledge of the relevant matters. The evidence nonetheless remains hearsay and is inherently less trustworthy because it cannot be tested by cross-examination.

42. In admitting hearsay in the interests of justice, the UNDT should always have regard to the reason why the original evidence is not given by the person upon whose credibility the probative value of such evidence depends - in this case the three complainants and any other eyewitnesses to the alleged conduct. If those witnesses are available to testify, there should be compelling reasons before disallowing such evidence and substituting it with the less cogent and inherently unreliable hearsay in the OIOS investigation report. Hence, where better evidence is available, the UNDT should readily allow it to be led.

43. The principal reason for excluding hearsay or attaching little weight to it is not only that the maker of the statement (in this case those alleging sexual harassment) might have been deliberately lying; he or she may simply have been mistaken owing to the deficiencies of memory or faltered in his or her observation of the contested events; or he or she may have narrated the facts to the investigator in a garbled or misleading fashion. The purpose of cross-examination is to expose these deficiencies, and if the maker of the statement is not before the UNDT, this safeguard is lost.

44. As mentioned, the Dispute Tribunal in Order No. 153 (NY/2020) refused the Appellant's request to call his witnesses, specifically AA (who he maintains did not consider herself a victim of sexual harassment), Mr. YY and Ms. XX. The UNDT rejected the Appellant's contention that the testimony of AA and Ms. XX was relevant to the question of whether his conduct constituted sexual harassment. It noted that the Appellant did not challenge the (hearsay) statements made by these witnesses to OIOS, but rather the weight and importance that they were given by the Administration when deciding to terminate his appointment. These issues, it held, were of legal and not factual nature and did not

necessitate a “rehearing” of either these proposed witnesses. It therefore refused his request to call them as witnesses.

45. The UNDT’s decision to exclude the evidence of AA and Ms. XX somewhat missed the point that the Appellant wished to rely on their testimony to prove that his conduct towards AA was not sexual in nature and caused no offence. He was unfairly denied that opportunity. The UNDT accepted correctly that AA considered the conduct of the Appellant towards her as not warranting a formal complaint. AA clearly stated in her OIOS interview that she did not consider the Appellant’s conduct, taken in context of a party atmosphere, to have had sexual motivations, nor did it cause her offence or humiliation. That evidence is undisputed. The UNDT however concluded that it did not matter that the Appellant considered it normal to kiss his dancing partner after a dance. What was important, in its view, was how AA perceived the kiss. And, despite AA’s statement that the kiss caused her no offence and did not have a sexual motivation, the UNDT deemed it sufficient that AA “clearly did not welcome it”. The UNDT saw the Appellant’s manner of dancing as adding to the overall gravity of his offence in the circumstances.

46. The UNDT’s conclusion that AA may not have welcomed the conduct and experienced it as offensive was based entirely on hearsay and is inconsistent with the content of that hearsay. AA confirmed to the OIOS investigator that she did not regard the Appellant to have sexually harassed her. Moreover, besides the inherent insufficiency of AA’s hearsay evidence, it was essentially exculpatory and thus provided an inadequate basis to conclude that there was clear and convincing evidence that the Appellant had sexually harassed AA by making an unwelcome sexual advance, gesture etc. that might reasonably have been perceived as offensive or humiliating. Yet, solely on the basis that the Appellant had not disputed the fact that he had kissed AA on the head, the UNDT mistakenly and unfairly denied the Appellant the opportunity to call AA to give evidence about her perception of his conduct, which most likely would have been favourable to him.

47. The UNDT thus clearly erred both in not permitting the Appellant to call AA as a witness and in the incorrect conclusions it drew from her hearsay evidence. While the conduct may have been unwelcome, AA did not consider it sexual in nature or offensive. An unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment.

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 considerably from the credibility and reliability of her allegations in the OIOS investigation report. Her unavailability compelled the UNDT to rely exclusively on the hearsay allegations she made to the OIOS investigator. The only corroboration of her version was the hearsay of EE who also did not testify before the UNDT. There is reference in the Impugned Judgment also to the hearsay of other witnesses about the state and conduct of the Appellant on the evening in question and with regard to BB's alleged disappointment about a conversation she had with the Appellant that evening. Again, for reasons unknown, none of these witnesses were called to testify and the hearsay itself is of uncertain relevance.

50. As mentioned, the UNDT rejected the Appellant's request to call Mr. YY to give evidence relevant to BB's allegations against him. It did so on the ground that the alleged incident that Mr. YY witnessed was not among the six alleged acts of sexual harassment on which the Administration based its decision. It felt that the "rehearing" of Mr. YY, whose statement to the OIOS investigation the Appellant did not challenge, would therefore not be necessary. This finding missed the point that Mr. YY's testimony was relevant to the nature of the interaction between the Appellant and BB shortly before the alleged incidents of harassment, the nature of his behaviour towards BB and BB's contemporaneous state of mind. This evidence, the Appellant contended, would have raised doubts about the alleged sexual motivation and offensive nature of his conduct and may have impacted on BB's credibility. It was unfair to deny the Appellant the opportunity to lead this evidence. If there were doubts about its relevance, the UNDT might better have afforded the Secretary-General the right to object to specific aspects of it during the course of the trial, rather than to have imposed a prior general ban of or restraint upon it.

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 consistent statement) by BB and CC to two unidentified “United Nations staff members”. In addition to it being hearsay, little weight can be attached to the evidence of unidentified persons, who were not called to testify on this potentially crucial corroborating evidence.

52. The hearsay upon hearsay and the unsubstantiated first report of the unidentified witnesses, while perhaps giving rise to a reasonable suspicion of sexual harassment, by no means attains the standard of clear and convincing evidence establishing that the Appellant grabbed BB’s face, held her closely, attempted to kiss her and moved physically close to her while dancing. It is wholly insufficient to conclude on a highly probable basis that the Appellant’s conduct was sexual.

53. Finally, the evidence in relation the allegations of CC that the Appellant attempted to grab her face, fell on her forcefully and took and pulled her hands to try get her to dance has also not been evaluated and determined satisfactorily. The Impugned Judgment confirms that CC testified before the UNDT. However, the UNDT failed entirely to discuss and analyse her direct examination and cross-examination and made no findings at all about the cogency of her performance as a witness, her credibility and reliability and the factual conclusions to be drawn from her testimony. There is merely one passing reference to the fact that CC had testified. Instead, the UNDT relied once again almost entirely upon the hearsay in the OIOS investigation report, as well as a relatively neutral admission by the Appellant in his OIOS interview that he had touched CC’s hand when inviting her to join a communal dance, as sufficient to establish the allegations.

54. To compound the difficulty, the Appellant did not testify before the UNDT. However, the UNDT attached some weight to admissions he made in his statement to the OIOS investigation – none of which rises to the level of a confession to all the elements of the offence of sexual harassment. He denied in his interview with the OIOS that he acted with sexual motives in relation to AA, BB or CC, or that his conduct could reasonably be perceived as offensive.

55. A finding of sexual harassment, as said, is a serious matter. It invariably will have severe consequences for the staff member in relation to his future employment, family life, financial security and reputation. The implications of such a finding, in today’s world, will

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 the witnesses presented by the Secretary-General. The evidence of AA would have been relevant to the question of whether the Appellant's conduct was unwelcome and/or offensive; while the evidence of Ms. XX and Mr. YY was relevant to the state of mind of the complainants and the credibility of their assertions that the alleged conduct was unwelcome or offensive. Added to that, we do not know what weight or significance, if any, was attached to the testimony of CC before the UNDT.

59. In the premises, the UNDT by refusing to allow key witnesses to testify and its over-reliance on hearsay evidence, committed an error in procedure, such as to affect the decision of the case and consequently erred also on the facts, resulting in a manifestly unreasonable decision.

60. The appropriate remedy is for the matter to be remanded to the UNDT with a direction for the application to be re-heard and considered by a different judge. The UNDT should at the very least hear the evidence of the complainants, any eyewitnesses to the incidents, the persons to whom the first report was made, and the three witnesses identified by the Appellant. Should some of the witnesses no longer be available, the UNDT must determine on the available evidence whether the allegations of sexual harassment have been proven by the Secretary-General on evidence that attains the standard of highly probable.

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