



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

---

Judgment No. 2018-UNAT-819

**Mbaigolmem  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

---

Before:	Judge John Murphy, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2017-1108
Date:	22 March 2018
Registrar:	Weicheng Lin

---

Counsel for Mr. Mbaigolmem:	Edward P. Flaherty
Counsel for Secretary-General:	John Stompor

**JUDGE JOHN MURPHY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/051, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 29 June 2017, in the case of *Mbaigolmem v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 25 August 2017, and Mr. Jacob Mbaigolmem filed his answer on 19 October 2017.

**Facts and Procedure**

2. Mr. Mbaigolmem joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in November 2011 as its Assistant Regional Representative (Supply) in Kinshasa, Democratic Republic of the Congo (the DRC) at the P-5 level.

3. From 17 to 27 June 2014, Mr. Mbaigolmem attended a UNHCR Workshop for Emergency Management (WEM) in Starum, Norway. All participants stayed in accommodations on-site and were divided into teams for various exercises. Mr. Mbaigolmem was named as the head of his team, which included a female staff member (the complainant) serving as Supply Associate (G-6) in Budapest, Hungary.

4. On the evening of 20 June 2014, after dinner and an all-team meeting, the complainant worked with Mr. Mbaigolmem in his hotel room on part of their team's assignment.

5. A few days before the end of the workshop, a staff counsellor informed Mr. Mbaigolmem orally that certain workshop colleagues had complained about inappropriate behaviour on his part. Subsequently, on 17 July 2014, the complainant lodged a complaint for sexual harassment against Mr. Mbaigolmem with the Inspector General's Office (IGO), UNHCR.

6. In her complaint, the complainant alleged that, on the evening in question, during their work session, Mr. Mbaigolmem enquired if she would be interested in P-2/P-3 positions in the DRC and later, as she gathered her things to leave, Mr. Mbaigolmem proposed that they take a hotel room together and spend the weekend after the workshop in Oslo. The complainant further alleged that, as she approached the door to leave, Mr. Mbaigolmem hugged her and tried to kiss her. She turned her head to avoid the unwelcome advance and tried to back away. She told Mr. Mbaigolmem that she did not want that. He kept his arms

around her and tried to kiss her again, after which he moved his arms downward, putting his hands on her buttocks. She repeatedly told him that his actions made her uncomfortable. She finally left the room.

7. IGO launched an investigation into the allegations. Seven witnesses were interviewed between August and October 2014 as part of the investigation, including the complainant and Mr. Mbaigolmem, as well as two trainers and three participants in the WEM, to whom the complainant had confided about the alleged incident on the following day or a few days later. Two of them (both female participants in the WEM) stated, after the complainant recounted the incident to them, that Mr. Mbaigolmem had also acted in an inappropriate manner with them during the training. One of them claimed that Mr. Mbaigolmem had touched her neck during a coffee break. The other said that she had encountered Mr. Mbaigolmem in the hotel corridor one evening during the WEM and he had proposed to her that they spend the night together. Neither of these participants brought a complaint against Mr. Mbaigolmem regarding these allegations.

8. On 5 December 2014, the IGO gave Mr. Mbaigolmem its draft investigation findings, invited him to comment on them and informed him that disciplinary procedures based on the investigation report could be initiated. Mr. Mbaigolmem provided his comments on 14 December 2014.

9. The IGO rendered its investigation report on 18 December 2014. It concluded on a preponderance of evidence standard that Mr. Mbaigolmem engaged in misconduct by sexually harassing the complainant at the end of the working session in his hotel room.

10. By letter dated 5 February 2015, the Director of the Division of Human Resources Management (DHRM), informed Mr. Mbaigolmem that disciplinary charges for sexual harassment were being brought against him. She sent the investigation report to Mr. Mbaigolmem and gave him an opportunity to answer to the allegations and produce countervailing evidence. Mr. Mbaigolmem submitted his comments on 28 February 2015, denying all of the allegations. He included in his submissions a brief written statement by one of the participants in the WEM indicating that on the evening he supposedly propositioned another female participant to spend the night with him, he had in fact spent the evening having drinks with a number of other colleagues in another hotel room.

11. On 26 June 2015, the Director, DHRM, transmitted to the High Commissioner for Refugees, who has the authority to make decisions regarding the imposition of disciplinary sanctions on UNHCR staff, a memorandum titled “Recommendation for a disciplinary measure”. The memorandum contained a legal analysis of the case and advised that Mr. Mbaigolmem be issued a disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The High Commissioner approved this recommendation on 3 July 2015 and Mr. Mbaigolmem was informed accordingly on 9 July 2015. The decision was based on the finding that Mr. Mbaigolmem had engaged in sexual harassment, specifically, by making unwelcome sexual advances towards a colleague. Mr. Mbaigolmem filed his application with the UNDT challenging his separation from service on 6 October 2015.

12. The UNDT rendered its Judgment on 29 June 2017 holding that the disciplinary sanction imposed on Mr. Mbaigolmem was unlawful. The UNDT accepted that if the alleged facts had indeed occurred, they would have amounted to sexual harassment as defined in Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). It identified the key question for determination to be whether the facts at issue were established to the required standard. However, despite the complainant being present at the hearing, it declined to permit her examination on the substance of the allegations and made no effort to obtain additional evidence from the women to whom the complainant had reported the incident or who had complained of similar misconduct by Mr. Mbaigolmem. Instead, it reviewed the conduct of the investigation by the IGO and found that there were flaws in the investigation in that the investigator “made a series of choices that seriously weakened the completeness and reliability of his conclusions”,<sup>1</sup> and that during the procedure following the investigation the Administration’s “assessment was tainted by an improper and excessive reliance on statements regarding different alleged incidents with other participants to the WEM”.<sup>2</sup>

13. The UNDT concluded that the facts at issue were not established to the required standard of clear and convincing evidence. In this regard, it noted that the evidence before it was restricted to the written statement of the complainant (which it accepted as more credible than Mr. Mbaigolmem’s statement), the statements of the witnesses to whom the complainant

---

<sup>1</sup> Impugned Judgment, para. 43.

<sup>2</sup> *Ibid.*, para. 53.

reported the incident and the similar fact evidence of the other women allegedly harassed by Mr. Mbaigolmem, which were mere hearsay in relation to the incident involving the complainant. Whilst such evidence, in its opinion, established that the incident had probably occurred (on a preponderance of evidence), the nature and scope of the evidence meant it had not established the facts of the misconduct as highly probable on the basis of clear and convincing evidence.

14. The UNDT was especially critical of the fact that the investigator had only interviewed witnesses unfavourable to Mr. Mbaigolmem and not interviewed other participants at the WEM, including those who occupied the rooms adjacent to Mr. Mbaigolmem and the alibi witness who averred that Mr. Mbaigolmem was in his room when he supposedly propositioned the other female participant. The UNDT offered no explanation in its Judgment for why these persons were not called by Mr. Mbaigolmem as witnesses at the UNDT hearing; and, accordingly, did not discuss whether any adverse inference might be drawn from that failure.

15. By way of remedy, the UNDT ordered rescission of the disciplinary measure and remanded the decision to the Administration for it to resume the disciplinary procedure, with complementary investigative action if deemed necessary for the High Commissioner to make a new decision in light of its findings and any additional relevant evidence. As an alternative, the UNDT ordered in-lieu compensation in the amount equivalent to six months' gross salary plus post adjustment, deducting the staff assessment as well as the termination indemnity and compensation in lieu of notice that Mr. Mbaigolmem received upon his separation.

### **Submissions**

#### **The Secretary-General's Appeal**

16. The Secretary-General asserts that the UNDT erred in fact and law in finding that there was no clear and convincing evidence that Mr. Mbaigolmem had sexually harassed the complainant and thus submits further that the UNDT erred in concluding that Mr. Mbaigolmem was unlawfully separated from service for sexual harassment. Mr. Mbaigolmem's actions amounted to misconduct in violation of his obligations under Staff Rule 1.2(f) and UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority dated April 2005 (UNHCR Policy). Moreover, the sanction of separation from service was proportionate to the offence of sexual harassment committed.

17. The Secretary-General maintains that the credible evidence of the complainant alone was sufficiently clear and convincing as to attain a high standard of probability and was adequately corroborated by the witness statements which demonstrated a pattern of behaviour on the part of Mr. Mbaigolmem towards female colleagues.

18. The IGO's failure to interview other participants of the WEM, to approach possible witnesses of Mr. Mbaigolmem's behaviour towards other women and to interview Mr. Mbaigolmem's alibi in relation to the other incident would not have advanced the case as they were of dubious relevance and secondary significance. Moreover, the credibility of the witness to whom the complainant had reported the incident was not cast into doubt by the nature of the questions she was asked by the IGO.

19. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment, uphold the decision to separate Mr. Mbaigolmem for misconduct and dismiss his UNDT application in its entirety.

**Mr. Mbaigolmem's Answer**

20. Mr. Mbaigolmem objects to the Secretary-General's account of the facts and submits that the Secretary-General merely reiterates arguments already presented before the UNDT and fails to discharge his burden of satisfying the Appeals Tribunal that the impugned Judgment is defective. He asserts that the UNDT did not err in concluding that Mr. Mbaigolmem was unlawfully separated from service for sexual harassment as his actions did not amount to misconduct and the sanction of separation from service was disproportionate even if the alleged offence had been committed, as it was excessive and the Organization did not consider mitigating circumstances.

21. Furthermore, the UNDT properly determined that the Administration failed to meet its burden of proof through clear and convincing evidence. The UNDT was correct in requiring additional corroboration of the complainant's direct evidence to meet this standard. As the Appeals Tribunal "cannot hear witnesses, and in the absence of a transcript, it would be unlawful on its part to overrule the UNDT's determination on credibility on the basis of (...) mere conclusions drawn by the [Secretary-General]".

22. The UNDT was also correct in finding that the Administration's assessment of the facts was tainted by improper and excessive reliance on the witness statements of two other WEM participants who alleged incidents involving Mr. Mbaigolmem. The Administration indeed incorrectly took these statements as proven facts without investigating their probative value as the concerned staff members had not brought any complaints and without verifying whether they in fact confirmed a pattern of behaviour by Mr. Mbaigolmem.

23. Finally, Mr. Mbaigolmem asserts that the UNDT did not err in law or in fact in finding that there were shortcomings in the investigation which seriously weakened its completeness and reliability. The UNDT correctly found that the Administration should have interviewed other WEM participants, especially those who occupied rooms adjacent to Mr. Mbaigolmem and who claimed to have spent the evening with him as well as witnesses to the other alleged incidents Mr. Mbaigolmem was involved in. Instead, the "investigator wrongly chose to pursue inculpatory evidence only [and to purposefully omit any other evidence], fatally tainting his findings". The UNDT correctly concluded that character evidence by Mr. Mbaigolmem's colleagues in the DRC should not have been excluded.

24. Based on the foregoing, Mr. Mbaigolmem requests that the Appeals Tribunal (a) dismiss the appeal in its entirety upholding the UNDT's decision; (b) award him USD 25,000 in "moral damages for the psychological and emotional suffering he continues to endure over his appeal"; (c) order an award of punitive damages in the amount of USD 10,000 for the Organization's bad faith in pursuing this lawsuit which will necessarily result in continued unnecessary expenditure of time and legal fees; and, (d) remand the case to the UNDT for consideration of the proportionality argument if it finds in favour of the Secretary-General.

### **Considerations**

25. While this Tribunal is not without sympathy for the constraints under which the UNDT is compelled to operate, the UNDT might have done better in this instance to have engaged in a fuller trial of the issues. It conducted a limited hearing at which neither the complainant (despite her availability to testify) nor any of the material witnesses were properly examined. It remanded the matter to the Administration to resume the disciplinary process and obtain additional evidence.

26. Article 16(2) of the UNDT Rules of Procedure provides that a hearing shall *normally* be held following an appeal against an administrative decision imposing a disciplinary measure. The reasons for that provision are obvious. Firstly, cases of alleged misconduct typically require determination of disputed factual issues. This is best done in an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony. Secondly, factual findings of misconduct are of far-reaching import. A judicial finding that a staff member has committed sexual harassment, fraud, theft or the like has life-altering consequences. Hence, the determination of misconduct should preferably be done in a judicial hearing by conventional adversarial methods.

27. In the present case, the UNDT followed a different approach. It essentially reviewed the investigative process, concluded that it resulted in an unreasonable determination and referred the matter back to the Administration for further investigation and fact-finding. The right of a staff member to “appeal” an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.

28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.

29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

30. In this case, the UNDT concluded that the evidence was insufficient in that it did not establish the misconduct beyond a preponderance of evidence. It accordingly rescinded the disciplinary measure, remanded the matter to the Administration to resume the disciplinary process for the purpose of supplementing the evidentiary record, but afforded the Administration an opportunity to opt out of a further investigation by paying in-lieu compensation in the amount of six months' emoluments. This is an incorrect approach. In terms of Article 10(4) of the UNDT Statute, the UNDT may only remand a case for correction of the required procedure if it has not reached the merits of a case. The UNDT determined the merits in this case by finding that the misconduct had been established on a balance of probabilities. It moreover rescinded the disciplinary measure in terms of Article 10(5) of the UNDT Statute with the consequence that it was restricted to making an award of specific performance or compensation in lieu of reinstatement. Had it made such an order, it would have been within the discretion of the Administration to recommence disciplinary proceedings if it wished to do so. In so far as the UNDT believed additional evidence was required, it was obliged to direct the parties to adduce that evidence in the oral hearing and to explain to them the implications of not doing so. The remittal of the matter to the Administration to determine the facts more fully was an abdication of the UNDT's responsibility.

31. Be that as it may, we are satisfied on the evidence that the Secretary-General discharged his overall onus before the UNDT. It is common cause that the complainant visited the room of Mr. Mbaigolmem on the evening in question. It is equally not disputed that the complainant made a first report about the incident at the first reasonable opportunity in the immediate aftermath of the event. That report is a previous consistent statement of the kind exceptionally admissible in cases involving sexual harassment or assault and is of considerable evidentiary weight. The credibility of it has not been damaged by any countervailing evidence. Additionally, other participants at the WEM gave statements, admittedly hearsay, alleging like conduct by Mr. Mbaigolmem, such also being exceptionally admissible as similar fact evidence signifying a propensity or impulsive behavioural pattern on the part of Mr. Mbaigolmem. Moreover, as the UNDT itself held, the various evidentiary statements relayed the version of the complainant with a conspicuous consistency that added to their credibility. By contrast, the statement of Mr. Mbaigolmem revealed that he was vague, elusive and contradictory in his account. Added to that, as the UNDT also acknowledged, it is objectively unlikely that the various witnesses against Mr. Mbaigolmem, who came from different countries to attend the WEM, and appeared to have

no prior association with each other, would have colluded or conspired with the complainant to falsely incriminate Mr. Mbaigolmem. They had no reason to do that.

32. Considering these proven facts, we believe the UNDT was too circumspect in the weight it ascribed to the evidence. It erred in its conclusion that the fact of sexual harassment had been established only on a balance of probabilities. The undisputed facts, the evidence of the first report, the coherent hearsay evidence pointing to a pattern of behaviour, the internal consistency of the witness statements, the unsatisfactory statement of Mr. Mbaigolmem and the inherent probabilities of the situation, taken cumulatively, constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.

33. Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment. The sanction imposed by the Administration in this case was accordingly proportionate. It follows that the appeal of the Secretary-General must succeed.

**Judgment**

34. The appeal is upheld and Judgment No. UNDT/2017/051 is hereby vacated.

Original and Authoritative Version: English

Dated this 22<sup>nd</sup> day of March 2018 in Amman, Jordan.

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Knierim

*(Signed)*

Judge Lussick

Entered in the Register on this 23<sup>rd</sup> day of May 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar