

2013-UNAT-280, Applicant

UNAT Held or UNDT Pronouncements

UNAT considered two appeals by the Secretary-General of judgment Nos. UNDT/2011/106 and UNDT/2011/192. UNAT held that it was satisfied that the Complainant did not share the Applicant's desire to pursue a sexual relationship and that the Applicant's conduct was unwelcome. UNAT held that the transmission by the Applicant of a photograph of his genitalia to a female colleague, much less a colleague under his supervision, could at its best, as found by the Joint Disciplinary Committee (JDC), be characterised as outrageous and most probably unwanted. UNAT held that the Secretary-General had clear and convincing evidence that the Applicant's conduct was unwelcome to the Complainant. UNAT held that the Secretary-General had sufficient grounds to conclude, as a matter of high probability, that the Applicant's conduct rendered the Complainant's work environment offensive within the meaning of ST/AI/379. UNAT held that the totality of the circumstances in which the Complainant found herself could reasonably be considered under any standard, unwelcome and offensive, and on occasions intimidating. UNAT held that UNDT failed manifestly to attach sufficient weight to the unequal nature of the respective positions of the Appellant and the Complaint, to the strength of the Complainant's rejection of the Applicant's desire for an intimate sexual relationship with her. UNAT held as manifestly unreasonable UNDT's finding that the Complainant was a consenting partner in an intimate adult relationship where no holds were barred as far as discussion topics were concerned. UNAT held that the weight attached by UNDT to the Complainant's rejection of the Applicant's offer to arrange for her to move temporarily to another section was disproportionate. UNAT accepted the Secretary-General's submission that it was reasonable for him to evaluate the communications between the Applicant and the Complainant in light of the Complainant's position of inequality and vulnerability vis-à-vis the Applicant. UNAT held that the finding of UNDT, that the Complainant's claim that she was afraid to open her emails at work was untrue, was manifestly erroneous. UNAT held that UNDT erred in law and fact in determining that the Applicant's conduct vis-à-vis the Complainant did not constitute sexual harassment within the meaning of

ST/AI/379. On workplace harassment, UNAT held that UNDT erroneously focused on certain placatory reactions of the Complainant, while ignoring the threat of rejection of the Applicant's conduct by her. UNAT held that the email and text messages exchanges to which the Complainant was subjected against the backdrop whereby she had set certain boundaries for their relationship, constituted harassment in connection with work. UNAT held that UNDT erred in law and fact by failing to find sufficient nexus was established between the complained-of actions and the workplace; UNAT held this nexus was established by the Applicant's status as her supervisor. UNAT held that any attempted demarcation between the friendship and their working relationship could not be sustained. UNAT held that UNDT erred in law and fact in concluding that the Applicant did not engage in workplace harassment. On the Applicant's attempts to engage with the Complainant's new supervisor post-allegations, UNAT held that UNDT erred manifestly in describing the circumstances as normal and the Applicant's actions as no more than gossip or backstabbing. UNAT held that UNDT's conclusion that the Applicant was merely exercising his obligations as a former manager was manifestly unreasonable. UNAT held that the Secretary-General reasonably concluded that the Applicant's actions constituted misconduct and that, by ruling otherwise, UNDT erred in law and fact. UNAT held that, where the Applicant himself acknowledged that his supervisor had also verbally advised him to refrain from contacting the Complainant, UNDT erred in its conclusion that former Staff Rule 101. 2(b) was not violated. UNAT concurred with the finding of the JDC that the Applicant should have received a copy of the complaint during the investigation; however, UNAT held that his due process rights were not substantively breached since the Applicant had the opportunity in the course of the investigation to respond to allegations. UNAT held that UNDT's conclusion that the Applicant's due process rights were breached was erroneous. UNAT held that in deciding on the sanction, the Secretary-General was entitled to take into consideration that the Applicant was the Complainant's supervisor; the Applicant's egregious conduct following the complaint in approaching the new supervisor and the retaliatory motivation, therefore; and the Applicant's failure to follow instructions. UNAT held that the Secretary-General reasonably concluded that the misconduct was incompatible with the standards of conduct expected of an international civil servant. UNAT held that the sanction of summary dismissal was not disproportionate and that UNDT erred in law in concluding that the Applicant was improperly dismissed. UNAT allowed both appeals and reversed the UNDT judgments.

Decision Contested or Judgment/Order Appealed

The Applicant contested his summary dismissal for sexual and workplace harassment, abuse of authority and failure to follow instructions given by his supervisors. In UNDT/2011/106, UNDT found that the actions of the Applicant did not amount to serious misconduct and the imposition of summary dismissal was “wrongful” and deserving of a reprimand “at the very worst but certainly not summary dismissal”. In UNDT/2011/192, UNDT ordered rescission of the summary dismissal, reinstatement or compensation in lieu thereof, compensation for due process violations, an award of moral damages, payment of a repatriation grant and placement on a roster for P-5 positions.

Legal Principle(s)

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 legal amount to misconduct; and whether the disciplinary measure applied is proportionate to the offence.

Outcome

Appeal granted

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

UNMIBH

Case Number(s)

2012-283

2012-284

Tribunal

UNAT

Registry

New York

Date of Judgement

28 Mar 2013

President Judge

Judge Faherty

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Disciplinary measure or sanction

Dismissal/separation

Harassment (non-sexual)

Sexual harassment

Termination (of appointment)

Disciplinary sanction

Summary dismissal

Applicable Law

Administrative Instructions

- ST/AI/371
- ST/AI/379

Former Staff Rules

- Rule 101.2(d)

Information Circulars

- ST/IC/2003/17

Other UN issuances (guidelines, policies etc.)

Related Judgments and Orders

UNDT/2011/106

UNDT/2011/192

2010-UNAT-022

UNDT/2010/122

UNDT/2010/204

2010-UNAT-076

2011-UNAT-164