

# **2022-UNAT-1210, Appellant**

## **UNAT Held or UNDT Pronouncements**

UNAT held that the UNDT erred both in not permitting the Appellant to call a witness (AA) and in the incorrect conclusions it drew from her hearsay evidence. UNAT held that, to the extent that BB (a non-UN staff member) was a witness adverse to the Appellant, the failure of the Secretary-General to secure her attendance before the UNDT permitted an adverse inference which detracted considerably from the credibility and reliability of her allegations in the OIOS investigation report. UNAT held that little weight could be attached to the evidence of two unidentified UN staff members, to whom the UNDT referred, when neither were called to testify. UNAT held that the hearsay upon hearsay and the unsubstantiated report of the unidentified witnesses did not attain the standard of clear and convincing evidence required to establish that the Appellant's conduct was sexual. UNAT held that the UNDT failed to discuss and analyse the evidence of one witness (CC) who gave testimony before it and made no findings about her performance as a witness, her credibility and reliability or the factual conclusions to be drawn from her testimony. UNAT held that 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. UNAT remanded the matter to the UNDT with direction for the application to be re-heard and considered by a different judge.

## **Decision Contested or Judgment/Order Appealed**

The Applicant contested the decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice and termination indemnity, for misconduct in the form of sexual harassment. UNDT dismissed his application.

## **Legal Principle(s)**

Sexual harassment must be shown by the evidence to have been highly probable. To ensure the satisfaction of the standard of proof in disciplinary cases, UNDT will ordinarily 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. If witnesses are available to testify, there should be compelling reasons before disallowing such evidence and substituting it with hearsay. The Secretary-General bears the considerable onus to bring clear and convincing evidence before UNDT to prove that the misconduct was highly probable. There is no overall onus on the staff member to prove his innocence. An investigative report, while useful, is no substitute for a judicial determination.

## Outcome

Case remanded

## Outcome Extra Text

The UNAT Judgment provided the following guidance on the rehearing: 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.

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Appellant

## Entity

UN Secretariat

## Case Number(s)

2021-1541

## Tribunal

UNAT

## Registry

New York

## Date of Judgement

18 Mar 2022

## President Judge

Judge Murphy

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Dismissal/separation

Sexual harassment

Corroboration/hearsay

Disciplinary sanction

Disciplinary matters / misconduct

Evidence

Termination (of appointment)

## Applicable Law

## Secretary-General's bulletins

- ST/SGB/2008/5

## Staff Rules

- Rule 10.2(a)(viii)

## UNDT RoP

- Article 16.2
- Article 17
- Article 18
- Article 25