

2022-UNAT-1264, AAC

UNAT Held or UNDT Pronouncements

The essential question for determination on appeal is whether the UNDT correctly held that the alleged misconduct of creating a hostile work environment and giving of gifts was proved in accordance with the standard of clear and convincing evidence. In other words, did the evidence establish the alleged misconduct to a high degree of probability? At its essence, therefore, this case involves strongly contested disputes of fact about whether AAC conducted himself in a manner that was abusive and created a hostile working environment. The Administration says he did. AAC strongly denies it. Thus, it was necessary for the UNDT to resolve the disputes of fact in accordance with the conventional judicial methodology for resolving disputes of fact. Unfortunately, the key factual findings of the UNDT in relation to the relevant issues are not clearly explicated in the Judgment. The Judgment does not coherently identify the evidence relied upon to make the critical findings against AAC. Besides not referring to the witnesses who testified on behalf of both parties, there is no overt attempt in the Judgment to analyze or assess the testimony of such witnesses to determine its reliability and credibility with a view to making specific factual findings on the probabilities. The assessment of the evidence for the most part appears to have been based on the hearsay analysis in the OIAI report and the statements of witnesses who did not appear before the UNDT. Most of the findings are vague, impressionistic, unsubstantiated, rely on untested hearsay, or merely repeat factual allegations from witness statements without reaching conclusive findings. Prejudicial opinions are expressed about AAC's character which are accepted as true and accurate without any clearly articulated supporting factual foundation for them. In addition, the UNDT's findings are inconsistent. In some instances, the UNDT discounted the evidence as subjective and unreliable but then went ahead and relied upon that very same evidence to make adverse findings against AAC. Thus, as counsel for AAC correctly pointed out, the UNDT acknowledged that many accounts of the other staff members (in the OIAI report) lacked sufficient probative value when looked at in isolation and were too subjective to stand as evidence of harassment. But then it later contradicted itself by holding

that the hearsay comments illustrated the unhealthy work environment and found unsustainably that it was improbable that staff members would speak in these negative terms unless there was truth to the allegations. It thus simultaneously, and incongruously, rejected and accepted the same evidence. In the final analysis, there has not been proper fact-finding in relation to the key issues in this case. The Judgment in many parts appears to be founded upon impressions drawn from the OIAI investigation report and subjective opinions about AAC's character offered by persons who did not testify before the UNDT. It is accordingly not possible to clearly ascertain and test the factual basis of the UNDT's conclusion that harassment was established as highly probable. There simply has not been a fair trial of the issues. A finding that a staff member is a harasser will have serious consequences. It likely will impact significantly on his or her life, status, financial security, and family life. AAC had an unblemished employment history with the Organization which spanned 35 years during which he admirably and successfully rose up the ranks. If his impressive career is to be terminated on the grounds that he is a harasser, the factual basis for that decision must be established properly, in accordance with the conventional methodology and prerequisites of judicial fact finding, as highly probable on clear and convincing evidence. It is best therefore for the matter to be remanded to the UNDT in terms of Article 2(4)(b) of the Statute of the UNAT with a request that it make clearer factual findings with fuller and more systematic reference to the evidentiary basis upon which they are made. The findings must distinctly identify the testimony of the witnesses upon which they are based and discuss the nature of the testimony (hearsay, opinion, character etc.), its admissibility, relevance and cogency, as well as the weight afforded to it. At danger of repetition, it must be emphasized that disputes of fact must be resolved with regard to the reliability and credibility principally of the testimony of the witnesses who testified and the inherent probabilities.

Decision Contested or Judgment/Order Appealed

UNDT/2021/043

Legal Principle(s)

Findings of credibility and reliability depend on the UNDT's impression about the veracity of any witness who testified before it in the hearing. That in turn will depend

on a variety of subsidiary factors such as: i) the witness' candour and demeanour in the witness box; ii) the witness' latent and blatant bias against the staff member; iii) contradictions in the evidence; iv) the probability or improbability of particular aspects of the witness' version; v) the calibre and cogency of the witness' performance when compared to that of other witnesses testifying in relation to the same incident; vi) the opportunities the witness had to experience or observe the events in question; and vii) the quality, integrity and independence of the witness' recall of the events. As a final step, the UNDT is then required to determine whether the Secretary-General succeeded in discharging his burden of proof to show that it was highly probable that the staff member was a harasser. That task is difficult where the probabilities are equipoised. In such a case, the party bearing the onus of proof (invariably the Secretary-General in disciplinary cases) may lose his case solely on the basis that he failed to discharge that onus and did not meet the standard of proof required.

Outcome

Case remanded

Outcome Extra Text

The following orders are made: i) the final determination of this appeal is postponed sine die; ii) the matter is remanded to the UNDT in terms of Article 2(4)(b) of the Statute of the UNAT for additional findings of fact as set out in the directions in this Judgment; iii) the UNDT is directed to do the additional fact finding and to serve copies of its written findings on the parties within 30 days of the issuance of this Judgment; iv) AAC may file with the UNAT any further submissions in relation to the additional findings within 10 days of receiving the findings of the UNDT; v) the Secretary-General may file with the UNAT any further submissions in relation to the additional findings within 5 days of the expiry of the time period in paragraph iv) of this order; and vi) the Registrar is directed to set the appeal down for final determination in the session of the UNAT scheduled for October 2022.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAC

Entity

UN Secretariat

Case Number(s)

2021-1569

Tribunal

UNAT

Registry

New York

Date of Judgement

19 Aug 2022

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abuse of authority

Sexual harassment

Harassment (non-sexual)

Disciplinary
Credibility assessment
Disciplinary matters / misconduct
Burden of proof
Evidence

Applicable Law

UNAT Statute

- Article 2.1(e)
- Article 2.4(b)

UNICEF Administrative Instructions