

UNDT/2022/071, Applicant

UNAT Held or UNDT Pronouncements

Preliminary matter: the use of prior conduct evidence The Applicant argues that his due process rights were violated during the investigation, particularly by the irregular use of prior conduct evidence which allegedly created a bias against him and masked the lack of clear and convincing evidence in relation to the sexual harassment complaint. The Tribunal considers it is proper and not unlawful for the Organization to consider the staff member's background and behaviour towards others in the context of a disciplinary case, as long as it is relevant, uncontroversial and probative. UNAT jurisprudence holds that prior conduct evidence may be considered in determining whether a staff member committed misconduct, provided that the conduct was investigated properly or sufficiently for it to become a legitimate and significant consideration in addressing subsequent conduct. UNAT case law also indicates that once the Organization takes into consideration "prior conduct", the role of the UNDT is to establish if there is clear and convincing evidence that those facts have occurred. In the case at hand, there is no evidence that the facts that were taken into consideration to substantiate the investigator's finding of "prior conduct" were properly investigated up to the threshold of clear and convincing evidence. Clear and convincing evidence means the veracity of facts is highly probable and that the available evidence is not unequivocal and is manifest. However, the only available elements on file are those contained in the investigation report prepared by OIOS, i.e., the witness statements who were interviewed in the context of the current procedures. There is no record of a full and thorough investigation into those incidents, which were not even subject to a complaint. Thus, the Tribunal finds it cannot consider those facts as proof of prior conduct. As a result, the credibility assessment made by the Administration via the use of prior conduct evidence in this case cannot stand. Accordingly, the alleged prior conduct will not be considered as evidence in the instant judicial review. Merits As per the well-settled case law of the UN internal justice system, the scope of judicial review is limited to a review of findings and the procedural aspects of both the investigation and the disciplinary process. Consequently, the UNDT is not empowered to perform

a “de novo” review of the whole case. Therefore, the Tribunal is seized to assess the following issues: (a) whether the facts are established according to the applicable “standard of proof” of clear and convincing evidence; (b) whether the established facts qualify as misconduct; (c) whether the sanction is proportionate to the misconduct; and (d) whether the Applicant’s due process rights were respected. Disregarding the prior conduct evidence from its consideration, the Tribunal determined that the facts and evidence of the case were established to the clear and convincing standard. Regarding sexual harassment, the Tribunal found all of the testimonies credible, especially that of the victim, not only because they were all consistent but also due to the fact that there is no evidence of bias or prejudice against the Applicant. As for the allegations that the Applicant created an intimidating and hostile work environment for the victim following her rejection of his advances, the Tribunal found that there was clear and convincing evidence in support of the victim’s account. Particularly, documentary evidence combined with several witnesses who testified to the Applicant’s bad behaviour towards the victim and the effect that it had on her during that period. Therefore, the set of facts attributed to the Applicant constitutes harassment and sexual harassment within the meaning of secs. 1.2 and 1.3 of ST/SGB/2008/5, and violation of staff regulation 1.2(a), staff rule 1.2(f), and secs. 2.1 and 3.2 of ST/SGB/2008/5. The Tribunal also found the sanction adequate and proportionate to the gravity of the offence, and in step with the Organization’s “zero tolerance policy” against sexual harassment.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to impose on him a disciplinary measure of separation from service, with compensation in lieu of notice and with 25 percent of the termination indemnity otherwise applicable, following a disciplinary process of sexual harassment and harassment.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

UNODC

Case Number(s)

UNDT/GVA/2020/36

Tribunal

UNDT

Registry

Geneva

Date of Judgement

28 Jul 2022

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Harassment (non-sexual)

Sexual harassment

Disciplinary matters / misconduct

Applicable Law

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Regulations

- Regulation 1.2(a)

Staff Rules

- Rule 1.2(f)
- Rule 10.2(a)(viii)

Related Judgments and Orders

UNDT/2019/109

2016-UNAT-639

2022-UNAT-1210

2020-UNAT-1033

2016-UNAT-700

2018-UNAT-819

2013-UNAT-280

2010-UNAT-040

2017-UNAT-781

2013-UNAT-336

2013-UNAT-295