

UNDT/2022/073, Applicant

UNAT Held or UNDT Pronouncements

Have the facts on which the disciplinary measure was based been established according to the applicable standard? It was alleged that during the Cox's Bazar all-staff retreat in February 2020, the Applicant: a. Grabbed V01 from behind her and held her tight with his hands around her waist to the front of her body. He rested his head on her back while he pulled her back so that the front of his body rested against the back of her body. V01 did not consent to him touching her; and b. Hugged V02 from the front side of her body with his body pressed against her body. He hugged her with both his arms and with one hand he pressed her breast. He held V02 for a few seconds before a colleague took her away. V02 did not consent to him touching her. After a careful review of the case file, the Tribunal found that the investigation gathered clear and convincing evidence that supports the complainants' allegations. In fact, both victims' statements are clear and consistent and do not reveal any bias against the Applicant. Moreover, their account of the events was corroborated by other witnesses who testified before OIAI, in a clear and objective manner, about the Applicant's behaviour at the retreat, i.e., he appeared to be drunk and was pulling women to dance. In addition, the Applicant did not provide any evidence of the alleged collusion against him nor there is any evidence of bias from any of the victims or witnesses. Contrary to what normally happens in situations of sexual harassment, in this case, there is direct evidence of the facts, and the Tribunal is satisfied that the concatenation of elements gathered by OIAI is in accordance with the standard of clear and convincing evidence. Therefore, the Tribunal found that the facts have been established to the required standard. Do the established facts amount to misconduct? The Applicant's conduct towards his two female colleagues as described in the sanction letter, i.e., hugging them from behind their back and pressing one's breast, is an attitude of a sexual nature, taken against the victims' will, which made them feel offended, embarrassed and extremely uncomfortable. The Tribunal considered that the Applicant's conduct was unacceptable and amounted to sexual harassment. While the incidents took place outside the office and after working hours, they occurred at a work-related event,

i.e., an all-staff retreat whose purpose inter alia was to serve as a team-building exercise. Consequently, the Tribunal found that the Applicant's behaviour as per the established facts amounts to misconduct. Was the disciplinary measure applied proportionate to the offence? Under the applicable legal framework, international civil servants must uphold the highest standards of integrity and conduct themselves in a manner befitting their status as international civil servants when they are at work and off duty. In this context, the Tribunal highlights the "zero-tolerance policy" the Organization has adopted against sexual harassment and endorses the Appeals Tribunal jurisprudence in Conteh 2021-UNAT-1171. The impact on a victim of sexual harassment can have long-lasting effects and is not quantifiable. The Appeals Tribunal in Conteh recognized that acts of sexual harassment do not require "any concrete or palpable result," and held that "unwelcome advances and inappropriate behaviour towards colleagues such as touching their body parts [...] are per se grave enough to cause harm". The Tribunal was not satisfied with the Applicant's arguments to challenge the proportionality of the sanction and found that the Administration had properly considered the nature of the Applicant's actions, the past practice of UNICEF in matters of comparable misconduct as well as aggravating and mitigating circumstances. Therefore, the Tribunal found the sanction adequate and proportional to the gravity of the offence. Were the Applicant's due process rights respected during the investigation and the disciplinary process? The Tribunal considered the Applicant's arguments in this respect and found that his rights were observed and fully respected during the disciplinary proceedings.

Decision Contested or Judgment/Order Appealed

The decision to separate the Applicant from service, with compensation in lieu of notice, and with termination indemnity.

Legal Principle(s)

Judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see Sanwidi 2010-UNAT-084, para. 42 and Santos 2014 UNAT 415, para. 30). The Appeals Tribunal has determined what the role of this Tribunal is when reviewing disciplinary cases (see Mahdi 2010-UNAT-018, para. 27 and Haniya 2010 UNAT-024, para. 31). When the disciplinary sanction

results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see Molari 2011-UNAT-164, para. 2). The Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times he must adhere to the principle of proportionality (Applicant 2013 UNAT 280, para. 120). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (Aqel 2010 UNAT 040, para. 35). The Appeals Tribunal found in Mbaigolmem 2018-UNAT-819, para. 33 that “[t]he 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.” In Conteh 2021-UNAT-1171, para. 48, the Appeals Tribunal recently held that sexual harassment does not depend on ill intent and that the absence of ill intent is not a relevant consideration for the proportionality of the sanction. Also, in para. 46, the Appeals Tribunal held that “if there is zero tolerance, there should be no requirement for the conduct to be repetitive. Depending on the circumstances, one instance could conceptually be sufficient to be misconduct subject to the sanction of separation”. According to the Appeals Tribunal’s jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (Akello 2013-UNAT-336, para. 36), whereas at the preliminary investigation stage only limited due process rights apply (Powell 2013-UNAT-295, para.17). The investigator has a certain margin of discretion, based on a critical assessment of the evidence produced, to decide what is relevant or not for the purpose of the investigation (Pappachan UNDT-2019-118, para. 93).

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

UNICEF

Case Number(s)

UNDT/GVA/2021/26

Tribunal

UNDT

Registry

Geneva

Date of Judgement

29 Jul 2022

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Sexual harassment

Disciplinary matters / misconduct

Applicable Law

Staff Regulations

- Regulation 1.2(a)
- Regulation 1.2(b)

Staff Rules

- Rule 1.2(f)
- Rule 10.2

UNICEF Executive Directives

- CF/EXD/2012-007

Related Judgments and Orders

2010-UNAT-084

2010-UNAT-018

2010-UNAT-024

2011-UNAT-164

2013-UNAT-280

2010-UNAT-040

2017-UNAT-781

2018-UNAT-819

2021-UNAT-1171

2013-UNAT-336

2013-UNAT-295

UNDT/2019/118