

UNDT/2022/098, Applicant Applicant

UNAT Held or UNDT Pronouncements

The situation of the present case is that only two persons, namely the Applicant and AA, were present when the alleged sexual abuse occurred, and they have presented contradictory witness testimonies. As the case involves termination, the question for the Tribunal to determine is therefore whether the Respondent has established with clear and convincing evidence that the factual background upon which the disciplinary sanction is well-founded. This means that AA's testimony is highly probable whereas, in consequence, the Applicant's testimony is not reliable.

With reference to the Tribunal's findings in the above, the Tribunal is—clearly and convincingly—persuaded by AA's testimony in which she affirms the facts as set out the sanction letter.

In the interest of justice, the Tribunal, found it necessary to also provide its assessment of whether the Applicant's established behavior, as a matter of law, indeed amounted to sexual abuse. Hence, sexual abuse is an objective standard, even if the Applicant's 9 July 2019 email is read as him admitting that he sexually abused AA. Hence, "sexual abuse" is defined in ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) as: "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions" (see sec. 1). In this Administrative Instruction particular reference is made to "sexual activity with children (persons under the age of 18)", which is prohibited "regardless of the age of majority or age of consent locally".

Decision Contested or Judgment/Order Appealed

The "Administration's finding of misconduct and imposition of a disciplinary sanction", namely "separation from service with compensation in lieu of notice and without termination indemnity".

Legal Principle(s)

The Appeals Tribunal has consistently held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”.

The Appeals Tribunal has consistently held that the “[j]udicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration”. In this context, [the Dispute Tribunal] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”, and when “termination is a possible outcome, misconduct must be established by clear and convincing evidence”.

The Administration enjoys a “broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere”. This discretion, however, is not unfettered. As stated in *Sanwidi* 2010-UNAT-084, “when judging the validity of the exercise of discretionary authority, ... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”. This means that the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”. However, “it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” or otherwise “substitute its own decision for that of the Secretary-General”. Among the circumstances to consider when assessing the Administration’s exercise of its discretion, “[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion”.

The jurisprudence above was affirmed in *Applicant* 2022-UNAT-1187, where the Appeals Tribunal made a range of elaborate findings specifically addressed to the Dispute Tribunal’s handling of cases regarding sexual misconduct. The Dispute Tribunal “may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence”. In addition, “the sexual misconduct must be shown by the evidence to have been highly probable”. The Tribunal considers that the total absence of statute of limitations for acts possibly committed several decades earlier is regrettable. Nevertheless, it recognizes that in terms of weight and validity of evidence, the question of passage of time could, for instance, be a relevant factor to consider in the specific circumstances of a case, especially when assessing witnesses’ recollection of certain events. Also, harm felt by a victim could diminish, if not disappear, over time.

Outcome

Appeal dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant Applicant

Entity

DGACM

Case Number(s)

UNDT/NY/2021/25

Tribunal

UNDT

Registry

New York

Date of Judgement

30 Sep 2022

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Sexual harassment

Evidence of harm

Disciplinary

Disciplinary matters / misconduct

Evidence

Burden of proof

Applicable Law

Former Staff Regulations

Secretary-General's bulletins

- ST/SGB/2003/13

Staff Rules

- Rule 10.2

Related Judgments and Orders

2019-UNAT-955
2015-UNAT-550
2013-UNAT-302
2011-UNAT-164
2019-UNAT-956
2020-UNAT-1024
2010-UNAT-084
2020-UNAT-978
2018-UNAT-889
2018-UNAT-869
2017-UNAT-765
2018-UNAT-876