

UNDT/2022/135, Applicant

UNAT Held or UNDT Pronouncements

The sensitive nature of the sexual harassment allegations and the fact that the victim may be easily identified by the factual circumstances surrounding the case constitute exceptional circumstances that warrant granting anonymity.

The Complainant's account of facts in relation to the relevant incidents is credible and reliable. The Applicant failed to adduce any evidence that could have undermined the credibility of the Complainant's evidence. There is no evidence of ulterior motives on the part of the Complainant.

The Administration succeeded in discharging its burden of proof to show that the facts on which the disciplinary measure was based, namely that the Applicant made unwelcome sexual advances towards his supervisee, have been established by clear and convincing evidence.

The Applicant's conduct constituted unwelcome sexual advances that were reasonably expected or perceived to cause offence or humiliation to another. As such, the Applicant engaged in sexual harassment in breach of the obligations under staff regulations 1.2(a) and (f), staff rule 1.2(f) and sec. 4.2 of the Policy. Accordingly, the Tribunal concludes that the established facts legally amount to misconduct.

The sanction applied in the present case is consistent with those applied in similar cases. The Administration duly considered aggravating and mitigating factors. A victim's acceptance of a sexual harasser's apology does not invalidate the general principle that a sexual harasser cannot remain on the job in line with the Organization's zero-tolerance policy. Accordingly, the disciplinary measure at issue is consistent with prior precedent and proportionate to the offence in the present case, and thus there is no basis for it to interfere with the Administration's exercise of discretion in this matter.

The key elements of the Applicant's right to due process were met in the present case. The Applicant has not identified any procedural irregularity during the investigation and disciplinary proceedings that could have rendered the disciplinary sanction at issue unlawful.

The Tribunal upholds the disciplinary measure imposed on the Applicant.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for alleged sexual harassment.

Legal Principle(s)

Judicial review of a disciplinary case requires the Tribunal to consider the evidence adduced and the procedures utilized during the course of an investigation by the Administration. Consistent jurisprudence requires the Tribunal to ascertain a) Whether the facts on which the disciplinary measure was based have been established according to the applicable standard; b) Whether the established facts legally amount to misconduct under the Staff Regulations and Rules; c) Whether the disciplinary measure applied is proportionate to the offence, and d) Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

The Administration has the burden of proof to establish that the alleged misconduct for which a disciplinary measure has been taken occurred. When the disciplinary process results in separation from service, the alleged misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. Clear and convincing proof requires more than a preponderance of evidence but less than proof beyond a reasonable doubt. To meet this standard, there must be a very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

The party who alleges a fact bears in principle the burden of proving its veracity. Sexual harassment can occur regardless of the scale of the impact on the possible victim. Conduct is considered as sexual harassment when it meets specified criteria.

The matter of the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case, and to the actions and behaviour of the staff member involved.

The most important factors to be considered in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

The onus is on the Applicant to provide proof of the lack of due process, and how it negatively impacted the investigation and/or the disciplinary process.

Outcome

Appeal dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

UNHCR

Case Number(s)

UNDT/GVA/2021/42

Tribunal

UNDT

Registry

Geneva

Date of Judgement

24 Dec 2022

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Sexual harassment

Disciplinary matters / misconduct

Applicable Law

Administrative Instructions

- ST/AI/2017/1

Laws of other entities (rules, regulations etc.)

- UNHCR/HCP/2014/4 Policy on Discrimination

Secretary-General's bulletins

- ST/SGB/2018/1

Staff Regulations

- Regulation 1.2(a)
- Regulation 1.2(f)

Staff Rules

- Rule 1.2(f)
- Rule 10.3(a)
- Rule 10.3(b)

UNDT Statute

- Article 11.6

Related Judgments and Orders

2016-UNAT-639
2013-UNAT-302
2010-UNAT-024
2015-UNAT-537
2021-UNAT-1183
2011-UNAT-164
2017-UNAT-776
2020-UNAT-1033
UNDT/2011/046
UNDT/2020/111
UNDT/2021/065
2018-UNAT-819
UNDT/2009/083
2022-UNAT-1256
2021-UNAT-1076
2012-UNAT-207
2022-UNAT-1210
2015-UNAT-523
2018-UNAT-859
2017-UNAT-781
2020-UNAT-1024
2019-UNAT-956