2023-UNAT-1332, AAE

UNAT Held or UNDT Pronouncements

The UNAT held that the Dispute Tribunal correctly reasoned that under the UNFPA Disciplinary Framework, the assessment of the facts of misconduct is not exclusive to OAIS, but that the Director of the Department of Human Resources (Director/DHR) must also analyze the evidence, and such analysis could lead DHR to a different conclusion than that of OAIS. Accordingly, in this case, the UNAT found that the UNFPA Administration had the authority or locus standi to proceed with a disciplinary process even in the absence of a finding of misconduct by OAIS. The UNAT further held that the UNFPA Disciplinary Framework gives the Director/DHR the authority to review the investigation report from OAIS and to request further information. Thus, in this case, although the OAIS investigation was closed by OAIS, the overall disciplinary case was not, because the Director/DHR had not yet acted on the investigation report. The disciplinary case remained open until the Director/DHR analyzed the additional evidence requested, issued the misconduct charges, received AAE's comments, and ultimately communicated the decision on the disciplinary sanction. The UNAT also found that there was no violation of AAE's due process rights because he had an opportunity to comment on the investigation report and the additional follow-up evidence that had been requested by the Administration. After reviewing the totality of the evidence and the UNDT Majority's conclusions based on the credibility of the witnesses' testimony, and the unsatisfactory inconsistencies in AAE's evidence, the UNAT found no error in the UNDT's findings as to Count 1. The UNAT held that the evidence established to a high degree of probability that AAE engaged in non-consensual sex with the complainant, amounting to sexual assault, on the night in question. The UNAT noted that the UNDT Majority had found the complainant was credible in her testimony, whereas AAE's account was generally lacking in credibility. The UNAT agreed with the UNDT that a series of WhatsApp messages corroborated the complainant's evidence and version of events. The UNAT also took note of other contemporaneous indicia of the rape, including the complainant's first report to her supervisor which was within a reasonable time of the incident. The UNAT rejected AAE's argument

that because the complainant did not struggle, scream, or attempt to flee, that this passive behavior equates to consent. The UNAT held that this was clearly incorrect and contrary to a reasonable standard in sexual assault cases. As to Count 2, the UNAT held that the UNDT Majority did not err in concluding that AAE had committed misconduct in providing false statements to the OAIS investigators on several topics. Having concluded that the UNDT did not err in its findings of misconduct with respect to the sexual assault under Count 1, the UNAT held that it could not be gainsaid that separation from service was the appropriate disciplinary sanction. With respect to the Secretary-General's cross-appeal on the UNDT's decision to anonymize AAE's name from all decisions that were published on the UNDT website, a majority of the UNAT Judges declined the Secretary-General's request to publish AAE's name. The UNAT Majority held that good cause had been shown to exclude AAE's name in the UNDT and UNAT Judgments. In a dissenting opinion, Judges Murphy, Colgan, and Knierim would have granted the Secretary-General's cross-appeal because they did not consider that AAE had established good cause, and that for AAE to assert that his and his family's interests would be harmed by the publication of his name was not exceptional to his case.

Decision Contested or Judgment/Order Appealed

In Judgment No. UNDT/2022/030, a three-judge panel of the Dispute Tribunal reviewed the application of a former staff member (AAE) whose service was terminated based on two counts of misconduct. Those counts were: (1) that AAE raped another staff member (the complainant) and (2) that he failed to cooperate with the Office of Audit and Investigation Services (OAIS) during the investigation into the misconduct. Before the UNDT, AAE challenged not only the misconduct findings and the disciplinary sanction, but also whether the UNFPA administration had the authority to "reopen" the OAIS investigation and to impose a disciplinary sanction in the absence of a conclusion by OAIS that AAE had engaged in misconduct. In a divided panel opinion, the UNDT upheld in full the misconduct under Count 1, and partly on Count 2, and found that the sanction of dismissal from service was proportionate. The UNDT further held that there was no abuse of process or violation of legitimate expectations when the UNFPA Executive Director sought clarification and further information from OAIS because the disciplinary case was not "closed". AAE appealed. The Secretary-General cross-appealed the decision of the UNDT to anonymize AAE's name in the impugned judgment and other

decisions on the UNDT website.

Legal Principle(s)

A plain, ordinary, and literal reading of Staff Rule 10.3(a) is that it is permissive. It provides that the Secretary-General “may” initiate the disciplinary process, giving the Secretary-General discretion to decide whether to commence a disciplinary process against a staff member “where the findings of an investigation indicate that misconduct may have occurred”. It does not provide that the Secretary-General can only commence disciplinary proceedings where the investigation finds that misconduct has occurred. The language of the provision does not make a finding of misconduct of an investigation mandatory or a condition precedent for the Secretary-General to commence a disciplinary process. It is undisputed that a staff member being investigated for misconduct is entitled to reasonably prompt closure. This is done by establishing time limits for the conclusion of the disciplinary case as well as the grounds and time limits for re-commencing the investigation, while ensuring due process. Whether a delay is inordinate will depend on the circumstances of each case and the nature and complexity of the allegations against the staff member. Sexual assault cases are typically difficult to adjudicate. Sexual misconduct typically occurs in private, often with little or no direct, independent evidence. Judges must make findings of fact often with two conflicting versions of events and with contradictory testimonial evidence. In order to come to a reasoned conclusion on the disputed facts, judges must satisfy themselves on the credibility and reliability of the persons concerned and provide cogent reasons for those findings. A finding of sexual misconduct against a staff member of the Organization is a serious matter with grave implications for the staff member’s reputation, standing, and future employment prospects. For that reason, the Dispute Tribunal must base its finding of sexual misconduct on sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that all the elements of sexual misconduct have been established by clear and convincing evidence. In other words, sexual misconduct must be shown by the evidence to have been highly probable. This normally occurs after an oral hearing of the involved parties and witnesses with the opportunity for cross-examination. The law cannot take silence, passive or ambiguous conduct as consent in sexual assault cases. Consent must be defined as a voluntary agreement of an individual to engage in the sexual activity in question in the form of actual statements, actions or other

evidence. Whether there is consent to the sexual activity will depend on the circumstances of each case and the totality of the evidence. However, there are circumstances where there clearly can be no consent in law, including but not limited to, 1) when there has been no attempt to obtain consent and the activity is clearly forced, 2) where an individual not involved in the activity expresses consent on behalf of the complainant, 3) where the complainant lacks capacity to provide consent , 4) where the individual induces the complainant to engage in the activity by abusing a position of trust, power, or authority, and 5) where the complainant communicates, by words or conduct, an express lack of agreement to engage in or continue the activity. Whether a lack of cooperation in a misconduct investigation may be considered an aggravating circumstance will depend on the circumstances of each case because there is a positive obligation in the regulatory framework on a staff member to cooperate with an investigation. It is important to distinguish between passive lack of cooperation and active hampering of an investigation. A determination that a staff member committed rape or sexual assault is undeniably serious misconduct that must lead to an end of the employment relationship between the staff member and the Organization.

Outcome

Appeal dismissed on merits; Appeal granted in part

Outcome Extra Text

The Secretary-General's cross-appeal was granted to the extent that there was a procedural error in the issuance of UNDT Order No. 166. However, the Order was not set aside. The Appellant's name in the UNAT's Judgment and Orders is anonymized, and the anonymization of the Appellant's name in the UNDT proceedings is affirmed, based on the reasoning in the UNAT Judgment.

Full judgment

Full judgment

Applicants/Appellants

AAE

Entity

UNFPA

Case Number(s)

2022-1695

Tribunal

UNAT

Registry

New York

Date of Judgement

28 Apr 2023

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Assault (verbal and physical)
Dismissal/separation
Facts (establishment of) / evidence
Proportionality of sanction
Sexual exploitation and abuse
Disciplinary matters / misconduct

Applicable Law

Laws of other entities (rules, regulations etc.)

- UNFPA Disciplinary Framework

Other UN issuances (guidelines, policies etc.)
Secretary-General's bulletins

- ST/SGB/2008/5
- ST/SGB/2009/4

Staff Regulations

- Regulation 10.1

Staff Rules

- Rule 10.1(a)
- Rule 10.3

UN Charter

- Article 97

Related Judgments and Orders

UNDT/2022/030
2018-UNAT-822
UNDT/2020/221
2018-UNAT-819
2015-UNAT-571
2018-UNAT-889
2016-UNAT-662
2022-UNAT-1259
2011-UNAT-164
2022-UNAT-1256
2022-UNAT-1210
2021-UNAT-1076
2022-UNAT-1264

2019-UNAT-972
2017-UNAT-741
2016-UNAT-639
2014-UNAT-480