

# 2023-UNAT-1348, AAK

## UNAT Held or UNDT Pronouncements

The UNAT held that the staff member was responsible for having agreed that the UNDT should hear no direct evidence from witnesses in person but should decide the matter on the documents submitted. As an inquisitorial and not a solely adversarial tribunal, the UNDT could nevertheless have held a hearing. The UNAT found that the UNDT was entitled to conclude on the complainant's evidence alone that the staff member had engaged in a sexual relationship with her. Their sexual relationship was employment-related and thereby transactional. The UNDT was entitled to conclude that this was an exploitative sexual relationship, one in which the participants had significantly different degrees of power and vulnerability, which imbalance the staff member deployed to his advantage. As a United Nations staff member, the Appellant was in a relatively advantaged situation financially as compared to the complainant and to many citizens of Guinea-Bissau. He held a privileged position with the United Nations mission, had access to good accommodation, motor vehicles and earned 'good money'. To pursue higher education and to support her family financially, the complainant had little choice in reality but to be the Appellant's housekeeper and, when he wished and dictated, his sexual partner. The UNDT was entitled to decide that their sexual relationship was an exploitative and abusive relationship between a United Nations employee and a local citizen beneficiary in Guinea-Bissau. The UNAT also held that the UNDT was entitled to conclude to the appropriate standard that the Appellant had attempted to improperly influence the complainant not to continue with her complaint, including by what amounted to bribery, that is to abandon or alter a true complaint in return for the payment to her of money. This was a serious breach of expected standards of conduct which had to be, and was, proven to the high standard of clear and convincing evidence. As to the complainant's covert recording of a conversation with the Appellant, the UNAT noted that the staff member's expectation of privacy of his conversation was not legitimate with regard to the complainant who was a known and legitimate party to that conversation. The UNDT justifiably found that she did not entrap him either into having the conversation with her, which she recorded, or into making any admissions or concessions that he would not otherwise have made. The UNAT did not see, in the circumstances of this case, anything objectionable or unlawful about the referral of the OIOS investigation report to the authorities in the staff member's home country. The UNAT dismissed the appeal and affirmed Judgment No. UNDT/2021/164.

## Decision Contested or Judgment/Order Appealed

A staff member contested the disciplinary measures of separating him from service with compensation in lieu of notice and without termination indemnity and imposing on him a fine equivalent to one month's net base salary. In Judgment No. UNDT/2021/164, the UNDT confirmed the disciplinary sanctions imposed on the staff member and rejected the application in its entirety. The staff member appealed.

## Legal Principle(s)

The UNDT Statute refers to cases as "appeals". There is no statutory reference in this regard to "judicial review", or the phrase combining those words. Thus, the UNDT is bound to consider such a challenge to the Secretary-General's decision as an appeal against it. It is inherent in the nature of an appeal in law that the decision-maker's decision, if challenged on appeal, must be subject to a subsequent judicial process by an independent and neutral tribunal or court consisting of professional and qualified judges. A challenge to the lawfulness of the dismissal of a staff member is not only an "appeal" against the decision but is the first opportunity that a staff member has of their appeal being heard and considered by a neutral judicial body which is, and is seen to be, independent of the Administration. In cases of potential loss of a staff member's employment, the UNDT's task is to decide, on the evidence before it and to the clear and convincing evidence

standard, both that due process protections have been applied and that the Secretary-General's decision on the merits of the particular case is correct in law. Where allegations are denied, the credibility of disputed accounts is in issue and the Organization has to establish to the UNDT a clear and convincing case, the UNDT should generally not consider the case solely on written submissions and documentary evidence but should hear from witnesses in person. Tribunals can benefit considerably from the physical (or even virtual) presence of significant individuals in a case, and the importance of a hearing should not be lightly compromised or abolished.

Outcome

Appeal dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

AAK

Entity

UNS-DPPA

Case Number(s)

2022-1673

Tribunal

UNAT

Registry

New York

Date of Judgement

19 May 2023

President Judge

Judge Colgan

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary measure or sanction

Facts (establishment of) / evidence

Fraud, misrepresentation and false certification

Sexual exploitation and abuse

Due process

Audio-recordings

Corroboration/hearsay

Admissibility of evidence

Judicial review (general)

Standard of proof

Disciplinary matters / misconduct

Evidence

Procedure (first instance and UNAT)

Standard of review (judicial)

Applicable Law

Agreements, conventions, treaties (etc.)

- International Covenant on Civil and Political Rights

GA Resolutions

Universal Declaration of Human Rights

UNAT Statute

- Article 2.1

Related Judgments and Orders

2022-UNAT-1259

UNDT/2021/164

2010-UNAT-084