

2023-UNAT-1370, AAC

UNAT Held or UNDT Pronouncements

After requesting additional findings of fact from the UNDT, the UNAT reconsidered an appeal by the staff member following the prior remand.

The UNAT found that the UNDT's judgment had failed to make a single mention of the nature, content or purpose of the testimony adduced under oath before it but was based entirely on hearsay evidence drawn exclusively from the investigation report and other documents. The UNAT found problematic the fact that the UNDT made no pronouncement as to why it exclusively relied on hearsay evidence and gave no reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depended. The UNAT noted that the Secretary-General offered no explanation for his failure to call witnesses to prove the alleged misconduct. The UNAT held that AAC was denied his right to face those who accused him of serious misconduct.

The UNAT accordingly concluded that the Secretary-General had not met the burden before the UNDT to prove the alleged misconduct as highly probable.

The UNAT was of the view that, considering the circumstances, including that the facts of this case occurred more than six years ago, it would not be in the interests of justice to conduct a fresh trial before the UNDT.

The UNAT granted the appeal and reversed Judgment No. UNDT/2021/043, rescinded the disciplinary decision and directed the Secretary-General to expunge the staff member's name from the relevant register of sexual harassers and ordered compensation in lieu of rescission in the amount of two years of net base salary.

Decision Contested or Judgment/Order Appealed

A former staff member contested the decision to summarily dismiss him for abuse of authority, harassment, and sexual harassment.

In Judgment No. UNDT/2021/043, the UNDT partially rescinded the disciplinary decision, replaced the sanction with separation from service with notice and termination indemnity and awarded compensation in lieu of rescission in the amount of six months' net base salary. The UNDT found that there was clear and convincing evidence of harassment and the creation of a hostile work environment by him but that the allegations of sexual harassment had not been established, and sufficient evidence of his gift-giving to third parties but the seriousness of the gift-giving remained unclear.

Legal Principle(s)

The task of the UNDT in disciplinary matters is to determine if the facts actually exist as a high probability and not merely to review whether the determination of the facts by the internal investigator was reasonable and procedurally fair.

The reason an oral hearing should normally be held in disciplinary cases is self-evident. Litigation about the imposition of a disciplinary measure will normally involve disputes of fact that cannot be reconciled or resolved satisfactorily on the papers. The Administration in most disciplinary cases will contend that the evidence proves the alleged misconduct, while the staff member will contend, on the contrary, no doubt with equal vigor, that the evidence does not prove the allegations. Real and genuine disputes of fact, irreconcilable on the papers normally have to be referred to oral evidence under oath for examination and cross-examination to allow for reasoned findings on credibility, reliability and probability.

Article 25 of the Rules of Procedure of the UNDT requires the judgments of the UNDT to "state the reasons, fact and law, on which they are based." The judgment of the UNDT therefore must provide a full, systematic analysis of the evidence that was presented to it during the hearing and should set out explicit reasons for accepting or rejecting the testimony of each witness who testified. Extraneous evidence that was not the subject of the testimony of a witness before the UNDT should only be admitted, and considered by it, if it is by agreement between the parties. It is impermissible for the UNDT in its judgment to have regard to any evidence that was

not properly adduced in the hearing.

All documentary evidence relevant to the facts in dispute, including the OIAI investigation report, must be adduced through appropriate witnesses or can be admitted by an agreement between the parties (set out in a pre-trial minute) confirming that the documents are what they purport to be and explicitly addressing which contents of the documents may be accepted as true or not.

In setting out its impression about the veracity of every witness who testified before it in the hearing, the UNDT needs to discuss a variety of subsidiary factors such as: (i) the witness' candour and demeanour in the witness box; (ii) the witness' latent and blatant bias against the staff member; (iii) contradictions in the evidence; (iv) the probability or improbability of particular aspects of the witness' version; (v) the calibre and cogency of the witness' performance when compared to that of other witnesses testifying in relation to the same incident; (vi) the opportunities the witness had to experience or observe the events in question; and (vii) the quality, integrity and independence of the witness' recall of the events.

The contents of an investigation report usually will be hearsay, unless the relevant witnesses themselves testify before the UNDT and their statements in the report are admitted into evidence in the course of their testimony. There is a need for increased flexibility in applying the hearsay rule and the interests of justice may justify the admission of hearsay on the basis of reasonable necessity and reliability. However, it must be kept in mind that the admission of adverse hearsay evidence, by definition, denies a party the right to challenge it effectively and fairly since the declarant is not before the tribunal and cannot be cross-examined. For that very good reason, hearsay is of lesser weight; and hence, where the Secretary-General relies solely on hearsay evidence, it is unlikely that he will discharge his burden before the UNDT to establish the relevant facts by clear and convincing evidence.

There is little room for deference when it comes to proving the facts of misconduct on a sound evidentiary basis. If employment tribunals are expected to defer uncritically to the opinions and findings of the employer's investigators on the sufficiency of the factual proof of the alleged misconduct, there is a danger that protection against unfair or unreasonable dismissal will not be subject to satisfactory control and supervision.

The internal law of the United Nations imposes a duty on the UNDT to establish the facts on the standard of clear and convincing evidence. That being the law, if

unexamined hearsay in an investigation report is the only evidence admitted in the judicial proceedings, such will rarely attain that standard.

Outcome

Appeal granted

Outcome Extra Text

The contested decision of separation from service was rescinded in its entirety. As an alternative to rescission, AAC was ordered the equivalent of two years' net base salary.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAC

Entity

UNICEF

Case Number(s)

2021-1569

Tribunal

UNAT

Registry

New York

Date of Judgement

1 Aug 2023

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Abuse of authority

Discretionary authority

Due process

Evidence

Admissibility

Disciplinary matters / misconduct

Applicable Law

UNAT Statute

- Article 2
- Article 2.1(e)
- Article 2.1(b)

UNDT RoP

- Article 10
- Article 16.1
- Article 16.2
- Article 17
- Article 25

Related Judgments and Orders

UNDT/2021/043
2022-UNAT-1264