

UNDT/2023/063, Soobrayan

UNAT Held or UNDT Pronouncements

The Tribunal assessed the evidence gathered by the investigators in relation to each incident and concluded that, in most instances, there was no direct or corroboratory evidence of harassment or sexual harassment, and the investigators based their conclusions solely on V01's narrative. Since almost all the evidence in support of the finding of misconduct comes from V01's testimony, in opposition to that of the Applicant, establishing V01's credibility is an essential exercise for a proper adjudication of the case.

However, the investigation failed to adequately establish the reliability of V01's testimony by not investigating the alleged retaliatory nature of her complaint, as raised by the Applicant, and ignoring the countervailing evidence he presented. The Applicant's evidence shows that V01 had a motive to fabricate or exaggerate her allegations against him and the timeline of events leading to V01's complaint further supports the Applicant's narrative, especially when considering the speedily deteriorating work relationship between the Applicant and V01 as a result of their disagreement over a work project, which started between the last alleged incident (18 May 2020) and V01's complaint (2 December 2020).

While the Tribunal agrees with the Respondent that it is unlikely that V01 fabricated all the reported incidents and manipulated the testimony of the witnesses, it is also not absurd to consider that those incidents might have been exaggerated due to bias or ulterior motives. This is precisely why investigating the Applicant's allegations was of critical importance as, at the very least, they were key to establishing the reliability of the evidence.

However, the investigators did not look into any possible motivation behind V01's complaint, did not consider the documentary evidence brought forth by the Applicant, and, nonetheless, concluded that the events that immediately preceded V01's complaint were irrelevant for the determination of the facts under dispute. It was incumbent on OIAI to explore the allegations made by the Applicant and take

into consideration the timeline of events preceding the complaint to determine if the alleged “retaliatory nature” of V01’s complaint merited further consideration or if it was indeed irrelevant.

By not doing this, the investigators seriously breached the Applicant’s due process rights, failed to clearly demonstrate the relevance or irrelevance of the evidence, and failed to properly establish the reliability of V01’s testimony, tainting the whole investigation process as a result.

In this regard, the Appeals Tribunal has recently clarified that corroborative evidence is always needed in cases where the probative value depends largely on the victims account.

Consequently, the Tribunal individually assessed all the reported incidents and considered that the facts on which the disciplinary measure was based were not established through clear and convincing evidence except for the incidents of 11 September 2019 and March 2020.

Concerning whether the two established facts legally amount to sexual harassment, the Tribunal finds that the evidence on record does not support the charges because the two established facts do not reach the threshold of sexual harassment. As a result, the Applicant did not engage in misconduct and the disciplinary sanction is unlawful.

Accordingly, the sanction imposed is rescinded and the Applicant’s reinstatement ordered, with the benefits and entitlements at the level he had before being separated from service. Pursuant to art. 10.5(a) of the Tribunal’s Statute, compensation in lieu is set at 11.5 months of net-base salary, which is what the Applicant was entitled to receive had he not been separated. Furthermore, the Applicant’s name shall also be deleted from the United Nations wide screening database on sexual misconduct.

Concerning moral damages, the Applicant did not provided evidence of harm directly linked to the contested decision, therefore is not entitled to compensation for moral damages.

Decision Contested or Judgment/Order Appealed

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

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Soobrayan

Entity

UNICEF

Case Number(s)

UNDT/GVA/2022/007

Tribunal

UNDT

Registry

Geneva

Date of Judgement

23 Jun 2023

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Sexual harassment

Fact-finding investigation

Disciplinary matters / misconduct

Investigation

Applicable Law

UNDT Statute

- Article 10.5(a)
- Article 10.5(b)

Administrative Instructions

- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Rules

- Rule 10.2(a)(viii)
- Rule 10.3(b)

Staff Regulations

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

Related Judgments and Orders

2010-UNAT-024
2010-UNAT-022
2015-UNAT-523
2015-UNAT-537
2019-UNAT-955
2019-UNAT-956
2020-UNAT-1024
2011-UNAT-164
2017-UNAT-776
2017-UNAT-742
2021-UNAT-1184
2022-UNAT-1210
2018-UNAT-858
2018-UNAT-874
2022-UNAT-1304
2022-UNAT-1228
2022-UNAT-1187
2022-UNAT-1187