

2023-UNAT-1361, AAO

UNAT Held or UNDT Pronouncements

The UNAT held that the UNDT judgment was problematic because the UNDT's findings seemed to be based entirely on hearsay evidence, i.e., the findings in the OIOS investigation report. The UNAT observed that the UNDT judgment failed to explain the evidentiary basis of its conclusion that sexual harassment was highly probable, and made no explicit or precise findings in relation to the evidence given under oath at the hearing. The failure of the UNDT to make findings about the testimony it heard made the appeal well-nigh impossible. The UNAT noted that there was no transcript of the hearing, and stated that it was not the task of the UNAT to relisten to oral evidence on audio-tape and then to make an educated guess about what factual findings the UNDT made in relation to it.

The UNAT disagreed with the UNDT's conclusion on affording substantial weight to the statements of the complainant, and its credibility findings favoring the complainant, when the complainant had not testified before the UNDT. The UNAT noted that the UNDT failed to explain why the complainant's interpretation of conversations and events were preferred over the explanations provided by AAO. The UNAT held that the UNDT's conclusion that AAO had "insisted" that he and the complainant share a room during a mission was not sustainable solely on the basis of the email in evidence. The UNAT also found that the UNDT dealt superficially with the issues of whether AAO had engaged in abuse of authority and workplace harassment of the complainant, and did not answer AAO's contention that the conduct complained of was simply normal tensions in the workplace.

In sum, the UNAT held that the methodological flaws in the UNDT judgment rendered it unsustainable in fundamental respects. In the absence of a proper account and judicial assessment of the evidentiary questions in relation to the disputed facts, the Appeals Tribunal could not make a finding as to whether the UNDT erred on questions of fact, resulting in a manifestly unreasonable decision. The UNDT's errors of law and procedure obliged the UNAT to reverse the UNDT judgment.

The appeal was granted, the UNDT judgment reversed, and the case remanded for determination by a different judge.

Decision Contested or Judgment/Order Appealed

In Judgment No. UNDT/2022/071, the Dispute Tribunal dismissed AAO's application challenging his dismissal from service based on sexual harassment and harassment of a subordinate with whom he had traveled on a work mission.

AAO appealed.

Legal Principle(s)

A hearing shall normally be held by the UNDT when exercising its jurisdiction under Article 2(1)(b) of the UNDT Statute in an appeal against an administrative decision imposing a disciplinary measure. The evidentiary hearing is usually necessary to resolve disputes of fact, which are irreconcilable on the record of documentary evidence and thus require fuller examination for the purpose of assessing the credibility and reliability of the witnesses in order to reach sustainable findings on the probabilities.

It will always be incumbent on the UNDT after holding an oral hearing to set out fully in its judgment the relevant evidence adduced before it and then to make unequivocal findings in relation to it, and to set out the basis for accepting or rejecting relevant testimony on grounds of credibility, reliability and probability. Where key facts are disputed, the UNDT must provide a clear indication of which disputed version it prefers and explain why.

Under the law of evidence, previous consistent statements are normally irrelevant and inadmissible as self-corroboration. It does not ordinarily add anything to the value of a witness' evidence to be told that the witness had always adhered to the same view.

Victims of possible abuse must be given every consideration; but that does not mean that their version must be received as more credible and reliable without due appreciation of the totality of the evidence and the circumstances of the case.

An investigation by OIOS, given its peculiar, restricted methodology, is unlikely in most cases to prove the facts at the standard of clear and convincing evidence or as highly probable.

The interests of justice may justify the admission of hearsay on the basis of reasonable necessity and reliability, having regard to: i) the nature of the proceedings; ii) the nature of the evidence; iii) the purpose for which the hearsay evidence was tendered; iv) the probative value of the hearsay evidence; v) the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depends; and vi) the prejudice to a party, which the admission of such evidence might entail.

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 reason, hearsay is universally regarded to be of lesser weight.

Outcome

Appeal granted; Case remanded

Outcome Extra Text

The appeal is granted, the UNDT judgment is reversed and the case is remanded to the UNDT for determination by a different judge.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAO

Entity

UNODC

Case Number(s)

2022-1734

Tribunal

UNAT

Registry

New York

Date of Judgement

25 Jul 2023

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Corroboration/hearsay

Oral hearings

Procedure (first instance and UNAT)

Evidence

Harassment (non-sexual)

Abuse of authority

Applicable Law

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Regulations

- Regulation 1.2(a)

Staff Rules

- Rule 1.2(f)

UNAT Statute

- Article 2
- Article 2(e)

UNDT RoP

- Article 16.2
- Article 25

UNDT Statute

- Article 2.1(b)

Related Judgments and Orders

UNDT/2022/071