

2022-UNAT-1187, Applicant

UNAT Held or UNDT Pronouncements

The UNDT was faced with two irreconcilable versions of the case, and thus it was necessary for the UNDT to satisfy itself on the credibility and reliability of the various factual witnesses and probabilities. This task was made especially difficult for the UNDT since the relevant witnesses did not present their evidence in person. In this case, the evidence presented by the Secretary-General was of an exceedingly limited nature and value. The Secretary-General relied exclusively on the contents of the written report of the OIOS investigation, which was entirely hearsay and, in some instances, double hearsay. The Secretary-General called no witnesses to prove his case. The failure to call the witnesses made it impossible for the UNDT to assess the credibility or reliability of the testimony of the complainants, the OIOS investigator and interpreter who took down the hearsay statements, or the other witnesses who had insight into the situation, with reference to their demeanor, and the caliber and cogency of their performance in the witness box in relation to the alleged sexual misconduct and the possibility of an ulterior motive. There simply was not a trial of the issues.

The limited evidence presented by the Secretary-General did not provide very solid support for a finding of sexual exploitation or abuse. It cannot be said that significantly more evidence supports the finding of sexual misconduct, and the limited information suggests the contrary.

If the available evidence of sexual exploitation and abuse is insufficient and unreliable, the Secretary-General should not proceed with the case against the staff member. The legitimate finding of the OIOS in this case that there were reasonable grounds to believe that there was sexual exploitation and abuse cannot, without more, translate automatically to a finding that there were clear and convincing grounds of sexual exploitation and abuse, simply because witnesses were not available, when clearly the other evidence on its own did not attain the applicable standard. The Secretary-General should not proceed to discipline in serious cases before being satisfied that, in addition to a finding of probable cause by OIOS, there

is evidence available that will attain the standard of clear and convincing proof before the UNDT. To do otherwise is to risk a travesty of justice inconsistent with the role of the United Nations as the custodian of human rights. Thus, the UNDT did not err in rescinding the contested decision.

As it is the practice of the Secretary-General not to abide orders of the UNDT or this Tribunal for reinstatement, the maximum amount of compensation should be payable. Indeed, this is one of those exceptional cases, contemplated in Article 9(1)(b) of the Statute of the UNAT, where payment of a higher compensation would have been justified. However, absent a cross-appeal against the award of compensation, this Tribunal is not at liberty to increase the award of compensation, even were it minded to do so.

Decision Contested or Judgment/Order Appealed

In Judgment No. UNDT/2020/204, the UNDT held that the Secretary-General failed to discharge his evidentiary burden of proof (clear and convincing evidence) that the staff member had sexually exploited or abused the two complainants. The UNDT ordered rescission of the separation decision, or alternatively, payment to the Applicant of two years' net base salary.

Legal Principle(s)

The UNDT may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that the elements of sexual exploitation and abuse have been established in accordance with the standard of clear and convincing evidence. In other words, the sexual misconduct must be shown by the evidence to have been highly probable.

Hearsay evidence is intrinsically unreliable and of little weight, unless substantially corroborated, because its probative value depends largely on the credibility of a person other than the person giving such evidence. Hearsay must be received with caution as the maker of the statement (for example, making an allegation of sexual harassment) might have deliberately lied; been mistaken owing to the deficiencies of memory or observation; or may have narrated the facts to the investigator in a

misleading fashion. The purpose of cross-examination is to expose these deficiencies, and if the maker of the statement is not before the trier of fact, this safeguard is lost.

Outcome

Appeal dismissed on merits

Outcome Extra Text

Appeal dismissed, UNDT Judgment upheld, and the Administration directed to expunge the Applicant's personnel record of all adverse information, materials and findings relating to the disciplinary proceedings leading to his separation from the Organization.

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

UN Secretariat

Case Number(s)

2021-1519

Tribunal

UNAT

Registry

New York

Date of Judgement

18 Mar 2022

President Judge

Judge Raikos

Judge Murphy

Judge Halfeld

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary

Sexual harassment

Sexual exploitation and abuse

Disciplinary cases

Separation from service

Burden of proof

Disciplinary matters / misconduct

Standard of proof

Applicable Law

Secretary-General's bulletins

- ST/SGB/2003/13

Staff Rules

- Rule 1.2(f)

- Rule 101.3

UNAT Statute

- Article 9.1(b)

UN Charter