

2023-UNAT-1384, Humphreys Timothy Shumba

UNAT Held or UNDT Pronouncements

The UNAT held that the UNDT committed an error of procedure such that it affected the outcome of the case in not holding an oral hearing and relying significantly on the OASIS investigation report to corroborate the truth of the events alleged by the Complainant, when there was no direct witnesses to the alleged misconduct and all the witnesses relied upon by the OASIS investigators obtained their evidence and information from the Complainant. As such, the UNAT concluded that their evidence was hearsay evidence and that the prejudice to the Appellant in admitting and relying upon this evidence without the opportunity to question it was significant.

Moreover, the UNAT held that the UNDT also erred on a question of fact resulting in a manifestly unreasonable decision when it found that the alleged misconduct had been proven by clear and convincing evidence. The UNAT concluded that it was not an instance in which the UNDT could forgo an oral hearing as there was a genuine dispute of fact and that the evidence in record cannot attain the standard of clear and convincing evidence due to internal inconsistencies in the witnesses' statements to the OASIS investigators.

The UNAT held that considering the delays in this matter and that the facts of this case occurred more than eight years ago, it was more than doubtful that the witnesses would still be available and, therefore, it would not be in the interest of justice and would be impracticable to remand the matter to the UNDT to conduct an oral hearing.

The UNAT granted the appeal and reversed Judgment No. UNDT/2022/103.

Decision Contested or Judgment/Order Appealed

The Appellant, a former staff member of the Office of the United Nations Population Fund (UNFPA), contested the decision of the Administration to summarily dismiss him for sexual harassment, sexual exploitation and abuse of a youth volunteer for a UNFPA Implementing Partner. In its Judgment No. UNDT/2022/103, the UNDT concluded, without conducting an oral hearing, that there was clear and convincing evidence of serious misconduct and dismissed the Appellant's application.

Legal Principle(s)

Applications against a contested decision imposing a disciplinary measure differ significantly from a conceivable judicial review of the fairness of the OASIS investigation and the reasonableness of its decision. Therefore, it will be unlikely that the Administration can discharge its burden before the UNDT to establish the relevant facts by clear and convincing evidence based solely on the investigation report and entirely hearsay evidence, without an oral hearing. On the contrary, the UNDT is required to engage in a fact-finding exercise and the general rule is that for disciplinary cases, it will normally conduct oral hearing except in specific instances where it is not necessary with regard to the evidence and circumstances of the case.

Hearsay evidence is evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. 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 usually given lesser weight and is normally not admitted or relied upon if it is used to prove the truth of the hearsay statement but only to support the fact that the statement was made.

Hearsay may be admitted and relied upon 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.

Outcome

Appeal granted

Outcome Extra Text

The Secretary-General is directed to expunge the name of Mr. Shumba from the ClearCheck database. In the event the Secretary-General elects not to rescind the contested decision, compensation in lieu is set at two years' net base salary.

Full judgment

[Full judgment](#)

Applicants/Appellants

Humphreys Timothy Shumba

Entity

UNFPA

Case Number(s)

2023-1778

Tribunal

UNAT

Registry

New York

Date of Judgement

20 Nov 2023

President Judge

Judge Sandhu

Judge Forbang

Judge Savage

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Disciplinary matters / misconduct

Sexual exploitation and abuse

Sexual harassment

Due process

Right to a hearing

Right to confront complainant

Procedure (first instance and UNAT)

Oral hearings

Standard of proof

Disciplinary cases

Termination (of appointment)

Summary dismissal

Evidence

Admissibility

Corroboration/hearsay
Credibility assessment
Sole testimony of complainant
Applicable Law
Secretary-General's bulletins

- ST/SGB/2003/13
- ST/SGB/2008/5

Staff Regulations

- Regulation 10.1

Staff Rules

- Rule 1.2(e)
- Rule 1.2(f)
- Rule 10.1(a)
- Rule 10.2(a)(ix)

UNAT Statute

- Article 2.1(d)

UNDT RoP

- Article 16.2

UNDT Statute

- Article 19
- Article 2.1

Related Judgments and Orders

2022-UNAT-1210
2022-UNAT-1256
2023-UNAT-1370
2023-UNAT-1361
2018-UNAT-819
UNDT/2022/103