

# 2024-UNAT-1469, Parmosivea Soobrayan

## UNAT Held or UNDT Pronouncements

The UNAT observed that the Secretary-General elected to limit the scope of his appeal only against the findings of the UNDT with respect to two of nine instances of alleged misconduct by the former staff member. The UNAT further acknowledged that the Secretary-General's contention was that the UNDT erred in law when it applied the legal tests for harassment and sexual harassment to the two incidents.

Nonetheless, the UNAT held that to determine the issue on appeal required more than simply an application of the correct legal test. To reach any conclusions requires more than simply regard to the law, but also necessitates consideration of the established relevant facts after resolving disagreements between the parties about those facts. The UNAT held that the questions of law were not extricable from the factual issues, and the errors made by the UNDT were sufficiently grave so as to overturn the factual findings.

The UNAT noted that the UNDT failed to hear any oral evidence about the two incidents of harassment and sexual harassment. Instead, the UNDT held a hearing focused only on whether the staff member's allegations that the victim had a retaliatory motive was adequately investigated. Once the UNDT determined that the investigation had been flawed, it was not clear on what basis the UNDT made its findings of fact, especially when it did not hear from the staff member or the victim with regard to the two incidents.

The UNAT held that the errors of the UNDT were not capable of correction on appeal, reversed the UNDT Judgment, and remanded the case for a de novo hearing on the two incidents of misconduct.

## Decision Contested or Judgment/Order Appealed

In Judgment No. UNDT/2023/063, the United Nations Dispute Tribunal granted the application of Mr. Parmosivea Soobrayan, a former staff member of the United Nations Children's Fund (UNICEF), and rescinded the Administration's decision to impose on him the disciplinary measure of separation from service for sexual harassment.

The Secretary-General appealed.

## Legal Principle(s)

When the question of law is not extricable from the factual issues, an application of the UNDT findings to the appropriate legal test is a question of mixed law and fact. In such cases, there must be a palpable and overriding error for the Appeals Tribunal to interfere, namely that the error is obvious and is sufficiently grave to overturn the finding of fact as it goes to the root of the issue and as such cannot stand.

In cases of alleged misconduct, which typically involve disputed factual issues, a hearing not only allows for witnesses' versions to be tested and challenged, but also affords the UNDT the opportunity to question witnesses and consider the veracity of their testimony having had the benefit of viewing their performance and considering their demeanor.

An oral hearing and cross-examination will not be required in all disciplinary cases, and whether an oral hearing will be required will depend on the circumstances of the case before the UNDT.

By its nature, harassment or sexual misconduct usually occurs between two individuals and often in the absence of any third-party witness able to corroborate the events. Given as much, a proper assessment of the credibility, reliability, and probabilities of the account of one witness over another is fundamental to an assessment of the veracity or otherwise of distinct versions in such matters.

Whether the investigation report alone provides sufficient evidence to establish the relevant facts by clear and convincing evidence will depend on the particular facts and circumstances of the case, including what facts are disputed, the nature and extent of such disputes, whether any supporting documentary or recorded evidence exists, and admissions made by the parties.

Outcome

Appeal granted

Outcome Extra Text

The Judgment is reversed and remanded to the UNDT for a de novo hearing pursuant to the instructions in the UNAT Judgment.

Full judgment

[Full judgment](#)

Applicants/Appellants

Parmosivea Soobrayan

Entity

UNICEF

Case Number(s)

2023-1864

Tribunal

UNAT

Registry

New York

Date of Judgement

7 Aug 2024

President Judge

Judge Savage

Judge Colgan

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Harassment (non-sexual)

Sexual harassment

Oral hearings

Disciplinary matters / misconduct

Procedure (first instance and UNAT)

Applicable Law

## Other UN issuances (guidelines, policies etc.)

- UNICEF Policy/DHR/2020/002

## Secretary-General's bulletins

- SGB/2008/5

## Staff Regulations

- Regulation 1.2(a)

## Staff Rules

- Rule 1.2(f)

## UNDT RoP

- Article 16.2

## UNDT Statute

- Article 2.1(b)

## UNICEF Executive Directives

- CF/EXD/2012-007

## Related Judgments and Orders

UNDT/2023/063

2023-UNAT-1340

2021-UNAT-1184

2011-UNAT-164

2017-UNAT-776

2022-UNAT-1187

2023-UNAT-1384

2018-UNAT-819

2023-UNAT-1361

2018-UNAT-873

2022-UNAT-1210