

2024-UNAT-1493, AAY

UNAT Held or UNDT Pronouncements

The Appeals Tribunal found that in its rigid treatment of the evidence in relation to AAY's conduct, the UNDT failed to have appropriate regard to what had been admitted to by AAY when interviewed by OIOS. The fact that AAY chose not to testify at the UNDT hearing made it clear that he stood by his statement to the OIOS investigators. The UNDT was required to consider this undisputed evidence from him in its assessment whether the misconduct against him had been proved, more so in circumstances in which he did not elect to testify further in his own defence. The fact that the three witnesses he called to testify before the UNDT had not witnessed the incidents in question, did not undermine the weight of his own admissions and the body of evidence against him. In relation to CC, the Appeals Tribunal found that the hearsay evidence of AA and BB was corroborated in important respects by CC in her oral testimony and there was no reason for the UNDT to ignore this evidence or attach limited weight to her evidence.

As to whether AAY's conduct was sexually motivated, the Appeals Tribunal noted that the UNDT repeated the statement made in the first UNAT judgment that "(w)hile the conduct was unwelcome, AA did not consider it to have been sexual in nature or offence. An unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment". The Appeals Tribunal disagreed with that statement finding that the suggestion that the unwelcome kiss given by AAY did not cause offence did not accord with the express evidence to the contrary.

The Appeals Tribunal granted the appeal and reversed the second judgment of the UNDT.

Decision Contested or Judgment/Order Appealed

AAY, a former United Nations staff member, challenged the disciplinary measure of separation from service with compensation in lieu of notice, and with termination

indemnity. This sanction was imposed after the Administration found it to have been established by clear and convincing evidence that during a farewell party for a colleague at the offices of the United Nations Headquarters in New York, AAY sexually harassed three female colleagues, AA, BB and CC.

In a first Judgment, the UNDT dismissed AAY's application contesting the sanction, and AAY appealed.

The UNAT found that, by refusing to allow key witnesses to testify and by over-relying on hearsay evidence, the UNDT had committed an error in procedure such as to affect the decision of the case, resulting in a manifestly unreasonable decision. The UNAT remanded the matter to be heard and determined by a different UNDT Judge.

On remand, the UNDT granted AAY's application. The UNDT found that given the unavailability of key witnesses, the issues raised in the UNAT Judgment could not be addressed, and it had not been established by clear and convincing evidence that AAY's conduct was of a sexual nature. The UNDT ordered rescission of the disciplinary sanction and, in the alternative to rescission, payment of two years' net base salary.

The Secretary-General appealed.

Legal Principle(s)

The OIOS investigation report prepared often contains a good deal of hearsay evidence, which may be considered inadmissible, or it may be given less weight than direct evidence given by a witness before the UNDT as a fact-finding tribunal. Unless its admission is agreed by the party against whom it is adduced, the person on whose credibility the probative value of such evidence depends testifies or the UNDT admits such evidence having regard to the interests of justice having considered issues including the nature of the proceedings, the nature, probative value and purpose of the evidence, the reason why the evidence is not given by the person upon whose credibility its probative value depends and considerations of prejudice.

Sexual harassment is more often than not concerned with the exercise of power and usually reflects the power relations that exist in society generally and specifically

within a particular workplace. By its nature sexual harassment undermines the dignity, privacy and integrity of the victim, creates an offensive and often intimidating work environment and risks creating a barrier to substantive equality in the workplace. It falls outside of the bounds of acceptable conduct for an employee to intrude on the privacy, dignity and personal space of others in a workplace setting. We accept that the facts matter, and the circumstances in which events occur and their context are relevant. Whether an unwelcome kiss causes offence and whether it is given without sexual motivation is a matter to be determined on the facts and the circumstances. However, as a general proposition, any environment in which unwelcome kisses are condoned, risks developing into a hostile one.

Outcome

Appeal granted

Outcome Extra Text

The appeal is granted, and Judgment No. UNDT/2023/111 is hereby reversed.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAY

Entity

UN Secretariat

Case Number(s)

2024-1877

Tribunal

UNAT

Registry

New York

Date of Judgement

5 Dec 2024

President Judge

Judge Savage

Judge Colgan

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Facts (establishment of) / evidence

Sexual harassment

Admissibility of evidence

Oral hearings

Disciplinary matters / misconduct

Procedure (first instance and UNAT)

Applicable Law

Administrative Instructions

- ST/AI/2007/1

Secretary-General's bulletins

- ST/SGB/2008/5

Staff Regulations

- Regulation 1.2(a)

Staff Rules

- Rule 1.2(f)
- Rule 10.3(b)

UN Charter

- Article 101.3

UNDT RoP

- Article 16.1
- Article 16.2
- Article 17.1
- Article 18

UNDT Statute

- Article 2.1
- Article 7.2(e)

Related Judgments and Orders

UNDT/2021/007

2022-UNAT-1210

UNDT/2023/111

2023-UNAT-1370

2010-UNAT-084

2023-UNAT-1340

2017-UNAT-776

2021-UNAT-1184

2021-UNAT-1183

2018-UNAT-889

2014-UNAT-407