

# UNDT/2024/068, Applicant

## UNAT Held or UNDT Pronouncements

It consistently follows from AA's responses, or lack thereof, to the Applicant's many texts on the proposed "bet" that he found these messages unwelcome. For instance, AA wrote to the Applicant that: "Still on that topic man?"; "I value my dignity more than \$2.000"; "I do not bet"; "I thought it was a really stupid bet haha I would never [force you to pay] me, but you have kept bringing it up 1298548065908 times. That is why I say that if you continue with that emotional topic, I will send you my UNFCU account and that is it"; "The bet. Now, man, stop the subject. It is over". Despite this, the Applicant kept coming back to the topic, culminating with him sending AA the relevant photo.

As an aggravating circumstance, the Tribunal finds that the Applicant's WhatsApp messages, in particular the photo, interfered with work and created an intimidating, hostile, and offensive work environment.

Whereas no genitals were displayed in the photo of the present case, it was, unlike *Szvetko*, indeed shocking, prurient, and pornographic. Even worse, the photo in the present case involved the Applicant in an explicit sexual act with another man and not just a photo depicting "a blurred out naked man in the background with a large gold watch prominent in the foreground" apparently from a watch advertisement (see, *Szvetko*, para. 6). Rather than displaying an unknown person, this made the photo personal to AA, because in the WhatsApp messages leading up to the Applicant sending it, he proposed AA, his otherwise close friend but of a different sexual-orientation, to engage in the same sexual act. Adding to the repulsiveness, the Applicant even offered AA money for doing so.

## Decision Contested or Judgment/Order Appealed

The decision to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and with half the termination indemnity

pursuant to Staff Rule 10.2(a)(viii) and to enter his name in [the United Nations] ClearCheck

## Legal Principle(s)

Under the UNHCR Policy's legal definition of harassment, impact on work or the work environment is stated as an aggravating circumstance rather than requirement for a finding of sexual harassment. This is evident from the reference: "is particularly serious".

The Appeal Tribunal has repeatedly endorsed the Administration's zero tolerance policy on sexual harassment, which it has stated is "a scourge in the workplace which undermines the morale and well-being of staff members subjected to it" (see, *Mbaigolmem* 2018-UNAT-819, para. 44, *Applicant* 2022-UNAT-1187, para. 47, and also, for instance, *Conteh* 2021-UNAT-1171).

It is well-established in the jurisprudence of the Appeals Tribunal that the Administration has "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" when imposing a sanction in its judicial review (see, *Ladu* 2019-UNAT-956, para. 40 and also, for instance, *Osba* 2020-UNAT-1061, para. 56, and *Halidou* 2020-UNAT-10, para. 34). At the same time, the "discretionary authority of the Administration is not unfettered" (see, *Mancinelli* 2023-UNAT-1339, para. 60). The Appeals Tribunal has further stated that "the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result". The requirement of proportionality is "satisfied if a course of action is reasonable, but not if the course of action is excessive", which "involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective" (see, *Sanwidi* 2010-UNAT-084, para. 39).

In cases of sexual harassment, despite the zero tolerance policy, the Appeals Tribunal has recognized that "there are degrees of severity to sexual harassment misconduct". Zero tolerance "merely refers to the attitude of the Organization to promptly and seriously react towards harassment". The principle of proportionality "therefore obliges the Administration to give full and proper consideration to less drastic and the most suitable means to achieve the objectives of the disciplinary

policy". The requirements of the zero-tolerance policy may well be adequately met in a particular case involving a lesser infringement (a passing inappropriate remark for instance) by the imposition of another penalty such as demotion, suspension, a fine etc.". Accordingly, the "ultimate penalty ... does not apply in every case". (See, *Szvetko* 2023-UNAT-1311, para. 48.) In *Szvetko*, the Appeals Tribunal also found that "[s]howing a colleague a picture of a penis can cause offence or humiliation, and whether it was shocking, prurient, or pornographic, although relevant, is not decisive". It further found that "the behaviour was puerile and offensive; and offence was taken", that "making unwelcome, suggestive, sexual comments or innuendos to colleagues and showing them photographs of genitalia is unbecoming and disregarding of sensibilities, it violates the obligation of an international civil servant to uphold the highest standard of integrity and naturally would undermine professional confidence", that "[p]ersons of mature character would know this", and that "[t]he two women confirmed to the investigators that they felt uncomfortable, shocked, and disgusted by the prohibited conduct". (See, para. 53.) In *Szvetko*, the Appeals Tribunal affirmed the Administration's decision to separate the staff member from service with compensation in lieu of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

## Outcome

Dismissed on merits

## Outcome Extra Text

The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

Under art. 9.4 of the Dispute Tribunal's Statute, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine (a) whether the facts on which the disciplinary measure is based have been established; (b) whether the established facts amount to misconduct; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were respected.

When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, the Appeals Tribunal in para. 51 of *Karkara* 2021-UNAT-1172) The Appeals Tribunal has further explained that clear and convincing proof “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable” (see para. 30 of *Molari* 2011-UNAT-164). In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred” (see para. 32 of *Turkey* 2019-UNAT-955).

In AAT 2024-UNAT-1412, para. 99, the Appeals Tribunal made a number of findings in another sexual harassment case from UNHCR, which were relevant to the present case. The Tribunal must follow these findings under the doctrine of *stare decisis* (see, for instance the Appeals Tribunal in *Igbinedion* 2014-UNAT-410, paras 23 and 24). Generally concerning “a finding of sexual harassment” under the UNHRC Policy, the Appeals Tribunal held in AAT that this requires four “elements” to be present (see, para. 99), namely: “[T]he conduct in question occurred”; “[The conduct] falls within the legal understanding of sexual harassment and is of a sexual nature”; “[The conduct] was unwelcome and reasonably expected or perceived to cause offence or humiliation”; “[The conduct] interfered with work or created an intimidating, hostile, or offensive work environment”.

In AAT, para. 102, the Appeals Tribunal underscored (with reference to *Gonzalo Ramos* 2022-UNAT-1256, para. 68) that sexual harassment “can encompass numerous types of conduct, some overtly sexual in nature and others more subtle”, and there “is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific”. Whether “a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case”. In this regard, the Appeals Tribunal highlighted that “a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant’s perception of the conduct”. The Appeals Tribunal also held in AAT that, depending on the circumstances, sending inappropriate texts and photos through WhatsApp may amount to sexual harassment (see, paras. 92 and 93). In AAT, the Appeals

Tribunal held that the burden was on the alleged perpetrator to ensure that sexual advances are “welcomed before engaging in such conduct” (see, para. 10). The Appeals Tribunal further specified that “a close and friendly relationship between colleagues does not excuse unwanted and inappropriate sexual advances [and] the Dispute Tribunal correctly found that the Complainant rejected AAT’s sexual advances and invitations on several occasions” (see para. 81).

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Applicant

## Entity

UNHCR

## Case Number(s)

UNDT/NY/2023/017

## Tribunal

UNDT

## Registry

New York

## Date of Judgement

30 Sep 2024

## Duty Judge

Judge Adda

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Sexual harassment

Disciplinary matters / misconduct

## Applicable Law

Staff Regulations

- Regulation 1.2(a)
- Regulation 1.2(b)
- Regulation 1.1(f)

UNDT Statute

- Article 9.4

## Related Judgments and Orders

2017-UNAT-765

2018-UNAT-876

2021-UNAT-1172

2011-UNAT-164

2019-UNAT-955

2024-UNAT-1412

2022-UNAT-1256

2018-UNAT-819

2022-UNAT-1187

2021-UNAT-1171

2019-UNAT-956

2020-UNAT-1061

2020-UNAT-1070

2023-UNAT-1339

2010-UNAT-084

