UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1187

Applicant
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2021-1519
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Applicant:	George G. Irving
Counsel for Secretary-General:	Angélique Trouche/Francisca Lagos Pola

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The Applicant, formerly with the United Nations Interim Security Force for Abyei (UNISFA), contested the decision to separate him from service for having exploited and/or abused, or attempted to sexually exploit and abuse, the cleaners working for the Mission. The United Nations Dispute Tribunal (Dispute Tribunal or UNDT) found for the Applicant, determining that the Secretary-General had failed to make the case against the Applicant by clear and convincing evidence, and ordering rescission of the contested decision and reinstatement, or two years' net base salary as in-lieu compensation. For the reasons set out below, we affirm the Judgment of the UNDT.

Facts and Procedure

2. The Applicant joined the Organization in 1999 as a United Nations Volunteer. In October 2013, he began working in the UNISFA. In March 2014, he was assigned to work in Abyei, Sudan, as a Facilities Management Assistant at the FS-5 level, in the Facilities Management Unit (FMU), UNISFA. On 5 August 2015, he was reassigned as the FMU Manager in Abyei, responsible *inter alia* for the hiring of the cleaners under an independent contract in Abyei. He was separated from service on 20 December 2018 on the grounds that he had violated Staff Regulations 1.2(a) and (b), Staff Rules 1.2(e) and (f) and Sections 1 and 3.2(a) of ST/SGB/2003/13 by alleged misconduct that constituted sexual exploitation and abuse.

3. In a letter dated 14 September 2016 addressed to the Chief, Engineering Section, UNISFA, the Abyei Dinka Paramount Chief, Mr. Bulabek Deng Kuol, reported that he had received complaints from some local women employed at UNISFA's Engineering Section that the Applicant had subjected them to acts of sexual harassment, abuse and inhumane treatment. Mr. Kuol stated that the Applicant was unwanted in the Abyei area and was "a threat to the community and harmful to existing cordial relations between the Mission and the local community". The complaint did not provide any precise information in relation to specific incidents and did not identify the complainants by name.

4. On 15 September 2016, the relevant Conduct and Discipline Officer referred the matter to the Office of Internal Oversight Services (OIOS) for investigation.

5. On 21 October 2016, the OIOS investigator sought to interview Mr. Kuol, but he declined an interview on grounds that he did not have first-hand information. However, he provided the OIOS investigator with nine names and told her that he had instructed them to report and be ready for the OIOS interviews. These nine people included Complainant 1 and Complainant 2. Complainants 1 and 2 were interviewed on 21 October 2016 and 24 October 2016, respectively. The OIOS investigation report does not indicate whether the other seven persons identified by Mr. Kuol were interviewed and makes no findings in relation to any allegations of misconduct made by them. The findings of the report are limited to the allegations of misconduct made by Complainant 1 and Complainant 2. Various other witnesses were interviewed. The Applicant was interviewed on 8 May 2017, and he provided the OIOS investigator further information by e-mail on 9 and 11 May 2017. OIOS issued its report on 25 August 2017.

6. As the impugned Judgment of the UNDT does not discuss the facts in a coherent and comprehensive fashion, it is necessary to examine the factual matrix discussed in the OIOS investigation report in more detail.

7. The complainants were employed as cleaners. Complainant 1 was employed as an individual contractor (IC). An IC is a person engaged by the Organisation from time to time under a temporary contract for a piece of work of a short-term nature against payment of an all-inclusive fee. The services of an IC are limited to six months or nine months in special circumstances, in any period of 12 consecutive months. Complainant 2 was employed as a private cleaner for several UNISFA staff members.

8. The Applicant was responsible for hiring IC cleaners for the Engineering Section at UNISFA. Evidence emerged during the OIOS investigation that during 2016, based on consultations with the leaders of the local community, the Engineering Section decided to hire different persons as IC cleaners at every contract renewal, thus providing employment opportunities for as many of the local community as possible. This decision, which was corroborated by other witnesses interviewed by the OIOS investigator, was very unpopular with the formerly employed ICs, as the Applicant's predecessor, Mr. Okwalo, had followed the practice of always rehiring the same ICs. The Applicant, by contrast, followed the new policy and several ICs were not rehired. He also decided to reduce the number of IC cleaners to 20. He explained to the OIOS investigator that his decision immediately elicited anger against him from the ICs. This resulted in complaints against the Applicant of discriminatory

hiring practices. The allegations of sexual harassment followed not long after the new hiring practices had been put in place.

9. The versions of the complainants are set out in the OIOS investigation report, which provides a summary of audio recordings of their interviews with the OIOS investigator. The recordings, together with their transcription into English, were the only evidence submitted by the Secretary-General to the UNDT in support of his case. The interviews of Complainants 1 and 2 were conducted by the OIOS investigator in the presence of a Security Officer assisting in the OIOS investigation and a United Nations Police (UNPOL) language assistant who provided consecutive interpretation in the English and Dinka languages. At the beginning of the interviews each complainant made averments of truth before relaying their accounts and expressly undertook to tell the truth at the beginning of their interviews.

10. The OIOS investigation report records that Complainant 1 worked as an IC cleaner form 5 January 2016 to 30 September 2016. During her interview with OIOS, she made two allegations of sexual harassment. She alleged firstly that, in March 2016, when she was about to enter the radio room to perform her cleaning duties, the Applicant approached her from behind and tried to smack her buttocks, but she was able to prevent contact by grabbing his hand. Her second allegation was that, on a Saturday in April 2016, when she was alone near the laundry room, the Applicant called her to his accommodation and asked for a massage. When she refused, the Applicant allegedly told her that he would not hire her again. When she responded dismissively, the Applicant allegedly became abusive by saying, *inter alia*, that the cleaners were prostitutes and thieves. The Applicant categorically denied that he had conducted himself in the manner alleged.

11. The OIOS investigator interviewed other witnesses in relation to the claims of Complainant 1. Ms. Dak informed the OIOS investigator that Complainant 1 had indicated to her that she was not on good terms with the Applicant, but provided no details or reasons. Ms. Dak recalled that Complainant 1 had told her the Applicant had slapped Complainant 1 on the buttocks. This account is not entirely consistent with Complainant 1's allegation that the Applicant had attempted to smack her buttocks, but she was able to prevent him from doing so. Mr. Luka Majok, the former FMU cleaning supervisor, told the OIOS investigator that Complainant 1 had complained that the Applicant had "called her to his accommodation, but did not cite the reasons".

12. Complainant 1, Mr. Majok and Mr. Cyrillo Mangok, a former FMU Administrative Assistant, described to the OIOS investigator how Complainant 1's pregnancy had caused some tension between her and the Applicant. Complainant 1 was pregnant when she was first hired as an IC. She did not disclose her pregnancy. She gave birth on 23 June 2016 and returned to work on 24 July 2016. She told the OIOS investigator that on her return to work the Applicant asked her why she had not disclosed her pregnancy and indicated that had he known of it he would not have hired her. The Applicant then refused to pay her salary for the month of her absence. After that, according to Complainant 1, the Applicant required her to sign the attendance sheet when she left the compound to feed her baby over lunch time. On 24 September 2016, when she returned to the compound after breast-feeding, her supervisor (Ms. Dak) was waiting for her and told her that the Applicant had sent for her because he suspected Complainant 1 was in a room with a man. Ms. Dak appears not to have confirmed this in her interview. Complainant 1 then confronted the Applicant, who told her that he was going to make sure she was not hired again.

13. The version of these events given by the Applicant to the OIOS investigator differs markedly from that of Complainant 1. He confirmed that Complainant 1 had been absent for a month to give birth and that she expected to be paid in full. This was not possible under the IC rules. The Applicant alleged that Complainant 1 then began to complain about him to other staff members for that reason. The OIOS investigation report records that Mr. Majok told the OIOS investigator that Complainant 1 was upset about not receiving a salary for her period of absence and that the Applicant had "clearly explained" to her that there were no provisions for paid maternity leave under an IC contract. Mr. Mangok corroborated this further (during his interview with the OIOS investigator). He said that Complainant 1 had "insisted to be paid even for the days she had been absent from work on maternity". When the Applicant declined her request, explaining that the ICs received pay only for days actually worked, Complainant 1 "became very angry, shouted and wanted to fight with" the Applicant.

14. With regard to the allegation of Complainant 1 that the Applicant sent Ms. Dak to find her because he suspected she was in a room with a man, the Applicant informed the OIOS investigator that a special arrangement had been made for Complainant 1 to take some time off during the day to breastfeed her baby. She could arrive late at work, leave over lunchtime and only worked until 16:00 hours. However, on occasion, Complainant 1 allegedly was absent from work beyond those arrangements, which led the Applicant to request Ms. Dak to

monitor Complainant 1's attendance more closely. There is no indication in the OIOS investigation report that Ms. Dak countered this version in any way.

15. Complainant 2 worked as a private cleaner for several UNISFA staff members. During her interview with OIOS, she made allegations about three specific instances of sexual harassment. She alleged firstly that on an occasion in July 2016 the Applicant told her that he "wanted to enter her", which she understood to be a proposition for sex. Complainant 2 refused and the Applicant then took a photograph of her identification card. The second instance was sometime in August–September 2016, after she had applied to be hired as an IC cleaner. On that occasion the Applicant told her he could not hire her as an IC cleaner, but if she visited his accommodation later that day, he had another job for her. Complainant 2 then visited the Applicant. He let her into his room, requested her to give him a massage and showed her a condom saying it was for her new job. Complainant 2 opened the door to leave and saw Ms. Dak, the cleaning supervisor. According to Complainant 2, the Applicant allegedly asked Ms. Dak about Complainant 2's work and said that she should no longer be allowed to work as a private cleaner. The OIOS investigation report records that Ms. Dak informed OIOS that she was not aware of any incidents between the Applicant and Complainant 2. Therefore, she must be taken to have denied the allegations of Complainant 2 regarding this alleged encounter. The third instance of alleged sexual harassment involving Complainant 2 occurred in August 2016. Complainant 2 maintained that the Applicant told her that he wanted "jiggy-jiggy", which she understood to mean sex. He allegedly told her that she could not refuse sex with him as the women of Abyei had no men to support them and he offered her money for sex. She refused and felt insulted. The Applicant then allegedly stated that "she will see whether she will still be coming to work". Complainant 2 explained to OIOS that, although experiencing mental anguish and distress, she had never told anyone about the incidents as she feared she would lose her job.

16. The Applicant categorically denied that he had expressed any sexual interest in either of the complainants or had made advances to them. He intimated that the allegations were made in response to his hiring practices and were retaliation for his strictly implementing the UNISFA policy for the procurement of services.

17. The interviews of the various witnesses were not conducted in the presence of the Applicant, and he was not afforded an opportunity to question the complainants or any of the other witnesses.

18. OIOS found that there were reasonable grounds to conclude that the Applicant failed to observe the standards of conduct expected of an international civil servant and recommended that the United Nations Department of Field Support (DFS) take appropriate action. Specifically, the OIOS investigation found that, sometime in April 2016, the Applicant had asked Complainant 1 to come to his accommodation for sex and had attempted to smack her buttocks. It found likewise, in respect of Complainant 2, that in August 2016 the Applicant asked her to perform sexual favors as a way of securing an IC position and took a photo of her ID after she had refused; and that, on another occasion, the Applicant called her to his accommodation and once she had entered he closed door behind her and demanded she perform acts of a sexual nature, but she managed to escape.

19. OIOS accepted that the Applicant had not acted in a discriminatory manner in his hiring practices and all the relevant witnesses concurred that he had acted in accordance with UNISFA's policy decisions to ensure that the widest number of persons possible of the local community could have a chance of being contracted, as UNISFA was almost the only source of income for that community.

20. On 10 January 2018, the DFS referred the matter to the Assistant Secretary-General for Human Resources Management (ASG/OHRM).

21. On 24 August 2018, OHRM charged the Applicant with sexual exploitation and/or abuse, or attempted sexual exploitation and/or abuse. Specifically, it was alleged that, in March-April 2016, the Applicant attempted to touch Complainant 1 inappropriately, threatened non-renewal of her IC contract when she refused his sexual advances, used derogatory language, and attempted to obtain sexual favors from her in exchange for money. In relation to Complainant 2, it was alleged that, in July-August 2016, the Applicant made unwanted sexual advances, and attempted to obtain sexual favors from her in exchange for employment and/or money.

22. In his response dated 2 November 2018, the Applicant denied all the charges of sexual exploitation and abuse. He stated that he was a victim of retaliation by the local leader and the IC cleaners for strictly implementing the Mission's policy for the procurement of services which required him not to rehire IC cleaners whose terms had expired, nor to hire privately engaged cleaners as UN cleaners. The policy, aimed at providing employment opportunities

to as many local members of the community as possible, was unpopular among the local community, especially the formerly employed IC cleaners.

23. On 20 December 2018, the Applicant received a letter from the ASG/OHRM notifying him that it had been established, by clear and convincing evidence, that he had sexually exploited and/or abused two complainants on multiple occasions in 2016, and that it had been decided to separate him from service of the Organization with compensation in lieu of notice but without termination indemnity for his serious misconduct.

24. The Applicant appealed to the UNDT against the decision to terminate his employment. In Judgment No. UNDT/2020/204 dated 8 December 2020, the UNDT held that the Secretary-General had failed to discharge the evidentiary burden of proof (clear and convincing evidence) that the Applicant had sexually exploited or abused the two complainants.

25. The UNDT held oral hearings on 16-17 September 2020, during which it heard three witnesses called by the Applicant. The Secretary-General did not call any witnesses and in making his case relied exclusively on the OIOS investigation report, the audio recordings of the OIOS interviews and synopses (not verbatim transcripts) of the interviews.

26. The Secretary-General objected to the Applicant calling his three witnesses on grounds of relevance and probative value. The UNDT allowed the evidence and ruled that it was relevant and of probative value. The evidence of the three witnesses related to the context within which the complaints against the Applicant had been made, rather than to the alleged specific acts of misconduct. The witnesses generally addressed the atmosphere in which the UNISFA staff in Abyei functioned, including the reaction of the principal chiefs of the Dinka tribe to procurement policy changes which they did not like. All three gave evidence of the historical nature of tensions between the local leadership and the Mission and referred to previous instances of the local leadership challenging United Nations personnel and programs which did not directly and personally benefit them, which led in one case to the removal or reassignment of a UNISFA official and the review of policies - to make them more favourable to the needs of the rival communities in the Abyei area. The evidence thus established that the local chiefs had a history of conflict with the UNISFA staff. The witnesses corroborated each other's testimony, and the Applicant's narrative.

27. In this regard, it needed be kept in mind that the complaints against the Applicant first came from the Paramount Chief, Mr. Kuol, who directed the complainants to make the complaints. This evidence led the UNDT to conclude that persons with influence in the community possibly had reason to invent charges against the Applicant.

28. The evidence, according to the UNDT, thus pointed to the possibility that the complainants may have had ulterior motives for making the complaints. This conclusion was bolstered by the inconsistencies in the statements of the complainants which were identified by the Applicant in his submissions. All three witnesses were consistent in their testimony that the complainants' allegations were part of a larger conspiratorial scheme by the local leader against the Applicant. The Secretary-General made no attempt to introduce any evidence in rebuttal of this testimony; nor was the alleged conspiracy inquired into by the OIOS investigator during the investigation.

29. The UNDT assessed the evidence of a possible ulterior motive in the light of the inexplicable failure by the Secretary-General to i) authenticate the complainants' original statements and their translation into English; and ii) the Secretary-General's decision not to call the complainants to give oral testimony. Complainants 1 and 2 did not sign or indicate the veracity of their statements. Although the complainants made their statements under oath, they neither signed the statements nor the translation from Dinka to English. The synopses were devoid of any averments by the complainants as to the truthfulness of their contents. The complainants and the OIOS investigator did not speak the same language, yet no steps were taken to authenticate the translation of the statements taken. This meant that there was no official record of the accuracy of the translation and therefore some doubt as to whether the translation of the statements could be relied upon.

30. The UNDT further found that both complainants' allegations and statements contained contradictory timelines, and those contradictions were not resolved despite being pointed out to them by the OIOS investigator. Moreover, as Complainants 1 and 2 were not called to give evidence at the oral hearing, the discrepancies in their statements could not be tested nor resolved. They could not be cross-examined by the Applicant and their written statements could not be assessed for consistency with their evidence at trial. Consequently, in relation to the allegations of sexual harassment, the UNDT was left only with the hearsay evidence in the statements and audio recordings. It accordingly concluded that there was substantial doubt as to the integrity and veracity of the complaints. The UNDT noted,

furthermore, that the OIOS investigator had paid scant attention to the Applicant's allegation that the complainants had threatened to retaliate for his not paying them for work not done and for his not continuing or agreeing to hire them as IC cleaners.

31. The Secretary-General's position that the complainants' interviews and statements were sufficient for purposes of the proceedings, despite the discrepancies and procedural deficiencies, meant that he had failed to meet his burden to establish by clear and convincing evidence that the truth of the facts asserted was highly probable. The UNDT's finding was based on the following considerations: i) OIOS' failure to follow proper investigation procedures; ii) serious doubt as to the authenticity and accuracy of the complainants' statements to the investigators; iii) the failure of OIOS to account for the accuracy of the translation of the statements attributed to the complainants; iv) the surrounding circumstances of alleged disaffection with the Applicant's enforcement of procurement/recruitment policies relating to the employment of cleaners and payment only for work done; v) a history of conflict between the UNISFA staff and the local tribal chiefs; vi) the circumstances surrounding the complaint by the Paramount Chief, Mr. Kuol, and his instruction to encourage witnesses to supply statements; and vii) the failure by the Secretary-General to call Complainants 1 and 2 to testify, whose complaints and testimony formed the basis of the separation decision. The UNDT held that the decision of the Secretary-General not to call the complainants deprived the parties and the UNDT of the opportunity to hear the complainants' account of the events and to clear up any inconsistencies. It also deprived the Applicant of the opportunity to test the evidence in cross-examination.

32. On this basis, the UNDT ordered rescission of the separation decision, or alternatively, payment to the Applicant of two years' net base salary.

33. On 8 February 2021, the Secretary-General filed an appeal against the UNDT Judgment. The Applicant filed an answer to the appeal on 22 March 2021.

Submissions

The Secretary-General's Appeal

34. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and uphold the decision to separate the Applicant from service. He requests in the alternative that the Appeals Tribunal reduce the UNDT's award of compensation in lieu of rescission.

35. The Secretary-General maintains that the Applicant's due process rights were respected throughout the investigation and disciplinary process, that the established facts legally amounted to misconduct, and that the disciplinary measure imposed on the Applicant was proportionate to the offence.

36. The Secretary-General submits that the UNDT erred in law and fact in finding that there was no clear and convincing evidence that the Applicant had sexually exploited and abused the two complainants, because the complainants' evidence had not been authenticated, had discrepancies, and had not been subjected to cross-examination, and moreover, the Dinka-English two-way interpretation during the interviews was not sufficiently reliable. The interviews of the complainants were conducted by an OIOS investigator with the assistance of a UNPOL language assistant, which is indicative of her professionalism and reliability. At the beginning of each interview each complainant made an averment of truth. The audio recordings of the OIOS interviews of Complainants 1 and 2 were submitted along with their transcription into English. The way the OIOS investigators asked follow-up questions on key elements ensured reliable fact-finding.

37. The Secretary-General also submits that it was an error of the UNDT to contest the reliability of the audio-recordings without the Applicant having even raised the matter. Further, there is no legal requirement for interviewees whose responses are in a different language from that of the investigator to authenticate the transcription of the interviews.

38. The Secretary-General also submits that there was no need for additional evidence, because the accounts provided by Complainants 1 and 2 during their OIOS interviews were detailed, consistent and reliable and the spontaneity and fluidity of the exchanges in the audio recordings showed the good faith of the complainants in providing all the details that they could remember of the incidents in order to provide an accurate account of the

incidents. Their accounts independently show a pattern of misconduct on the part of the Applicant.

39. The UNDT erred in requiring that the Applicant have an opportunity to cross-examine the complainants and concluding that the unavailability of the complainants to testify in court affected the reliability of their evidence. In the course of the UNDT proceedings, the Secretary-General made every effort to locate Complainants 1 and 2, but was not able to produce neither, due to the Covid-19 pandemic in August-September 2020 and the rainy season in Abyei. The Secretary-General states that the legal framework does not always require that a complainant's evidence be tested in court.

40. The UNDT erred in law and in fact in finding that the complainants might have had ulterior motives for making a complaint against the Applicant, and that the evidence of the Applicant's witnesses was relevant as it gave context to the complaints against him.

41. The UNDT erred in fact and in law in awarding compensation to the Applicant. The UNDT had no basis to rescind the separation decision and set an alternative award of compensation. But if the Appeals Tribunal were to uphold the UNDT's decision to rescind, the Secretary-General requests that the Appeals Tribunal vacate the UNDT's award of alternative compensation, because the UNDT has failed to explain how the amount ordered was calculated.

The Applicant's Answer

42. The Applicant requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the UNDT Judgment. The Applicant also requests that the Appeals Tribunal award costs in the amount of USD 5,000 against the Secretary-General for his abuse of process by misrepresenting the facts of the case and by causing further protracted litigation.

43. The Secretary-General failed to demonstrate the truth of the allegations of misconduct by clear and convincing evidence. The Applicant's witnesses, two of whom are senior officials, cast serious doubt on the veracity of the complaints. Their evidence stands unchallenged. The Secretary-General, on the other hand, called no witnesses and specifically declined to call the complainants. None of the investigators (or the interpreter) took the stand at the UNDT hearings to support the OIOS transcripts or to be scrutinized under questioning.

44. The UNDT did not err in finding that the complainants' evidence was not reliable "without more". The Secretary-General's excuse for not calling any witness is equally unconvincing. There was testimony that Complainant 1 was still working for the Mission at the time, contrary to the assertion otherwise, and Complainant 2 was reachable. No evidence was produced of any effort to contact them.

45. The Applicant maintains that the Secretary-General has not cited any error by the UNDT in considering the compelling testimony and evidence that he had presented in his defense, including the context and background for targeting him, which was corroborated by all three of his witnesses.

46. The Applicant lastly argues that the compensatory award of two years' net base salary is fully warranted, as the penalty of termination was unjustified, and he has suffered not only from an unjust termination of his career with the Organization, but also from the harm to his personal and professional reputation caused by the severity of the charges against him.

Considerations

47. Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment and to implement a policy of zero tolerance. Section 3 of ST/SGB/2003/13 "Special measures for protection from sexual exploitation and sexual abuse" (9 October 2003) gives effect to that policy. It provides:

> 3.1 Sexual exploitation and sexual abuse violate universally recognized international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules.
>
> 3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:
>
> (a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence;

(c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;

(d) Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged;

(e) Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment.

3.3 The standards set out above are not intended to be an exhaustive list. Other types of sexually exploitive or sexually abusive behaviour may be grounds for administrative action or disciplinary measures, including summary dismissal, pursuant to the United Nations Staff Regulations and Rules.

48. Section 1 of ST/SGB/2003/13 provides that the term "sexual exploitation" means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

49. Rule 1.2(e) and (f) of the Staff Regulations and Rules of the United Nations (ST/SGB/2018/1/Rev.1 - 1 January 2021) also prohibits sexual exploitation and abuse including the exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Any form of discrimination or harassment, including sexual

or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

50. By the same token, a finding of sexual misconduct against a staff member of the Organization is a serious matter. Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, 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.

51. It is accordingly incumbent on the tribunals of the United Nations, in recognition of the obligation to promote and encourage respect for human rights and fundamental freedoms, enshrined in Article 1(3) of the Charter, to ensure compliance with appropriate human rights standards through observance of due process, the rights to a fair trial and the principle not to condemn a person to undue sanction. A party to either civil or criminal proceedings should have a reasonable opportunity of presenting his or her case under conditions that do not place him or her at a substantial disadvantage. Where a case is presented largely on hearsay evidence, as in this case, the party affected should normally be afforded an opportunity to challenge its substance and credibility, and this may require, at the very least, the right to challenge the reporter of the hearsay – the OIOS investigator.

52. The submissions of the Secretary-General indicate a lack of appreciation of the evidentiary burden he is required to discharge before the UNDT in disciplinary cases. It is necessary therefore to make certain general comments about the correct methodology to be followed in the trial of disciplinary cases before the UNDT in the hope that these matters in future will be prosecuted appropriately in accordance with universally accepted standards and principles of the law of evidence.

53. In disciplinary cases, the UNDT is required to consider the evidence adduced and to determine whether the facts on which the sanction is based have been established on clear and convincing evidence, whether the established facts qualify as misconduct under the Staff Regulations and Rules, and whether the sanction is proportionate to the offence.

54. The first requirement obliges the UNDT to engage in a process of fact-finding. The purpose of the fact-finding to be undertaken by the UNDT is to obtain detailed knowledge of the relevant facts underlying a contested administrative decision in order to exercise effectively the function of discipline in the workplace. The UNDT, in fulfilment of its duty to find the facts, must hear testimony, examine relevant data and consider contextual circumstances in order to deduce whether applicable normative standards have been violated and to reach a judicial determination. The exercise must aim to illuminate the circumstances, causes, consequences and aftermath of an event from a systematic collection of facts. This can be done to dispel or verify allegations.

55. As just intimated, the standard of proof applied in disciplinary cases by the UNDT and this Tribunal is that of clear and convincing evidence when termination is a possible outcome. To ensure the satisfaction of the standard of proof in disciplinary cases, the UNDT ordinarily will be obliged to convene an oral hearing at which the alleged wrongdoer will be afforded an opportunity to face and cross-examine those who accuse him or her of misconduct. Article 16(2) of the UNDT Rules of Procedure provides that the UNDT shall normally hold a hearing in an appeal to it against an administrative decision imposing a disciplinary measure. The reason for that provision is self-evident. Disputes in relation to discipline require a factual determination of the alleged misconduct at a higher degree of certainty; and a trial is best suited to that purpose. Articles 17 and 18 of the UNDT Rules of Procedure therefore envisage the calling, examination and cross-examination of witnesses under oath before the UNDT and the proper consideration and determination of the relevance and admissibility of any evidence led during an oral hearing.

56. Article 25 of the UNDT Rules of Procedure in turn requires the UNDT to issue its judgment in writing and to state the reasons, facts and law on which it is based. It is incumbent on the judge in his or her judgment to set out the results of the fact-finding exercise, the nature and content of the evidence and to make appropriate factual and legal findings in relation to it so as to demonstrate that the standard of proof has been attained. This involves an analysis of the admissibility of the evidence, its probative value (cogency, sufficiency, reliability and credibility) and its relevance to the issues in dispute (*facta probanda*) and/or the facts relevant to the facts in issue (*facta probantia*).

57. The importance of confrontation, and cross-examination of witnesses is well-established. Wigmore called cross-examination "the greatest legal engine ever invented for the discovery of truth".[1] A full appreciation of the evidence can only occur in most circumstances where the individual whose interests may have been adversely affected has an opportunity not only to be present to hear the evidence and face his or her accuser but also to test the evidence through cross-examination. Added to that, as relevant to the specific facts of this appeal, a judicial or quasi-judicial finding that a person has committed sexual misconduct often will have consequences far worse than a criminal finding. In the present day, such a finding may very well result in the staff member becoming unemployable and the destruction of his or her reputation, financial security, standing and family life. Accordingly, a finding of sexual misconduct, or of any other criminal act for that matter, should not be made lightly.

58. However, it must be emphasized, an oral hearing and cross-examination will not be required in all disciplinary cases. Much will depend on the nature, the cogency, credibility and reliability of the available evidence, as well as the inherent probabilities that appear from that evidence. Moreover, it has been said that disciplinary cases are not criminal, and liberty is usually not at stake; and thus, due process may not always require that a staff member challenging a disciplinary measure has the right to confront and cross-examine his accusers.

59. Nonetheless, the failure to call witnesses by the Secretary-General and the denial to the applicant of an opportunity to cross-examine his or her accusers, especially in serious cases, may very well result in a finding that the Secretary-General has failed to meet his burden of proof leading to a rescission of the contested decision.

60. The standard of proof is the central methodological premise in any fact-finding exercise. Standards of proof exist to assist the fact-finder to determine forensic truth on a scale of proof from conjecture to absolute certainty. The applicable standard of proof marks a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other. Proof furnished in support of a particular proposition must meet or surpass the applicable point for a finding to be made.[2] The essential question when

[1] Wigmore *Evidence* para. 1367.
[2] See generally S. Wilkinson: *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions* – Geneva Academy of International Humanitarian Law and Human Rights.

concluding that certain facts (proving sexual misconduct, theft, etc.) are correct is whether the standard of proof has been reached.

61. However, the standard of proof varies according to the aim and objective of the fact-finding process. The four standards applied in all legal systems are: i) reasonable grounds to believe – probable cause; ii) balance of probabilities (sufficient evidence); iii) clear and convincing evidence; and iv) beyond a reasonable doubt - overwhelming evidence. The standard to be followed in a particular case is invariably influenced by the nature of the tribunal, the process followed and by specific sensitivities relating to the applicable norms.

62. The probable cause standard is the standard applied in investigations and is the result arrived at usually after an inquisitorial process. A determination of probable cause essentially concludes that there is a reasonable suspicion or reasonable grounds to believe, on the limited evidence available in the investigative process, that the incident in question occurred; but other more probable or certain conclusions could possibly be arrived at after a more rigorous adversarial process in which the available evidence is challenged and subjected to greater scrutiny. A finding of probable cause is usually made in contemplation and expectation of further processes possibly reaching a stronger determination on the probabilities, or with proximate certainty, on the basis of fuller or stronger evidence. The limited finding of OIOS in this case was to the effect that there was reasonable suspicion of sexual misconduct. The OIOS investigation is akin to a police inquiry in criminal cases. It is not a substitute for a trial and, on account of its limited inquisitorial methodological approach, will rarely alone establish clear and convincing evidence of misconduct. The OIOS investigation report merely forms the reasonable basis upon which further proceedings are recommended. By analogy, a conviction on a criminal charge can never be sustained on the written investigative report of the police alone, except perhaps on a plea of guilty. More is required.

63. A finding on the balance of probabilities (or on the preponderance of probabilities) means that more evidence supports the finding than contradicts it. This is the standard of proof applicable in a civil trial where a court is called upon to make a determination of liability, for example, in a contractual or delictual damages claim.

64. The standard of clear and convincing evidence is a finding of higher probability. There must be very solid support for the finding; significantly more evidence supports the finding and there is limited information suggesting the contrary. This is the standard that the Secretary-General must meet in disciplinary cases when termination is a possible outcome. It requires much more than a finding of probable cause by OIOS, which perforce of its limited investigative methodology is ordinarily restricted to making such a lesser finding.

65. The standard of proof beyond a reasonable doubt is the standard applicable in the attribution of criminal liability, be it in fraud, theft, murder or sexual cases. The norm is that conclusive or highly convincing evidence supports the finding. The evidence is overwhelming or undeniable. Where there is a reasonable doubt, the accused person should be acquitted. A reasonable doubt will exist where the accused's version (although perhaps in some respects not believable) is reasonably possibly true.[3]

66. Moreover, and most importantly with regard to the methodological requirements of fact-finding by the UNDT, the standard of proof must, ultimately, be considered in connection with the proposition to which it attaches – in this case, the truth or falseness of the proposition "the Applicant is a sexual harasser". It is the truth of that proposition—and that proposition alone—that, in the final analysis, must be shown by the Secretary-General to be highly probable.

67. Faced with the two irreconcilable versions in this case, and in order to come to a conclusion on the disputed issues, it was necessary for the UNDT to satisfy itself on the credibility and reliability of the various factual witnesses and the probabilities. That task was made especially difficult for the UNDT since the relevant witnesses did not present their evidence in person. In the nature of things, findings on credibility and reliability typically depend on the UNDT's impression about the veracity of any witness. That in turn will depend on a variety of subsidiary factors such as: i) the witness' candour and demeanour in the witness box; ii) the witness' latent and blatant bias against the staff member; iii) contradictions in the evidence; iv) the probability or improbability of particular aspects of the witness' version; v) the calibre and cogency of the witness' performance when compared

[3] The International Labour Organization's Administrative Tribunal (ILOAT), unlike the UNDT and this Tribunal, requires proof beyond a reasonable doubt in serious disciplinary cases with potential significant adverse consequences. One assumes it takes that approach quite legitimately because it believes a high standard should apply before it brands a staff member a thief, a fraud or a sexual harasser.

to that of other witnesses testifying in relation to the same incident; vi) the opportunities the witness had to experience or observe the events in question; and vii) the quality, integrity and independence of the witness' recall of the events.

68. In the light of its assessment of the credibility and reliability of the testimony and the inherent probabilities, the UNDT, as a final step, is then required to determine whether the Secretary-General has succeeded in discharging his burden of proof to show that it was highly probable that the staff member was a thief, fraud, sexual harasser or whatever the case might be. That task again will be made difficult for the UNDT where the probabilities are equipoised, especially where it has not been possible to test the credibility and reliability of the relevant witnesses because they did not appear before it. In such a case, the party bearing the onus of proof (invariably the Secretary-General in disciplinary cases) may lose his case solely on the basis that he failed to discharge that onus and did not meet the standard of proof required.

69. The evidence presented by the Secretary-General in this case was of an exceedingly limited nature and value. He 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. He failed to call the complainants, the Dinka Paramount Chief, Mr. Kuol (to give the critical evidence of the first reports—admissible previous consistent statements), the OIOS investigator, the interpreter or any other witness to whom a report of sexual harassment allegedly had been made or who had incriminated the Applicant, such as Mr. Majok, who told the OIOS investigator that Complainant 1 was upset about the Applicant not paying her for her period of absence. Nor did the Secretary-General call Ms. Dak, who was alleged to have witnessed Complainant 2 leave the Applicant's room immediately after the Applicant had allegedly propositioned her for sex. Ms. Dak also apparently told the investigator that Complainant 1 had told her (double hearsay) that the Applicant had smacked Complainant 1's buttocks.

70. The Secretary-General's approach and his failure to call these witnesses was akin to a prosecutor in a criminal trial simply handing in a written report of the police recommending a prosecution on a criminal charge, without calling the investigating officer or any of the relevant witnesses to the crime. It is inconceivable that any court could return a conviction on so incomplete an evidentiary basis. 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 demeanour, and the calibre and cogency of their performance in the witness box in relation to the alleged sexual misconduct and the possibility of an ulterior motive. There has simply not been a trial of the issues.

71. The evidence of the two complainants contained in the OIOS investigation report is essentially hearsay. The investigation report was supplemented by audio recordings in Dinka, translated by an interpreter, and synopses of the interviews in English. The investigator, interpreter and translators did not testify or vouch for the translations or synopses. No evidence was placed before the UNDT confirming the status and expertise of the translators or affirming the authenticity, accuracy and reliability of the translations.

72. While hearsay evidence is normally not admissible in jury trials, there can be no objection to its admissibility before the UNDT, provided it is in the interests of justice to admit it having regard to the nature of the evidence, the purpose for which it is tendered, its probative value, the reason for the evidence not being given by the person upon whose credibility the probative value of the evidence depends and any prejudice to the other party.

73. Nonetheless, it must be emphasized, hearsay evidence is intrinsically unreliable and of little weight, unless substantially corroborated, because its probative value depends largely on the credibility of a person (the complainants) other than the person giving such evidence (in this case the OIOS investigator, the interpreter and the person(s) responsible for the synopses – had they testified or verified the authenticity of the recordings and the accuracy of their translation). Hearsay must be received with caution as the maker of the statement (in this case those alleging sexual harassment) might have deliberately lied; been mistaken owing to the deficiencies of memory or observation in relation to the contested events; 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 UNDT, as in this case, this safeguard is lost.

74. Accepting the hearsay evidence of the allegations of the alleged sexual misconduct as admissible, in this case, it remains of limited weight and sufficiency because its credibility and reliability was not tested in cross-examination and there is no corroboration of it by any independent witness or other compelling evidence. On the other hand, there is the evidence of three witnesses, two of whom were senior staff members of the Organisation, that there

was an ulterior motive at play in incriminating the Applicant. In addition, Complainant 1 had a grievance against the Applicant about the maternity pay and his decision to monitor her closely; and Complainant 2 had a grievance about the Applicant admonishing her for hanging laundry outside the laundry area. They were both further aggrieved by the Applicant's implementation of the re-hiring policy which affected them adversely. There is also the hearsay evidence of Mr. Mangok in the OIOS report that Complainant 1 on one occasion became aggressive and wanted to fight with the Applicant in relation to her maternity pay.

75. The Secretary-General did not refute any of this evidence, nor did he bring any evidence in rebuttal of it. As such, the credibility and reliability of the evidence of the three witnesses who testified stands in the main unchallenged and is corroborated by the hearsay in the OIOS investigation report. This evidence is, at the very least, sufficient to give rise to a reasonable doubt in that even were the UNDT hypothetically not entirely convinced by it, it stood unchallenged, hence is reasonably possibly true, and thus gives rise to a reasonable doubt about whether the misconduct had occurred.

76. In addition, there is exculpatory hearsay evidence in the OIOS investigation report favouring the Applicant, to which the OIOS investigator applied no weight. Ms. Dak contradicted the statement of Complainant 2 to OIOS that she witnessed the incident at the Applicant's room. Ms. Dak also informed the OIOS investigator that Complainant 1 was not on good terms with the Applicant. Mr. Singh, a Technician with UNISFA, and Mr. Yeboue, a Security Officer with UNISFA, confirmed that the Applicant had justifiably admonished Complainant 2 about not using designated laundry areas, that she was arrogant in response and showed an animus against the Applicant. This all points to probable latent and blatant bias against the Applicant on the part of the complainants and thus adds further to the unreliability of their hearsay evidence and the reasonable possibility of an ulterior motive.

77. On this basis alone, the evidence against the Applicant simply does not attain the standard of clear and convincing proof. The limited evidence presented by the Secretary-General does 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.

78. The difficulty that the Secretary-General claims he experienced in calling witnesses is open to question. The Applicant has cast doubt on the truth of the claim that the relevant witnesses were not available. But even if there was some appreciable difficulty in that regard, such can never be justification for basing a finding of sexual misconduct (with its detrimental consequences) on insufficient evidence. 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 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.

79. In the premises, the UNDT did not err in rescinding the contested decision.

80. There is no legal basis to interfere in the UNDT's award of in-lieu compensation. The compensatory award of two years' net base salary is fully warranted, as the disciplinary penalty of termination was wholly unjustified. The Applicant has suffered not only from an unjust termination of his career with the Organization, but also from harm to his personal and professional reputation caused by the nature of the unsubstantiated charges against him. His employment has been terminated and he has been subjected to a damning pronouncement on his conduct and character on the basis of insufficient evidence. Justice requires that the Applicant be vindicated by reinstatement. 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.

81. While the Secretary-General's prosecution of the appeal is questionable, it cannot be said that he has manifestly abused the appeals process. There is accordingly no basis to award costs against him in terms of Article 9(2) of the Statute of UNAT.

82. The unjustifiable finding against the Applicant most probably has unjustly affected his employment prospects with the Organisation. Justice requires that an order be made in terms of the incidental powers in Article 2(3) of the Statute expunging the adverse information from the personnel record of the Applicant.

Judgment

83. The appeal is dismissed, and Judgment No. UNDT/2020/204 is upheld.

84. The Administration is 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 Organisation.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding Cape Town, South Africa	Judge Raikos Athens, Greece	Judge Halfeld Juiz de Fora, Brazil

Entered in the Register on this 4th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar