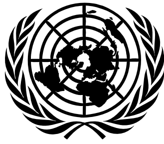

UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-718

Bagot
(Appellant/Respondent on Cross-Appeal)

v.

Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge John Murphy
Case No.:	2016-953
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Bagot: Mathis Kern

Counsel for Commissioner-General: Rachel Evers

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2016/017, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 19 May 2016, in the case of *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Christopher Bagot filed the appeal on 18 July 2016, and the Commissioner-General filed his answer on 16 September 2016. The Commissioner-General filed a cross-appeal on 18 November 2016, and Mr. Bagot filed his answer to the cross-appeal on 16 January 2017.

Facts and Procedure

2. The following facts are uncontested:[1]

> ... Effective 19 October 2013, the Applicant was employed by the Agency as the Director, Department of Internal Oversight Services ("D/DIOS") on a fixed-term appointment of two years.
>
> ... By email dated 7 January 2014 to the Applicant, the Director of Enterprise Resource Planning Department ("D/ERP") requested urgent feedback on a draft paper on "ERP Roles and Access" ("ERP Paper") that would be submitted to an Implementation Management Group ("IMG"), of which the Applicant was a member, on 16 January 2014. The draft had been prepared by Ms. L, a contractor in the Enterprise Resource Planning Department ("ERP").
>
> ... By email dated 8 January 2014, the Applicant advised the D/ERP to seek formal input by contacting directly two other colleagues in DIOS. The Applicant provided some informal input after a "quick scan" of the ERP [P]aper and proposed to meet on Sunday afternoon in relation to the informal input.
>
> ... By email dated 8 January 2014 addressed to three persons including the Applicant, Ms. L requested comments from DIOS in relation to the ERP [P]aper.
>
> ... By email dated 8 January 2014, the Applicant forwarded to Ms. L the "quick scan" feedback he had provided to the D/ERP.
>
> ... By email dated 9 January 2014 (5:22 a.m.), the Applicant forwarded to Ms. L the preliminary feedback from his colleagues in DIOS.

[1] Impugned Judgment, paras. 3-32.

... By email dated 9 January 2014 (12:50 p.m.), a Senior Auditor from DIOS provided feedback to Ms. L in relation to the ERP [P]aper.

... On Friday, 10 January 2014 (Friday is not a working day), the Applicant met with Ms. L at a local restaurant for lunch. After lunch, they stopped by a nearby liquor store, and then went to the Applicant's apartment, which was within walking distance from the restaurant. At the Applicant's apartment they had a discussion about personal matters, followed by physical contact on the part of the Applicant with Ms. L.

... On 20 January 2014, Ms. L filed a formal complaint of prohibited conduct against the Applicant with the Deputy-Commissioner General. The complaint was forwarded to the Director of Human Resources ("DHR").

... On 3 February 2014, the DHR requested the Investigations Division of the United Nations Office of Internal Oversight Services ("OIOS") to undertake an investigation of Ms. L's complaint.

... OIOS conducted an investigation from 3 February to 11 March 2014.

... Ms. L was interviewed by the OIOS' investigators on 7 February 2014.

... Ms. H was interviewed by the OIOS' investigators on 14 February 2014.

.... The D/ERP was interviewed by the OIOS' investigators on 16 February 2014.

... By Notice of Investigation dated 16 February 2014, OIOS notified the Applicant that:

> ... (OIOS) is conducting an investigation into allegations that you may have engaged in misconduct as defined in General Staff Circular (GSC) No. 5/2007.
>
> OIOS has received information alleging that on 10 January 2014 you engaged in prohibited conduct, during a meeting with Ms. [L.] at a restaurant, [...] and later at your own residence. If found to be true, this would constitute a violation of the UNRWA International Staff Rules and Regulations, which in turn, may amount to misconduct within the meaning of GSC 5/2007.

... OIOS advised the Applicant that the interview would take place the following day. However, the Applicant requested the interview to start immediately. The Applicant informed OIOS that he "waived the right to 24 hrs". The Applicant was interviewed by OIOS investigators on the same day.

... The Senior Auditor, DIOS was interviewed by the OIOS investigators on 17 February 2014.

... OIOS issued an investigation report dated 11 March 2014.

... By letter dated 20 March 2014, the DHR summarised the findings of OIOS and provided the Applicant with a redacted OIOS report dated 11 March 2014. The Applicant was later provided with an unredacted version of the report and all the exhibits thereto.

... On 11 May 2014, the Applicant provided a response to the due process letter dated 20 March 2014 and the investigation report.

... Following the Applicant's response, OIOS conducted further interviews with Ms. L and the D/ERP. OIOS then issued a final report dated 23 June 2014.

... By letter dated 26 June 2014, the DHR summarised the findings of OIOS and provided the Applicant with the final investigation report and additional exhibits.

... On 21 July 2014, the Applicant provided a response to the final investigation report.

... On 12 September 2014, the Advisory Committee on Internal Oversight ("ACIO") convened a special meeting at the request of the Commissioner-General, to review the Applicant's case. Considering the circumstances, the ACIO appointed the Chief of Staff as Secretary of the special meeting, in lieu of the Applicant who, in his position as the D/DIOS, would otherwise have served as Secretary pursuant to Article 10, Organization Directive No. 24 ("OD 24") dated 5 October 2012. The minutes of the meeting stated that:

> 12. The ACIO advised that, when considering the weight of the evidence, the [Commissioner-General] should consider whether there is clear and convincing evidence, considering the totality of the evidence, that there has been prohibited conduct by D/DIOS. The ACIO advised that due attention should be given to areas where there are similarities and discrepancies in the positions set forth by the complainant and D/DIOS, as well as consistencies in the testimony with the behavior of the complainant in the aftermath of the critical incident.
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> […]
>
> 14. The ACIO advised that the Com-Gen might wish to consider whether, the seniority of the position and the nature of his work and responsibilities, including the code of ethics expected from a professional with the stature of D/DIOS, are relevant to evaluating the complainant's perceptions.
>
> […]
>
> 16. The ACIO advised the Com-Gen to review the evidence, in its totally, that may support the conclusion that prohibited conduct, in one or more ways, may have occurred. It further advised the Com-Gen to also review the evidence that may support a conclusion that prohibited conduct may not have occurred.

> 17. The ACIO advised the Com-Gen to consider whether, separate from prohibited conduct, there was evidence of a breach of trust and professional code of ethics by D/DIOS, who is one of UNRWA's key senior managers.

... On 15 October 2014, the Commissioner-General and the DHR met with the Applicant to inform him of the Commissioner-General's decision to terminate the Applicant's appointment for misconduct effective 18 October 2014. The Commissioner-General's decision was set out in the letter of the same date, which was given to the Applicant at the meeting. [In his decision letter, the Commissioner-General noted, *inter alia*, the following:[2]

> Until OIOS had assessed all of the evidence, it would not have been reasonable or responsible for OIOS to identify specifically which types of prohibited conduct were under investigation. The definition of prohibited conduct under [UNRWA General Staff Circular No. 06/2010 on PROHIBITION OF DISCRIMINATION, HARASSMENT – INCLUDING SEXUAL HARASSMENT – AND ABUSE OF POWER (GSC No. 06/2010)], has four elements, three of which are harassment, sexual harassment, and abuse of power. I am of the view that you had sufficient information, at the time of your interview, to discern that you were the subject of an investigation into an allegation that you had perpetrated harassment, sexual harassment, and/or abuse of power vis-à-vis the Complainant at the meeting on 10 January 2014.]

... By email dated 15 October 2014 to the DHR, the Applicant "confirmed [his] willingness to offer [his] resignation with immediate effect".

... By email dated 16 October 2014, the DHR acknowledged receipt of the Applicant's email in relation to his resignation and stated that he would need to tender a formal letter of resignation to the Commissioner-General, latest by close of business 16 October 2014, to which the Agency would commit to reply. The DHR pointed out that by submitting his resignation he would "accept that the Agency [would] communicate to appropriate stakeholders about [his] separation, including text along the following lines:

> Following the receipt of a complaint from a member of the Agency's workforce an independent investigation was conducted by OIOS. Taking into account the evidence, findings and recommendations of that investigation and the advice of the ACIO, the Commissioner-General considered that the allegations were properly made out and the staff member concerned was separated from the Agency".

... By email dated 16 October 2014 in response to the DHR's email, the Applicant withdrew his offer of resignation, and the withdrawal was acknowledged by the DHR.

[2] *Ibid.*, para. 135.

> ... The Applicant's appointment was terminated for misconduct effective 18 October 2014.
>
> ... On 14 December 2014, the Applicant submitted a request for decision review to the DHR. No response was provided.

3. On 13 April 2015, Mr. Bagot filed an application with the UNRWA Dispute Tribunal contesting the Commissioner-General's decision to terminate his appointment for misconduct. The UNRWA DT rendered its Judgment on 19 May 2016 dismissing the application. It made the following findings of fact based on "clear and convincing evidence"[3] regarding the events on 10 and 11 January 2014 which were (partly) contested by the parties before the UNRWA DT and some of which remain contested on appeal:

- *Purpose of the lunch*: The purpose of the lunch on 10 January 2014 was either a social or working event or only a social gathering. While Ms. L was interested in discussing the ERP Paper with Mr. Bagot, she could not have ignored that Mr. Bagot was much more interested in having a social engagement with her. Thus, it has not been established by clear and convincing evidence that Mr. Bagot enticed Ms. L to have lunch with him under the pretence that it would be a working lunch to discuss the ERP Paper.

- *The lunch*: During the lunch, both Mr. Bagot and Ms. L voluntarily consumed alcoholic beverages. It remained disputed whether Ms. L tried to engage Mr. Bagot in a conversation about the ERP Paper and whether Mr. Bagot proposed to discuss the issue in his apartment. Undisputedly, however, Ms. L accepted without hesitation to go to Mr. Bagot's apartment after lunch and they bought more alcoholic beverages on their way.

- *The apartment*: In the apartment, they did not discuss the ERP Paper, consumed two cocktails each and engaged in a conversation of a personal nature. Mr. Bagot massaged Ms. L and she did not object to the physical contact except when Mr. Bagot put her toe and subsequently her thumb in his mouth and bit her, causing pain. At this point, Mr. Bagot ended the physical contact. It was further established that Ms. Bagot then feigned an emergency situation as an excuse to

[3] *Ibid.*, para. 101.

leave, declined his offer to drive her home and suddenly departed from Mr. Bagot's apartment without further explanation when he had left the room.

- *Following events*:[4] After Ms. L had left the apartment, Mr. Bagot sent her several text messages to which she replied that she was in her building with her building's guard and that he should not "trouble" himself. Mr. Bagot drove to her apartment but did not find her there because she was at the house of her friend, Ms. H. Mr. Bagot sent Ms. L a text message asking whether he should stay or go since he was already outside the building and he gave her several unanswered phone calls. Subsequently, they had a conversation of around 17 minutes on the phone in which Mr. Bagot *inter alia* said - as testified by Ms. H - that he and Ms. L were "meant to be together" as "soulmates" and that he was "outside [her] house and [would] stay [there] for 2, 3, 4, hours, however long it takes" to which Ms. L replied not to "concern himself" and to "go home". Mr. Bagot returned to his apartment and sent two more unanswered text messages. In the early morning of the following day, he sent her a text message apologizing and later tried to call her. Ms. L sent the final draft of the ERP Paper to the D/ERP; Mr. Bagot then provided feedback on the paper. The following day, Ms. L who seemed "very disturbed" informed the D/ERP that she could not present the paper as an incident had occurred with a "member of senior staff" and that she did not feel safe in Amman. She subsequently returned to her home in the United Kingdom, where she, on 20 January 2014, filed a formal complaint against Mr. Bagot.

4. The UNRWA DT concluded that while "only some alleged facts against [Mr. Bagot] are established by clear and convincing evidence[,] … these facts constitute sexual harassment and misconduct".[5] First, it found that the established facts in relation to Mr. Bagot's actions prior to and during the lunch did not qualify as misconduct. Similarly, according to the UNRWA DT's findings, there was no clear and convincing evidence that the incidents in Mr. Bagot's apartment amounted to sexual harassment since Ms. L voluntarily agreed to go to the apartment and to consume a considerable amount of alcohol, willingly engaged in a "discussion of personal nature between two adults, who had previously socialised as the same group of friends" and did not, at the beginning, object to the physical contact.[6] When she did, he stopped and "up to that point,

[4] *Ibid.*, paras. 93-111 and 116.
[5] *Ibid.*, para. 150.
[6] *Ibid.*, paras. 104-110.

[Mr. Bagot] could reasonably consider that his behaviour was not 'unwelcome'".[7] The UNRWA DT then found that subsequently, however, after Ms. L had abruptly left the apartment and declined Mr. Bagot's offer to help and told him not to trouble himself, "no reasonable person could have doubted that the emergency situation was only an excuse to leave his apartment, and that any other action on his part would be unwelcome".[8] It concluded that under these circumstances, the calls and text messages including the message from the early morning hours of the following day constituted sexual harassment.

5. The UNRWA Dispute Tribunal further held that the sanction of termination was not disproportionate. Considering, in particular, Mr. Bagot's senior position in the Agency, the Commissioner-General would have imposed the same disciplinary measure "had he only considered as misconduct the same facts as the [UNRWA Dispute] Tribunal".[9] With regard to Mr. Bagot's due process rights, the UNRWA DT decided that the only violation could be found in the Agency's failure to inform him of the specific allegations against him during his interview on 16 February 2014. This procedural irregularity, however, did not "have any consequence on the establishment of the facts".[10] Finally, having found against Mr. Bagot on the merits, the UNRWA DT did not consider his claim for damages and alternative relief.

6. Mr. Bagot filed the appeal against this Judgment on 18 July 2016 and the Commissioner-General filed his answer on 16 September 2016. On 25 October 2016, Mr. Bagot submitted a "Motion for Finding Irreceivability of Portions of the Answer", arguing that the Commissioner-General's answer contained a disguised cross-appeal. On 4 November 2016, the Commissioner-General submitted his response to the motion requesting the Appeals Tribunal to "withdraw and/or strike off the record" some paragraphs of his answer and filed a motion for waiver of time limit and leave to file a cross-appeal. The Appeals Tribunal issued Order No. 272 (2016) on 11 November 2016 granting the Commissioner-General's request to amend his answer and his motion. In accordance with the Order, the Commissioner-General submitted his amended answer and cross-appeal on 18 November 2016 and Mr. Bagot filed his answer to the cross-appeal on 16 January 2017.

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[7] *Ibid.*, para. 110.
[8] *Ibid.*, para. 112.
[9] *Ibid.*, para. 122.
[10] *Ibid.*, para. 144.

Submissions

Mr. Bagot's Appeal

7. Mr. Bagot submits that the UNRWA DT erred on questions of fact. He refutes the UNRWA DT's finding that he "could have had reasonable doubts" or that it was "obvious" that Ms. L had fabricated the emergency. The UNRWA DT also failed to see that, under the circumstances of the case, Mr. Bagot's behaviour after the meeting was not "unwanted". In particular, the UNRWA DT incorrectly assumed that Mr. Bagot had already received Ms. L's text message asking him not to "trouble himself" when he decided to nevertheless drive to her house, whereas, in reality, he was already outside her building when he received the text message, "which is why he took the reasonable action of replying to her message by asking whether he should stay or go". Ms. L had not told Mr. Bagot that she did not want to speak to him again and he - as "any reasonable and decent person" - called to ensure that Ms. L, who was inebriated, was fine and able to deal with the alleged emergency situation. The record also shows that Ms. L voluntarily answered his phone calls twice. During their 17-minute conversation, Mr. Bagot had no reason to suspect that the call was unwanted because she consciously and deliberately decided to take the phone call and to speak to him for 17 minutes. Nothing in this conversation - even assuming it occurred as described by Ms. H - can be understood as a refusal of future interactions with him. Hence, there was no basis to conclude that the subsequent text messages, in which he stated that he was back home, offered help, expressed his hope that they would continue their conversation and apologised for any misunderstanding, were unwanted. Therefore, none of these actions constituted misconduct.

8. In addition, Mr. Bagot maintains that the content of the 17-minute call did not amount to prohibited conduct. The UNRWA DT erred by relying on Ms. H's statement to determine the content of the conversation without explaining why Mr. Bagot's denial was not given any weight and by corroborating her statement by Ms. L's account which was unreliable due to her inebriated state and the fact that she lied repeatedly, including under oath. Even if the conversation had had the described content, the expressions he allegedly used did not contain any sexual references or implications and they needed to be considered in the context of the preceding "four-hour drinking session" during which they had discussed very personal matters but not engaged in any sort of sexual contact. Furthermore, the UNRWA DT failed to consider some relevant facts such as that Ms. L and Ms. H had been untruthful at several occasions during the investigations and court hearings, that they tried to cover-up these lies during the hearing

before the UNRWA DT and that there must have been "witness tampering" by the Agency because they suddenly modified their account in the hearing.

9. He further contends that the UNRWA DT erred on questions of law. It disregarded the fact that there was no clear and convincing evidence that any of the events on 10 January 2014 was work-related as required by Paragraphs 5 and 6 of GSC No. 06/2010 and thus cannot, as a matter of law, constitute harassment or sexual harassment. Mr. Bagot's actions after the meeting were not unwanted and thus do not qualify as harassment or sexual harassment.

10. Mr. Bagot submits that the UNRWA DT also exceeded its jurisdiction and competence by substituting its own decision to that of the Commissioner-General instead of "remanding" the case to the Agency. The UNRWA DT did so by reviewing "whether the Commissioner-General would have imposed the same disciplinary-measure … had he only considered as misconduct the same facts as the [UNRWA DT]",[11] namely only the incidents after Ms. L's departure from the apartment.

11. Mr. Bagot further maintains that the UNRWA DT failed to exercise the jurisdiction vested in it and committed errors of procedure, mainly

a) by not considering his request for alternative relief, namely expungement of documents from his personnel file, and issuance of a factually correct certificate of employment, given the UNRWA DT's determination that most allegations were unfounded;

b) by not considering whether to award compensation for the damages he incurred in terms of increased legal fees and difficulties to find a new employment due to the violation of his due process rights and due to the fact that the Commissioner-General charged him with misconduct for actions that the UNRWA DT found not to constitute misconduct.

12. Mr. Bagot therefore requests his reinstatement or, alternatively, "remand" to the Commissioner-General for a new decision on the disciplinary sanction or, alternatively, payment of his full salary and benefits until the ordinary retirement age, or, alternatively, payment of two years' net base salary. He further requests, in any event, that the investigation report, the due process letter and all related material and the impugned decision be expunged from his personnel file, or, in the alternative, all materials related to events that do not constitute

[11] *Ibid.*, para. 122.

misconduct be expunged. In the event that the Appeals Tribunal does not order reinstatement, he requests "that UNRWA issue a factually correct certificate of employment, mentioning the quality of his work and recommending him to future employers". In addition, he requests payment of moral damages in the amount of USD 50,000 and payment of legal fees in the same amount.

The Commissioner-General's Answer

13. In his amended answer, the Commissioner-General submits that the UNRWA DT did not err in fact when it concluded that Mr. Bagot sexually harassed Ms. L after she left his apartment. He recalls the high standard contained in Article 2(1)(*a*) of the Appeals Tribunal Statute which requires incorrect findings of fact to have resulted in a "manifestly unreasonable" decision. The UNRWA DT was entitled to reject Mr. Bagot's version of the events and instead to rely on Ms. L and Ms. H's "consistent accounts", in particular of the 17-minute phone call. With regard to the witnesses' credibility and the alleged "witness tampering", deference should be given to the trial Judge who had the opportunity to assess the witnesses first-hand.

14. He further argues that the UNRWA DT did not err in law when it found that sexual harassment took place outside the workplace and outside working hours. In fact, the Appeals Tribunal's jurisprudence does not establish a restriction in that regard and GSC No. 06/2010 explicitly includes in its definition of sexual harassment conduct occurring in any other setting outside the workplace which impacts on work. The UNRWA DT also did not err in accepting Ms. L's testimony to determine that Mr. Bagot's behaviour was "unwelcome" and it correctly considered the issue from the perspective of a "reasonable person".

15. The Commissioner-General further refutes Mr. Bagot's submission that the UNRWA DT exceeded its jurisdiction or competence by substituting itself for the Commissioner-General. Instead, the UNRWA DT confirmed the Commissioner-General's decision by echoing his reasons for terminating Mr. Bagot's contract for misconduct.

16. Finally, he states that the UNRWA DT neither failed to exercise the jurisdiction vested in it nor committed errors of procedure. Having found that Mr. Bagot did not succeed on the merits, it correctly concluded that he was not entitled to any of the relief requested including damages since the alleged violation of his due process rights was inconsequential. In the interest

of judicial efficiency, the UNRWA DT did not have to engage in a hypothetical discourse on remedies where Mr. Bagot had been unsuccessful on the merits.

17. The Commissioner-General therefore requests the Appeals Tribunal to reject each of Mr. Bagot's pleas and to dismiss his appeal in its entirety.

The Commissioner-General's Cross-Appeal

18. The Commissioner-General contends that the Appeals Tribunal's jurisprudence, holding that a prevailing party may not file an appeal, does not apply to his cross-appeal. In particular, *Sefraoui*[12] can be distinguished because in that case the appeal was inadmissible for lack of applicable grounds of appeal in accordance with Article 2(1) of the Appeals Tribunal Statute. In the present case, however, the cross-appeal is based on valid grounds of appeal.

19. On the merits of the cross-appeal, he argues that the UNRWA DT failed to exercise its jurisdiction by not properly considering the question of abuse of power and/or harassment as one of the bases for terminating Mr. Bagot's appointment. Should the Appeals Tribunal conclude that the UNRWA DT erred in finding that Mr. Bagot's behaviour towards Ms. L after she left his apartment constituted sexual harassment, his actions qualify as abuse of power and/or harassment as defined in Paragraph 6(d) and 6(b) of GSC No. 06/2010. In particular, the UNRWA DT erroneously concluded that there was no clear and convincing evidence that Ms. L felt uncomfortable but did not dare to reject Mr. Bagot's advances because he was her superior. Moreover, in light of its findings that Ms. L did not feel safe and could not present the ERP Paper and that the incidents created a "hostile" work environment in the aftermath of the events, the UNRWA DT should have concluded that it was reasonable for the Commissioner-General to find that Mr. Bagot had both abused his power and harassed Ms. L.

20. The Commissioner-General also submits that the UNRWA Dispute Tribunal erred in law by applying a purely subjective test to the question of whether there was sexual harassment and by determining whether the conduct was "unwelcome" from the perspective of the perpetrator. Its approach on these questions, including on whether a victim has to immediately express his or her rejection for a certain behaviour to qualify as sexual harassment, departs from the Appeals Tribunal's jurisprudence in such cases. Furthermore, Mr. Bagot's conduct towards Ms. L

[12] *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.

in the apartment also amounted to sexual harassment, especially as he did not in fact end physical contact after she told him not to bite her toe, but instead proceeded to bite her thumb.

Mr. Bagot's Answer to the Cross-Appeal

21. Mr. Bagot submits that because the Commissioner-General's decision was upheld before the UNRWA DT, the latter was barred from filing a cross-appeal, referring to the Appeals Tribunal's holding in *Saffir and Ginivan*.[13]

22. On the merits, he argues that the UNRWA DT did exercise its jurisdiction and properly considered the question of abuse of power and harassment. It explicitly took notice of these allegations, "carefully and thoroughly" analyzed the evidence in this respect, and reasonably ruled out any form of misconduct other than sexual harassment as well as all misconduct up to the point when Ms. L left the apartment.

23. Mr. Bagot further contends that the UNRWA DT did not err on questions of law or fact in respect of the issues raised in the cross-appeal. The cross-appeal does not fulfill the conditions for pleading an error of fact, requiring, in particular, that such error resulted in a manifestly unreasonable decision.

24. Mr. Bagot also maintains that there was no error of law in the UNRWA DT's reasoning regarding the events prior to and during the lunch and contends, among others, that the UNRWA DT correctly concluded that there was no evidence that the lunch was work-related or that there was abuse of power and/or sexual harassment. The allegations in the cross-appeal as to the events in the apartment are equally unfounded since there was no indication of an "unwelcome" conduct and thus no harassment or sexual harassment and no abuse of power. Especially, the UNRWA Dispute Tribunal correctly found no evidence suggesting that Ms. L did not dare to tell Mr. Bagot to end physical contact because of his position, considering, in particular, that she later did in fact tell him to stop which he complied with. Ms. L's "unsupported and contested statements" in this regard do not constitute clear and convincing evidence. The UNRWA DT did not depart from the Appeals Tribunal's jurisprudence since in the cited case,[14] contrary to the case at hand, there was overwhelming evidence of unwelcome physical contact, the victim complained immediately and the offender's conduct could obviously

[13] *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, para. 13.
[14] *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207.

be expected to cause offense to the victim. In the present case, the UNRWA DT instead decided in line with the principle of presumption of innocence and the applicable burden of proof.

25. The UNRWA DT also correctly found that the events after Ms. L left Mr. Bagot's apartment did not constitute harassment or abuse of power. His behaviour could not reasonably be expected to cause offense or humiliation; it cannot be understood as an attempt to use a position of authority and it occurred outside of the work context as a direct follow-up of the "several hour-long consensual social meeting". Apart from Ms. L's very subjective statement that her work environment had become hostile, there was no evidence supporting this allegation and the UNRWA DT correctly held that "[i]t is highly probable that Ms. L's reaction was due to her very sensitive nature".[15]

Considerations

Receivability of the cross-appeal

26. The first issue to be decided is whether the Commissioner-General's cross-appeal is receivable.

27. The Commissioner-General submits that the Appeals Tribunal's jurisprudence, according to which a party whose position has prevailed at the first instance may not file an appeal, does not apply to his cross-appeal.

28. By contrast, the Appellant contends - referring to the Appeals Tribunal's holding in *Saffir and Ginivan*[16] - that since the Commissioner-General's decision was upheld before the UNRWA DT, the latter was barred from filing a cross-appeal. He explains that this cross-appeal "is, in effect, an appeal against a judgment about a claim in which UNRWA has prevailed".

29. In *Rasul,*[17] *Sefraoui*[18] and other cases,[19] this Tribunal held that the party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. Thus, the successful party is prevented from filing an appeal, which is an instrument to

[15] Impugned Judgment, para. 118.
[16] *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, para. 13.
[17] *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077, para. 15.
[18] *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.
[19] *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, paras. 14-23; *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134, para. 34.

pursue a change of a judicial decision, in the form of modification, annulment or vacation, used as a way to repair a concrete grievance directly caused by the impugned judgment. The concrete and final decision adopted by a court must generate the harm that constitutes the *conditio sine qua non* of any appeal. It is not enough to claim that the grievance comes from the reasoning of the judgment, from all or part of its motivation or from the rejection of certain or all of the arguments submitted by a party. The right to appeal arises when the decision has a negative impact on the situation of the affected party. That means that a judgment can contain errors of law or fact, even with regard to the analysis of the tribunal's own jurisdiction or competence and yet, it may still be not appealable.

30. The aforementioned principle, developed in our jurisprudence, does not apply in the same way to the filing of a cross-appeal for the reasons set out as follows.

31. Article 9 of the Rules of Procedure of the Appeals Tribunal (Rules), under the title "Answers, cross-appeals and answers to cross-appeals", provides:

> 1. The respondent's answer shall be submitted on a prescribed form.
>
> …
>
> 4. Within 60 days of notification of the appeal, a party answering the appeal may file a cross-appeal, accompanied by a brief which shall not exceed 15 pages, with the Appeals Tribunal stating the relief sought and the grounds of the cross-appeal. The cross-appeal may not add new claims.

32. The plain wording of Article 9(4) of the Rules makes it clear that the cross-appeal is not an independent legal recourse granted to a litigant who asserts having suffered some grievance or damage from a judgment in order to obtain its annulment by the higher tribunal judge. This is the goal of an appeal filed by the aggrieved litigant. By contrast, the cross-appeal is a *sui generis* proceeding of a subordinate nature in relation to the appeal raised by the opposing party, which primarily serves as a means of defense and, under certain conditions, of counter-attack.

33. These particular features of the cross-appeal are evident in the wording of Article 9(4) of the Rules which provides for the right to cross-appeal and its time limit to be dependent on the filing of the appeal. The subordinate nature of the cross-appeal is also echoed in the cross-appellant's foreclosure from adding new claims in the appeals proceedings.

34. Consequently, under the current procedural legislative framework, the cross-appeal is a mechanism that allows a party to appeal the portion of a judgment unfavourable to it. In this case, the party seeks to enlarge his or her own rights or to decrease the rights of his or her opponent under the judgment. Indeed, by taking the "wait and see" approach, a party, though partially vindicated, with no desire to appeal unless his or her opponent appeals, is entitled to cross-appeal on learning his or her opponent appealed or near the end of the ordinary time period for filing an appeal.

35. On the other hand, if the party merely seeks to defend a judgment, even on grounds other than those embraced by the lower tribunal, an appellee's answer is sufficient. In this case, the appellee may, without filing a cross-appeal, contest the lower court's reasoning or insist on matters overlooked or even ignored by it. In other words, the party lacks standing to cross-appeal unless it is adversely affected by the judgment it seeks to challenge. A cross-appeal is unnecessary when the party seeks no change in the final judgment in his or her favour.

36. However, nothing in the language of Article 9 of the Rules prevents the prevailing party from filing a so-called "conditional cross-appeal", whose fate depends entirely on the initial appeal, meaning that if the initial appeal is denied so too is the cross-appeal. In this case, the conditional element is whether the cross-appeal's merits will be reached, because the issues presented in the cross-appeal assume that the Appeals Tribunal will reverse the impugned judgment.

37. This is the line of reasoning followed by this Tribunal in *Ovcharenko et al.*,[20] where we found no need to address the Secretary-General's cross-appeal due to the dismissal of the appeal, as well as in *Worsley,*[21] where we dismissed the Secretary-General's cross-appeal, as a result of the failure of the appeal. In both cases, the Secretary-General was the prevailing party before the first instance tribunal. We confirm this jurisprudence.

38. Therefore, we accept the Commissioner-General's cross-appeal as receivable.

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[20] *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530, para. 37.
[21] *Worsley v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-199.

Merits

39. Mr. Bagot was charged with sexual harassment, harassment and abuse of authority in violation of GSC No. 06/2010 and his appointment was terminated.

40. Mr. Bagot appeals the UNRWA DT's Judgment, which upheld the termination decision, on a number of grounds.

i. Did the UNRWA DT err on questions of law and fact in concluding that the Appellant engaged in sexual harassment?

a. The lunch and the apartment

41. After carefully and thoroughly examining the evidence on which the Administration had based the sanction, namely the testimonies of the D/ERP, who was Mr. Bagot's supervisor as well as those of Ms. H and Ms. L and the record before it, the UNRWA DT made the findings and conclusions set out in paragraph 3 of this Judgment.

42. In the case at hand, the applicable Regulations, Rules and other administrative issuances are the following:

43. UNRWA International Staff Regulation 10.2(a) provides:

> The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

44. UNRWA International Staff Rule 110.3(b), in effect at the time of the events in question, provided:

> Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure.

45. GSC No. 06/2010 provides in Paragraph 6 in relevant part:

> (b) **Harassment** is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy,

> alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment.
>
> (c) **Sexual harassment** is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Both males and females can be victims or offenders.
>
> (d) **Abuse of power** is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his/her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of power may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of power.

46. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*:[22]

> Judicial review of a disciplinary case requires the [United Nations Dispute Tribunal (UNDT)] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen 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".

47. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.[23]

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[22] *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29; see also *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, paras. 29 and 30; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 29 and 30.

48. It is in the context of these definitions and principles that Mr. Bagot's appeal and the Commissioner-General's cross-appeal against the UNRWA DT's conclusions must be assessed.

49. This Tribunal agrees with the findings of the UNRWA DT that the established facts regarding the lunch and the events that took place in the apartment do not amount to misconduct on the part of Mr. Bagot.

50. In his submissions to this Tribunal, the Commissioner-General argues that the UNRWA DT failed to exercise its jurisdiction by not properly considering the question of abuse of power and/or harassment as one of the bases for terminating Mr. Bagot's appointment. In addition, he asserts, among others, that, if the Appeals Tribunal concludes that the UNRWA DT erred in finding that Mr. Bagot's behaviour towards Ms. L after she left his apartment constituted sexual harassment, then his actions qualify as abuse of power and/or harassment as defined in Paragraph 6(d) and 6(b) of GSC No. 06/2010.

51. In all the circumstances of the case, we are not persuaded by the Commissioner-General's arguments. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and evidential value of evidence placed before him by the parties to justify his findings,[24] this Tribunal is satisfied that the only reasonable conclusion available to the first instance Judge was that the facts of the alleged misconduct were not established by clear and convincing evidence. This is particularly true in light of the plot and the sequence of the events in the case at hand, assessed in conjunction with the fact that Mr. Bagot and Ms. L had a friendly relationship, that he invited her to his apartment after lunch, she accepted the invitation and they drank several cocktails, and finally engaged in a personal conversation and that there was physical contact by Mr. Bagot with Ms. L, to which Ms. L did not object at the beginning and which he immediately ceased when she asked him to stop.

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[23] *Hallal v. Secretary-General of the United Nations,* Judgment No. 2012-UNAT-207, para. 28, *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087, para. 17.

[24] *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20.

52. First of all, GSC No. 06/2010 provides that the sexual advances must be "unwelcome". This means that the alleged offender should reasonably be able to understand that his advances are not welcome.[25] Second, the sanctioned conduct of the staff member must be work-related. In our view, the UNRWA DT correctly concluded, under the specific facts, that Mr. Bagot's above-described behaviour, aside from not being work-related, could not reasonably be considered as unwelcome.

b. Following events

53. For an understanding of the circumstances in which it is contended by the Commissioner-General that the actions of Mr. Bagot vis-à-vis Ms. L constituted, *inter alia*, sexual harassment within the above-quoted definition, it is necessary to set out in some detail the relevant events, including the contents of text messaging and other communications between Mr. Bagot and Ms. L, after the latter left the apartment.

54. In this regard, the UNRWA DT found the following facts established:[26]

> … It is not contested by Ms. L that she did not answer Ms. H's calls at 5:00 p.m. and 5:30 p.m. It is established that at 5:55 p.m. Ms. L called Ms. H in order to fabricate an excuse to leave the Applicant's apartment by feigning a household emergency involving her domestic employee. Ms. L then informed the Applicant that she had to leave immediately due to this emergency. Ms. L called Ms. H again at 6:00 p.m. and continued to feign an emergency situation. The Applicant proposed to drive her home; however, Ms. L left the apartment without giving any further explanation to the Applicant.
>
> … After leaving the Applicant's apartment, Ms. L took a taxi on the street. Ms. L directed the driver to her apartment and called Ms. H at 6:05 p.m. asking her to come to her residence as she was not feeling well. At 6:06 p.m., the Applicant called Ms. L to ascertain what the emergency was and to inform her that he was driving to her house. Ms. L then instructed the taxi driver to go directly to Ms. H's residence.
>
> … While waiting at the front of Ms. H's building to be let in, Ms. L sent the Applicant a text message at 6:21 p.m. telling him that she was with her building's guard and not to trouble himself. In the meantime, it is not contested that the Applicant drove to Ms. L's apartment and did not find her there. The Applicant then called Ms. L three times at 6:23 p.m., 6:24 p.m. and 6:26 p.m., but she did not answer. At 6:26 p.m., the Applicant sent a text message to Ms. L informing her that he was

[25] See *Perelli v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-291, paras. 64 and 66.
[26] Impugned Judgment, paras. 92-96.

outside her building and asking whether she wanted him to "stay or drive back". The Applicant called Ms. L again at 6:27 p.m., but she did not answer.

> … Ms. H testified that when Ms. L arrived at her apartment, she smelled of alcohol, felt nauseous and vomited twice. At 6:29 p.m., the Applicant called Ms. L, and the duration of the conversation was 17 minutes. During the call, Ms. L put the telephone on speaker and part of the conversation was overheard by Ms. H. The Applicant then returned to his apartment. He sent a text message to Ms. L at 7:12 p.m. and another at 9:20 p.m. to which she did not reply. Ms. L returned to her apartment at about 11:30 p.m. that night.
>
> … On 11 January 2014 at 5:47 a.m., the Applicant sent a text message to Ms. L in which he apologised for his "options approach" and thanked her for "listening" and giving him "the chance to help". He also promised to say nothing further on the matter. The same day at 3:26 p.m., the Applicant attempted to call Ms. L but she did not answer.

55. Then, with regard to the following events, as a result of its examination of the factual allegations related to the charges, the UNRWA DT drew the following conclusions:[27]

> … The events that took place after Ms. L left the Applicant's apartment are quite different. When Ms. L fabricated an excuse to leave the Applicant's apartment at around 5:55 p.m. and told him that she had to go immediately due to an emergency, the Applicant proposed to drive her home. She declined his offer. Ms. L then took the opportunity to suddenly leave the apartment when the Applicant had left the room. At this point, the Applicant could have had a reasonable doubt about the alleged emergency situation. Even assuming that the Applicant believed Ms. L's explanation about the emergency situation, and he wanted to help her, at 6:21 p.m., Ms. L sent him a text message telling him that she was with her building's guard and not to trouble himself. Nevertheless, he drove to her apartment and did not find her there. The Applicant then called Ms. L three times at 6:23 p.m., 6:24 p.m. and 6:26 p.m. She did not answer the calls. At 6:26 p.m., the Applicant sent a text message to Ms. L informing her that he was outside her building and asking whether she wanted him "to stay or drive back". The Applicant attempted to call Ms. L again at 6:27 p.m.; however, she did not answer the call.
>
> … In light of the established facts as mentioned in the paragraph above, the Applicant should have been reasonably aware that, contrary to what Ms. L had mentioned, there was no emergency situation and that she had wanted to leave his company. It was evident that Ms. L was either not at her apartment or she did not want to open the door for him. At this point, no reasonable person could have doubted that the emergency situation was only an excuse to leave his apartment, and that any

[27] *Ibid.*, paras. 111-114.

other action on his part would be unwelcome. However, at 6:29 p.m. the Applicant called Ms. L, she answered the call and they had a conversation for about 17 minutes. Ms. L, who was at Ms. H's apartment, put the telephone on speaker so that Ms. H could hear the conversation.

... Ms. H testified that she heard part of the conversation between Ms. L and the Applicant. […] According to Ms. H's testimony, Ms. L told him "no, please don't concern yourself, please go home, don't trouble yourself, I'm ok"; however, he responded:

> but […] we are meant to be together, we are soul mates, we are destined to be together, the universe had this plan, I understand the universe better than you do, you think that this means that the universe thinks that we shouldn't be together but I understand this is the way the universe is giving you a choice and the choice is yours but you have to make the choice tonight.

... In view of the manner in which the meeting at the apartment had ended, the [UNRWA Dispute] Tribunal finds that it was obvious that Ms. L did not want to talk to the Applicant any further. Therefore, the Applicant's actions in calling Ms. L six times between 6:06 p.m. and 6:29 p.m. and sending her three text messages between 6:26 p.m. and 9:20 p.m. certainly constituted unwelcome conduct. Furthermore, the content of the 17-minute conversation, as described by Ms. L and Ms. H in their respective testimony, does constitute sexual harassment. The sexual harassment continued on 11 January 2014 when the Applicant sent a text message to Ms. L at 5:47 a.m. and attempted to call her at 3:26 p.m.

56. Similarly, having regard to this factual situation the UNRWA DT went on to conclude:[28]

... In the present case, it has been established in both the statement and the testimony of the D/ERP, who was the Applicant's supervisor, that Ms. L was very disturbed after the incident. According to the D/ERP, Ms. L did not feel safe in Amman, and she was not able to present the ERP [P]aper at the IMG meeting of 16 January 2014.

... A few days after the incident and following discussions with the D/ERP and the DHR, Ms. L returned to her home in the United Kingdom.

... It is highly probable that Ms. L's reaction was due to her very sensitive nature. However, it is evident that she considered that the Applicant's actions had caused her "offence or humiliation" and that her work environment had become "hostile" after the incident. Therefore, even if the Tribunal has held above that it has not been established that the purpose of the lunch of 10 January 2014 was a working meeting, the sexual harassment that occurred after Ms. L left the Applicant's apartment had

[28] *Ibid.*, paras. 116-118.

> direct consequences on Ms. L's work environment, and as such, the requirements imposed by the relevant GSC 06/2010 are met.

57. Applying the definition of sexual harassment to the facts as established, the UNRWA DT found two of the elements of GSC No. 06/2010 satisfied, namely, that there was a conduct of a sexual nature and that it created an offensive work environment. According to the impugned Judgment, the first one is reflected in the "the content of the 17-minute conversation, as described by Ms. L and Ms. H in their respective testimony", which "does constitute sexual harassment" and this "sexual harassment continued on 11 January 2014 when the Applicant sent a text message to Ms. L at 5:47 a.m. and attempted to call her at 3:26 p.m.". The second requirement is assumed from the fact "that Ms. L was very disturbed after the incident. According to the D/ERP, Ms. L did not feel safe in Amman, and she was not able to present the ERP [P]aper at the IMG meeting of 16 January 2014. … A few days after the incident and following discussions with the D/ERP and the DHR, Ms. L returned to her home in the United Kingdom."

58. Also, after analyzing in depth witness testimonies and statements (including Mr. Bagot's, Ms. L's, Ms. H's, and the D/ERP's), the UNRWA DT found that Mr. Bagot's conduct was "unwelcome" (the third mandatory requirement as set out in GSC No. 06/2010). The UNRWA DT was satisfied that he was on notice as to the unwelcome nature of his conduct. In the words of the first instance Judge, this conclusion is based on "the manner in which the meeting at the apartment had ended, the [UNRWA Dispute] Tribunal finds that it was obvious that Ms. L did not want to talk to the Applicant any further. Therefore, the Applicant's actions in calling Ms. L six times between 6:06 p.m. and 6:29 p.m. and sending her three text messages between 6:26 p.m. and 9:20 p.m. certainly constituted unwelcome conduct."

59. The main question before this Tribunal is, therefore, whether the UNRWA DT's aforementioned conclusions - namely that Mr. Bagot's conduct of a sexual nature created an offensive working environment for Ms. L, and he had constructive knowledge of the unwelcome nature of his actions - are factually and legally sustainable.

60. A careful analysis of the totality of circumstances, especially of the content of the aforementioned 17-minute conversation at 6:29 p.m. on 10 January 2010 and of the text message exchanges between the Appellant and Ms. L on 10 and 11 January 2011, as set

out in the impugned Judgment, does not reveal in a clear and unambiguous way that Mr. Bagot had constructive knowledge of the unwelcome nature of his actions.

61. As noted elsewhere above in this Judgment, GSC No. 06/2010 provides that in order for a conduct to constitute sexual harassment, apart from an "unwelcome sexual advance", it is required that the behaviour in question "might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, […] or creates an intimidating, hostile or offensive work environment" and that "[w]hile typically involving a pattern of behaviour, it can take the form of a single incident".

62. This Tribunal notes that, for a behaviour of a staff member to be punishable as constituting the disciplinary offence of sexual harassment or harassment pursuant to Paragraph 6(c) and Paragraph 6(b) of GSC No. 06/2010, it is not enough to be found "inappropriate". No conduct automatically rises to the level of sexual harassment merely on the basis of its sexual overtones and lack of "appropriateness" or to the level of harassment on foot of its "inappropriate" character. This is true no matter how reprehensible one finds that conduct to be, unless it involves the elements articulated in the relevant rules and jurisprudence.

63. There is no dispute that Mr. Bagot had a managerial position of high rank, though he was not an immediate supervisor of Ms. L. Nevertheless, the Appeals Tribunal is satisfied - having regard to the content of the text messages exchanged on 10 and 11 January 2014 and of the 17-minute conversation, which are to be considered in the context of the preceding events, prior to and during the lunch and in the apartment, and, indeed, having regard to the uncontested preceding social relationship as part of a group of colleagues who used to meet outside working hours, that Mr. Bagot's behaviour could not reasonably be perceived as "unwelcome" or work-related. From the relevant factual findings of the UNRWA DT, it is not evident that Ms. L had set out boundaries in clear terms for Mr. Bagot at this time. In any case, when she did, as happened in the apartment, when he "bit her toe and thumb", he immediately complied with her request to stop.

64. Additionally, neither the manner in which the meeting at the apartment had ended, nor the unanswered phone calls, made by Mr. Bagot between 6:06 p.m. and 6:29 p.m. on 10 January 2014 or the text message to Ms. L at 5:47 a.m. and the attempts to call her at 3:26 p.m. on 11 January 2014 made it obvious that his conduct was unwelcomed by Ms. L,

in view of the fact that the latter answered his phone call at 6:29 p.m. on 10 January 2014 and talked with him for 17 minutes without objecting to his calling. As for the content of the 17-minute conversation, as described by Ms. L and Ms. H in their respective testimonies, it cannot be considered as *per se* constituting sexual harassment. These facts do not constitute clear and convincing evidence of misconduct under the UNRWA Staff Regulations and Rules. In holding otherwise, the UNRWA DT erred in law and in fact, by not deciding in accordance with the principle of presumption of innocence and the applicable burden of proof as indicated above.

65. Indeed, in the instant case, Mr. Bagot's conduct, even assuming *arguendo* that it was inappropriate, absent any indication that he had been directly put on notice or reasonably should have understood that Ms. L considered that his conduct was unwelcome or created an intimidating, hostile or offensive work environment, does not meet the conditions set out in the relevant provisions of the GSC No. 06/2010. Accordingly, we are satisfied - applying the test set out in our jurisprudence - that there is no clear and convincing evidence that the Appellant's conduct as established did constitute sexual harassment.

66. Having regard to all of the foregoing, the Appeals Tribunal finds that the UNRWA DT erred in law and fact in determining that Mr. Bagot's conduct vis-à-vis Ms. L constituted sexual harassment within the meaning of Paragraph 6(c) of GSC No. 06/2010. Hence, it follows that his termination from service is legally and factually unsustainable, and Mr. Bagot's appeal is granted.

ii. Did the UNRWA DT err in law and fact in not deciding whether Mr. Bagot engaged in harassment and/or abuse of authority?

67. The Commissioner-General submits that the UNRWA DT failed to exercise its jurisdiction by not properly considering the question of abuse of power and/or harassment as one of the bases for terminating Mr. Bagot's appointment. He argues that, should the Appeals Tribunal conclude that the UNRWA DT erred in finding that Mr. Bagot's behaviour towards Ms. L after she left his apartment constituted sexual harassment, his actions qualify as harassment and/or abuse of power as defined in Paragraph 6(b) and 6(d) of GSC No. 06/2010.

68. In all of those circumstances, we find, for the reasons set out above, that the conditions for harassment and abuse of authority (Paragraph 6(b) and (d) of GSC No. 06/2010) are not satisfied. The established facts do not rise to the level of harassment or abuse of authority, since the totality of the circumstances in which Ms. L found herself prior to and during the lunch, in the apartment and in the course of the following events do not constitute circumstances which could reasonably be considered as unwelcome to her or as an improper use of a position of influence, power or authority against her.

Remedies

69. The remaining issues under appeal are related to Mr. Bagot's assertions that the UNRWA DT failed to exercise the jurisdiction vested in it and committed errors of procedure: (a) by not considering his request for alternative relief, namely expungement of documents from his personnel file, and issuance of a factually correct certificate of employment, given the UNRWA DT's determination that most allegations were unfounded; and (b) by not considering whether to award compensation for the damages he incurred in terms of increased legal fees and difficulties to find new employment due to the violation of his due process rights and due to the fact that the Commissioner-General charged him with misconduct for actions that the UNRWA DT found not to constitute misconduct.

70. Specifically, Mr. Bagot takes issue with the failure of the UNRWA DT to order the expungement of documents from his personnel file and the issuance of a factually correct certificate of employment. Such a remedy is not within the statutory remit of either the UNRWA DT or this Tribunal. However, in light of our findings above, and to give solace to Mr. Bagot, we hereby direct that a copy of this Judgment be placed in his personnel file. This is the best remedy in these circumstances.[29]

71. With regard to the alleged increased legal fees incurred by Mr. Bagot, there is no question about the authority of this Tribunal to award legal costs as a sanction in cases where there has been a manifest abuse of the appeal process by a party (Article 9(2) of the Appeals Tribunal Statute). Although this Tribunal upholds that principle, this is not the case

[29] See *Das v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-421, paras. 44-45; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400, para. 64.

here. In any case, this Tribunal is mindful of Mr. Bagot's claims for harm when assessing the compensation in lieu of reinstatement, as set out below.

72. Article 9(1) of the Statute of the Appeals Tribunal provides as follows:

> The Appeals Tribunal may only order one or both of the following:
>
> *(a)* Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph *(b)* of the present paragraph;
>
> *(b)* Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

73. The Appeals Tribunal's discretion under Article 9(1)(*a*) of its Statute is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 9(1)(*b*) of the Appeals Tribunal Statute) as an alternative to an order rescinding a decision on appointment, promotion or termination. Accordingly, pursuant to Article 9(1) of the Appeals Tribunal Statute, where the Appeals Tribunal rescinds a contested administrative decision concerning appointment, promotion or, as in this case, termination, it must set an amount of compensation in lieu of rescission or specific performance which the Secretary-General may elect to pay instead.

74. With respect to the alternative compensation award of two years' net base salary in lieu of rescission, an examination of the evidence shows that Mr. Bagot was recruited on a fixed-term two-year appointment effective 19 October 2013. It is our settled jurisprudence that a fixed-term appointment ends with the effluxion of time and a person so employed does not have a right or legitimate expectation of renewal.[30] It follows, therefore, that any consideration of an award of damages for persons who are recruited on fixed-term appointments must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the

[30] *Appellee v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-341, para. 14; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 42.

time of any alleged breach.[31] In our view, the reasonable expectation of the duration of Mr. Bagot's contract was two years. Since Mr. Bagot had twelve months remaining of his appointment (from his termination effective 18 October 2014 to 19 October 2015), we set the alternative award of compensation in lieu of rescission at twelve months' net base salary.

Judgment

75. The appeal is allowed in part. Judgment No. UNRWA/DT/2016/017 is reversed to the extent that it finds that the termination of Mr. Bagot's appointment was lawful. Thus, we order Mr. Bagot's reinstatement or, if the Administration so chooses, the award to him of twelve months' net base salary at the rate in effect at the date of this Judgment in lieu of rescission of the separation.

76. The Commissioner-General's cross-appeal is dismissed.

77. A copy of this Judgment is to be placed in Mr. Bagot's personnel file within two weeks of the issuance of the Judgment.

[31] See *Andreyev v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-501, para. 31; *Gakumba v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-387, para. 16.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)	*(Signed)*	*(Signed)*
Judge Raikos, Presiding	Judge Lussick	Judge Murphy

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar