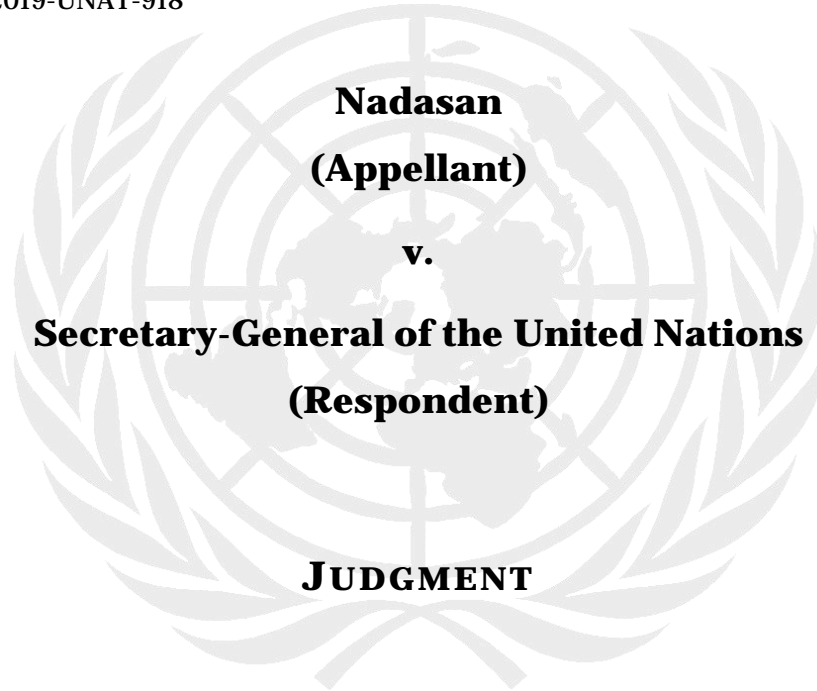




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-918



**Nadasan
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2018-1213
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Appellant:	Szilaghi Alina
Counsel for Respondent:	Wambui Mwangi

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/095, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 27 November 2018, in the case of *Nadasan v. Secretary-General of the United Nations*. Mr. Calin Nadasan filed the appeal on 24 November 2018, and the Secretary-General filed his answer on 28 January 2019.

Facts and Procedure

2. Mr. Nadasan, then a staff member of the United Nations Mission in Liberia (UNMIL), first met Ms. X (name redacted for privacy), then a Project Manager at the French Embassy in Liberia, in January 2012 at a restaurant in Liberia. Mr. Nadasan developed romantic feelings for Ms. X and in April or May 2012 he called her office phone inviting her for a drink. Ms. X did not accept the invitation and hung up the phone. Between 21 June 2012 and 6 August 2012, Mr. Nadasan telephoned Ms. X multiple times and sent her text messages communicating his sexual attraction. Ms. X ignored the calls and sent Mr. Nadasan a text message in July 2012, which stated that she was not interested in his advances and that if he did not stop contacting her she would call the police. Mr. Nadasan, however, continued his advances by sending her over one hundred messages on Facebook from 21 June to 22 November 2012.

3. In November or December 2012, Ms. X made a complaint against Mr. Nadasan to the Chief Security Adviser of UNMIL. Ms. X alleged that Mr. Nadasan had begun to harass her after they had first met in January 2012 by sending her numerous texts and Facebook messages of an intimidating and sexual nature.

4. In December 2012, as a consequence of the complaint, and at the request of Ms. X, the Chief Security Adviser, in an effort to resolve the matter informally, met with Mr. Nadasan and requested that he stop contacting Ms. X. Mr. Nadasan persisted, however, and the Chief Security Adviser, warned him again. The Chief Security Adviser had also enlisted the assistance of a colleague of the same nationality as Mr. Nadasan in an effort to impress upon him the importance of leaving Ms. X alone and the need to abide by the rules of the Organization.

5. On 6 February 2013, the French Ambassador to Liberia sent a letter to the Special Representative of the Secretary-General (SRSG) of UNMIL, requesting UNMIL's assistance with regard to Mr. Nadasan's continued harassment of Ms. X. On 11 February 2013, the matter was referred for investigation to the UNMIL Special Investigations Unit (SIU).

6. In December 2013, Ms. X left Liberia to become a staff member of the United Nations International Children's Emergency Fund (UNICEF) office in Haiti. In February 2014, Mr. Nadasan applied for and was recruited to a position at his level at the United Nations Stabilisation Mission in Haiti (MINUSTAH). In July 2014, Mr. Nadasan left Liberia for Haiti to join MINUSTAH.

7. In July 2014, the UNMIL SIU determined that the matter should proceed by way of a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) at MINUSTAH, since Ms. X and Mr. Nadasan had both since relocated to Haiti.

8. On 25 November 2014, the Chief, Conduct and Discipline Team (CDT), MINUSTAH, received a request from the Chief, CDT, UNMIL, to address the unresolved complaint of possible sexual harassment. The case was then officially re-assigned to the MINUSTAH Conduct and Discipline Team by the Department of Field Support (DFS).

9. On 27 March 2015, in accordance with the provisions of ST/SGB/2008/5, the SRSG for MINUSTAH convened an investigation panel of two MINUSTAH staff members, Mr. AO, Chief Integrated Mission Training Center in MINUSTAH and Ms. CM, Planning Officer in the Office of the SRSG (the Panel), to conduct a fact-finding investigation into the reported harassment.

10. On 14 August 2015, the Panel issued its investigation report, which found that the allegations of prohibited conduct pursuant to ST/SGB/2008/5 against Mr. Nadasan were well-founded and amounted to possible misconduct.

11. On 15 September 2015, Mr. Nadasan's case was referred to the Office of Human Resources Management (OHRM) for appropriate action. The referral was based on the Panel's investigation report of 14 August 2015.

12. On 26 November 2015 Mr. Nadasan received a memorandum dated 30 October 2015, (Charge letter) by which he was requested to respond to formal allegations of misconduct. By e-mail dated 9 December 2015, Mr. Nadasan submitted his comments on the allegations of misconduct. Following a review of his comments, and by e-mail dated 1 June 2016, Mr. Nadasan was provided with additional information and was invited to provide any further comments. By e-mail dated 8 June 2016, Mr. Nadasan submitted his further comments. By e-mail dated 26 July 2016, Mr. Nadasan was provided with the additional information that was obtained following receipt of his comments and he was invited to submit further comments within two weeks. On 22 August 2016, having received no response by the end of the two-week period, OHRM e-mailed Mr. Nadasan and informed him that no response had been received and invited him again to submit further comments, by 6 September 2016. Mr. Nadasan did not submit a further response.

13. By letter dated 4 October 2016, Mr. Nadasan was informed that: (a) upon review of the dossier, and taking into account his comments on the allegations, the Under-Secretary-General for Management (USG/DM) had concluded that the allegations against Mr. Nadasan were established by clear and convincing evidence; and (b) the USG/DM had decided to impose upon Mr. Nadasan the disciplinary measures of separation from service with compensation in lieu of notice and with termination indemnity.

14. On 18 January 2017, Mr. Nadasan filed an application with the UNDT contesting this disciplinary sanction.

15. On 27 September 2018, the UNDT issued its Judgment dismissing Mr. Nadasan's application in its entirety. The UNDT found that the material facts on which the disciplinary measure was based were sufficiently established and amounted to sexual harassment in violation of Staff Rule 1.2(f), which is serious misconduct, and that the disciplinary sanction imposed by the Secretary-General was proportionate. In reaching this conclusion the UNDT found *inter alia* that Mr. Nadasan had repeatedly contacted Ms. X via telephone, e-mail, and Facebook messages despite her repeated and clear demands that he stop contacting her. The content of his messages was clearly sexual in nature and it was clear from Mr. Nadasan's application before the UNDT that he knew his advances were not welcome.

16. The UNDT also found that Mr. Nadasan's due process rights had been respected. Mr. Nadasan was interviewed in all material aspects of this case, he had the opportunity to review the record of his interview and make amendments, and he had the opportunity to introduce new material. Mr. Nadasan signed the amended record of his interview to certify its accuracy and was provided with the allegations of misconduct memorandum together with all supporting documentation. He was informed of his right to seek counsel and he was given an opportunity to comment. Having been given extensions and the Panel taking further fact-finding exercises resulting in no exculpatory evidence, the UNDT found that Mr. Nadasan had been given adequate time and opportunity to provide comment and supplemental information. The Tribunal further found that Mr. Nadasan failed to submit evidence supporting his alleged claim that he could not fully respond to the charges because he had no e-mail access to the third set of questions sent to him by OHRM. The UNDT took the view that the third set of questions would not have changed the final outcome.

17. Regarding Mr. Nadasan's claim that his proposed witnesses were not interviewed by the Panel, the UNDT noted that the Panel maintained the discretion to determine how to conduct its investigation and it had discharged its obligations by diligently investigating Mr. Nadasan's account of events including the witnesses he had proposed. Regarding Mr. Nadasan's claim that the Panel did not properly count the number of Facebook messages, the UNDT found the numerical discrepancy was immaterial. Mr. Nadasan admitted to sending 140 messages. While content and quantity of communications are relevant factors, the UNDT noted that even one sexually inappropriate message could have amounted to sexual harassment. The Panel had considered the totality of the evidence.

18. The UNDT found that Mr. Nadasan had failed to provide any evidence to suggest that Ms. X was not credible and found, to the contrary, that her testimonies were corroborated by documentary evidence. The UNDT found the evidence was clear that Mr. Nadasan's conduct was continuous, sexual in nature, and was not welcomed.

19. As to the Organization's imposed disciplinary measure, the UNDT found the sanction was proportionate and noted that the USG/DM had considered mitigating factors in setting the sanction, such as the period of time it took to resolve the matter, Mr. Nadasan's long service with the Organization, and his claimed stress from workload. The UNDT noted that established jurisprudence provides that the UNDT shall give deference to the Secretary-General in this regard, unless the decision is manifestly unreasonable,

unnecessarily harsh, obviously absurd, or flagrantly arbitrary. In the instant matter, the UNDT found that the sanction imposed was in accordance with Staff Rule 10.2(a) and was proportionate to the serious misconduct of sexual harassment.

Submissions

Mr. Nadasan's Appeal

20. Mr. Nadasan argues that the UNDT erred in law as he and Ms. X had never worked in the same place and had never had any work relationship when the alleged harassment took place in 2012. Accordingly, he asserts that "the provisions of SGTB are not applicable". It is presumed he is referring to ST/SGB/2008/5.

21. Mr. Nadasan also argues that the UNDT erred in procedure when it failed to conduct a hearing pursuant to Article 16(2) of the UNDT Rules of Procedure. He argues that pursuant to Article 2(1)(b) of the UNDT Statute, his right to appeal the imposition of a disciplinary measure is not restricted to the review of the investigative process; but requires an appeal *de novo* comprising of a complete re-hearing so that witnesses may be heard and their credibility tested. He asserts other procedural irregularities as follows: (1) he was never shown a formal complaint against him; (2) the Panel and the UNDT did not interview key witnesses; (3) in the interview of some of the witnesses, the Panel failed to ask the questions he had proposed; (4) the SIU was the wrong investigative body as it should have been the CDT; (5) there was a two and a half years' delay in the investigation and a one-year delay while his application to the UNDT was pending before his case was reassigned to a second UNDT judge; and (6) his motion for a case management discussion was refused by the UNDT.

22. Mr. Nadasan also argues that the UNDT erred in its determination of several facts. Firstly, the Panel did not check the inconsistencies in the statements of several witnesses and the UNDT should have held a hearing to assess their credibility. Mr. Nadasan also asserts that evidence of the text conversations of 25 and 26 July 2012, wherein Ms. X indicated she would call the police was never produced. The content of the July 2012 Facebook message related to his interest in a position in Haiti.

23. The UNDT further erred in determining that Mr. Nadasan continued to contact Ms. X, besides his last text message sent on 26 July 2012 and his last Facebook message sent on 22 November 2012, he had last contacted Ms. X on 24 January 2013. The Panel and the UNDT erroneously ignored evidence that on 6 August 2012 Ms. X messaged him and unblocked him on Facebook, which he understood as her being agreeable to him contacting her and demonstrated a “seduction and a teasing game”. The UNDT’s finding that Ms. X had consistently rejected him was never proven as the only time Ms. X rejected him was in Yoga class in January 2013. Mr. Nadasan further argued that the Panel had failed to consider the testimony of Ms. Z, who indicated in her e-mail that Mr. Nadasan had visited her at her compound. The Panel instead accepted Ms. X’s allegation that he was trying to get into the complex to see her. Ms. Z also indicated there was no interaction between him and Ms. X at a local social establishment, which refuted Ms. X’s allegation. Further, Ms. Z, Mr. K, and Ms. S provided a favorable character description of Mr. Nadasan. Mr. Nadasan also argues the Panel failed to consider his work experience and record with the Organization and failed to consider that he could not access his work e-mails.

24. Mr. Nadasan requests an oral hearing before the Appeals Tribunal and requests that the Appeals Tribunal award him USD 1 million as follows: USD 500,000 for loss of employment, USD 250,000 for damage caused to his personal image since it is now public knowledge that he was discharged, and USD 250,000 for damage to his health due to the prolonged stress, tension, and anxiety suffered during a long investigation. Lastly, Mr. Nadasan requests the Appeals Tribunal to order the Secretary-General to produce the “approval selection memorandum” of Mr. Nadasan as “WatSan P-3”, which he asserts “shows the new attitude of [the Organisation] towards him considering his separation from service as unjust”.

The Secretary-General’s Answer

25. The Secretary-General requests the Appeals Tribunal to affirm the UNDT’s Judgment and dismiss the appeal in its entirety. The UNDT correctly concluded that there was clear and convincing evidence that established the facts on which the disciplinary sanction was based. The UNDT found that the facts were sufficiently established based on Mr. Nadasan’s own admissions that he was placed on notice to stop contacting Ms. X, but he continued to do so anyway. The facts were further corroborated by documentary evidence in the form of Facebook messages, telephone records, e-mails and the written intervention from

the French Ambassador of Liberia to UNMIL. The UNDT, therefore, had an ample basis to conclude the facts were established by clear and convincing evidence. Mr. Nadasan's arguments that the UNDT did not notice and check the inconsistencies between the different statements of Ms. X related to the date when she first met him, and the total number of messages and calls, were considered and correctly dismissed by the UNDT as such alleged errors were not relevant. The fact that Ms. X informed Mr. Nadasan verbally that she would call the police if he continued to contact her as opposed to conveying her protest in a text message is not a reversible error that renders the UNDT's conclusion unreasonable.

26. Mr. Nadasan has argued before the UNDT that the allegation that he continued to contact Ms. X was false and that she was engaged in a "seduction and teasing game", and that her printing and sharing Facebook messages with others called into question her good faith. The UNDT found these arguments to be without merit. Mr. Nadasan has merely disagreed with these findings and has repeated his arguments on appeal. The UNDT noted that Mr. Nadasan did not provide evidence to support his claim that Ms. X acted in bad faith. The UNDT found her credible and noted that her allegations were corroborated by documentary evidence.

27. Mr. Nadasan's argument that Ms. X should have gone to the police versus registering her complaint with UNMIL, and that he did not have a working relationship with Ms. X nor did the alleged incidents take place at work, are not factors calling into question the UNDT's finding of misconduct. Misconduct is not defined solely in terms of acts committed by staff members against other staff members.

28. The Secretary-General also argues that the UNDT did not err in finding that Mr. Nadasan's due process rights were respected as there were no procedural irregularities. First, Mr. Nadasan was interviewed and was given ample opportunities to comment and provide evidence. He was given the allegations against him, the investigation report and supporting documentation, including the records of interviews. Mr. Nadasan was informed of his right to seek counsel. Second, regarding Mr. Nadasan's claim that he did not have e-mail access, the UNDT correctly concluded that he was estopped from claiming a breach of procedural fairness based on his own failure to inform the decision-maker of his contact information. The UNDT properly concluded that the additional questions sent via e-mail in July 2016 would not have changed any material findings of the Panel.

29. Third, the UNDT did not err in its decision not to hold an oral hearing. In this regard, Mr. Nadasan's reliance on *Mbaigolmem*¹ is misplaced. In that case, the Appeals Tribunal provided for a situation whereby the record arising from an investigation may be sufficient for the UNDT to render a decision without a hearing. Furthermore, the UNDT had ordered the parties to either file their closing submissions if the parties agreed for the matter to be heard on the papers or file a joint submission listing the witnesses they intended to call and the evidence they intended to introduce. Mr. Nadasan had bilaterally agreed with the Secretary-General for the matter to proceed on the papers and had filed his closing submission choosing not to request an oral hearing. Mr. Nadasan, thus, should be estopped from making this argument as he chose not to request a hearing before the UNDT. As for the e-mails, which Mr. Nadasan indicated came from colleagues who spoke to his character, they do not amount to evidence detracting from the documentary evidence of his sexual harassment. Mr. Nadasan ultimately fails to demonstrate how the UNDT's findings of fact are not supported by the evidence or are unreasonable.

30. Lastly, the Secretary-General argues that the UNDT correctly upheld the imposed disciplinary sanction as proportionate since sexual harassment is serious misconduct for which the more serious sanction of dismissal is warranted. The Administration took into consideration aggravating and mitigating factors and rendered the sanction of compensation in lieu of notice and termination indemnity. The UNDT considered these factors and found the less severe sanction was proportionate.

31. With regard to Mr. Nadasan's request for compensation, the Secretary-General asserts this is not legally sustainable as it exceeds the statutory limit of Article 9(1)(b) of the Appeals Tribunal's Statute (Statute). Furthermore, Mr. Nadasan has not produced evidence of an exceptional circumstance. Mr. Nadasan's claim for stress-induced sick leave was correctly rejected by the UNDT as it considered the opinion of a physician who opined that there was no causal link between Mr. Nadasan's medical condition and the complaint filed against him.

¹ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051.

Considerations

Preliminary Issues

32. Mr. Nadasan's request for an oral hearing is denied. Oral hearings are governed by Article 8(3) of our Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). We do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. In these circumstances, the request for an oral hearing is denied.

33. Mr. Nadasan's request that the Appeals Tribunal order the Secretary-General to produce the "approval selection memo of Mr. Nadasan as WatSan P-3" is also denied. The production of this document has no effect on the case as it does not address any facts relevant to the determination of sexual harassment and misconduct.

The UNDT's case management

34. Mr. Nadasan complains that his application was pending before the UNDT for about a year before his case was reassigned to, and decided by, a second UNDT Judge. Although we agree with Mr. Nadasan that such a delay is unfortunate, he has not demonstrated that this is a procedural error affecting the outcome of the case.

35. Mr. Nadasan further argues that the UNDT erred when it refused the Secretary-General's Motion for a case management discussion. We find that the UNDT erred in deciding to refuse the Secretary-General's request. In Order No. 33 (NY/2018), the UNDT noted that:²

[d]uring discussions with the counsel for the [Secretary-General], [Mr. Nadasan] stated that 'he would agree that the matter be decided on the papers at the Dispute Tribunal, and that he would produce witnesses who were willing to testify for him at his possible appeal at the Appeals Tribunal in case the judgment at the Dispute Tribunal is not in his favor.' The Secretary-General further informed the Tribunal that he advised [Mr. Nadasan] that he could avail himself of assistance from the Office of Staff Legal Assistance (OSLA) and that he could also reach out [to] the Registry of the Tribunal for any issues or questions about the proceedings. In these circumstances, the [Secretary-General] considers that the situation should be brought to the attention of the Tribunal for a fair and expeditious disposal of the case. On the

² Order No. 33 (NY/2018), para. 10.

basis of the foregoing, the [Secretary-General] requests that the Tribunal decide to hold a case management discussion (...) to elicit input directly from [Mr. Nadasan] as to whether the case should be decided on the papers or a hearing should be held.

36. In circumstances where the Secretary-General brought to the Judge's attention that Mr. Nadasan was under the erroneous impression that he could call witnesses and reargue his case on appeal and specifically requested an oral hearing to discuss whether or not the case could be decided on the papers, the UNDT erred in exercising its case management discretion when it refused the request for an oral hearing.

37. However, as will be explained below, this error did not affect the decision of the case.

Standard of review in disciplinary cases

38. In disciplinary cases under Article 2(1)(b) of the UNDT Statute, the UNDT will examine the following: i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.

i. Whether the facts on which the disciplinary measure was based have been established

39. There may be instances, where the UNDT will come to the conclusion that the facts on which the disciplinary measure was based have been established, where necessary by clear and convincing evidence, during the investigation proceedings. In such cases, the UNDT will normally undertake an oral hearing as provided for in disciplinary cases under Article 16 of the UNDT Rules of Procedure, but the Tribunal may decide not to (re)hear witnesses or gather additional evidence.

40. If, on the other hand, the UNDT does not find the evidence established during the disciplinary proceedings is sufficient, it will undertake a "fresh" or "de novo" investigation meaning that the UNDT will (re)hear witnesses and/or gather other evidence to examine and assess whether the above-mentioned standard of proof has been met. The Appeals Tribunal would like to point out that there has been no change in jurisprudence. The UNDT is not allowed to investigate facts on which the disciplinary sanction has not been based and may

not substitute its own judgment for that of the Secretary-General. It will only examine whether there is sufficient evidence for the facts on which the disciplinary sanction was based. Before the UNDT issued its judgment in *Mbaigolmem*,³ it was not disputed that the UNDT has the authority to rehear the witnesses of the disciplinary proceedings in order to assess whether there is sufficient evidence to conclude that misconduct occurred, and the UNDT has done that several times.⁴

ii. Whether the established facts legally amount to misconduct

41. The judicial review of decisions of whether or not misconduct has been established dictates that due deference be given to the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements.

iii. Whether the disciplinary measure applied was proportionate to the offence

42. Our jurisprudence is best described in *Sanwidi* where we held:⁵

... In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and

³ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051.

⁴ *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700.

⁵ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39, 40, and 42.

also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

iv. Whether the staff member's due process rights have been respected.

43. With regard to due process, we have consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.⁶

Application to the present case

44. By letter dated 4 October 2016, Mr. Nadasan was separated from service with compensation in lieu of notice and with termination indemnity, for having, between January 2012 and October 2015, sexually harassed Ms. X, a staff member at the French Embassy in Liberia and thereafter a staff member of UNICEF in Haiti, by making unwanted advances and sending improper messages, some of which were of a sexual nature, despite Ms. X's requests to cease such behaviour, and by continuing to attempt to contact Ms. X despite the complaints and efforts to informally resolve the case.

45. Applying the above-mentioned standards and criteria to the present case, we find that the UNDT did not err as there was clear and convincing evidence that Mr. Nadasan indeed committed sexual harassment against Ms. X and that the disciplinary sanction of

⁶ *Muindi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-782.

separation from service with compensation in lieu of notice and with termination indemnity was proportionate and lawful.

i. Clear and convincing evidence for sexual harassment

46. We find that the UNDT did not err in holding that the documentary evidence was sufficient to conclude that Mr. Nadasan had committed sexual harassment against Ms. X. There is clear and convincing evidence for this allegation in the findings during the disciplinary investigation, in Mr. Nadasan's application to the UNDT, and in his appeal to this Tribunal. The totality of the evidence clearly and convincingly has established that Mr. Nadasan, for a substantial amount of time, had sexually harassed Ms. X by sexually addressing and following her despite her having made it clear to him that his advances were unwelcome. As the UNDT Judgment gives a thorough and convincing reasoning, we do not find it necessary to repeat each and every detail but refer to paragraphs 34 to 64 of the Judgment. We will, however, present the most important pieces of evidence and highlight those actions which most clearly demonstrate that Mr. Nadasan committed sexual harassment against Ms. X.

47. In his appeal, Mr. Nadasan stated that Ms. X had told him, at the end of July 2012, that she had a boyfriend. Nevertheless, in August and September 2012, Mr. Nadasan sent her a number of Facebook messages of a sexual nature. Some of those messages are as follows:

At 9:48 a.m., on 14 August 2012: "... so you have NOT blocked me again? ... please, please ... stop writing to me, stop texting me, stop talking to me! ... ay, ay, ay! ... that means you DO want to be "punished" ... you're even ex[c]ited about the prospect of it... well, [Ms. X], my dear, well noted ... we'll definitely see to it!!! ... bye for now.

At 6:10 p.m., on 16 August 2012: "LAST WARNING!!! By choosing, against all good advice, not to shut me out for good and for ever, you hereby acknowledge accepting the high risk of being subjected to some cruel caressing, slow kissing, heavy cuddling and even more serious ... you know what, by the undersigned ...:) c. student of TYY and i'm not joking"

At 8:36 a.m., on 20 August 2012: "why the blondes favor contraceptive pills over condoms? - because they are easier to swallow! ... :))"

At 6:29 a.m., on 29 September 2012: "have you heard this one? ... good education is like an erection; when you have it, everybody can see it!"

48. Furthermore, in Mr. Nadasan's appeal, he himself stated that he promised, at the end of November 2012, after he had been informed that Ms. X had complained about his inappropriate behavior, to never contact Ms. X again. Despite this promise, he continued to attend the same yoga class as Ms. X although she had made it clear to him, and he knew that she resented his presence in the class. Despite this promise, he approached and addressed Ms. X when they incidentally met at the airport in Monrovia in October 2013. Despite this promise, he even took up a new position in Haiti in July 2014 where he knew that Ms. X had been working for UNICEF since December 2013 and contacted her via e-mail. Despite this promise, Mr. Nadasan contacted Ms. X several times in September and October 2015.

49. Mr. Nadasan's application to the UNDT also renders clear and convincing evidence that he sexually harassed Ms. X with intent. It becomes clear from his submissions that he kept following Ms. X and sent messages with sexual content although she had made it clear to him that she was not interested and he knew that his advances were unwelcome.

50. Mr. Nadasan stated in his application before the UNDT (Emphasis in original):

... I had her business card and phone number, spoke 2 times on the phone and 7 or 8 times in person and I had told her several times we should 'have coffee together'. She kept postponing.

... At the end of July 2012, after returning from a home leave, with my divorce pronounced I sent her a SMS trying to reconnect where we have left, to organize a 'coffee together' so we can get to know each other better. She replied with a very angry tone, in a very poor and broken English and totally opposed to what I had been used to have from her, that she "already had a boyfriend" and I should stop contacting her. By that time I had also sent her a few (7 messages from 21 June to 24 July) Facebook messages trying to get closer, but did not get any answer from her. Also my [Facebook] friend request to her had remained unanswered for a few days and I finally cancelled it.

... On 11 August 2012, a weekend, I made a small experiment to make sure that her "blocking" was real and tried to send a message made up of just a dingle dot. To my amazement, it was delivered. Same was the one sent a couple of hours later. Things were clear, she HAD unblocked me on Facebook messenger and although she did not reply to my messages, I took it as an encouragement as she clearly WANTED to "hear" from me. From that moment and until 20 September 2012 I kept writing to her on Facebook, **a total of 131 messages**, showing my deep attraction to her and trying to organize a 'tete-a-tete'. Finally, when I noted she continued to ignore me, although she gave clear signs she was receiving my messages, I switched to trying to get her to talk to me and have a casual, civilized, free of any shade of romance

relationship. I did not see any reason for us to retain an attitude of hard feelings, tension and bitterness, especially that we were part of a small expat community and whether we wanted it or not, we were going to cross ways in a small city like Monrovia in social situations. It is true, in those first FB messages I had made it clear I was very deeply attracted to her from all points of view and in the process, inadvertently used a couple of not very politically correct words which “could” be interpreted as sexual in nature.

...

... Nevertheless, I decided I would keep staying as far as possible from Ms. [X] as it had been the case for a long time, but that I would carry on normally with my life as if nothing happened go where ever I felt like, even though, given a few options available in Monrovia, I knew it was going to further annoy [Ms. X] when she saw me at “her places”. I considered this as my little revenge for the wrong she had caused me, for the humiliation and bullying she subjected me to.

... I must admit though that at the time of the application, that the complainant was working in Haiti and that it would annoy her to find out I was also relocating there. Again it gave me satisfaction in a certain way, another small revenge for the humiliation and character assassination she had subjected me to.

51. We find that this evidence speaks for itself.

ii. Serious misconduct and proportionality of the disciplinary sanction

52. In assessing the seriousness of misconduct and deciding on the proportionality of a disciplinary sanction, we have consistently granted large discretion to the Secretary-General. As we stated in *Toukolon*:⁷

... The Secretary-General had the discretion to determine whether Mr. Toukolon’s physical assault on Ms. Oduke and verbal abuse of a UNMIS Security Officer and engaging in aggressive and uncooperative behavior towards him amounted to misconduct or serious misconduct. The Appeals Tribunal finds that a determination that the said conduct was serious misconduct was a reasonable exercise of that discretion.

... Moreover, the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. The Appeals Tribunal finds, again, that it was a reasonable exercise of his discretion to determine that assault, together with the other charges, rendered Mr. Toukolon unfit for further service with the Organization, and is satisfied that

⁷ *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407, paras. 30 and 31.

separation from service with compensation in lieu of notice and with termination indemnity – which is not, after all, the most severe form of dismissal - was neither unfair nor disproportionate to the seriousness of the offences.

53. We find no fault in the UNDT's finding that Mr. Nadasan's behaviour towards Ms. X amounted to serious misconduct. However, as Mr. Nadasan's actions were not work-related in a strict sense, it would have been better for the UNDT to rely on Staff Regulation 1.2(a) and (f) also cited in the 4 October 2016 termination letter. Staff Regulation 1.2(a) and (f) states as follows:

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

...

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status[.]

54. By sexually harassing Ms. X, Mr. Nadasan violated these Regulations. He did not conduct himself in a manner befitting his status as an international civil servant. His actions not only violated Ms. X's personal dignity but also adversely affected the interests of the United Nations. Until the end of 2013, Ms. X was a staff member of the French Embassy in Liberia, and the French Ambassador to Liberia complained to the United Nations about his behaviour towards Ms. X. Later, Ms. X became a staff member of UNICEF in Haiti. We find that the Secretary-General's determination that Mr. Nadasan's behaviour amounted to serious misconduct was a reasonable exercise of his discretion.

55. We also find that it was a reasonable exercise of the Secretary-General's discretion to determine that Mr. Nadasan's behaviour towards Ms. X rendered him unfit for further service with the Organization. Mr. Nadasan harassed Ms. X for a substantial amount of time although she had clearly told him that his advances were unwelcome. Mr. Nadasan had been advised, by several people, to stop, and warned that if he did not stop he would risk losing his job. Although he had promised that he would not contact Ms. X again, he did not keep that promise but kept on harassing her. Even up to the present day, Mr. Nadasan has not understood and does not accept that he did anything wrong but rather feels like the victim of the whole matter. As Ms. X was a staff member first of a member state of the United Nations, later of UNICEF, Mr. Nadasan's actions affected the reputation of the United Nations Secretariat. We are, thus, satisfied that separation from service with compensation in lieu of notice and with termination indemnity was fair and proportionate to the seriousness of the offence.

iii. Due process

56. The main requirements of due process are met. Mr. Nadasan was informed about the allegations against him and had an opportunity to respond and defend himself. There is no merit in Mr. Nadasan's submission that he was never shown a formal complaint against him. It is clear from the documentary evidence that he was given a charge letter and supporting documents, had several opportunities to comment on the allegations and was informed of his right to seek counsel. His allegation that he could not comment on the third round of questions because he had no access to his work e-mail account is without merit. His e-mails dated 7 July and 14 August 2016 clearly show that he knew about the inaccessibility of his work account and the possibility that communication regarding the disciplinary proceedings would possibly not reach him. In this situation, he had an onus to inform the investigators and provide his private e-mail address with which he communicated during that time.

57. As to any other possible procedural irregularities during the disciplinary investigation and with respect to the UNDT's denial of an oral hearing, as alleged by Mr. Nadasan, we find that they are of no consequence given the kind and amount of evidence proving Mr. Nadasan's misconduct. As we stated in *Michaud*.⁸

⁸ *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 60.

... This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

iv. Request for compensation

58. Mr. Nadasan’s claim for compensation is rejected. Absent any illegality, there can be no compensation. We note, further, that a delay in the UNDT’s proceedings cannot support a claim for compensation under Article 9(1)(b) of the Appeals Tribunal’s Statute. Compensation can only be awarded for material or moral harm resulting from an administrative decision. As to the alleged delay in the disciplinary investigation, Mr. Nadasan has not demonstrated how this delay supports his claim for compensation for “damage to his health” as he has not established a causal connection between the delay and the impact he alleges to his health. He fails to meet his evidentiary burden necessary for the award for compensation of moral damages and, accordingly, his request for moral damages is denied.

Judgment

59. The appeal is dismissed and Judgment No. UNDT/2018/095 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Murphy

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar