



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

Judgment No. 2021-UNAT-1076

**Ali Hussein Haidar
(Appellant/Respondent)**

v.

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

JUDGMENT

Before: Judge Jean-François Neven, Presiding
Judge Sabine Knierim
Judge Martha Halfeld

Case No.: 2020-1368 & 2020-1369

Date: 30 October 2020

Registrar: Weicheng Lin

Counsel for Mr. Haidar: Self-represented

Counsel for Secretary-General: Maryam Kamali

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Mr. Ali Hussein Haidar filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision to impose the disciplinary measures of separation from service with compensation in lieu of notice and without termination indemnity and a fine of one-month net base salary for serious misconduct. By Judgment No. UNDT/2019/187, the UNDT set aside the fine of one-month net base salary and rejected all other pleas.
2. Both parties have appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal). For the reasons set out below, we dismiss the appeals and uphold the UNDT Judgment.

Facts and Procedure

3. Mr. Haidar joined the United Nations Interim Force in Lebanon (UNIFIL) in September 1983. At the date of his separation from service, he was an Associate Liaison Officer with the Office of the UNIFIL Force Commander (UNIFIL/FC).
4. The Complainant, a Language Assistant with the UNIFIL Language Support Unit (LSU), beginning 5 January 2015, was on a short-term assignment from the LSU to the Office of the UNIFIL/FC to work directly with Mr. Haidar. Her assignment to work with Mr. Haidar was initially for one month, but was extended, with her consent, for another month, until the end of February 2015. On 27 March 2015, the Complainant made an informal complaint to the UNIFIL/FC and the Conduct and Discipline Unit (CDU), alleging *inter alia*, that Mr. Haidar had created a hostile work environment and that on 9 February 2015, he had insisted on giving her a shoulder massage and touched her breasts during the massage.
5. On 20 April and 11 June 2015, Mr. Haidar filed his own complaint under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) against the Complainant, claiming that she had harassed him by defaming him with false accusations.

6. After informal settlement efforts failed, the Complainant filed a formal complaint against Mr. Haidar on 11 June 2015. That same day, the UNIFIL/FC appointed a panel to conduct a fact-finding investigation into allegations of prohibited conduct under ST/SGB/2008/5 in connection with the two separate complaints filed by Mr. Haidar against the Complainant and the Complainant against Mr. Haidar. The panel issued its fact-finding report on 11 September 2015, in accordance with the provisions of ST/SGB/2008/5 and issued a supplementary memorandum, dated 19 November 2015, to the Head of Mission of UNIFIL and UNIFIL/FC.

7. On 15 December 2015, the UNIFIL/FC recommended to the Under-Secretary-General, Department of Field Support (USG/DFS) that the Fact-Finding Report be submitted to the Office of Human Resources Management (OHRM) for appropriate disciplinary action pursuant to ST/SGB/2008/5 and informed the USG/DFS that the matter relating to the allegations by Mr. Haidar against the Complainant had been closed.

8. By memorandum, dated 29 January 2016, the ASG/DFS referred the matter to OHRM for appropriate action. On 28 November 2016, Mr. Haidar was requested to respond to formal allegations of misconduct, which he did on 15 December 2016. Mr. Haidar provided further clarifications to OHRM on 23 and 24 January 2017.

9. By letter dated 31 March 2017, the Acting Assistant Secretary-General, OHRM informed Mr. Haidar that the Under-Secretary-General for Management (USG/DM) had concluded that the allegations against Mr. Haidar had been established by “clear and convincing evidence” and that through his conduct, he had violated Section 2.1 of ST/SGB/2008/5, Section 3.1 and 3.2 (a) of ST/SGB/2003/13, Staff Regulations 1.2(a) and 1.2(f) and Staff Rule 1.2(e) and (f).

10. The USG/DM imposed the disciplinary measure of a fine of one-month net base salary and separation from service with compensation in lieu of notice and without termination indemnity, in accordance with Staff Rule 10.2(a)(v) and (viii).

11. The Decision Letter indicated that in determining the appropriate sanction, the USG/DM had considered the “past practice of the Organization in matters of comparable misconduct, which revealed that cases involving sexual harassment normally resulted in disciplinary measures at the stricter end of the spectrum, namely, demotion, separation or

dismissal”. The Decision Letter indicated that the Organization had considered the aggravating factors of Mr. Haidar’s case, which included “foment[ing] an atmosphere under which [the Complainant] was made to believe that [Mr. Haidar] could influence her career, and [Mr. Haidar] exploited her vulnerable position”. In addition, the USG/DM considered Mr. Haidar’s long period of service with the Organization as a mitigating circumstance.

12. Subsequent to his separation from the Organization, on 27 April 2017, the UNIFIL CDU brought to the attention of OHRM that Mr. Haidar was threatening the Complainant and her husband, intimidating her to withdraw her complaint and retract her statements.

13. On 20 June 2017, Mr. Haidar filed an application with the UNDT, contesting the decision to impose the disciplinary measures of separation from service with compensation in lieu of notice and without termination indemnity and a fine of one-month net base salary, in accordance with Staff Rule 10.2(a)(v) and (viii) for repeatedly touching the breasts of the Complainant, who was working in a subordinate position in his office.

14. The UNDT held oral hearings on the case from 17 to 21 June 2019, during which it heard from a number of witnesses.

15. On 26 December 2019, the UNDT issued Judgment No. UNDT/2019/187 granting the application, in part, setting the fine of one-month net base salary aside and rejecting the other pleas.

16. The UNDT held that the established facts of Mr. Haidar’s conduct towards the Complainant legally amounted to misconduct as there was clear and convincing evidence that Mr. Haidar repeatedly touched the Complainant’s breasts against her will. The UNDT further found that the misconduct represented a serious attack on the Complainant’s dignity and that the mere recollection of the event several years afterwards still caused her great distress.

17. While the UNDT found that Mr. Haidar had violated Staff Regulation 1.2(a) and 1.2(f), Staff Rule 1.2(f) and Section 2.1 of ST/SGB/2008/5, the UNDT found that it did not consider that Mr. Haidar had violated Staff Rule 1.2(e). The UNDT found that Staff Rule 1.2(e) applied to sexual relations exploiting systematic inequality, such as between peacekeepers and the local population, and particularly where transactional exchange is involved. The UNDT added that

workplace relations between two staff members, even of uneven positions, are addressed under Staff Rule 1.2(f).

18. The UNDT found that the measure of separation from service without termination indemnity was not a disproportionate sanction, given that “remaining in service would be irreconcilable with core values professed by the United Nations and the gravity of the conduct”.¹ However, the UNDT found the fine of one month’s net base salary was “arbitrary and irrational,” and deemed it a form of “disguised dismissal”.² The UNDT reasoned that the cumulative application of termination with a fine could seem possible in exceptional factual circumstances where termination alone would not reflect the nature and gravity of the misconduct. The UNDT further regarded the fine of one-month net base salary as “arbitrary and irrational” for the reason that the Secretary-General had opted not to dismiss Mr. Haidar and had allowed him to have the benefit of compensation in lieu of notice, which in Mr. Haidar’s case was the equivalent of one-month salary.

19. The Secretary-General and Mr. Haidar both appealed on 24 February 2020. Mr. Haidar and the Secretary-General filed their answers on 1 May 2020 and 28 April 2020, respectively.

Submissions

Mr. Haidar’s Appeal

20. The UNDT in reaching its conclusions relied on the Complainant’s version of events. In view of a missing adequate professional investigation on the facts, these conclusions are inadequate for lack of evidence and consequently the sanctions disproportionate.

21. The UNDT erred in basing its considerations principally on the testimony of the Complainant. The fact that the fact-finding panel was created the very same day the Complainant filed her complaint, demonstrates that there was earlier coordination between the Administration and the Complainant which reveals bias in her favour. Some of the witnesses mentioned in the Complainant’s allegations were not interviewed, in particular General Shahrour and other LAF personnel who allegedly pressured her, which distorted the judgment on the Complainant’s credibility. The Complainant’s claim that Mr. Haidar sent her threats via text messages was not properly

¹ Impugned Judgment, para. 82.

² *Ibid.*, para. 85.

investigated despite the phone set and sim card mentioned are United Nations' property which would have made it easy to verify. The Complainant alleged that she reported her complaint to the Training Officer and an Officer of the Welfare and Staff Counseling Unit, but neither of them supported her claim in their testimonies before the UNDT. The Complainant accused Mr. Haidar of using bad words while all the other staff who worked with him or used to come to his office confirmed before the UNDT that they never heard him doing so, while the UNDT ignored the issue. Regarding Mr. Haidar's defense of alibi, the UNDT unfairly rejected his claims outright without further considering them.

22. When examining whether the sanction was proportionate to the offence, the UNDT proceeded as if the case had been incontrovertibly established. However, a review of the Judgment reveals that the UNDT had some doubts regarding some of the evidence adduced by the Secretary-General. The UNDT did not establish a clear case of sexual harassment against him save for the complaint made by the Complainant which was not corroborated by any of the witnesses. In the absence of any direct evidence it is unjust on the part of the Tribunal to decide on the mere assumption that the Complainant could not have made up her evidence because she sounded more believable than Mr. Haidar.

23. The UNDT failed to properly consider the statement of Mr. W.T., dated 5 July 2017, in which the witness related information about his alleged interactions with Mr. Haidar on 9 February 2015, between 11 am and 12 pm. UNIFIL could have checked since Mr. W.T. is still a UNIFIL contractor and as such bound to follow the UNIFIL rules and procedures.

24. Mr. Haidar was kept in the dark until December 2016 and was not given a clear chance to address the facts or defend himself.

25. The UNDT failed to consider that the Complainant formally submitted her complaint several months after the allegations had been spread around the office and that the evidence adduced against him was basically hearsay. The UNDT also failed to duly consider the evidence given by Mr. Haidar which discredited the Complainant concerning her past work-related issues such as poor relations with colleagues, poor communication skills and earlier involvement in similar misunderstandings. The UNDT further erred in finding irrelevant Mr. Haidar's submissions against the Complainant that she had kept a record of her exchanges with him since her first day at the office which showed her bad intentions and unjustified distrust. Finally, the UNDT disregarded Mr. Haidar's contention that the

Complainant was not credible because she continued working with a man who allegedly had sexually harassed her, including that she communicated with him normally and openly but kept undermining him.

The Secretary-General Answer

26. The UNDT found that there was clear and convincing evidence that on 9 February 2015, at his office, Mr. Haidar repeatedly touched the Complainant's breasts against her will. The UNDT found the Complainant's testimony was coherent, detailed and consistent, the facts presented by the Complainant were confirmed by neutral witnesses, forming a detailed picture of a workplace showing the power differential between the Complainant's position and that of Mr. Haidar. Furthermore, the UNDT believed that the Complainant had no reason or motive to wrongly accuse Mr. Haidar, and that no witnesses, including Mr. Haidar, provided any reason why the Complainant would make false allegations against him.

27. The UNDT found no merit in Mr. Haidar's claim that the Complainant was not credible because, among other things, she continued working with someone who allegedly had sexually harassed her. After hearing oral evidence, the UNDT found that after the incident on 9 February 2015, the Complainant tried to leave early, absented herself from work the next day and called in sick the following days in order to avoid Mr. Haidar as much as possible. The UNDT also rejected Mr. Haidar's unsupported claim that the fact-finding mission was not a "professional investigation" where all facts were checked and all witness testimonies were ascertained.

28. The UNDT assessed Mr. Haidar's testimony as not being credible based on a reasoned analysis of the totality of the evidence. In particular, the UNDT found that Mr. Haidar's explanations were shifting and internally contradictory; his testimony was not credible with respect to an essential element of the incident – i.e., his presence in the office at the time of the incident – casting doubt on his testimony in general. Finally, the UNDT found that Mr. Haidar's allegation of discrepancies between the Complainant's testimony and other witnesses' testimonies lacked the minimum level of specifics to see where such alleged discrepancies might be, and how such discrepancies would result in a manifestly unreasonable determination of facts in question.

29. Mr. Haidar was found by clear and convincing evidence to have touched the Complainant's breasts against her will. His acts of sexual harassment were found by the UNDT to be in violation of the norms consistently upheld by the Organization. In view of the foregoing, the UNDT correctly concluded that the established facts legally amounted to serious misconduct.

30. In the present case, separation from service, together with a fine of one month's net-base salary was proportionate to Mr. Haidar's misconduct. Mr. Haidar's conduct was particularly grave in light of the position he held, and the responsibilities he was entrusted with. As the Decision Letter made clear, his position of influence was an aggravating factor. Thus, it was reasonable for the Secretary-General to conclude that Mr. Haidar's conduct violated the core values of the Organization and that his actions warranted at least separation from service. Moreover, the Organization did take mitigating factors of Mr. Haidar's long period of service into consideration. Notwithstanding the seriousness of his conduct, the sanction he received was not the most severe, i.e., dismissal. The Appeals Tribunal has held that the level of sanction falls within the remit of the Administration and can only be reviewed in cases of obvious absurdity and flagrant arbitrariness. No obvious absurdity or flagrant arbitrariness has been demonstrated in the present case. In view of the foregoing, the UNDT correctly concluded that the disciplinary measures imposed were proportionate to the grave misconduct committed and that the disciplinary measures of separation from service for serious misconduct were justified.

31. The UNDT found no merit in Mr. Haidar's contention that he was kept in the dark until December 2016 and was not given a clear chance to address the facts or defend himself. Mr. Haidar was interviewed by the panel and asked about all material aspects of his case on 30 June 2015, 22 July 2015, and 10 August 2015. In addition, he reviewed and signed the three written statements on record. He was provided an allegations memorandum in November 2016 and was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the charges of misconduct against him. He provided his comments and was invited to submit any additional documents. There is also no merit in Mr. Haidar's contention that the panel was created on the same day after the Complainant filed her complaint. This argument was raised with the UNDT, and the UNDT determined that the formation of the panel was a reasonable and legitimate exercise of discretion. On appeal, Mr. Haidar repeats his argument without demonstrating how the UNDT erred in

rejecting his argument. In view of the foregoing, the UNDT correctly concluded that Mr. Haidar's due process rights had been fully respected.

32. The Secretary-General requests the Appeal Tribunal to dismiss the appeal in its entirety.

Secretary-General's Appeal

33. The UNDT erred in law in finding that Mr. Haidar had not violated Staff Rule 1.2(e). This provision is not limited to transactional exchanges or to peacekeeping situations as found by the UNDT. Rather, Staff Rule 1.2 (e) prohibits "[t]he exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour". Mr. Haidar's conduct was humiliating, degrading as well as exploitative. He exploited his higher rank and the inequality inherent in the relationship between him as superior and the Complainant as his subordinate. For example, Mr. Haidar frequently told the Complainant that he would help her in extending her contract when she asked him whether her contract would be extended. Therefore, the UNDT erred in finding that Mr. Haidar's conduct had not violated Staff Rule 1.2(e). Moreover, just because the conduct breached one Staff Rule does not mean that it cannot also breach another Staff Rule. The UNDT therefore also erred in finding that his conduct did not violate Staff Rule 1.2(e) because, in the view of the UNDT, such conduct was better described by Staff Rule 1.2(f). That error also led the UNDT to set aside the disciplinary measure of a fine of one-month net base salary.

34. It is within the sole discretion of the Secretary-General to decide among the disciplinary measures available in sanctioning a staff member who has been found to have engaged in misconduct. In the present case, the Secretary-General exercised his discretion, pursuant to Staff Rule 10.2 to impose a sanction on Mr. Haidar of "one or more" of the sanctions listed in Rule 10.2(a), i.e., a fine of one month's salary pursuant to Rule 10.2(a)(v) and separation from service, pursuant to Rule 10.2(a)(viii). Such a multiple form of sanction was warranted to not only serve as punishment for Mr. Haidar's misconduct, but also to serve as an example of the Organization's commitment to a workplace free of sexual harassment as well as to the paramount principles of transparency and integrity and to a rules-based protocol.

35. The applicable legal framework does not require exceptional factual circumstances to impose multiple disciplinary measures. It is within the Secretary-General's discretion to impose one or several disciplinary measures. In this regard, the Secretary-General has the discretion to combine a fine with separation for cases warranting a more severe sanction than separation, but lesser than dismissal. In fact, the Dispute Tribunal held that Mr. Haidar's conduct was such that in comparable cases involving sexual harassment and sexual exploitation/abuse, it would normally result in disciplinary measures at the stricter end of the spectrum of separation or dismissal.

36. The UNDT was misguided in believing that there was no difference between the disciplinary measures imposed in this case and a dismissal. For example, the fine was in the amount of one month's net base salary, whereas, the compensation in lieu of notice related to a gross amount. Furthermore, a dismissal has more onerous consequences than merely a lack of notice or compensation in lieu of notice because it results in loss of payment for accrued leave, loss of any repatriation grant to internationally recruited staff, and no eligibility for after-service health insurance (ASHI). In this case, Mr. Haidar benefitted from the imposition of the sanction by having the difference between his gross and net pay of one month's net base salary, as well as maintaining his eligibility to receive pay for accrued leave and to enroll in ASHI. The UNDT's finding that imposing both termination and a fine was "arbitrary and irrational" and a disguised dismissal was clearly based on erroneous assumptions and an apparent misunderstanding of what a dismissal entails.

37. In the present case, the disciplinary sanctions imposed were not the most serious available. The sanctions imposed were less than a dismissal and were clearly reasonable in light of the seriousness of Mr. Haidar's wrongful actions. In light of the above, the UNDT erred in finding that the sanctions imposed were disproportionate to his misconduct and it erred in setting aside the one-month net base salary fine and thereby substituted its own discretion for that of the Secretary-General. The Secretary-General requests that the Appeals Tribunal reinstate the fine of one-month net base salary and maintain the rest of the UNDT Judgment.

Mr. Haidar's Answer

38. Mr. Haidar does not directly answer the Secretary-General's appeal. Instead he mainly recounts the facts and resubmits the arguments from his own appeal.

Considerations*Oral Hearing*

39. Mr. Haidar requests that the Appeals Tribunal hold an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute, which states: "[t]he judges assigned to a case will determine whether to hold oral proceedings"; and by Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules), which states: "[t]he judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case." The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Moreover, 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. Accordingly, the request for an oral hearing is denied.

Mr. Haidar's Appeal

40. The Appeals Tribunal has consistently held:³

Judicial review of a disciplinary case requires the 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

³ *Applicant v. Secretary-General of the United Nations*, Judgment 2013-UNAT-302, para. 29 (internal footnotes omitted), citing *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.

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”.

Did the UNDT err in concluding that the facts on which the disciplinary measure was based had been established by clear and convincing evidence?

41. As recalled in *Negussie*,⁴

[o]ur task on appeal is not to ourselves re-decide the case that was before the UNDT using these same tests. That is because we cannot enjoy a number of advantages experienced by the first-instance judge, for example seeing and hearing the witnesses give their accounts of events. Rather, our task is to determine whether the UNDT did not apply the correct tests and whether the Tribunal could reasonably have reached the decisions it did about what happened.

42. The UNDT found that there was clear and convincing evidence that on 9 February 2015, at his office, Mr. Haidar repeatedly touched the Complainant’s breasts against her will and in doing so, abused a position of influence and power.

43. The UNDT correctly found that it is typical in disputes concerning sexual harassment that the alleged conduct takes place in private, without direct evidence other than from the complainant and that the evidentiary questions in such cases centre on the credibility of the complainant’s testimony.⁵ The UNDT found that in the present case, the Complainant, who testified before the Tribunal over the course of several hours, gave a coherent, detailed, and consistent account of the events⁶ and that her testimony was consistent with her initial complaint in 2015 and the statements given to the investigators. The UNDT found that she never wavered in the description of the incident and her actions at the time, providing many details and specific recollections.⁷ Furthermore, the UNDT deepened the question whether the Complainant could have reason to wrongly accuse Mr. Haidar and concluded that no witness, including Mr. Haidar, could provide any reason why the Complainant would make false allegations against him.⁸ The UNDT concluded the quality of her testimony was very high and her version of events was corroborated through indirect evidence from several

⁴ *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 48.

⁵ Impugned Judgment, para. 67.

⁶ *Ibid.*, para. 57.

⁷ *Ibid.*, para. 58.

⁸ *Ibid.*, para. 59.

witnesses, most prominently by Ms. I. and Mr. T. to whom she had turned promptly after the incident. We see no error in that approach and in determination of the facts.

44. Mr. Haidar attempted to discredit the Complainant's testimony. But he did not succeed in this attempt before the UNDT. On appeal, he argues, or reargues, that some of the witnesses mentioned in the Complainant's allegation were not heard and that the allegation that he sent some threats via text messages was not investigated. As the UNDT focused its hearings on the incident of 9 February 2015 and on the credibility of the Complainant's testimony, these claims are not relevant. Mr. Haidar also states that the fact-finding panel was created the very same day the Complainant filed her complaint, which demonstrates, in his view, that there was prior coordination between the Administration and the Complainant. This inference appears to be purely speculative and the UNDT did not err in deciding that in the case at hand, the creation of a panel was the result of a reasonable and legitimate exercise of discretion by the Administration.⁹

45. Moreover, Mr. Haidar simply reiterates various arguments made before the UNDT regarding the incident of 9 February 2015. We recall:¹⁰

The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal's Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.

⁹ See also *ibid.*, para. 75.

¹⁰ *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 33; see also *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-896, para. 51, citing *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30, which in turn cited *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15; and *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

46. On the question of facts, Mr. Haidar did not identify any defects or flaws in the UNDT Judgment from which it could be inferred that the UNDT erred in deciding that the Complainant's testimony was credible and that sexual harassment was established.

Did the UNDT err in concluding that the established facts amounted to serious misconduct?

47. Mr. Haidar was found by clear and convincing evidence to have touched the breasts of the Complainant who was working in a subordinate position in his office. The UNDT correctly found that by doing so and by improperly using a position of influence and power, he engaged in acts of sexual harassment that are in violation of standards consistently reiterated by the Organization since at least 1992.¹¹

48. Staff Rule 10.1(a) provides that the failure by a staff member to comply with his or her obligations under the Organization's legal framework or to observe the standards of conduct expected of an international civil servant may amount to misconduct. In the present case, Mr. Haidar engaged in sexual harassment pursuant to Staff Rule 1.2(f), which prohibits "[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work"¹² and Section 2.1 of ST/SGB/2008/5, which states:

In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d) [*currently staff rule 1.2*], 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

49. In view of the foregoing, the UNDT correctly concluded that the established facts legally amounted to serious misconduct.

¹¹ Impugned Judgment, para. 77 and references cited.

¹² On the question whether he also violated Staff Rule 1.2(e) on sexual exploitation, see Secretary-General's appeal.

Did the UNDT commit an error in procedure such as to affect the decision of the case?

50. Mr. Haidar argues that the UNDT failed to properly consider the statement of Mr. W.T., dated 5 July 2017. The UNDT accepted the explanation why this statement was made two years after the facts but also explained why it did not place reliance on this statement.¹³ Mr. Haidar does not establish that the UNDT committed an error of procedure when it assessed the credibility of this statement and decided that Mr. Haidar's alibi was not established by this statement.

51. The UNDT found no merit in Mr. Haidar's contention that he was kept in the dark until December 2016 and was not given a clear chance to address the facts or defend himself. Mr. Haidar was interviewed by the panel and asked about all material aspects of his case on 30 June 2015, 22 July 2015, and 10 August 2015. In addition, he reviewed and signed the three written statements on record. He was provided an allegations memorandum in November 2016 and was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the charges of misconduct against him. He provided his comments and was invited to submit any additional documents. We see no procedural flaws in that.

Did the UNDT err in concluding that the sanction imposed was proportionate to the sexual harassment committed?

52. The Organization has a variety of disciplinary sanctions at its disposal. Staff Rule 10.2(a) provides different disciplinary measures ranging from different types of warnings and reprimands through "[s]eparation from service, with notice or compensation in lieu of notice ... and with or without termination indemnity" and "[d]ismissal".

53. In *Samandarov*, the Appeals Tribunal clarified the scope of review when the proportionality of the sanction is discussed:¹⁴

¹³ Impugned Judgment, para. 71.

¹⁴ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 23 to 25 (internal footnotes omitted), with internal references to *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 20-21; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39-40, 42 and 47; and *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

... With regard to the discretion of the Secretary-General to impose a sanction, the UNDT noted that this discretion is not unfettered, in that there is a duty to act fairly and reasonably in terms of which the UNDT is permitted to interfere where the sanction is lacking in proportionality. The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.

... It is undeniably true that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc. But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. ... In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

... The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. ...

54. When the sanction of termination was chosen by the Administration, it must be held that:¹⁵

The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable.

¹⁵ *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 47.

55. In the present case, the administrative decision indicated that Mr. Haidar's conduct was particularly grave in light of the position he held, and the responsibilities he was entrusted with. As the Decision Letter made clear, his position of influence was an aggravating factor. Therefore, the Secretary-General decided that Mr. Haidar's conduct violated the core values of the Organization and that his actions warranted at least separation from service. However, the Organization did take the mitigating factor of Mr. Haidar's long period of service into consideration and, notwithstanding the seriousness of his conduct, the sanction he received was not the most severe, i.e., dismissal.

56. The UNDT found that the measure of separation from service without termination indemnity was not a disproportionate sanction, given that remaining in service would be "irreconcilable with core values professed by the United Nations and the gravity of the conduct". We see no error in that. Mr. Haidar argues that the sanction was not proportionate and the UNDT proceeded as if the case had been incontrovertibly established. As the review of Judgment reveals that the UNDT did not err in deciding that the facts of sexual harassment were established, we cannot accept Mr. Haidar's argument and we conclude that the UNDT did not err in deciding that the disciplinary measure of separation from service for serious misconduct was justified.

Secretary-General's Appeal

Did the UNDT err in finding that Mr. Haidar's conduct did not violate Staff Rule 1.2(e)?

57. Staff Rule 1.2(e) states:

Sexual exploitation and abuse is prohibited. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

58. The UNDT correctly decided that this provision does not apply to all forms of sexual harassment or degrading behaviour, but more specifically to different forms of sexual exploitation and sexual abuse with, for example, "exchange of money, employment, goods or

services for sex”. It should be distinguished from Staff Rule 1.2(f), which focuses on sexual harassment and abuse in any form at the workplace or in connection with work. The UNDT did not err in deciding that in the present case, the conduct of sexual harassment by Mr. Haidar, in the context of workplace relation between two staff members, even of uneven position, only amounted to a violation of Staff Rule 1.2(f).

Did the UNDT exceed its jurisdiction by substituting the Secretary-General’s discretion with its own in considering that separation from service was an onerous enough sanction and that the fine of one-month salary should be set aside?

59. As noted above, while the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

60. In the present case, the UNDT carried out a factual assessment of the elements of proportionality and decided that in so far as termination of employment presents for the affected staff member a significant financial onerousness, if not loss of livelihood, combining termination with a fine does not seem to bear rational connection with either the retributive or preventive purpose of the sanction. In so deciding, the UNDT correctly applied the proportionality test and did not err in considering that the disciplinary measure of a fine should be lifted.

Judgment

61. The appeals are dismissed and Judgment No. UNDT/2019/187 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 13th day of January 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar