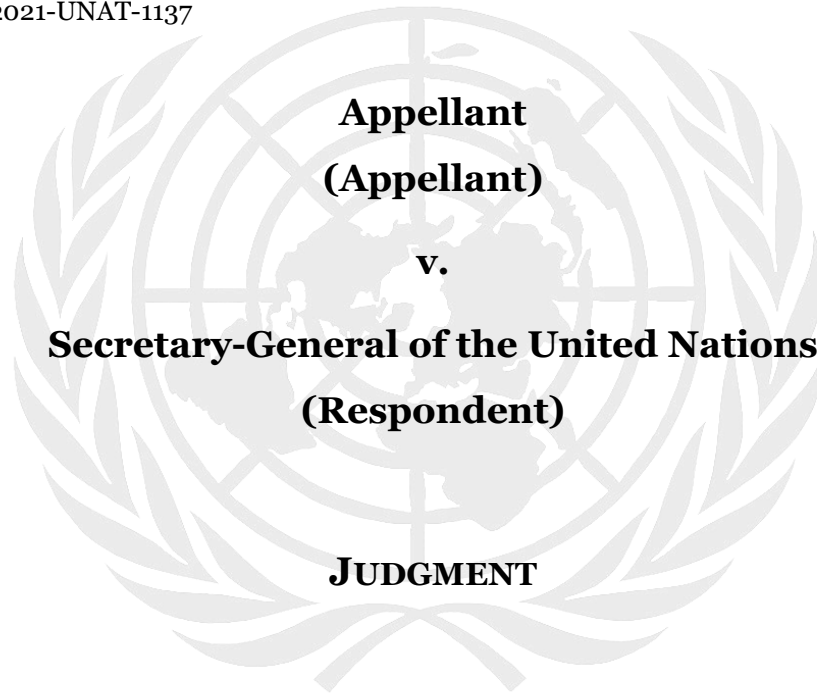




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1137



**Appellant
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Martha Halfeld Judge Sabine Knierim
Case Nos.:	2020-1434
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Appellant: Omar Yousef Shehabi, OSLA

Counsel for Respondent: Noam Wiener

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The Appellant, a former staff member of the International Residual Mechanism for Criminal Tribunals (IRMCT) contested decision of the Administration not to refer a Medical Officer for accountability, following a complaint of prohibited conduct that she filed under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment including sexual harassment and abuse of authority) (Bulletin).

2. In its initial and corrected Judgments under No. UNDT/2020/094, the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) held the investigating panel (Panel) did not properly conduct the investigation following the complaint of Appellant and granted her application in part.¹ The UNDT found the Panel did not consult with the Director of the then Medical Services Division (the MSD Director) to obtain information on the proper professional and medical standards of conduct. The Dispute Tribunal made no finding of prohibited conduct and restricted its review on procedural issues. It rescinded the contested decision and remanded the matter to the IRMCT to consider, in consultation with the Division of Healthcare Management and Occupational Safety and Health (DHMOSH), whether additional supervisory or other measures are required for the Medical Officer. The Dispute Tribunal also awarded the Appellant USD 12,500 in moral damages.

3. The Appellant appeals and says that if the Dispute Tribunal rescinded the decision, finding the evidence did not establish prohibited conduct, this can only mean that the Dispute Tribunal believed the evidence at hand established "possible" misconduct, which should have triggered a mandatory referral for accountability.² The Appellant now requests the United Nations Appeals Tribunal (Appeals Tribunal) to order the Medical Officer be referred for accountability or alternatively to remand the matter for additional fact finding. Finally, the Appellant also requests an award for further damages on the basis that the IRMCT failed to adequately discharge its obligations under the Bulletin to protect her during the investigation and because of procedural delays and irregularities in the investigation.

¹ *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/094/Corr.1 dated 24 June 2020 (Impugned Judgment).

² See Section 5.18(c) of the Bulletin.

4. The issue before this Tribunal is whether the UNDT erred in its finding that the contested decision was unlawful due to procedural irregularities and in its remand and award of damages. For reasons set out below, we find the Dispute Tribunal did not err in its final order and uphold the rescission of the contested decision, although for different reasons.

Facts and Procedure

5. The Appellant is a former staff member of the IRMCT in Arusha, Tanzania. She joined service as an Associate Legal Officer with IRMCT.

The Complaint

6. As part of the Appellant's induction into service after her initial temporary appointment was extended, she underwent a medical examination by the Medical Officer at the IRMCT Medical Clinic in Arusha on 14 January 2019. During the medical examination, the Medical Officer verbally asked the Appellant for permission to conduct a breast examination. He placed his hands on the Appellant's breasts through the Appellant's clothing.

7. On 15 January 2016, the Appellant reported to the then Registrar of the IRMCT that she had been a victim of sexual misconduct by the Medical Officer during the medical examination, namely the Medical Officer touched her breasts in an inappropriate manner.

8. On 27 January 2016, as prescribed by the Bulletin, the Registrar convened a fact-finding Panel to investigate the Appellant's allegations. The Panel was composed of the Chief, Human Resources Section (HRS Chief) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Chief, Safety and Security Section (SSS Chief) of the ICTY.

9. The Panel interviewed the Appellant, two of her colleagues, the IRMCT nurse, the Medical Officer and the Chief Medical Officer of the ICTY.

10. On 6 June 2016, the Panel submitted its findings to the Registrar pursuant to Section 5.17 of the Bulletin.

11. On 19 December 2016, the Office of the Registrar requested the Panel to provide additional information, which was submitted in a supplemental report on 22 December 2016.

12. The Panel found the Appellant and supporting witnesses were “clear, credible and gave no contradictory information”. They found the Medical Officer as articulate and forthcoming in the interviews but “some of his statements were contradictory when assessed with other reported facts”. For example, he stated he “always” conducts breast examinations during the medical examination of female patients but when informed that two other patients he examined the same day said he did not conduct the breast examination, he responded that he could not remember. However, the Panel did not determine that the Medical Officer lacked credibility in denying “sexual gratification” during the examination. They found no evidence that he had a history or pattern of sexual harassment. The Panel found that it was highly likely that he had not consistently performed breast examinations and he had not consistently conducted them “in accordance with accepted international medical standards”. The Panel also found that there was inconsistent evidence on how the Medical Officer conducted the breast examination, but this could be due to the Medical Officer “lacking attention to detail”.

13. However, the Panel found that the investigation did not prove “clear and convincingly” that the touching of the complainant’s breast was “sexual” in nature, particularly as the complainant was fully clothed and the touch was “perfunctory”. The Panel held it could not determine the Medical Officer’s “intentions” while touching the Appellant’s breasts.

The Contested Decision

14. On 6 February 2017, the newly appointed Registrar informed the Appellant of his decision. Based on the report of the Panel, he did not find sufficient evidence to indicate sexual harassment or other prohibited conduct under the Bulletin (the Contested Decision).

15. The Registrar also informed the Appellant that he would not refer the case for disciplinary action in accordance with Section 5.18(b) of the Bulletin and would instead address the matter through managerial action. It was later revealed that the managerial action consisted of a five-hour training for the Medical Officer on pre-employment medical examinations.

16. On 7 April 2017, the Appellant requested management evaluation of the Contested Decision. On 17 October 2017, the Under-Secretary-General for Management accepted the recommendation of the Management Evaluation Unit (MEU) and upheld the Contested Decision.

17. On 17 July 2017, the Appellant filed an application with the Nairobi Registry of the Dispute Tribunal but on 5 December 2019, at the Appellant's request, the case was transferred to the New York Registry.

18. On 7, 8 and 18 May 2020, the UNDT conducted a hearing and the following witnesses testified: the Appellant, the Registrar of the IRMCT; the HRS Chief, a Legal Officer who was close to the Appellant at the time of the events; the Alternate Focal Point for Women/Gender Officer of the IRMCT; the MSD Director, and an Officer of UN Women as an expert witness on the application the Bulletin.

The UNDT Judgment

19. In its initial Judgment, the Dispute Tribunal rescinded the Contested Decision but found that no further action was needed regarding the Medical Officer based on its erroneous belief that the Medical Officer had since left the Organization. The tribunal also ordered the payment of USD 12,500 to Appellant for moral damages.

20. On 24 June 2020, the Dispute Tribunal issued a correction in accordance with Article 31 of the Dispute Tribunal Rules of Procedure (UNDT Rules). Upon advisement that the Medical Officer was still employed, the tribunal ordered rescission of the Contested Decision and remanded the matter to the IRMCT, to decide, in consultation with DHMOSH, whether additional supervisory or other measures are required for the Medical Officer.

21. The Dispute Tribunal explained that its judicial review was not to determine whether the Contested Decision was correct but rather whether the Administration legally exercised its discretion.³ Upon examining the sole issue of whether the Contested Decision was tainted with procedural irregularities, the tribunal found that by not seeking the MSD Director's feedback in a timely manner, the Registrar failed to take relevant matters into consideration before making the Contested Decision. The tribunal concluded that:⁴

... both the members of the fact-finding panel and the Registrar himself lacked the required subject-matter expertise. Therefore, it was simply impossible for the Registrar to properly determine whether the Medical Officer's conduct amounted to prohibited conduct or professional incompetence. The Registrar was equally ill-equipped to decide

³ Impugned Judgment, para. 17.

⁴ Impugned Judgment, para. 29.

whether the Medical Officer was competent to serve in his position. Moreover, without the Director's timely involvement, it was equally impossible for the Registrar to determine an appropriate remedial measure to address any perceived shortcomings in the Medical Officer's performance.

22. As such, the Dispute Tribunal found the decision-making process was "vitiating by a defect that rendered the contested decision irrational."⁵

23. Additionally, the tribunal found the delay in handling the complaint unjustified. The tribunal noted that under Section 5.17 of the Bulletin, the Panel report must be submitted to the responsible official no later than three months, and in the instant case, this was done almost six months later. The tribunal also expressed concern that following the Panel report, the Registrar did not issue a decision until February 2017.

24. Regarding the Appellant's claim that she was not afforded adequate protection, the tribunal found the Administration had placed adequate methods of protection "to ensure a reasonable working environment while respecting the parties' due process rights."⁶ The tribunal found the Administration lawfully acted within its discretion in fulfilling its obligations under Section 6.4 of the Bulletin.

25. As for remedies, in reviewing the claim for moral damages, the Dispute Tribunal disagreed with the Appellant that the Contested Decision had a negative impact on her career because she had since been promoted to a P-3 level post in a permanent office of the Secretariat in New York.

26. However, because of procedural irregularities, the Dispute Tribunal awarded USD 12,500 in compensation for established harm caused to the Appellant, namely for the emotional distress she suffered as a result of unreasonable delays in the complaint process.

⁵ Impugned Judgment, para. 30.

⁶ Impugned Judgment, para. 40.

Submissions

Appellant's Appeal

27. The Appellant submits the Dispute Tribunal made several errors that yielded a manifestly unreasonable decision, with respect to IRMCT's various failures under the Bulletin. These alleged failures include: (i) the IRMCT's non-referral of the Medical Officer for accountability under Section 5.18(c) of the Bulletin for sexual harassment; (ii) its failure under Section 6.1 of the Bulletin to take protective measures necessary to provide the Appellant with a harmonious work environment during and after the investigation, and (iii) its failure under Section 6.4 of the Bulletin to undertake its "monitoring" obligations during the investigation.

28. The Appellant also says that if the Dispute Tribunal rescinded the Contested Decision that the evidence did not show prohibited conduct, this can only mean that the Dispute Tribunal believed the evidence at hand did establish "possible" misconduct, and if that was the case, this should have triggered mandatory referral for accountability under Section 5.18 of the Bulletin. Also, the tribunal was mistaken when it stated it was not competent to order referral but could only remand the matter. Thus, the Appellant submits the Dispute Tribunal failed to exercise jurisdiction.

29. The Appellant also argues the Dispute Tribunal's decision to not refer the Medical Officer for accountability was manifestly unreasonable as the facts established by the Panel contained all the elements of possible misconduct under the Bulletin.

30. By identifying the defect in the Contested Decision as a lack of subject matter expertise on the part of the Panel or the Registrar in determining whether the conduct of the Medical Officer was prohibited conduct or professional incompetence, the Appellant says the Dispute Tribunal erred because there is no such distinction in the Bulletin. Touching a woman's breast in a manner that does not serve any medical purpose cannot be anything but sexual harassment and cannot be classified as anything but objectionable to a reasonable person. The context of medical examination cannot shield United Nations staff members from accountability. The Dispute Tribunal thus erroneously conflated the standards of sexual harassment and professional misconduct.

31. Because the tribunal did not make a finding that the Panel considered irrelevant matters, such as the intent and motivation of the Medical Officer, it inevitably erred and reached a manifestly unreasonable decision.

32. As for the Appellant's protection claims, she says the Dispute Tribunal made three sets of errors.

33. The first is the tribunal applied the wrong legal standard for evaluating IRMCT's protective measures when it held the IRMCT met its duty by attempting to address the issues the Appellant raised regarding ensuring a harmonious work environment under Section 6.1 of the Bulletin, proper monitoring under Section 6.5 of the Bulletin, and taking appropriate interim protective measures under Section 5.3 of the Bulletin. The Appellant argues that the protective measures put in place by the Administration were inadequate and should have been evaluated based on their effectiveness and result, rather than focusing on the attempts the Administration made to fulfill its protection mandate.

34. The second set of errors allegedly made by the Dispute Tribunal are the purported errors of fact that resulted in a manifestly unreasonable decision, starting with the conclusion that the IRMCT was not required to do more to prevent the Appellant's frequent encounters with the Medical Officer. The moving of the Appellant's office actually increased the encounters, and this was exacerbated by the identity of the complainant being disclosed to the Medical Officer during the investigation. The Dispute Tribunal's finding that IRMCT satisfied its monitoring obligations under Section 6.4 of the Bulletin is based on incorrect factual assumptions as the Appellant did not go to the Hague in August 2018 as a protective measure but that in fact the Appellant was seconded to the United Nations Assistance to the Khmer Rouge Trials (UNAKRT) in Cambodia in August 2018, without the IRMCT's involvement. The Dispute Tribunal's finding that the IRMCT provided appropriate solutions for the Appellant's access to local medical services is also incorrect or distorted. The Appellant's lack of access to a United Nations doctor in Arusha placed her in a dangerous situation, and she also did not have access to a sexual harassment/gender focal point.

35. The third set of errors the Dispute Tribunal allegedly made include its failure to exercise jurisdiction by failing to address or rule on the Appellant's claims for harassment under Section 1.2 of the Bulletin, abuse of authority under Section 1.4 of the Bulletin, and the IRMCT's failure to take interim protective measures under Section 5.3 of the Bulletin.

36. The Appellant also makes several submissions on procedural irregularity by the Dispute Tribunal in refusing to admit testimony from certain witnesses and the lack of due process in seeking to correct its “grave error of fact” in the initial Judgment that the Medical Officer had left his employment.

37. As for remedies, she requests an order that the Medical Officer be referred for accountability, or in the alternative, remand the matter for further fact finding, additional damages for IRMCT’s failure to meet its obligations under the Bulletin, and that paragraph 54 be struck from the Impugned Judgment as it purportedly mischaracterized Appellant’s testimony on her new position and questioned her professional integrity.

Secretary-General’s Answer

38. The Secretary-General or Respondent submits the Dispute Tribunal was correct to refrain from determining that the Medical Officer had sexually harassed the Appellant. The Dispute Tribunal found the fact-finding process to be defective and therefore properly remanded the decision to the IRMCT to review in consultation with DHMOSH whether additional supervisory or other measures (including disciplinary measures) were required for the Medical Officer. Once the IRMCT has determined the next course of action, the Appellant would then be able to contest that course of action, if she so chooses.

39. The Dispute Tribunal was also correct to refrain from ordering the Administration to initiate disciplinary proceedings against the Medical Officer, as the role of the Dispute Tribunal is not to substitute the Administration’s discretion with its own in respect to the disciplinary process but to ensure the Administration applied and followed proper procedures.

40. The Respondent also says the Dispute Tribunal correctly determined the IRMCT took adequate measures of protection, and in particular the tribunal correctly defined the scope of the measures that the IRMCT was obliged to take under the Bulletin. As such, the Secretary-General submits the tribunal did not err in making factual findings regarding the measures undertaken by the IRMCT to protect the Appellant.

41. Finally, the Respondent submits the Appellant has failed to demonstrate the Dispute Tribunal erred in its calculation of the award of compensation. Because the tribunal denied the Appellant’s request to declare that she was the subject of sexual harassment, it did not award compensation for injury to *dignitas*. In the present case, the Appellant has failed to

show how UNDT erred in fact or law when it already awarded compensation for the procedural defect and delay in the investigation.

Considerations

Preliminary matters

42. The Appellant requests a confidential oral hearing before the Appeals Tribunal. She says a hearing is required as the record contains substantial evidence upon which the Appeals Tribunal may reverse the Dispute Tribunal's findings in favour of the Administration. Also, to the extent there are any gaps or ambiguities in the record, an oral hearing (rather than a remand) would assist in the expeditious and fair disposal of the case.

43. Under Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), the Appeals Tribunal may grant an oral hearing if it would "assist in the expeditious and fair disposal of the case". We find that an oral hearing would not assist in expeditiously and fairly resolving the issues on appeal. Further, the Appellant fails to identify the specific evidence to be adduced in an oral hearing or the "gaps" or "ambiguities" in the evidence. An appeal before the Appeals Tribunal is not a rehearing of the matter.

44. Also, although there is no Motion for Confidentiality in this case, in footnote 1 of the Appeal, the Appellant requests the Appeals Tribunal to uphold the Dispute Tribunal's ruling on anonymity for purposes of this appeal. On 21 September 2018, the Dispute Tribunal ordered reciprocal anonymity to the Appellant and the Medical Officer. Given the sensitive nature of the appeal and the potential impact of the allegations on both the Appellant and the Medical Officer, we grant this request.

Merits of the appeal

45. The Bulletin provides a legal framework for complaints of prohibited conduct. Section 2.1 of the Bulletin ensures that: "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". The Bulletin details the process of investigating a formal complaint and the resulting duties and obligations of managers and supervisors, after a complaint is made.

46. The definition of prohibited conduct is set out in Section 1.3 of the Bulletin:

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.

47. Section 5.18 states the responsible official shall take one of three courses of action after the completion of an investigation of a complaint, filed under the Bulletin. The first is that if the report indicates that no prohibited conduct took place, the responsible official will close the case.⁷ The second course of action is that the responsible official can order managerial action if the investigation report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts warrant managerial action.⁸ The third course of action is that if the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action.⁹

Judicial review of the Contested Decision

48. In reviewing the Contested Decision, the jurisprudence of the Appeals Tribunal is clear that:¹⁰

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 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.

⁷ Section 5.18(a) of the Bulletin.

⁸ Section 5.18(b) of the Bulletin.

⁹ Section 5.18(c) of the Bulletin.

¹⁰ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-84, para. 40.

49. We find the Dispute Tribunal correctly reviewed and rescinded the Contested Decision, largely because of procedural irregularities. However, the Contested Decision also contained other substantial errors, including consideration of irrelevant matters such as the Medical Officer's intent in determining whether prohibited conduct occurred. It is important to review these other errors to ensure they are corrected in the future.

50. In the Judgment, the Dispute Tribunal reviewed whether the Contested Decision was tainted by procedural irregularities. It considered the Panel's questioning of the Appellant, the confidentiality of the process, and the lack of involvement of the MSD Director and then held the decision-making process was vitiated by procedural irregularities. The Dispute Tribunal also found the delay in the handling of the Appellant's complaint was unjustified. We accept the Dispute Tribunal's findings on these matters and find no fault in them.

51. The Dispute Tribunal further held that by not seeking the MSD Director's feedback in a timely manner, the Registrar failed to consider relevant matters before making the Contested Decision. We accept the Dispute Tribunal's finding that the Panel and Registrar did not have the requisite expertise or expert evidence before them to determine the medical standards for a breast examination and as such, their finding that the Medical Officer likely had not consistently conducted these examinations "in accordance with accepted international medical standards" was not supportable. As a result, the Contested Decision was unlawful, and we find no fault in the Dispute Tribunal's finding on this.

52. However, by finding the responsible officials lacked the requisite expertise, this assumed that the professional competence of the Medical Officer was the primary relevant evidentiary issue in the determination of whether the prohibited conduct occurred. This may explain why the Dispute Tribunal did not engage in substantially reviewing the reasonableness of the Contested Decision. But the finding of these largely procedural irregularities should not have precluded the Dispute Tribunal in conducting a rationality review of the Contested Decision, which would have further illustrated other errors.

53. In the present case, the Dispute Tribunal did not expressly review the reasonableness, i.e., the rationality and proportionality of the Contested Decision or the reasonableness of the finding that there was no sufficient evidence of prohibited conduct. It did not review the evidence before the Panel to determine if the Panel's findings were supported by the evidence

or if there was a “rational connection” between the information before the responsible official and the Contested Decision that there was no prohibited conduct requiring further action.¹¹

54. The Dispute Tribunal could have examined the reasonableness of the Contested Decision as part of a rationality review. In other words, it could have examined whether the Contested Decision was a decision which a reasonable decision-maker would have made based on the information before it?¹² If so, the UNDT could have concluded the Panel and the Registrar applied the wrong test in determining whether the established facts amounted to prohibited conduct. There is no dispute of the Panel’s finding of fact that the Medical Officer touched the complainant’s breasts over her clothing during an “improperly conducted” breast examination and that the method for conducting the examination was not in accordance with international medical standards. However, the Panel wrongly proceeded to find that the “intentions” of the Medical Officer could not be determined by the Panel in making a finding as to whether the conduct was of a “sexual” nature.

55. This implies the Panel applied an entirely subjective test for determining whether the conduct was sexual harassment. Section 1.3 of the Bulletin defines the prohibited physical conduct or behavior to be of a “sexual nature”, however, this does not mean that this is determined entirely by the intention of the perpetrator.

56. The definition of sexual harassment in Section 1.3 of the Bulletin includes “physical conduct (...) of a sexual nature, or any other behavior 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 (...) or creates an intimidating, hostile or offensive work environment.” A finding of sexual harassment therefore requires the following elements: (i) the conduct in question occurred; (ii) it falls within the legal understanding of sexual harassment and is of a sexual nature; (iii) the conduct was unwelcome and reasonably expected or perceived to cause offence or humiliation, and (iv) it interfered with work or created an intimidating, hostile, or offensive work environment. The conduct does not have to be intentional to be of a sexual nature.

¹¹ See *Belkhabbaz v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873.

¹² *Ibid.*

57. Sexual harassment can encompass numerous types of conduct, some overtly sexual in nature and others more subtle. There is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific. Whether a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case.

58. Importantly, a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct.¹³

59. By unduly relying on its failure to determine the "intentions" of the Medical Officer in reviewing whether the conduct was "sexual" in nature, the Panel and Registrar did not consider all relevant considerations in determining sexual harassment. The intention of the Medical Officer does not necessarily remove the conduct beyond the definition or scope of sexual harassment as it may include conduct that "might reasonably be expected or be perceived to cause offence or humiliation to another".¹⁴ Harassment focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person.¹⁵

60. Both the Panel and the Registrar therefore misconceived the nature of the enquiry they were required to conduct and failed to assess the evidence and determine the conduct based on the appropriate definition of sexual harassment. This misconception also tainted the Registrar's failure to make the required findings to support the referral of the Medical Officer for managerial action.

61. Section 5.18 provides that the responsible official can take only one of three courses of actions depending on the finding of prohibited conduct. In the present case, the Registrar found there was insufficient evidence to indicate sexual harassment or other prohibited conduct in the Bulletin. If so, the only available course of action pursuant to Section 5.18 of the Bulletin would be to close the case. In order to refer a matter for managerial action under

¹³ See *Hallal v. Secretary-General of the United Nations*, Judgment No. UNDT-2011-046, para. 51.

¹⁴ Section 1.3 of the Bulletin.

¹⁵ *Belkhabbaz* Judgment, *op. cit.*, para. 76.

Section 5.18(b), there would need to be a “factual basis for the allegations” while not sufficient to justify the institution of disciplinary proceedings does warrant managerial action. In the Contested Decision, the Registrar did not make a finding that there was a “factual basis for the allegations” but rather found the Medical Officer did not consistently conduct all of the examinations and the circumstances led the complainant to “believe” she “may have been the victim of prohibited conduct”. The Registrar’s reasons conflated professional incompetence with prohibited conduct and created a lack of clarity. Allegations of sexual harassment should be clearly and consistently determined as the consequences of any doubt or lack of clarity in these matters can be prejudicial to the parties and the process.

Failure to protect during the investigation

62. The Appellant says the Dispute Tribunal applied the wrong legal standard for evaluating IRMCT’s protective measures. The Appellant argues the UNDT erroneously held the IRMCT met its duty in regards to ensuring a harmonious work environment and in placing proper monitoring and appropriate interim protective measures, as required by the Bulletin. She submits that the protective measures put in place by the Administration were inadequate, and they should have instead been evaluated based on their effectiveness and the resulting outcome, instead of focusing on the attempts made by the Administration to fulfill its protection mandate.

63. We find no merit in this argument. We find no error of law, fact, procedure, or jurisdiction in the Dispute Tribunal’s finding that the Administration acted lawfully in fulfilling its obligations with regard to instituting protective measures as required by the Bulletin.

64. The Dispute Tribunal also reviewed the Appellant’s claim that the Administration did not respect the confidentiality of the process, but it found no evidence to suggest that confidentiality was breached. The Dispute Tribunal held the delay in the handling of the complaint was unjustified and contributed to the ultimate finding of procedural irregularities. However, it was not satisfied that the Appellant had proven that adequate methods were not put in place to ensure a reasonable working environment while respecting the parties’ due process rights. The Appellant complained the Medical Officer knew the Appellant’s identity. However, the Medical Officer would have needed to know the Appellant’s identity in order to adequately respond to the complaint and allegations against him and speak as to how he

conducted the examination. To do otherwise would have been a violation of his due process rights.

65. We also find no error in the Dispute Tribunal's finding that the IRMCT adequately provided appropriate protection and accommodation to ensure a reasonable working environment and that the Appellant had access to medical services

The Appellant's request for accountability

66. The Appellant says the Dispute Tribunal's "belief" that it lacked competence to refer the Medical Officer for accountability was an error of law and a failure to exercise jurisdiction. The Appellant relies on the Appeals Tribunal decision in *Belkhabbaz* that the Dispute Tribunal had jurisdiction to issue an order of referral for disciplinary action as specific performance under Article 10(5) of the Dispute Tribunal Statute (UNDT Statute).¹⁶ We also recall the Dispute Tribunal has jurisdiction under Article 10(8) of the UNDT Statute, and this Tribunal under Article 9(5) of its Statute, to refer appropriate cases to the Secretary-General for possible action to enforce accountability, although that power has been exercised sparingly and only where the breach or conduct in question exhibits serious flaws.¹⁷ However, to address the Appellant's comparison with *Belkhabbaz*, the conduct complained of in that case was held to be sexual harassment, and therefore it justified the specific performance order to refer for disciplinary action. In the present case, the Dispute Tribunal did not find that the conduct complained of was prohibited conduct but rather there were procedural irregularities that vitiated the Contested Decision. The rescission of the Contested Decision based on this ground differentiates the present case from *Belkhabbaz*.

67. In conclusion, we affirm the rescission of the Contested Decision. In rescinding the Contested Decision, the matter of whether there was prohibited conduct must be reopened and again decided by the Administration. In doing so, the Administration must ensure that the correct test for sexual harassment as outlined above is applied and the appropriate course of action is clearly supported by the findings, as required by Section 5.18 of the Bulletin.

¹⁶ *Belkhabbaz* Judgment, *op. cit.*

¹⁷ *Cohen v. Registrar of the International Court of Justice*, Judgment No. 2017-UNAT-716, para. 46; *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 37; *Finniss v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-397, paras. 37-38.

68. There is also a terminology issue regarding the Dispute Tribunal's Order that should be addressed for clarification. The Dispute Tribunal ordered a "remand" of the matter to IRMCT. A remand to the Administration can only be ordered under Article 10(4) of the UNDT Statute, which gives authority to the Dispute Tribunal to remand "with the concurrence of the Secretary-General of the United Nations" and prior to the determination of the merits of a case. As the Secretary-General has not consented in this matter, the only remedies available to the Dispute Tribunal are contained in Article 10(5) of the UNDT Statute, which allows the UNDT to rescind the Contested Decision or order specific performance and award compensation for harm.¹⁸ The Dispute Tribunal rescinded the Contested Decision, which requires the IRMCT to reopen the complaint of prohibited conduct. The Dispute Tribunal's direction that the IRMCT review and consult with DHMOSH on additional or other measures required for the Medical Officer is meant to ensure that the IRMCT, when again deciding on the Appellant's complaint, issues a decision which is lawful, rational, procedurally correct, and proportionate.¹⁹

The Dispute Tribunal's Process

69. The Appellant alleges the Dispute Tribunal violated her due process rights in correcting the factual error in its initial Judgment without providing her an opportunity to apply for revision of the Judgment based on the error. We find it was in the discretion and authority of the Dispute Tribunal to correct its judgment to ensure accuracy and on its own initiative. This means the tribunal is not obligated to wait for an application or seek the parties' consent to correct its judgments.²⁰

70. Therefore, this argument is without merit.

Remedies:

71. The Appellant submits that additional compensation is warranted for undue procedural delay and seeks moral damages of USD \$20,000 for harm to *dignitas*, emotional harm and harm caused by being forced out her narrow field of work, which she loved.

¹⁸ *Baracungana v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-725, para. 33.

¹⁹ See *Sanwidi* Judgment, *op. cit.*

²⁰ See Article 12 of the UNDT Statute.

72. In the Judgment, the Dispute Tribunal ordered USD 12,500 in moral damages pursuant to Article 10(5)(b) of the UNDT Statute, which provides the tribunal may order: “Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute 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. We find no errors in the Dispute Tribunal’s award of damages. The tribunal accepted the undue delay in the process caused emotional harm and distress to the Appellant. There was no error in the application of the law nor was there an error of fact that resulted in a “manifestly unreasonable decision”. It was within the authority and jurisdiction of the tribunal to determine the quantum of the award based on the evidence and submissions.

74. In the absence of a compelling argument that the Dispute Tribunal erred on a question of law or fact, which is not present here, we will not lightly interfere with the computation of damages by the Dispute Tribunal.²¹ Accordingly, this ground of appeal fails.

75. Finally, the Appellant asks the Appeals Tribunal to strike paragraph 54 from the Dispute Tribunal’s Judgment as it purportedly mischaracterized her testimony regarding her new position at the Secretariat in New York and questioned her professional integrity. The Appeals Tribunal declines this request as there is no authority for the Appeals Tribunal to order the Dispute Tribunal to revise or correct its judgments.

²¹ See *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 37.

Judgment

61. We affirm the Judgment on different grounds and dismiss the appeal.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 10th day of August 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar