



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

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Judgment No. 2021-UNAT-1171

**Kenneth Conteh  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before: Judge Martha Halfeld, Presiding  
Judge Kanwaldeep Sandhu  
Judge Dimitrios Raikos

Case No.: 2021-1505

Date: 29 October 2021

Registrar: Weicheng Lin

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Counsel for Kenneth Conteh: Joseph Amisi

Counsel for Secretary-General: Francisca Lagos Pola

**JUDGE MARTHA HALFELD, PRESIDING.**

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Kenneth Conteh contested the decision to separate him from service with compensation in lieu of notice and without termination indemnity, for misconduct. In Judgment No. UNDT/2020/189, the UNDT rescinded the contested sanction and replaced it with a more clement one. The Secretary-General has filed an appeal asking that the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) vacate the UNDT Judgment.
2. For the reasons set out below, we uphold the appeal and vacate the UNDT Judgment.

**Facts and Procedure**

3. Mr. Conteh began service with the Office of the United Nations High Commissioner for Refugees (UNHCR) on 1 October 2000 in Freetown, Sierra Leone. Between 16 August 2014 and 1 May 2015, he supervised the UNHCR Resettlement Unit in Kakuma, Kenya, serving as Acting Senior Protection Officer at the P-4 level. The UNDT established, and it is not contested on appeal, that during this time, Mr. Conteh sexually harassed three women that worked in the Resettlement Unit in Kakuma (Ms. F, Ms. M and Ms. C) by:<sup>1</sup>

- a. Placing his face into Ms. M.'s cleavage while he was inebriated during a party at the World Food Programme ("WFP") compound in Kakuma in September 2014;
- b. Approaching Ms. M. from behind, putting his arm around her and lifting her breasts with his arm and hands, and whispering in her ear "it's me, your boyfriend, your one true love". This incident occurred during a party at the UNHCR cafeteria in Kakuma on 25 December 2014 when the Applicant was inebriated;
- c. Putting his hand up Ms. F.'s back, underneath her shirt and touching her skin as they walked back with a group of colleagues to the UNHCR compound shortly after Ms. F.'s arrival in Kakuma in August 2014; and
- d. Grabbing Ms. C's bottom on one occasion in Kakuma.

4. On 18 August 2015, UNHCR's Inspector General's Office (IGO) received a complaint of sexual harassment and abuse of authority against Mr. Conteh. The IGO subsequently began an investigation and interviewed 17 witnesses, including Mr. Conteh. Mr. Conteh denied all allegations. On 15 June 2017 the IGO issued its investigation report which concluded that

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<sup>1</sup> Impugned Judgment, para. 25.

Mr. Conteh's behaviour towards the three women constituted misconduct and that there was sufficient evidence to support the allegations of sexual harassment.

5. On 10 August 2017, Mr. Conteh received a letter dated 3 August 2017, notifying him of the allegations of misconduct brought against him. In his response, dated 6 September 2017, Mr. Conteh stated that as he was a heavy drinker at the time, he could "not entirely exclude that [he] acted in the way the women describe[d] it".

6. By letter dated 27 December 2017, Mr. Conteh was informed of the High Commissioner's decision to separate him from service, effective 9 January 2018, with compensation in lieu of notice, and without termination indemnity.

7. On 28 March 2018, Mr. Conteh filed an application with the UNDT contesting the High Commissioner's decision. On 6 November 2020, the UNDT issued Judgment No. UNDT/2020/189.

8. The UNDT found that there was clear and convincing evidence that Mr. Conteh had committed four acts of sexual harassment against Ms. M, Ms. C and Ms. F and that these acts constituted misconduct. The UNDT was also satisfied that the key elements of Mr. Conteh's due process rights had been respected.

9. However, in considering the proportionality of the sanction, the UNDT found that the sanction was unfair and disproportionate. While the Administration had discretion to impose the disciplinary measure that it considered adequate to the circumstances of a case and to the actions and behaviour of the staff member involved, such discretion was not unfettered since it was bound to exercise its discretionary authority in a manner consistent with the principles of due process and proportionality.

10. The UNDT held that in determining the appropriate measure, each case was to be decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating factors. As to sexual harassment, the UNDT considered that relevant factors (such as whether the behaviour of the offender was objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of the victim), especially if combined, deserved the maximal sanction, i.e. the offender's dismissal or separation; however, absent globally those factors, the sanction should be milder, especially when like in Mr. Conteh's case, none of them occurred.

11. The UNDT found that Mr. Conteh was sanctioned for a behaviour that was essentially episodic, was not threatening the victims or persistently annoying them, without specific consequences. Mr. Conteh immediately gave up the harassment when he understood that his “rude advances” were disturbing the complainants. Having considered that the alleged facts did not interfere with the work or created an intimidating, hostile or offensive environment; the conditions themselves of the harassment (perpetrated in non-working occasions and in private locations, in an atmosphere of conviviality), without any ill intent by Mr. Conteh; and the fact that the Mr. Conteh’s professional interactions with the complainants were rare, the UNDT concluded that the established facts had no (or at least a very limited) impact on the work environment. The UNDT also found that it had not been established that Mr. Conteh may have negatively impacted the image and reputation of UNHCR.

12. In the sanction letter, the Administration identified aggravating and mitigating circumstances. As aggravating factors, the Administration considered Mr. Conteh’s supervisory responsibility over the harassed women and the alleged negative impact of misconduct on UNHCR’s image and reputation. As mitigating factors, the Administration considered that Mr. Conteh had expressed remorse and that he had a long and satisfactory service record as a UNHCR staff member, including service in numerous hardship duty stations. In addition to the mitigating circumstances identified by the Administration, the UNDT considered that the fact that Mr. Conteh expressed his intention to contact the complainants to apologize for his behaviour, should also be pondered as mitigating circumstances. Noting that the fact that Mr. Conteh was inebriated when two of the incidents occurred was not a mitigating factor per se, the UNDT found it was relevant as it made unlikely that such kind of incidents might occur again, particularly during working hours.

13. Noting that Mr. Conteh was a long-serving UNHCR staff member with a positive performance record and no previous disciplinary problems, that “ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence”<sup>2</sup> and having considered previous practice of the High Commissioner and the Secretary-General in disciplinary cases, the UNDT concluded that the disciplinary sanction imposed on Mr. Conteh was unfair and disproportionate to the established misconduct.

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<sup>2</sup> *Ibid.*, para. 68.

14. The UNDT therefore ordered that the imposed disciplinary measure be rescinded and replaced with the disciplinary measure of suspension without pay for a period of twelve months effective the date of Mr. Conteh's separation from service; and that Mr. Conteh be subsequently placed on special leave with full pay and receive retroactive payment of his salary and related benefits. As an alternative to the rescission, the UNDT set a sum equivalent to two years' net base salary.

15. The Secretary-General appealed the UNDT Judgment on 6 January 2021 and Mr. Conteh filed his answer on 12 March 2021.

### **Submissions**

#### **The Secretary-General's Appeal**

16. The UNDT exceeded its jurisdiction by substituting the High Commissioner's discretion with its own in setting aside the imposed sanction and ordering a more clement one. The United Nations has a zero-tolerance policy for sexual harassment, which is a policy decision falling within the remit of the Secretary-General and not the UNDT. By sexually harassing, or even sexually assaulting, three female colleagues, Mr. Conteh violated the core values of the Organization. Separating Mr. Conteh from service in these circumstances, especially when this was not the strictest disciplinary measure available, was a reasonable decision within the discretion of the High Commissioner. The UNDT therefore exceeded its jurisdiction by substituting the High Commissioner's discretion with its own in setting aside the imposed sanction and ordering a more clement sanction.

17. The UNDT committed several errors in concluding that the sanction of separation from service was not proportionate to the offence of sexual harassment committed by Mr. Conteh.

18. First, the UNDT erred in law in holding that the sanction of separation from service was not supported by the practice or jurisprudence. The UNDT mischaracterized the pattern of sanctions presented in the Compendium on disciplinary measures since all cases relating to sexual harassment by a staff member in the Compendium resulted in either the dismissal or separation from service of the staff member, with the exception of one case. The UNDT also ignored that several sexual harassment cases in the Compendium resulted in dismissal, a more severe sanction than the one imposed in the present case. The sanction imposed in the present

case was not arbitrary or absurd as it was in line with the majority of the cases of past practice of the Organization and UNAT jurisprudence relating to sexual harassment.

19. Second, the UNDT erred in law and fact in finding that the sanction of separation from service or dismissal should be given only for sexual harassment cases where the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with direct and continuous supervision of the victim; that, in the present case, none of the factors were present; and that absent those factors, the sanction should have been milder. The UNDT's finding has no basis under the legal framework which does not require such factors to be present for the sanction of separation to be proportionate. The UNDT further erred in fact in finding that such factors were not present in the instant case. The three women who had been sexually harassed, indeed sexually assaulted, by Mr. Conteh expressed how they had been intimidated by him and felt uncomfortable. The victims were in a subordinate relationship with Mr. Conteh, since he was the Officer-in-Charge of the Resettlement Unit where they all worked. Having been sexually harassed by the person heading the Unit, the work relationship between the women and Mr. Conteh had become strained and intolerable.

20. The UNDT erred in holding that Mr. Conteh was sanctioned for a behaviour that was essentially episodic; that he had not threatened the victims or persistently annoyed them, without specific consequences; and that he immediately gave up the harassment when he understood that he was disturbing the complainants. Mr. Conteh's behaviour was not an isolated incident but rather it was part of a continuous pattern of seriously inappropriate behaviour. The evidence shows that he sexually harassed three women on four separate occasions, that he harassed one of those women twice and that he was renowned in his unit for being inappropriate in his behaviour with women. Furthermore, Mr. Conteh threatened at least one of the women when sexually harassing her by making it clear that he was her supervisor. In light of the above, the UNDT erred in law and in fact in finding that certain factors need to be present for a sanction of separation from service to be justified and in finding that the present case was absent such factors.

21. Third, the UNDT erred in fact in finding that the Organization failed to consider a number of mitigating circumstances which it should have taken into consideration namely that Mr. Conteh cooperated with the investigators; that he apologized for his actions; and that he requested permission to contact the complainants to apologize for his behaviour. Mr. Conteh never took responsibility for his actions. He did not apologize for, and never tried to remedy, his wrongdoing. It was therefore reasonable for the High Commissioner not to consider those factors as mitigating

factors. Even if UNAT were to consider that these factors were factually present and should be considered in mitigation, the sanction of separation from service should still be considered proportionate to the misconduct, Mr. Conteh having sexually harassed three women.

22. Fourth, the UNDT erred in fact and law in finding that the conditions of the harassment, without any ill intent by Mr. Conteh and the fact that the professional interactions of Mr. Conteh with the complainants were rare, lead to the conclusion that the facts had no impact (or at least a very limited impact) on the work environment. The sexual harassment took place on the United Nations' premises and on the way back to the UNHCR compound where UNHCR staff work and live. The UNDT also erred in its consideration of UNAT's jurisprudence in *Belkhabbaz*,<sup>3</sup> which explicitly states that it is not necessary to establish ill-intent by the offender. The UNDT's conclusion that the facts had no impact or a very limited impact on the work environment is speculative and disregards Mr. Conteh's managerial and supervisory responsibilities over his victims and the fact that he continued to interact professionally with them. By the same token, the UNDT erred in fact and in law when it held that there was no evidence on record to show any specific manner in which Mr. Conteh may have negatively impacted the reputation of UNHCR.

23. Fifth, the UNDT erred in law in considering the likelihood of recurrence Mr. Conteh's misconduct, particularly during working hours, as relevant to the proportionality of the sanction. It was further an error of fact to find that it was unlikely Mr. Conteh would repeat his behaviour, given that the conduct occurred on multiple occasions. The finding of the UNDT is based on the false premise that Mr. Conteh would not have committed the misconduct had he not been inebriated and also presupposes that it is relevant whether the sexual harassment occurred during working hours. Whether Mr. Conteh was inebriated is irrelevant to the proportionality of the sanction. UNAT has repeatedly held that being under the influence of alcohol is no excuse for misconduct and is not a mitigating factor. The UNDT's finding also suggests that Mr. Conteh's actions warrant a less severe sanction because the incidents occurred outside of the working hours. Staff members have to conduct themselves in a manner befitting their status as international civil servants both when at work and off-duty; any consideration of whether misconduct was committed during or outside the working hours constitutes an error of law.

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<sup>3</sup> *Belkhabbaz (formerly Oummih) v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873, para. 76.

24. Sixth, the UNDT erred in law in considering that ordinarily separation from service is not an appropriate sanction for a first offence. The UNDT has chosen to deliberately ignore the UNAT jurisprudence that supports the sanction imposed and has relied on irrelevant UNDT exceptions where the facts materially differ from the present case.

25. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, uphold the decision to separate Mr. Conteh for misconduct and dismiss his application in its entirety.

**Mr. Conteh's Answer**

26. The UNDT did not exceed its jurisdiction. The UNDT recognized that the Administration can and should exercise its discretion to impose a disciplinary measure that it considers adequate to the circumstances of a case before it and to the actions and behaviour of the concerned staff member. It is not to interfere with this discretion unless the sanction imposed appears blatantly illegal, arbitrary, adopted beyond the limits stated by respective norms, excessive, abusive, discriminatory or absurd in its severity. The UNDT, however, cannot stand aside and leave the Administration unrestrained because the Administration must exercise its discretion in a manner consistent with the principles of due process and proportionality. The UNDT was properly guided by statute and case law in reviewing the administrative sanction imposed by the Secretary-General in this case. The Judgment shows the clear steps taken by the UNDT purely in its judicial review role leading to the decision made. The UNDT acted within its jurisdiction when it rescinded the disciplinary measure to replace it with a more clement sanction.

27. The UNDT did not err in finding that the impugned sanction was not proportionate. In considering the proportionality of the sanction imposed, the UNDT carefully laid a foundation for the proper consideration of the provisions of Staff Rule 10.3(b), the merits of the case, the unique circumstances of the case, and aggravating and mitigating circumstances.

28. The UNDT did not err in law in holding that the sanction was not supported by practice or jurisprudence. The UNDT properly considered the High Commissioner's practice in disciplinary matters and the United Nations Compendium on disciplinary measures as well as case law.

29. Contrary to what the Secretary-General suggests, the incidents of misconduct on Mr. Conteh's part should not be viewed as a continuous transaction. They are independent, single and separate incidents in their own right as the UNDT rightly determined when describing them



as “episodic”. Nowhere in the Judgment does the UNDT term the challenged sanction as arbitrary or absurd. The UNDT is very clear that the sanction is unfair and disproportionate and has laid down its reasoning for this finding.

30. The UNDT did not err in law and or fact in finding that in sexual harassment cases certain factors should be present for a sanction of separation from service to be justified and that these factors were absent in this case, leading to the need for a milder sanction. While Ms. M., Ms. C, and Ms. F made statements alluding to Mr. Conteh uttering words to them is not in question, the interpretation cannot be made that his words were harsh, fearful and intolerant of the misconduct. Furthermore, it is not in dispute that Mr. Conteh was not in a professional relationship where any of the three women were his subordinates.

31. The UNDT did not err in fact in finding that the Organization had failed to consider mitigating circumstances that would have led to the imposition of a milder sanction. The UNDT recognized that the Administration identified aggravating and mitigating circumstances in the sanction letter and further considered it proper to introduce Mr. Conteh’s cooperation with the investigators, excusing himself for his actions and request to contact the complainants to apologize for his behaviour as additional mitigating factors. The record demonstrates that Mr. Conteh cooperated with the investigators at all material times. Mr. Conteh’s reference to his inebriation and cultural inclination are not put forth to justify his actions but as mitigating factors in their own right. Mr. Conteh requested permission to contact the complainants and apologize to them, and the UNDT properly considered this as a mitigating factor. The UNDT properly found that the misconduct took place outside of the workplace and had limited impact on the work environment, as well as without ill intent by Mr. Conteh. The Secretary-General has provided no cogent evidence to demonstrate that the image and reputation of UNHCR have been negatively impacted by Mr. Conteh’s misconduct.

32. The UNDT properly found his actions to be episodic, meaning that they were and remain unlikely to recur. The fact that he may have been inebriated at the time they occurred further buttresses this position because, as the record shows, there are no such incidences when he was not inebriated and or when he was at the workplace. Lastly, the UNDT was proper in relying on case law in pointing out that separation from service or dismissal is not a sanction appropriate for a first offence, or offender, as Mr. Conteh’s position was in this case.

33. In light of the foregoing, Mr. Conteh contends that the UNDT did not err in fact or in law in arriving at its decision and requests that UNAT uphold the UNDT Judgment in its entirety.

### Considerations

34. The following UNDT findings have not been disputed in the appeal: i) the facts on which the disciplinary measure was based were established by the appropriate standard of evidence; ii) these established facts legally amount to misconduct (sexual harassment); iii) Mr. Conteh's due process rights during the investigation process were respected.

35. Thus, there is no challenge against the UNDT's finding that Mr. Conteh committed four acts of sexual harassment by:<sup>4</sup>

- a. Placing his face into Ms. M.'s cleavage while he was inebriated during a party at the World Food Programme ("WFP") compound in Kakuma in September 2014;
- b. Approaching Ms. M. from behind, putting his arm around her and lifting her breasts with his arm and hands, and whispering in her ear "it's me, your boyfriend, your one true love". This incident occurred during a party at the UNHCR cafeteria in Kakuma on 25 December 2014 when the Applicant was inebriated;
- c. Putting his hand up Ms. F.'s back, underneath her shirt and touching her skin as they walked back with a group of colleagues to the UNHCR compound shortly after Ms. F.'s arrival in Kakuma in August 2014; and
- d. Grabbing Ms. C's bottom on one occasion in Kakuma.

36. The only issue on appeal is whether the UNDT erred when it found that the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity was disproportionate to Mr. Conteh's misconduct. The disciplinary sanction was imposed under Staff Regulation 1.2 (a) and (b), Staff Rule 1.2 (f) and UNHCR's HCP/2014/4 Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority.

37. On basic rights and obligations of staff (including outside working hours), Staff Regulation 1.2(e) and (f) establish that:<sup>5</sup>

Staff Regulation 1.2

- (e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter,

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<sup>4</sup> Impugned Judgment, para. 25.

<sup>5</sup> Emphases added.

is a fundamental obligation of all staff members by virtue of their status as international civil servants;

(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[.]*

38. In turn, the Standards of Conduct for International Civil Servants (ICSC) (2013) provides at Section 42 that:<sup>6</sup>

The private life of international civil servants is their own concern and organizations should not intrude upon it. There may be situations, however, in which the behaviour of an international civil servant may reflect on the organization. *International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations.* This can also result from the conduct of members of international civil servants' households, and it is the responsibility of international civil servants to make sure that their households are fully aware of this.

39. UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority was issued under the commitment that all international organizations must have "zero tolerance" for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. Such behaviour or conduct is contrary to the spirit of the United Nations Charter, its Staff Regulations and Rules and the Standards of Conduct for the International Civil Service.<sup>7</sup>

40. UNHCR's policy framework is particularly linked to Principle 4 (Contribute to building a harmonious workplace based on team spirit, mutual respect and understanding) and Principle 9 (Refrain from any form of harassment, discrimination, physical or verbal abuse, intimidation or favouritism in the workplace) of UNHCR's Code of Conduct and is intended to support the building of a positive, respectful and motivating environment.<sup>8</sup>

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<sup>6</sup> Emphases added.

<sup>7</sup> Introduction to UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority, available on [https://www.un.org/womenwatch/osagi/UN\\_system\\_policies/\(UNHCR\)policy\\_on\\_harassment.pdf](https://www.un.org/womenwatch/osagi/UN_system_policies/(UNHCR)policy_on_harassment.pdf)

<sup>8</sup> *Ibid.*

41. The “zero tolerance” policy is aimed at providing a safe environment for all United Nations employees, free from discrimination on any grounds and from harassment at work including sexual harassment. The interpretation of the policy allows the Appeals Tribunal to conclude that, as a general rule, it aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.

42. Because suitable deterrent sanctions are meant to be applied to ensure that incidents of sexual harassment are not treated as trivial as a result of the “zero tolerance” policy, it is fundamental that this policy is widely disseminated to all relevant persons, as it was the case at UNHCR, where the respective issuance UNHCR’s HCP/2014/4 was published on its website.

43. This same policy governs the formal process to resolve a dispute involving a complaint of harassment. Section 48 of the policy establishes that after completion of the investigation process, and in cases where the allegations have been established, the Director of DHRM will either decide i) that the case should be closed when the facts reported in the investigation appear in his view to indicate that misconduct has not occurred, or ii) to inform, in writing, the staff member subject of the investigation of their right to reply and to counsel, in cases when the facts reported in the investigation appear to indicate that misconduct may have occurred.

44. The UNDT’s restriction of separation as a sanction only to instances of inappropriate sexual relationships<sup>9</sup> is without authority or merit and undermines the broad spectrum of sexual harassment that can and does occur which requires each case to be determined entirely on their individual circumstances. The severity of the sanction is thus dependent on the circumstances of each case while ensuring the objective of the discipline in these cases which is zero tolerance for these behaviours.<sup>10</sup>

45. In reaching its finding that the sanction was disproportionate, the UNDT erred again when it concluded that the “rude advances” made by Mr. Conteh were not repetitive nor “concretely interfered with the work or created an intimidating, hostile or offensive environment”.<sup>11</sup> It is true

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<sup>9</sup> Impugned Judgment, para. 63.

<sup>10</sup> Introduction to UNHCR/HCP/2014/4.

<sup>11</sup> Impugned Judgment, paras. 58, 60 and 61.

that the evidence on record does not show any kind of extreme physical violence in Mr. Conteh's behaviour. He was a sociable person, who used to enjoy hosting or attending parties, where he would drink and sometimes become inebriated.<sup>12</sup> The events took place outside of the work environment, in the strict sense, even though still in the UNHCR compounds or around them,<sup>13</sup> in what was supposed to be a convivial atmosphere. Regardless of the context in which they happened, the incidents portrayed above still fell under the definition of sexual harassment as per paragraph 5.3 of UNHCR/HCP/2014/4 and caused offence or humiliation to the victims, as correctly found by the UNDT.<sup>14</sup>

46. Moreover, the misconduct concerned people who Mr. Conteh had met in his professional capacity and to whom he was bonded by the work he had at the time when he encumbered the position of Officer-in-Charge of the Resettlement Unit in UNHCR, an Agency whose main objective is to protect people against their own vulnerabilities. Mr. Conteh's position as having supervisory responsibility over the harassed women's functional unit was taken into account by the Administration, as noted in the letter communicating the imposition of the disciplinary measure. Since at least three of them happened in the second half of 2014, the Appeals Tribunal cannot but conclude that they were repetitive, despite the UNDT's conclusion to the contrary.<sup>15</sup> Furthermore, if there is zero tolerance, there should be no requirement for the conduct to be repetitive. Depending on the circumstances, one instance could conceptually be sufficient to be misconduct subject to the sanction of separation.<sup>16</sup>

47. Further, the UNDT erred when it required evidence of harm to the work environment.<sup>17</sup> As a general rule, acts of sexual harassment do not require any concrete or palpable result. Unwelcome advances and inappropriate behaviour towards colleagues such as touching their body parts and making comments of a sexual nature are *per se* grave enough to cause harm. Here, the harm is in the actions themselves and the detrimental effects they have in the environment, such as offense and humiliation.<sup>18</sup> Moreover, there is no requirement of evidence of further individual

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<sup>12</sup> *Ibid.*, para. 17.

<sup>13</sup> *Ibid.*, para. 39.

<sup>14</sup> *Ibid.*, para. 38.

<sup>15</sup> *Ibid.*, para. 60. The UNDT found them "essentially episodic".

<sup>16</sup> Paragraph 5.3 of UNHCR/HCP/2014/4 provides that "[w]hile typically involving a pattern of behaviour, [sexual harassment] can take the form of a single incident".

<sup>17</sup> Impugned Judgment, para. 61.

<sup>18</sup> *Ibid.*, para. 38.

harm other than the inherent individual, social and reputational harm originating from the sexual harassment.

48. In this regard, the UNDT also erred when it found that in light of the absence of ill intent and rare professional interactions with the victims, Mr. Conteh's conduct would have had little or no impact on the work environment. Firstly, because sexual harassment does not depend on ill intent, but rather on the attitude of the person. Secondly, because the frequency of the professional interaction is a minor element in the grand picture of a "zero tolerance" policy. Likewise, cooperation with investigations is not bound to be considered as a mitigating factor, since it is a staff member's duty.<sup>19</sup> In the present case, the Appeals Tribunal noted that Mr. Conteh's initial submission during his interview in the investigation report was to deny any wrongdoing and to diminish his conduct by trying to find reasons to justify his behaviour. Only later did he admit his actions.

49. In any event, according to Staff Rule 10.2, the disciplinary measure imposed on Mr. Conteh was not the most severe one. He did not receive a dismissal sanction, which would be the gravest disciplinary measure. Instead, after having assessed aggravating and mitigating circumstances of the case including the remorse expressed after the events and his long and satisfactory service including in hardship duty stations, the Administration opted for the second most severe one (separation from service with compensation in lieu of notice). It fell under the Administration's discretion to choose which sanction to impose.

50. As previously held,<sup>20</sup>

the Administration has a broad discretion in determining the disciplinary measure imposed on staff members as a consequence of wrongdoing. It 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. Thus, in determining the proportionality of a sanction, the UNDT should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations.

51. As discussed, there were no procedural irregularities in the investigation report and it is undeniable that Mr. Conteh committed at least four acts of sexual harassment at different occasions with different women whom he had a professional relationship with while he

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<sup>19</sup> Staff Rule 1.2(c).

<sup>20</sup> *Ali Halidou v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1070, para. 34.

held a high-level in UNHCR. His position required a much higher standard of behaviour. Sexually harassing individuals is a fundamental violation of the values of the Organization, which directly contravenes the obligation of all staff to uphold and respect the principles set out in the United Nations Charter, including the dignity and worth of the human person. There is no place for sexual harassment in the workplace, as explicitly held by the “zero tolerance” policy. Separating Mr. Conteh from service in these circumstances was not arbitrary and fell within the range of reasonable disciplinary options. Mr. Conteh’s repetitive failure to observe the applicable standard damaged the substratum of trust in a manner rendering the continuation of the employment relationship intolerable. The termination of his employment was accordingly proportionate and the UNDT erred in holding otherwise.

### **Judgment**

52. The appeal is upheld and Judgment No. UNDT/2020/189 is vacated.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of October 2021.

*(Signed)*

Judge Halfeld, Presiding  
Juiz de Fora, Brazil

*(Signed)*

Judge Sandhu  
Vancouver, Canada

*(Signed)*

Judge Raikos  
Athens, Greece

Entered in the Register on this 30<sup>th</sup> day of December 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar