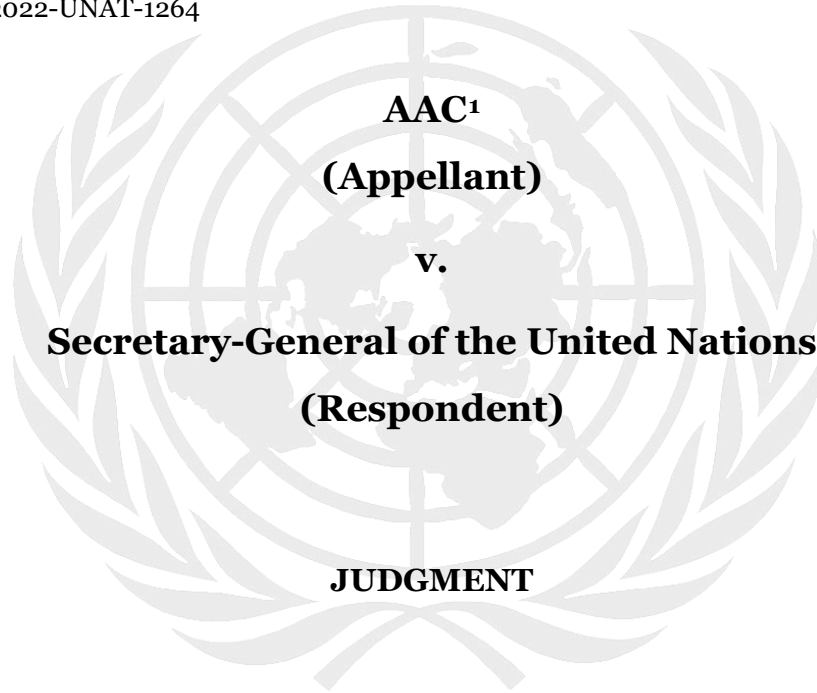




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1264



**AAC¹
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2021-1569
Date of Decision:	1 July 2022
Date of Publication:	19 August 2022
Registrar:	Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Angélique Trouche

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. AAC was until the termination of his appointment employed by the United Nations Children's Fund (UNICEF). He contested the decision to summarily dismiss him for abuse of authority, harassment, and sexual harassment. In Judgment No. UNDT/2021/043, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) held that the allegations of harassment were substantiated but those of abuse of authority and sexual harassment had not been established by clear and convincing evidence. It ordered that the imposed sanction be replaced with the sanction of separation from service with notice and termination indemnity, or six months' net-base salary as in-lieu compensation.

2. For the reasons set out below, we remand the case to the UNDT for additional findings of fact.

Facts and Procedure

3. AAC joined UNICEF as a staff member on 16 October 1990. He served assignments in many countries, including difficult duty stations such as Kabul (Afghanistan). On 27 May 2016, he was appointed as UNICEF Representative for Papua New Guinea (PNG) at P5 level. This appointment was his first assignment in the position of Head of Office. The management of the PNG Country Office was acknowledged to be challenging.

4. Not long after his appointment, AAC ran into difficulty with some of his colleagues and was accused of creating a hostile work environment. It was alleged that he belittled the Deputy Representative of the PNG Country Office (the Deputy Representative) in front of other staff members; shouted at his driver and belittled him; and stopped talking to one of his supervisees (a communication specialist) for several months.

5. On 3 September 2017, the Deputy Representative of the PNG Country Office filed a complaint of harassment and abuse of authority against AAC to the Regional Director, UNICEF. The Regional Director forwarded it to the Deputy Executive Director (DED) Management, UNICEF, and to the Director, Division of Human Resources (DHR), UNICEF.

6. On 6 September 2017, the Director of DHR sent the complaint to the Office of Internal Audit and Investigations (OIAI), UNICEF, with seventeen other grievances about AAC confidentially submitted by staff members of the PNG Country Office.

7. On 19 September 2017, the Regional Director, as a managerial measure, removed AAC from the PNG Country Office. After a period of annual leave, AAC was placed on a supernumerary post in New York. On 24 February 2018, AAC was placed on administrative leave with full pay pending completion of an investigation into AAC's conduct.

8. The OIAI investigation included an on-site investigation at the PNG Country Office from 16 April to 4 May 2018. The OIAI interviewed approximately 40 current and former staff members, including several of the witnesses put forward by AAC. AAC was interviewed in person by OIAI investigators on two occasions, on 18 June 2018 and 30 July 2018.

9. On 5 September 2018, following the completion of the investigation, the OIAI provided AAC with a copy of its draft investigation report. AAC submitted his comments on the report on 24 September 2018. A final copy of the investigation report, including AAC's comments, was sent to the Director, DHR, on 8 October 2018.

10. On 25 October 2018, the Director, DHR, issued a charge letter, which outlined the allegations of misconduct against AAC. The charges against AAC were: i) abuse of authority encompassing harassment; ii) sexual harassment; and iii) failing to ensure a harmonious work environment. The charge letter alleged that AAC's conduct contravened: i) staff regulations 1.2(a), (b), (f), (g) and (m); ii) staff rules 1.2(f), (k), (q), and 10.1(a); and iii) constituted misconduct under various provisions of the internal law of the Organization. On 12 November 2018, AAC submitted his reply to the charges.

11. On 28 December 2018, the DED, Management, wrote to AAC informing him of her findings that he had committed misconduct. Specifically, she found that AAC had: i) harassed and sexually harassed certain UN staff members; ii) made comments at a meeting which were tantamount to inviting staff members to engage in sexual exploitation and abuse; iii) created a hostile work environment; iv) gave gifts to a PNG governmental official; and v) threatened and/or belittled the Deputy Representative. Based on these findings, AAC was summarily dismissed from the service of UNICEF.

12. On 20 February 2019, AAC filed an application before the UNDT to challenge the contested decision. A hearing took place before the UNDT on 17 and 18 March 2021. On 28 April 2021, the UNDT issued the Judgment. The UNDT found that there was clear and convincing evidence of harassment and the creation of a hostile work environment by AAC but

found that the allegations of sexual harassment had not been established. It also found that there was insufficient evidence proving that AAC had irregularly recruited two local consultants. As will be discussed later, the precise factual findings of the UNDT are difficult to fathom from its Judgment. However, the UNDT essentially accepted that AAC had shouted at his driver, had been abrupt and rude to the Deputy Representative and was unduly coercive in his management style. It in addition made a number of sweeping and damning findings and observations about AAC's character and conduct.

13. The UNDT also found that there was sufficient evidence of AAC's gift-giving to third parties within the PNG Government, but the seriousness of the gift-giving remained unclear.

14. The UNDT accordingly partially rescinded the contested decision and ordered that AAC's summary dismissal from service be replaced with the sanction of separation from service with notice and termination indemnity. In the alternative, compensation *in lieu* of rescission in the amount of six months net base salary was awarded.

15. On 21 June 2021, AAC filed an appeal of the Judgment with the United Nations Appeals Tribunal (UNAT).

Submissions

AAC's Appeal

16. AAC requests that the Appeals Tribunal vacate the UNDT Judgment in part and rescind the decision to summarily dismiss him for misconduct and order his reinstatement, or, alternatively, payment of three years' net base salary for the period from his separation through retirement age, plus compensation for loss of pension, damage to personal and professional reputation, loss of career opportunities and costs for abuse of process.

17. AAC contends that the UNDT erred in fact in its assessment of allegations of harassment and erred in law in finding that the alleged misconduct warranted separation.

18. AAC takes issue with several of the factual findings and submits that the UNDT erred in fact in its assessment of the evidence of harassment and ignored key relevant evidence which would have cast a different light on the facts. He makes various submissions about the factual evidence and maintains that the UNDT erred in several respects.

19. He alleged that the working environment was problematic before he arrived and that there had been “mobbing” of him when he arrived and sought to effect a turn around.

20. Further, AAC submits that the UNDT did not explain how it set in-lieu compensation at six months’ net-base salary when it replaced the sanction of summary dismissal with separation with notice (three months’ salary) and termination indemnity (12 months’ salary).

The Secretary-General’s Answer

21. The Secretary-General submits that AAC fails to show that the UNDT erred in concluding that: (a) allegations of harassment had been established by clear and convincing evidence; (b) the sanction of separation from service with notice and termination indemnity was proportionate, or alternatively, (c) six months’ net base salary, as in-lieu compensation, was appropriate.

22. The Secretary-General maintains that the UNDT correctly found that allegation of harassment had been established by clear and convincing evidence. The UNDT confirmed the establishment of several facts, including the treatment of the Deputy Director and the Regional Emergency Advisor, AAC’s not speaking to a supervisee for several months, and the shouting at staff.

23. The Secretary-General contends that AAC’s claim that the overwhelming number of complaints against him were linked to “an already hostile environment in the office” and the “possibility of mobbing” is without basis.

24. Under the Appeals Tribunal’s settled jurisprudence, some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT reviewed in detail the evidence contained in the investigation report and after an oral hearing, found that harassment had been established by clear and convincing evidence. The Secretary-General submits that AAC fails to demonstrate that the UNDT erred in its findings.

25. Second, the Secretary-General submits that the UNDT correctly considered that there was sufficient finding of misconduct as it relates to harassment, to justify imposition of a severe sanction and that it was justifiable for the Administration to take the view that due to the pervasive nature of the hostile work environment created by AAC he was not suitable to remain in UNICEF.

26. The Secretary-General submits that in addition to allegation of harassment, the UNDT also found that AAC had “engaged in giving gifts to third parties within the government of PNG” which amounted to an appearance of conflict of interest.

27. Considering the overall circumstances of the case, past practice and the absence of sexual misconduct, the Secretary-General conceded that the UNDT correctly found that separation from service with notice and termination indemnity would have been proportionate, instead of dismissal.

28. Considering the above, the Secretary-General submits that AAC fails to demonstrate that the UNDT erred by deciding that termination was warranted under the circumstances.

29. The Secretary-General submits that AAC’s claim that in-lieu compensation in the amount of six months’ net base salary is too low by comparison to the revised sanction of separation from service with notice and termination indemnity is unsupported. As a staff member separated for misconduct, AAC could only be paid a termination indemnity at the discretion of the Secretary-General, not exceeding one half of the indemnity to which he would otherwise be entitled, under Annex III to the Staff Regulations and Rules, para. (c). Absent misconduct, this indemnity would have been twelve months and therefore, at most, AAC would have received a maximum of six months’ salary as termination indemnity. With an additional compensation for a termination notice of three months’ salary, AAC could only hope for a maximum of nine months’ salary of total indemnities at best, and three months’ salary (due for termination notice) as a minimum. As a result, in-lieu compensation of six months’ net base salary is adequate to place AAC in the same position in which he would have been, had the Administration imposed on him the sanction of separation from service with notice and with termination indemnity.

30. While AAC seeks three years of net base salary as an alternative to rescission and reinstatement, he does not demonstrate the exceptional circumstances that would warrant exceeding the maximum of two years’ net base salary. Therefore, his claim must be rejected and the UNDT finding must be upheld.

Considerations

31. The essential question for determination on appeal is whether the UNDT correctly held that the alleged misconduct of creating a hostile work environment and giving of gifts was proved in accordance with the standard of clear and convincing evidence. In other words, did the evidence establish the alleged misconduct to a high degree of probability?

32. The definition of harassment in UNICEF's CF/EXD/2012-007 reads:

Harassment is any improper and unwelcome conduct that has or might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an intimidating, hostile or offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. Harassment normally involves a series of incidents.

33. A finding that AAC was guilty of harassment requires proof that he engaged in improper and unwelcome conduct which was offensive or humiliating to others and tended to abuse, demean, belittle, etc.

34. The main contention of AAC on appeal is that the UNDT basically got the facts wrong. The question then is: did the UNDT err on questions of fact, resulting in a manifestly unreasonable decision within the contemplation of Article 2(1)(e) of the Statute of the UNAT?

35. At its essence, therefore, this case involves strongly contested disputes of fact about whether AAC conducted himself in a manner that was abusive and created a hostile working environment. The Administration says he did. AAC strongly denies it. Thus, it was necessary for the UNDT to resolve the disputes of fact in accordance with the conventional judicial methodology for resolving disputes of fact.

36. Faced with the two irreconcilable versions, and in order to come to a conclusion on the disputed issues, it was thus necessary for the UNDT to satisfy itself and pronounce on the credibility and reliability of the various factual witnesses and the probabilities. Findings of credibility and reliability depend on the UNDT's impression about the veracity of any witness who testified before it in the hearing. That in turn will depend on a variety of subsidiary factors such as: i) the witness' candour and demeanour in the witness box; ii) the witness' latent and blatant bias against the staff member; iii) contradictions in the evidence; iv) the probability or improbability of particular aspects of the witness' version; v) the calibre and cogency of the witness' performance when compared to that of other witnesses testifying in relation to the same incident; vi) the opportunities the witness had to experience or observe the events in question; and vii) the quality, integrity and independence of the witness' recall of the events.

37. As a final step, the UNDT is then required to determine whether the Secretary-General succeeded in discharging his burden of proof to show that it was highly probable that the staff member was a harasser. That task is difficult where the probabilities are equipoised. In such a case, the party bearing the onus of proof (invariably the Secretary-General in disciplinary cases) may lose his case solely on the basis that he failed to discharge that onus and did not meet the standard of proof required.

38. Unfortunately, the key factual findings of the UNDT in relation to the relevant issues are not clearly explicated in the Judgment.² The Judgment does not coherently identify the evidence relied upon to make the critical findings against AAC. Besides not referring to the witnesses who testified on behalf of both parties, there is no overt attempt in the Judgment to analyze or assess the testimony of such witnesses to determine its reliability and credibility with a view to making specific factual findings on the probabilities. The assessment of the evidence for the most part appears to have been based on the hearsay analysis in the OIAI report and the statements of witnesses who did not appear before the UNDT. Most of the findings are vague, impressionistic, unsubstantiated, rely on untested hearsay, or merely repeat factual allegations from witness statements without reaching conclusive findings. Prejudicial opinions are expressed about AAC's character which are accepted as true and accurate without any clearly articulated supporting factual foundation for them.

39. In addition, the UNDT's findings are inconsistent. In some instances, the UNDT discounted the evidence as subjective and unreliable but then went ahead and relied upon that very same evidence to make adverse findings against AAC. Thus, as counsel for AAC correctly pointed out, the UNDT acknowledged that many accounts of the other staff members (in the OIAI report) lacked sufficient probative value when looked at in isolation and were too subjective to stand as evidence of harassment. But then it later contradicted itself by holding that the hearsay comments illustrated the unhealthy work environment and found unsustainably that it was improbable that staff members would speak in these negative terms unless there was truth to the allegations. It thus simultaneously, and incongruously, rejected and accepted the same evidence.

² The relevant paragraphs of the Judgment dealing with the issue of harassment and the creation of a hostile work environment are paragraphs 47-75; while those dealing with the giving of gifts are paragraphs 143-146.

40. In the final analysis, there has not been proper fact-finding in relation to the key issues in this case. The Judgment in many parts appears to be founded upon impressions drawn from the OIAI investigation report and subjective opinions about AAC's character offered by persons who did not testify before the UNDT. It is accordingly not possible to clearly ascertain and test the factual basis of the UNDT's conclusion that harassment was established as highly probable. There simply has not been a fair trial of the issues.

41. A finding that a staff member is a harasser will have serious consequences. It likely will impact significantly on his or her life, status, financial security, and family life. AAC had an unblemished employment history with the Organization which spanned 35 years during which he admirably and successfully rose up the ranks. If his impressive career is to be terminated on the grounds that he is a harasser, the factual basis for that decision must be established properly, in accordance with the conventional methodology and prerequisites of judicial fact finding, as highly probable on clear and convincing evidence.

42. It is best therefore for the matter to be remanded to the UNDT in terms of Article 2(4)(b) of the Statute of the UNAT with a request that it make clearer factual findings with fuller and more systematic reference to the evidentiary basis upon which they are made. The findings must distinctly identify the testimony of the witnesses upon which they are based and discuss the nature of the testimony (hearsay, opinion, character etc.), its admissibility, relevance and cogency, as well as the weight afforded to it. At danger of repetition, it must be emphasized that disputes of fact must be resolved with regard to the reliability and credibility principally of the testimony of the witnesses who testified and the inherent probabilities.

43. The additional factual findings by the UNDT should be made taking account of the directions and comments in relation to the various paragraphs of the Judgment as set out herein below.

The directions of this Tribunal

44. **Ad paragraph 47** – what evidence is there of AAC having consistently and regularly shouted at staff members? Identify every staff member at whom and the occasion where AAC shouted at staff members.

45. **Ad paragraph 47** – What precise conduct or treatment of the Deputy Representative amounted to harassment as defined in the UNICEF policy?

46. **Ad paragraph 48** – What evidence establishes the fact that AAC stared at the Deputy Representative in an intimidatory manner?
47. **Ad paragraph 52** – What precisely was “the manner and the tone” of the remark? What evidence is relied upon to prove the manner and tone of the remark? Of what precisely was “the manner and tone” of the remark made to the Deputy Representative probative? Does the UNDT hold that the manner and tone of the remark constituted harassment or other misconduct?
48. **Ad paragraph 54** – On what evidentiary basis is it concluded that AAC responded to the Deputy Representative in an abrupt manner?
49. **Ad paragraph 54** – On what evidentiary basis is it concluded that the Deputy Representative was “intimidated” or “belittled”?
50. **Ad paragraph 56** – Does the UNDT reject the contentions made by staff members in the OIAI investigation interviews that AAC’s actions “went beyond bad management practice”? To which “actions” do the contentions refer?
51. **Ad paragraph 57** – Does the UNDT make any factual findings regarding the opinions, observations and comments about AAC’s personality? For example, does the UNDT concur with the allegations that AAC was “incredibly narcissistic” and was inclined to “look at people in an aggressive way”? If so, on what evidence are such findings made and relied upon to establish the alleged misconduct of abuse and harassment?
52. **Ad paragraph 57** – What evidence proves that AAC shouted at staff in the office or hallways or during meetings?
53. **Ad paragraph 57** – What evidence is there that AAC called chiefs of programme sections “jokers, clowns and idiots”?
54. **Ad paragraph 57** – What evidence is there of AAC banging the table?
55. **Ad paragraph 57** – What findings does the UNDT make regarding AAC’s alleged use of offensive language?

56. **Ad paragraph 57** – In what respects is the colloquial expression “shoot from the hip” offensive?

57. **Ad paragraph 58** – Does the evidence confirm that AAC’s management style was “erratic, misogynistic, homophobic and prone to gossip behind people’s backs”? Set out fully the evidentiary basis for any such finding.

58. **Ad paragraph 59** – On what basis does the UNDT conclude that unproven, subjective comments of staff members, almost entirely of a hearsay nature, are of probative value credibly corroborating “other stronger evidence”? What precisely is the nature of the “other stronger evidence” and what does it prove?

59. **Ad paragraph 61** – The UNDT is required to set out (with reference to the relevant testimony of all the witnesses who testified before it) the basis of its conclusion (proven to the standard of clear and convincing evidence) that AAC created “a work environment of intimidation, rife with gossip”.

60. **Ad paragraph 61** – Has it been established as a fact that AAC called a former UNICEF consultant “gay”? If so, in what respect was such comment offensive or contributory to a hostile work environment?

61. **Ad paragraph 61** – What evidence proves that AAC called: i) a UNICEF consultant “fat”; ii) a communications specialist “a witch”; and iii) section chiefs “jokers, clowns or idiots”?

62. **Ad paragraph 63** – What finding does the UNDT make regarding the fact that AAC and the communication specialist were not on speaking terms? What aspect of AAC’s conduct in this regard contributed to a hostile work environment?

63. **Ad paragraph 64** – Precisely what evidence presented to the UNDT by the Deputy Representative and the Regional Emergency Adviser paints “a clear and convincing basis for a finding of harassment”?

64. **Ad paragraph 65** – What weight, if any, did the UNDT place on the statements of AAC’s witnesses who testified that he was not abusive and in fact enjoyed their full support? Provide full reasons for rejecting this evidence and preferring the statements of other witnesses adverse to AAC.

65. **Ad paragraph 65** – What is the evidentiary basis for the UNDT’s conclusion that AAC did not enjoy the support of a large number of his staff? Is this finding made exclusively on the basis of untested hearsay evidence in the OIAI investigation report? In which event, set out the nature and content of the hearsay and provide an explanation for why it should be afforded significant probative value.

66. **Ad paragraph 66** – What is the evidentiary basis for the finding of the UNDT that AAC had a “propensity to shout at and belittle [his] staff”? Precisely which staff members did AAC shout at and belittle, and when and where did this conduct occur?

67. **Ad paragraph 72** – On what evidence does the UNDT rely to conclude that AAC’s “style of communication was unduly coercive with the use of shouting”?

68. **Ad paragraph 72** – On what evidence does the UNDT base its finding that “there was minimal listening to the views of others and there was belittling of their contributions”? To whose views, where and when, did AAC not listen? Whose views, where and when, did AAC belittle?

69. **Ad paragraph 74** – The UNDT is requested to present a fuller and clearer factual basis for its finding that AAC mishandled the change process which “clearly manifested in a behaviour pattern that was intimidating to staff”. Which staff members were intimidated by the alleged behaviour pattern? When and where were they so intimidated?

70. **Ad paragraph 74** – The UNDT is requested to set out all the instances (established factually by admissible reliable, credible and convincing evidence) of AAC’s alleged: i) shouting; ii) desk pounding; iii) inappropriate name calling; and iv) gaslighting.

71. **Ad paragraph 146** – The UNDT is requested to set out and discuss all the evidence in support of the allegation of “gift giving” by AAC. Has it been established by admissible, reliable, credible evidence that AAC made any gifts other than the scarf (valued at USD 20) given to the PNG Secretary for Social Welfare?

72. **Ad paragraph 146** – Did the giving of a USD 20 scarf to the PNG Secretary for Social Welfare violate any specific rule of the Organization or constitute misconduct? Set out fuller details of any violation and the seriousness of any alleged misconduct of this kind.

73. The UNDT should elaborate on any other factual findings upon which it has based its general conclusion that AAC harassed staff members and created a hostile working environment.

74. In making the factual findings required in terms of these directions, the UNDT is required to refer to the testimony of the witness who testified before it in relation to the specific issue and to explain why that testimony is to be favored above any contradictory testimony of AAC or any of the witnesses who testified on his behalf.

75. Where the UNDT in making any factual finding relies on testimony other than that of a witness who testified in the hearing before it, such as the OIAI investigation report, or other hearsay, character, or opinion evidence, it should explain and justify the weight to be attached to such evidence in light of it not having been subject to cross-examination or being otherwise less reliable.

Judgment

76. The following orders are made: i) the final determination of this appeal is postponed *sine die*; ii) the matter is remanded to the UNDT in terms of Article 2(4)(b) of the Statute of the UNAT for additional findings of fact as set out in the directions in this Judgment; iii) the UNDT is directed to do the additional fact finding and to serve copies of its written findings on the parties within 30 days of the issuance of this Judgment; iv) AAC may file with the UNAT any further submissions in relation to the additional findings within 10 days of receiving the findings of the UNDT; v) the Secretary-General may file with the UNAT any further submissions in relation to the additional findings within 5 days of the expiry of the time period in paragraph iv) of this order; and vi) the Registrar is directed to set the appeal down for final determination in the session of the UNAT scheduled for October 2022.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 19th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar