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

Judgment No. 2023-UNAT-1311

**Balint Szvetko**

**(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations**

**(Appellant/Respondent)**

## JUDGMENT

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| Before: | Judge John Raymond Murphy, Presiding<br>Judge Graeme Colgan<br>Judge Gao Xiaoli |
| Case No.: | 2022-1691 |
| Date of Decision: | 22 March 2023 |
| Date of Publication: | 22 March 2023 |
| Registrar: | Juliet Johnson |

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| Counsel for Balint Szvetko: | Jason Biafore, OSLA |
| Counsel for Secretary-General: | Francisca Lagos Pola |

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Balint Szvetko contested the decision of the United Nations High Commissioner for Refugees (UNHCR) to separate Mr. Szvetko from service on the grounds of misconduct, with compensation in lieu of notice and without termination indemnity in terms of Staff Rule 10.2(a)(viii). By Judgment No. UNDT/2022/026,[1] the UNDT rescinded the contested decision, replaced it with a written censure, and set a sum equivalent to two years' net base salary, based on his salary at the time of his separation, as compensation in lieu of rescission.

2. The Secretary-General has filed an appeal before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).

3. For the reasons set out below, we grant the appeal and reverse the UNDT Judgment.

## Facts and Procedure

4. The Secretary-General appeals against the Judgment of the UNDT (Judgment No. UNDT/2022/026) rescinding the decision of UNHCR to separate the Respondent, Mr. Szvetko, from service on the grounds of misconduct, with compensation in lieu of notice and without termination indemnity in terms of Staff Rule 10.2(a)(viii).

5. At the time of his dismissal, Mr. Szvetko served as an Associate Supply Officer, at the P-2 level with UNHCR in Tunisia.

6. The UNDT set out the relevant facts as follows:[2]

> … Sometime towards the end of May 2018, around the 24th or 25th, the Applicant attended a UNHCR office retreat [at] a hotel outside of Budapest, Hungary.
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> … The incidents which led to the impugned decision mostly occurred during that retreat. The Applicant made an inappropriate comment (using the word mountains to refer to her breasts) to a fellow colleague, Ms. S, while at the swimming pool; he is also accused of having made another inappropriate comment to anther colleague, Ms. A (that the water jets in the pool/jacuzzi could be pleasurable between a woman's legs).
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> … The Applicant admits only the first comment and denies the second one.

[1] *Szvetko v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/026.
[2] *Ibid.*, paras. 8 to 25.

… At some point during the same retreat, the Applicant received a meme on his mobile phone. He describes it as an advertisement for a wristwatch, "depicting a blurred out naked man in the background with a large gold watch prominent in the foreground". He showed the meme to several colleagues, including Ms. S. Most laughed it off as funny, but Ms. S took offense at having been showed the meme.

… There was a staff party at the retreat on the evening of 24 May 2019. As the party was winding down, the Applicant joined a group of people, including his colleagues, as they went around the hotel knocking on doors to get others to join the party.

… The Applicant cannot say for sure if the knock on Ms. S's door was by him or one of the other revellers; it could have been any of them, he says. Whereas she took offence at her door being knocked, several others testified that the knocking on their doors did not annoy, offend or harass them.

… It is in the investigation report, that at an unspecified time the Applicant stopped Ms. A along the corridors of the UNHCR Office in Budapest and said that his friend was selling a watch and insisted that she look at the photo on his phone which was a picture of a watch with a penis underneath it.

… The Applicant unequivocally denies this allegation, and queries why Ms. A did not report it given the offence that the Respondent now claims his action caused her.

… On 20 June 2019, the Inspector General's Office ("IGO") received allegations of sexual harassment implicating the Applicant. An investigation into the allegations was opened on 28 June 2019.

… The IGO interviewed 11 individuals. On 1 April 2020, the Applicant was interviewed as the subject of the investigation.

… On 20 April 2020, the IGO shared the draft investigation findings with the Applicant. The Report states that the Applicant "engaged in prohibited conduct by: a) using inappropriate and offensive language; b) showing inappropriate pictures on his mobile phone; and, c) knocking on hotel room doors of female staff members late at night."

… The Applicant was given the opportunity to respond to the draft investigation, which he did on 1 May 2020.

… The Respondent submits that those comments "were taken into account for the finalization of the investigation report ("IR") dated 5 May 2020."

… On 8 June 2020, the Applicant was notified of the allegations of misconduct.

… The Applicant responded to the allegations on 24 August 2020 and submitted a supplemental response with the assistance of counsel on 18 September 2020.

… The Respondent considered the Report and the Applicant's response to it, and found that there was clear and convincing evidence that he

> a) Made comments of a sexual nature to Ms. S (using the word mountains to refer to her breasts) during an UNHCR retreat in May 2018;
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> b) Made comments of a sexual nature to Ms. A (suggesting that she direct the water jets in the pool/jacuzzi between her legs) during the same retreat;
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> c) Showed a "watch" photograph or "meme" which contained male genitalia to Ms. S and Ms. A, on separate occasions (at the May 2018 retreat and in the UNHCR office in Budapest, respectively); and
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> d) Knocked on Ms. S's hotel room twice, late at night (during the May 2018 retreat).
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> … The Applicant was found to have violated staff rule 1.2 (f), paragraph 4.2 of UNHCR Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4) and Principles 2, 4 and 9 of UNHCR Code of Conduct.
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> … On 18 December 2020, the Applicant was notified of the decision to separate him from service with compensation *in lieu* of notice and without termination indemnity pursuant to staff rule 10.2(a)(viii).

7. On 18 March 2021, Mr. Szvetko filed the application with the UNDT challenging the decision to separate him and alleged that the decision was unlawful because: a) the facts on which the sanction was based had not been established for each charge; b) the established facts did not qualify as misconduct under the Staff Regulations and Rules; and, c) the sanction was not proportionate to the offence. The Secretary-General filed his reply on 20 April 2021 contending that the facts had been established to the required standard of proof and constituted misconduct. He argued further that the sanction was proportionate to the gravity of Mr. Szvetko's misconduct.

8. On 24 January 2022, the UNDT issued Order No. 006 (NBI/2022) to inform the parties that this matter would be adjudicated on the papers, to which end the parties were invited to file their closing submissions. Both parties filed their closing submissions, as directed, on 31 January 2022.

**The Judgment of the UNDT**

9. The Judgment of the UNDT in this matter is a careful, thoughtful and well-reasoned exposition and application of the relevant principles to the facts. It is thus worthy of full consideration and analysis.

10. The UNDT held that it had been established by clear and convincing evidence that Mr. Szvetko had: a) made comments of a sexual nature to Ms. S (using the word mountains to refer to her breasts) during the UNHCR retreat in May 2018; b) made comments of a sexual nature to Ms. A (suggesting that she direct the water jets in the pool/jacuzzi between her legs) during the same retreat; c) showed a "watch" photograph or "meme" which contained male genitalia to Ms. S and Ms. A, on separate occasions (at the May 2018 retreat and, at an unspecified time, in the UNHCR office in Budapest, respectively); and d) knocked on the door of the hotel room of Ms. S twice, late at night (during the May 2018 retreat).

11. The UNDT held further that the established facts amounted to misconduct and that Mr. Szvetko had failed to comply with his obligations under various relevant provisions, in particular: i) Staff Regulation 1.2(b) which provides that staff members shall uphold the highest standards of efficiency, competence and integrity; ii) Staff Rule 10.1 which provides that a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant; and iii) Staff Regulation 1.2(a) and Staff Rule 1.2(f) which provide that every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination or harassment, including sexual harassment.

12. The UNDT also concluded that the conduct in question constituted sexual harassment as defined in paragraph 5.3 of the UNHCR Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4) as follows:

> **5.3 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 excepted or be perceived to cause offence or humiliation to another. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of

> behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

13. The UNDT accepted that the behaviour in question constituted conduct with sexual connotations reasonably perceived as offensive to the complainants and indisputably unwelcome.

14. Mr. Szvetko has not filed a cross-appeal challenging any of the findings of the UNDT in relation to his conduct or the characterisation of it as misconduct in terms of the legal framework. The issue on appeal is therefore limited to whether the UNDT erred in concluding that the sanction was disproportionate.

15. The UNDT thoroughly reviewed the law in relation to the question of sanction. It first pointed out that Staff Rule 10.2(a) provides for a variety of disciplinary measures besides separation or dismissal, including: i) written censure; ii) loss of one or more steps in grade; iii) deferment, for a specified period, of eligibility for salary increment; iv) suspension without pay for a specified period; v) a fine; vi) deferment, for a specified period, of eligibility for consideration for promotion; and vii) demotion with deferment, for a specified period, of eligibility for consideration for promotion.

16. The UNDT also had regard to Staff Rule 10.3(b), which provides that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct; and that in determining the appropriate measure, each case must be decided on its own merits, taking into account the particulars of the case, including aggravating and mitigating circumstances.

17. The UNDT then conducted an extensive analysis of existing case-law precedent and distilled the following principles for application to the issue.

18. The starting point is the premise that the Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behaviour of the staff member involved and deference is called for unless the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity.

19. However, due deference does not entail uncritical acquiescence. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. A sanction will be arbitrary and irrational, and thus disproportionate and illegal, if it bears no rational connection or suitable relationship to the proven misconduct and the purpose of progressive or corrective discipline. Hence, the discretion of the Administration is not unfettered since it is bound to exercise its discretionary authority in a manner consistent with the due process principles and the principle of proportionality. Likewise, the principles of equality and consistency of treatment in the workplace dictate that where staff members commit the same or broadly similar offence, the penalty, in general should be comparable.

20. Thus, the UNDT concluded that the principle of proportionality requires that the sanction should not be more excessive than is necessary for obtaining the desired result, and that the most important factors to be taken into account include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his past conduct, the context of the violation and employer consistency.

21. The UNDT went on to express the view that in the assessment of accusations of harassment the test 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. Thus, it is not necessary to establish that the alleged offender was ill-intended for determining sexual harassment. However, the lack of ill-will by the offender could be relevant in the assessment of the proportionality of the sanction.

22. In this case the behaviour was indisputably of a sexual nature because the objectionable comments and images related to intimate parts of the body. The behaviour was also clearly unwelcome and offensive. However, context is important and the UNDT took account of the fact that most of the misbehaviour occurred during the recreational part of the retreat. On this basis, the UNDT concluded that the misconduct in the present case was not severe in nature. The comments and showing of photographs, while wholly inappropriate, were, in the opinion of the UNDT, made in jest or suggestively but without the aim of harming or harassing anyone.

23. As to the showing of the meme, the evidence established that it contained only a sexually explicit (but not pornographic or prurient) picture. According to the testimonies collected by the investigators, the nature of the meme was silly and fun, with sexual connotations only in the background. While showing it was certainly inappropriate, it was a

questionable attempt at humour "amongst colleagues in moments of relaxation in the office, without sexual advances and in no targeted way".

24. The UNDT did not accept as an aggravating factor the claim that Mr. Szvetko engaged in victim blaming by saying that the complainants' reactions were exaggerated and unreasonable. He merely questioned the legitimacy of the reaction given the context, in order to defend himself and to demonstrate that there was no intention to offend the victim at all.

25. The UNDT recognised that the policy of zero tolerance for sexual harassment will always be a highly relevant consideration. The policy, however, does not rule out the use of progressive discipline to remedy sexual harassment in appropriate cases. In a legal assessment of the case, the reference to the "zero tolerance" policy refers to the attitude of the Organization to promptly and seriously react towards harassment. As a matter of law, however, in the stated view of the UNDT, "proportionality remains a principle of parity which cannot be derogated from by the employer". One understands by this that "zero tolerance" does not require dismissal as a sanction for every instance of sexual harassment. The principle of proportionality obliges the UNDT to give full consideration to less drastic and most suitable means to give effect to the objectives of the Administration. The question to be answered in the final analysis, it reasoned, is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable.

26. Applying these principles to the case at hand, the UNDT concluded:[3]

> … [T]he incidents in this case carried no substantial effect towards the victim apart for a very limited nuisance (and soon after promptly stopped) (…).
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> … The framework of the main facts is a retreat in an hotel abroad, in an afterhours context; the incident that happened in the office is episodic and without impact on the work relationship.
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> … Some mitigating factors must be taken into account, such as the Applicant's unblemished work record, his admission to certain allegations, the cooperation from the outset of investigation, his apology to one of the victims.
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> …

[3] *Ibid.*, paras. 80-82 and 84-93.

… In its practice, the Administration often applied the sanction of dismissal or separation from service…for cases of sexual harassment that entailed touching intimate parts of a person's body, or for inappropriately touching colleagues in different occasions outside working hours, especially when the behaviour was repetitive or connected with other facts of misconduct (such as discriminatory or insulting comments, comments on physical appearance or abuse of authority).

… (…) [W]e note that there have been cases where the Administration applied only a censure for verbal and physical assault.

… As to sexual harassment (not combined with other additional facts of misconduct), in its case law the Tribunal considers relevant factors such as whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with a direct and continuous supervision of the victim. These factors, especially if combined, although of course not relevant for the misconduct to occur but only for the proportionality test, deserve the maximal sanction, that is the offender's dismissal or separation. However, absent globally those factors the sanction should be milder, especially when, like in the present case, none of them occurred.

… The present case is similar on some points to *Gelsei* UNDT/2021/007 where the staff member shared multiple Facebook messages with a colleague that had sexual content or a clear sexual innuendo, and links to images of genitals and to a website hosting a sex shop, overcoming the boundaries of a professional conduct with a supervisee and sharing a room with her during a mission.

… Among the distinctions between the two cases, however, is the fact that the memes shared in *Gelsei* were targeted to the complainant and were even more sexual in nature; the accused staff member engaged in exchanges of a sexual nature with a supervisee, so the disparity of power between him and the victim aggravated his responsibility for a conduct which was abusive and protracted for some time.

… Ultimately, the Tribunal in *Gelsei* determined that the sanction imposed in that case (loss of steps, deferment of promotion and managerial action) was proportionate to the misconduct found to have occurred therein.

… In *Gelsei,* therefore, although the conduct was much more serious, the sanction applied was more lenient than the one applied to the Applicant in the present case.

… The Applicant in this was sanctioned harshly for less serious behaviour, which was essentially isolated, was not threatening the victims or persistently annoying them. Moreover, the Applicant immediately gave it up once he realized his behaviour was unwelcome. With reference to the case at hand, there is no evidence at all on record produced by the Respondent showing that those alleged facts concretely interfered with the work or created an intimidating, hostile or offensive environment; the conditions themselves of the harassment (perpetrated on non-working occasions and mostly in private locations, in an atmosphere of conviviality), without any ill intent by the

> Applicant can lead to the conclusion that the facts had no impact (or at least a very limited impact) on the work environment.
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> … It is also relevant to recall the judgment by UNAT in case *Michaud* 2017-UNAT-761, where a staff member was only sanctioned with a written reprimand for allegedly similar conduct (in the case, making sexually suggestive inappropriate comments to a supervisee).
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> … In light of the above considerations, the Tribunal finds that the disciplinary measure imposed in this case – separation from service with compensation *in lieu* of notice and no termination indemnity - is unfair and disproportionate to the established misconduct, which deserves a more clement disciplinary sanction. It should properly have been more lenient than *Gelsei* and more similar to that applied in *Michaud*.

27. On this basis the UNDT opted to rescind the contested decision, replaced it with a written censure, and set a sum equivalent to two years' net base salary, based on his salary at the time of his separation, as compensation in lieu of rescission.

28. The Secretary-General filed his appeal against the Judgment on 17 May 2022. Mr. Szvetko filed his answer on 18 July 2022.

## Submissions

### The appeal of the Secretary-General

29. The Secretary-General submits that the UNDT exceeded its jurisdiction by usurping and substituting the High Commissioner's discretion with its own in setting aside the imposed sanction and ordering a more clement sanction. He argues that it is within the sole discretion of the High Commissioner to decide among the disciplinary measures available, and to set policy priorities by deciding that there is zero tolerance with regard to certain behaviour.

30. The Secretary-General argues that the Tribunals may only interfere and rescind or modify a sanction imposed where the sanction imposed is "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity". The sanction imposed by the Administration in this case was neither in that it was consistent with the Secretary-General's zero-tolerance policy for sexual harassment, a policy widely communicated to the staff.

31. The Secretary-General argues that the UNDT did not appreciate the gravity of the sexual harassment in this instance.

32. The Secretary-General goes further and argues that the UNDT erred in law in considering that the sanction of dismissal or separation from service is warranted only in the presence of the certain "relevant factors", namely whether the behaviour of the offender is objectively unlawful or harsh, fearful, repetitive, persistent, intolerable and incompatible with direct and continuous supervision of the victim.

33. But even if it was permissible to review on the basis that relevant factors were not considered, according to the Secretary-General, none of the "relevant factors" were present in the instant case. The impugned behaviour was fear inducing, repetitive and persistent, as shown by Ms. S who after being "repeatedly sexually harassed in the pool" and elsewhere described how afraid she felt when Mr. Szvetko knocked on her door late at night. Moreover, he maintains that the absence of ill will was not a relevant consideration. The legal definition of sexual harassment under the UNHCR Policy on Sexual Harassment excludes the relevance of the offender's intentions.

34. The Secretary-General contends further that the UNDT erred in finding that the picture of a penis lacked shocking content and was not pornographic or prurient. A picture of a penis can reasonably be expected or be perceived to cause offence or humiliation, which it did to both women. Whether it was shocking, prurient, or pornographic is irrelevant and should not have been considered. By taking these factors into account and lowering the sanction to the lowest sanction available, the Secretary-General argues, the UNDT has endorsed the patriarchal notion of "boys will be boys" which excuses the bad behaviour of men towards women as nothing more than fun and humorous. The endorsement of this notion undermines the very purpose of the Secretary-General's zero-tolerance policy.

35. In addition, it is submitted that the UNDT erred in fact in finding that Mr. Szvetko immediately stopped sexually harassing Ms. S and Ms. A after the first incident and that the incidents in this case carried no substantial effect and were more in the way of limited nuisance.

36. The Secretary-General accordingly requests the appeal to be granted and for the Judgment to be reversed.

**Mr. Szvetko's Answer**

37. Mr. Szvetko submits that the Secretary-General has failed to demonstrate that the UNDT erred in any way in its determination that the sanction was unfair and disproportionate. In this regard, he aligns fully with the findings of the UNDT that taking all the relevant factors into consideration dismissal was not an appropriate sanction in this case.

38. While Mr. Szvetko accepts that it cannot be reasonably or appropriately argued that sexual harassment misconduct is not exceptionally serious and need not be dealt with in a firm and expeditious manner, the "zero tolerance" policy remains subject to the formal processes established under the legal authorities within the Organization's internal justice system. There is no indication that the zero-tolerance policy has been promulgated, as part of the issuances of the Organisation, at least to the extent that zero-tolerance means automatic loss of employment where sexual misconduct is established following a duly constituted investigation and disciplinary process that respects all elements of procedural fairness.

39. He argues that there are degrees of severity to sexual harassment misconduct. A passing suggestive glance or remark, for example, is not the same offence as a violent sexual assault or even an inappropriate touch, and neither are the examples of misconduct at issue in the instant matter. Accepting rationally that there exists a gradation in sexual harassment offences, it is appropriate that such graded misconduct be met with a gradation of imposed sanction. The Administration's reliance on a zero-tolerance policy to circumvent this requirement, and sustain this unjust result, should not be countenanced.

40. Mr. Szvetko points out that the Administration accepts the concept of graded misconduct of a sexual nature. In *Gelsei* it actually defended a sanction other than separation in the litigation of that matter. The fact that there, the conduct was graver than in the instant case, and yet the sanction imposed was dramatically less severe than that imposed here is inconsistent with proportionality or the principle of parity. Staff members who commit similar offenses should generally be given similar sanctions.

41. Mr. Szvetko submits also that the UNDT was not manifestly unreasonable in setting the amount of in-lieu compensation at two years' net base salary.

42. Mr. Szvetko accordingly requests the appeal to be dismissed.

## Considerations

43. The submission of the Secretary-General (oft repeated before us in disciplinary cases) that the UNDT exceeded its jurisdiction, by setting aside the imposed sanction because it is within the sole discretion of the Administration to decide among the disciplinary measures available, is misguided and reveals a lack of understanding of the nature of judicial review on the basis of the principle of proportionality.

44. The Secretary-General does not have an unfettered discretion on the question of sanction. Like all public executives and administrators across the world he is subject to the principle of legality which embodies proportionality. The UNDT is not only permitted but is obliged to interfere where a disciplinary sanction is lacking in proportionality.

45. In view of the Secretary-General's puzzling persistence in making the same unsustainable and untenable arguments that review of the proportionality of a sanction usurps his authority, we hope it may be of some assistance to repeat what we said with regard to the basic doctrine and principles of judicial review on proportionality grounds in *Samandarov*:[4]

> … (…) The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.
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> … The main criticism of the impugned Judgment by the Secretary-General is that the UNDT usurped his discretion by failing to show due deference in substituting its own preference of sanction for that of his. The criticism, with respect, is somewhat overstated. It is undeniably true that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc. But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial

[4] *Samandarov v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-859, paras. 23-25 (internal footnotes omitted).

> assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.
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> … Our jurisprudence has expressed the standard for interference variously as requiring the sanction to be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" or to be obviously absurd or flagrantly arbitrary. The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

46. To accept the submission of the Secretary-General would negate the power of review and leave the officials of the Administration free from judicial supervision in their employment decisions.

47. Likewise, to argue, as counsel for the Secretary-General does in this case, that it was somehow inappropriate for the UNDT to consider whether certain objective criteria (irrelevant or relevant factors) were taken into account or ignored, is equally mistaken. In assessing whether the Administration has imposed a proportionate sanction, the UNDT is obliged to determine if the responsible functionary applied his or her mind to the relevant considerations of proportionality and excluded irrelevant factors. If a functionary tasked with a duty to act proportionately were to relegate a factor of obvious and paramount importance to one of insignificance, and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind to the objective factual substratum upon which a proportional decision should rest. The assessment of proportionality by its very nature is a factual inquiry requiring the UNDT to review and balance all the competing considerations to determine whether less drastic and more suitable means might better have accomplished the necessary disciplinary objective. The argument that such an inquiry on the part of the UNDT is erroneous fails to appreciate the methodology of judicial review on proportionality grounds.

48. Hence, the approach of the UNDT, recognising that there are degrees of severity to sexual harassment misconduct, was correct. Moreover, drawing the line between acceptable flirtation and sexual harassment is never easy. As Mr. Szvetko argues, a passing suggestive glance or remark is not the same offence as a violent sexual assault or even an inappropriate

touch. A gradation in sexual harassment offences necessarily implies a gradation of possible sanctions. And the existence of a zero-tolerance policy to sexual harassment does not alter that. As the UNDT correctly reasoned, the zero-tolerance policy does not rule out the use of progressive discipline. Zero tolerance merely refers to the attitude of the Organization to promptly and seriously react towards harassment. The principle of proportionality therefore obliges the Administration to give full and proper consideration to less drastic and the most suitable means to achieve the objectives of the disciplinary policy. The requirements of the zero-tolerance policy may well be adequately met in a particular case involving a lesser infringement (a passing inappropriate remark for instance) by the imposition of another penalty such as demotion, suspension, a fine etc. The ultimate penalty accordingly does not apply in every case.

49. In the premises, the UNDT did not err in any respect in embarking upon the factual inquiry of considering and balancing the relevant and irrelevant factors that were taken or not taken into account by the Administration in making the contested decision. The Judgment of the UNDT is well-reasoned and correct in its methodological approach.

50. That said, the argument that the UNDT erred factually and legally resulting in a manifestly unreasonable decision is on firmer ground. Some of the UNDT's findings are speculative, disregard the evidence and misapply the applicable legal framework.

51. The UNDT's finding that there was an immediate cessation of the harassment is not accurate. The evidence on record shows that after making comments about Ms. S' breasts, Mr. Szvetko proceeded to show her a picture of a penis on his phone and then later on went about knocking on colleagues' bedroom doors (possibly including that of Ms. S) late at night. He also showed Ms. A a meme of a penis, and, on a separate occasion, made inappropriate comments on how water jets could be pleasurable between a woman's legs.

52. The policy of zero tolerance, *inter alia*, targets continuous inappropriate behaviour which points to the possibility of a pattern or disposition. Mr. Szvetko not only sexually harassed two women but sexually harassed those two women twice in quick succession. His cumulative behaviour exhibits a disposition, which in this instance caused the complainants significant discomfort and anxiety and impacted on their ongoing professional relationship with Mr. Szvetko. The UNDT accordingly erred firstly in finding that this conduct was not serious because it endured for a limited duration of time.

53. The UNDT likewise erred in its appraisal that the picture of a penis lacked shocking content and was not pornographic or prurient. Showing a colleague a picture of a penis can cause offence or humiliation, and whether it was shocking, prurient, or pornographic, although relevant, is not decisive. The behaviour was puerile and offensive; and offence was taken. It was compounded by the comments about breasts and the water jets, as well as the unwelcome knocking on the door of Ms. S. The two women confirmed to the investigators that they felt uncomfortable, shocked, and disgusted by the prohibited conduct. All individuals are entitled to be free of this kind of puerile behaviour in the work context. Making unwelcome, suggestive, sexual comments or innuendos to colleagues and showing them photographs of genitalia is unbecoming and disregarding of sensibilities, it violates the obligation of an international civil servant to uphold the highest standard of integrity and naturally would undermine professional confidence. Persons of mature character would know this.

54. Further, and importantly, at the time of the incidents the two complainants worked with Mr. Szvetko in the UNHCR's Budapest office in the same section of the office. The objectionable behaviour, and the complainants' responses to it, as just said, inevitably would have impacted on the work relationship with possible lasting effects. Mr. Szvetko's very presence at the office would have been an ongoing reminder to the complainants of his upsetting distasteful actions.

55. The behaviour of Mr. Szvetko thus reflected poor judgement and a deficient consciousness on his part about its potential for harm to his relationship with his colleagues. The offensive conduct looked at cumulatively (the inappropriate remarks, sharing the photograph of genitalia and the knocking on the door late at night) went beyond the limits of acceptable flirtation or playful banter. The conduct was inconsistent with the applicable ethos expected by the Organisation from those responsible for executing its mandate. The damage to trust and confidence accordingly rendered a continued employment relationship with Mr. Szvetko less tenable. This factor was a highly relevant consideration in determining a proportionate sanction. As we stated in *Mbaigolmem*,[5] the Organisation is entitled and obliged to pursue a severe approach to sexual harassment. The message needs to be sent out clearly that staff members who sexually harass their colleagues normally should expect to lose their employment.

[5] *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 33.

56. Accordingly, the UNDT erred in fact in finding that the sexual harassment had no substantial effect and in its assessment of the nature and severity of the misconduct, which was persisted in for the duration of a significant part of the retreat, caused obvious discomfort, anxiety, humiliation and embarrassment to the complainants, and, in the final analysis, undermined the collegial professional relationship.

57. In so far as Mr. Szvetko has argued that the sanction is disproportionate for want of consistency, it must be agreed that the principle of equality of treatment of staff members (the parity principle) is always an important consideration. Similar cases should be treated in the same way. However, there are limits to the parity principle and perfect consistency will be difficult to achieve in a multiple agency Organisation operating in different contexts around the globe. No approach will provide clear cut answers as to what constitutes a suitable disciplinary sanction in every single case. The imposition of a sanction is not a mechanistic process which leads to easily predictable solutions. The Administration has to consider a wide range of often conflicting considerations which may be difficult to resolve. Sanctions applied in previous cases are no more than a guide, and the Administration, in accordance with the principle of deference, should enjoy a margin of appreciation to flexibly impose different sanctions provided they fall within a reasonable range of proportionate options. This will especially be the case where there has been a shift in social *mores* in the workplace, as is the case with conduct of a sexual nature in the current climate, and where the Organisation has communicated unequivocally to staff members that a very high standard of behaviour is expected of them in such regard.

58. Hence, while the conduct in this case was less egregious than other instances of sexual harassment that have led to dismissal in the past and may reasonably have been sanctioned with a lesser penalty, it does not follow that dismissal was not reasonably appropriate in light of the damage to confidence it caused. In these circumstances, the decision to impose the sanction of separation fell within the reasonable range of disciplinary options and was one to which the UNDT ought to have deferred. The sanction was proportionate and the UNDT erred in holding otherwise.

59. The appeal must be granted.

## Judgment

60. The appeal is granted and Judgment No. UNDT/2022/026 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2023 in New York, United States.

| *(Signed)* | *(Signed)* | *(Signed)* |
|---|---|---|
| Judge Murphy, Presiding | Judge Colgan | Judge Xiaoli |

Judgment published and entered into the Register on this 22nd day of March 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar