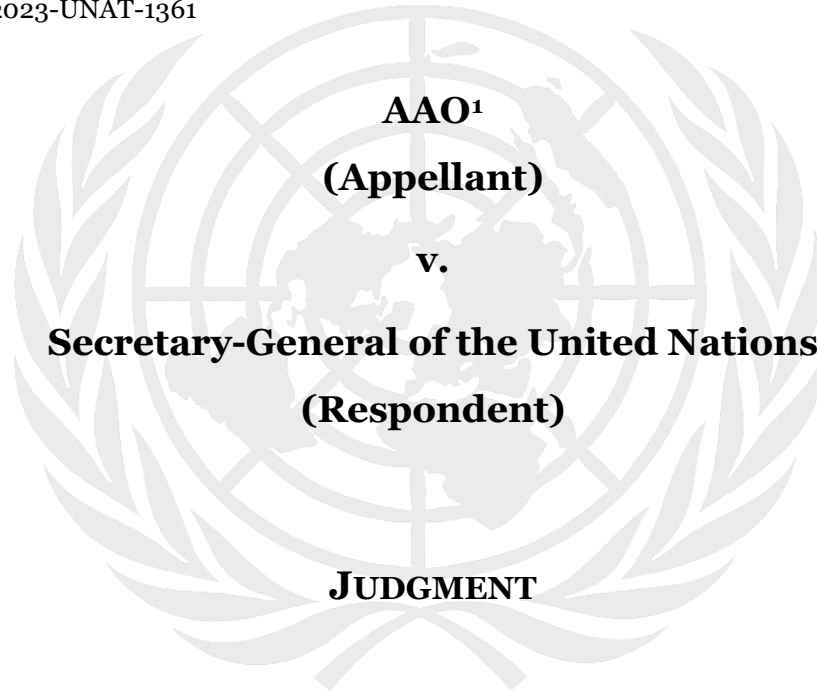




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1361



Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Martha Halfeld
Case No.:	2022-1734
Date of Decision:	30 June 2023
Date of Publication:	25 July 2023
Registrar:	Juliet Johnson

Counsel for Appellant: Jeffrey C. Dahl
Counsel for Respondent: Amanda Stoltz

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. The Appellant, AAO, is a former staff member of the United Nations Office on Drugs and Crime (UNODC). He was separated from service after the Administration determined that he had sexually harassed and harassed an individual consultant with UNODC, Ms. V (the complainant). AAO challenged his separation from service (the contested decision) in an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).
2. By Judgment No. UNDT/2022/071 (the impugned Judgment), the Dispute Tribunal dismissed AAO's application in its entirety.
3. AAO has filed an appeal of the impugned Judgment before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons to be elaborated in this Judgment, the Appeals Tribunal grants AAO's appeal, reverses the impugned Judgment and remands the case to the Dispute Tribunal for further proceedings before a different UNDT judge.

Facts and Procedure

5. Prior to AAO's separation from service he served as a Social Affairs Officer at the P-3 level in the Data Development and Dissemination Unit (DDDU), UNODC, Vienna. AAO had previously supervised the complainant during her internship with UNODC, but during the relevant period, the complainant had been re-hired as a consultant and had a different First Reporting Officer (FRO), Mr. B. Nonetheless, at the time of the alleged incidents the complainant worked under AAO's supervision on projects which he managed.
6. In September 2017, the Appellant invited the complainant to join him on a mission to conduct training in South Korea.
7. Prior to their departure on mission, in November 2017, the Appellant is alleged to have suggested to the complainant, in face-to-face conversations and via e-mails, that he and she share a room or Airbnb accommodation on the night of 8 December 2017 in Seoul at the tail end of the mission, and, on at least one occasion, offered to pay for the accommodation. The content of the allegedly offensive e-mail correspondence is not in dispute; it was conducted in German but has been translated into English. The relevant part of the correspondence on

8 November 2017 begins after the Appellant requested the complainant to look at accommodation prices. The complainant replies:

I have already looked. Basically, there are all sorts of accommodations between 50 and 500 euros! At booking.com there are always good deals - if you give me a price range I can reserve two rooms. This is very fast. Also for the airport shuttle either the shuttle will drive us to Seoul on Friday to the new accommodation (instead to the airport) or on Saturday from Seoul accommodation to the airport.

8. To this the Appellant responded:

OK price range of 50- 100 should be OK, but I am more in line with your budget. Maybe you'll find something on Airbnb where you have two rooms or separate beds or something like that. I can ask if we can take the shuttle on Friday to Seoul, I really do not want to ask for Saturday.

9. The complainant considered the suggestion to find something on Airbnb with separate beds amounted to a proposal to share a room and was thus sexually suggestive. On 21 November 2017, the complainant advised AAO that Airbnb was "too complicated", to which AAO responded with a link to "booking.org". The complainant subsequently booked two separate hotel rooms for each of them.

10. The complainant next alleges that on 3 December 2017, during the flight to South Korea, the Appellant spoke to her incessantly for about six hours regarding matters of a personal nature, such as his recent divorce and his relationship with a woman in Costa Rica; and that he eventually expressed romantic feelings towards the complainant, and stated that, despite recent sensitivity training, he did not care about the Organization's principles regarding supervisor-supervisee personal relationships.

11. The complainant alleges furthermore that on 9 December 2017, on the return flight from South Korea, the Appellant told her that he had brought her on the mission for both personal and professional reasons. On landing in Vienna, the complainant phoned a colleague and a friend (Ms. S.) and reported to her what had transpired on the trip to South Korea.

12. Following a period when the complainant felt she was subjected to a hostile work environment due to rejecting the Appellant's advances in connection with the trip to South Korea, the complainant filed a complaint of sexual harassment, harassment and abuse of authority against AAO with the Office of Internal Oversight Services (OIOS) on 20 July 2018.

13. During the subsequent investigation by OIOS, the complainant stated in her interview that she was discomforted by what she perceived to be unwelcome sexual advances by the Appellant.

14. The transcript of the complainant's interview by OIOS reveals that the complainant made repeated reference to other incidents of sexual harassment by another staff member. It appears that shortly prior to the trip with the Appellant to South Korea the complainant had been the victim of sexual harassment by that other staff member, which behaviour had clearly affected her adversely and caused her distress and anxiety.

15. The complainant alleged further that between January and July 2018, after she returned from the mission to South Korea, the Appellant changed his behaviour towards her and created an intimidating and hostile work environment for her, including by: i) closely and excessively monitoring her work and movements in the office; ii) treating her rudely in team meetings; iii) making demeaning remarks to or about her in work contexts; and iv) raising his voice at her in public settings in the workplace.

16. In addition to interviewing the complainant and colleagues in the work unit, OIOS interviewed AAO. He informed the OIOS investigators that he was surprised by the complaint against him as he considered that he had always had a very good relationship with the complainant. He explained that he had taken the complainant on the trip to South Korea because he felt she was best suited for the mission. He denied that he had proposed to the complainant that they should share a room or suggested that he would pay for it. He essentially argued that the e-mail proposing the Airbnb arrangement had been misinterpreted. He maintained that it had never been his intention to suggest that they should share the same room.

17. Regarding the allegation that he had excessively monitored or controlled the complainant's behaviour and movements following the trip to South Korea, the Appellant denied that there was anything untoward or unacceptable about his interactions with the complainant and commented that "it seems like it's a psychological problem that she had". He also denied the various incidents raised by the complainant regarding his behaviour, or offered a different interpretation of them, and thus denied that he had abused his authority or created a hostile working environment.

18. OIOS also investigated and took statements from other witnesses who made damaging, adverse observations about the Appellant's behaviour in relation to other persons on other prior occasions. This evidence is mostly hearsay and was not explored with the Appellant by OIOS during its investigation.

19. OIOS concluded its investigation of the matter on 28 June 2019, and in its report, made the following findings:²

... OIOS' investigation found that [the Appellant] sexually harassed and abused his authority vis-à-vis [the complainant] by sending her an e-mail on 8 November 201[7] in which he suggested that they share a room on the last night of an official trip to South Korea.

... OIOS' investigation found that [the Appellant] harassed and abused his authority vis-a-vis [the complainant] by:

(i) controlling her movements and creating a hostile working environment after she refused his advances, and she reproached him for his conduct towards her;

(ii) making offensive comments on International Women's Day – 8 March 201[8]- as witnessed by [Mr. R] and confirmed by [Ms. K];

(iii) humiliating her and being rude to her in the presence of other colleagues during team meetings as confirmed by [Messrs. R and K];

(iv) causing her embarrassment by making comments about her age during a dinner in June 2018 as confirmed by [Ms B];

(v) speaking to her using the loud tone especially when she had done something wrong, as explained by [Mr. R]; and

(vi) raising his voice towards her during a discussion on 5 July 2018, and by being harsh and unfriendly with her during the subsequent meeting, as confirmed by [Mr. B].”

20. The ultimate conclusion of OIOS was that “[t]he established facts constitute reasonable grounds to conclude” that the Appellant failed to observe the standards of conduct expected of a United Nations civil servant. It is important to emphasise that OIOS (constrained by its investigative methodology) did not decide that the allegations had been established as probable

² Appellant's Annex 8, OIOS Investigation Report, Case No. 0574/18, paras. 129-130.

on a preponderance of evidence, or as highly probable on the evidentiary standard of clear and convincing evidence. Quite properly, it limited its definitive pronouncement to a finding, on the available evidence, of probable cause, i.e., that reasonable grounds existed to believe that the alleged misconduct had occurred.

21. On 24 September 2019, the Director of the Administrative Law Division, Office of Human Resources, issued a memorandum entitled “Allegations of misconduct”. The Appellant was requested to provide any written statements or explanations he might wish to give in response to the allegations of misconduct. On 29 November 2019, the Appellant filed his response. In his response, and consistently since then, the Appellant denied that he misconducted himself in any way towards the complainant.

22. On 19 May 2020, notwithstanding OIOS making no such finding itself, the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC), concluded that OIOS’ investigation established by clear and convincing evidence that the Appellant made unwelcome sexual advances towards the complainant in November to December 2017, and from January to July 2018, created an intimidating and hostile work environment for her. The USG/DMSPC concluded that the Appellant’s actions constituted serious misconduct in violation of Staff Regulation 1.2(a),³ Staff Rule 1.2(f)⁴ and Sections 2.1 and 3.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). In the contested decision, the USG/DMSPC decided to impose the disciplinary measure of separation from service, with compensation in lieu of notice and with 25 per cent of the termination indemnity otherwise applicable, pursuant to Staff Rule 10.2(a)(viii)⁵.

23. On 3 August 2020, the Appellant submitted an application to the UNDT challenging the contested decision (the Application). On 4 September 2020, the Secretary-General filed a reply.

24. By Order No. 49 (GVA/2022) of 8 April 2022, the UNDT instructed the parties to provide written submissions on the use of prior conduct as evidence in disciplinary investigations, to identify whether an oral hearing would be needed, and to provide a list of

³ Secretary-General’s Bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

⁴ *Ibid.*

⁵ *Ibid.*

potential witnesses, if any, explaining the relevance of each testimony for the determination of the issues in dispute.

25. By Order No. 58 (GVA/2022) of 19 May 2022, the UNDT “decide[d] to hold a hearing to hear witnesses exclusively related to the matter of prior conduct and moral damages”. With regard to the other disputed factual and legal matters, the UNDT pronounced itself “satisfied with the extensive evidence on record and [would] issue its determination based on the papers”.⁶

26. The UNDT held a hearing between 13 to 15 June 2022, at which AAO and four other unidentified witnesses gave testimony.

27. On 28 July 2022, the UNDT issued the impugned Judgment.

28. In the impugned Judgment the UNDT first addressed the use of “prior conduct evidence”. The UNDT referred to certain allegations of prior misconduct in the sanction letter and the OIOS investigation report that did not involve the complainant. The Appellant argued that his rights had been violated during the investigation by the improper reliance upon these allegations which had created a bias against him and masked the lack of clear and convincing evidence in relation to the sexual harassment complaint made by the complainant in this case. The UNDT concluded that the consideration of prior conduct could not be considered as corroborating, as the prior incidents referred to a different set of factual circumstances involving different persons and contexts. It held that corroborating evidence needed to be directly linked to the evidence gathered in relation to the same set of facts or circumstances.⁷ Moreover, and most importantly, there was no evidence that the prior conduct was properly investigated and established at the standard of clear and convincing evidence.⁸ It was therefore not possible to conclude that a pattern of conduct had been established. This was particularly so in light of the fact that none of these persons had made a complaint against the Appellant.⁹ Accordingly, the UNDT concluded that the prior conduct could not be relied on in any way.

29. The UNDT nonetheless held that the facts on which the disciplinary measure was based had been established through clear and convincing evidence and amounted to sexual

⁶ AAO *v. Secretary-General of the United Nations*, Order No. 58 (GVA/2022), para. 12.

⁷ Impugned Judgment, para. 37.

⁸ *Ibid.*, para. 45.

⁹ *Ibid.*, para. 53.

harassment and harassment, the disciplinary measure applied was proportionate, and the Appellant's due process rights had been respected.¹⁰ Accordingly, the UNDT dismissed the application.

30. In finding that the Appellant was guilty of sexual harassment the UNDT accepted the evidence of the complainant, which it considered to be "congruent, clear and objective".¹¹ However, in its Judgment it provides no explanation for why it rejected the evidence of the Appellant and favoured the complainant's interpretation of the events. It drew an adverse inference against the Appellant on the basis that on the flight to South Korea he had discussed with the complainant the details of his divorce and his relationship with another woman. It also found that in the e-mail of 8 November 2017 he had "*insisted* to share a common place in an Airbnb"¹² with the complainant. The UNDT's finding on sexual harassment was based almost exclusively on this narrow factual foundation. The specific findings of the UNDT in regard to the question of sexual harassment are discussed more fully later in this judgment.

31. The UNDT's findings in relation to workplace harassment are drawn entirely from the witnesses' statements in the OIOS investigation report.

32. There is no discussion in the impugned Judgment of any evidence presented to the UNDT during the hearing of 13-15 June 2022 on these questions.

33. On 26 September 2022, the Appellant filed an appeal of the impugned Judgment with this Tribunal, to which the Respondent answered on 12 December 2022.

Submissions

Appellant's Appeal

34. The Appellant contends that there is no clear and convincing evidence of conduct constituting sexual harassment. He submits that the UNDT failed to differentiate between the existence of evidence of conduct that constitutes sexual harassment as defined by Section 1.3 of ST/SGB/ 2008/5 and the complainant's subjective reactions. He maintains that the evidence on

¹⁰ *Ibid.*, paras. 88, 99, 111, 117 and 120.

¹¹ *Ibid.*, para. 67.

¹² *Ibid.* para. 69 (emphasis added).

record upon which the judicial determination is based simply does not attain the standard of clear and convincing evidence.

35. The essential basis upon which the UNDT determined that there was sexual harassment is comprised of the e-mail of 8 November 2017. The Appellant contends that this is insufficient. He argues that the UNDT took the message out of context and failed to have proper regard to the full exchange of written messages. It placed undue weight upon the complainant's subjective interpretation. He submits further that a proper reading of the e-mail in context indicates that it was neither a sexual advance, a request for a sexual favour, verbal or physical conduct or gesture of a sexual nature, or other behaviour of a sexual nature as contemplated in the definition of sexual harassment in Section 1.3 of ST/SGB/ 2008/5.

36. He submits also that there is no basis in the language of the e-mail of 8 November 2017 justifying the UNDT's conclusion that he *insisted* on sharing a room with the complainant.

37. The Appellant contends furthermore that the UNDT improperly relied on irrelevant facts and the complainant's subjective interpretation to bolster its erroneous finding of clear and convincing evidence. In his submission, the UNDT understood that the e-mail of 8 November 2017 was in itself insufficient, it therefore sought to enlarge on its finding, drawing upon irrelevant discussions about the fact that the Appellant had confided in the complainant about his divorce and drew an unsustainable inference that this left no doubt about the nature of his intentions. He submits that the inference drawn is insupportable and not the most probable inference.

38. The Appellant further complains that the UNDT erred in largely disregarding his evidence in relation to the events and accepting the complainant's interpretation without undertaking a clear comparison of the different versions. The impugned Judgment does not offer a proper basis for rejecting his version. He submits that the key mistake made by the UNDT was its conflation of the reliability of the complainant's testimony that certain things happened in a certain order with her subjective interpretation of the meaning of these events. Subjective interpretations cannot be equated with the objective reasonable perception that is required by the law.

39. Moreover, the Appellant argues that the sharing of personal information with a colleague occurs regularly in the workplace all over the world; and that the UNDT gave improper weight and interpretation to the complainant's subjective and speculative interpretation that this discussion meant that he had romantic intentions towards her. There is no sustainable basis upon which it

might be found that the sharing of personal information about one's life with a colleague means that there was probably and necessarily a romantic motivation in doing so.

40. The Appellant submits that the UNDT erred also in finding that there was clear and convincing evidence of workplace harassment. Firstly, the UNDT largely ignored all the conflicting testimony from the various staff members. He maintains that a proper analysis of the evidence indicates that it is far from clear and convincing, both regarding the conduct in and of itself and the causal link between the conduct and the preceding mission to South Korea. He adds that most of the issues complained about by the complainant were in any event normal workplace situations and tensions that did not rise to the level of workplace harassment.

41. For these reasons, and for others, the Appellant requests this Tribunal to reverse the impugned Judgment, to rescind the disciplinary sanctions, to reinstate him or, in the alternative, to award him compensation for ancillary losses related to his dismissal, which he claims are more acute at his age.

The Secretary-General's Answer

42. The Secretary-General aligns with the findings of the UNDT and maintains that it correctly determined that the facts upon which the sanction was based were established by clear and convincing evidence and amounted to misconduct.

43. The Secretary-General argues that the Appellant's version contained inconsistencies, denials, unconvincing explanations and unsubstantiated claims that the complainant had invented the allegations for unknown malicious reasons. In support of this submission, the Secretary-General makes no reference and offers no analysis of the testimony presented under oath to the UNDT during the hearing of 13-15 June 2022. He relies exclusively on a statement made by the Appellant during his interview with OIOS, alleging that the complainant had invented most of her account and that because she had previously brought a sexual harassment complaint against another colleague, she had brought an allegedly untrue complaint against him. The Secretary-General offers no explanation as to why this allegation by the Appellant was false or unconvincing.

44. The Secretary-General essentially submits that the allegations of sexual harassment and workplace harassment were established before the UNDT to the level of clear and convincing evidence exclusively upon the evidence contained within the OIOS investigative report and submits

that this Tribunal should not lightly interfere with the UNDT's determination of the facts on the basis of the OIOS investigative report. Again, the Secretary-General makes no submissions regarding the evidence adduced before the UNDT during the hearing of 13-15 June 2022. The essence of his submission is the OIOS investigative report is sufficient proof of the allegations against the Appellant.

45. The Secretary-General makes similar submissions in relation to the findings of the UNDT regarding workplace harassment and contends that the Appellant has not established that the UNDT erred in finding that the evidentiary onus had been discharged.

46. The Secretary-General submits that the UNDT correctly found that the Appellant's due process rights were duly respected during the disciplinary process.

47. The Secretary-General accordingly requests this Tribunal to dismiss the appeal in its entirety.

Considerations

48. The Judgment of the UNDT is problematic in a number of respects. For the most part, the UNDT seems to have based its findings entirely on hearsay evidence which on the face of it was mostly inadmissible. It is also not clear from the impugned Judgment to what extent the UNDT based its finding that the misconduct had been proved on any evidence adduced at the hearing before it.

49. The flawed approach of the UNDT appears *inter alia* from its reasoning and findings in relation to the sexual harassment charge, at paragraphs 67-77 of the impugned Judgment. They read as follows:

... The Tribunal finds [the complainant's] statements congruent clear and objective as she always kept the same narrative throughout the course of the investigation and there is corroborating evidence of her account of the events.

... Moreover, the complainant provided a significant number of details about her interactions with the Applicant that render her testimony even more credible for instance the fact that he has shared with her intimate details about his marriage and divorce and his former girlfriend (of around the same age as the victim).

... In addition, the chronology of events also renders her account reliable. In this regard, we recall that the Applicant invited [the complainant] to the training in South Korea, he suggested they stay an extra day and insisted to share a commonplace in an Airbnb. Moreover, the day before the flight, he went to the [complainant's] office for the check in and book to seat next to hers.

... The Tribunal also notes that it was only after the mission to South Korea that the team members noticed a change in the Applicants conduct towards [the complainant]. He started being aggressive to the point of leading her to tears UN premises and during working hours.

... The incidents that occurred during the mission to South Korea were also corroborated by the testimony of Ms. T, who confirmed before OIOS, that [the complainant] told her about the Applicant's insistence to spend an extra day in South Korea, and to share a room in an Airbnb at his expenses. Ms. T also confirmed that [the complainant] found this proposal inappropriate and asked for her advice.

... Therefore the e-mail exchanges between the Applicant and [the complainant] confirm the veracity of [the complainant's] account i.e. that he insisted that [the complainant] reserve a common place for them to stay, whereas she preferred to book two separate hotel rooms.

... According to the OIOS investigation report, the Applicant made comments about his personal life to [the complainant], he mentioned that he was divorced and showed her pictures of his former girlfriend at Costa Rica which was around [the complainant's] age. These facts show the Applicant's attitude towards the complainant and demonstrate his romantic intentions towards her. Concurrently, his romantic intentions provided a rational explanation for his behaviour during the preparation and the travel to South Korea.

... There is also a clear and convincing evidence that the situation had a negative impact on the complainant, who confided these events to a friend, Ms. S, and who, in turn, confirmed to OIOS during her interview how depressed and stressed [the complainant was].

... The Tribunal found these testimonies credible not only because they were all consistent but also due to the fact that there is no evidence of bias or prejudice against the Applicant.

... The Tribunal underlines that in cases of sexual harassment due regard should be given to the victims' account as they do not face these situations lightly.

... In fact, due to the sensitive nature of the matter at stake in most cases, it is extremely difficult for the victims to make a formal complaint and to go through a formal procedure.

50. The ensuing analysis will discuss some of the respects in which the findings of the UNDT, as set out above, are erroneous and flawed; they do not provide a sustainable basis to conclude that the evidence establishes, as highly probable, the sexual harassment of the complainant by the Appellant. However, before embarking on that analysis it is necessary to say something about the hearing that was held by the UNDT over three days and the implications of the fact that there is no discussion in the Judgment of the testimony that was adduced during that hearing.

51. The task of the UNDT in a disciplinary matter is to determine whether: i) the facts pertaining to the allegations of misconduct are established according to the evidentiary standard of clear and convincing evidence; ii) the established facts qualify as misconduct in terms of the applicable legal framework; iii) the sanction is proportionate to the misconduct; and iv) there has been due process or procedural fairness by the original decision-maker. To that end, Article 16(2) of the Dispute Tribunal Rules of Procedure (UNDT Rules) provides that a hearing shall *normally* be held by the UNDT when exercising its jurisdiction under Article 2(1)(b) of the Dispute Tribunal Statute (UNDT Statute) in an appeal against an administrative decision imposing a disciplinary measure.

52. The main purpose for holding an oral hearing in disciplinary cases, as contemplated in Article 16(2) of the UNDT Rules, is to resolve any factual disputes that naturally arise when one party makes allegations of serious misconduct against another. The evidentiary hearing is usually necessary to resolve disputes of fact, which are irreconcilable on the record of documentary evidence and thus require fuller examination for the purpose of assessing the credibility and reliability of the witnesses in order to reach sustainable findings on the probabilities. The oral hearing, or the trial, therefore, is the mechanism whereby the factual truth might be discovered by the apposite, well-established means of fact-finding known to all in legal practice.

53. The trial, if it is to achieve its purpose, must be conducted in accordance with the rules of trial and the law of evidence concerned with the mechanics of presenting evidence to the tribunal. The rules of trial applicable in misconduct cases before the UNDT are set out plainly enough, albeit cryptically, in Article 17 and Article 18 of the UNDT Rules. These provisions give a clear signal that referrals to oral evidence will at times be necessary, and of what a trial

for that purpose should look like, and how it should proceed. They envisage and explicitly provide for the calling and cross-examination of witnesses who are expected to testify under oath. The UNDT may also question such witnesses and is required during the course of the trial to make rulings on objections by the parties to the admissibility of any evidence that is adduced. All evidence adduced during the hearing should be both relevant and admissible in terms of the law of evidence.

54. Article 25 of the UNDT Rules requires the judgments of the UNDT to “state the reasons, fact and law, on which they are based”. The judgment of the UNDT must provide a full, systematic analysis of the evidence that was presented to it during the hearing and should set out reasons for accepting or rejecting the testimony of each witness who testified.

55. The Judgment of the UNDT in this case fails to do this. In a 25-page decision, comprised of 122 paragraphs, there are merely four references to the three-day hearing before the UNDT. Paragraph 12 alludes to a pre-trial order directing the parties to “identify” whether an oral hearing was needed. Paragraph 17 confirms that the UNDT informed the parties that an oral hearing would be held. Paragraph 18 records that a hearing was held from 13 June to 15 June 2022. And, then, more substantively, but minimally, paragraph 65 states that “after a careful analysis of *the documentary evidence on file and the witnesses’ and Applicant’s statements at the hearing*, the Tribunal concludes that there is clear and convincing evidence of the facts alleged by [the complainant], as explained below”.¹³

56. The promise in paragraph 65 of the impugned Judgment to later explain the evidentiary basis of the conclusion that sexual harassment was highly probable on the basis of all the evidence before it, is however, not adequately fulfilled. The impugned Judgment does not mention or identify the witnesses who gave oral testimony to the UNDT; nor is there any discussion or analysis of the evidence presented by them, any assessment and determination of their credibility, or any pronouncement on the reliability of their testimony. There is no explanation about why, or any reasons given for, the evidence of any witness being preferred or rejected. In short, the UNDT made no explicit or precise findings in relation to the evidence given under oath at the hearing. Although the purpose of the hearing seems to have been restricted to determining the issue of prior conduct, the UNDT suggests that it relied on some of that testimony to make findings regarding the alleged misconduct in relation to the

¹³ Impugned Judgment, para. 65 (emphasis supplied).

complainant. Yet it does not appear from the impugned Judgment what those findings might have been. Further obfuscating what the UNDT relied upon in making its determinations is the UNDT's use of the term "testimony" in the impugned Judgment, which frequently appear to refer to OIOS interview transcripts rather than sworn testimony under oath in a trial before the Judge herself.¹⁴

57. This Tribunal is thus left somewhat in the dark about what transpired during that hearing and is accordingly not able to determine, pursuant to Article 2(1)(e) of the Statute of the UNAT, whether, as contended by the Appellant, the UNDT erred on questions of fact, resulting in a manifestly unreasonable decision. The failure of the UNDT to make findings about the testimony it heard makes an appeal well-nigh impossible. Compounding the difficulty, no transcript of the hearing forms part of the record of appeal. There are audio tapes of the three days of evidence, but they help little. It is not the task of the UNAT to re-listen to the oral evidence on audio-tape and then to make an educated guess about what factual findings the UNDT may have made in relation to it. Moreover, neither party in their submissions on appeal has made any reference to the testimony adduced before the UNDT during the hearing. When the parties and the UNDT have collectively invested resources in conducting a three-day hearing, and commanded non-party witnesses to appear, it is difficult to fathom why a written record would not be made, as it is essential to the parties' argumentation, to the Dispute Tribunal's final determination, and to the Appeals Tribunal's ultimate resolution of any future appeal.

58. As said, it will always be incumbent on the UNDT after holding an oral hearing to set out fully in its judgment the relevant evidence adduced before it and then to make unequivocal findings in relation to it, and to set out the basis for accepting or rejecting relevant testimony on grounds of credibility, reliability and probability. Where key facts are disputed, as in this case, the UNDT must provide a clear indication of which disputed version it prefers and explain why. This has not happened in this case. Instead, as will be seen in the ensuing analysis, the UNDT, in support of its conclusions, has cherry-picked its findings almost entirely from the hearsay sources of the OIOS investigative report (with the possible exception of AAO's oral testimony); and on this insufficient foundation has elevated to a standard of high probability

¹⁴ See, e.g., impugned Judgment, para. 71 ("[t]he incidents that occurred during the mission to South Korea were also corroborated by the testimony of Ms. T, who confirmed before OIOS (.)."). The complainant did not testify at the June hearing, yet the impugned Judgment, at paragraph 89, refers to her "testimony" as being "credible and consistent throughout the entire investigation".

the OIOS' overall finding of probable cause – a lower evidentiary standard. That is untenable and amounts to an abdication of the judicial method for determining the facts.

59. The UNDT's evident exclusive reliance on the OIOS report in the present circumstances is also problematic. An investigation by OIOS, given its peculiar, restricted methodology, is unlikely in most cases to prove the facts at the standard of clear and convincing evidence or as highly probable. The OIOS investigation report will mostly be hearsay in the judicial proceedings of the UNDT. Hearsay evidence is evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. The contents of the OIOS investigation report, therefore, usually will be hearsay; unless the relevant witnesses themselves testify before the UNDT and their statements in the report are admitted into evidence in the course of their testimony. If the witnesses do not testify before the UNDT, and the evidence is merely admitted in documentary form or through another witness, such as an investigator, since the probative value of their written statements in the OIOS investigation report will depend upon the credibility of a witness who is not in front of the tribunal, the written statements will for that reason constitute hearsay.

60. That is not to say hearsay evidence has no value. Modern legal systems allow for the admission of hearsay evidence in the interests of justice. There is a need for increased flexibility in applying the hearsay rule and the interests of justice may justify the admission of hearsay on the basis of reasonable necessity and reliability having regard to: i) the nature of the proceedings; ii) the nature of the evidence; iii) the purpose for which the hearsay evidence was tendered; iv) the probative value of the hearsay evidence; v) the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depends; and vi) the prejudice to a party which the admission of such evidence might entail. However, as explained, it must be kept in mind that the admission of adverse hearsay evidence by definition denies a party the right to challenge it effectively and fairly since the declarant is not before the tribunal and cannot be cross-examined. For that reason, hearsay is universally regarded to be of lesser weight.

61. Against that backdrop, we turn to reflect illustratively upon some of the findings of the UNDT and explicate why they are untenable in law and render the impugned Judgment unsustainable.

62. Firstly, in general, and as discussed, the UNDT offered no evaluation of the probative value of any of the hearsay evidence in the OIOS report upon which it relied; nor any explanation of why the evidence was not given by the person upon whose credibility the probative value of the evidence depended, if that was the case; nor did it offer any account of how the prejudice to the Appellant by the admission of such evidence was justified or mitigated.

63. Furthermore, in paragraph 67 of the impugned Judgment the UNDT found that the complainant's "statements were congruent, clear and objective as she always kept the same narrative throughout the course of the investigation and that there was corroborating evidence of her account of the events". As the complainant did not testify before the UNDT, this credibility finding is based on the hearsay evidence of the OIOS investigation report. There is moreover no explanation or elucidation of the basis upon which the UNDT found the complainant statements to be "congruent, clear and objective", whatever that might mean. If the complainant was the victim of sexual harassment of the Appellant, then she clearly and understandably had a subjective bias against the Appellant, and the reliability and credibility of her testimony needed to be assessed against safeguards that supported its reliability.

64. The finding that the statements of the complainant deserved more substantial weight on the basis of her keeping "the same narrative throughout the course of the investigation" fails to appreciate that in terms of the law of evidence previous consistent statements are normally irrelevant and inadmissible as self-corroboration. During a trial, a witness may not be asked in examination-in-chief whether she has made some previous statements which tend to confirm her testimony. The principal reason for the rule is that a witness' previous consistent statements are insufficiently relevant and have no probative value. It does not ordinarily add anything to the value of a witness' evidence to be told that she had always adhered to the same view. It would be surprising if it were otherwise. Such confirmatory evidence is therefore generally not admissible because all trials must be conducted with an effort to concentrate evidence on what is capable of being cogent.

65. The UNDT (in paragraph 68 of the impugned Judgment) made a credibility finding favouring the complainant on the basis that it was impressed by the fact that she was able to provide a significant number of details about her interactions with the Appellant, in particular the fact that on board the flight to South Korea the Appellant shared with the complainant intimate details about his marriage and divorce and his former girlfriend in Costa Rica who was the same age as the complainant. This is not much of a basis for a credibility finding,

especially in the absence of the complainant testifying. There is nothing consequential in the ability of an aggrieved witness (in an unchallenged and unexamined statement to an investigator) to recall the general details of a significant conversation in which she was a participant.

66. If the complainant's hearsay evidence about what was said during that conversation was found to be credible and reliable, it could arguably form the basis of a reasonable inference that the Appellant was inappropriately seeking to establish intimacy in pursuance of his personal goals in relation to the complainant. However, before any such substantive inference could legitimately be drawn, it would be necessary for the UNDT to set out clearly the complainant's interpretation of that conversation and to explain more fully why the innocent explanation offered by the Appellant in his submissions to it (repeated on appeal) stood to be rejected; the question being whether the inference sought to be drawn was the most probable or legitimate inference in the circumstances of the trip to South Korea. But there is no discussion in the impugned Judgment of any evidence tendered by the complainant or the Appellant in relation to this particular incident or conversation. It is also not clear whether the Appellant testified about this conversation under oath before the UNDT, and if so, why the hearsay of the complainant was preferred above his sworn testimony. It is accordingly not possible on appeal to decide whether the inference, if that, sought to be drawn by the UNDT is tenable. Once again, the basis upon which this finding is made appears to be the possibly inadmissible hearsay of the OIOS investigation report and inadmissible self-corroboration; and there is no analysis of why this evidence was admissible in terms of the legal criteria for admissibility.

67. In paragraph 69 of the impugned Judgment, the UNDT reasons that the complainant's version deserves elevated "reliability" on the basis that the Appellant had invited her to join the mission to South Korea, had suggested that they stay an extra day, *insisted* on sharing a common place in an Airbnb, and took steps to book a seat next to her on the flight. None of these considerations has any apparent bearing on the *reliability* of the hearsay evidence of the complainant in relation to these topics. Reliability is concerned with issues like bias, the capacity of independent recall, the proper opportunity for observation and the like.

68. These allegations, nevertheless, once again, might provide some basis for a legitimate inference that the Appellant was intent on seduction of the complainant. However, before such an inference can be drawn, the UNDT needed to compare the competing versions of the parties

in relation to these facts and then to make a finding in that regard. The Appellant has put forward a different interpretation. In his statement to OIOS he made it clear that he had asked the complainant to join the mission because he felt she had certain qualities that would be useful and also to give her an opportunity to expand her experience. The suggestion that he *insisted* on sharing a common place in Airbnb is not sustainable on the basis of the e-mail of 8 November 2017 alone, but conceivably might be supported by oral testimony of a witness who testified before the UNDT. However, the language of the Appellant in the e-mail, on the face of it, does not get beyond a suggestion or attain the level of insistence. Moreover, the Appellant has put forward an innocent explanation and suggests that the e-mail was misinterpreted. This may or may not be true; but the UNDT neglected to determine the probabilities of these disputed questions explicitly in the impugned Judgment. It merely reflected these issues as uncontested facts and drew an inference that was not necessarily the most probable inference to draw. It is not immediately evident why the version of the Appellant on these disputed facts and conjecture, presumably confirmed under oath during his testimony to the UNDT, was rejected by the UNDT while the hearsay evidence of the complainant was favoured above it. Absent a clear finding on the record by the UNDT, we cannot say on appeal whether or not the conspectus of evidence supports the inference sought to be drawn.

69. Similar difficulties arise throughout the considerations of the UNDT in paragraphs 70-77 of the impugned Judgment, and also in relation to the UNDT's findings in paragraphs 78-90 that deal superficially with the factual issues related to the alleged abuse of authority and workplace harassment. It is evident from the impugned Judgment that in assessing the factual and legal issues regarding the allegations of workplace harassment, the UNDT relied exclusively upon the statements annexed to, and the findings of, the OIOS investigative report. No effort is made in the impugned Judgment to compare the competing versions and different interpretations of the events. Nor did the UNDT make a finding providing an answer to the Appellant's contention that the conduct complained of did not attain the level of workplace harassment but amounted to no more than the tensions normally arising in any workplace, to which the complainant was perhaps overly and unduly sensitive. The UNDT's sparse reasoning indicates that little was done to assess the credibility or reliability of the two contrasting versions on this issue, there being no meaningful or transparent evaluation of the testimony adduced before it or in the OIOS investigative report.

70. Moreover, and decisively, and as intimated in the preceding analysis, there are indications throughout the impugned Judgment that, despite the three days of hearing, the UNDT rested its reasoning and conclusions almost entirely on possibly inadmissible hearsay statements included in the OIOS investigation report. From this we conclude that the UNDT gave little or no consideration to the testimony adduced in the hearing before it, and/or that the hearing was not focused on the crux of the factual disputes underlying the incidents that led to the disciplinary decision, which should properly have formed the primary basis of the impugned Judgment. The documentary evidence is of relevance only if it is introduced through a witness or is accepted by agreement between the parties to be a truthful reflection of what has transpired. Some of the conclusions and inferences drawn, such as the fact that the Appellant spoke of a previous girlfriend in Costa Rica and that such revealed his romantic intentions towards the complainant, are not sustainable as probable inferences of improper intent on the basis of this hearsay alone.

71. Moreover, in paragraphs 76 and 77 of the impugned Judgment, the UNDT seems to suggest that in cases of sexual harassment the evidence of the victim should be favoured, (“due regard should be given”) above that of the alleged culprit. To some extent the learned judge of the UNDT is correct. Victims of possible abuse must be given every consideration; but that does not mean that their version must be received as more credible and reliable without due appreciation of the totality of the evidence and the circumstances of the case. Determinations of credibility and reliability must be done in line with the criteria, principles and considerations outlined earlier in this Judgment.

72. In the final analysis, the methodological flaws in the impugned Judgment render it unsustainable in fundamental respects. In the absence of a proper account and judicial assessment of the evidentiary questions in relation to the disputed facts, the Appeals Tribunal is not able to make a finding as to whether the UNDT erred on questions of fact, resulting in a manifestly unreasonable decision. The UNDT’s errors of law and procedure nonetheless oblige us to reverse the impugned Judgment.

73. Unfortunately, because of the legal and procedural flaws, there has not been a proper trial of the issues. The job supposed to be done has not been done. In the interests of justice to both parties, the matter must be remanded to the UNDT for a fresh trial before another judge pursuant to Article 2(6) of the Appeals Tribunal Statute. We leave it to the parties, and the UNDT judge assigned to adjudicate the remanded case, to agree in the case management

process whether to proceed on the record of the hearing of 13-15 June 2022 or to begin entirely anew. Given the limitations in scope of the latter hearing, a new hearing would seem advisable; however, we leave this decision to the UNDT judge. The agreement on how to proceed should be reflected in a formal pre-trial minute. In conclusion we add that it may be prudent for the parties to attempt a settlement perhaps with the assistance of mediation and avoid the burden of another trial and appeal.

Judgment

74. The appeal is granted; Judgment No. UNDT/2022/071 is hereby reversed and the case is remanded to the UNDT for determination by a different judge.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Halfeld

Judgment published and entered in the Register on this 25th day of July 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar