UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1370

AAC[1]

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Graeme Colgan
Case No.:	2021-1569
Date of Decision:	30 June 2023
Date of Publication:	1 August 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Angélique Trouche

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

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. AAC was until the termination of his appointment employed by the United Nations Children's Fund (UNICEF). He contested the decision to summarily dismiss him for abuse of authority, harassment, and sexual harassment (contested decision).

2. In Judgment No. UNDT/2021/043[2], the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) held that the allegations of harassment were substantiated but that those of abuse of authority and sexual harassment had not been established by clear and convincing evidence (impugned Judgment). It ordered that the imposed sanction be replaced with the sanction of separation from service with notice and termination indemnity, or six months' net-base salary as in-lieu compensation.

3. AAC lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).

4. For the reasons set out below, we grant the appeal and reverse the impugned Judgment.

Facts and Procedure

5. This matter has been the subject of a prior Judgment of this Tribunal (prior Judgment), namely *AAC v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1264, wherein the UNDT was directed to supplement its Judgment with additional findings of fact.[3] The UNDT has done so and the parties have filed additional submissions in relation to them.

6. It will be convenient to restate the essential facts as set out in the prior Judgment.

7. AAC joined UNICEF as a staff member on 16 October 1990.[4] He served assignments in many countries, including difficult duty stations such as Kabul (Afghanistan). On 27 May 2016, he was appointed as UNICEF Representative for Papua New Guinea (PNG) at the P-5 level. This appointment was his first assignment in the position of Head of Office.

8. On 3 September 2017, the Deputy Representative of the PNG Country Office filed a complaint of harassment and abuse of authority against AAC.[5] On 6 September 2017, the

[2] *Applicant v. Secretary-General of the United Nations*, Judgment dated 28 April 2021.
[3] The prior Judgment maintained AAC's anonymity.
[4] Prior Judgment, para. 3.
[5] *Ibid.*, para. 5.

Director of Division of Human Resources (Director/DHR) sent the complaint to the Office of Internal Audit and Investigations (OIAI), UNICEF, with seventeen other grievances about AAC confidentially submitted by staff members of the PNG Country Office. On 24 February 2018, AAC was placed on administrative leave with full pay pending completion of an investigation into his conduct.

9. During the course of its investigation, the OIAI interviewed approximately 40 witnesses.[6] The final investigation report was sent to the Director/DHR, on 8 October 2018. On 25 October 2018, the Director/DHR, issued a charge letter setting out the following charges against AAC: i) abuse of authority encompassing harassment; ii) sexual harassment; and iii) failing to ensure a harmonious work environment. The charge letter alleged that AAC's conduct contravened: i) United Nations Staff Regulations 1.2(a), (b), (f), (g) and (m); ii) United Nations Staff Rules 1.2(f), (k), (q), and 10.1(a);[7] and iii) constituted misconduct under various provisions of the internal law of the Organization. On 12 November 2018, AAC submitted his reply to the charges.

10. On 28 December 2018, the Deputy Executive Director (DED), Management, UNICEF, apprised AAC of the contested decision, informing him of the findings that he had committed misconduct.[8] Specifically, DED found that AAC had: i) harassed and sexually harassed certain United Nations staff members; ii) made comments at a meeting which were tantamount to inviting staff members to engage in sexual exploitation and abuse; iii) created a hostile work environment; iv) gave gifts to a PNG governmental official; and v) threatened and/or belittled the Deputy Representative. Based on these findings, AAC was summarily dismissed from the service of UNICEF.

11. On 20 February 2019, AAC filed an application before the UNDT to challenge the contested decision.[9] A hearing took place before the UNDT on 17 and 18 March 2021. On 28 April 2021, the UNDT issued the impugned Judgment. The UNDT found that there was clear and convincing evidence of harassment and the creation of a hostile work environment by AAC but that the allegations of sexual harassment had not been established. It also found that there was insufficient evidence proving that AAC had irregularly recruited two local

[6] *Ibid.*, para. 8.
[7] Secretary-General's Bulletin ST/SGB/2018/1.
[8] Prior Judgment, para. 11.
[9] *Ibid.*, para. 12.

consultants. The UNDT held further that there was sufficient evidence of AAC's gift-giving to third parties within the PNG Government, but the seriousness of the gift-giving remained unclear. It accordingly partially rescinded the contested decision and ordered that AAC's summary dismissal from service be replaced with the sanction of separation from service with notice and termination indemnity. In the alternative, compensation *in lieu* of rescission in the amount of six months' net base salary was awarded.

12. On 21 June 2021, AAC filed an appeal of the Judgment with the Appeals Tribunal. In the appeal, he contended that the UNDT materially erred in fact in its assessment of allegations of harassment and erred in law in finding that the alleged misconduct warranted separation. He took issue with several of the factual findings made by the UNDT and requested the Appeals Tribunal to vacate the impugned Judgment in part and rescind the decision to summarily dismiss him for misconduct and order his reinstatement, or, alternatively, payment of three years' net base salary for the period from his separation through retirement age, plus compensation for loss of pension, damage to personal and professional reputation, loss of career opportunities and costs for abuse of process.

13. The Secretary-General maintained that the UNDT had correctly found that the allegation of harassment had been established by clear and convincing evidence and that in addition to harassment, the UNDT correctly found that AAC had "engaged in giving gifts to third parties within the government of PNG" which amounted to an appearance of conflict of interest.

14. In the prior Judgment, this Tribunal noted that the main contention of AAC on appeal was that the UNDT materially erred on questions of fact, resulting in a manifestly unreasonable decision as contemplated in Article 2(1)(e) of the Statute of the UNAT. There are thus strongly contested disputes of fact about whether AAC conducted himself in a manner that was abusive, created a hostile working environment and inappropriately engaged in giving gifts. The Administration says he did. AAC strongly denies it.

15. The Appeals Tribunal expected the UNDT, faced with the two irreconcilable versions, and in order to come to a conclusion on the disputed issues, to have heard evidence from witnesses able to testify about the disputed issues, to have satisfied itself and pronounced on the credibility and reliability of those witnesses, and to have made a determination on the probabilities of the evidence heard by it. Thus, it was necessary for the UNDT to resolve the

disputes of fact in accordance with the conventional judicial methodology for resolving disputes of fact. However, the UNDT in the impugned Judgment failed to set out the key factual findings in relation to the relevant issues in a satisfactory manner. It did not clearly identify the evidence it had relied upon to make the critical findings against AAC. Besides not referring to the witnesses who testified on behalf of both parties, there was no analysis or assessment of the testimony of those witnesses to determine its reliability and credibility with a view to making specific factual findings on the probabilities. The assessment of the evidence in the impugned Judgment indicated that the findings were based entirely on hearsay taken from the OIAI investigation report (which had not been examined or tested during the hearing) and the written statements of witnesses who did not appear before it. Most of the findings in the UNDT Judgment were vague, impressionistic, unsubstantiated, relied on untested hearsay, or merely repeated factual allegations from witness statements without reaching conclusive findings. Prejudicial opinions were expressed about AAC's character and accepted as true and accurate without any clearly articulated supporting factual foundation for them.

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

17. This Tribunal therefore concluded in the prior Judgment that there had not been a proper, judicial fact-finding exercise in relation to the key issues in the case and that it was accordingly not possible on appeal to ascertain and test the factual basis of the UNDT's conclusion that harassment and improper gift-giving were established as highly probable on clear and convincing evidence. There simply had not been a fair trial of the issues in such a manner for an appeal on the facts to be properly determined in accordance with the conventional methodology and prerequisites of judicial fact-finding. The Appeals Tribunal accordingly decided to remand the matter to the UNDT in terms of Article 2(4)(b) of the Statute

of the UNAT with a request that it make clearer factual findings with fuller and more systematic reference to the evidentiary basis upon which they were made and, in particular, identifying the specific testimony of the witnesses upon which they were based. The Appeals Tribunal also directed the UNDT to discuss the nature of the testimony (hearsay, opinion, character etc.), its admissibility, relevance and cogency, as well as the weight afforded to it. This Tribunal then gave precise directions to the UNDT to address particular queries. These directions are set out at paragraphs 44 *et seq*. of the prior Judgment.

18. In response to the directions of this Tribunal in the prior Judgment, on 20 January 2023, rather than supplementing its Judgment, the UNDT opted to file a "Note for File". As the learned judge of the UNDT herself concedes, and for the reasons she explains, the Note to File fails to address the unresolved evidentiary questions and for that reason is not entirely satisfactory. It is evident from the Note to File that the judge was not in a position to elaborate upon and supplement her findings as required by the directions because the two witnesses who testified before her at the hearing (AAC and an investigator) gave evidence of little consequence. Understandably perhaps, the judge did not attempt to summarize the nature and import of their testimony or make any findings in relation to it. In the final analysis, the UNDT judge acknowledged that she had relied exclusively on the hearsay evidence in the OIAI investigation report and therefore opted in her responses, as she was practically compelled to do, merely to reiterate the unsubstantiated findings made in her earlier Judgment (mainly without elaboration or elucidation). Most of the evidentiary findings thus remain problematic for the reasons set out in the prior Judgment.

19. In acknowledging the difficulty with some of the factual findings in her judgment, the UNDT judge stated in paragraphs 10 and 11 of the Note to File:

> (…) The guidance is duly noted, however, the Tribunal's findings on credibility and reliability were made based on a review of the evidence available to the decision-maker as presented in the Investigation Report and other documents on record submitted by the parties. The approximately 40 witnesses interviewed during the investigation that led to the decision (…) were not called as witnesses before the Tribunal.(…) The Tribunal did not seek to replace the decision-maker's impressions of the demeanour or veracity of witnesses with its own impressions based on hearing them afresh. (…) At the hearing held on 18 March 2021 there was no fresh hearing of witnesses other than the Applicant and an Investigator (…).

20. Consistent with that acknowledgment, the UNDT judge made the following proposal in paragraph 8 of the Note to File:

> As there will be no substantive changes to the Judgment, this Tribunal respects that UNAT, upon receipt of these responses, may exercise its jurisdiction to:
>
> Affirm, reverse or modify findings of fact of the Dispute Tribunal and, if deemed appropriate, to revise the compensation award on the basis of substantial evidence in the written record; or
>
> b. Remand the case for a full retrial by a different judge of the UNDT pursuant to [Articles] 2 and 9 of the Appeals Tribunal's Statute and [A]rticle 10 of the Appeals Tribunal's Rules of Procedure, if UNAT determines that a decision cannot be taken without additional oral testimony or of other forms of non-written evidence.

21. Nonetheless, the learned UNDT judge diligently took the time and made the effort to address the directions set out in the prior Judgment. However, as mentioned, her responses justify her findings almost entirely on the basis of the findings of the OIAI investigation report. For reasons which will become apparent presently, there is no need to examine her specific responses, as in the final analysis they do not resolve the evidentiary problems in a satisfactory manner.

Submissions

The additional submissions of AAC

22. After receiving the Note to File, AAC filed further submissions in relation to the additional findings.

23. AAC emphasizes that the Secretary-General bears the burden of proving the case with clear and convincing evidence, while he bears no burden of proving his innocence.

24. AAC observes that the Secretary-General failed to offer any explanation as to why additional witnesses were not called to testify during the UNDT proceedings. The Secretary-General elected not to call any witnesses and relied entirely on the findings of the OIAI investigation as proof of what had been asserted.

25. AAC points out that he testified at the UNDT hearing himself. Yet no mention was made, or analysis undertaken of his testimony in the impugned Judgment; nor was his testimony evaluated to determine its credibility and reliability in relation to the facts in dispute.

The only other witness to be called was an OIAI investigator who provided no specific comments on the testimony in relation to the issues in dispute.

26. AAC therefore emphasizes that the specific allegations against him were not tested properly during the UNDT proceedings and thus remain largely unexamined and untested. The UNDT took no opportunity to assess and evaluate the credibility and reliability of the persons who made the allegations against him; and thus it was not in a position to make findings on the probabilities in relation to the allegations. The UNDT instead relied totally and inappropriately on the credibility and reliability assessment of the OIAI investigators who did not testify before the UNDT or provide a proper and adequate basis for such an assessment to be made.

27. Hence, AAC submits, most of the allegations against him amount to uncorroborated hearsay. There was accordingly insufficient cogent admissible evidence before the UNDT to conclude that he was guilty on the charges as alleged. The Secretary-General failed to present a proper case to the UNDT and to discharge the burden to establish the facts and alleged misconduct in accordance with the evidentiary standard of clear and convincing evidence.

28. AAC submits that the UNDT thus erred in fact by relying solely upon inadmissible evidence, resulting in a manifestly unreasonable decision as contemplated in Article 2(1)(e) of the UNAT Statute, and his appeal should succeed on that basis.

29. AAC notes furthermore that not only was he unlawfully separated from service, but his name was placed on a computerized register of sexual harassers, even though the UNDT found that there was no evidence of sexual harassment.

30. He requests that the contested decision be rescinded in its entirety and by implication asks for his name to be expunged from the relevant register.

The additional submissions of the Secretary-General

31. The Secretary-General in the additional submissions essentially provides an analysis of the testimony of certain witnesses who made statements to the OIAI investigators during the course of the investigation but who did not testify before the UNDT. This evidence, he suggests, is sufficient proof of the allegations against AAC.

32. The Secretary-General fails in the additional submissions to address specifically AAC's argument that by relying wholly on hearsay evidence, the Secretary-General failed to meet its burden before the UNDT to establish the alleged misconduct as highly probable on the evidentiary standard of clear and convincing evidence.

33. The Secretary-General furthermore offers no explanation for the failure to present any oral evidence or examine any witnesses before the UNDT. The Secretary-General appears to assume that absolute reliance on the OIAI investigation report was sufficient to establish the allegations against AAC as highly probable.

34. The Secretary-General accordingly asks that the appeal be dismissed and that the impugned Judgment be upheld.

Considerations

35. The issues raised in this appeal require this Tribunal once again to set out the legal framework for the determination by the UNDT of appeals of administrative decisions imposing disciplinary measures.

36. At the outset, and in fairness to the learned judge of the UNDT, it should be said that the procedure and methodology applied by her in this case is by no means unusual and has in the past been followed by other UNDT judges in similar cases. The approach is flawed and fails to give proper expression to the statutory requirements for the judicial determination of matters of misconduct by the UNDT.

The legal framework for resolving disputes of fact

37. Article 2 of the Statute of the UNDT confers jurisdiction on the UNDT *inter alia* to hear and pass judgment on applications filed by staff members in relation to "appeals" of administrative decisions that are alleged to be in non-compliance with the terms of appointment or contract of employment of staff members, as provided in Article 2(1)(a), and appeals against an administrative decision imposing a disciplinary measure, as provided in Article 2(1)(b).

38. The term "appeal" is not defined in the Statute of the UNDT. However, it is now established jurisprudence that while Article 2(1)(a) of the Statute of the UNDT confers a

conventional review jurisdiction in relation to administrative decisions impacting on contractual terms and benefits in non-disciplinary cases (limited to a consideration of whether the administrative decision was lawful, reasonable and procedurally fair), Article 2(1)(b) of the Statute of the UNDT contemplates a wide appeal or merits-based review in which the disputed facts of the alleged misconduct are required to be established by the UNDT through the admission and evaluation of evidence anew. Thus, in a multitude of judgments, this Tribunal has confirmed that the task of the UNDT in a disciplinary matter is to determine whether: i) the facts on which the sanction is based 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.

39. The process in relation to applications to the UNDT in terms of Article 2(1)(b) of the Statute of the UNDT, mandated by the applicable evidentiary standard, therefore differs significantly from a conceivable judicial review of the fairness of the investigation and the reasonableness of the decision of the OIAI. The task of the UNDT is to determine if the facts actually exist as a high probability and not merely to review whether the determination of the facts by the internal investigator was reasonable and procedurally fair. It is therefore envisaged that the UNDT, in the first instance, should engage in a fact-finding exercise to establish whether the facts pertaining to the allegations of misconduct, as affirmed by the Administration in the disciplinary decision, exist as a high probability; and then to apply the principles, rules and standards of the legal framework to decide if the proven facts constitute misconduct. Thereafter, as a separate exercise, taking account of all relevant (proven) facts and considerations, the UNDT must decide (on the evidence) whether the sanction was proportionate.

40. In deciding the facts, the UNDT is obliged to apply the principles and rules of the law of evidence. To this end, Article 16(1) of the Rules of Procedure of the UNDT provides in general terms that a judge hearing a case may hold an oral hearing. Article 16(2) of the Rules of Procedure of the UNDT provides furthermore that a hearing shall *normally* be held in an appeal against an administrative decision imposing disciplinary measure.[10] The reason an oral hearing should normally be held in disciplinary cases is self-evident. Litigation about the imposition of a disciplinary measure will normally involve disputes of fact that cannot be

[10] Emphasis added.

reconciled or resolved satisfactorily on the papers. The Administration in most disciplinary cases will contend that the evidence proves the alleged misconduct, while the staff member will contend, on the contrary, no doubt with equal vigour, that the evidence does not prove the allegations. Real and genuine disputes of fact, irreconcilable on the papers normally have to be referred to oral evidence under oath for examination and cross-examination to allow for reasoned findings on credibility, reliability and probability. Trials of fact or referrals to oral evidence are necessary for that purpose.

41. The task then of the UNDT, faced with a genuine dispute of fact irreconcilable on documentary evidence alone, is to embark upon a fact-finding exercise firstly to resolve the disputes of fact on the basis of the evidence it considers most credible, reliable and probable; and secondly, most importantly, to decide if the facts have been established overall by clear and convincing proof as highly probable.

42. The determination of whether certain incriminating facts exist requires the application of a specific methodology in accordance with the rules of trial and the law of evidence with which all employment law trial judges ought to be familiar. The methodology is not dissimilar to that employed by trial judges in both criminal and civil courts in national jurisdictions. It has been said that the UNDT is not a criminal court and misconduct cases do not carry criminal consequences. That is true. But that is not the point being made here. The point rather is that in cases of misconduct (fraud, theft, assault, harassment etc.) there are often disputes of fact that can be resolved only through a given methodology. The method is not employed just in criminal trials but equally in civil trials of contractual or delictual disputes, and most pertinently, also in employment misconduct cases.

43. The rules of trial applicable to misconduct cases before the UNDT are set out clearly enough in Article 17 and Article 18 of the UNDT Rules of Procedure. These provisions give a clear indication 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, including experts, 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.

44. Although there may be different approaches to the conduct of trials or referrals to oral evidence, best practice, in the interests of curial efficiency, envisages the party bearing the overall onus presenting his or her case first. Ordinarily, counsel (or the party himself, where unrepresented) should commence with an opening address to the UNDT. The purpose of the opening address is to: i) present the theory of the case; ii) narrow the issues; iii) identify the facts in dispute; iv) set out the order of the witnesses to be called; and v) explain the nature and purpose of the evidence to be presented. Thereafter, the witnesses of that party will be called to be examined in chief by him or her, then to be cross-examined by his or her opponent and thereafter may be subject to re-examination on matters arising within the scope of cross-examination. Once all the witnesses for the one party have testified, the opposing party, with a better and fuller understanding of the case he or she has to meet, will present his or her witnesses in a similar fashion. Thereafter, counsel will make their closing arguments and submissions founded on the admissible and relevant evidence which has been adduced and admitted during the hearing.

45. Article 25 of the Rules of Procedure of the UNDT requires the judgments of the UNDT to "state the reasons, fact and law, on which they are based." The judgment of the UNDT therefore must provide a full, systematic analysis of the evidence that was presented to it during the hearing and should set out explicit reasons for accepting or rejecting the testimony of each witness who testified. Extraneous evidence that was not the subject of the testimony of a witness before the UNDT should only be admitted, and considered by it, if it is by agreement between the parties. It is impermissible for the UNDT in its judgment to have regard to any evidence that was not properly adduced in the hearing.

46. As mentioned earlier, the impugned Judgment in this case makes not a single mention of the nature, content or purpose of the testimony adduced under oath before it. This is problematic. The failure to analyse the critical evidence defeats the purpose of an oral hearing. Ordinarily, the most relevant, determinative evidence, for the purpose of an appeal before this Tribunal, is that which was presented to the UNDT during the oral hearing. That evidence is the foundation of the evidentiary record in an appeal on issues of fact. All documentary evidence relevant to the facts in dispute, including the OIAI investigation report, must be adduced through appropriate witnesses or can be admitted by an agreement between the parties (set out in a pre-trial minute) confirming that the documents are what they purport to be and explicitly addressing which contents of the documents may be accepted as true or not.

Obviously, where the truthfulness of the contents of documents is disputed, other evidence will normally need to assist in resolving the question.

47. Where key facts are disputed, as in this case, the UNDT in its judgment must make explicit findings pertaining to the credibility and reliability of the evidence and provide a clear indication of which disputed version it prefers and explain why. This will require the UNDT to set out its impression about the veracity of every witness who testified before it in the hearing. In doing that, the UNDT will need to discuss a variety of subsidiary factors such as: i) the witness' candour and demeanour in the witness box; ii) the witness' latent and blatant bias against the staff member; iii) contradictions in the evidence; iv) the probability or improbability of particular aspects of the witness' version; v) the calibre and cogency of the witness' performance when compared to that of other witnesses testifying in relation to the same incident; vi) the opportunities the witness had to experience or observe the events in question; and vii) the quality, integrity and independence of the witness' recall of the events. On the basis of its findings of credibility, reliability and probability, the UNDT, as a last step, must decide whether the Secretary-General has succeeded in discharging his burden of proof to show that it was highly probable in accordance with the standard of clear and convincing evidence that the staff member committed the misconduct in question.

Hearsay evidence and the evidentiary standard

48. As this Tribunal has noted on prior occasions, an investigation by the OIAI, given its peculiar methodology, is unlikely in most cases to prove the facts at the standard of clear and convincing evidence. There is no denying that documentary evidence (correspondence and the like), on its own, sometimes can establish facts as inherently probable, but proof of disputed events or interactions not reduced to writing in contemporaneous documents or taking place and witnessed in a manner intrinsically not able to be so documented, usually requires more. Moreover, the evidence against the accused staff member taken during an OIAI investigation is typically not given in his presence. Thus, the staff member during the OIAI investigation is denied the opportunity to face his accuser and has no right to question the witnesses offering incriminating testimony against him. Nor is he permitted to directly put his version in rebuttal, or his differing interpretation of the disputed events, to those witnesses for their comment. These rights are concomitants of a fair trial that also methodologically underpin a forensic determination of probability. There are, no doubt, good reasons for the OIAI proceeding in the manner it does, its investigative process is after all inquisitorial not judicial, but evidence not

examined in the presence of and not subject to challenge by the alleged culprit is, in the nature of things, less weighty. The evidence of a witness who holds up under cross-examination tends to be more credible and reliable.

49. The manner of the investigation conducted by the OIAI also means that the contents of the OIAI investigation report will 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 OIAI 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 who actually witnessed the disputed events do not testify before the UNDT, and the evidence is merely admitted in documentary form or through another witness, such as an investigator, the written statements of those witnesses will for that reason constitute hearsay because the probative value of their written statements in the OIAI investigation report will depend upon the credibility of a witness who is not in front of the tribunal. The investigative report may also be comprised mostly of previous consistent statements of the witnesses testifying in the subsequent judicial proceeding, generally amounting to inadmissible self-corroboration in terms of the law of evidence, unless certain conditions for its admissibility are met, and, therefore, without more, may carry little evidentiary weight, if any, for that reason also.

50. We hasten to add that our pronouncements here must not be construed to mean that 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 very good reason, as explained, hearsay is of lesser weight; and hence, where the Secretary-General relies solely on hearsay

evidence, as in this case, it is unlikely that he will discharge his burden before the UNDT to establish the relevant facts by clear and convincing evidence.[11]

51. The contents and underlying documents making up the investigation report nonetheless can be useful if the disputing parties agree to admit them into evidence and affirm the truth of their contents; or they can be relied on in cross-examination to establish contradictions and previously inconsistent statements that will assist the UNDT in determining the credibility and reliability of the relevant witness. But to simply hand up an investigation report, the contents and findings of which are almost wholly disputed, as in this case, and then not to call any witnesses in support of the contested allegations, will usually not suffice for a judicial determination.

52. Some argue, not unreasonably, that an investigative process in which the facts are determined by a non-judicial method and presented to the tribunal as hearsay, and which restrict judicial review to an assessment of the reasonableness and procedural fairness of an OIAI investigation, may be preferable on grounds of administrative expediency. That may be true, depending on one's point of view about the power of employers in relation to the dismissal of its staff members. Legislation may conceivably restrict the scope of judicial review of disciplinary dismissal by requiring strong deference to the managerial margin of appreciation. However, most employment law systems, including the internal justice system of the United Nations, reject the idea of deference in relation to the determination of the facts, while readily observing deference on the question of sanction. Most accept that there is a band of reasonableness within which one employer might reasonably prefer one sanction, while another might take a different (but equally reasonable) view. However, the prevailing consensus is that there is little room for deference when it comes to proving the facts of misconduct on a sound evidentiary basis. If employment tribunals are expected to defer uncritically to the opinions and findings of the employer's investigators on the sufficiency of the factual proof of the alleged misconduct, there is a danger that protection against unfair or unreasonable dismissal will not be subject to satisfactory control and supervision. The value of a judicial determination of disciplinary disputes will be undermined.

[11] Ordinarily, the outcome of an inquisitorial investigation amounts to a conclusion that there are reasonable grounds to believe that misconduct has occurred; akin to the findings of probable cause made by a grand jury in the United States of America.

53. But, in any event, a deferential stance in relation to proving the facts is not an option under the current legal framework. The internal law of the United Nations imposes a duty on the UNDT to establish the facts on the standard of clear and convincing evidence. That being the law, if unexamined hearsay in an investigation report is the only evidence admitted in the judicial proceedings, as said but worth repeating, such will rarely attain that standard. Moreover, a final determination of allegations of serious misconduct by an investigation (rather than a judicial process) subject only to a subsequent rationality review by a tribunal may not constitute "an effective remedy" justifying immunity from national suit.

54. Hence, it must be emphasized, in conclusion, that the engagements and exchanges that take place within a trial are normally the most suitable means for evaluating the credibility and reliability of evidence regarding facts in dispute. Disputes of fact are best resolved on the evidence by judges observing the demeanour and assessing the calibre and performance of witnesses who are examined before them. For that reason, an oral hearing, rather than an assessment by an investigator, is the universally preferred method for deciding disputes of fact upon which a judicial determination of misconduct must rest.

Pre-trial methods for narrowing disputes of fact

55. Insofar as there may be apprehension that the requirement of a trial by the UNDT in misconduct cases may prove cumbersome and burdensome in the context of an international organization, that alone can never be sufficient reason to abdicate the judicial responsibility conferred on it by the internal justice system of the United Nations, the upper guardian of human rights in the international legal order. Findings of serious misconduct against staff members can have devastating financial and personal consequences and should only be made on the basis of acceptable legal standards. The judicial responsibility to determine the high probability of facts upon which momentous decisions are based, requires the utmost ethical and professional consideration.

56. But, in any event, the burden can be easily managed by case management. Article 19 of the Rules of Procedure of the UNDT is a useful mechanism providing for case management. It is often resorted to by the judges of the UNDT to sensibly delimit the facts and issues in dispute. The prudent application of an effective case management process is the best way to ensure that the parties in referrals to oral evidence do not adduce unlimited evidence in an inconsequential manner. Yet, too often, we see witnesses before the UNDT ranging widely on irrelevancies,

without any apparent relevant purpose or coherent direction, that just waste the time of the tribunal. The referral to oral evidence must be confined to specified issues. And a concerted judicial effort must be made to delineate the disputed factual issues to a comparatively narrow compass.

57. To this end, the case management mechanism can be applied meticulously to produce binding pre-trial minutes and agreed statements of fact which delineate the undisputed and common cause facts, leaving only the disputed facts for trial or oral evidence. The hearing can then be restricted to hearing evidence only in relation to the disputed facts expressly specified in the pre-trial minute. A properly structured oral hearing, conducted on the basis of a well-constructed pre-trial minute, will substantially reduce the burden by ensuring that only evidence relevant to the facts in dispute is heard and the referral to oral evidence efficiently achieves its purpose.

58. An even better way to deal with factual disputes is to provide for an application process which requires greater precision in the pleading of factual matters. The current practice of pleading before the UNDT can be informal. Precise pleadings can usefully set the parameters within which the oral proceedings will be conducted and define the nature of the evidence to be admitted or excluded. They also assist in determining the shifting evidentiary burdens of proof in the applicable case and which party will have the duty to begin adducing evidence in the hearing.

59. Article 8 and Article 10 of the Rules of Procedure of the UNDT set out the bones of an application procedure. The procedure is not suitably tailored or particularly helpful as a process for defining and efficiently delineating the factual issues in dispute. These provisions merely require each party to furnish a statement of his or her case in a narrative form without any requirement to plead specifically and directly to each factual averment made in the other party's pleading. In practice, the parties tend to exchange general descriptive narratives and attach unexplained documentation. Another approach would be for the parties to present their cases by means of witness statements which systematically and coherently address each and every factual allegation that is made in the other party's pleadings. The applicant's founding statements should set out in numbered paragraphs the allegations upon which his or her case is based including averments explaining the relevance of particular aspects of any document attached. The respondent, in reply in the answering statement, will then set out precisely and *ad seriatim* which of the applicant's allegations the respondent admits and which he or she

denies and his or her own version of the relevant facts in contrast to the factual allegations as they have been pleaded in the applicant's founding statement. It is not enough to simply do this in terms of a general narrative, as is the prevailing practice before the UNDT. It is better to refer explicitly and directly to the paragraph number of the founding statement in which the contested factual averment is found. It is also permissible to "confess and avoid"—that is, to admit a fact but to cast a different interpretation upon it. Failure of the respondent to deal at all with an allegation by the applicant, depending on the circumstances, may well lead to an adverse inference, if not be regarded as an admission.

60. The great value of this process, therefore, is that by virtue of the precise manner of pleading involved, it automatically distinguishes the undisputed facts (the common cause facts not denied by the respondent) and the denied or disputed facts—either totally denied by the respondent or "confessed and avoided". In this mechanical fashion, the dispute between the parties is then significantly narrowed and the factual issues that need to be referred to oral evidence are clarified and demarcated for further oral evidence.

61. Whenever a genuine dispute of material fact arises on the witness statements, the tribunal has discretion to deal with the dispute in various ways. If the undisputed facts are insufficient to determine whether the staff member committed the sanctionable offence, the application should be referred to a hearing of oral evidence for the limited purpose of establishing the specific facts in dispute as identified in the pleading process or appear *ex facie* in the witness statements. On the other hand, the parties themselves might prefer the tribunal to adopt a robust approach and decide the issues on the witness statements alone. In such circumstances, there should be a principle dictating which version on paper should prevail. Normally, where the parties did not request an oral hearing, the practice is for the tribunal to assess the undisputed facts together with the disputed facts put forward by the respondent and to determine whether the respondent's version of events is established to the requisite standard of proof. However, the principle should not be applied too mechanistically. Where the respondent's factual allegations are far-fetched or patently untenable, the tribunal may be justified in rejecting them on the papers and opt instead to establish the relevant facts on the basis of the common cause facts and the applicant's version of the disputed facts.

62. We have digressed at length in this Judgment to make these remarks (*obiter dicta*) about the UNDT's practice of fact-finding because the manner in which the UNDT in its practice resolves factual disputes in misconduct cases is inconsistent. Directed case

management and possibly introducing a more coherent, systematic pleading process will ensure that in litigation before the UNDT the facts are determined properly and in an orderly fashion, in accordance with acceptable principles of pleading and the law of evidence. A reform of this kind might improve the situation and will result in the adjudication of misconduct cases in a manner attaining the appropriate standard of internal justice befitting the United Nations.

63. At the same time, we fully recognize that in harassment cases witnesses may require special consideration when offering testimony to the UNDT. In such instances, it is incumbent on the UNDT to ensure that procedures akin to those used in other jurisdictions are in place to accommodate such witnesses and to afford them protection and the opportunity to present their testimony in a manner which takes account of their vulnerabilities and the sensitivities associated with allegations of such misconduct.

The basis of the factual findings in this case

64. We turn now to the problematic nature of the resolution of the disputes of fact in this appeal.

65. The impugned Judgment, by the UNDT's own admission, is based entirely on hearsay evidence drawn exclusively from the OIAI investigation report and other documents submitted by the parties.[12] The UNDT, in admitting that evidence, made no pronouncement on the necessity for that exclusive reliance or about the reliability of the hearsay evidence having regard to the applicable criteria for determining its admissibility, in particular the probative value of the hearsay evidence and the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depended. The Secretary-General has offered no explanation for his failure to call any witnesses before the UNDT to prove the alleged misconduct.

66. The UNDT also gave no consideration at all to the prejudice to AAC which the admission of such hearsay evidence entailed. AAC was denied his right to face those who accused him of serious misconduct, to question their version, to confront them with his version of the same events and to explore with them, in the presence of the deciding judge, the credibility, reliability and probability of their accounts on factual matters. He had no

[12] UNDT Note for File, para. 10.

opportunity whatsoever, at any stage in the investigative or judicial proceedings, to elicit from those witnesses against him evidence which supported his own version and to cast doubt upon the credibility and reliability of their version by confronting them with a different perspective of the probabilities.

67. In the final analysis, the UNDT simply accepted the alleged misconduct as proven on the basis of the OIAI's findings. That is akin to a judge in a criminal matter accepting as conclusive the written report (not even the oral testimony) of the policeman investigating the crime. A judge in a sexual assault trial would not be able to return a guilty verdict on the basis of such a report and its annexed witness statements alone. Once again, we rush to state that this proposition is not meant to liken the proceedings before the UNDT to a criminal trial. Our aim rather is to demonstrate by way of a stark analogy that the method employed by the UNDT, and the litigation strategy of the Secretary-General, are insufficient means for resolving the evidentiary issues arising from the disputes of fact in relation to the serious allegations of misconduct in this case. The point is not to equate the UNDT process with a criminal trial, the alleged misconduct with a crime, or the sanction with a criminal sentence. The point rather relates to the nature, admissibility, sufficiency and cogency of the evidence and the methodology of proof required to prove, pursuant to the internal law of the United Nations, that the misconduct was established on the evidence as highly probable in keeping with the standard of clear and convincing evidence.

68. In the premises, the ultimate conclusion is inescapable. The Secretary-General has not met the burden before the UNDT to prove the alleged misconduct as highly probable. The contested decision must be set aside.

69. Considering the delays and the inappropriate way the Secretary-General presented the case to the UNDT, it would not be in the interests of justice to remand the matter to the UNDT. The facts of this case occurred more than six years ago, and it is more than doubtful that the witnesses are now available. It will be practically difficult to conduct a fresh trial at this stage.

70. The most just and suitable remedies, therefore, are the retrospective reinstatement of AAC to service and the expungement of his name from the register of sexual harassers. In this latter regard, it should be kept in mind that the UNDT, despite its other findings, held that the hearsay evidence in the OIAI investigation report did not establish that sexual

harassment had occurred. There has been no cross-appeal by the Secretary-General against that finding.

Judgment

71. AAC's appeal is granted and Judgment No. UNDT/2021/043 is hereby reversed. The following orders are issued:

i) The contested decision of the DED, Management, UNICEF, of 28 December 2018 is hereby rescinded in its entirety.

ii) The Secretary-General is directed to expunge the name of AAC from the relevant register of sexual harassers into which it may have been entered.

iii) In terms of Article 9(1)(a) of the Statute of the UNAT, in the event of the Secretary-General electing not to rescind the contested decision, the Secretary-General is directed to pay in-lieu compensation to AAC in an amount equivalent to two years of his net base salary within 30 days of this Judgment. Interest on the late payment of this amount shall accrue at 5 per cent above the United States Prime Rate.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Sandhu	Judge Colgan

Judgment published and entered into the Register on this 1st day of August 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar