



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1469

Parmosivea Soobrayan
(Respondent/Applicant)

v.

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

JUDGMENT

Before: Judge Katharine Mary Savage, Presiding
Judge Graeme Colgan
Judge Kanwaldeep Sandhu

Case No.: 2023-1846

Date of Decision: 28 June 2024

Date of Publication: 7 August 2024

Registrar: Juliet E. Johnson

Counsel for Appellant: Angélique Trouche

Counsel for Respondent: Robbie Leighton, OSLA

JUDGE KATHARINE MARY SAVAGE, PRESIDING.

1. In Judgment No. UNDT/2023/063 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted the application of Mr. Parmosivea Soobrayan, a former staff member of the United Nations Children’s Fund (UNICEF), and rescinded the Administration’s decision to impose on him the disciplinary measure of separation from service for misconduct (contested decision).
2. The Secretary-General has appealed the impugned Judgment to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
3. For the reasons set forth herein, the UNAT upholds the appeal, reverses the impugned Judgment in part and remands to the UNDT pursuant to the directions in this Judgment.

Facts and Procedure

4. Prior to his separation, Mr. Soobrayan served as the Regional Advisor, Education, Europe and Central Asia Regional Office (ECARO) for UNICEF in Geneva.
5. On 2 December 2020, an individual (VO1) filed a complaint of misconduct with the Office of Internal Audit and Investigation (OIAI) against Mr. Soobrayan in relation to a number of incidents between November 2018 and May 2020.² An investigation followed.
6. After receipt of the OIAI report, the Deputy Executive Director, Management (DED/M), UNICEF, issued a charge letter to Mr. Soobrayan, including notice of allegations of misconduct which concerned details of nine distinct instances of sexual harassment or harassment involving VO1.³
7. Following review of his responses, the Administration found that Mr. Soobrayan had committed the nine instances of misconduct set out in the charge letter, with disciplinary measure of separation from service for this misconduct imposed on him as a result.⁴

¹ *Soobrayan v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/063 (23 June 2023).

² *Ibid.*, para. 2.

³ *Ibid.*, para. 22.

⁴ *Ibid.*, para. 7.

8. Prior to the complaint filed by VO1, between 27 January 2020 and 19 November 2020, numerous e-mail exchanges and meetings were held between Mr. Soobrayan, his First Reporting Officer (FRO), VO1 and a representative of HR, in which serious work-related disagreements between Mr. Soobrayan and VO1 were raised.

9. On 27 January 2020, Mr. Soobrayan wrote in an e-mail addressed to HR:⁵

I write to request HR mediation in an apparent dispute over my supervisory role with [VO1]. We appear to be encountering numerous misunderstandings in the use of certain terminology ... these disagreements are making it difficult for me to exercise my supervisory powers.

10. On 30 June 2020, Mr. Soobrayan sent an e-mail to his FRO to request intervention to solve professional issues with VO1 in relation to the development of a project referred to as the LearnIn project. These concerns are reiterated in several other e-mails.⁶

11. On 13 August 2020, Mr. Soobrayan had a meeting with VO1 and his FRO, in the presence of the HR representative, to discuss issues around the LearnIn project and the working relationship problems between himself and VO1. Mr. Soobrayan questioned the fact that VO1 was sending updates on the project to his FRO without going through him first, and complained that VO1 was insubordinate, bypassed him several times, and made decisions that were in contradiction with his instructions. Mr. Soobrayan also highlighted that he suspected dishonest conduct by VO1 regarding a possible implementing partner to LearnIn, the Alpha Foundation.⁷

12. Between 14 and 18 August 2020, in a number of e-mail exchanges between Mr. Soobrayan and VO1, he raised his concern regarding potential reputational damage to UNICEF as a result of the issues with the LearnIn project and stated that he was going to submit a formal complaint on the matter.⁸

13. On 18 August 2020, Mr. Soobrayan had a call with the HR representative to clarify that the issues he was having with VO1 were not about disregard for hierarchy, reporting lines or management style, but rather about VO1's disregard for his instructions as her supervisor and

⁵ *Ibid.*, para. 64.

⁶ *Ibid.*, para. 65.

⁷ *Ibid.*, paras. 66-67.

⁸ *Ibid.*, para. 68.

leader of the LearnIn project. Mr. Soobrayan indicated his interest in resolving the issues amicably.⁹

14. On 8 September 2020, the representative of HR wrote to Mr. Soobrayan and VO1 stating that he believed the issues between them were related to performance management and provided recommendations. Mr. Soobrayan replied, strongly disagreeing with HR's conclusion that the issues were performance related, stating that, instead, he "flagged serious concerns about the violation of internal controls".¹⁰

15. On 19 November 2020, Mr. Soobrayan wrote to the external partner of LearnIn involved with the Alpha Foundation, with VO1 copied in this communication, stating that he was going to take action and file a formal complaint with UNICEF.¹¹

16. On 2 December 2020, VO1 filed her complaint of harassment and sexual harassment against Mr. Soobrayan, indicating nine incidents ranging between November 2018 and May 2020.

17. Among these nine incidents, it was undisputed that in what is referred to as Incident 1, on 11 September 2019, when on a work trip, Mr. Soobrayan entered VO1's hotel room uninvited.¹² Her door was not completely closed, and she was asleep and late for a dinner arrangement with Mr. Soobrayan and a third colleague. VO1 claimed that Mr. Soobrayan touched her, and she awoke to find him bent over her with his face in front of hers. She screamed and jumped out of the bed. She stated that her heart was pounding, and she was very agitated and stressed as a result. They went downstairs to meet a third colleague for dinner, and VO1 claimed that Mr. Soobrayan was laughing about the incident.¹³

18. Mr. Soobrayan stated that he entered VO1's room because she was late for dinner, he said that he thought she left it open for him as she had on a previous trip. He said that he called out her name but did not touch her.¹⁴ Initially in his interview with investigators, he said that VO1 screamed, but later he clarified that she did not scream. He said that they both joked about what

⁹ *Ibid.*, para. 69.

¹⁰ *Ibid.*, para. 70.

¹¹ *Ibid.*, para. 71.

¹² *Ibid.*, para. 38.

¹³ 31 August 2021 Letter from DED/M to Mr. Soobrayan (Charge Letter), paras. 15-19.

¹⁴ 10 November 2021 Sanction Letter from DED/M to Mr. Soobrayan (Sanction Letter), para. 20.

had occurred with their third colleague.¹⁵ The third colleague stated that VO1 appeared “nervous” and “worried” in the hotel lobby, and later VO1 told her what happened close in time to the event.¹⁶

19. With respect to an incident in March 2020 (referred to as Incident 2), it is not disputed that Mr. Soobrayan gave VO1 an unsolicited neck massage in the ECARO offices. This was corroborated by a direct witness who saw Mr. Soobrayan walk behind VO1 and give her the neck massage. The witness did not notice a reaction from VO1 but said that such conduct was “not typical” in their office. VO1 felt uncomfortable. Mr. Soobrayan conceded he may have touched VO1’s neck and that they often had discussions about back pain, but he denied giving her a “massage”.¹⁷

20. In response to the charge letter, Mr. Soobrayan denied the allegations against him, and stated instead that he had experienced serious professional difficulties with VO1 concerning the LearnIn project and that he had a difficult relationship with VO1, who was engaged in corrupt practices. He pointed out that VO1 had not made contemporaneous complaints about the various incidents alleged, and that the timing of her complaint appeared to be directly related to, and in response to, their professional falling out. Mr. Soobrayan submitted documentary evidence in support of the difficulties he had experienced in attempting to report the problems he had experienced in his professional relationship to his superiors. He complained that the investigators had entirely ignored this evidence and considered it unrelated to the alleged misconduct reported, which amounted to a breach of his due process rights.¹⁸

21. After evaluating Mr. Soobrayan’s response, the DED/M concluded that his conduct amounted to sexual harassment and harassment under the relevant UNICEF policies¹⁹ and United Nations Staff Regulation 1.2(a) and Staff Rule 1.2(f).²⁰

¹⁵ Response to Charges in Letter from the Office of the UNICEF Executive Director dated 31 August 2021, paras. 36 and 43.

¹⁶ Sanction Letter, para. 21.

¹⁷ Impugned Judgment, paras. 54-56.

¹⁸ Sanction Letter, para. 56.

¹⁹ See UNICEF Executive Directive CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority).

²⁰ Sanction Letter, para. 46.

22. The DED/M noted that it was not in dispute that Mr. Soobrayan had a problematic relationship with VO1 but did not consider that this was a basis to suggest that VO1 had fabricated her account.²¹

23. The DED/M considered the seriousness of Mr. Soobrayan's conduct in relation to all nine allegations of misconduct, including Incidents 1 and 2. The DED/M considered that Mr. Soobrayan was a senior manager at the P-5 level and his actions were not limited to isolated incidents but showed a pattern of behavior over an extended period of time. It was noted that Mr. Soobrayan had expressed no remorse for his actions.²²

24. The DED/M concluded that separation from service, with compensation in lieu of notice and without termination indemnity was an appropriate sanction.

25. On 14 February 2022, Mr. Soobrayan filed an application with the UNDT challenging the contested decision.

26. The UNDT held an oral hearing limited to examining the evidence on how Mr. Soobrayan's allegations of malicious motivation by VO1 in lodging the complaint were investigated and/or considered. Following the hearing, the UNDT accepted Mr. Soobrayan's additional evidence on this issue into the record.²³

Impugned Judgment

27. In its Judgment, the UNDT found that OIAI had breached Mr. Soobrayan's due process rights by failing to investigate fully whether VO1's complaint was motivated by her professional disagreement with Mr. Soobrayan. The UNDT considered that the failure by OIAI to explore this possible bias by VO1 undermined the reliability of her testimony and that this error rendered the entire investigation flawed.²⁴

28. The UNDT found that the documentary evidence put up supported Mr. Soobrayan's allegation that he was dealing with a very difficult professional relationship with VO1 prior to her complaint against him, and that there was a possibility that VO1 might have had an ulterior motive in filing the complaint against him. It was found that the timeline of events showed, at

²¹ *Ibid.*, para. 4.

²² *Ibid.*, paras. 48-49.

²³ Impugned Judgment, paras. 13, 16 and 25.

²⁴ *Ibid.*, paras. 83-88.

the very least, that Mr. Soobrayan's narrative was worth investigating in that it demonstrated a potential ulterior motive and bias against him, which put into question the reliability of VO1's allegations.²⁵

29. The UNDT noted that all relevant exchanges had been provided to OIAI, discussed with Mr. Soobrayan during his interview, and that the investigators knew VO1 might have been biased and had an ulterior motive against Mr. Soobrayan related to the issues concerned with the LearnIn project and Mr. Soobrayan's warning that he intended to report VO1 for misconduct. The UNDT found that while it was unlikely that VO1 had fabricated all the reported incidents and manipulated the testimony of the witnesses, it was "not absurd to consider that those incidents might have been exaggerated due to bias or ulterior motives". It was noted that this was why investigating Mr. Soobrayan's allegations was of critical importance as, at the very least, they were key to establishing the reliability of the evidence, but that the investigators did not look into any possible motivation behind VO1's complaint, did not consider the documentary evidence brought forth by Mr. Soobrayan, and, nonetheless, concluded that the events that immediately preceded VO1's complaint were irrelevant for the determination of the facts under dispute.²⁶

30. The UNDT noted that after an OIAI Quality-Assurance Specialist flagged the lack of reference to Mr. Soobrayan's allegations in the investigation report during the review process in July 2021, OIAI management "determined that the information provided about the described disagreements between [Mr. Soobrayan] and [VO1] was not directly relevant to the allegations of sexual harassment or to [VO1's] reliability as a witness". The UNDT found that it had been clearly established from the testimony of the investigators at the hearing that they decided not to investigate Mr. Soobrayan's allegations and disregarded them as "irrelevant", without an investigation or consideration of the evidence provided.²⁷

31. The UNDT held that it was incumbent on OIAI to have explored the allegations made by Mr. Soobrayan and considered the timeline of events preceding the complaint to determine if the alleged "retaliatory nature" of VO1's complaint merited further consideration or if it was indeed irrelevant. By not doing this, the investigators were found to have "seriously breached" Mr. Soobrayan's due process rights, failed to clearly demonstrate the relevance or irrelevance

²⁵ *Ibid.*, para. 73.

²⁶ *Ibid.*, paras. 74-77.

²⁷ *Ibid.*, para. 79.

of the evidence, and failed to properly establish the reliability of VO1's testimony, tainting the whole investigation process as a result. This was so in that the investigation relied exclusively on VO1's testimony without first properly establishing her credibility as a reliable witness and whether she was retaliating against Mr. Soobrayan because of previous professional disagreements and his indication that he would make a formal complaint against her for misconduct. Regard was had to the evidence on record that Mr. Soobrayan was discouraged by his FRO and the HR representative to pursue the matter against VO1 formally, which explained why he had refrained from doing so.²⁸

32. The UNDT found that since the investigators are under a duty to act impartially and independently and collect both inculpatory and exculpatory evidence, the fact that they failed to do so renders the entire investigation flawed.²⁹

33. The UNDT considered that the seven incidents, in respect of which there were no third-party witnesses and in respect of which Mr. Soobrayan and VO1 had starkly conflicting accounts, these incidents had not been established through clear and convincing evidence. Accordingly, these seven incidents must, by virtue of the UNDT's Judgment and the absence of any appeal against it in these respects, be deemed as not having occurred. However, the UNDT accepted that the facts were established through clear and convincing evidence in respect of Incident 1 on 11 September 2019, when the Applicant entered VO1's hotel room, and Incident 2 in March 2020, when the Applicant gave VO1 a "neck massage".³⁰

34. In considering whether the two incidents "legally amount to sexual harassment and, thus, misconduct",³¹ the UNDT observed in respect of Incident 1 that the third colleague did not witness the event, and that when VO1 told her about it, VO1 did not identify it as sexual harassment. The Tribunal stated that Mr. Soobrayan exercised poor judgment in entering her hotel room to call her for dinner, but one could "not reasonably interpret this action as a 'sexual advance', gesture or conduct of 'a sexual nature' within the meaning of sexual harassment" under the law.³²

35. With respect to Incident 2, the UNDT acknowledged that there was a direct witness to this incident but that this witness had not considered it to be of "a 'sexual nature'". The Tribunal noted

²⁸ *Ibid.*, paras. 83-85.

²⁹ *Ibid.*, para. 88.

³⁰ *Ibid.*, para. 89.

³¹ *Ibid.*, para. 94.

³² *Ibid.*, para. 94(a).

that this witness stated that VO1 and Mr. Soobrayan had spoken of “tension” and “aches” and that when Mr. Soobrayan briefly massaged VO1’s neck, neither of them reacted. The Tribunal found that Mr. Soobrayan had “demonstrated poor judgment and behaved in an unprofessional way but, in context, this action cannot be interpreted as having a ‘sexual connotation’”.³³

36. The UNDT found that “the established facts do not reach the threshold of sexual harassment”³⁴ and thus the disciplinary sanction was unlawful. It therefore rescinded what it found to be the unlawful disciplinary sanction imposed on the basis that it had negatively impacted Mr. Soobrayan’s career and reputation. It ordered that Mr. Soobrayan be reinstated, with all his benefits and entitlements, from the date of separation, at the level he held before being separated. Any actuarial cost linked to the recalculation of his pension benefit arising from his reinstatement was ordered to be borne by the Organization.³⁵

37. Since Mr. Soobrayan was 11.5 months from retirement when he was separated from service, the UNDT ordered that, in the event that the Secretary-General elected instead to pay compensation in lieu of reinstating him, Mr. Soobrayan be paid a sum equivalent to 11.5 months of net-base salary at the same grade and level he held at the time of his separation, with interest at the United States prime rate from the date the Judgment became executable until payment of the compensation.³⁶ An additional five per cent was ordered to be applied to the United States prime rate 60 days from the date that the Judgment became executable. In addition, Mr Soobrayan’s name was ordered to be deleted from the United Nations-wide database on sexual misconduct.³⁷

38. The UNDT rejected Mr. Soobrayan’s request for payment of USD 10,000 in moral damages because he did not provide any evidence of harm directly linked to the contested decision.³⁸

39. The Secretary-General lodged an appeal against the impugned Judgment on 21 August 2023, and Mr. Soobrayan filed his answer on 13 October 2023.

³³ *Ibid.*, para. 94(b).

³⁴ *Ibid.*, para. 97.

³⁵ *Ibid.*, para. 114(b).

³⁶ *Ibid.*, para. 114(c).

³⁷ *Ibid.*, para. 114(e).

³⁸ *Ibid.*, para. 112.

Submissions

The Secretary-General's Appeal

40. For reasons that are not apparent, the Secretary-General appeals solely against the UNDT's determination that the facts as established in respect of Incidents 1 and 2 did not constitute misconduct. No appeal has been raised against the UNDT's findings in respect of the seven further allegations of misconduct raised by VO1, or its findings in relation to the investigation report which was produced following the investigation of the allegations raised by VO1.

41. In relation to Incident 1, the Secretary-General submits that the UNDT erred in finding that Incident 1 did not constitute sexual harassment. The Secretary-General argues that the Tribunal was clearly in error because the Administration had not found Incident 1 to constitute sexual harassment. Rather, in the Sanction Letter, the Administration had found that Incident 1 amounted to harassment. It followed that whether or not there was a sexual component to Incident 1 was irrelevant.³⁹

42. The Secretary-General submits that pursuant to Section 1.1(b) of CF/EXD/2012-007 Amend. 1, harassment is defined as "any improper and unwelcome conduct that might reasonably be expected or perceived to cause offence or humiliation to another person". The UNDT recognized that Mr. Soobrayan's conduct in Incident 1 was "improper" (e.g., he demonstrated poor judgment) and his entry into her hotel room was also unwelcome and unsolicited. VO1 also registered a pounding heart, anxiety and stress, and the third colleague observed VO1 was worried and nervous afterwards. The Secretary-General submits that this meets the definition of harassment, and the UNAT should uphold UNICEF's decision in this regard and reverse the UNDT.

43. In relation to Incident 2, the Secretary-General contends that the UNDT erred in finding that Incident 2 was not of a sexual nature and that it therefore did not constitute sexual harassment. In this regard, the Secretary-General submits that the UNDT erred in relying solely

³⁹ The Sanction Letter stated: "By entering VO1's hotel room uninvited and waking her up,³⁹ you engaged in "improper and unwelcome conduct that... might reasonably be expected or be perceived to cause offence" within the meaning of Section 1.1(b) of CF/EXD/2012-007 (harassment). VO1 was upset by your actions, to the extent of screaming and being upset when she went to the hotel lobby shortly after the incident. Entering the hotel room of a junior colleague, to whom you had already made inappropriate comments, without any invitation, and waking her up (whether physically or verbally) could reasonably be expected or perceived to cause offence. As above, as her senior colleague, you put VO1 in a position that made her feel uncomfortable. It interfered with work, as it occurred during an official mission."

on the testimony of a third party who witnessed the neck massage to determine whether it was sexual in nature. The Secretary-General argues that it does not matter how an incident is perceived by a third party, since it was VO1 who was receiving the neck massage, not the bystander.

44. The Secretary-General contends that under the UNICEF legal framework, sexual harassment is “any unwelcome and improper conduct of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment”.

45. The Secretary-General states that there is no dispute that the neck massage was unsolicited. He argues that it was also unwelcome, VO1 stated that she tried to move away, but even if she did not, the UNAT has held that a victim does not have to give the perpetrator a warning or a sign that the behavior is unwelcome to make it so.⁴⁰

46. The Secretary-General points out that the UNDT already found that this conduct was “unprofessional” which is equivalent to “improper” in the definition of sexual harassment. Moreover, the conduct does not have to be overtly sexual. Mr. Soobrayan imposed a prolonged physical touch on his supervisee. VO1 testified that she did not feel comfortable and that he was invading her space. Mr. Soobrayan was thus interfering with work as it occurred in her office.

47. The Secretary-General submits that it is unacceptable for a supervisor to give an unsolicited massage to a supervisee, and the UNDT erred in relying exclusively on a third-party witness to assess whether Incident 2 constituted sexual harassment.

48. It was argued that Incidents 1 and 2 were serious in nature and thus the disciplinary measure of separation was proportionate, given that Mr. Soobrayan was a P-5 level manager who had committed two separate instances of serious misconduct on VO1, his supervisee, and he showed no remorse, even denying Incident 2 which was observed by a third party. The Secretary-General submits that a sanction on the severe side is appropriate, particularly in light of UNAT jurisprudence that “sexual harassment is a scourge in the workplace”.⁴¹

⁴⁰ The Secretary-General relies on *Adriantseheno v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1146/Corr. 1, para. 50.

⁴¹ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 33.

49. The Secretary-General submits that the due process rights of Mr. Soobrayan were fully respected as he was informed of the charges, able to mount a defense, and the Sanction Letter addressed his comments to the Charge Letter.

50. The Secretary-General therefore seeks that the Appeals Tribunal vacate the UNDT's findings with respect to Incidents 1 and 2, find that they amounted to misconduct, and uphold the sanction of separation from service.

Mr. Soobrayan's Answer

51. In opposing the appeal Mr. Soobrayan contests the Secretary-General's decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. He submits that he and VO1 had a friendly, collegial relationship for a long period of time until they had extremely serious disagreements regarding the LearnIn project. It was only after he threatened to report her for corrupt practices that VO1 filed a complaint against him. OIAI investigators characterized Mr. Soobrayan's evidence as irrelevant and refused to investigate.

52. Mr. Soobrayan submits that the UNDT's finding that his due process rights were seriously breached is not subject to appeal.

53. Mr. Soobrayan argues that the Secretary-General has not contested the UNDT's findings that VO1's evidence could not be considered credible given the failures of the OIAI investigation, and thus the Secretary-General cannot rely on the evidence of VO1 with respect to Incidents 1 and 2, because such evidence is tainted.

54. Mr. Soobrayan submits that because VO1's evidence cannot be relied upon, the only evidence that can be credited is his own or that of the third parties.

55. Mr. Soobrayan submits that just because he demonstrated "poor judgment" in entering VO1's hotel room uninvited, "poor judgment" is not synonymous with "improper" conduct, as would be necessary for this to constitute harassment as a legal matter. He submits that entering someone's hotel room uninvited because they were late for dinner may have been a mistake, but that does not mean it was immoral or dishonest.

56. Mr. Soobrayan submits that the fact that VO1 was “shocked” does not mean that this caused “offence” as required under the definition of harassment. The word “offence” in the definition of harassment implies a reaction to a perceived insult or rudeness, not simply causing shock or alarm.

57. Mr. Soobrayan submits that accidentally causing someone shock or alarm is materially different from improperly causing someone offence or humiliation. If a single act can represent harassment, it should be an obviously improper, offensive, or humiliating act, which this was not.

58. As to Incident 2, Mr. Soobrayan submits that the Secretary-General errs by conflating the fact that the neck massage was unsolicited means that it was unwelcome. These are not synonymous terms. The fact that VO1 did not react shows that in the context of their friendly relationship and having a discussion about back pain, the contact was not unwelcome.

59. Mr. Soobrayan repeats his denial that he gave VO1 a neck massage, insisting that he pointed to areas where tension might build up while discussing back pain and posture and that the third-party witness did not use the word “massage” until this term was proposed by the OIAI investigator. Mr. Soobrayan submits that this conduct was plainly not sexual in nature as it occurred in front of a third-party witness, and this witness confirmed that it was not sexual in nature.

60. Mr. Soobrayan submits that given that the Secretary-General did not contest the UNDT’s findings that VO1 was unreliable as a witness, her testimony cannot be relied upon to support that this contact was sexual in nature.

61. Mr. Soobrayan argues that the DED/EM accepted that the neck massage was not sexual *per se* but inferred that it was sexual from the other misconduct findings. However, he notes that the other misconduct findings were overturned by the UNDT and not appealed by the Secretary-General.

62. Mr. Soobrayan submits that the UNDT correctly found that Incidents 1 and 2 were not misconduct. However, if the UNAT were to disagree, Mr. Soobrayan submits that the sanction is disproportionate.

63. Mr. Soobrayan points out that the Sanction Letter specifically referenced that the sanction was related to a course of conduct rather than isolated incidents. Since only two

incidents were appealed by the Secretary-General, a proportionate sanction would not reflect a course of conduct.

64. Mr. Soobrayan submits that his failure to admit certain content should not be deemed an aggravating circumstance and that disciplinary cases where a single act has justified separation from service involve far more egregious conduct.⁴²

Considerations

The Standard of Review for Disciplinary Cases

65. In undertaking a judicial review of disciplinary cases under Article 2(1)(b) of the Dispute Tribunal Statute (UNDT Statute), the UNDT is required to examine: (i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); (ii) whether the established facts amount to misconduct; (iii) whether the sanction is proportionate to the offence; and (iv) whether the staff member's due process rights were respected.⁴³

66. In *Kennedy* we made it clear that:⁴⁴

Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

67. A finding that misconduct has been established on clear and convincing evidence therefore requires the UNDT to accept that the truth of the facts asserted is highly probable.⁴⁵

⁴² Mr. Soobrayan references *Temu v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1281, and *Conteh v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1171.

⁴³ *Mubashara Iram v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1340, para. 47.

⁴⁴ *Timothy Kennedy v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1184, para 47.

⁴⁵ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30; *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-776, para. 34.

The Legal Framework

68. There are several applicable norms to which the UNDT was required to have regard in relation to the allegations against Mr. Soobrayan in relation to Incidents 1 and 2.

69. Article 101, paragraph 3 of the Charter of the United Nations, and the core values set out in Staff Regulation 1.2(a) and Staff Rule 1.2(f),⁴⁶ provide that every staff member has the right to be treated with dignity and respect, and to work in an environment free from harassment and abuse. Consequently, any form of discrimination, harassment, sexual harassment and abuse of authority is prohibited.

70. Staff Rule 1.2(f) sets out the basic rights and obligations of staff and provides that:

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

71. UNICEF Executive Directive, CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority), which was applicable until 8 March 2020, provided in Section 1.1(b) that:

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

72. Section 1.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides that harassment includes conduct “that might reasonably be expected or perceived to cause offence or humiliation to another person”.

73. Section 1.3 of the same Bulletin defines sexual harassment as:

Any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an

⁴⁶ Secretary-General’s Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

74. The UNICEF Policy on the Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority, Policy/DHR/2020/002, applicable from 9 March 2020 to date, which applies to all UNICEF personnel, provides that “sexual harassment” constitutes:

... any unwelcome and improper conduct of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.

75. Clause 9 of Policy/DHR/2020/002 recognises as a general principle that although “typically involving a pattern of behavior, prohibited conduct may take the form of a single incident”. Clause 10 of the same Policy also requires that:

In assessing the reasonableness of expectations or perceptions, the perspective of the person(s) who is/are the target(s) of the prohibited conduct (...) shall be taken into account.

The Scope of the Appeal and Alleged Errors

76. As we have already noted, the Secretary-General elected to limit the scope of his appeal against the Judgment of the UNDT only to the findings made in respect of Incidents 1 and 2. No appeal was therefore raised against the UNDT’s finding that the seven other incidents of misconduct, of which Mr. Soobrayan had been found by the Administration to have committed following its investigation, had not been proved to the standard required given the lack of third-party evidence to corroborate such incidents. It follows that for purposes of this appeal only two of the nine allegations of misconduct investigated are before us.

77. In relation to Incident 1, we accept the Secretary-General’s contention that the UNDT erred in law in applying the legal test for sexual harassment as set out in Section 1.3, rather than that for harassment under Section 1.2 of ST/SGB/2008/5. The Secretary-General invites us on appeal to apply the correct legal test and find Mr. Soobrayan to have committed the misconduct alleged. Yet, to determine the issue on appeal requires more than simply an application of the correct legal test. The Secretary-General submits that the harassment test

has been met in that Mr. Soobrayan was found by the UNDT to have exhibited “poor judgment” which meant his conduct was “improper” for purposes of the harassment as defined, and “unsolicited” which meant it was also “unwelcome”. The view we take, however, is that to reach such conclusions requires more than simply regard to the law and necessitates a consideration of the established relevant facts after resolving disagreements between the parties as to what these were.

78. The facts before the UNDT were those that had been determined by OIAI as detailed in the investigation report. The UNDT elected to refer only a narrow issue to an oral hearing, namely whether Mr. Soobrayan’s due process rights had been breached by the failure of OIAI to investigate fully whether VO1’s complaint was motivated by her professional disagreement with Mr. Soobrayan and explore whether the possible bias by VO1 undermined the reliability of her testimony. Following this hearing the UNDT found that there was merit in Mr. Soobrayan’s contention that OIAI’s failure to investigate VO1’s motivations and possible bias affected her reliability as a witness thus rendering the entire investigation flawed. Importantly, there is no appeal by the Secretary-General which has been raised against this finding. This, in our view, has serious consequences for the determination of the matter on appeal.

79. To find that the legal threshold for harassment in relation to Incident 1 has been met requires that regard be had to the facts as set out in the investigation report which are then applied to the law. This in circumstances in which VO1’s possible bias and reliability as a witness has been called into question by the UNDT and the finding that the investigation report was flawed and not appealed.

80. Similarly in relation to Incident 2, the Secretary-General contends that the UNDT erred in law in its finding that the conduct was not “sexual” in nature as is required by the legal test for sexual harassment. What is sought on appeal is that we reverse this determination and find instead that the conduct was sexual in nature and consequently falls within the legal definition of sexual harassment. However, to do so also requires us to reach conclusions about the facts (some of them disputed) and apply them to the law, since the question of law is not extricable from the relevant factual issues.

81. In the present appeal, because the question of law is not extricable from the factual issues, an application of the UNDT findings to the appropriate legal test is a question of mixed law and fact. As such, there must be a palpable and overriding error for this Tribunal to

interfere, namely that the error is obvious and is sufficiently grave to overturn the finding of fact as it goes to the root of the issue and as such cannot stand. For reasons that follow, we find that the UNDT made such an error.

82. Article 16(2) of the UNDT Rules of Procedure (UNDT Rules) provides that a hearing shall *normally* be held following an appeal against an administrative decision imposing a disciplinary measure.⁴⁷

83. It is for the UNDT to decide whether an oral hearing should be held on the merits of a disciplinary case given that as a first instance tribunal it is best placed to decide what is appropriate for the fair and expeditious disposal of a case and to provide justice for both parties. In this regard the UNDT enjoys a wide margin of discretion to decide what is required to balance the need for fairness to the parties in misconduct cases and efficiency in the Tribunal's proceedings.

84. We have made it clear that "an oral hearing and cross-examination will not be required in all disciplinary cases",⁴⁸ and that whether an oral hearing will be required "will depend on the circumstances of the case before the UNDT. For example, there may be documentary, audio or video evidence or circumstances surrounding the parties or witnesses that may support the decision not to hold an oral hearing."⁴⁹ At the same time, since cases of alleged misconduct typically require the determination of disputed factual issues, this is often best done through "an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony".⁵⁰ In such cases, a hearing not only allows for witnesses' versions to be tested and challenged, but also affords the UNDT the opportunity to question witnesses and consider the veracity of their testimony having had the benefit of viewing their performance and considering their demeanour.

85. By its nature, harassment or sexual misconduct usually occurs between two individuals and often in the absence of any third-party witness able to corroborate the events. Given as much, a proper assessment of the credibility, reliability, and probabilities of the account of one

⁴⁷ Emphasis added.

⁴⁸ *Applicant v. Secretary-General of the United Nations* Judgment No. 2022-UNAT-1187, para. 58.

⁴⁹ *Humphreys Timothy Shumba v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1384, para. 74.

⁵⁰ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 26; *AAO v Secretary-General of the United Nations*, Judgment No 2023-UNAT-1361, para. 52.

witness over another is fundamental to an assessment of the veracity or otherwise of distinct versions in such matters.

86. In spite of the importance of establishing whether misconduct had been proved to the threshold required, the UNDT did not hear any oral evidence related to any of the instances of misconduct alleged, including Incidents 1 or 2. This was so in spite of the fact that the UNDT had noted in its Case Management Order⁵¹ that the parties disputed the essential facts particularly regarding the standard of evidence required and that Mr. Soobrayan had contended that VO1's complaint was motivated by retaliation. Despite being alive to the fact that there existed material factual disputes in respect of the misconduct complaints, the UNDT decided to hold a hearing only on whether Mr. Soobrayan's allegations of retaliation had been investigated and/or considered. Oral evidence was therefore heard only from the investigation officers and an OIAI Quality-Assurance specialist on the limited issue it had identified, with no testimony heard from direct witnesses to the alleged misconduct, including VO1.

87. It is apparent from the record of the hearing before the UNDT that Mr. Soobrayan, who was self-represented, grappled with how to limit the issues to those related to the investigation of motive during the investigative process, often seeking to impugn the credibility of VO1's account of events to the investigators. This appears to us to be unsurprising given the extent of the factual controversies which existed relating to the merits of the complaints raised by VO1.

88. Having heard the evidence concerning bias, the UNDT accepted that it was unlikely that VO1 had fabricated all of the reported incidents and manipulated the testimony of the witnesses in the course of the investigation, but considered that it was "not absurd" that the incidents might have been exaggerated due to VO1's bias or ulterior motives which was why the investigation of Mr. Soobrayan's allegations as to her motive was of critical importance. The UNDT makes this finding without giving VO1 the opportunity to speak or rebut this allegation. The UNDT also found that the failure of OIAI to act impartially and independently, collect inculpatory and exculpatory evidence, examine the allegations made by Mr. Soobrayan and determine if VO1's allegations against him were retaliatory in nature amounted to a serious breach of his due process rights. As stated, such breach was found to render the entire

⁵¹ *Soobrayan v. Secretary-General of the United Nations*, Case Management Order No. 24 (GVA/2023).

investigation flawed, with the facts on which the disciplinary measure was based not established on clear and convincing evidence, except for Incidents 1 and 2.

89. In this matter, having found the investigation report to be flawed and having raised issues pertaining to the reliability of VO1's version without hearing from VO1, it is not clear to us on what basis the UNDT resolved the material disputes of fact which existed.

90. In respect of Incident 1, the UNDT was required to determine whether Mr. Soobrayan's conduct could be expected or perceived to have caused offence or humiliation to a reasonable person.⁵² Yet, it is also not clear how the UNDT determined issues such as the nature of the relationship between VO1 and Mr. Soobrayan, why VO1's hotel room door was not completely closed, Mr. Soobrayan's reason for entering the room, VO1's response to the incident and whether Mr. Soobrayan's conduct could be expected or perceived to have caused offence or humiliation to a reasonable person. Without one account of events having been tested against the other, no just and expeditious resolution of the factual disputes was possible.

91. Turning to Incident 2, as was made clear in *Appellant*,⁵³ the threshold of evidence needed to establish a finding of sexual harassment, must be –

... sufficient, credible and reliable evidence proving a high probability that the perpetrator: i) made a sexual advance; ii) made a request for a sexual favour; iii) engaged in conduct or behaviour of a sexual nature; or iv) made a gesture of a sexual nature. In addition, the advance, request, conduct or gesture must be shown to have been unwelcome; might reasonably have been perceived to cause offence or humiliation to another; or have caused a hostile work environment.

92. Despite finding that the investigation was flawed, in considering Incident 2 the UNDT relied on the same report and on the evidence given to investigators by the eyewitness to find that the legal threshold of sexual harassment had not been reached. That witness did not consider that the neck massage was of a sexual nature and that the massage occurred in a context in which Mr. Soobrayan and VO1 had spoken of "tension" and "aches", following which he had briefly massaged VO1's neck. The witness also recalled that there was no reaction from either VO1 or Mr. Soobrayan following this massage. The UNDT accepted that the evidence showed that no conduct of a sexual nature had occurred without indicating why the third-party

⁵² *Belkhabbaz (formerly Oummih) v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-873, para. 31.

⁵³ *Appellant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1210, para. 35.

witness's account was more plausible and stood to be accepted over that of VO1, and failing to determine the factual disputes which existed having regard to the credibility of the accounts, their reliability, and the probabilities of the different versions. In doing so, the UNDT erred in its treatment of the facts as they applied to the law in relation to Incident 2.

93. Since the UNDT found that the investigation report was flawed and elected to narrow the scope of the oral evidence heard in the matter to issues of VO1's alleged motives, it is not clear on what basis it reached its decision on the disputed facts in order to apply such facts to the law as it related to Incidents 1 and 2, particularly when it heard no direct evidence from Mr. Soobrayan and VO1 with respect to these incidents.

94. We emphasize that our finding does not mean that in all cases an oral hearing is required. Whether the investigation report alone provides sufficient evidence to establish the relevant facts by clear and convincing evidence will depend on the particular facts and circumstances of the case, including what facts are disputed, the nature and extent of such disputes, whether any supporting documentary or recorded evidence exists, and admissions made by the parties. We accept that there will be circumstances in which in the course of an investigation, it is indeed possible that careful regard is had to the disputes which exist between witnesses, with the appropriate opportunity given to parties to respond to disputed versions or have their own different version put to a witness to challenge their version. In such instances, an oral hearing may not be required.

95. However, that is not the case here. In the present case, we find that the UNDT made errors of law and fact which on appeal are not capable of correction simply through the application of the correct legal standard, having regard to the undisputed facts. Given the material errors of law and fact committed and their palpable and overriding nature, the appeal against the UNDT's findings in relation to Incidents 1 and 2 must succeed. Since we are not in a position to determine whether Incidents 1 and 2 have been proved in the manner and to the standard required and thereafter apply such findings of fact to the law, the appropriate remedy in the circumstances is to remand the matter to the UNDT for hearing *de novo* in relation to the two incidents for proper and additional fact finding pursuant to Article 4(b) of the UNAT Statute.

96. Accordingly, the UNDT is instructed to conduct a hearing *de novo* on the following allegations of misconduct raised against the Respondent:

- i) Harassment in that on 11 September 2019, while on mission to Ashgabat, Turkmenistan, Mr. Soobrayan entered VO1's hotel room while she was sleeping, touched her, and stood over her when she woke up (Incident 1); and

- ii) Sexual harassment in that in March 2020, while within the ECARO offices in Geneva, Mr. Soobrayan gave a neck massage to VO1, without asking for her permission (Incident 2).

Judgment

97. The Secretary-General's appeal is granted. Judgment No. UNDT/2023/063 is hereby reversed in part and the matter remanded to the UNDT in accordance with the instructions in paragraph 96 of this Judgment.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Savage, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 7th day of August 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar