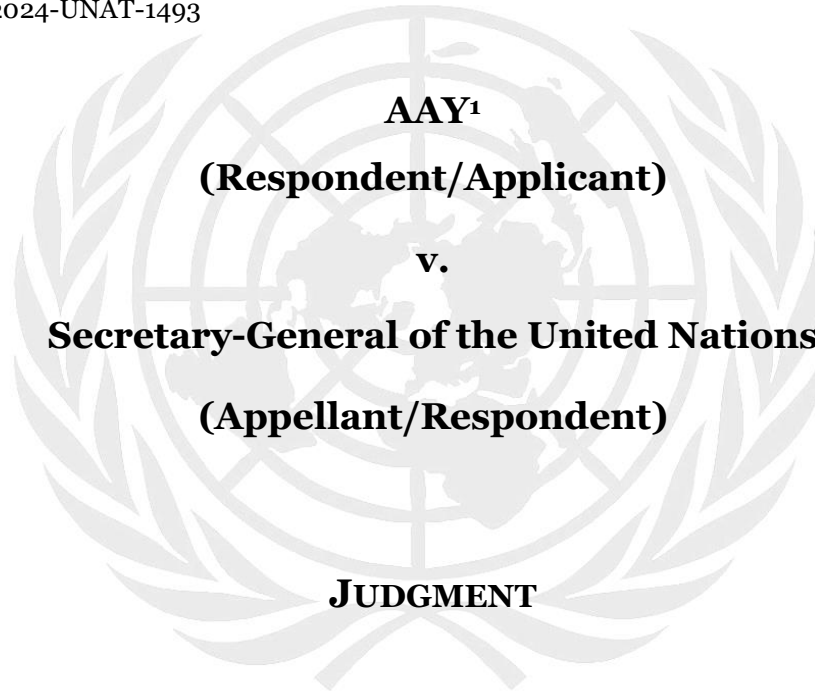




**UNITED NATIONS APPEALS TRIBUNAL**  
**TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2024-UNAT-1493



**AA<sup>1</sup>**

**(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations**

**(Appellant/Respondent)**

**JUDGMENT**

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Before:	Judge Katharine Mary Savage, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2023-1877
Date of Decision:	25 October 2024
Date of Publication:	5 December 2024
Registrar:	Juliet E. Johnson

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Counsel for AA<sup>1</sup>: George G. Irving

Counsel for Secretary-General: Rupa Mitra

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<sup>1</sup> 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 KATHARINE MARY SAVAGE, PRESIDING.**

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), AAY, a former United Nations staff member, contested the decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with Staff Rule 10.2(a)(viii) (contested decision). In Judgment No. UNDT/2021/007,<sup>2</sup> the UNDT dismissed his application. AAY subsequently appealed that judgment to the United Nations Appeals Tribunal (UNAT). By Judgment No. 2022-UNAT-1210,<sup>3</sup> the UNAT remanded the case to be heard and determined by a different UNDT Judge.

2. On 4 October 2023, the UNDT issued Judgment No. UNDT/2023/111 (impugned Judgment), granting AAY's application, rescinding the disciplinary measure and granting in-lieu compensation in the amount of two years' net base salary and directing the Secretary-General to expunge AAY's name from the relevant register of sexual harassers into which it may have been entered, and to inform AAY when this is executed.<sup>4</sup>

3. The Secretary-General appeals the impugned Judgment.

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

**Facts and Procedure**

5. AAY joined the Organization in 2012 as an Information Systems Officer at the P-4 level. Prior to his separation in March 2019, AAY held a fixed-term appointment at the P-5 level.<sup>5</sup>

6. It was alleged that, on 8 November 2017, during a farewell party for a colleague at the offices of Enterprise Resource Planning (ERP)-Umoja Project at the United Nations Headquarters in New York, AAY sexually harassed three female colleagues, AA, BB and CC. The six specific allegations against AAY were: i) he grabbed AA's face, held her closely, leaned forward and attempted to kiss her; ii) when AA resisted AAY kissing her, he forced her head down and kissed her on the forehead; iii) he grabbed BB's face, held her closely, leaned forward and attempted to kiss her; iv) he tried to move physically close to AA and BB while dancing, despite their attempts

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<sup>2</sup> *Appellant v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/007 (the UNDT's first Judgment).

<sup>3</sup> *Appellant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1210 (the UNAT's first Judgment).

<sup>4</sup> Impugned Judgment, para. 113.

<sup>5</sup> *Ibid.*, para. 3.

to keep him at a distance; v) he attempted to grab CC's face, when she blocked her face with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and vi) he took and pulled CC's hands to try to get her to dance, despite her resistance.<sup>6</sup>

7. On 15 November 2017, CC reported the alleged harassment to the ERP-Umoja Project Director, who referred the matter to the Office of Internal Oversight Services (OIOS), which then initiated an investigation of the complaint. On 29 June 2018, OIOS concluded its investigation and transmitted an investigation report of the incident (the investigation report) to the Under-Secretary-General for Management. On 25 October 2018, following a review of the investigation report, the Office of Human Resources Management issued a memorandum to AAY detailing allegations of misconduct leveled against him (the allegations memorandum).<sup>7</sup>

8. On 13 December 2018, AAY provided his comments on the allegations of misconduct. He admitted that he had danced with the three complainants and had kissed AA on the forehead after dancing with her. He denied kissing or attempting to kiss BB and CC and denied completely the allegations of sexual harassment.<sup>8</sup>

9. On 29 March 2019, the Assistant Secretary-General for Human Resources informed AAY that the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) had decided that the allegations against him had been substantiated by clear and convincing evidence and that she had decided to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.<sup>9</sup>

10. On 26 June 2019, AAY filed an application before the UNDT, requesting rescission of the contested decision. AAY did not testify but requested to call five witnesses, i.e. AA, BB, CC, XX, and YY. The UNDT declined to hear the evidence of AA, XX, and YY. BB declined to testify, and only CC testified. The Secretary-General did not call any other witnesses.<sup>10</sup>

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<sup>6</sup> *Ibid.*, para. 4.

<sup>7</sup> *Ibid.*, paras. 5 to 7.

<sup>8</sup> *Ibid.*, para. 8.

<sup>9</sup> *Ibid.*, para. 9.

<sup>10</sup> The UNAT's first Judgment, para. 14.

*The UNDT's First Judgment*

11. On 3 February 2021, the UNDT issued Judgment No. UNDT/2021/007 in the case of *Applicant v. Secretary-General of the United Nations*, dismissing AAY's application and affirming the contested decision. In making its findings, the UNDT relied on the investigation report and on the evidence of CC. The UNDT found that the Secretary-General had established the facts on which the imposition of the disciplinary measure was based on clear and convincing evidence, that these facts constituted misconduct in the form of sexual harassment, that the disciplinary measure was proportionate to the nature of the misconduct and that AAY's due process rights had been fully observed. AAY subsequently appealed that judgment to the Appeals Tribunal.<sup>11</sup>

*The UNAT's First Judgment*

12. On 18 March 2022, the UNAT issued Judgment No. 2022-UNAT-1210 (the UNAT's first Judgment). The UNAT found it was incumbent on the Secretary-General to lead the evidence of the complainants, other eyewitnesses who witnessed the alleged misconduct and the persons to whom the complainants made their first report, all of whom AAY might have cross-examined. Likewise, AAY ought to have been allowed to call AA, YY and XX. AAY set out a reasonable basis for why their evidence would have been exculpatory, and, had such evidence been allowed, it might have assisted the UNDT to properly assess the credibility and reliability of the witnesses presented by the Secretary-General. The evidence of AA would have been relevant to the question of whether AAY's conduct was unwelcome and/or offensive; while the evidence of XX and YY was relevant to the state of mind of the complainants and the credibility of their assertions that the alleged conduct was unwelcome or offensive. To the extent that BB was a witness adverse to AAY, the failure of the Secretary-General to secure her attendance before the UNDT permitted an adverse inference which detracted considerably from the credibility and reliability of her allegations in the investigation report.<sup>12</sup>

13. The UNAT found that the UNDT failed to discuss and analyse the evidence of CC who gave testimony before it and made no findings about her performance as a witness, her credibility and reliability or the factual conclusions to be drawn from her testimony. Instead, the UNDT relied once again almost entirely upon the hearsay in the investigation report, as

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<sup>11</sup> *Ibid.*, paras. 15 and 16.

<sup>12</sup> *Ibid.*, paras. 49 and 58.

well as a relatively neutral admission by AAY in his OIOS interview that he had touched CC's hand when inviting her to join a communal dance, as sufficient to establish the allegations.<sup>13</sup>

14. The UNAT concluded that, by refusing to allow key witnesses to testify and by over-relying on hearsay evidence, the UNDT had committed an error in procedure such as to affect the decision of the case, resulting in a manifestly unreasonable decision. The appropriate remedy was found to be for the matter to be remanded to the UNDT with a direction for the application to be re-heard and considered by a different judge.<sup>14</sup>

*The impugned Judgment*

15. On 4 October 2023, following the re-hearing of the matter, the UNDT issued Judgment No. UNDT/2023/111.

16. The UNDT found no merit in the Secretary-General's contention that during the proceedings in this case, the procedural error had been corrected, i.e., all available witnesses, including those proposed by AAY, had been heard by the UNDT.<sup>15</sup>

17. The UNDT found that the Secretary-General had once again failed to secure the attendance of two victims, i.e., AA and BB, at the remanded hearing. Based on the fact that AA and BB, who were consultants and thus not staff members, were not available to testify on remand, the UNDT held that "the available evidence does not attain the standard of clear and convincing evidence establishing that [AAY] sexually harassed" AA and/or BB.<sup>16</sup>

18. The UNDT referred to the testimonies of PM, SR, and MN holding that none of their testimonies corroborated the charges and that in fact, they were "exculpatory in so far as all three witnesses testify that they did not see [AAY] doing anything improper at the party". The UNDT held that, therefore, the testimonies of the three witnesses did not represent an adequate response to the concerns raised by the UNAT.<sup>17</sup>

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<sup>13</sup> *Ibid.*, para. 53.

<sup>14</sup> *Ibid.*, paras. 59 and 60.

<sup>15</sup> Impugned Judgment, paras. 77 and 85.

<sup>16</sup> *Ibid.*, paras. 58 to 63.

<sup>17</sup> *Ibid.*, paras. 72 and 73.

19. The UNDT noted that neither the allegations memorandum nor the sanction letter elaborated upon the “sexual nature” of the alleged offence, and the Administration consequently failed to prove by clear and convincing evidence, a key element of sexual harassment, that the verbal or physical conduct, gesture or any other behaviour was of “a sexual nature”. The UNDT nevertheless continued to examine whether the facts in relation to AA, BB, and CC had respectively been proven by clear and convincing evidence.<sup>18</sup>

20. The UNDT held that the evidence showed that AA considered AAY’s conduct towards her as not warranting a formal complaint and that she did not regard AAY to have sexually harassed her. The UNDT referred to AA’s statement to OIOS that AA did not consider AAY’s conduct, taken in the context of a party atmosphere, to have had sexual motivations, nor that it did cause her offence or humiliation. The UNDT concluded that the available evidence did not attain the standard of clear and convincing evidence establishing that AAY had sexually harassed AA.<sup>19</sup>

21. Turning to BB, the UNDT noted that she had once again declined to testify before the UNDT. The only corroboration of her version before OIOS was the hearsay of AJ who also did not testify before the UNDT. In contrast, SR who did testify before the UNDT, stated that he spoke to BB, but she did not express any concern about AAY and that he did not see AAY kissing BB. The UNDT found that the available evidence did not attain the standard of clear and convincing evidence establishing that AAY had sexually harassed BB.<sup>20</sup>

22. Finally, the UNDT found that as to the events regarding CC, it was unable to ground an adverse finding on her evidence. AAY admitted that he touched CC’s hands while inviting her to join a communal dance but denied in his interview with OIOS that he forcefully fell on her. The UNDT found that while CC was largely consistent in her testimony relating to the above allegation, it was evident that the fresh hearing presented an unfair advantage in filling gaps in key aspects of her earlier testimony. Regardless of whether CC’s explanations were credible, the UNDT found that the fact that the Secretary-General took advantage of the opportunity for the fresh hearing to fill existing gaps in her evidence, which was not the purpose of the remand, posed the risk of the UNDT basing its conclusions on rehearsed evidence. Moreover, even with CC’s explanations, it was still strange that at a party attended by a considerable number of

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<sup>18</sup> *Ibid.*, paras. 74 to 77.

<sup>19</sup> *Ibid.*, paras. 74 to 77.

<sup>20</sup> *Ibid.*, paras. 83 and 85.

people in a relatively small space and at which people were not stationary, no one saw AAY falling on/leaning on CC. This, the UNDT found, was compounded *inter alia* by the fact that none of the other witnesses had seen any of the incidents that CC alluded to, and this affected CC's credibility and reliability as a witness.<sup>21</sup>

23. As to the allegation that AAY took and pulled CC's hands to try to get her to dance despite her resistance, AAY admitted in his OIOS interview, that he might have taken CC's hands and asked her to join the line for an Italian dance. However, he denied that he acted with sexual motives in relation to CC or that his conduct could reasonably be perceived as offensive. The UNDT found that given the festive context of what was going on, it was difficult to apply the definition of sexual harassment that is "reasonably perceived to cause offence or humiliation" let alone to give any sexual connotation to the contact. The UNDT concluded that there was no evidence that AAY's actions were sexually motivated and that given the circumstances of the case, while his act of taking and pulling CC's hands to try to get her to dance may have been unwelcome, there was no evidence that it was sexual in nature.<sup>22</sup>

24. Considering the above, the UNDT found that the facts underlying the disciplinary measure had not been established by clear and convincing evidence, and as such, the contested decision was unlawful. The UNDT ordered rescission of the contested decision and, in the alternative to rescission, payment of two years' net base salary to AAY.<sup>23</sup>

25. On 4 December 2023, the Secretary-General appealed Judgment No. UNDT/2023/111. AAY filed his answer on 12 January 2024.

## **Submissions**

### **The Secretary-General's Appeal**

26. The Secretary-General contends that the UNDT erroneously required all the evidence to be heard *de novo* in oral testimony. The UNDT erred in deciding that, in the absence of AA's and BB's oral testimony, it would not take into consideration their written and sworn OIOS interview records or indeed the corroborating OIOS testimonies from other witnesses. The UNDT's requirement that AA and BB be heard in oral testimony, failing which the allegations must be

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<sup>21</sup> *Ibid.*, paras. 92 to 99.

<sup>22</sup> *Ibid.*, paras. 100 to 104.

<sup>23</sup> *Ibid.*, paras. 104, 112 and 113.

dismissed, places the UNDT in the role of principal finder of fact, rather than judicial reviewer of the contested decision and usurps the discretion of the Secretary-General in disciplinary matters. If the Tribunals consider OIOS investigation reports as hearsay which can almost never constitute clear and convincing evidence supporting a disciplinary decision, essentially every disciplinary decision would ultimately be decided by the Tribunals, which is not their statutory function.

27. The Secretary-General avers that the UNDT erred in law and procedure in concluding that, unless the Secretary-General “secured” the attendance of all of the complainants before the UNDT to give oral testimony, the UNAT’s concerns would not be addressed. The UNDT improperly conflated the calling of a witness with whether the witness subsequently accepts to testify. The UNAT’s remand was not based on a finding that the Secretary-General had failed to secure the attendance of all of the complainants. Rather, the UNAT raised concerns about the judicial procedures that led to the UNDT’s conclusions in the UNDT’s first Judgment. Specifically, the UNAT found that by refusing AAY’s request to call AA and two other key witnesses, XX and YY, on the basis that their testimonies would not be relevant, the UNDT declined to hear those testimonies “for unacceptable reasons” and erred in procedure and consequently erred also in fact, resulting in a manifestly unreasonable decision.

28. The Secretary-General submits that the UNDT failed to adequately evaluate and analyse the oral testimonies in the second proceedings in accordance with the UNAT’s first Judgment. The UNAT’s decision to remand the matter centered on the UNDT’s actions and inactions in the first proceedings, rather than on the content of the witnesses’ testimonies. The UNAT found that the UNDT had failed to provide adequate analysis of the witnesses’ testimonies in its first Judgment. Yet the UNDT reached the findings that none of the testimonies of PM, SR, or MN corroborated the charges and that in fact, they were “exculpatory” without discussing and analysing those testimonies and without making any findings at all about the cogency of those witnesses’ performances, their credibility and reliability. The UNDT thereby again fell short, on remand, of the UNAT’s requirements.

29. The UNDT erred in law in failing to undertake the first step of its judicial analysis of whether the facts relating to AA, BB, and CC on which the disciplinary measure was based had been established to the “clear and convincing evidence” standard. With regard to the incidents involving AA, the UNDT failed to note that AAY had not disputed any of AA’s allegations. The UNDT only reviewed whether AA considered that AAY’s conduct towards her warranted a formal complaint, and whether AA personally regarded AAY’s conduct to have constituted sexual



harassment. The UNDT also improperly ignored BB's evidence solely because she had not testified. The UNDT accepted AAY's OIOS interview wholesale without his appearance before the UNDT but dismissed the OIOS interviews on which the contested decision was based, where the relevant witnesses did not appear for oral testimony. In relation to the incidents involving CC, the UNDT accepted AAY's version of events without any analysis, including any analysis of CC's evidence to the contrary. The UNDT failed to assess the credibility of CC's oral evidence at the hearings and weigh it against AAY's OIOS interview. In light of the foregoing, the UNDT erred in law in failing to undertake the first step of its judicial analysis of whether the facts on which the disciplinary measure was based were established.

30. The UNDT made material errors in its analysis of AA's evidence. The UNDT heavily relied on its finding that AA did not regard AAY to have sexually harassed her. However, AA never stated that she did not consider that AAY sexually harassed her. On the contrary, AA indicated to OIOS that AAY's conduct was unwelcome. There are multiple instances in which AA specifically stated to OIOS that she had felt uncomfortable and upset by AAY's conduct, which she described as "inappropriate" and as conduct that should not take place in a work-related setting. Even if AA may have wished to address AAY's inappropriate conduct by having a conversation with him about it, such preference does not automatically lead to a conclusion that AA did not consider the conduct to be offensive. Indeed, AA reported that she had a panic attack when attempting to confront AAY about his behaviour. The impugned Judgment omits all mention of these aspects of AA's evidence.

31. The UNDT made a material error of law with regard to AA's evidence. The UNDT misapplied the legal standard for sexual harassment under ST/SGB/2008/5, Section 1.3. The legal test does not turn on whether the victim of sexual harassment subjectively considers it to be sexual, nor whether the victim wishes to bring a formal complaint. Indeed, there is an objective element in the test that includes behaviour that "might reasonably be expected or be perceived to cause offence or humiliation to another". As explained above, the allegations regarding AA were not contested. AAY did not dispute that he attempted to kiss AA and when she resisted, that he forced her head down and kissed her on the forehead. The UNDT failed to consider that, in the Organization's multicultural environment, grabbing a colleague's face with both hands and attempting to kiss them against their will would reasonably be considered both sexual in nature and offensive, and it was reasonable for the Secretary-General to find so. Consequently, the UNDT also misapplied the legal framework regarding AA, leading to a manifestly unreasonable decision.

32. The Secretary-General further alleges that the UNDT erred in law in requiring that there be clear and convincing evidence that the conduct in question was sexual in nature. In doing so, the UNDT conflated the first step of its judicial review, i.e. to determine whether the facts on which the disciplinary measure is based have been established, with the second step, which is to ascertain whether the facts, as established, amount to misconduct. In conflating these two steps of its judicial review, the UNDT incorrectly applied the standard of “clear and convincing”, which applies to the first step of the review, to the second step. There is no requirement that there be clear and convincing evidence that the conduct was sexual in nature. That aspect relates to the question of whether the established facts legally amount to misconduct, which is separate from the determination of whether the facts on which the disciplinary measure was based were established to the required clear and convincing evidence standard.

33. The Secretary-General submits that in addition to applying the wrong standard, the UNDT improperly substituted its own view of whether the conduct was sexual in nature. The UNDT uncritically accepted AAY’s view that the “festive context” made it “difficult to apply the definition of sexual harassment” “let alone to give any sexual connotation to the contact”. The UNDT improperly held that it was difficult to assign any ill motive to AAY’s act of taking and pulling CC’s hands to try to get her to dance despite her resistance in the context of a dance party. First, the festive atmosphere does not erode the scope of what constitutes sexual harassment; and second, the definition of sexual harassment does not turn on such motive. The UNDT exceeded its competence by usurping the authority of the Secretary-General in disciplinary matters, rather than conducting each step of its judicial review according to the established UNAT jurisprudence.

34. Finally, the Secretary-General submits that the UNDT erred in law in relation to its analysis of CC’s testimony. The UNDT found that the Secretary-General took advantage of the fresh hearing to fill existing gaps in CC’s evidence, which posed the risk of the UNDT basing its conclusions on rehearsed evidence. However, on remand, the Secretary-General did not lead CC on direct examination to offer explanations as to why no one had witnessed AAY trying to kiss her or falling on her. It was AAY’s counsel who, on cross-examination, pushed CC to provide an explanation as to why no one had come forward to say they had witnessed the incident; and the UNDT thus directed CC to offer possible reasons for the fact that no one had apparently witnessed the incident. The Secretary-General did not lead this evidence to fill gaps. In addition, the UNDT failed to

exercise its jurisdiction because it expressly declined to consider the credibility of CC's testimony by dismissing it, "regardless of whether CC's explanations are credible".

35. The Secretary-General requests that the UNAT reverse the impugned Judgment and dismiss AAY's application in its entirety.

**AAY's Answer**

36. AAY contends that the Secretary-General's argument that the UNDT erred in requiring all the evidence to be heard *de novo* in oral testimony is a misrepresentation of the impugned Judgment. It is based on the false assertion that in the absence of their testimony, the UNDT would not take into consideration the OIOS interview records. The UNDT carefully assessed the value of AA's and BB's prior statements, including the fact that AA did not file a formal complaint and stated that she did not consider herself as having been sexually harassed as well as BB's refusal to testify, which coupled with the contradictory new evidence of SR and MN, rendered both their testimonies before OIOS less than clear and convincing evidence of the misconduct alleged. The Secretary-General's attempt to misrepresent the findings of the UNDT being without regard to the evidence contained in the investigation report is erroneous and constitutes an abuse of process.

37. AAY submits that the Secretary-General is challenging the established UNAT jurisprudence with respect to the use of investigations reports, effectively arguing that the findings of the OIOS investigations are the only evidence needed to justify the exercise of discretionary decision-making authority by the Secretary-General, a proposition clearly rejected by the UNAT. Investigations reports are not balanced inquiries, but often prosecutorial in nature and recourse to the internal justice system provides the only fair framework in which a staff member may fully elaborate a defence for an independent judicial review.

38. AAY avers that there is no merit to the Secretary-General's argument that the UNDT incorrectly applied the requirements of the first UNAT Judgment. The Secretary-General seeks to excuse his failure to produce any witnesses to testify against AAY other than the original complainant CC. The UNDT clearly followed the UNAT's directions. AAY had initially himself sought to secure AA's testimony, who although not wishing to participate, nevertheless provided him a statement of support. AAY identified two eyewitnesses-PM and SR-and the UNDT called a third witness-MN-at the Secretary-General's suggestion, who all testified that they did not witness anything improper while closely observing AAY's interactions that evening.

39. AAY contends that the Secretary-General criticizes the UNDT for not providing more extensive analysis of the witnesses' testimonies although the impugned Judgment specifically references their testimonies in analysing the three examples of AA, BB, and CC given in the allegations. Specifically, PM described the atmosphere of the party in which everyone was pulling someone else to join in the dancing, but during which he did not do anything improper. SR who spoke with BB, not only disputed CC's recollection of their alleged encounter, but affirmed he saw nothing involving AAY that caused him concern. MN, who had been nominated by the Secretary-General, spoke with AA and BB, but heard no complaint and observed no improper behaviour.

40. AAY submits that the Secretary-General seems to be embarking on an attempt to reargue the case while ignoring the applicable standard of judicial review. The Secretary-General attempts to refocus his case on AA and BB based on their initial responses to OIOS without addressing the important distinction between "awkward social interactions and sexual misconduct", a distinction recognized by both AA and BB but ignored by the Secretary-General. The Secretary-General inserts in his submission the unsupported claim that BB declined to testify to preserve her mental health as a victim of sexual misconduct. There is however no evidence that BB ever said that and conversely, there is evidence that she had "increased and friendly relations with [AAY] after the party".

41. AAY contends that in relation to AA, the Secretary-General is merely offering his own interpretation of AA's prior statements while failing to address AA's refusal to join in any further proceedings and instead to offer her support to AAY. The Secretary-General's attempt to call into question previously exculpatory statements by AA constitutes an abuse of the appeals process. The Secretary-General ignores AA's interview testimony stating that "I could never say that I felt anything inappropriate from him" and tries to infer that feeling uncomfortable with someone's attention is synonymous with being sexually harassed. The Secretary-General also overlooks the fact that after the party AA and AAY met and considered the matter resolved, and that thereafter she refused to join in any criticism.

42. AAY submits that the Secretary-General's brief analysis of CC's testimony, the principal evidence for the charge, is both evasive and accusatory. While arguing earlier that a witness's cogency, credibility, and reliability are all relevant considerations in assessing their evidence, the Secretary-General finds fault with the UNDT's analysis of CC's testimony. The Secretary-General objects to the UNDT's finding that CC's evidence, whether rehearsed or not, was of doubtful

credibility or reliability. Yet, the purpose of remanding the case was precisely to assess the witnesses' testimonies for consistency, credibility, and reasonableness and this is what the UNDT did. In support of his contentions, AAY refers to the UNAT Judgment in AAC,<sup>24</sup> where the UNAT set forth the relevant jurisprudence applicable to such proceedings.

43. AAY contends that CC testified that while she was at the edge of the dance area, dancing by herself to the music, AAY approached her attempting to grab her face and falling on her forcefully and urged her to dance by taking her hand. However, SR who she had cited as witnessing the incident, when called to testify, stated that he had no recollection of seeing anything like what she described. She remained at the event instead of leaving, apparently even joining in the dance at some point, and none of the eyewitnesses observed anything out of the ordinary. Moreover, a central question posed during the hearing was why no one witnessed the incident that CC described as an act of sexual assault. Her attempt to explain CC's explanation that cubicles and balloons blocked their vision does not comport with witness testimony or pictures of the venue. Furthermore, PM and MN who were with CC at the relevant time, and whose testimonies were not disputed, seriously undermined CC's credibility.

44. AAY says that he himself preferred not to testify believing that there was little more he could add to his prior statements to OIOS, Human Resources, and the UNDT, but he remained open to being called to testify before the UNDT. He submits that this choice should not be held against him since the burden was not on him to prove his innocence.

45. AAY states that this appeal is the fourth time that the Secretary-General has used the judicial process to make the case that AAY is a sexual harasser, "drawing out the process for some seven years", while AAY remains "blacklisted and permanently labelled a sexual harasser all over the internet". Given the absence of any errors of fact or law justifying the present appeal, AAY asks that the Appeals Tribunal award USD 10,000 in costs and additional legal expenses for abuse of process.

46. AAY asks that the Appeals Tribunal dismiss the appeal, affirm the impugned Judgment and award costs.

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<sup>24</sup> AAC v. Secretary-General of the United Nations, Judgment No. 2023-UNAT-1370.

### Considerations

47. Article 2(1) of the UNDT Statute provides that: “The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: ... (b) To appeal an administrative decision imposing a disciplinary measure”.

48. Article 7(2)(e) of the UNDT Statute requires that the UNDT Rules of Procedure (UNDT Rules) shall include provisions concerning oral hearings. Article 16(1) and (2) of the UNDT Rules provide that the judge “may hold oral hearings” and that a “hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure”. Parties are entitled at such oral hearing to call witnesses and experts to testify, who may be cross-examined,<sup>25</sup> with the UNDT to determine the admissibility and order the production of any evidence.<sup>26</sup>

49. In spite of the express language of the UNDT Statute, which empowers that Tribunal to consider an appeal against an administrative decision imposing a disciplinary measure, the jurisprudence over time has not always been consistent on the issue.<sup>27</sup> The task of the UNDT is to determine: “(i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence under Section 9.1(b) of Administrative Instruction ST/AI/2017/1 [Unsatisfactory conduct, investigations and the disciplinary process] which requires a finding that, more likely than not, the facts and circumstances underlying the misconduct exist or have occurred, 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.”<sup>28</sup>

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<sup>25</sup> Article 17(1) of the UNDT Rules.

<sup>26</sup> Article 18 of the UNDT Rules.

<sup>27</sup> See for example *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42, which expressly references a review. Notably, *Sanwidi* also established that the role of the UNDT is to “examine ... [w]hether the facts on which the disciplinary measure was based have been established”, which was the basis for having hearings where there was doubt regarding the facts. See *Sanwidi* Judgment, para. 43 (quoting *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27).

<sup>28</sup> *Mubashara Iram v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1340, para. 47.

50. To find that misconduct has been established on clear and convincing evidence requires that the truth of the facts asserted is accepted to be highly probable.<sup>29</sup> In *Kennedy*, we made it clear that:<sup>30</sup>

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.

51. The Secretary-General argues that the UNDT is not the principal finder of fact in disciplinary matters, with its role not to usurp the discretion of the Secretary-General. It is so that the OIOS investigation is a fact-finding exercise on which the Secretary-General places reliance in taking decisions in disciplinary matters. While it is apparent from the UNDT Rules that an oral hearing is not mandatory, it falls to the UNDT to determine on appeal whether the disciplinary measure imposed was correct in the sense that the facts have proved misconduct on clear and convincing evidence, and the sanction imposed was lawful and proportionate. Doing so often requires the UNDT to embark on a judicial fact-finding exercise, even where an investigation has occurred. This is usually because material disputes of fact may not have been resolved during the investigation, nor conflicting versions carefully tested and resolved. In such cases, it falls to the judge hearing the matter to determine, after hearing from the parties including on whether they seek to call or have called any witness, whether such a hearing is required.

52. At the same time, regard must be had to the nature and purpose of workplace discipline and the circumstances under which it is imposed. It is not required that before a disciplinary measure may be imposed a trial must be conducted which meets the high standard of a civil or even criminal trial. Where the relevant evidence has been gathered by an investigator, such evidence has been put to the employee, who has been given an opportunity to respond to or rebut such evidence and provide an answer to it, the investigation process will usually have reached an acceptable threshold. Where difficulty arises is in those matters in which conflicting versions are apparent during the course of the investigation but are not carefully and thoroughly tested during

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<sup>29</sup> *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-776, para. 34; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

<sup>30</sup> *Timothy Kennedy v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1184, para. 48 (internal footnote omitted).

the process. In such instances it is usually not possible to determine, without oral evidence being heard and witnesses cross-examined, whether the allegations have been proved on clear and convincing evidence. It is in such cases that the UNDT will usually determine that an oral hearing is required.

53. It is so that the investigation report prepared often contains a good deal of hearsay evidence, in the form of evidence that is not tendered by a witness at the proceedings before the UNDT. Such evidence may be considered inadmissible, or it may be given less weight than direct evidence given by a witness before the UNDT as fact-finding tribunal. This is so unless its admission is agreed by the party against whom it is adduced, the person on whose credibility the probative value of such evidence depends testifies or the UNDT admits such evidence having regard to the interests of justice having considered issues including the nature of the proceedings, the nature, probative value and purpose of the evidence, the reason why the evidence is not given by the person upon whose credibility its probative value depends and considerations of prejudice.

54. The reason hearsay is usually not admitted into evidence is that it is not possible to question or cross-examine the person who made the hearsay statement since that person is not in court. There are, however, unique considerations which pertain in the context of a disciplinary matter given that it is not a civil or criminal trial. The investigation report and the record of the evidence it contains may, in the interests of justice, despite its hearsay, be admitted into evidence. This will usually occur where the employee has been provided with a fair and adequate opportunity to understand the disciplinary complaint raised, been allowed to answer to the allegations and the investigation report illustrates that the investigator(s) has properly weighed and assessed the evidence in all its facets carefully. What weight will be given to the investigation report will depend on the circumstances of the case on an assessment of the totality of evidence. This includes whether there exist material factual disputes on key issues; whether corroborating evidence such as video and other evidence exists; whether significant due process violations have occurred during the investigation; and the severity of the sanction imposed. Thus, while hearsay evidence has its intrinsic limitations and drawbacks, it nevertheless is admissible in appropriate circumstances with the requirement that it be treated with caution.

55. Turning to the current appeal, 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), 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.

56. Staff Rule 1.2(f) sets out the basic rights and obligations of staff and provides that “[a]ny 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”.

57. Section 1.2 of Secretary-General’s Bulletin 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”.

58. Section 1.3 defines sexual harassment as:

[A]ny 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 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.

59. Relying on the UNAT’s first Judgment, in its rehearing of the matter the UNDT approached the determination of the matter on the basis that all of the evidence was to be heard *de novo* by way of oral testimony. It concluded that in the absence of AA’s and BB’s oral testimony, their written and sworn OIOS interview records and the corroborating OIOS testimonies from other witnesses could not be taken into account. The failure on the part of the Secretary-General to secure the attendance of AA and BB at the remanded hearing, both of whom were not staff members, led the UNDT to find that “the available evidence does not attain the standard of clear and convincing evidence establishing that [AAY] sexually harassed” AA or BB.<sup>31</sup> It found that the evidence showed that AA considered AAY’s conduct towards her as not warranting a formal complaint, that she did not consider the behaviour to have had sexual motivations and that she did not regard AAY to have sexually harassed her, nor had it caused her offence or

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<sup>31</sup> Impugned Judgment, paras. 77 and 85.

humiliation. The UNDT concluded that the available evidence did not attain the standard of clear and convincing evidence establishing that AAY had sexually harassed AA.

60. We find that the approach adopted to the available evidence by the UNDT amounted to a rigid treatment of the evidence in relation to AAY's conduct directed at AA, without appropriate regard to that evidence which had been admitted to by AAY. This included his statement to the OIOS investigators that while dancing with AA "I was trying to kiss her and that's why she was retracting"<sup>32</sup> and that later on "I kissed her or I managed to kiss her on the forehead"<sup>33</sup> and "she retracted, you know just leaning on the back".<sup>34</sup> When asked, if he had held AA's face with his hands and tried to kiss her, at which point she pushed him away with her hands and that he had then pushed her head down and kissed her on the forehead, AAY replied: "Yeah, that's how it went actually."<sup>35</sup> When asked if he held AA or touched her face, AAY replied "I am going to say yes" and that "[y]es, it's like what you do when you kiss someone, you take the face and then you kiss him" but that "[i]t was not like this was the most romantic moment in my life let's say".<sup>36</sup>

61. When asked, if he had forced AA to have the forehead kiss, AAY replied "Yes, I was ... yeah, I mean, what can I say she was not enthusiastic",<sup>37</sup> that "she was a little bit reluctant",<sup>38</sup> "she was kind of uncomfortable and that "[s]he was doing some gesture to stay away from me".<sup>39</sup> From his own admissions, AAY's conduct towards AA made her retract and was clearly unwelcome and his admissions accorded with the evidence given by AA to the investigators that his conduct "made me uncomfortable...I kept pushing him away...and I told him no".<sup>40</sup> AAY did not dispute that he grabbed AA's face, held her closely, leaned forward and attempted to kiss her and that when he did, AA resisted him kissing her, he forced her head down and kissed her on the forehead. AA explained that "I kept on resisting then he ... sort of forced my head down and kissed me on the forehead".<sup>41</sup> Although AAY told OIOS investigators that he only kissed AA, he later admitted

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<sup>32</sup> Transcript of AAY's OIOS interview, 1 March 2018, line 761.

<sup>33</sup> *Ibid.*, line 763.

<sup>34</sup> *Ibid.*, line 787.

<sup>35</sup> *Ibid.*, line 742.

<sup>36</sup> *Ibid.*, lines 798 to 811.

<sup>37</sup> *Ibid.*, line 817.

<sup>38</sup> *Ibid.*, line 743.

<sup>39</sup> *Ibid.*, lines 751 to 752.

<sup>40</sup> Transcript of AA's OIOS interview, 26 January 2018, lines 121 to 125.

<sup>41</sup> *Ibid.*, lines 243 to 244.

that he was a “serial kisser” and had kissed many people at the party.<sup>42</sup> Clearly, on the evidence before the investigators AAY’s conduct was both unwelcome and made AA feel uncomfortable.

62. Importantly, when given an opportunity to testify at the second UNDT hearing, AAY elected not to do so in spite of being aware of what he had told the investigators in response to AA’s allegations which had been put to him.

63. The disciplinary complaint raised against AAY in relation to BB was that he grabbed BB’s face, held her closely, leaned forward and attempted to kiss her, and that he tried to move physically close to AA and BB while dancing, despite their attempts to keep him at a distance. BB stated in her evidence to the investigators that AAY grabbed her by the hand and kept trying to get closer and she “was like no, no like leave space and he didn’t ...and then he basically got into a tantrum of I am the man, I lead” while dancing. He then “grabbed her face in front of everyone and he basically put his two hands on my cheeks and he was holding me as if he was going to kiss me in front of everyone and my instinct at that moment was to freeze...it...could have been a bit of an out of body experience”. She said he was very “pressy the rest of the evening and it wasn’t just with me, there were other colleagues, both UN and non-UN staff members whom he was just beyond the pillar of what is acceptable behaviour”. When he held her face, it was “extremely close”, “obscenely close”, even recognizing that cultural differences existed. His conduct was described as “excessively handsy, he kept trying to get closer and I wasn’t comfortable with that”. He also asked BB about her relationship status. BB stated that that night her “anxiety was full blown flared because I couldn’t make sense of what had happened that evening”. She reached out to a friend in human resources and explained to her what had happened that evening and told her she was having a really bad anxiety attack. Later, CC told BB she was just as shaken as BB was.<sup>43</sup>

64. While BB’s evidence is hearsay since she did not testify at the oral hearing, it is material that AAY admitted to OIOS investigators, that both AA and BB had attempted to push him away while dancing because they did not want him to dance so closely to them and that AAY did not dispute that both AA and BB had felt uncomfortable as a result of his behaviour. AAY recalled asking BB why her boyfriend of four years had not married her and said that he had joked that after such a period of time he never would. He told her that men lead while dancing and the

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<sup>42</sup> Transcript of AAY’s OIOS interview, 1 March 2018, line 997.

<sup>43</sup> Transcript of BB’s OIOS interview, 29 January 2018, lines 102 to 106, 121 to 123, 130 to 131, 164, 183, 184, 400, 401, 576 to 578 and 607.

woman has to follow and recalled that BB pushed him away because maybe she did not want to dance with him anymore or she felt uncomfortable.<sup>44</sup>

65. It follows that the undisputed facts of AAY's own version were that he had danced too closely to BB and that she had attempted to push him away because his conduct was unwelcome, and she felt uncomfortable. Once again, because of his election not to give evidence despite his admissions made to the investigators, the UNDT was required to consider whether BB's hearsay evidence ought properly to be admitted into evidence, and to weigh the reliability and probabilities of the two accounts.

66. The disciplinary complaint against AAY in relation to CC was that he attempted to grab CC's face, when she blocked her face with her hands, he grabbed her hands and tried to pull them apart, and when she resisted, he fell on her forcefully; and, on another occasion, he took and pulled CC's hands to try to get her to dance, despite her resistance. In considering the oral evidence of CC tendered at the rehearing of the matter, the UNDT found that while CC was largely consistent in her testimony relating to the allegations, it was evident that the rehearing of the matter presented an unfair advantage in filling gaps in key aspects of her previous testimony before the UNDT and that this posed the risk that conclusions would be drawn by the UNDT on rehearsed evidence.

67. We are not satisfied that this amounted to a permissible basis on which to reject CC's evidence. It is a consequence of a rehearing that a witness may be placed in a position to provide a fuller, better or even different account of events. What this requires is that the credibility, reliability and probabilities of such further account be carefully assessed, including assessed against prior statements made under oath. AAY had the opportunity through the cross-examination of CC to seek to exploit the discrepancies between her two accounts of events and thereby impugn her credibility. Without considering as much and in the absence of a careful assessment of CC's evidence, and instead electing rather to proceed on the basis of a wholesale rejection of such evidence, the UNDT erred.

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<sup>44</sup> Transcript of AAY's OIOS interview, 1 March 2018, lines 547 to 555.

68. At the hearing CC testified under oath that AAY “kept barging towards me, I started stepping back”, and when he was:<sup>45</sup>

trying to grab my face...I couldn't understand what he was trying to do. Then he ...caught my hands and he started pulling them apart...he was trying forcefully, and I was trying ...them to close and he kept asking “Did I kiss you tonight? Did I kiss you tonight? He kept asking multiple times. I said, “I'm not interested. I am not interested”. I started shouting ... “I am not interested. I am not interested.” And then he started saying “Let me kiss you, let me kiss you.” He was trying ...pulling...my hands apart... then I hit the desk of [her colleague]. I didn't have any place to go. I almost bent completely back. And he was on top of me. Completely bent. The whole body was on me. He was so forceful. I mean, I just...felt it was impossible for me to get out of that grip that he was trying to...my only focus was not...never to open my hands because I know he was just here...closer to my hands and I...all the intention which I had to stay put and not open my hands. ... And he was trying to pull hard. And this ... happened for some time and then ...I don't know caught where and how, but there was a second of time where I could push him or, maybe, I don't know what happened but I got the strength...I was able to come out of his grip.

69. CC then left the dance floor and exited towards the lift area. She testified that “I was utterly shocked ... like this is my office space and ...colleagues...who I saw every day”. She stated that she saw a colleague who told her “you look pretty traumatized” and she nodded. She then saw AAY walking towards her and testified that she was “s\*\*\* scared...I was really, really scared...my mind was completely shattered of what was happening there.” She went to a group of colleagues and talked to them when AAY “came to me, and he started pulling me towards the dancing floor saying ‘Come, come ... let's go, let's dance.’” CC stated that she said “No ... I'm not interested, I'm not interested”. However, her evidence was that AAY kept beating on her hands, about 15 to 20 times. CC testified that: “I was traumatized. I was like so angry I didn't want to do anything” but BB took her to the dance floor and she “pretended to be dancing” but her “whole body was alert”. AAY then came up behind her and took her shoulders and asked her to dance with him. She said “I'm not interested, I'm not interested.” She stated that he kept touching her hand, arm, and shoulder and he tried to pull her to him. She realised that he would not stop and she turned to him and said “[AAY], I am not interested.” She walked to the lift area and he followed her and she turned and yelled “I'm not

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<sup>45</sup> Transcript of UNDT hearing, 20 July 2023, CC's testimony, page 17, lines 19 to page 18, line 16.

interested, please leave me, please leave me” and he said “okay, it’s fine, it’s fine” and she said “No, it’s not fine with me...I’m not interested, please go away.”<sup>46</sup>

70. CC’s evidence was that AAY was doing the same with AA, trying to grab her face with his hands and she was trying to resist. CC left the party. She said “it was a traumatic night”. She did not know with whom to share what had happened. “I mean, I thought New York’s city streets were for sure not safe. But that was the first time I realised the workplace, which I worked for almost one and half years was no -- no more safe as well.” The next morning she went to BB’s desk to thank her for what she had done for her and found that BB was “shivering” about what AAY had done to her because he had grabbed BB by her face and BB only got out of that grip of him trying to kiss her when someone diverted him. BB told CC that “she had panic attacks and anxiety issues because of that event; that she’s unable to cope with it”.<sup>47</sup>

71. CC reported the incident to a colleague the next day who said she knew that AAY had been completely out of control the night before. CC testified that she is “actually considering to go to a therapy because this trauma has not left me”. She has “[m]any sleepless nights” and “many nightmares that someone is trying to chase me” while she begs them not to. “It is not easy.”<sup>48</sup>

72. In cross-examination, CC stated that AAY “fell on me” and that she used her body’s force to try to push him away. She said:<sup>49</sup>

He was on top of me from top to bottom. ... he was trying to drag my hands and I was trying to put my hands on my face and still trying to push him away. ... Someone trying to grab your face and trying to force to kiss you which you are not interested in, which I had multiple times told him and someone was trying to force themselves upon you. It is all sexual intent....someone forcing themselves to kiss me, to put themselves on me, touching my hands when I’m trying to hide my face, forcibly opening them... it was a clear sexual intent...this should not happen to any other girl.

73. AAY admitted to investigators that when he was holding CC’s hands, inviting her to the dance floor, she resisted and said no. He stated that he did something stupid but with no sexual intent. As previously stated, it was a relevant consideration that AAY elected not to testify at the second UNDT hearing apparently because he had expressed himself already both in his OIOS interview and in his response to the charges. This election warranted careful consideration and

<sup>46</sup> *Ibid.*, page 18, line 17 to page 21, line 23.

<sup>47</sup> *Ibid.*, page 29, line 8 to page 31, line 2.

<sup>48</sup> *Ibid.*, page 31, lines 7 to 18; page 35, lines 7 to 25.

<sup>49</sup> *Ibid.*, page 39, line 18 to page 50, line 11.

assessment by the UNDT, when CC's account was not undermined during cross-examination and when material corroboration for her account under oath was to be found in the contents of BB's hearsay statement made to the OIOS investigators, which accorded in material respects with CC's evidence. BB reported to OIOS that, in relation to CC, AAY was "very pressy" and "persistent" with CC and wanted to dance with her and that BB had to interfere and block him to keep him away from her "because his advances were very much not wanted".<sup>50</sup> BB stated that she told AAY's manager that if he didn't get AAY under control she had a background in kickboxing. She stated that "[h]e was unbelievably...he was almost...he was like predatory almost", "borderline chasing her, he wouldn't get away no matter how much we would like block him, like he would grab [CC]...it was relentless".<sup>51</sup> BB stated that CC was "unbelievably uncomfortable" and that AAY was drunk, his eyes were not focused and he was "just sloppy the whole evening", and "he was making a lot of women in there very uncomfortable".<sup>52</sup>

74. In addition, further corroboration that the incidents alleged had occurred existed in the statement of AA to investigators. AA indicated that she saw AAY try to kiss CC and that the following day she discussed what had happened with a colleague and reported that AAY's conduct was "inappropriate" and that it caused a "level of discomfort". AA confirmed that CC was really shaken by AAY's conduct, she felt "extremely uncomfortable" about what had happened, and she refused to mediate the issue as she wanted it "addressed how it needs to be addressed".<sup>53</sup>

75. We are unable to agree with the UNDT's finding that given its festive context, AAY's conduct at the party could not reasonably have been perceived to cause offence or humiliation, let alone to give any sexual connotation to the conduct and that the evidence did not show that AAY's actions were sexually motivated given the circumstances of the case. AAY in his evidence to OIOS made important factual admissions which were material and went to the proof of the complaints. The fact that AAY chose not to testify at the UNDT hearing made it clear that he stood by his statement to the OIOS investigators. Such admissions should properly have been considered by the UNDT and taken into account in its assessment whether the misconduct against him had been proved. This was all the more so in circumstances in which he did not elect to testify further in his own defence. The fact that the three witnesses he called to testify before the UNDT had not witnessed the incidents in question, did not undermine the weight of his own admissions

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<sup>50</sup> Transcript of BB's OIOS interview, 29 January 2018, lines 140, 142, 143, 215 and 216.

<sup>51</sup> *Ibid.*, lines 202 to 208.

<sup>52</sup> *Ibid.*, lines 284 to 288, 330 and 331.

<sup>53</sup> Transcript of AA's OIOS interview, 26 January 2018, lines 409 to 413, 598, 602, 607 and 685.

and the body of evidence against him. In relation to CC, the hearsay evidence of AA and BB was corroborated in important respects by CC in her oral testimony, and there was no reason for the UNDT to exclude such evidence.

76. As to whether AAY's conduct was sexually motivated, the UNDT considered AA's statement to OIOS that "she did not consider [AAY's] conduct, taken in context of a party atmosphere, to have had sexual motivations, nor that it did cause her offence or humiliation".<sup>54</sup> The UNDT repeated the statement made in the UNAT's first Judgment that "[a]n unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment".<sup>55</sup>

77. With this, we are again unable to agree. Sexual harassment is more often than not concerned with the exercise of power and usually reflects the power relations that exist in society generally and specifically within a particular workplace. By its nature sexual harassment undermines the dignity, privacy and integrity of the victim, creates an offensive and often intimidating work environment and risks creating a barrier to substantive equality in the workplace. It falls outside of the bounds of acceptable conduct for an employee to intrude on the privacy, dignity and personal space of others in a workplace setting. To suggest that an attempt to kiss another employee in the workplace in circumstances in which this is not consensual is devoid of sexual motivation and not sexual in nature is to ignore the realities of such conduct and human behaviour. We accept that the facts matter, and the circumstances in which events occur and their context are relevant. Whether an unwelcome kiss causes offence and whether it is given without sexual motivation is a matter to be determined on the facts and the circumstances. However, as a general proposition, any environment in which unwelcome kisses are condoned, risks developing into a hostile one. To the extent that it is suggested that the unwelcome kiss given by AAY did not cause offence, this does not accord with AA's evidence to the contrary. AA in her evidence stated that AAY's conduct was unwelcome, even if it did not cause her offence or humiliation. Being unwelcome, it certainly constituted harassment. Furthermore, AAY did not dispute that his conduct caused offence and, from an objective assessment of the facts of the matter, we are of the view that it can clearly be determined to be sexual in nature. As such it fell within the definition of sexual harassment.

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<sup>54</sup> Impugned Judgment, para. 76.

<sup>55</sup> *Ibid.*



78. The Administration was required to prove misconduct against AAY on clear and convincing evidence. We are satisfied that on the evidence before the UNDT, the facts indicated that AAY's conduct met the threshold of sexual harassment as defined. He was shown on clear and convincing evidence to have committed such misconduct in relation to the complainants AA and CC and in relation to BB in dancing too closely to her in a manner that was unwelcome, caused offence and was sexual in nature. It follows that the legal standard required to prove sexual harassment under ST/SGB/2008/5, Section 1.3 was met, and that in finding differently, the UNDT erred. This conduct constituted a serious breach of the Organization's Regulations and Rules.

79. The Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on appeal. The role of the UNDT is not to consider the correctness of the choice made by the Administration amongst the various courses of action open to it or to substitute its own decision for that of the Administration.<sup>56</sup> Rather, any disciplinary measure imposed on a staff member must be proportionate to the nature and gravity of the misconduct<sup>57</sup> and be lawful, reasonable and procedurally fair. The sanction imposed on AAY was not unlawful, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity,<sup>58</sup> with no indication that the Secretary-General failed to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.<sup>59</sup>

80. It follows for these reasons that the appeal must succeed, and the impugned Judgment must be reversed.

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<sup>56</sup> *Iyad Youssef Zaqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1183, para. 32; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 39; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

<sup>57</sup> Staff Rule 10.3(b).

<sup>58</sup> See *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.

<sup>59</sup> *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407, para. 31.

**Judgment**

81. The appeal is granted, and Judgment No. UNDT/2023/111 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 25<sup>th</sup> day of October 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 5<sup>th</sup> day of December 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar