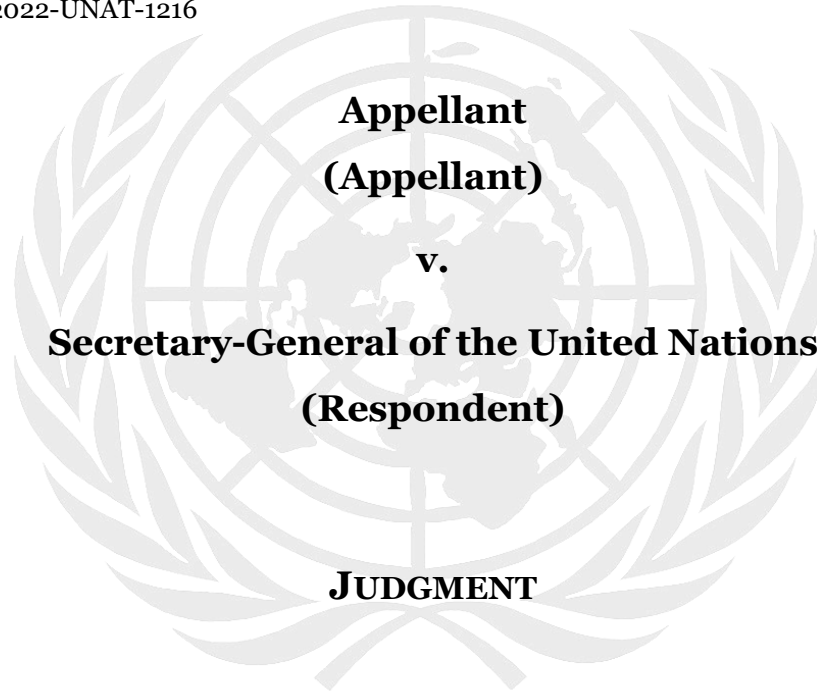




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2022-UNAT-1216



**Appellant  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2021-1530
Date:	18 March 2022
Registrar:	Weicheng Lin

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Counsel for Appellant:	Omar Yousef Shehabi, OSLA
Counsel for Respondent:	Francisca Lagos Pola

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The Appellant was a staff member of the United Nations Children’s Fund (UNICEF) who served in a senior role at the P-4 level in Sudan. He was summarily dismissed from service after the conclusion of a disciplinary process, which was premised upon the charge that he had sexually harassed a United Nations Volunteer (Complainant) who worked with the United Nations High Commissioner for Refugees (UNHCR).
2. The Appellant filed an application with the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging his dismissal, and on 31 December 2020, the UNDT issued Judgment No. UNDT/2020/220,<sup>1</sup> rejecting his application and finding that the disciplinary measure was lawful.
3. For the reasons set out below, we affirm the UNDT’s Judgment.

**Facts and Procedure**

4. The Appellant began service with UNICEF in July 2006. Over the years, he served in different capacities and locations, namely as a Child Protection Officer in Pakistan and Sudan. He eventually rose through the ranks and was serving as the most senior UNICEF official at a field location in Sudan when he was summarily dismissed for misconduct.
5. The inquiry into the Appellant’s misconduct began on 22 December 2017 when the UNHCR Inspector General’s Office (IGO) referred to UNICEF’s Office of Internal Audit and Investigations (OIAI) a complaint of sexual harassment, which was initiated by the Complainant following events that occurred in October of 2017.
6. OIAI conducted a thorough investigation into the Complainant’s allegations, which culminated in an Investigation Report that was issued a year later in December 2018. The investigation included interviews with relevant witnesses and gathering relevant evidence. It was alleged that the Appellant had touched the Complainant in an inappropriate way when he grabbed her breast while dancing at a work social gathering. The Complainant also alleged to have informed

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<sup>1</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/220 dated 31 December 2020 (Impugned Judgment).

the Appellant that his advances were unwanted and that she was not interested in him, but he disregarded her instructions and continued to contact her.

7. Specifically, the investigation revealed that on the night of 11 October 2017, the Appellant invited the Complainant for dinner at his container located within the United Nations compound. The Complainant accepted the invite and after dinner, the Appellant thanked her for visiting him. The next day, on 12 October 2017, there was a social gathering at the compound, and several tenants got together to share a meal and drinks. The investigation determined that the Appellant made unwelcome sexual advances to the Complainant and commented on her looks and told her that he would be waiting for her in his room. The Complainant was uncomfortable at these suggestions. She reached out to another attendee at the social gathering (W. A.) and asked her if she could speak with her.<sup>2</sup> They went outside, and the Complainant burst into tears, telling W. A. that she was being sexually harassed by the Appellant and that she did not know what else to do to make it clear to the Appellant that his advances were not welcome. The Complainant considered leaving the party, but W. A. encouraged her to stay and told her that she would keep an eye on her. While dancing at the party, it is alleged that the Appellant grabbed one of the Complainant's breast. Although the Appellant initially denied this, he stated that there were people dancing in a circle and given that they were drunk, they could possibly have touched each other. He maintained, however, that it was never inappropriate or intentional. The Complainant, on the other hand, categorically states that the touching was not accidental, and in fact W. A. did notice the Appellant trying to get too close to the Complainant. For this reason, when the Appellant grabbed the Complainant around the shoulder, W. A. stood between them as a buffer.

8. According to other attendees at the social gathering, the Appellant appeared to be under the influence of alcohol that night. On the following morning, 13 October 2017, the Appellant sent text messages to the Complainant, inviting her for breakfast. On 14 October 2017, the Appellant did the same thing and invited the Complainant for breakfast again. The Complainant turned down his advances again, which she had to do back to back for three days in a row.

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<sup>2</sup> Witness A (W. A.) is a staff member of the Organization and is referred to as RdN in the Impugned Judgment. She cooperated in the investigation and provided a sworn Witness Statement in which she corroborated several of the Complainant's allegations. The UNDT held a hearing in this matter on 11, 12, 13 and 23 November 2020 and heard four witnesses, including the Complainant, W. A. and two investigators.

9. The investigation also noted that the Appellant tried to have several of his colleagues intercede on his behalf to encourage the Complainant to withdraw her complaint. The Appellant also tried to smear the reputation of the Complainant, saying that she had mental health or psychological issues and that she was fired from her previous employment.

10. In conclusion, the investigation found that the Appellant engaged in acts of sexual harassment by making unwelcome sexual advances toward the Complainant and by touching her inappropriately on the breast on the night of 12 October 2017. The investigation also established that even though the Complainant told the Appellant that she was not interested in him, he persisted in his advances toward her.

11. On 14 January 2019, the Director, Division of Human Resources, charged the Appellant with misconduct with respect to the allegation that he engaged in sexual harassment. He responded to the charge letter in an e-mail through OSLA on 26 February 2019.

12. On 22 March 2019, the Deputy Executive Director, Management, informed the Appellant that after a review of the entire dossier, she found there was clear and convincing evidence that the Appellant had engaged in sexual harassment. As this was a serious misconduct, the Administration determined that summary dismissal would be the appropriate sanction.

13. On 15 April 2019, the Appellant was informed by the Chief, Policy and Administrative Law Section, that as a result of his dismissal, his details will be included in an electronic database (Screening Database) that is accessible by other entities participating in the United Nations System. The Screening Database contains the details of personnel whose appointments have been terminated following a final determination of sexual harassment.

14. On 12 June 2019, the Appellant filed an application with the UNDT challenging both the summary dismissal decision and the decision to include his information on the Screening Database.

15. On 31 December 2020, the Dispute Tribunal issued the Impugned Judgment, dismissing the application and finding *inter alia* that the disciplinary sanction of summary dismissal was justified. The tribunal conducted a thorough analysis of the evidence and noted, among other things, that the Appellant admitted to touching the Complainant, possibly

accidentally.<sup>3</sup> The Appellant maintained if there was any touching, it was never intentional. However, the tribunal found the Appellant clearly lied to the investigators about his behavior.<sup>4</sup> Notably, the Appellant had denied contacting the Complainant after the night of 12 October 2017 when there is evidence pointing to the contrary.<sup>5</sup> Furthermore, the Appellant also denied attending another party on the following night, which again proved to be untrue.<sup>6</sup>

16. On the other hand, the UNDT found the Complainant's testimony to be credible; to wit:<sup>7</sup>

The Tribunal also finds that it is a valuable indicator of determination to be forthright about the incident that the Complainant gave evidence and was not in difficulty explaining her evidence or accounting for the discrepancy which had shown up. The Complainant was not a weak, flighty personality who did not take time to ensure that justice was done. She fielded the questions that were asked by Counsel for the Applicant and answered them without any difficulty.

17. In addition, the tribunal also credited the testimony of W. A. in which she stated that she placed herself in a position between the Appellant and the Complainant because he was getting too close to her. The UNDT considered this to be important evidence of the consistency of the Complainant's account of what happened on that night.<sup>8</sup> Taken objectively, the UNDT reasoned, the evidence of W. A. being consistent with that of the Complainant led to the conclusion that the Complainant was telling the truth.<sup>9</sup>

18. The Dispute Tribunal also explained there was nothing said by the investigators, which undermined the evidence of the Complainant.<sup>10</sup> Apart from an inconsistency regarding the time of the touching incident, there was no evidence that put into question the Complainant's truthfulness.<sup>11</sup>

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<sup>3</sup> Impugned Judgment, para. 26.

<sup>4</sup> *Ibid.*, para. 38.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para. 30.

<sup>8</sup> *Ibid.*, para. 27.

<sup>9</sup> *Ibid.*, para. 42.

<sup>10</sup> *Ibid.*, para. 45.

<sup>11</sup> *Ibid.*

19. After reviewing the evidence, the tribunal had to determine whether the Appellant engaged in sexual harassment under the applicable law of UNICEF. In this regard the UNDT explained:<sup>12</sup>

... The Tribunal considers that not all sexual harassment is the same. Some may include actual sexual assault or physical contact and others may not. Some may involve the direct application of coercive power and others may be less direct. Some may involve few actual instances of harassing [behavior] while others may involve several instances.

... This is a case in which the physical touching is not the only evidence of the harassing [behavior] of the Applicant. Counsel for the Applicant submitted that the touching was not proved. The Tribunal considers that there is clear and convincing evidence not only of the Complainant but of her supporting witness which demonstrates that the opportunity for such touching existed during the dancing that took place at the party. The confusion of the Complainant about the sequence of events in no way nullifies the powerful evidence of [W. A.] who felt it necessary to get between the Complainant and the Applicant to prevent unwanted touching.

... In any event, even if the touching was accidental which is a real possibility based on the facts of this case, it occurred in a context of *reckless unwanted [behavior]* by the Applicant which the witness [W. A.] reported seeing at the party.

... The Applicant's Counsel appeared to be of the view that the touching was the major issue involved in sexual harassment and cited the case in which a number of physical acts of sexual touching did not result in the Applicant's dismissal. This can be explained on the basis that the circumstances were not the same. *A sexual assault can occur when both parties are inebriated, and one takes too many liberties in the circumstances but attaches no nuances of power relations to the [behavior] either because he/she is unable to do so or because the perpetrator is not interested in exploiting any power imbalance.*

20. On the point regarding the nature of the conduct, the UNDT remarked how the Appellant's persistence made the Complainant feel. The wishes expressed by the Complainant were completely ignored and disregarded.<sup>13</sup> As such, the tribunal found the continued persistence by the Appellant to call and attempt to establish a relationship with the Complainant constituted a significant element in establishing sexual harassment.<sup>14</sup>

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<sup>12</sup> *Ibid.*, paras. 49 – 52 (emphasis added).

<sup>13</sup> *Ibid.*, para. 54.

<sup>14</sup> *Ibid.*, para. 53.

21. Regarding the issue whether the alleged misconduct also impacted the work life of the Complainant, the tribunal noted that the Appellant was prepared to use his power and influence to make life difficult for the Complainant, should she pursue a complaint against him.<sup>15</sup> The tribunal also pointed out that the Appellant even sought one of his colleagues to intercede on his behalf to quieten the Complainant.<sup>16</sup>

22. In conclusion, the tribunal was satisfied that the evidence of sexual harassment in this case was clear and convincing.<sup>17</sup> In that regard, the tribunal explained:<sup>18</sup>

There is sufficient evidence consistent with the events of the night of 12 October 2017 to the effect that the Applicant was pursuing the Complainant for a sexual relationship. *Indeed, even if the touching was accidental, the indication by the Complainant of her disinterest should have been enough to bring his advances to a halt. But it was not.* The Complainant was made to feel that her desire to be left alone outside of a professional relationship, was of no moment.

23. Finally, the tribunal noted that the due process rights of the Appellant were respected throughout the investigation phase and at trial. In regards to whether the sanction was proportionate to the misconduct, the UNDT explained the facts of each case of sexual harassment are usually different, leading to different conclusions. The tribunal noted the changing worldview on the scourge of sexual harassment and how the law also needs to adapt to this evolved understanding. As such, the UNDT highlighted that even though the Appellant was not able to use his power to enforce any harsh or discriminatory action or sexual abuse against the Complainant, it remains that the most senior UNICEF official in the area persisted with sexual advances, after being repeatedly told by the Complainant that she was not interested. The Appellant was determined to get what he wanted, without due regard to the Complainant's rights or feelings in the circumstances.

24. Hence, the tribunal found the most severe measure of summary dismissal was justified in this case.

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<sup>15</sup> *Ibid.*, para. 55.

<sup>16</sup> *Ibid.*, para. 56.

<sup>17</sup> *Ibid.*, para. 57.

<sup>18</sup> *Ibid.* (emphasis added).

25. On 1 March 2021, the Appellant filed an appeal against Judgment No. UNDT/2020/220, and the appeal was registered with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) as Case No. 2021-1530. On 3 May 2021, the Secretary-General filed his answer.

### **Submissions**

#### **The Appeal**

26. The Appellant first argues the UNDT erred in law and failed to exercise its competence by declining to compare the sanction imposed in this case with the Organization's past practice. Specifically, the Appellant submits that the UNDT ignored past sanctions imposed for acts involving unwelcome physical contact and unwelcome communications – acts which the tribunal established the Appellant committed against the Complainant in this case. Furthermore, the Appellant adds the UNDT not only ignored past practices, but it also ignored the relevant jurisprudence in the area of sexual harassment. As such, the tribunal did not follow the law but rather decided the question of proportionality *ex aequo et bono*.

27. The Appellant thus explains this error of the UNDT resulted in an unusually harsh punishment being imposed on him. The Organization has generally reserved “dismissal” for offenses of a different nature, such as sexual exploitation and abuse. In cases of sexual harassment, the sanction imposed is usually the less severe “separation from service,” and even then, it was generally reserved for cases of far greater severity; for example, in cases where the sexual harassment was linked to abuse of authority.

28. The failure by the UNDT to conduct the correct proportionality analysis, alleges the Appellant, resulted in him being subjected to a disciplinary measure that is considerably in excess of the Organization's general practice with regard to similar conduct. Specifically, the Appellant argues that not all acts of sexual harassment are of the same nature and severity, and as such, instances of inappropriate touching or unwelcome communications cannot all be met with the same uniform sanction, that is termination. That defies the proportionality principle, argues the Appellant.

29. In this regard, the Appellant notes the distinction under Staff Rule 10.2(a) between “separation from service” and “dismissal” and the further distinction between “separation from service with termination indemnity and without termination indemnity”. By failing to conduct



the required proportionality analysis, the UNDT did not justify why the ultimate type of termination in its most punitive form was given to the Appellant.

30. Second, the Appellant argues the UNDT also erred in law when it determined that his seniority at UNICEF relative to the Complainant's rank at UNHCR was a *per se* aggravating factor. That is, although the tribunal found the Appellant had no influence over the terms and conditions of the Complainant's appointment, it nevertheless factored the Appellant's seniority vis-à-vis the Complainant's volunteer status at UNHCR in its proportionality analysis. This was an error, argues the Appellant, because the seniority of the Appellant did not matter in this case.

31. The above miscalculations on the part of the UNDT resulted in a grossly disproportionate sanction on the Appellant. As such, he requests this Tribunal to reverse the Impugned Judgment and also order his reinstatement or, in the alternative, to grant him an award of two years' net base salary *in lieu* of rescission. Additionally, the Appellant also requests an order directing the Organization to remove his information from the Screening Database.

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

32. As a starting point, the Respondent remarks that the Appellant does not dispute the UNDT's conclusion that: (i) the facts on which the disciplinary measure was based were established by clear and convincing evidence; (ii) the facts legally support the conclusion of sexual harassment, and (iii) the due process rights of the Appellant were respected. The sole point of contention appears to be that the UNDT erred in law and exceeded its competence in concluding that the sanction of dismissal was proportionate to the offense of having sexually harassed the Complainant.

33. First, the Respondent argues, Staff Rule 10.1 (b) provides that the decision to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General. The Respondent also highlights UNAT jurisprudence regarding the broad discretion enjoyed by the Secretary-General in determining disciplinary sanctions to be imposed on staff members as a consequence of their wrongdoing. Furthermore, citing *Koutang*,<sup>19</sup> the Respondent notes that

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<sup>19</sup> *Koutang v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-374, para. 30.

UNAT will not lightly interfere in the Administration's broad discretion on disciplinary matters and that the degree of the sanction imposed is usually reserved for the Administration.<sup>20</sup>

34. The Respondent explains the type of sanction imposed in disciplinary cases can only be reviewed in cases of obvious absurdity and flagrant arbitrariness.<sup>21</sup> Citing *Sall*,<sup>22</sup> the Respondent adds: "[I]t is only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude its unlawfulness and change the consequence."

35. Referring to the Organization's zero-tolerance policy on sexual harassment, the Secretary-General explains the Appellant's dismissal under the circumstances, even if it is the strictest disciplinary measure, was not arbitrary, excessive, abusive, discriminatory, or absurd in its severity. Instead, the Respondent argues the dismissal decision was a reasonable one within the discretion of the Secretary-General and in line with the Appellant's violation of Staff Rule 1.2 (f).

36. In addition, the Secretary-General also argues that the sanction of dismissal is in fact in line with the Organization's past practice and jurisprudence in disciplinary cases involving sexual harassment; to wit: the Compendium on disciplinary measures, which sets out the practice of the Secretary-General in exercising his authority in disciplinary matters reflects that all cases relating to sexual harassment by a staff member have resulted in either the dismissal or separation from service of the staff member, except in one case.

37. Second, the Respondent argues the UNDT neither ignored its past practice nor did it hold that UNAT jurisprudence was irrelevant in sexual harassment cases. Rather, the UNDT held that in the cases cited by Appellant, the circumstances were different and the measures taken at the time reflected an outdated approach to sexual harassment.

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<sup>20</sup> *Portillo-Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 19.

<sup>21</sup> *Bertrand v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-738, para. 35.

<sup>22</sup> *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.

38. Regarding the claim that the UNDT did not appreciate the difference between dismissal and other forms of separation, the Respondent submits the UNDT appreciated these distinctions but decided to uphold the Administration's discretion in determining which was best suited for the Appellant's misconduct.

39. Additionally, the Respondent notes that even though only a single incident of sexual harassment could warrant dismissal because of the seriousness of this type of misconduct and its negative impact on the Organization, in the present case, the Appellant was actually dismissed for a continuous pattern of unwanted behavior in an isolated field location. The Secretary-General highlights that the UNDT appreciated that this case was not only about physical touching, but it was importantly about the persistence of the Appellant who continued to call and attempt to establish a relationship with the Complainant. Despite the Complainant's express requests asking the Appellant to stop, he nevertheless persisted. It is this persistent conduct that is at the core of the sexual harassment in this case.

40. Regarding the working relationship between the Appellant and the Complainant, the Secretary-General argues even though there was no direct superior-subordinate relationship between the two as they worked in different organizations, it is clear that in this situation that there was a power imbalance between a Chief of Field Office and a volunteer. As such, the Respondent submits the UNDT correctly considered this power imbalance when the Appellant sexually harassed the Complainant.

41. In light of the above, the Respondent asks the Appeals Tribunal to affirm the Impugned Judgment and to dismiss the appeal in its entirety. Furthermore, the Respondent requests that the name of the Appellant be published in full in UNAT's Judgment because there are no exceptional circumstances that would justify the UNDT's order redacting the Appellant's name from the record. The Respondent also submits there is no basis for removing the Appellant's name from the Screening Database.

### **Considerations**

42. Although the introductory part of the statement of appeal suggests that the Appellant takes issue with the UNDT's finding that sexual harassment has been established by clear and convincing evidence, however, he has not launched any specific ground of appeal in terms of Article 2 (1) of the Appeals Tribunal Statute. Rather, the Appellant claims, through his

articulated grounds of appeal, that the UNDT erred in law and exceeded its competence in concluding that the sanction of dismissal from service meted out on him was proportionate to the offense of having sexually harassed the Complainant. Therefore, this is the sole issue for the Appeals Tribunal to consider.

43. The Organization has a variety of disciplinary sanctions at its disposal. Staff Rule 10.2(a) provides different disciplinary measures ranging from different types of warnings and reprimands to “[s]eparation from service, with notice or compensation in lieu of notice (...) and with or without termination indemnity” and “[d]ismissal.”

44. Staff Rule 10.3(b) provides, *inter alia*, that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. In the present case, this means that the Dispute Tribunal as well as this Tribunal must determine whether the Secretary-General’s imposition of the ultimate sanction of dismissal from service meets the justice of the case, after due consideration is given to the entire circumstances of the case.

45. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures; to wit: a sanction within the limits stated by the respective norms, which is sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of

this Tribunal.<sup>23</sup> The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.<sup>24</sup>

46. Further, as we stated in *Samandarov*:<sup>25</sup>

... [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

...The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

47. When the sanction of termination is chosen by the Administration, it must be in line with the following principle, as stated in *Rajan*:<sup>26</sup>

48. The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable. In the case at bar, the Appellant was irrefutably found by clear

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<sup>23</sup> *Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para.89; *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 39; *Sall* Judgment, *op. cit.*

<sup>24</sup> *Ladu* Judgment, *op. cit.*, para. 40.

<sup>25</sup> *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24-25.

<sup>26</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 47.

and convincing evidence to have sexually harassed the Complainant, including the Appellant's touching of her breast. As the UNDT held:<sup>27</sup>

The Tribunal is satisfied that the evidence of sexual harassment is clear and convincing. There is sufficient evidence consistent with the events of the night of 12 October 2017 to the effect that the Applicant was pursuing the Complainant for a sexual relationship. Indeed, even if the touching was accidental, the indication of the Complainant of her disinterest should have been enough to bring his advances to a halt. But it was not. The Complainant was made to feel that her desire to be left alone outside of a professional relationship, was of no moment.

49. Further, the touching of the Complainant's breast was only a fraction of the Appellant's unwanted behavior and advances towards her in an isolated field location. In this context, we share the UNDT's holding that "[t]his is a case in which the physical touching is not the only evidence of the harassing behavior of the Applicant"<sup>28</sup> and that "the persistence of continuing to call and attempt to establish a relationship when it was clearly unwelcome is an important element of sexual harassment in this case".<sup>29</sup> Though the Appellant was made abundantly aware by the Complainant that his sexual advances were unwelcome from the beginning, he went on harassing the victim. His first text message did not receive an answer. Even after the events of 12 October 2017 at the party when the Complainant had made it clear to the Appellant that he was making her uncomfortable and that she did not want any further contact with him that was not work-related, nevertheless the Appellant persisted in his efforts to contact her to advance his sexual interests in the Complainant, despite her express requests to the contrary.

50. Staff Regulation 1.2 (a) provides that: "Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them."

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<sup>27</sup> Impugned Judgment, para. 57.

<sup>28</sup> *Ibid.*, para. 50.

<sup>29</sup> *Ibid.*, para. 53.

51. Staff Rule 1.2(f) 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.”

52. In *Mbaigolmem*, this Tribunal decided:<sup>30</sup>

Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

53. In the context of the existing legal framework, we find no fault in the UNDT’s conclusion that the Appellant’s behavior towards the Complainant amounted to serious misconduct. By sexually harassing her, the Appellant violated the applicable Regulations and Rules. He did not conduct himself in a manner befitting his status as an international civil servant. His actions not only violated the Complainant’s personal dignity but also adversely affected the interests of the United Nations. His conduct violated the core values of the Organization and the measure of summary dismissal from service was not a disproportionate sanction, given that remaining in service would be irreconcilable with the core values professed by the United Nations and the gravity of the conduct.

54. Further, as the UNDT held:<sup>31</sup>

In this case, it is true that the Applicant was not able to use his power to enforce any discriminatory or harsh action or sexual abuse. This is a case in which the perpetrator, being the Applicant, the most senior UNICEF official in the area, persisted with sexual advances when he was told by the victim that she was not interested and that she was disturbed by it. Although they may not have worked for the same agencies their respective offices relied on each other for support. It is in this area of mutual cooperation and support that the danger resided. The Applicant’s persistence showed that he was determined to get what he wanted nevertheless, and he demonstrated little or no concern for the Complainant’s rights or feelings in the circumstances. This behaviour continued even after the Complainant had reported the matter to the relevant authorities. Professional standards would have dictated that he should cease contact

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<sup>30</sup> *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 33.

<sup>31</sup> Impugned Judgment., para. 69.

with the Complainant until the matter was resolved in his favour and if not, never contact the Complainant again. But he disregarded such standards.

55. We fully agree with this holding. Consequently, given the seriousness and degree of the Appellant's misconduct, the sanction of summary dismissal from service was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Secretary-General's discretion to determine that engaging in acts of sexual harassment of a junior colleague is in violation of the standards that have been consistently reiterated by the Organization since at least 1992. This rendered the Appellant unfit for further service with the Organization, and therefore, this Tribunal is satisfied that summary dismissal from service was neither unfair nor disproportionate to the seriousness of the offense.

56. Arguably, the Appellant violated the relationship of trust that existed between him and the Organization. His conduct was particularly egregious in light of the position he occupied, that of Chief of Field Office in Kadugli, Sudan, at the P-4 level while the Complainant was a United Nations Volunteer. As such, the Appeals Tribunal finds that, in these circumstances, imposing the disciplinary sanction at the strictest end of the spectrum was not disproportionate and manifestly abusive but a reasonable exercise of the Administration's broad discretion in disciplinary matters – a discretion with which this Tribunal will not lightly interfere. Accordingly, the UNDT also did not err in finding the sanction proportionate to the offense.

57. This conclusion renders it unnecessary to examine the other grounds of appeal advanced by the Appellant that the UNDT erred in law and failed to exercise its jurisdiction by declining to compare the allegations of misconduct in this case with the Organization's past practice in similar cases of misconduct and by failing to follow UNAT jurisprudence.

58. At any rate, the Appellant's contentions are devoid of merit for the following reasons. For one thing, the UNDT was alive to the UNAT jurisprudence on the matter at issue and fully complied with it. It applied the correct legal standards in considering the proportionality of the imposed disciplinary sanction and striking the right balance between the lawful exercise of the Secretary-General's discretion to select an adequate and proper sanction and the Appellant's right to judicial protection. Again, in determining the proportionality of a sanction, the UNDT should observe a measure of deference. Even supposing the UNDT did not agree with the administrative decision, this would not change the reasonableness of the decision.



Similarly, if the UNDT did not agree with the choice of the sanction imposed by the Administration, this would not make the implementation of the sanction arbitrary and/or disproportionate. It is certainly not the role of the Dispute Tribunal to select what it believes to be the most appropriate sanction for the Administration to impose, but rather it is only to examine the fairness and reasonableness of the decision.<sup>32</sup>

59. For another, it is not accurate that the UNDT ignored its own jurisprudence or the Organization's past practice in disciplinary cases. On the contrary, the UNDT examined, as per its reasoning, the administrative practice of the Organization in similar cases, i.e., in cases where the staff member has been sanctioned for sexual harassment, and found out that either the circumstances of those cases differed from the present case or that they reflected an "outdated" approach to sexual harassment allegations in light of the recent UNAT jurisprudence. Moreover, the UNDT was correct in noting that each case of sexual harassment is judged on its own, since the facts may be different, giving rise to different conclusions in relation to aggravating and mitigating factors of the offense and the offender.<sup>33</sup>

60. Indeed, there is no gainsaying that, for the interest of justice and the principle of legal certainty, the Administration should be consistent with its own administrative practices when similar situations are at stake, follow parity principles in determining the sanction and make reference to other cases based on analogous facts and principles, if need be. Along the same vein, in the context of exercising its judicial review of proportionality of the imposed disciplinary sanction and molding its value judgment in this regard, the UNDT – and eventually the UNAT on appeal – may recur to and take stock of decisions rendered in similar cases in the past. However, in light of the unique circumstances of each case, it is well within the discretion of the tribunals to reach different conclusions from case to case, as they should, depending on the factors considered, even though the type of harassment or sexual harassment may be the same.

61. This conclusion renders it unnecessary to examine the Appellant's request to remove his name from the Screening Database, which came as a result of his dismissal from service for engaging in the sexual harassment of a colleague. Furthermore, the decision to post the Appellant's information on the Screening Database was a final administrative decision in and of itself, which was distinct from the dismissal decision. As such, if the Appellant sought to

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<sup>32</sup> *Cheikh Thiare v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1167, para. 40.

<sup>33</sup> Impugned Judgment., para. 65.

challenge it, he should have first submitted a request for management evaluation, pursuant to Article 8 of the Dispute Tribunal Statute, which he failed to do.

*Request for compensation*

62. The Appellant’s claim for compensation is rejected. Since no illegality was found, there was no justification for the award of any compensation. As this Tribunal stated before, “compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member’s rights or administrative wrongdoing in need of repair”.<sup>34</sup>

63. For the foregoing reasons, we find that the Appellant has failed to establish that the UNDT made any error of law or failed to exercise its competence in its review of the disciplinary measure imposed by the Secretary-General. It follows that the appeal must fail.

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<sup>34</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33.

**Judgment**

64. The appeal is dismissed, and Judgment No. UNDT/2020/220 is upheld.

Original and Authoritative Version: English

Dated this 18<sup>th</sup> day of March 2022.

*(Signed)*

Judge Raikos, Presiding  
Athens, Greece

*(Signed)*

Judge Murphy  
Cape Town, South Africa

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 6<sup>th</sup> day of May 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar