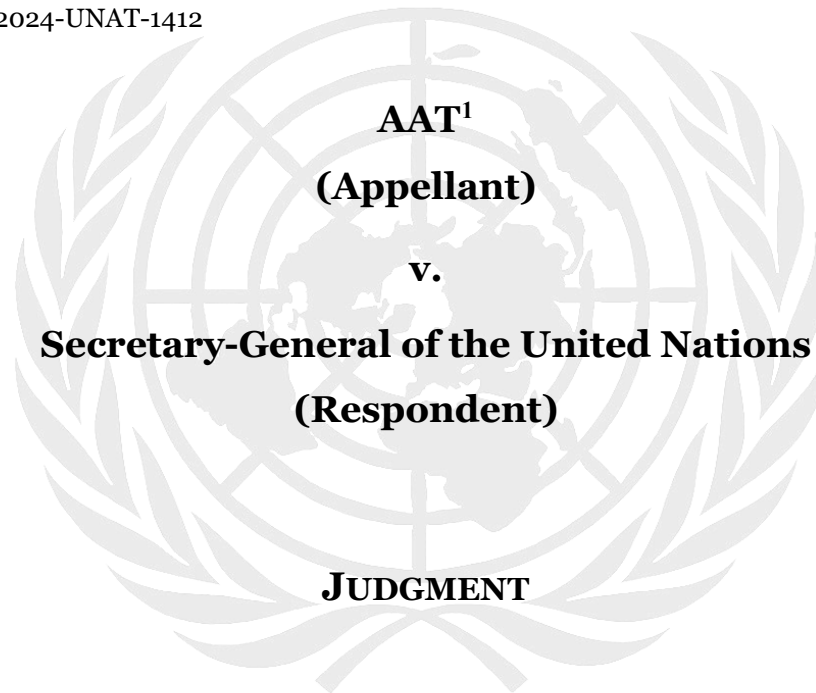




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1412



AAT¹
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Katharine Mary Savage Judge Graeme Colgan
Case No.:	2023-1789
Date of Decision:	22 March 2024
Date of Publication:	16 April 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Ron Mponda and Rodney Mkweza
Counsel for Respondent:	Rupa Mitra

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

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. AAT, a Senior Protection Officer, contested the decision of the Office of the United Nations High Commissioner for Refugees (UNHCR) to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for sexual harassment of a United Nations Volunteer (Complainant) at the Quetta Sub-Office in Pakistan (contested decision).
2. By Judgment No. UNDT/2022/135 (impugned Judgment),² the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) upheld the disciplinary measure imposed on AAT and dismissed his application. The Dispute Tribunal made its determination based on the written material before it as the parties agreed to forego an oral hearing. AAT appeals.
3. For reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) dismisses the appeal and affirms the impugned Judgment.
4. As a preliminary matter, given that there was no challenge to anonymity by the Secretary-General, the UNDT order to anonymize AAT's name remains in effect, pursuant to Section II.C.32 of Practice Direction No. 1 of the Appeals Tribunal.

Facts and Procedure

Background

4. AAT joined UNHCR in 2003. He resigned in 2008 and was rehired in 2010. At the relevant time of events, he was a Senior Protection Officer, at the P-4 level, assigned to the Quetta Sub-Office in Pakistan.
5. On 3 September 2020, the Inspector General's Office (IGO) received allegations of sexual harassment against AAT pertaining to events that reportedly occurred in August 2020.
6. At the time of the alleged events, AAT was the Officer-in-Charge (OiC) and the Acting Head of Office at his duty station and the Complainant was his supervisee. The Complainant was a United Nations Volunteer working as an Associate Protection Officer in the Quetta Sub-Office.

² *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/135.

7. In Quetta, the Complainant and AAT both lived in a shared guest house which normally housed seven international UNHCR staff members. After a rest and recuperation cycle, during which she returned to Europe, the Complainant worked remotely in Europe due to the COVID-19 pandemic lockdown. She subsequently returned to Quetta in mid-July 2020 until 15 August 2020. Prior to returning to Quetta, she informed AAT, her supervisor, that she planned on resigning her position. When she returned to Quetta, there were three other international staff members at the guest house, including AAT. However, one of the staff members left after a few days, leaving her with AAT and one other staff member.³

The alleged misconduct

8. The Complainant told the investigators that she and AAT socialized at the guest house as everyone was isolated due to the COVID-19 pandemic and were not allowed to go out. She alleged that, in August 2020, AAT made unwelcome advances and comments, and attempted to touch her without her consent while they were both living in the guest house.⁴

9. On 1 August 2020, it is undisputed that AAT texted the Complainant via WhatsApp at 3:04 a.m., asking if she was sleeping. He then called her at 3:31 a.m.⁵

10. The Complainant stated that AAT asked her to come to his room. During the investigation interview, she mentioned that she found it was “strange” but thought he might be sick as they had been drinking previously. When she arrived in his room, she found him in bed. He called her to “come to [his] bed”. She says she declined, but he continued to ask. As the other staff member’s room was next door and she was afraid he might hear, she complied but sat “uncomfortably” at the diagonal other end. AAT started to touch her arm, her head and her hair and began to talk inappropriately. She told the investigators that she tried to joke or pretend that she did not understand and got up to leave. He opened the door and she left.⁶

11. AAT disputed this version of events to the investigators. He says that he did not ask the Complainant to come to his room and she did so on her own. However, he could not explain why he

³ Investigation Report, paras. 12-19.

⁴ Annex 3 of the Investigation Report contains a transcript of the entirety of WhatsApp messages between AAT and the Complainant from 26 January 2020 to 15 August 2020 with attachments.

⁵ Investigation Report, para. 23.

⁶ *Ibid.*, paras. 23-29.

called the Complainant at 3:31 a.m. In any event, he says that his door was open, she walked in, sat on his bed, and they talked until she left.⁷

12. The Complainant and AAT continued to subsequently communicate and interact. The Complainant explained that she said nothing directly about her discomfort as she had to “keep the peace” in the situation.⁸

13. On 4 August 2020, AAT texted the Complainant at 11:01 p.m. asking if she was sleeping and wanted to know if she wanted a “night cap”. She responded with “(...) any problem?” as she was worried that he was possibly sick.⁹ She did not meet AAT for the “night cap”.

14. AAT admitted to the investigators that this message was “not appropriate”, but further stated that it was an invite “in a social context if she want[ed]”.¹⁰

15. On 9 August 2020, at approximately 3:00 a.m., there are a series of WhatsApp messages between AAT and the Complainant as follows:¹¹

2:53 a.m.: AAT sent a message: “Goodnight pretty. You such amazing company.”

2:54 a.m.: The Complainant responded: “You too definitely. Thanks a lot. Sweet dreams.” AAT then sent a message: “I really enjoy all [the] (...) time spent with you and will surely be dreaming of you.” AAT admitted to the investigators that this was inappropriate.

2:55 a.m.: The Complainant responded with two green heart emojis and with: “Thanks a lot. I sincerely appreciate that you are here around!”

2:56 a.m.: AAT sent a message: “Wish you were sleeping next to me but you need to sleep in your bed.”

⁷ *Ibid.*, paras. 88-89 and 102.

⁸ Annex 2 of the Investigation Report, Complainant’s record of interview, p. 8 of 17. See also Annex 3 of the Investigation Report, WhatsApp exchange between the Complainant and AAT from 26 January 2020 to 15 August 2020, pp. 1-20 of 20.

⁹ Investigation Report, para. 59. Annex 3 of the Investigation Report, WhatsApp exchange between the Complainant and AAT from 4 August 2020, pp. 13-14 of 20.

¹⁰ Annex 16 of the Investigation Report, AAT’s record of interview, p. 16 of 28.

¹¹ The entire conversation is reproduced in Annex 3 of the Investigation Report, WhatsApp exchange between the Complainant and AAT from 9 August 2020, pp. 16-17 of 20.

2:57 a.m.: The Complainant responded: “Yes, I do” and “Like Drake says: I only love my mum and my bed.”

2:58 a.m.: AAT responded: “That’s drake and he said so because he doesn’t like and want the chick who said she love him.” The Complainant responded with five laughing emojis.

2:59 a.m.: AAT sent a message: “So that cannot become the standard.” The Complainant responded: “Drake is rubbish indeed.”

3:01 a.m.: AAT sent a message: “So just be truthful to your feelings and act accordingly. I know we have quite a lot in common but are all holding back.” The Complainant responded: “:) Let’s keep holding back then.”

3:03 a.m.: AAT sent another message: “Don’t be a psychologist!! Put that aside and be human.”

3:11 a.m. to 3:23 a.m.: AAT sent a series of photos to the Complainant without prompting, including one which translates to “I love you”, a picture of a rose, a picture of himself, and a short video of a baby sucking on the naked breasts of a doll. AAT could not explain why he sent these to the Complainant other than he had drunk too much.

16. Later in the day of 9 August 2020, AAT and the Complainant continued to exchange general messages.¹²

17. At 10:09 p.m., AAT sent a message to the Complainant: “Hey, my apologies for this crazy whiskey conversation of this morning. And soo [sic] sorry if you were offended by it. I won’t repeat itself.” At 10:15 p.m., the Complainant responded: “Thanks for saying this. No problem.”¹³

Events subsequent to the alleged misconduct

18. On 10 August 2020, the Complainant messaged the Administrative Officer of the Quetta Sub-Office to request a confidential conversation.¹⁴ The Administrative Officer confirmed the conversation to the investigators and explained that the Complainant sought her advice on what she

¹² *Ibid.*, pp. 17-18 of 20.

¹³ *Ibid.*, p. 18 of 20.

¹⁴ Investigation Report, paras. 74-75. See also Annex 9 of the Investigation Report, Message exchange between the Complainant and the Administrative Officer.

could do regarding AAT's "harassment". She advised the Complainant that she could report the matter to the Head of Office. However, the Administrative Officer also told the investigators that AAT and the Complainant seemed friendly and at times she had a feeling they were "flirting".¹⁵

19. On 16 August 2020, subsequent to a phone conversation held on 12 August 2020, the Complainant e-mailed the Head of Office to explain the incidents that occurred with AAT.¹⁶ In preparation for her departure, AAT completed a volunteer performance evaluation on the Complainant as her supervisor.

20. The Complainant held her position until 15 August 2020, when her resignation took effect. During the notice period prior to her resignation, she was offered the option to telecommute for that period but declined the offer.¹⁷

21. On 15 August 2020, after the Complainant left Quetta, she sent a message to AAT in which she stated that she did not say anything to him because she did not want to damage their work relationship as they were living in the same house, and she was new to UNHCR. She stated that she liked their conversations, but she objected to his sexual advances and was uncomfortable. She explained that as AAT was her boss, she felt "powerless". AAT responded that he was "hurt" and "disappointed" in himself and with his behaviour after too much alcohol. He realized that he "crossed the line" and again apologized for making her feel bad.¹⁸

The investigation

22. On 12 October 2020, the IGO opened an investigation into the allegations of misconduct. On 23 October 2020, AAT was informed that he was the subject of the investigation. On 28 October 2020, he was interviewed by the IGO. The investigation also included the interviews of the Complainant and the Administrative Officer.

¹⁵ Investigation Report, para. 76. See also Annex 15 of the Investigation Report, the Administrative Officer's record of interview, p. 6 of 8.

¹⁶ Annex 14 of the Investigation Report, E-mail dated 16 August 2020 between the Complainant and the Head of Office.

¹⁷ Investigation Report, paras. 13 and 16-18.

¹⁸ Annex 3 of the Investigation Report, WhatsApp exchange between the Complainant and AAT from 15 August 2020, p. 19 of 20.

23. On 12 November 2020, the IGO sent the draft of its Investigation Report to AAT. AAT submitted his comments on 19 November 2020.

24. On 20 November 2020, the IGO issued its Investigation Report in which it considered that the following allegations were substantiated and supported a finding that AAT failed to fulfil his responsibilities as a manager, supervisor and UNHCR staff member:¹⁹

- i) Calling [the Complainant] to his room on 1 August 2020 at 3:13 a.m.;
- ii) Inviting [the Complainant] for a 'night cap' on 4 August 2020 at 11:02 p.m.;
- iii) Having an inappropriate conversation with [the Complainant] on 9 August 2020 between 2:53 a.m. and 3:03 a.m., during which he tried to convince her to have sex with him and making sexual advances towards her; and
- iv) Sending a video of a black toddler sucking a barbie doll's breasts to [the Complainant] on 9 August 2020 at 3:23 a.m.

25. On 14 December 2020, the Director of Human Resources (DRH) informed AAT by letter of the allegations of misconduct against him and that the Administration had decided to initiate a disciplinary process for misconduct. He was also provided a copy of the Investigation Report and offered an opportunity to respond to the allegations in writing within one month, which he did on 13 January 2021.

The Contested Decision

26. On 18 May 2021, the DRH informed AAT by letter that the High Commissioner had determined that his actions constituted misconduct in respect of which the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity was imposed in accordance with Staff Rule 10.2(a)(viii)²⁰ and that his name will be included in the ClearCheck database.

27. The letter also addressed, *inter alia*, AAT's reply to the allegations of misconduct but indicated that the following three counts of misconduct were established based on clear and convincing evidence:

Count 1: On 1 August 2020, AAT called the Complainant, his direct supervisee, at 3:13 a.m. after official duty station working hours and asked her to come to his room. When she

¹⁹ Investigation Report, paras. 171-173.

²⁰ Secretary-General's Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

arrived at his room, AAT was lying in bed. When the Complainant placed herself some distance from AAT and the bed, he repeatedly asked her to come to the bed, whereupon he attempted to touch her, without her consent.

Count 2: On 4 August 2020, at 11:03 p.m., again at a time well outside official working hours, AAT invited the Complainant for a night cap.

Count 3: On 9 August 2020, WhatsApp messages establish that AAT repeatedly sent communications of a sexually suggestive nature to the Complainant.

28. The letter further reviewed the mitigating and aggravating circumstances that the High Commissioner considered in the determination of the appropriate disciplinary measure to be imposed. The aggravating factors were as follows: i) AAT's conduct in harassing the Complainant was repeated; ii) AAT held the most senior position in the Quetta Sub-Office at the time of the events; iii) there was a "considerable disparity in power" between him and the Complainant; iv) the Complainant was the only female international staff member at the duty station; and v) the misconduct reflected negatively on the UNHCR's image and reputation. The mitigating factors were as follows: i) AAT's "long and satisfactory service record as a UNHCR staff member, including service in numerous hardship duty stations"; and ii) AAT's apology for sending the WhatsApp messages of 9 August 2020 with the Complainant's acceptance of the apology.

Procedures before the Dispute Tribunal and the impugned Judgment

29. On 9 July 2021, AAT filed an application with the Dispute Tribunal challenging the contested decision.

30. On 2 November 2022, the UNDT held a case management discussion (CMD) during which both parties agreed that the case could be determined on the written pleadings without holding a hearing on the merits.²¹

31. On 23 December 2022, the Dispute Tribunal issued the impugned Judgment. It considered that the sensitive nature of the allegations and the fact that the Complainant may be easily identified amounted to exceptional circumstances that warranted granting AAT's request for anonymity.²²

²¹ *Applicant v. Secretary-General of the United Nations*, Order No. 101 (GVA/2022), para. 3.

²² Impugned Judgment, para. 24.

32. Turning to the merits of the case, the Dispute Tribunal examined the facts in support of the three counts of misconduct.

33. Regarding Count 1, the Dispute Tribunal concluded that the 9 August 2020 incident had been established by clear and convincing evidence based on the documentary evidence and the undisputed facts regarding the incident. Moreover, the UNDT found no merit in AAT's submission that his timely and unconditional apology accepted by the Complainant closed the matter.

34. Regarding Counts 2 and 3, the Dispute Tribunal found the Complainant's version of events was coherent, detailed, reliable, consistent, and supported by documentary evidence, namely the WhatsApp exchanges between her and AAT.

35. Turning to AAT's main arguments in support of his submission that the Complainant was not credible, the Dispute Tribunal found that he failed to adduce any evidence that undermined the Complainant's credibility.

36. The Dispute Tribunal found that AAT's conduct amounted to sexual harassment pursuant to Staff Regulation 1.2(a) and (f), Staff Rule 1.2(f) and Section 4.2 of UNHCR/HCP/2014/4 (Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority) (UNHCR Policy). It further concluded that his acts constituted unwelcome sexual advances towards the Complainant that were reasonably expected or perceived to cause offence or humiliation. The Dispute Tribunal highlighted that "considering the close working and living arrangements of the duty station and the fact that [AAT] was the Complainant's supervisor and OiC/Head of Office at all material times, his conduct [was] offensive and humiliating not only to the Complainant but also to any reasonable person placed under the same circumstances".²³

37. The Dispute Tribunal held that the contested decision was proportionate to the nature and the gravity of AAT's misconduct, in accordance with Staff Rule 10.3(b). Indeed, it found that the sanction imposed was not the most severe available and was consistent with those applied in similar cases. Furthermore, relying on Appeals Tribunal jurisprudence,²⁴ the Dispute Tribunal found that the Administration correctly used its discretion in considering both aggravating and mitigating

²³ *Ibid.*, para. 72.

²⁴ *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956.

circumstances. It also observed that a “sexual harasser could not remain on the job in line with the Organization’s zero-tolerance policy”.²⁵

38. Last, the Dispute Tribunal concluded that AAT’s due process rights had been respected during the investigative and the disciplinary process. In this regard, it noted that AAT had not identified any procedural irregularity.²⁶

39. Therefore, the Dispute Tribunal upheld the contested decision and concluded that AAT was not entitled to any remedies.

Submissions

AAT’s Appeal

40. AAT requests that the Appeals Tribunal “reverse or modify the [Dispute] Tribunal’s findings of fact on the critical points identified in the appeal brief and (...) the [Dispute] Tribunal’s decision finding that the facts in this case legally amounted to the misconduct of sexual harassment”.²⁷

41. AAT submits that the Dispute Tribunal erred in law by shifting the burden of proof to him and elevating that burden to an unreasonable level when it found that his “submissions lack[ed] the minimum level of specifics to discharge his burden of proof”.²⁸

42. He also submits that the Dispute Tribunal, by ignoring several elements he highlighted, failed to properly determine whether the facts legally amounted to misconduct under the Staff Regulations and Rules. AAT also contends that the Dispute Tribunal failed to thoroughly scrutinize his submissions and accord them the appropriate weight, arguing that these submissions constituted “strong mitigating factors”.

43. In this regard, AAT argues that “prohibition against sexual misconduct does not preclude the entry into sexual relations among staff” and that “[s]exual advances in themselves come to the fore when the complainant signals a definite no, that such an advance or advances are unwanted”.

²⁵ Impugned Judgment, para. 83.

²⁶ *Ibid.*, paras. 86-88.

²⁷ Appeal form.

²⁸ Impugned Judgment, para. 51.

44. AAT argues that the Dispute Tribunal erred by putting excessive weight on position of OiC, emphasizing that it was merely an administrative arrangement that was not accompanied by a Special Post Allowance (SPA) and did not confer enhanced responsibilities.

45. As for the events of 9 August 2020, he asserts that while he did not dispute before the Dispute Tribunal the content of the WhatsApp exchange that occurred on that date, he “vigorously disputed (...) the Complainant’s detailed descriptions of what transpired as well as the Complainant’s reference to other, past sexual advances”. AAT argues that during the eight months they worked together, he and the Complainant were friends, engaging in social interactions, even in his room. He emphasizes that one of the witnesses interviewed by the IGO, the Administrative Officer, even testified that “she had the feeling they were flirting”.²⁹

46. AAT argues that the Dispute Tribunal also failed to consider that the Complainant voluntarily went into his room on 1 August 2020, while he never visited her room. Furthermore, he submits that both the investigators and the Dispute Tribunal disregarded and did not question the Complainant’s statements that: i) she was obliged to accept his invitation to his room on 1 August 2020 to maintain a harmonious work relationship; ii) she believed it was necessary to warn the women of the service personnel to clean his room quickly and not stay there; and iii) she made her complaint of sexual harassment to protect other women.³⁰

47. As for his apology, AAT submits that the Dispute Tribunal erred by failing to make a definitive ruling on his submission concerning the consequence of an apology in sexual harassment cases. He reiterates that “a timely apology that is unconditionally accepted by a complainant should bring a sexual harassment complaint to an end”.

48. Regarding his apology to the Complainant, AAT contends that the Dispute Tribunal also committed an error in procedure when, at the CMD, it did not indicate his “general or specific inclination/viewpoint on this aspect (...) as to afford [him] (...) his right to be heard *viva voce* via the final closing arguments, given the agreed position not to hold oral hearings”.

49. In addition, he contends that the Dispute Tribunal committed several errors of fact in the impugned Judgment. For example, AAT argues that the Dispute Tribunal misunderstood the Complainant’s explanation for declining the Administration’s offer to telecommute, leading to an

²⁹ Investigation Report, para. 76.

³⁰ *Ibid.*, paras. 48 and 70.

error in finding that her explanation was plausible and legitimate. He highlights that the Complainant's statement that she "wanted to leave with good memories, [she] wanted to prove [to] the people that [she was] there, even in those difficult times, that [she did] not escape from difficulty *per se*" did not pertain to her complaint against him but rather to her role in the office, which had been disrupted by the COVID-19 measures, preventing her from undertaking field missions.³¹

50. AAT also argues that the Dispute Tribunal erred in finding that he sought to suggest that his sexual misconduct had almost no impact on the Complainant, as he submitted that she resigned for reasons other than his misconduct.

51. Furthermore, AAT contends that the Dispute Tribunal erred in concluding that his admission concerning the facts related to the 9 August 2020 incident amounted to a general admission. On the contrary, AAT submits that he disputed the Complainant's account of the events of 9 August 2020.

52. AAT also asserts that the Dispute Tribunal did not give sufficient weight to the fact that the Complainant had shared intimate details of her life with him on 9 August 2020. He requests the Appeals Tribunal to note that when he mentioned these details to the investigators, they were characterized as "lack of remorse (...), which is tantamount to abridging [his] due process rights".

53. Last, AAT submits that the Dispute Tribunal erred in issuing a judgment that is a reproduction of the Secretary-General's reply.

The Secretary-General's Answer

54. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and uphold the impugned Judgment.

55. The Secretary-General contends that the Dispute Tribunal correctly found that there had been no procedural error during the CMD.

56. The Secretary-General submits that the Dispute Tribunal correctly applied the burden of proof to the present case. It carefully examined whether the Administration had established the requisite standard underlying each count of misconduct, taking into consideration the documentary evidence as well as both the Complainant and AAT's accounts of the events. The Secretary-General recalls that

³¹ Impugned Judgment, para. 52. See also Investigation Report, para. 17.

the Dispute Tribunal does not have the obligation to address every submission made by a litigant and that AAT's disagreement with the Dispute Tribunal's findings does not demonstrate any error in the impugned Judgment.

57. The Secretary-General asserts that the UNDT correctly determined that the established facts qualified as misconduct under the Staff Regulations and Rules.

58. Despite AAT's submissions, the Secretary-General contends that AAT has not shown any error of fact in the impugned Judgment.

59. In particular, the Secretary-General argues that AAT's submission that "prohibition of sexual misconduct does not preclude the entry into sexual relations among staff" is irrelevant. Regarding his argument that "[s]exual advances in themselves come to the fore when the complainant signals a definite no, that such an advance or advances are unwanted", the Secretary-General points out that the Dispute Tribunal correctly found that the Complainant rejected AAT's sexual advances several times.³²

60. Turning to AAT's arguments that he was friends with the Complainant for over eight months before the incidents and shared intimate details of her life, that she voluntarily went into his room on 1 August 2020, and that he never visited her room, the Secretary-General observes that they are irrelevant to the present case and constitute an attempt by AAT to relitigate his case.

61. The Secretary-General also submits that the Dispute Tribunal did not make an error in recognizing AAT's supervisory relationship with the Complainant.

62. As for the apology, the Secretary-General argues that the Dispute Tribunal correctly concluded that AAT's apology did not resolve the sexual harassment complaint. Regarding the reason for the Complainant's refusal to telecommute, the Secretary-General argues that there is no evidence indicating that the Dispute Tribunal misunderstood the Complainant's explanation in this regard.

Finally, the Secretary-General contends that the Dispute Tribunal adequately considered all of AAT's arguments and evidence and that it was well within the Dispute Tribunal's scope of judicial review to find the Secretary-General's submissions persuasive and to reject those of AAT.

³² *Ibid.*, paras. 55 and 71.

Considerations

Preliminary issue

63. AAT submits that the Dispute Tribunal erred in procedure when, in the CMD, the learned Judge failed to indicate her “general or specific inclination/viewpoint” on the impact of the apology in the case and as such did not afford him the right to be heard either *viva voce* or in final closing arguments. We find no merit in this argument.

64. The Appeals Tribunal has consistently held that the Dispute Tribunal has broad discretion with respect to case management including on whether to call witnesses, to order an oral hearing, or to order production of documents.³³

65. In the present case, the parties attended the CMD with their counsel. Although AAT disputed certain facts underlying the disciplinary measure at issue, both parties agreed that the case could be determined by written pleadings and without holding a hearing on the merits. There is no obligation for a learned Judge to indicate their “inclination” on the evidence, particularly when all evidence has not yet been adduced. Further, AAT made submissions relying on the apology; therefore, he would have been aware of the potential impact of his submissions on the final outcome of his case, including that the Dispute Tribunal might find that the apology did not vitiate the misconduct.

66. The Appeals Tribunal has consistently held that we will not interfere lightly with the broad discretion of the Dispute Tribunal in the management of cases and will only do so in “clear cases of denial of due process of law affecting the right to produce evidence by a party”. There has been no such clear denial of due process or procedural fairness in this case.³⁴

The disciplinary standard

67. In disciplinary cases, it is well-established that the Dispute Tribunal must consider:³⁵

- (a) whether the facts on which the sanction is based have been established by clear and convincing evidence when termination is a possible outcome,

³³ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-981, paras. 47-48.

³⁴ *Onifade v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-668, para. 41.

³⁵ *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 95. See also *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 37; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 1-2 and 29-30.

- (b) whether the established facts qualify as misconduct under the Staff Regulations and Rules,
- (c) whether the sanction is proportionate to the offence and the circumstances, and
- (d) whether the staff member's due process rights were observed in the investigation and disciplinary process (...).

Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable.

68. We find that the Dispute Tribunal correctly made its determination based on the above standard of review and did not err in the impugned Judgment for the reasons that follow.

Establishment of facts by clear and convincing evidence

69. AAT submits that the Dispute Tribunal erred in law by shifting the burden of proof from the Secretary-General onto him when it held that his submissions lacked "the minimum level of specifics to discharge his burden of proof".³⁶

70. There is no indication in the impugned Judgment that the Dispute Tribunal erred in law in its application of the burden of proof. Rather, the Dispute Tribunal correctly identified that the Administration has the burden to establish the alleged misconduct by clear and convincing evidence. It relied on relevant Appeals Tribunal jurisprudence as well as on the appropriate legal framework, namely Section 9.1(a) of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).³⁷

71. In applying the burden and having regard to the standard of proof, the Dispute Tribunal reviewed and considered the entirety of the evidence and the parties' submissions and made appropriate findings. In doing so, it correctly determined that the facts underlying the allegations were established by clear and convincing evidence, and, therefore, the Administration discharged its burden.

72. It appropriately recognized that AAT also bears the onus of proving his case and version of events. This is what the Dispute Tribunal refers to in paragraph 51 of the impugned Judgment. The Dispute Tribunal did not accept AAT's submissions and evidence and found that he had not met the

³⁶ Impugned Judgment, para. 51.

³⁷ *Ibid.*, paras. 27-29.

onus of proving his version. It reviewed AAT's arguments disputing the Complainant's motivation to not telecommute, her ulterior motives in making her sexual harassment complaint, and her credibility on the allegations and it provided appropriate reasons for not accepting them.

73. As such we find that the Dispute Tribunal appropriately held that the underlying facts of all three counts of misconduct were established by clear and convincing evidence as set forth in the written materials before it.

74. AAT argues that the Dispute Tribunal based its impugned Judgment "wholly" on a reproduction of the Secretary-General's submissions. Therefore, he contends the learned Judge did not properly scrutinize the materials, especially his evidence and submissions.

75. The Appeals Tribunal has previously held that:³⁸

As a general rule, there is a judicial presumption of integrity and impartiality that the Judge has done his/her task as sworn to do. A party seeking to set aside a judicial decision owing to the fact that the reasons in the judgment incorporated portions of the submissions of the parties bears the burden of showing that this presumption is rebutted. Moreover, the threshold for rebutting the presumption of judicial integrity and impartiality is high, as it requires cogent evidence. The question is therefore whether the evidence presented by a party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the Judge did not perform his/her sworn duty to review and consider the evidence with an open mind.

76. We find that AAT has not discharged his burden by simply pointing out paragraphs and bullet points that have the same "format, wording [and] syntax, including punctuation". The impugned Judgment thoroughly reviews the relevant facts and submissions of the parties and is reasoned in its determination on all three counts of misconduct which we review below.

Count 1: 1 August 2020 event

77. The first count of misconduct concerns the events that occurred on 1 August 2020, when the Complainant attended AAT's room.

78. AAT "vigorously" disputes the Complainant's version of events that night and submits that the Dispute Tribunal failed to fully scrutinize each party's assertions. He argues that the Dispute Tribunal

³⁸ *AAG v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1308, para. 59.

ignored the nature of their relationship, including their social interactions throughout the eight months, such as gatherings in his room at the guest house to avoid causing offence to the other occupants due to their alcohol consumption. Further, he asserts that the Complainant voluntarily went to his room on 1 August 2020, and the Dispute Tribunal did not adequately test her assertion that she “obliged the invitation” because of the working relationship. He points to “inconsistencies” that, he claims, the Dispute Tribunal ignored.

79. These submissions have no merit. The Dispute Tribunal correctly found that the Complainant’s account of relevant facts in relation to the incidents was “coherent, detailed, reliable, and consistent”.³⁹

80. There is no inconsistency between the Complainant’s description of their relationship and her allegations of sexual harassment. In fact, the Complainant admitted that her relationship with AAT was “nice”, that he was “like-minded” and “liberal”, and their relationship was “friendly” and “close”.⁴⁰

81. However, a close and friendly relationship between colleagues does not excuse unwanted and inappropriate sexual advances, especially between a supervisor and supervisee. Indeed, the Dispute Tribunal correctly found that the Complainant rejected AAT’s sexual advances and invitations on several occasions as outlined in paragraph 71 of the impugned Judgment.

82. As the Dispute Tribunal stated, there was no justification to excuse AAT’s misconduct, in particular considering the power imbalance in their relationship.⁴¹ AAT contends that there was no power imbalance because his position of OiC was not accompanied by an SPA or enhanced responsibilities. However, it is clear that AAT was the Complainant’s supervisor and was even tasked to conduct a performance evaluation of the Complainant at the time of the events in question.⁴² AAT, as the Complainant’s supervisor, had an obligation to recognize that power imbalance and its impact on the professional and social relationship, and to act accordingly in his dealings with a supervisee.

83. This was best expressed by the Complainant in her message to AAT on 15 August 2020, wherein she stated that she “enjoyed [their] conversations” but AAT should have “kept it there”, and

³⁹ Impugned Judgment, para. 49.

⁴⁰ Investigation Report, para. 21. See also Annex 2 of the Investigation Report, Complainant’s record of interview, p. 7 of 17.

⁴¹ Investigation Report, para. 55.

⁴² Impugned Judgment, para. 56. See also Investigation Report, para. 112.

that “when a woman drinks, eats or talks to you, it doesn’t mean that she wants to have sex with [him]. [She] trusted [him] as [her] supervisor”.⁴³

84. What occurred here is that AAT, in a position of power with the Complainant, misread her polite and friendly conduct as soliciting sexual advances. The Complainant, afraid of causing undue offence and wishing to maintain a collegial workplace environment (which involved her living in the same house as AAT, her supervisor, in a foreign country), responded to those unsolicited advances with understandable restraint. In her message to AAT, she clearly explained the difficult bind she was in. She did not file her complaint until after she had left the country.

85. The Dispute Tribunal also correctly rejected AAT’s argument that his account of the events was unjustifiably dismissed in the contested decision and the disciplinary process. On the contrary, it concluded that “both the investigation panel and the High Commissioner critically assessed [his] account of the incidents in light of the totality of the evidence on record and, relied upon portions of his statements to verify the Complainant’s evidence”.⁴⁴

86. The Dispute Tribunal dismissed AAT’s arguments suggesting that his sexual harassment had almost no impact on the Complainant. In particular, AAT claimed that the Complainant left her position not due to sexual harassment but because she was unhappy with the COVID-19 restrictions measures and that she filed a complaint solely to protect other women. Relying on *Gonzalo Ramos*, the Dispute Tribunal emphasized that “sexual harassment can occur regardless of the scale of the impact on the possible victim”.⁴⁵

87. In finding that the facts underlying the misconduct of 1 August 2020 had been established by clear and convincing evidence, the Dispute Tribunal relied not only on the IGO Records of Interviews but also the parties’ admissions and documentary evidence, particularly the WhatsApp messages. These admissions and documentary evidence corroborated the Complainant’s version of events and supported the finding that she was credible. The Dispute Tribunal further observed that the Complainant, in her WhatsApp message dated 15 August 2020, in an e-mail to the Administration on

⁴³ Annex 3 of the Investigation Report, WhatsApp exchange between the Complainant and AAT from 15 August 2020, p. 19 of 20.

⁴⁴ Impugned Judgment, para. 60.

⁴⁵ *Gonzalo Ramos v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1256, para. 64.

16 August 2020, and in her interview with the IGO always described the events in a detailed and specific manner.⁴⁶

88. As for determining the credibility of the parties in disciplinary cases, we note that in *Applicant*, this Tribunal stated that “the UNDT ordinarily will be obliged to convene an oral hearing at which the alleged wrongdoer will be afforded an opportunity to face and cross-examine those who accuse him or her of misconduct” but also that “an oral hearing and cross-examination will not be required in all disciplinary cases”.⁴⁷ Further, in *Shumba*, the Appeals Tribunal opined that whether an oral hearing will be required “will depend on the circumstances of the case before the UNDT. For example, there may be documentary, audio or video evidence or circumstances surrounding the parties or witnesses that may support not holding an oral hearing”.⁴⁸

89. In *Gonzalo Ramos*, the Appeals Tribunal stated that:⁴⁹

... Specifically with regard to the standard of evidence when dealing with cases involving sexual harassment, the Appeals Tribunal has already held that the credibility of the witnesses is of fundamental value. Moreover, it was undoubtedly enough for the Secretary-General to discharge his burden of proof by providing ‘the various evidentiary statements relay[ing] the version of the complainant with a conspicuous consistency that added to their credibility’.

90. Therefore, in the present case, the Dispute Tribunal appropriately considered not only the Investigation Report, but also AAT’s admissions as well as other evidence that corroborated the Complainant’s version of events, such as the testimony of the Administrative Officer, copies of e-mails, and, importantly, the WhatsApp messages exchange between AAT and the Complainant. This provided sufficient grounds for the Dispute Tribunal’s determination that the Complainant was credible, thereby accepting her version of events on Count 1 as clear and convincing.

Counts 2 and 3: 4 and 9 August 2020 events

91. In his investigation interview, AAT confirmed engaging in “inappropriate communication” with the Complainant on 4 August 2020 and then again on 9 August 2020, the latter which he realized

⁴⁶ Impugned Judgment, para. 49.

⁴⁷ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1187, paras. 55 and 58.

⁴⁸ *Shumba v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1384, para. 74.

⁴⁹ *Gonzalo Ramos* Judgment, *op. cit.*, para. 68 (internal footnote omitted).

later was inappropriate and apologized for.⁵⁰ This included an “invite” for a night cap on 4 August 2020 at 11:02 p.m., which he admitted was not “appropriate”.

92. As for the 9 August 2020 WhatsApp messages, AAT recognized it was “wrong” to write that he wished that the Complainant was sleeping by his side.⁵¹ Furthermore, when asked why he sent inappropriate photos and a video of a baby sucking on a doll’s breasts to the Complainant on that same date, he agreed that it was a “senseless act” on his part, admitting that he made a “mistake of judgment”, but could not explain why he sent them except attributing it to “having too much to drink”.⁵²

93. We find that these messages, by themselves, are clear and convincing evidence establishing the facts underlying Counts 2 and 3 of misconduct. The WhatsApp messages are inappropriate and amount to unsolicited sexual advances.

94. Although he does not dispute the content of the WhatsApp messages, AAT does provide excuses for the messages (“mistake of judgment” or “having too much to drink”) and a reason to negate the misconduct, such as the 9 August 2020 apology by WhatsApp message.

95. However, as the Dispute Tribunal rightly stated in the impugned Judgment, the mere acceptance of an apology alone does not negate the Complainant’s right to subsequently file a complaint of misconduct or to vitiate the conduct from constituting sexual misconduct.⁵³ In this instance, although AAT apologized for the 9 August 2020 WhatsApp messages and the Complainant thanked him for the apology, it does not alone excuse the conduct or prevent a complaint of misconduct from being made or, as AAT argues, puts the complaint “to an end”. The impact of an apology will depend on the circumstances of each case. In the present case, it was appropriately considered as a mitigating factor but not in negating the complaint itself.

⁵⁰ Annex 16 of the Investigation Report, AAT’s record of interview, pp. 7, 10 and 15-16 of 28.

⁵¹ *Ibid.*, p. 10 of 28.

⁵² *Ibid.*, p. 17 of 28.

⁵³ Impugned Judgment, para. 37. See also *Mdoe v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/065, para. 80; *Hallal v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/046.

Establishment of misconduct

96. In finding that AAT's conduct amounted to sexual harassment, the Dispute Tribunal relied on the Staff Regulations and Rules and the UNHCR Policy.

97. Staff Rule 1.2(f) 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".

98. Section 5.3 of the UNHCR Policy 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. Sexual harassment is particularly serious when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. Sexual harassment may be unintentional and may occur outside the workplace and/or outside working hours. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between or amongst persons of the opposite or same sex.

99. Based on the foregoing, a finding of sexual harassment requires the following elements: i) the conduct in question occurred; ii) it falls within the legal understanding of sexual harassment and is of a sexual nature; iii) the conduct was unwelcome and reasonably expected or perceived to cause offence or humiliation; and iv) it interfered with work or created an intimidating, hostile, or offensive work environment.

100. AAT's conduct meets these elements. The evidence established clearly and convincingly that AAT made unwelcome sexual advances towards his supervisee through the events of 1 August 2020, and the WhatsApp messages of 4 and 9 August 2020. As admitted by AAT himself, these communications were inappropriate and might reasonably have been expected or interpreted to cause offence or humiliation.⁵⁴

101. However, AAT suggests that his conduct was not unwelcome to the Complainant and argues that "[s]exual advances in themselves come to the fore when the Complainant signals a definite no, that such an advance or advances are unwanted" and that "sexual relations among staff" is "part of human nature". This is a distortion of the prohibition against sexual harassment in the workplace.

⁵⁴ Annex 16 of the Investigation Report, AAT's record of interview, p. 16 of 28.

The onus is not on the recipient of the advances to signal that the advance is unwanted. Rather, the responsibility lies on the perpetrator to ensure that the advances or conduct are welcomed before engaging in such conduct, which responsibility is all the greater when there is a power imbalance involved between the parties.

102. In *Gonzalo Ramos*, the Appeals Tribunal found that:⁵⁵

... Sexual harassment can encompass numerous types of conduct, some overtly sexual in nature and others more subtle. There is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific. Whether a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case. Importantly, a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant's perception of the conduct.

103. In the present case, it is not disputed that the parties had a “warm” and “friendly” relationship. However, this alone does not mean that the Complainant wanted anything more and there is nothing from the evidence and the WhatsApp messages to suggest otherwise. Rather, on 1 August 2020, the Complainant only went to his room when he messaged her, as she thought he might be ill. She left AAT's room after he made sexual advances. Similarly, in the 9 August 2020 WhatsApp messages, when AAT asked her to not hold back on their feelings, she responded by saying “let's keep holding back”. Further, she confirmed her humiliation and reluctance in her 15 August 2020 WhatsApp message, wherein she outlined the deleterious impact of AAT's conduct on her.

104. Therefore, we find that the Dispute Tribunal did not err in finding that AAT's actions amounted to sexual harassment and violated Staff Rule 1.2(f). As such, the established facts amounted to misconduct subject to a disciplinary process and the imposition of disciplinary measures pursuant to Staff Rule 10.1(a).

Due process rights during the investigation and disciplinary process

105. Staff Rule 10.3(a) sets out the rules governing due process in the disciplinary process:

⁵⁵ *Gonzalo Ramos* Judgment, *op. cit.*, para. 38.

The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

106. There is no evidence that due process was not followed in this case. AAT was fully informed of the allegations against him and given the opportunity to respond to them, which he did by providing his evidence to the investigators and his written response to the Investigation Report.

107. The Appeals Tribunal has previously held that only substantial procedural irregularities in the disciplinary investigation will render a disciplinary measure unlawful.⁵⁶

108. We find that the Dispute Tribunal did not err when it held that AAT has not identified any procedural irregularity during the investigation and disciplinary process that would render the contested decision unlawful.

Proportionality of the sanction

109. Staff Rule 10.3(b) provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the staff member’s misconduct”.

110. As the Dispute Tribunal correctly noted, the Secretary-General has a broad discretion in determining the appropriate disciplinary measure for the established misconduct and will only overturn a measure if it finds that it is excessive or unreasonable.⁵⁷

111. In the present case, the Dispute Tribunal did not err when it found that the sanction imposed on AAT was consistent with those applied in similar cases and was satisfied that the Administration duly considered aggravating and mitigating factors in determining the appropriate sanction.

⁵⁶ *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 33.

⁵⁷ *George M’mbetsa Nyawa* Judgment, *op. cit.*; *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 19-21.

112. AAT argues that “some [other] disciplinary sanction” would be justified in the circumstances and that there were “strong mitigating factors” that should have been considered.

113. However, as we stated, the Secretary-General has broad discretion in determining the appropriate disciplinary measure and there is a reasonable range of sanctions open to him in this regard. We agree with the Dispute Tribunal that the disciplinary measure imposed was consistent with prior precedent and proportionate (i.e., neither excessive and unreasonable) to the offence and the circumstances. Further, there is no evidence that the Administration ignored relevant considerations or relied on irrelevant ones, acted with improper motive, or that the sanction decision is absurd or perverse.⁵⁸ As such, the Administration exercised its discretion judicially and rationally; consequently, the sanction stands.

114. Therefore, the appeal must fail on all grounds.

⁵⁸ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

Judgment

115. AAT's appeal is dismissed, and Judgment No. UNDT/2022/135 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Savage

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 16th day of April 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar