



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1280



AAA
(Appellant/Respondent on Cross-Appeal)

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2021-1608 & 2021-1612
Date of Decision:	28 October 2022
Date of Publication:	6 December 2022
Registrar:	Juliet Johnson

Counsel for AAA:	Víctor Rodríguez
Counsel for Secretary-General:	Angélique Trouche

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. AAA, a former staff member, was separated from service for failure to report alleged sexual abuse by a fellow worker and for refusal to participate, without justification, in an interview investigating his failure to report. AAA filed an application challenging the sanction decision before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT).

2. In Judgment No. UNDT/2021/091 (the impugned Judgment) the Dispute Tribunal held there was not clear and convincing evidence of misconduct because 1) AAA only had hearsay information of the abuse allegation, 2) AAA did not have the details required for reporting under Section 4.5 of ST/AI/2017/1 (“Unsatisfactory conduct, investigations and the disciplinary process”), and 3) the Administration was already aware of the allegations. As for the alleged refusal to cooperate, the Dispute Tribunal held the Administration could have waited to interview AAA. As a result, the Dispute Tribunal rescinded the contested decision¹ to impose on AAA a sanction of separation from service with pay in lieu of notice and without termination indemnity for serious misconduct, and ordered that, in lieu of reinstatement, AAA should be paid compensation of 12 months’ net base salary. Both parties appeal the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) .

3. For the reasons stated above, the Dispute Tribunal’s decision is hereby rescinded and AAA is reinstated to her position with pay in lieu of notice and without termination indemnity for serious misconduct, and ordered that, in lieu of reinstatement, AAA should be paid compensation of 12 months’ net base salary. Both parties appeal the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) .

Facts and Procedure

The contested decision, AAA held a continuing appointment at the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO or Mission).

Member of a local prayer group in Goma, in the Democratic Republic of Congo

0 (eT) w - 4 - 30 . i 8 r 20 .

6. CM

23. In the Judgment, the Dispute Tribunal held that the evidence was not sufficiently convincing to establish AAA's misconduct. The Dispute Tribunal rescinded the decision to impose the disciplinary sanction of separation from service and ordered compensation

m13 (53.7 (s03.7 (s03.7 i)93 (r2
en(d)2.2 (43.9 ()3.5 (e

33. The Dispute Tribunal erred in law by finding that AAA could not be required to “report an allegation of rape which he heard from another person who attended court”.¹¹ It is an error of law to require first-

consultation with the Medical Services Division”. The Dispute Tribunal created a new requirement, namely that the MSD should have examined or spoken to AAA.¹⁴

38. After OIOS’ documented efforts, it was within the Administration’s discretion to close the investigation on 31 January 2019 and AAA had no right to be interviewed before doing so. AAA was able to comment on the allegations against him in the course of the disciplinary process, and such comments were duly taken into account, as extensively reflected in the contested sanction decision. Also, OIOS waited for AAA for over two months and reasonably exercised its discretion to close the investigation under the circumstances.

39. The Secretary-General requests the Judgment be vacated and the disciplinary sanction decision be upheld.

Considerations

40. The issue before us is whether the Dispute Tribunal erred in its determination that there was not clear and convincing evidence that AAA violated the duty to report the allegations against CE because AAA had hearsay and incomplete information and/or that AAA failed to

T

THE U

53. Further, the Dispute Tribunal held that it should not be “presumed” that AAA had a “concern or suspicion” about the alleged abuse

57. As a result, the Dispute Tribunal erred in law in its interpretation of Section 4.1 and 4.5 of ST/AI/2017/1.

58. Further, the Dispute Tribunal ignored relevant evidence that AAA participated in a

61. In conclusion, the Dispute Tribunal erred in fact and in law when it held that there was not clear and convincing evidence of AAA's failure to report the rape allegations against CE. Thereel

67. Further, the Tribunal asked what difference it would have made to have waited until January 2019 to interview AAA. In a 26 December 2018 e-mail, the investigator advised AAA of MSD's finding that there was no medical impediment to proceed to an interview, but AAA still declined on 2 January 2019 to be interviewed. Also, in previous e-mails, the investigator asked when he would return to MONUSCO. He did not respond to that question, nor did he provide his availability to attend an interview.

68. It is clear from his conduct that AAA was not cooperating and therefore, the Administration exercised its discretion in the circumstances to proceed with allegations of misconduct on this basis. It is not up to the Dispute Tribunal to determine the correct action in these circumstances which it attempted to do in the Judgment.

69. Regarding due process, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.²⁷

70. In this instance, the investigator made several attempts to arrange an interview with AAA who did not respond or stated he was ill and/or had already been interviewed. AAA was provided with several invitations to be interviewed in the disciplinary investigation against him but refused to accept any of them. As a result, he cannot claim before the Tribunals that the Administration violated his due process rights because they did not interview him.

71. AAA argues that OIOS violated his rights by closing the investigation report without interviewing him contrary to the OIOS Investigation Manual, Section 5.2.2, Subject Interviews. The Dispute Tribunal did not consider or decide this in the Judgment. It appears to be a new argument.

72. The OIOS Manual is not an administrative issuance and does not provide subjects of an investigation with the right to be interviewed. Due process rights fully apply only to the disciplinary stage of the process. During

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2022-UNAT-1280

Judgment

83. The Secretary General's appeal is granted while AAA's appeal is dismissed. The Dispute Tribunal's Judgment No. UNDT/2021/091 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

UNDT/2022/1280 (gi)-t pbEng0.001 Uni3.1 (gi)-3.15.6 (i(i)-3.1

Judge Sandhu, Presiding

Judge Raik1()TjET(902 Tw (Tw 10.98 -0 0 0 0 10.9i)-3CID 4Dn)(Sig