



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

**Mbaigolmem
(Respondent/Applicant)**

v.

Secretary-General of the United Nations and Lussick ~~OT 286~~m-

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal

around her and tried to kiss her again, after which he moved his arms downward, putting his hands on her buttocks. She repeatedly told him that his actions made her uncomfortable. She finally left the room.

7. IGO launched an investigation into the allegations. Seven witnesses were interviewed between August and October 2014 as part of the investigation, including the complainant and Mr. Mbaigolmem, as well as two trainers and three participants in the WEM, to whom the complainant had confided about the alleged incident on the following day or a few days later. Two of them (both female participants in the WEM) stated, after the complainant recounted the incident to them, that Mr. Mbaigolmem had also acted in an inappropriate manner with them during the training. One of them claimed that Mr. Mbaigolmem had touched her neck during a coffee break. The other said that she had encountered Mr. Mbaigolmem in the hotel corridor one evening during the WEM and he had proposed to her that they spend the night together. Neither of these participants brought a complaint against Mr. Mbaigolmem regarding these allegations.

8. On 5 December 2014, the IGO gave Mr. Mbaigolmem its draft investigation findings, invited him to comment on them and informed him that disciplinary procedures based on the investigation report could be initiated. Mr. Mbaigolmem provided his comments on 14 December 2014.

9. The IGO rendered its investigation report on 18 December 2014. It concluded on a preponderance of evidence standard that Mr. Mbaigolmem engaged in misconduct by sexually harassing the complainant at the end of the working session in his hotel room.

10. By letter dated 5 February 2015, the Director of the Division of Human Resources Management (DHRM), informed Mr. Mbaigolmem that disciplinary charges for sexual harassment were being brought against him. She sent the investigation report to Mr. Mbaigolmem and gave him an opportunity to answer to the allegations and produce countervailing evidence. Mr. Mbaigolmem submitted his comments on 28 February 2015, denying all of the allegations. He included in his submissions a brief written statement by one of the participants in the WEM indicating that on the evening he supposedly propositioned another female participant to spend the night with him, he had in fact spent the evening having drinks with a number of other colleagues in another hotel room.

reported the incident and the similar fact evidence of the other women allegedly harassed by Mr. Mbaigolmem, which were mere hearsay in relation to the incident involving the complainant. Whilst such evidence, in its opinion, established that the incident had probably occurred (on a preponderance of evidence), the nature and scope of the evidence meant it had not established the facts of the misconduct as highly probable

17. The Secretary-General maintains that the credible evidence of the complainant alone was sufficiently clear and convincing as to attain a high standard of probability and was adequately corroborated by the witness statements which demonstrated a pattern of behaviour on the part of

22. The UNDT was also correct in finding that the Administration's assessment of the facts was tainted by improper and ex

30. In this case, the UNDT concluded that the evidence was insufficient in that it did not establish the misconduct beyond a preponderance of evidence. It accordingly rescinded the disciplinary measure, remanded the matter to the Administration to resume the disciplinary process for the purpose of supplementing the evidentiary record, but afforded the Administration an opportunity to opt out of a further investigation by paying in-lieu compensation in the amount of six months' emoluments. This is an incorrect approach. In terms of Article 10(4) of the UNDT Statute, the UNDT may only remand a case for correction of the required procedure if it has not reached the merits of a case. The UNDT determined the merits in this case by finding that the misconduct had been established on a balance of probabilities. It moreover rescinded the disciplinary measure in terms of Article 10(5) of the UNDT Statute with the consequence that it was restricted to making an award of specific performance or compensation in lieu of reinstatement. Had it made such an order, it would have been within the discretion of the Administration to recommence disciplinary proceedings if it wished to do so. In so far as the UNDT believed additional evidence was required, it was obliged to direct the parties to adduce that evidence in the oral hearing and to explain to them the implications of not doing so. The

Judgment

34. The appeal is upheld and Judgment No. UNDT/2017/051 is hereby vacated.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar