



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

Judgment No. 2016-UNAT-700

**Negussie
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Deborah Thomas-Felix Judge Dimitrios Raikos
Case No.:	2016-931
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Mr. Negussie:	Daniel Trup, OSLA
Counsel for Secretary-General:	Amy Wood

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/057, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 10 May 2016, in the case of *Negussie v. Secretary-General of the United Nations*. Mr. Sisay Negussie filed the appeal on 16 May 2016, and the Secretary-General filed an answer on 15 July 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant was employed by the World Food Programme (WFP) on 16 August 2011 as a member of its locally recruited field staff based at its Ethiopia Country Office, and, in July 2013, he was appointed under a fixed term contract as a Finance and Administrative Assistant, GS-5 in WFP's Gode Sub-Office. This was the position that he held during the time of the events at issue in this case.

... On 25 November 2013, the WFP Ethiopia Country Office ("CO") informed the Office of Inspections and Investigations ("OIGI") of an alleged physical assault, committed on 20 November 2013 by the Applicant.

... Mr. John Corpuz, Field Security Officer, conducted an initial fact-finding and interviewed a number of witnesses who gave written and signed statements in relation to the incident.

... On 23 January 2014, the Applicant was informed that he was the subject of allegations and that he was alleged to have "physically assaulted an employee of a WFP contractor during working hours and within WFP premises in Gode, Ethiopia" and on 24 January 2014, he was interviewed by investigators.

... Following the gathering of information by Mr. Corpuz an investigation was then initiated against the Applicant by the Office of Inspections and Investigations of WFP. The report was issued on 19 February 2014.

... Disciplinary proceedings were initiated against the Applicant. By letter of 19 August 2014 he was informed of the charges and his rights were explained.

... The charges were that he physically assaulted and engaged in a physical altercation with Mr. Ibrahim Mudey, a generator operator for Midnimo Labor Association (Midnimo) causing him physical injuries on WFP premises. It was also alleged in the charges that the act of misconduct of the Applicant had serious consequences for WFP.

¹ Impugned Judgment, paras. 1-10.

... The Applicant responded to the charges in a long and detailed response. According to the decision to separate him from service, his response was sent by an email dated 25 September 2014. In his narrative he explained all the facts leading to the incident and the bottom line of his long discourse is that he denied the act of misconduct.

... By a memorandum dated 27 October 2014, the Applicant was informed that he was separated from service with compensation in lieu of notice and with termination indemnities.

... On 22 December 2014, the Applicant filed his Application challenging the decision to separate him from service. He requests that [...] the decision be rescinded and in the alternative that he be compensated in an amount representing 15 months' net base salary.

3. Oral hearings were held from 13 to 15 October 2015 and 26 to 27 January 2016.

4. On 10 May 2016, the UNDT issued the impugned Judgment, in which it dismissed the application having found that the “the facts on which the disciplinary measure was based [had] been established and that the act of misconduct [had been] established by clear and convincing evidence”.² Although it found “procedural breaches” in the investigation and that Mr. Negussie’s right to due process had been prejudiced by “the failure to provide [Mr. Negussie] with the investigation report” even though he did not request it, the UNDT did not award Mr. Negussie any compensation.³ In that regard, it noted that Mr. Negussie had not canvassed the issue of due process and found that “[i]t ha[d] not been shown ... that [he had] suffered any specific damages resulting from a breach of his fundamental rights”.⁴

Submissions

Mr. Negussie’s Appeal

5. The UNDT erred when it dismissed Mr. Negussie’s application despite finding that the investigation was biased. It also erred when it found that his grabbing the hand of Mr. Mudey was sufficient in and of itself to justify the facts as presented by the Administration. The impugned Judgment “evinces a reviewable error of procedure”—namely, “the failure of the [UNDT] to provide a full reasoned decision” with respect to: (i) why the act of grabbing Mr. Mudey’s hand was sufficient on its own to substantiate the Administration’s conclusion;

² *Ibid.*, para. 79.

³ *Ibid.*, paras. 93 and 94-97.

⁴ *Ibid.*, para. 97.

(ii) “obvious discrepancies” in the evidence; and, (iii) “why a finding of a biased investigation did not in [and] of itself amount to a specific damage to [Mr. Negussie]”.

6. The UNDT must provide a reasoned determination that meets certain core requirements, which have not been met in this case. Although it recounts versions of events, it “fails to assess the weight that should be attached to them” and “nothing in the judgement refers to any of the arguments propounded by [Mr. Negussie] [n]or examines why a particular version of events is believed” nor addresses discrepancies in the case—most notably, regarding how the fight started, the report from Gode Hospital adduced in the hearing and the medical certificate that, taken together, provide sufficient doubt as to the facts. As in *Kadri*,⁵ the omission of adjudging Mr. Negussie’s entire application was a violation of his due process rights and constituted a procedural error affecting the decision of the case.

7. Mr. Negussie grabbed Mr. Mudey’s hand in order to escort him out of the cafeteria. Grabbing the hand “[does] not constitute in [and] of itself sufficiency in seriousness to constitute dismissal” and, thus, “raise[s] the specter of proportionality of [the] sanction”.

8. As the UNDT concluded that the investigation was biased, “then it seems illogical to establish that the facts of the case have been made out on clear and convincing evidence”. Given this finding of bias, “then the witnesses adduced in court and the evidence obtained must also be regarded with at the very least an element of suspicion”.

9. Although Mr. Negussie “claimed specific compensatory award for the manner in which he was separated from service and specifically the lack of a transparent process of investigation”, the UNDT “simply concluded that the lack of due-process had not been canvassed by [him] and therefore no damages [were] warranted”.

10. Mr. Negussie respectfully requests that the impugned Judgment be vacated and “either the full transcript of evidence [be] reassessed by a different judge in first instance or that compensation be awarded as originally claimed”.

⁵ *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512, para. 30.

The Secretary-General's Answer

11. The UNDT correctly upheld the decision to separate Mr. Negussie from service for misconduct. It correctly determined that Mr. Negussie had assaulted Mr. Mudey, and that his misconduct properly formed the basis for the disciplinary measure imposed.

12. The UNDT's conclusion was based on two uncontroverted facts – that Mr. Negussie did not deny that (i) he had started the incident on 20 November 2013 and (ii) he had grabbed Mr. Mudey's hand. From these two admissions, the UNDT reasonably inferred that Mr. Negussie's actions "amounted to an assault". The undisputed fact was that Mr. Negussie's angry hand-grabbing precipitated a physical altercation. The exact details of how the ensuing fight unfolded do not alter this finding by the UNDT, or otherwise affect the outcome of the impugned Judgment. Mr. Negussie's allegation that the manner in which the UNDT assessed the evidence constitutes a reversible error should be rejected.

13. The UNDT's conclusion is consistent with the Staff Regulations and Rules. Given the circumstances of this case, the decision to separate Mr. Negussie from service was neither absurd nor arbitrary. It is also consistent with the Organization's policy and practice in relation to similar types of verbal and physical abuse resulting in separation from service.

14. Mr. Negussie has not established any errors warranting reversal of the impugned Judgment and his allegation of procedural error is unsupported by the record and without merit. He merely repeats arguments on appeal and suggests evidence of his choosing should have been afforded greater probative weight. It is clear from, *inter alia*, the hearing spanning several days and the Judgment itself that the UNDT based its findings and conclusions on a thorough and thoughtful consideration of all the evidence before it.

15. The UNDT did not err when it declined to award compensation. The record does not support a finding that the investigation was flawed. Mr. Negussie misrepresents the UNDT's findings of bias and has not demonstrated that he suffered harm warranting compensation.

16. It is unclear what the basis is for the UNDT's *sua sponte* finding that "the failure to provide [Mr. Negussie] with the investigation report prejudiced his right to due process". Mr. Negussie did not allege that he was denied access to any report or other material, and the investigation report was appended to the 19 August 2014 letter sent to him informing him of the charges against him. Mr. Negussie's due process rights were, thus, fully respected.

17. The Secretary-General respectfully requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal in its entirety.

Considerations

Standard of review in disciplinary matters

18. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*⁶ citing *Applicant*⁷ and others:⁸

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

19. To observe a party’s right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment. Although it is not necessary to address each and every claim made by a litigant, the judge has to take the party’s submissions into consideration and lay down, in its judgment, whether the above mentioned criteria are met.⁹

Application of this standard in the present case

20. We are of the view that the UNDT did not respect and apply this well-founded jurisprudence and thus committed errors of law and fact and exceeded its competence. Moreover, in not rendering a fully reasoned judgment, it violated Mr. Negussie’s due process rights and thus committed an error in procedure such as to affect the decision of the case.

⁶ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

⁷ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

⁸ See also *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, paras. 29 and 30; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 29 and 30.

⁹ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 35; *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512, para. 30.

21. The disciplinary sanction from 27 October 2014 to separate Mr. Negussie from service was based on the charge that Mr. Negussie, on 20 November 2013, (i) initiated a fight with Mr. Mudey without being provoked or attacked and (ii) continued to fight in a manner that caused severe physical injury to Mr. Mudey. It also took account of the aggravating factor that it was the second time that Mr. Negussie had used physical force in the workplace.¹⁰

22. In its Judgment, however, the UNDT solely stated that, by grabbing the hand of Mr. Mudey, Mr. Negussie committed a physical assault, and “accordingly finds that the facts on which the disciplinary measure was based have been established and that the act of misconduct was established by clear and convincing evidence”.¹¹

23. In our view, this reasoning falls far too short. As the disciplinary measure is based on two aspects (that Mr. Negussie initiated the fight and continued to fight in a severe manner) and an aggravating factor (that he had previously committed a physical assault in April 2013), it is the task of the Dispute Tribunal to examine whether there is clear and convincing evidence for all these facts.

24. Above all, the UNDT should have examined and stated in its Judgment whether there was clear and convincing evidence that Mr. Negussie continued to fight in a severe manner thus causing physical injury to Mr. Mudey. In his closing submissions, Mr. Negussie had not only questioned the credibility of the witnesses and referred to inconsistencies in their statements with regard to the fight in the canteen, but also doubted the credibility of the medical certification produced by Mr. Mudey as to the severity of his injuries.

25. Further, the UNDT should have addressed the question as to whether there was clear and convincing evidence that Mr. Negussie had used physical force against a driver in April 2013, all the more so as it obviously had doubts in this regard.¹²

Consequences for the procedure

26. As the UNDT has not rendered a fully reasoned judgment and additional fact-finding is necessary, the case has to be remanded to the UNDT.

¹⁰ See OIGI Investigation Report of 19 February 2014, page 2; Memorandum of 19 August 2014, pages 2 and 3; Memorandum of 27 October 2014, pages 2 and 3.

¹¹ Impugned Judgment, para. 80.

¹² *Ibid.*, paras. 88-91.

27. We note, however, that we do not think that the procedural issues raised by the UNDT render the sanction unlawful. In our view, Mr. Negussie either received a copy of the investigation report or could have easily requested such a copy before the disciplinary sanction was issued since the report was at least mentioned in (if not attached to) the 19 August 2014 Memorandum. As the incident of April 2013 was clearly mentioned in the 19 August 2014 Memorandum, he had ample opportunity to comment on this incident. With regard to the 25 November 2013 letter by Mr. Corpuz, we are of the view that, as he merely conducted a preliminary investigation, his remarks did not render the whole disciplinary investigation unlawful.

28. We have no doubt that, if all the facts on which the disciplinary sanction was based can be established by clear and convincing evidence, Mr. Negussie's behaviour constitutes serious misconduct and separation from service can be regarded as a proportionate measure. Even if only part of the allegations can be established by clear and convincing evidence we think it possible that the disciplinary sanction could be upheld; in this case, however, it would be necessary to carefully examine whether the imposed sanction is still proportionate.

Judgment

29. Judgment No. UNDT/2016/057 is vacated. The case is remanded to the President of the Dispute Tribunal or the Judge that the President shall designate for adjudication consistent with this decision.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Raikos

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar