



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

Judgment No. 2020-UNAT-1033

**Sisay Negussie
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Sabine Knierim Judge Jean-François Neven
Case No.:	2019-1308
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Negussie: Katya Melliush/Daniel Trup, OSLA

Counsel for Secretary-General: Noam Wiener

JUDGE GRAEME COLGAN, PRESIDING.

1. This Judgment concludes an appeal against the Judgment of the United Nations Dispute Tribunal (the UNDT) finding that the Secretary-General was not justified in separating from service (on notice) a staff member who had been involved in a physical fight with an external contractor on the Organization's premises. For the reasons set out as follows, we conclude that the UNDT did not err in fact and law, its Judgment is affirmed, and the Secretary-General's appeal is dismissed.

Facts and Procedure

2. Analysis of the issues raised on this appeal is detailed and intensely factual. This has necessitated a close scrutiny of multiple investigation documents, the transcripts of evidence given before the UNDT, and documentary exhibits. We are, nevertheless, very mindful of the benefits enjoyed by the UNDT at first instance in determining matters of disputed credibility and this Tribunal's obligation to give appropriate deference to the Dispute Tribunal where the evidence before it allowed it to make the factual findings it did. The following is our summary of the relevant facts found by the UNDT.

3. On 16 August 2011, Sisay Negussie began work with the World Food Programme (WFP) as a member of its locally recruited field staff based at its Ethiopia Country Office. In July 2013, he was appointed under a fixed-term appointment as a Finance and Administrative Assistant at the GS-5 level in WFP's Gode Sub-Office. He held this position at the times material to this case.

4. On 18 November 2013, there was a dispute about the installation of an air conditioner at the Gode office of the WFP. This was between Mr. Negussie and another person whom we will describe as "M", who worked for a contractor to the WFP. This altercation was resolved by a decision of the WFP that M would be suspended and would not return to the WFP's premises. M's employer also apologised in writing to Mr. Negussie, although the terms of the apology appear not to have satisfied Mr. Negussie. The truce was, however, to be short-lived. We will address later in this Judgment both the undisputed and the disputed accounts of this incident which are at the heart of the case and these appeals.

5. On 25 November 2013, the WFP Ethiopia Country Office (CO) informed the Office of Inspections and Investigations (OIGI) that on 20 November 2013 Mr. Negussie had allegedly assaulted M. Mr. Negussie had been taken into police custody almost immediately after the event. Mr. Negussie was bailed and released from police custody on the evening of 22 November 2013. It appears from the evidence of the settlement reached on the following day, 23 November, with M's community by payment of a sum of money, that Mr. Negussie was charged but not ever convicted by a court. The written agreement, signed by Mr. Negussie, contains at least an implied admission of his guilt in relation to the 20 November incident. "C", Field Security Officer, undertook an initial fact-finding and interviewed a number of witnesses who gave written and signed statements in relation to the incident. Although given an opportunity to do so, Mr. Negussie declined to provide a statement whilst in custody. Upon his release there was a debriefing followed by an interview with him to enable him to make a sworn statement. The first report compiled by C on 20 December 2013 was prepared by reference to the accounts of those involved (in written and signed statement form) taken relatively soon after the events in question.

6. On 23 January 2014, Mr. Negussie was informed by his employer 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. So too were further or other witnesses

7. Following the gathering of information by C, an investigation was then initiated against Mr. Negussie by the OIGI of WFP. On 19 February 2014, the OIGI issued its investigation report finding "sufficient" evidence to conclude that Mr. Negussie had physically assaulted M.

8. By letter dated 19 August 2014, Mr. Negussie was informed of the charges and his rights were explained. The charges were that, while on WFP premises, he had physically assaulted, and engaged in a physical altercation with M, a generator operator for a contractor to the WFP, causing him (M) physical injuries. It was also alleged that this act of misconduct had serious consequences for the WFP.¹ The report concluded that these events were aggravated by Mr. Negussie having "physically pushed" a WFP driver in April 2013. That event occurred before Mr. Negussie was appointed to his final fixed-term position with the WFP in Gode.

¹ Mr. Negussie's response to the charges is undated. According to the decision to separate him from service, his response was sent by e-mail on 25 September 2014.

9. By memorandum dated 27 October 2014, Mr. Negussie was informed that the charges of misconduct against him had been confirmed and that he was to be separated from service with compensation in lieu of notice but without termination indemnities. The disciplinary sanction was based on the charge that Mr. Negussie had (i) initiated a fight with M without being provoked or attacked; and (ii) continued to fight in a manner that had serious consequences for M and the Organization. In imposing the disciplinary sanction, the WFP considered as an aggravating factor that it was the second time that Mr. Negussie had used physical force in the workplace. The OIGI also apparently considered significant, at least when the matter came before the UNDT, that Mr. Negussie paid M a sum equivalent to about USD 1,900 in settlement of the altercation between them. This was under the agreement settled soon after Mr. Negussie was released from custody. Although Mr. Negussie was a party to this agreement, it appears to have been entered into with the assistance of his employer to settle possible local unrest following the altercation, which potentially prejudiced the WFP's operation in Gode.

10. On 22 December 2014, Mr. Negussie filed an application with the UNDT challenging the decision to separate him from service. On 10 May 2016, the UNDT issued Judgment No. UNDT/2016/057 dismissing Mr. Negussie's application finding that the disciplinary measure had been properly imposed. Mr. Negussie appealed.

11. On 28 October 2016, the Appeals Tribunal issued Judgment No. 2016-UNAT-700. The Appeals Tribunal concluded that the UNDT had not rendered a fully reasoned judgment as the UNDT had based its conclusion that Mr. Negussie had committed a physical assault solely on its finding that he had grabbed M's hand. As the disciplinary measure was based on two grounds and an aggravating factor, it was the task of the Dispute Tribunal to examine whether there was clear and convincing evidence for all these facts or elements. Further, the UNDT should have addressed the question 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. The Appeals Tribunal remanded the case to the UNDT for a fuller examination of the facts and requiring it to answer three specified questions. The Appeals Tribunal said:²

² *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, paras. 23 to 25 and 28 (internal footnote omitted).

... 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.

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 [M]. ...

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.

...

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.

13. By agreement of the parties, the UNDT did so on the records of the previous hearing and without a further hearing. On 17 June 2019, the UNDT in Nairobi issued Judgment No. UNDT/2019/109 rescinding the disciplinary sanction, that is finding in Mr. Negussie's favour.

14. The UNDT found that a report had been made to the WFP Head of the Gode sub-office on 18 November 2013 after an altercation between Mr. Negussie and M over the installation of an air conditioner. It was then agreed that M would be suspended and not allowed into the WFP premises. The following day the company M was working for, apologised in writing to Mr. Negussie. As things transpired, the only other staff member of the contractor able to perform that same work as M could not attend the WFP's premises as necessary on 20 November, and M was directed to do so. It appears that Mr. Negussie was unaware of this change to the agreement that M would stay away from the WFP's premises.

15. On 20 November 2013, Mr. Negussie saw M on the premises, accosted him by taking hold of his hand or wrist with a view to ejecting him, and told him to leave. The UNDT found that there was no doubt that a fight ensued during which both Mr. Negussie and M were on the floor with Mr. Negussie being on top of M, with Mr. Negussie evidently having the

upper hand. Others on the premises managed to separate Mr. Negussie and M who both sustained some injuries. M's mouth was bleeding and Mr. Negussie sustained a human bite on his back during the incident, although the evidence establishes that this was inflicted not by M, but by one of those people who attempted to break up the fight by pulling Mr. Negussie off M.

16. The UNDT found that the only eyewitness to the initiation of the fight, someone we will call "A" who worked in the WFP canteen in the premises and was employed by the same contractor as M, was not a reliable witness of this event. A had stated during the initial fact-finding investigation that she saw Mr. Negussie walk into the cafeteria, "scream at" M and then start to punch him in the face. The UNDT compared that to her statement to the OIGI that she had seen Mr. Negussie "beating" M when she returned from giving a message to a WFP official we will call "F", which suggested that she (A) did not see the start of the physical altercation. Furthermore, while according to A's former account, Mr. Negussie had pushed her when she tried to intervene, she stated during cross-examination before the UNDT that she had not tried to physically intervene in the fight but only shouted for help.

17. The UNDT found it "strange" that the OIGI investigation would choose for acceptance one account given by A, over her other inconsistent accounts of the same event. Considering that the parties to the physical altercation each claimed that they did not initiate the fight and that the sole eye witness as to how the fight started was not reliable, the UNDT concluded that there was no clear and convincing evidence to establish that Mr. Negussie had initiated the fight with M.

18. Turning to the Organization's conclusion that Mr. Negussie had caused physical injuries to M, the UNDT considered first F's testimony that he had asked that M be taken to the hospital but was told that M instead went to the police station. The UNDT noted that when led in evidence, M however described in detail how Mr. Negussie had assaulted him leading to the fight between them, that he subsequently went to the hospital and had x-rays of his chest and mouth, and that he had sustained an injury to his head and one front tooth had been knocked out.

19. Reviewing the medical certificate from Gode hospital presented by M, the UNDT found that the document was solely in English, the writing was illegible, the information was scant, and it appeared that it had not been made on the letterhead paper of the Gode Hospital. The document also did not refer to any x-rays of M's teeth and chest that M claimed had been taken; it did not show that he had lost a tooth as M had claimed; and it failed to describe his medical condition. Moreover, there were two dates on the certificate (with one date being prior to the incident) and

the UNDT questioned why the OIGI would “misrepresent” the date of the medical report by choosing one date over the other without apparent further inquiry. The UNDT also considered a written report from Gode Hospital dated 12 December 2014 produced by Mr. Negussie stating that the hospital had no record of M visiting the hospital on 20 November 2013 or thereafter. The UNDT found that the OIGI had failed to verify both the credibility of M’s medical certificate, and the veracity of Mr. Negussie’s disclaimer document of 12 December 2014 relating to that earlier certificate. The UNDT concluded that there was not clear and convincing evidence that Mr. Negussie had seriously assaulted and injured M.

20. As to the settlement agreement under which Mr. Negussie agreed to pay compensation in the amount of USD 1,900 to M, the UNDT found that it appeared that Mr. Negussie’s agreement had been coerced and that the agreement could not be relied on to establish his culpability. It held that several factors also militated against a finding that the agreement was evidence of Mr. Negussie’s guilt. These included that the WFP might legitimately have sought to preserve its goodwill with its host community of Gode; the extent of threats to the WFP by the local Gode community; and its involvement and interference with C and F during C’s fact-finding which resulted, in effect, in the community eliciting assurances from C and others that Mr. Negussie would be punished. These together caused the UNDT to find the investigative process tainted irredeemably in this case.

21. In summary, the UNDT concluded that Mr. Negussie had attempted to physically remove M from the WFP Gode sub-office on the morning of 20 November 2013 and that in so doing, he had been imprudent and reckless since he could have sought the assistance of security personnel. The UNDT found, however, that the allegations that he had initiated the fight with M and continued to fight severely and inflict serious injuries on him, had not been established by clear and convincing evidence. The UNDT further found that in imposing the disciplinary sanction on Mr. Negussie, the Organization had unlawfully considered as an aggravating factor the allegation that in April 2013 Mr. Negussie had pushed a WFP driver while at the Gambela sub-office, an allegation which had never been reported, investigated or established.

22. The UNDT rescinded the decision to separate Mr. Negussie from service and awarded in-lieu compensation in the amount of 12 months' net base salary.

23. The Secretary-General filed an appeal on 16 August 2019 and Mr. Negussie filed his answer on 9 September 2019.

Submissions

The Secretary-General's Appeal

24. There was clear and convincing evidence that Mr. Negussie physically assaulted M, causing him physical injuries. The WFP Administration's conclusion was supported by the statements of multiple individuals who were present at the time of the incident. M's account was consistent with the statements provided by A and F, both of whom were present during the incident. Mr. Negussie's account of the accidental nature of the collision was at odds with the consistent accounts of M, A, and F that Mr. Negussie had thrown M on the ground and had beaten him. The consistency of these statements provided clear and convincing evidence to conclude that it was highly probable that Mr. Negussie had violently assaulted M.

25. The UNDT erred in law and fact in finding that A was the only witness to the incident and that she was not a reliable witness. A was not the only witness who testified that Mr. Negussie had initiated the fight. Mr. Negussie, M and A all stated that Mr. Negussie made the first physical contact which quickly escalated to the more severe physical assault on M by Mr. Negussie. The UNDT also erred in focusing on minor and immaterial inconsistencies in A's statements to dismiss her as an unreliable witness and by giving undue weight to whether A had specifically stated that she saw Mr. Negussie enter the cafeteria or how she described her role in the fight. These factors did not detract from the overall consistency of A's account of the events, which was consistent with the other evidence on record. The UNDT also had no reason to emphasize that A and M were employed by the same contractor as a reason to doubt the truthfulness of A's account of the incident.

26. The UNDT erred in finding that the Administration had improperly relied on the April 2013 incident as an aggravating factor and imposed a disproportionate disciplinary sanction. The UNDT erred in law in concluding that an element considered as an aggravating factor for the purpose of determining the severity of a disciplinary sanction must be established by a full investigation in the same manner as required for the elements of a charge of misconduct. In the

present case, the acknowledgement by Mr. Negussie that he had acted inappropriately in pushing another WFP staff member constituted sufficient evidence that the incident had occurred and could be considered an aggravating factor when assessing the severity of a disciplinary sanction in connection with the incident at issue in this case. Even without relying on the April 2013 incident as an aggravating factor, the sanction imposed on Mr. Negussie was proportionate, as it was not the most severe sanction.

27. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, affirm the decision to separate Mr. Negussie from service with compensation in lieu of notice and without termination indemnities, and dismiss his application in its entirety.

Mr. Negussie's Answer

28. The Secretary-General mistakenly advocates the UNDT standard of review as the standard of review that the Appeals Tribunal is to undertake in disciplinary cases. The appeals process is corrective in nature and not an opportunity to reargue the case. The Secretary-General in his appeal is simply asking the Appeals Tribunal to review and rehear the entirety of the evidence. He fails to identify the alleged defects in the impugned Judgment and does not, as required, state the grounds relied upon in asserting that the UNDT's determination was defective. He simply paraphrases his closing submissions made at trial.

29. There was no clear and convincing evidence that Mr. Negussie had assaulted M. On the day in question, 20 November 2013, Mr. Negussie was assaulted by M after asking M to leave the WFP compound. M had been excluded from the WFP compound following an earlier incident in which he had abused and tried to attack Mr. Negussie. M, an external contractor, had written an apology through his employer regarding this prior incident. The Administration brought its case against Mr. Negussie on the basis of two principal witnesses, M and A. Following a review of the witness statements and after cross-examination, it was apparent that both statements were not consistent with each other. As highlighted in the UNDT Judgment, A gave various versions of the events regarding the commencement of the fight. In reviewing the evidence given by A, the UNDT reasonably emphasized it was "strange" that the Administration would choose one account given by her over other accounts. The apparent "clarity" of the versions of events as presented by the Secretary-General got further diluted by the evidence given by M. It was incumbent on the Secretary-General to clarify these glaring inconsistencies before determining whether Mr. Negussie was guilty.

30. The Secretary-General has failed to show why it was unreasonable for the UNDT to conclude that the parties to the fight had each claimed that they did not initiate the fight and that what therefore ought to have been independent evidence provided by A did not meet the standard of clear and convincing evidence to establish that Mr. Negussie initiated the fight. Moreover, the statement given by F that he had witnessed Mr. Negussie smashing M's head to the ground while shouting at him why he had come to the office, was embellished and indeed proved to be entirely inaccurate.

31. It was ultimately left to Mr. Negussie to describe accurately the events of 20 November 2013. He described how he had grabbed M's hand to escort him out of the cafeteria, whereupon M punched him on the forehead; how he then grabbed M by the waist and they fell on the floor; that he was on top of M while M was punching him in the head; that he was lying on M's stomach trying to shield himself from the punches; and how he was bitten on his back during the altercation, an injury subsequently witnessed by C, the investigator.

32. Mr. Negussie refutes the Secretary-General's assertions regarding the allegation that Mr. Negussie initiated the fight and that M was injured as a result. The Secretary-General's first assertion, that Mr. Negussie's aggression towards M would have provided a sufficient basis for his separation, suggests that the Secretary-General is arguing proportionality. He does however not provide any further details as to what this aggression was and how it would be equated to a disciplinary sanction. The extent of Mr. Negussie's actions was that he grabbed M's hand. If such an activity merited dismissal, then it would be incumbent on the Secretary-General to demonstrate why such "aggressive" action merited dismissal and why the UNDT erred in law based on jurisprudence. The Secretary-General has however only made a vague assertion without substantive argument.

33. The Secretary-General's second assertion, that Mr. Negussie accepted that he had grabbed M's hand and that he had therefore initiated the fight, is untenable and was rejected by the UNDT on the ground of insufficient evidence. The UNDT's conclusion that Mr. Negussie had been reckless in grabbing M's hand as he should have sought assistance of security personnel was a reasonable conclusion drawn from a review of the evidence.

34. As to the third assertion about the apparent injuries sustained by M, the veracity of the “medical certificate” from Gode Hospital was legitimately questioned on the grounds that it was dated 19 November 2013, one day before the incidents, was written only in English and appeared not to be written on Gode Hospital letterhead paper; it was not a medical report and did not refer to any x-rays of the teeth and chest injuries M subsequently claimed he suffered; and Mr. Negussie had admitted into evidence a certified report from Gode Hospital stating that the Hospital had no record of M ever attending their medical facilities either on 20 November 2013 or thereafter. Moreover, a report issued by the Deputy Police Commissioner for the Ethiopian Somali regional state, Shebelle zone Police Department, which the Secretary-General never challenged during the proceedings, confirmed that the Ethiopian police had investigated M’s alleged injuries and concluded that they were false. The UNDT’s conclusion that the investigators had failed to demand a proper medical report beyond the scanty and unreliable medical certificate provided by M, was therefore reasonable.

35. The Secretary-General also mischaracterizes the agreement concluded between M and Mr. Negussie. The agreement was reached between the elders of Gode agreeing to a payment of 40,000 Ethiopian Birr. The agreement did not import responsibility and C instructed Mr. Negussie to sign it as otherwise it would create problems for the rest of his colleagues. C testified before the UNDT that the incident of 20 November 2013 had caused significant tension within the local community with community representatives threatening to take action against the WFP if it were to shield Mr. Negussie from assuming responsibility. According to a confidential report describing the meeting with community elders prior to the investigation, the community leaders conveyed their support for M and asked that the WFP assure them that Mr. Negussie would not leave Gode. They only left after WFP had given assurances that it would not take actions to the disadvantage of “anyone like [M]”.

36. The UNDT rightly concluded on the evidence that the Gode community wanted Mr. Negussie punished and M’s job protected, and that C and F practically assured the community that the WFP would do so. The UNDT correctly placed weight on the promises made by the WFP that M would be protected, the corollary being that Mr. Negussie would be punished for the fight as a result of which he was pressured to sign the agreement. The UNDT accepted that Mr. Negussie did not wish to go back to prison, which he could avoid by signing the agreement. In conclusion, the UNDT correctly determined that Mr. Negussie had entered a settlement agreement to free himself from police detention and from the pressure on the WFP to take action against him. The

UNDT rightly concluded that the practices of the WFP and specifically the investigator, had detracted from the professionalism and detachment that ought to attend the investigative process and tainted it irredeemably.

37. Finally, the UNDT correctly found that the Administration had unlawfully relied, as an aggravating factor, upon Mr. Negussie's alleged conduct during an incident in April 2013 which had never been reported, investigated or established. The intention of the reference in the investigation report that "[h]aving information of a similar incident that occurred inside Gambella Sub-Office where [Mr. Negussie] manhandled a driver, [makes] it more likely that [Mr. Negussie] did the same with [M]", served to undermine Mr. Negussie's character. Similar fact evidence may be considered in disciplinary matters if the evidence is probative of the matter in question and relevant or significant to the facts of a case. In the present case, however, allegations of unsubstantiated misconduct on the part of Mr. Negussie should have played no part in an investigation report or conclusion, primarily because they did not prove that Mr. Negussie assaulted M.

38. Mr. Negussie requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

39. First, it is necessary to give some context to the events of 20 November 2013 that lead to Mr. Negussie's dismissal. This was not the first contretemps between the two men. A report had been made to the WFP Head of the Gode sub-office on 18 November 2013 after an altercation between Mr. Negussie and M, over the installation of an air conditioner. This resulted in a decision that M would be suspended and not allowed onto the WFP's premises. The following day, the company M was working for apologised in writing to Mr. Negussie. From his conduct a day later, it is apparent that Mr. Negussie was aware of that prohibition upon M returning to the WFP's premises. It is, however, improbable that Mr. Negussie knew of the circumstances in which M was permitted to return to the WFP's premises so soon after having been barred therefrom. We infer that the appellant concluded that fault and responsibility for this first incident lay, at least predominantly, with M and that he (M) was initially banned from the WFP's premises to avoid a further confrontation. It is clear, however, that only two days after the first event, M returned to the premises from which he had been banned and he soon encountered Mr. Negussie. M had, and knew he had, permission to return there. It is equally probable that Mr. Negussie did not know this.

40. Mr. Negussie's first interaction with M on 20 November was to remonstrate with him and, it is not disputed, to approach and grasp M by the hand or wrist with a view to persuading the latter to leave the premises. This was not the initiation of the fight between the two men. While Mr. Negussie may have, in a strictly technical sense, assaulted M by placing his hand upon him, that alone was not fighting. That initial touching would not have constituted misconduct, certainly not misconduct sufficiently serious to warrant Mr. Negussie's dismissal. There was a subsequent fight between the two men, but which of them struck the other or did something constituting fighting was what the UNDT was directed to focus on and, in particular to determine whether there was clear and convincing evidence that Mr. Negussie initiated that fight as we have described it. The UNDT could not conclude to that standard that Mr. Negussie initiated the fighting and our review of the evidence and the Tribunal's findings confirms that conclusion of the UNDT.

41. There are several additional uncontroverted and incontrovertible facts that were before the UNDT about the events that followed. This included evidence from witnesses other than A, that Mr. Negussie was sitting astride M who was pinned to the floor on his back, largely immobile. M's mouth was bleeding immediately after the altercation, although how severely, and from what particular underlying cause was uncertain. M had been injured but it appears that Mr. Negussie had not, at least in more than a minor way, been injured by M. The bite suffered by Mr. Negussie to his back had been administered by one of the onlookers who tried to separate the combatants.

42. Beyond these accounts of the events for which there was clear and convincing evidence, however, the accounts of witnesses, including Mr. Negussie himself, differed substantially. The following is a brief summary of the starkly different accounts of the fight between the two men. Mr. Negussie claimed that after he laid his hand on M, the latter punched and wrestled him to the ground where he continued to attempt to assault Mr. Negussie. He claims that any injuries to M's mouth came about as a result of M's ongoing attempts to assault Mr. Negussie, even although Mr. Negussie was sitting astride a prone M. The contrary accounts of other witnesses were that Mr. Negussie threw M to the ground, sat astride and beat M, and that M's injuries were caused by Mr. Negussie head-butting M as he pinned him to the ground.

43. In a case such as this where there is a conflict of evidence between witnesses, and especially where documents tend to throw doubt upon one or more of the contested eye-witness accounts of events, the UNDT is usually in the best position to assess the relevant probabilities. We also remind ourselves that the standard to which the allegations of serious misconduct by

Mr. Negussie must be established before the UNDT, is that of “clear and convincing” evidence. If the UNDT had set to one side and ignored the allegations about Mr. Negussie’s conduct about which it decided it did not have clear and convincing evidence, there was still evidence of other aspects of Mr. Negussie’s behaviour towards M. Mr. Negussie began the confrontation by assaulting M, albeit technically and minimally: Mr. Negussie was seen to have pinned M to the ground by sitting astride him; and M suffered an injury or injuries as a result of that incident.

44. It is important to record the allegations levelled against Mr. Negussie and so what the Secretary-General had to establish to the clear and convincing evidential standard before the Dispute Tribunal. First, it was alleged that Mr. Negussie initiated the fight with M, that this was unprovoked and was not done in self-defence. Mr. Negussie denied these allegations. Second, it was alleged that he fought M in a manner that had severe consequences for both M and for the Organisation. These allegations were also denied by Mr. Negussie. Third, it was alleged that this had not been the first time that Mr. Negussie had used physical force against another person in the workplace. Mr. Negussie asserted that the Organisation was not entitled to rely on this, in effect as propensity evidence. Finally, it was said that Mr. Negussie had conceded his guilt by entering into an agreement to pay M a not insignificant sum of money to compensate for M’s medical treatment for his injuries. Mr. Negussie’s response was that he was unduly influenced to sign that agreement to obtain his release from custody and that the WFP had been unduly influential in settling this agreement to ensure a cordial relationship with the local community to which M belonged.

45. What is the nature of “clear and convincing” evidence? Clear and convincing evidence of misconduct, including as here, serious misconduct, imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

46. In determining whether these evidential standards have been established in any case, the UNDT must consider and weigh not only the evidence put forward by witnesses produced for the Secretary-General, but also any countervailing evidence adduced for the staff member, and any relevant and probative documentary evidence which may either corroborate or cast doubt on the recollections of witnesses.

47. Finally, not only must such an analysis be applied by the UNDT to each individual piece of disputed evidence, but it must then be applied likewise to the totality of the evidence in support of the allegation of misconduct. The judge can only then answer the fundamental question: “Is there clear and convincing evidence to enable the Tribunal to conclude that the allegation(s) of misconduct have been established?”

48. Our task on appeal is not to ourselves re-decide the case that was before the UNDT using these same tests. That is because we cannot enjoy a number of advantages experienced by the first-instance judge, for example seeing and hearing the witnesses give their accounts of events. Rather, our task is to determine whether the UNDT did not apply the correct tests and whether the Tribunal could reasonably have reached the decisions it did about what happened.

49. In its Judgment, the UNDT stated for itself the correct tests in law to determine the onus and burden of proof, that is to decide whether the Secretary-General (the bearer of that onus) in establishing justification for separation from service by termination, had adduced “clear and convincing evidence” supporting the conclusion of serious misconduct as had been directed in the first Appeals Tribunal Judgment. That means that the evidence justifying the potential consequences (including up to the ultimate sanction of dismissal) must be both manifest as opposed to suppositional (“clear”) and more than meets a balance of probabilities standard (“convincing”). A sufficient doubt or doubts about the credibility of other evidence (including eyewitness evidence) can be a good indicator that this standard has not been met. So, too, can be unexplained inconsistency of accounts of events provided at different times by the same witness. The same is true of more than minor discrepancies between the accounts of the same event by different witnesses. Those were all features of Mr. Negussie’s case in the UNDT.

50. We conclude that the UNDT was entitled to both doubt and disregard some, if not all, of the evidence of A and her observations of the fight between Mr. Negussie and M. Parts of her reported accounts, and her evidence before the Dispute Tribunal, were inconsistent in significant respects. A was a key witness for the Secretary-General and the UNDT was entitled to conclude that her evidence was not clear and convincing.

51. The documentary medical evidence about the precise nature of M’s injuries was sufficiently weak and contradictory that the Tribunal was entitled to disregard it and the conclusions it purported to reach. M’s own vague evidence about his injuries needed to be reinforced if it was to be clear and convincing, and the confused documentation did not do so. Indeed, the

documentation pointed, if anything, away from M's account of his injuries and, thereby, how severely he may have been beaten. The undisputed fact that M had suffered an internal mouth injury was insufficient to conclude that this had been brought about by Mr. Negussie's serious assault upon him. It did not meet the clear and convincing standard required for the UNDT to be satisfied that this injury was caused by Mr. Negussie continuing to fight M "in a severe manner".

52. So, we cannot conclude that the UNDT was wrong to have held that the evidence of this element of its directions to the UNDT did not meet the clear and convincing standard.

53. Next, we conclude that the UNDT did determine correctly that the prior altercation in April 2013 could not provide propensity evidence to corroborate witnesses' accounts of the fight with M. That incident was not investigated properly or sufficiently for it to have become a legitimate and significant consideration in addressing the consequences of Mr. Negussie's altercation with M several months later.

54. There is an error that we are satisfied the UNDT committed. It held that Mr. Negussie was influenced unduly to enter a settlement agreement with M and M's community (and thereby to admit his guilt for the assault on M) by the promise of his release from police custody after three days and two nights. The evidence establishes, however, that Mr. Negussie was released from custody (on bail posted by a friend) on the evening before the negotiations for that agreement were begun and concluded, so that at the time Mr. Negussie made that agreement, he was free of any undue influence to obtain his freedom. The UNDT has not, however, been shown to have been wrong in its conclusion that an influential factor in Mr. Negussie's signing the settlement agreement was the greater imperative (at least to the WFP in the Gode region) to re-establish the confidence and support of the local community of which M was a member. In these circumstances, and even discounting its error about the incentive of Mr. Negussie's release from custody, the UNDT was correct to conclude that the settlement agreement's contents did not amount to clear and convincing evidence of an admission of guilt by him. .

55. We consider that the Tribunal did not have clear and convincing evidence that Mr. Negussie initiated the fight with M on 20 November. Nor was it established by the Secretary-General that there was clear and convincing evidence that Mr. Negussie continued to fight with M "in a severe manner" and thereby caused injury to M. Likewise, the Secretary-General has not established that the UNDT was wrong to have concluded that an event several months previously in which Mr. Negussie was involved physically with a visitor to the WFP

site, could constitute legitimately such an aggravating factor that his proven misconduct towards M warranted the sanction of separation from service.

56. We have considered whether this Judgment and our reasoning are consistent with this Tribunal's earlier Judgment between the same parties, *Negussie v Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700 which gave the UNDT directions about how it was to re-decide Mr. Negussie's case. We consider that the UNDT followed correctly the directions of this Tribunal and, with one exception that is not decisive of the appeal, has not been found to have erred in fact or law in that exercise.

Judgment

57. The Secretary-General's appeal is disallowed, and Judgment No. UNDT/2019/109, is affirmed.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 11th day of August 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar