UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/115
Judgment No.: UNDT/2016/057
Date: 10 May 2016
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEGUSSIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Simon Parchment, WFP
Angela Arroyo, WFP

Introduction

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.

2. 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.

3. 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.

4. 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.

5. 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.

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

7. 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.

8. 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.

9. 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.

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 He requests that that the decision be rescinded and in the alternative that he be compensated in an amount representing 15 months' net base salary.

The Investigation

11. In the course of the investigation, the investigators interviewed: the Applicant; Mr. Ibrahim Mudey, the alleged victim of the assault; Ms. Leila Mohamed Abdi, a cook who was working on the WFP compound in Gode; Mr. MM, a generator operator for Midnimo Labor Association; Mr. Alemayehu Assegid, Office assistant, WFP Gode; Mr. Mohamed Diriye, driver WFP Gode; Mr. Saeid Faryabi, head of sub-office WFP Gode; and Mr. Said, driver, WFP Gode.

Applicant's evidence as contained in his investigation statement and his court testimony

12. On 18 November 2013, the Applicant saw Mr. Mudey and asked him why he had taken an air conditioner (AC) which was kept for some other use to install in a store room. The Applicant did this as result of a complaint from Mr. Assegid who saw Mr. Mudey take away the AC. Mr. Mudey told the Applicant not to yell at him and the Applicant asked him for the key to the store. Mr. Mudey told him to back off and threw a punch at him twice but missed. The Applicant stepped back and as Mr. Mudey approached him aggressively he pushed him way.

13. The Applicant then rushed to the office of Mr. Faryabi feeling very angry as Mr. Mudey had "chased me in front of people who are working under my

supervision". He explained the situation to Mr. Faryabi. He told Mr. Faryabi that Mr. Mudey should be fired. Mr. Faryabi calmed him down and told him that he would talk to some people and get back to him. Later, Mr. Faryabi told the Applicant that Mr. Mudey had a family and should be given a chance. The Applicant insisted that a warning letter should be issued to Mr. Mudey and his company, Midnimo, should send him an apology letter.

14. The Applicant then left Mr. Faryabi and proceeded to his quarters. On his way he saw Mr. Mudey and he got angry. He went back to Mr. Faryabi and asked him why Mr. Mudey was still on the compound. Mr. Faryabi told the Applicant he had had a meeting with Midnimo and told them that Mr. Mudey would not be allowed on the WFP compound unless he received a warning letter and WFP received a letter of apology from Midnimo.

15. On 19 November 2013 at around 5:00 p.m., Midnimo handed a letter of apology to the Applicant. The Applicant was not happy with the letter and insisted that there should also be a mention of the incident of 18 November as it happened. The letter dated 19 November 2013 and addressed to WFP CO in its relevant part read: "This is to inform you that midnimo company would like to apologize the bad Action from Ibrahim mudey (sic) which he has confronted the WFP Admn staff member".

16. The Applicant added the following in his own handwriting to the letter: "By throwing a punch and threatening to kick him when he was told to return the AC he took from the office to his workshop without the knowledge of the Admin Finance".

17. On 20 November 2013, when he came out of the shower of his guesthouse, the Applicant saw Mr. Mudey standing around. He asked him what he was doing on the compound and who allowed him in. Mr. Mudey told him "It's your mom when I was on top of her".

18. The Applicant was mad that Mr. Faryabi had allowed Mr. Mudey access to the compound and he told Mr. Mudey "you are pushing me to take serious action against you". The Applicant then got dressed and went to look for Mr. Faryabi but

the latter was not in his office. The Applicant then proceeded to the compound cafeteria.

19. On reaching there, he saw Mr. Mudey and asked him to come out telling him "you are creating a big problem". The Applicant grabbed Mr. Mudey by the hand. Mr. Mudey punched him on the head. The Applicant grabbed the waist of Mr. Mudey and they both fell down. A number of the staff of Midnimo gathered round them and the Applicant felt someone biting his back, slapping him and pulling his leg. In the process his head hit the head and face of Mr. Mudey. The Applicant got back to his feet.

20. Mr. Faryabi then came on the scene and ordered both Mr. Mudey and the Applicant to leave. The Applicant told Mr. Faryabi: "You brought all this on all of us by disregarding my advice to you regarding this outsource company [Midnimo] because you are a bad manager". He also asked Mr. Faryabi how he could have allowed Mr. Mudey into the compound.

21. When he was in the office, the Applicant was informed that the police were looking for him. On the insistence of Mr. Faryabi the Applicant went out of the compound to meet the police. At the police station, Mr. Faryabi told the police that he had seen the Applicant assaulting Mr. Mudey. He also showed the police an injury on his face stating that the Applicant had hit him.

22. The police were shocked at what Mr. Faryabi told them and told Mr. Faryabi that this was a criminal case and unless a letter from the United Nations was brought to them they would have to arrest the Applicant. Mr. Faryabi said this could not be done and the Applicant was placed in detention.

23. Mr. Mudey attended the police station in the company of Mr. Faryabi and showed them that one of his teeth was loose and that he needed to get a medical certificate. When he was told to go and see a Dr. S, Mr. Faryabi intervened to say that Dr. S could not be trusted and Mr. Mudey decided to go to another doctor. The police told the Applicant that he could not be released until Mr. Mudey obtained his medical certificate.

24. On 22 November 2013, WFP Security Officer John Corpuz together with the Local Security Assistant, visited the Applicant at the police station to discuss his release. The Applicant was told by the Local Security Assistant he could only be released after he compensated Mr. Mudey for his "liabilities". Mr. Corpuz even told him to come to an agreement to avoid problems with the police. The Applicant was willing "to agree to anything to get out". On his release, Mr. Corpuz and Mr. Faryabi had a debriefing session with the Applicant.

25. On 23 November 2013, the Applicant along with his father and siblings met the elders of Mr. Mudey's family and came to a settlement "through traditional means" with Mr. Mudey, in consideration of the amount of 40,000 Ethiopian Birr, agreeing to withdraw the complaint he made to the police.

26. The Applicant repeated substantially what he had told the investigators. He added that when he grabbed the hand of Mr. Mudey, the latter freed himself and was not happy. Then Mr. Mudey punched him on the left side of his forehead. When he grabbed him by the waist, Mr. Mudey was struggling and it was then that both of them fell down. When he was bitten on the back he arched backwards and when he fell down again his head hit Mr. Mudey's face and the "top of his head hit the mouth" of Mr. Mudey.

Saeid Faryabi's evidence as contained in one undated investigation statement and the 22 September 2015 statement and his court testimony.

27. In an undated statement to the investigators, Mr. Faryabi stated that on 18 November 2013 the Applicant was walking towards him looking angry and saying "Now I want you to kick Ibrahim [Mudey] out of the compound right away and I do not want to see him in this office". When the Applicant told him that Mr. Mudey had attempted to beat him up, Mr. Fayrabi told the Applicant: "How could that happen? How can someone with Ibrahim's build compared to you, can beat you?"

28. The Applicant then replied that he was Mr. Mudey's supervisor but Mr. Mudey had no respect for him, disregarded his instruction and threw punches at him.

29. Mr. Faryabi noticed that the Applicant "was out of control, angry and aggressive" and he told him to cool down. He told the Applicant he could not put an end to Mr. Mudey's contract as he was providing good service.

30. Mr. Faryabi saw Mr. Mudey who was shivering. His eyes were red and he looked sad. Mr. Mudey told Mr. Faryabi that the Applicant wanted to "kill him" and had demanded from him the key to his office to remove an AC. The Applicant had also "showed his punch to his face" and told him "listen to me and do what I order you to do". Mr. Mudey added that he tried to take the Applicant's hand off from him to defend himself. The Applicant then left when he saw other people coming.

31. Mr. Faryabi attempted to solve the issue amicably and even agreed to issue a warning to Mr. Mudey. Mr. Mudey was told to leave until he was recalled for work. He elaborated in a statement he gave on 29 September 2015 by adding,

> I arranged a meeting with Mr. Mudey' employer, Midnimo Labor Association. To satisfy Mr. Negusie [Applicant] in order to avoid the serious tension which could cause security problems in the office, it was agreed to issue an apology letter to WFP and that Mr. Mudey would be sent home until the situation calmed down, after which he could return to the office and get back to duty.

32. On 19 November 2013, another generator operator informed Mr. Faryabi that he would not be able to attend work as he had a medical appointment. Mr. Faryabi then asked Mr. Mudey to attend work on 20 November in the compound.

33. On 20 November, Mr. Faryabi was expecting Mr. Mudey in his office. As he had left his office, Mr. Mudey went to look for him at the guesthouse. It was then that the Applicant saw Mr. Mudey.

34. Some minutes later Ms. Mohamed Abdi came to see him and told him that the Applicant was angry on seeing Mr. Mudey. Mr. Faryabi instructed Ms. Mohamed Abdi to tell Mr. Mudey to go home. Then he went to the cafeteria where he saw the Applicant on top of Mr. Mudey on the floor. Along with others he pulled the Applicant away. Mr. Mudey's face was bleeding. He ordered both the Applicant and Mr. Mudey to leave the cafeteria.

35. Before leaving the Applicant told Mr. Faryabi: "Saeid it is your entire fault. You disregarded me. You are the one who brought Ibrahim to this compound". As the Applicant was angry Mr. Faryabi ignored him.

36. As the police were looking for the Applicant, Mr. Faryabi advised him to remain inside the compound but he did not and left. At the police station, Mr. Faryabi asked the Applicant why he did not follow the advice. He answered that his uncle would deal with the police.

37. Mr. Faryabi had a small injury at the forehead but he could not say how he got injured.

38. Without any prompting by the investigators, Mr. Faryabi added that the Applicant has been a source of problems in regard to the staff of the outsource company since he came to Gode as he wanted to bring his friend to replace Mr. Mudey. The Applicant was told that he had no responsibility to manage outsource companies.

39. In the course of his oral testimony, Mr. Faryabi added that he had told Mr. Mudey to go home but did not give him a precise time when he should come back to the compound. Mr. Mudey's replacement was on the compound on 20 November and as he had to go to the hospital, Mr. Faryabi decided to call Mr. Mudey back on that very day. He did so as he believed the incident that occurred on 18 November 2013 was over and he was not expecting any problem.

40. He came to know about the incident when he heard people shouting and Ms. Mohamed Abdi told him that the Applicant was beating up Mr. Mudey. When he went to the cafeteria he heard the Applicant shouting "I told you not to come to the office". He saw the Applicant on top of Mr. Mudey sitting on his knees and punching him. He tried to get the Applicant off Mr. Mudey. He saw the Applicant "smashing the head" of Mr. Mudey. He agreed that he did not mention any smashing or shouting in his statement.

41. After the fight he saw that Mr. Mudey could not walk and was bleeding from the nose and teeth.

42. Mr. Faryabi told the company staff that the Applicant was very angry and that a warning letter to Mr. Mudey would be part of the solution as his aim was to avoid problems.

43. The witness agreed that the Applicant was blamed for the fight. The local Somali community to which Mr. Mudey belonged blamed the Applicant for the fight and there was considerable interest in that community to see the Applicant punished. Regardless of where the truth lay, the community believed the Applicant was guilty.

44. In a memorandum dated 19 August 2014 under the signature of Prerana Issar, Director of Human Resources Division, addressed to the Applicant, the latter was informed of the following: "The incident of 20 November 2013 caused significant tension within the local community. Community representatives threatened to take action against WFP, if the Programme were to shield you from assuming your responsibilities in relation to the incident"[1].

45. This was put to Mr. Faryabi and his answer was that the community people were saying that Applicant wanted Mr. Mudey to be terminated but Mr. Faryabi told them this was not going to happen. It was not in Mr. Faryabi's interest to see the Applicant leave.

46. The witness also conceded there had been a number of complaints against him in relation to financial discrepancies; hiring cleaners without a contract; misappropriation; financial irregularities. He also added that he was on special leave with full pay when cross examined but when reexamined he stated that he had left Gode as his contract came to an end.

Ibrahim Mudey's investigation statements of 11 December 2013 and 28 September 2015 and his court testimony.

47. Mr. Mudey stated that on 18 November 2013, he was at the WFP compound. The Applicant asked him to remove two AC units and to install them somewhere. Mr. Mudey installed one in the office of Mr. Alemayehu Assegid and

[1] Annex 11 to the Respondent's Reply at para. 4.

one in his own office. The Applicant was not happy that Mr. Mudey installed one AC unit in his own office and approached Mr. Mudey with "his closed fist and pressed his knuckles" against his face.

48. On 20 November 2013, he went to the compound as he had been requested on 19 November by Mr. Faryabi to attend work. In his 11 December 2013 statement to Mr. John Corpuz, he said that it was the deputy of Midnimo, Mr. MM, who called him on 19 November and asked him to report for work on the compound. He reached the compound at 8:00 a.m. and he could not find Mr. Faryabi in his room. He then saw the Applicant who yelled at him and asked him what he was doing on the compound.

49. Mr. Mudey did not respond and went straight to the cafeteria. Ms. Mohamed Abdi told him to wait there while she would look for Mr. Faryabi. Ms. Mohamed Abdi came back and told Mr. Mudey that Mr. Faryabi had requested that he should go home and come back at 10:00 a.m. because the Applicant was upset by his presence on the compound.

50. As he was leaving the cafeteria, Mr. Mudey saw the Applicant who approached him, held him by the waist and pushed him on the floor. When he hit the floor he fell "unconscious for a moment". When he regained consciousness he saw the Applicant was sitting on him and "kicking him in the chest". The Applicant also held his arms and hit him with his head. Other staff members pulled the Applicant from him.

51. He bled "profusely" from the mouth and noticed that "four of my teeth were bent inwards towards my gums". On the same day, he went for a dental X-ray and he had four damaged teeth and reported the matter to the police.

52. On 23 November 2013, elders from his family and the Applicant met and came to an agreement on the incident. The Applicant agreed to pay 40,000 Birr to cover his medical expenses and it was agreed that the case would be dropped. The Applicant's relatives apologized to him.

53. At the hearing, Mr. Mudey confirmed what he had told the investigators. He stated however that when he fell down he felt dizzy and not unconscious. When he came round he saw the Applicant sitting on his chest with his knees and was holding his neck. He decided to defend himself. The Applicant hit his face and "with the commotion" he could not remember a lot. Then he added that the Applicant's leg hit his chest and that the Applicant was holding both his arms and was trying to head butt him.

54. He denied that he ever received warning letters about his conduct and he added that the first time he was banned from accessing the WFP compound was on 18 November 2013. He never threatened the Applicant nor assaulted him. He denied having insulted the Applicant by mentioning his mother.

Ms. Mohamed Abdi's investigation statements of 11 December 2013, 21 and 28 September 2015 and her court testimony.

55. Ms. Mohamed Abdi was at the material time a cook with Midnimo. She was working at the cafeteria on the compound on 20 November 2013. She saw and heard the Applicant yelling at Mr. Mudey and was asking him why he was in the compound. She did not hear Mr. Mudey insult the Applicant.

56. Ms. Mohamed Abdi told Mr. Mudey to wait in the cafeteria and she went to see Mr. Faryabi and told him there was a problem between Mr. Mudey and the Applicant. Mr. Faryabi told her he would immediately go to the cafeteria and Ms. Mohamed Abdi went back there.

57. When she reached the cafeteria she saw the Applicant approach Mr. Mudey and punch him in the head. Mr. Mudey held his head and covered his face. She then saw the Applicant grab Mr. Mudey and throw him on the floor. She tried to intervene but was pushed away. Then Mr. Faryabi tried to pull away the Applicant.

58. In court, Ms. Mohamed Abdi stated that she saw the Applicant enter the cafeteria and was shouting at Mr. Mudey. He then punched Mr. Mudey on the head and this was how the fight started. Then she started screaming.

Mr. Diriye's investigation statement of 29 September 2015 and his court testimony.

59. On 18 November at about 11:30 a.m., he was parking his vehicle in the parking area near the generator area in the WFP compound. He saw the Applicant running towards the generator area and he looked angry. He was shouting at Mr. Mudey and was telling him repeatedly "Are you refusing me?" The Applicant approached Mr. Mudey and pushed him.

60. At the hearing he added that he saw the Applicant run towards Mr. Mudey and push him. Then both Mr. Mudey and the Applicant "started pushing each other". He conceded that he had received two warning letters from the Applicant.

Considerations

61. In disciplinary matters the role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions[2]. The Tribunal should "examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence[3]".

62. The United Nations Appeals Tribunal (UNAT) has held that in exercising judicial review in disciplinary cases, the Dispute Tribunal has to examine: "(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the […] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence"[4].

63. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal

[2] *Diakite* UNDT/2010/024 para. 65.
[3] *Haniya* 2010-UNAT-024*; Mahdi* 2010-UNAT-018, para. 27.
[4] *Abu Hamda* 2010-UNAT-022, para. 25.

can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse[5].

64. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and Office of Human Resources Management (OHRM)[6].

65. UNAT further observed in *Hallal*[7] that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

66. In *Nyambuza*[8], UNAT stated: "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration".

Whether the facts on which the disciplinary measure was based have been established and whether the established facts legally amount to misconduct

67. The determination of the present case rests on an evaluation of the credibility of the Applicant and of the witnesses called by the Respondent.

68. The Applicant was the sole witness on his own behalf. The Respondent relies on the testimony of Mr. Mudey, the alleged victim as well as Ms. Mohamed Abdi, the cook, and Mr. Diriye, the driver.

69. In *Diakite*[9] the Tribunal observed:

[5] *Sanwidi* 2010-UNAT-084, para. 40.
[6] *Sanwidi* UNDT/2010/036, para. 7.1.4.
[7] 2012-UNAT-207, para. 27.
[8] 2013-UNAT-364, para. 30, citing *Messinger* 2011-UNAT-153.
[9] *Op. cit.*, para. 71.

> The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

70. In the case of *Applicant*[10] the Tribunal took the following approach in relation to assessing the credibility of witnesses.

> As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. There is no particular rule or formula that can be used in the assessment of credibility. In a jury trial, jurors are told to use their varied experiences in life to assess the credibility of witnesses. The same applies to a judge as a trier of facts. The judge should use his/her own varied experiences in life to engage in that exercise.

71. It is also for the Administration to prove the act of misconduct by clear and convincing evidence. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, *Molari*[11].

72. In disciplinary matters, the burden of proof to establish the act of misconduct rests on the Administration. In a system of administration of justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred[12].

[10] UNDT/2016/022, para. 95.
[11] 2011-UNAT-164, para. 30.
[12] *Liyanarachchige* 2010-UNAT-087, para. 2; *Diabagate* 2014-UNAT-403, para. 30; and *Hallal* 2012-UNAT-207, para. para. 28.

73. The Tribunal will now analyze and evaluate the testimony of the witnesses in the light of the above principles.

74. The Applicant does not deny that he was the one who started the incident with Mr. Mudey on 20 November 2013 as he was angry on seeing him in the WFP compound on that day. The incident of 18 November 2013, which humiliated him, explained his 20 November attitude the more so as Mr. Mudey had been told not to come to the compound on 20 November. The Applicant either was not aware or feigned to be unaware that Mr. Mudey was on the compound at the request of Faryabi.

75. The Applicant states that when he grabbed the hand of Mr. Mudey the latter freed himself and was not happy. Then Mr. Mudey punched him on the left side of his forehead. According to the Applicant, they both fell when he grabbed Mr. Mudey by the waist. Mr. Mudey says that the Applicant held him by the waist and pushed him to the ground.

76. The Applicant stated that when they fell on the ground he was bitten on the back so he arched backwards and when he fell down again his head hit the face of Mr. Mudey and the "top of his head hit the mouth" of Mr. Mudey. Mr. Mudey could not explain how the head butt happened as when he fell down he felt dizzy or lost consciousness momentarily.

77. According to Mr. Mudey the Applicant sat on him with his knees and kicked him in the chest. The Applicant also held his arms and hit him with his head. Both Mr. Mudey and the Applicant agreed on the head butt. Their testimony departs on how the head butt happened. The falling to the ground was the consequence of the Applicant grabbing the hand of Mudey. The Tribunal pauses here to discuss whether the grabbing of the hand was the start of the assault on the person of Mudey. When the Applicant grabbed the hand of Mudey this was an unwarranted gesture by him. If he was not happy about the presence of Mudey on WFP premises he should have gone and complained to his supervisor and not taken the law in his own hands as it were.

78. When the Applicant grabbed the hand of Mudey he was in an angry mood. That grabbing amounted to an assault on Mr. Mudey as the *actus reus* of an assault is committed when a person touches another person and causes the other to fear that force is about to be used on him. And the *mens rea* of the offence is when that fear is caused intentionally or recklessly. Given the Applicant's angry mood at the time of the grabbing of the hand it can reasonably be inferred that there was an intention on the part of the Applicant to instill fear in Mr. Mudey. In the case of *Faulkner v Talbot*[13] Lord Lane, Chief Justice defined unlawful physical force as

> any intentional [or reckless] touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, rude, or aggressive.

The facts of the case fall squarely within that definition.

79. The Tribunal 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.

80. There is another issue that arises in this case in view of a memorandum dated 19 August 2014 under the signature of Prerana Issar addressed to the Applicant in which he was informed about the following:

> The incident of 20 November 2013 caused significant tension within the local community. Community representatives threatened to take action against WFP, if the Programme were to shield you from assuming your responsibilities in relation to the incident.

81. In relation to that memorandum, Mr. Faryabi in his testimony in court stated that the community people were saying that Applicant wanted Mr. Mudey "to be out" meaning to be terminated. In *Mmata*[14], Judge Meeran held that

> It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the

[13] [1981] 3 All ER 468.
[14] UNDT/2010/053, para. 45.

> absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.

82. The Tribunal will also refer to what Judge Izuako stated in *Borhom*[15],

> Clearly, an investigator who at the outset of carrying out her assignment to investigate the allegations against any person is convinced of that person's guilt for any reason, is not competent to undertake such an assignment. It is an elementary principle of law and a rule of natural justice that one cannot be a judge in his/her own cause. By the same token, it stands to reason that an investigator, just like the judge, must be neutral, without bias and must approach the case he/she is mandated to investigate from the stand of a presumption of the innocence of the subject of the investigation.

83. In the light of the pronouncement of Judges Meeran and Izuako, the question arises whether the investigation was fair and obeyed the principles of natural justice or whether the investigation was conducted in such a manner as to placate the local community and safeguard the reputation of WFP. Were the investigators and those responsible for taking disciplinary action against the Applicant objective in their evidence gathering exercise or decision making process?

84. Article 100.1 of the United Nations Charter clearly stipulates,

> In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

85. The above principle which is embodied in the Charter, the apex of the laws and regulations of the Organization, was not in the forefront of the minds of the investigators and decision makers in the present case.

86. This conclusion is reinforced by one other factor. In a "Brief on the Investigation in Gode" sent via email to WFP officials by Mr. John Corpuz on 25 November 2015, he writes:

[15] UNDT/2011/067, para. 46.

> The victim [Mudey] is a respected member of his community being a sheik and has many sympathizers. Soon after the s/m's release in the evening of 22 Nov, the victim's sympathizers became restless for fear that Sisay may get away with what he did. During the night, four individuals had an overnight vigil outside of the WFP compound. The following morning, three influential community leaders paid a call to WFP-Gode expressing their concern on Sisay's release and fear that Sisay may leave without settling his liabilities. The community leaders also conveyed that in the event that happens, the community will take action against WFP. The HoSO Gode and the WFP FSO assured the trio that WFP will ensure that Sisay does not run away from his liabilities and that WFP will continue to maintain its good relations with the community.

87. The above observations smack of subjectivity and do not meet the standard of fairness required of an investigation. In *Fedorchenko*[16], it was held that the Administration has the duty to conduct investigations into the alleged conduct of staff members in certain cases in compliance with the respective applicable norms.

88. Secondly, it would also appear that the investigators allowed themselves to be guided or influenced by importing in their fact finding exercise evidence of the bad disposition of the Applicant. In the investigation Report dated 19 February 2014, at paragraph 22, the author of the report writes:

> [T]here is an aggravating factor to this incident in the fact that it is not the first time that Mr. Negussie used physical force against another individual within the WFP premises. In April 2013, Mr Negussie had an altercation with a WFP Driver within the premises of the Gambnella SO where Mr Negussie was working before going to Gode. In an e-mail dated 19 April 2013, Mr Negussie wrote to Mr. OT [name redacted], the Driver that he was sorry he had gotten emotional and pushed Mr T….

89. No evidence was presented as to whether any action was taken in relation to the alleged April 2013 email. The Tribunal is left in the dark as to whether the Applicant was sanctioned in any manner. The reference to that incident in the investigator's fact finding exercise is akin to what the criminal law of common law jurisdiction describes as evidence of bad disposition or bad character.

[16] 2015 UNAT 499, para. 33.

Evidence of bad character in a criminal case means a disposition to commit an offence and is only admissible subject to strict conditions.

90. The same approach should be taken in disciplinary proceedings where investigators should obey the paramount considerations of fairness, detachment and scrupulous objectivity. Evidence of bad character or disposition to establish that show that an individual being investigated has a propensity to commit an act of misconduct should not be relied on unless a past act of misconduct is also part of the investigation. Such evidence cannot lightly be invoked or presented in a court of law and it should not influence the findings of an investigator or those whose responsibility it is to initiate disciplinary proceedings.

91. This evidence of bad character or bad disposition contained in the report of the investigators may have unduly influenced the decision-makers in taking the action that was taken against the Applicant without giving him an opportunity to comment or respond to the 19 April 2013 incident.

92. Due process also requires that a staff member who has been under investigation for a matter that may lead to a disciplinary measure be given an opportunity to comment on the report of the investigation. This was not done here. In *Bertucci*[17] it was held that the Administration's refusal to give the staff member access to the investigation file was unlawful. In *Wishah*[18] it was held

> Due process requires, in the present case, that the staff member be able to assess by himself the relevance or irrelevance of the content of the investigation report, after a direct reading of it, as the Administration's charges were mainly founded on that investigation, the characteristics and outcome of which were under discussion.
>
> When challenging a termination for disciplinary reasons, the staff member is entitled to review by him- or herself the evidence used to support the conclusion of misconduct, to examine whether the fact finding conducted by the Administration indeed leads to the conclusions and the impugned administrative decision. If that opportunity is denied, due process of law is not respected, as it occurred in the present case.

[17] 2011-UNAT-114, para. 20.
[18] 2013-UNAT-289, para. 32.

93. Though the Applicant did not request for the report it was incumbent on the Respondent to communicate it to him for his comments. Therefore, notwithstanding the findings of fact above, the failure to provide the Applicant with the investigation report prejudiced his right to due process.

Judgment

94. Though on the facts the charge of misconduct is established, the issue arises whether the Applicant is entitled to any compensation due to the procedural breaches.

95. The issue of lack of due process was not canvassed by the Applicant. In *Shkurtaj*[19], UNAT held that,

> Damages awarded for violations of due process rights are not exemplary or punitive, but must be awarded with great care and be of a reasonable amount.

96. In *Obdeijn*[20] UNAT held,

> Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages. The Tribunal may thus award compensation for actual pecuniary or economic loss, non-pecuniary damage, stress and moral injury.

97. It has not been shown here that the Applicant suffered any specific damages resulting from a breach of his fundamental rights.

98. The Application is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 10th day of May 2016

[19] 2011-UNAT-148, para. 30.
[20] 2012-UNAT-201, para. 42.

Entered in the Register on this 10th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi