

UNDT/2016/022, Applicant

UNAT Held or UNDT Pronouncements

Standard of proof in disciplinary cases - In disciplinary proceedings it is well settled now that the evidence must be clear and convincing and that would include identification evidence. Evidence of misconduct must be clear and convincing.

Findings of fact by the trial judge - As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. The findings of fact of a trial judge should rarely be reversed on appeal unless the findings are so perverse that no reasonable person would have come to the conclusions reached on the facts by the trial judge.

Investigations and the role of the Dispute Tribunal - 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. The Tribunal is no way bound by the conclusions reached by the investigators. Citing *Sanwidi*, 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 OHRM. It is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

Weight to be attached to unsigned witness statements - Citing *Diabagate* and *Nyambuza*, statements of witnesses who were not placed on oath before being interviewed and which were not signed are untrustworthy and unreliable.

Photographic spread identification - It is settled now that it is perfectly permissible to make use of a photographic array for the purpose of identifying a suspect in a criminal case or an individual involved in a case of misconduct. In considering whether the identification of the Applicant constitutes clear and convincing evidence, the Tribunal is mindful of the word of caution referred to by the ICTY in *Fatmir Limaj*. The questions that arise from the words of caution in the *Fatmir Limaj et al* case are the following: (a) Was the photographic

array of good quality?; (b) Did it contain a sufficient number of males alongside the photo of the Applicant?; (c) The familiarity of GS with the Applicant; (d) The time that elapsed between the moment when GS saw the Applicant and the identification; (e) Whether the identification was made immediately and with confidence; and (f) Whether there were opportunities for GS to become familiar with the appearance of the Applicant after the events and before the identification was made and thus be prone to pick him. Fairness – Citing Mmata, 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 absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred. Redaction of name - There is a long line of decisions of the UNAT that have held that it is only in exceptional and sensitive cases that the name of a litigant or a witness will be redacted. The only conclusion this Tribunal can draw from all the pronouncements that the general principles of transparency, access to information, openness, accountability and good governance militate against redaction. But if there is a requirement to protect sensitive information or if an individual is wrongly blamed or charged, then redaction would be permissible. The Tribunal takes the view that the general principles cannot be of universal application in an absolute manner. Each request for redaction should be decided having regard to the particular facts and circumstances of a case. The nature of the charge against the Applicant is not only serious but also exposes sensitive materials affecting his personal conduct and possibly his private life. The Tribunal has cleared him of the charge and it would be most unfair even in the name of transparency, access to information, openness, accountability and good governance to allow his name to remain in the Judgment.

Decision Contested or Judgment/Order Appealed

On 7 April 2014, the Applicant filed an Application challenging the decision to dismiss him following an investigation by the Office of Internal Oversight Services (OIOS) into a report of his having allegedly had a sexual relationship with a minor.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The Tribunal found that the Respondent had failed to establish the charge against the Applicant by clear and convincing evidence. The Tribunal concludes that the disciplinary measure imposed on the Applicant was not justified.

Full judgment

[Full judgment](#)

Applicants/Appellants

Applicant

Entity

MONUSCO

Case Number(s)

UNDT/NBI/2014/27

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

13 Mar 2016

Duty Judge

Judge Boolell

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Investigation

Standard of proof

Termination (of appointment)

Summary dismissal

Applicable Law

UNDT RoP

- Article 17.3

UNDT Statute

- Article 11.6

Related Judgments and Orders

UNDT/2010/036

UNDT/2010/024

2010-UNAT-022

UNDT/2010/041

UNDT/2012/200

2012-UNAT-207

2013-UNAT-302

2014-UNAT-403

2013-UNAT-364

2012-UNAT-210

2014-UNAT-456

2014-UNAT-481

2015-UNAT-524