

UNDT/2017/051, Mbaigolmem

UNAT Held or UNDT Pronouncements

Discretion of investigators: Duly authorised investigators have a discretion to determine the information that they deem relevant to gather and probe further. However, such discretion is not unfettered. Investigations must be conducted in a fair, balanced and impartial manner.

Admissibility and value of evidence: Circumstantial evidence, as well as hearsay, are admissible in the Organization's internal justice system. However, their probative value is more limited than that of direct evidence. Mere statements of witnesses holding that the Applicant had engaged in other instances in behavior of the same nature than the main allegations, if not properly tested, can be taken as indicia, but not as proven facts.

Assessment of witnesses' credibility: The level of detail and consistency of a witness' account, the fact that an alleged victim reported the facts to other individual in the immediate aftermath of the events, third people's perception of the person's emotional state, and the consideration of the motives, or lack thereof, that a person would have to state accusations against another, are factors that may validly be taken into account in assessing a witnesses' credibility.

Assessment and standard of evidence: Evidence must be assessed on a case-by-case basis, in light of the circumstances of the specific case. The Appeals Tribunal has made clear that, when separation from service is at stake, clear and convincing evidence is required. It is nevertheless arguable, a contrario, that a lesser sanction could have been imposed if the manager is satisfied that the allegations of misconduct were established by preponderance of evidence.

Decision Contested or Judgment/Order Appealed

The Applicant contested his separation from service, with termination indemnities and compensation in lieu of notice, imposed on him as a disciplinary measure

further to allegations of sexual harassment.

Legal Principle(s)

The Tribunal found a number of shortcomings in the conduct of the investigation and subsequent assessment of evidence, including the considering as proven facts separate incidents of alleged unwelcome advances or contact of sexual connotation (although less serious than those alleged by the Complainant) related by two female witnesses in statements that had not been inquired or further verified. More importantly, the Tribunal found that the evidence available was sufficient to meet the standard of proof of preponderance of evidence, but not the higher one of clear and convincing evidence which, according to constant case law, is required to impose a sanction entailing separation. The decision was set aside and the case remanded to UNCHR to take a new decision in light of the findings in the Judgment, setting an alternative compensation of six months of emoluments.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Mbaigolmem

Entity

UNHCR

Case Number(s)

UNDT/GVA/2016/9

Tribunal

UNDT

Registry

Geneva

Date of Judgement

29 Jun 2017

Duty Judge

Judge Downing

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Burden of proof

Disciplinary

Evidence

Investigation

Separation from service

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNHCR Guidelines on Conducting Investigations and Preparing Investigation Reports (2012)

Secretary-General's bulletins

- ST/SGB/2008/5

UNDT Statute

- Article 10.5

Related Judgments and Orders

UNDT/2011/067

UNDT/2011/181

2010-UNAT-024

2015-UNAT-537