

# UNDT/2018/086, Siddiqi

## UNAT Held or UNDT Pronouncements

The contested decision was imposed on the Applicant after finding that there was clear and convincing evidence that the Applicant threatened to kill other staff members in the Afghanistan Country Office. The crux of the Applicant's case was that the facts were not established through clear and convincing evidence as the witnesses present during the alleged threats provided inconsistent testimonies, and the evidence was not properly collected and, consequently, was unreliable. Whether the investigation was vitiated by procedural flaws Having reviewed the whole investigation file, which was not entirely disclosed to the Deputy Executive Director, Management, UNICEF, and heard the witnesses as to the way the evidence was collected, the Tribunal found that the procedure used to collect the statements of the three key witnesses of the incident did not present sufficient guarantees to ensure their reliability and credibility. After identifying failures in the way the investigation was conducted, the Tribunal concluded that the witness statements of the three direct witnesses of the incident, which formed the basis of the contested decision, were not sufficiently reliable and credible to establish the alleged facts in accordance with the required standard. Whether the facts were established by clear and convincing evidence The Tribunal noted that while the Applicant made the contested statement in farsi, which may explain some differences in the way it was reported by the various people involved, the Tribunal found that the evidence of three direct witnesses is sufficiently coherent to conclude that the Applicant said that he would "kill" some staff members. The Tribunal examined the evidence and found that the facts upon which the disciplinary measure was based were not established through clear and convincing evidence insofar as the Applicant's statement could not be interpreted as a real and serious threat to kill identified staff members in the Afghanistan Country Office or any staff member. The Applicant's statement was nevertheless intimidating and aggressive in its tone and content. It was directed primarily to two staff members, who were conducting and discussing the Harmonized Approach to Cash Transfers spot checks, and alluded to two other staff members, who apparently were also involved in the transactions that were

under review. It referred to possible consequences if the Applicant was terminated as a result of the spot check exercise. The Tribunal therefore found that the Applicant's statement denoted an intent to interfere with the spot check exercise being conducted. Whether the facts amount to misconduct The Tribunal found that the Applicant made an intimidating statement intended, directly or indirectly, to interfere with the ability of two other staff members to discharge their official functions. There was no clear and convincing evidence that these two individuals were the direct subject of the threat but the reference to negative consequences that may ensue to their colleagues constitutes intimidation in the discharge of their official functions. Even if the two staff members in question did not take the threat seriously, it was not acceptable for the Applicant to suggest that their investigative work could result in negative consequences, whatever they may be. Similar to the Deputy Executive Director, Management, UNICEF, the Tribunal found that the Applicant's conduct amounts to misconduct under staff rule 1.2(g) and sec. 1.4(a) of CF/ EXD/ 2012-005, although based on a different factual matrix. Proportionality of sanction Since the Tribunal found in the present case that the facts upon which the disciplinary sanction was based were not all established, the sanction cannot stand. The Tribunal found it appropriate to replace the previous sanction of dismissal, which was the most severe one, by a suspension without pay for a period of three months, pursuant to sec. 4.3(d) of CF/EXD/2012-005. Remedies Having found that the contested decision was unlawful because the facts upon which it is based were not established, the Tribunal rescinds it pursuant to sec. 10.5(a) of its Statute. However, since it found that misconduct was established based on a more limited set of facts, the Tribunal imposed a disciplinary sanction of suspension without pay for a period of three months, pursuant to the same provision. The Tribunal found it adequate, fair and reasonable in the present case to award compensation in lieu of rescission in an amount equal to one-year net base salary, based on the Applicant's salary on the date of the termination of his fixed-term appointment, i.e., on 6 November 2017. No compensation for damages was awarded.

## Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to summarily dismiss him for misconduct.

## Legal Principle(s)

It is trite law that a witness statement must be an accurate and faithful record of what the witness said during the interview. No other source of information may be used to complete the statement, whatever it is. The burden of demonstrating that the actions for which a sanction was issued truly occurred rests with the Administration (Liyanarachchige 2010-UNAT-087, Nyambuza 2013-UNAT-364, Diagabate 2014-UNAT-403). The Appeals Tribunal has consistently held that when termination is a possible sanction, the misconduct must be established by “clear and convincing evidence” (Diagabate 2014-UNAT-403, El Kkalek 2014-UNAT442). The degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved” (Portillo Moya 2015-UNAT-523). Therefore, “only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, ... the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one)” (Portillo Moya 2015-UNAT-523). The determination of the “in lieu compensation” must be done on a case-by-case basis and carries a certain degree of empiricism (Mwamsaku 2011-UNAT-265). Furthermore, in setting the amount of compensation in lieu of reintegration, the Tribunal may take into account the grounds on which the decision to dismiss was rescinded, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed term), the remaining time, chances of renewal and the two-year limit imposed by the Statute of the Dispute Tribunal, which constitutes a maximum and cannot be the average “in lieu compensation” established by the court (Mushema 2012UNAT-247; Liyanarachchige 2010-UNAT-087; Cohen 2011-UNAT-131; Harding 2011-UNAT-188).

## Outcome

Judgment entered for Applicant in full or in part

## Outcome Extra Text

Judgment vacated by the Appeals Tribunal (Siddiqi 2019-UNAT-913).

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Siddiqi

## Entity

UNICEF

## Case Number(s)

UNDT/GVA/2018/011

## Tribunal

UNDT

## Registry

Geneva

## Date of Judgement

3 Sep 2018

## Duty Judge

Judge Bravo

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Compensation

In-lieu compensation

Disciplinary matters / misconduct

Dismissal/separation

## Applicable Law

Information Circulars

- ST/IC/2015/22

Laws of other entities (rules, regulations etc.)

Staff Rules

- Rule 1.2(g)

UNDT Statute

- Article 10.5

UNICEF Executive Directives

- CF/EXD/2012-005

## Related Judgments and Orders

2014-UNAT-436

2014-UNAT-403

2010-UNAT-028

2012-UNAT-207

2018-UNAT-819

2014-UNAT-442

2013-UNAT-364

2010-UNAT-087

2015-UNAT-523

2012-UNAT-247

2011-UNAT-131

2011-UNAT-188