

UNDT/2018/090, Ricks

UNAT Held or UNDT Pronouncements

An assault on a co-worker in connection with work constitutes misconduct, no matter the type of contract or appointment. The direct evidence from written statements, confirmed by strong circumstantial evidence adduced both in the investigation and at the hearing, taken cumulatively constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred. In the Applicant's case, whereas the Tribunal would not be inclined to rely heavily on "character witnesses" heard rather selectively, the mere fact that the Applicant had been using the United Nations vehicle without authorisation and transported an unauthorised passenger demonstrate disrespect for the organisational order and constituted a factor speaking against any mitigation. As such, the disciplinary punishment imposed is not disproportionate.

Decision Contested or Judgment/Order Appealed

The Applicant was contesting a decision dated 24 November 2015 to impose on him the disciplinary sanction of termination from service for serious misconduct.

Legal Principle(s)

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. In this context, the UNDT is to examine: a. whether the facts on which the sanction is based have been established b. whether the established facts qualify as misconduct under the Staff Regulations and Rules and c. whether the sanction is proportionate to the offence. Part of the test in reviewing decisions imposing sanctions is whether due process rights were observed. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a

possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. It is not the role of the UNDT to conduct a de novo review of the evidence and place itself “in the shoes of the decision-maker”. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker’s decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker’s administrative decision. This is a misunderstanding of the delicate task of conducting judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General. The preference for having an adversarial hearing over disputed facts is not meant to be a matter of right, but rather a matter of utility. Considering witness statements from the investigation is legitimate where the witness testifies before the Tribunal in a manner inconsistent with the prior statement, on which the Applicant had an opportunity to comment. It will be for the Tribunal to weigh the probative value of the conflicting narrations for their quality and against the entirety of evidence. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. A disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence. Physical aggression is not to be tolerated among United Nations personnel, no matter the degree of provocation on the part of the victim or personal circumstances of the attacker.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Ricks

Entity

UNMIL

Case Number(s)

UNDT/NBI/2016/015

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

19 Sep 2018

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct
Termination (of appointment)

Applicable Law

Administrative Instructions

- ST/AI/371

Staff Rules

- Rule 1.2(f)
- Rule 10.2(a)(viii)