

UNDT/2020/164, Hossain

UNAT Held or UNDT Pronouncements

The offences alleged in the instant case were of a complex nature and were framed in a manner that required several discrete facts to be established so that a sanction of separation could be justified. Each element of the allegations of misconduct the Administration found to have been established was therefore subject to review. With the account of one person to be weighed against another, the Respondent had to properly consider issues of credibility on the record. There was no indication that the Respondent considered the two possible motives. The Applicant's case was that the disciplinary process was improperly motivated by ethnic bias and vindictiveness. This aspect of the Applicant's case was supported by the testimony of two witnesses. The inference of improper motive for testifying against the Applicant, to be drawn from their evidence, was on record before the sanction decision was made. The Applicant also specifically drew the Respondent's attention to it. The Respondent appears to the Tribunal to have ignored it or dismissed the suggestion of bias and vindictiveness as irrelevant, as there is nothing on the record to rebut it. There was no indication from the record that the Respondent duly weighed the unreliability of the information being provided during the investigation. On the totality of the evidence that was before the Respondent when the challenged sanction decision was made, the Tribunal found that the established facts did not in any clear or convincing way qualify as misconduct. The severity of the allegations against the Applicant would also have had an adverse effect on his reputation at the end of his career. These factors sufficiently justified an award at the higher end but did not merit the treatment of the application as an exceptional case for more than two year's salary to be awarded. There was merit to the Respondent's argument that the Applicant had not put forward sufficient evidence proving any causal link between the loans cited and any financial losses due to the separation decision. No moral damages could be awarded in relation to the loans. In the instant case it was impossible to separate the stress caused by the investigation from the stress of the separation that resulted from the investigation.

Decision Contested or Judgment/Order Appealed

The Applicant challenged the disciplinary sanction of separation from service for two charges of misconduct namely, transporting ammunition from UNAMI premises and asking the witness to the misconduct to give false evidence.

Legal Principle(s)

The adjudication function of the Tribunal is that of judicial review. In other words, the Tribunal examines how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. A greater level of deference is afforded to the Administration in the review by the Tribunal of disciplinary decisions regarding dishonesty. This is in recognition of the duty of the Administration to hold staff members to the highest standards of integrity. However, due deference does not eradicate the role of the UNDT in reviewing decisions of the Administration relating to misconduct. The critical issue to be determined is whether there is clear and convincing evidence of each fact cited in the allegations of misconduct. Was there a proper investigation to form the basis for the impugned decision; in particular, whether the Respondent failed to interview and/or duly consider relevant witnesses?

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The decision to impose the sanction of separation was rescinded. If the Respondent elected to pay compensation in lieu of rescission, the Applicant was to be paid two years' net-base salary in compensation under art. 10.5(a) of the Dispute Tribunal's Statute.

Full judgment

[Full judgment](#)

Applicants/Appellants

Hossain

Entity

Other peacekeeping mission

Case Number(s)

UNDT/NBI/2018/122

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

9 Sep 2020

Duty Judge

Judge Honeywell

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Disciplinary measure or sanction

Facts (establishment of) / evidence

Standard of review (judicial)

Disciplinary cases

Termination (of appointment)

Disciplinary sanction

Applicable Law

Staff Regulations

- Regulation 1.2(b)
- Regulation 1.2(f)
- Regulation 1.2(g)
- Regulation 1.2(q)

Staff Rules

- Rule 1.2(c)