

# **UNDT/2020/165, Paris**

## **UNAT Held or UNDT Pronouncements**

When termination was the possible outcome of the investigation, each allegation of misconduct must be established by clear and convincing evidence; in other words, the truth of the facts asserted must have been highly probable. The only rule cited as applicable in this case referred to a blood alcohol level as a measure of intoxication. The Applicant was not subjected to a blood test. The Tribunal found that there was no clear or convincing evidence before the Respondent that the Applicant drove while intoxicated. There is no rule prohibiting United Nations staff from having a drink of alcohol. It cannot be an unusual or unexpected event for such persons to socialize during private time with friends while on holidays and this may include a social drink. What was prohibited in the MINUSMA Code of Conduct is driving while intoxicated. The burden of proving possession of the firearm at the accident scene in a clear and convincing manner to justify separation from employment was on the Respondent. The Respondent's conclusions were, however, expressly based not on clear or convincing evidence but on probability. The Respondent's contention that as the issue of mistranslation was not previously raised, the Tribunal ought not to take it into account in reviewing the disciplinary decision, was without merit. There was no basis on which the Respondent could have found clear and convincing evidence that the Applicant had the firearm with him after he drank beer that night. This conclusion seems to have been based on a hunch by the Respondent. No witness came forward to say the Applicant was seen with the firearm at the scene of the accident. Instead the sole independent witness, gave sworn evidence that he did not see the Applicant with a firearm on the night of the accident. The Respondent, *ex post facto*, raised a point however, that if the Applicant left the firearm in his hotel room that too would have been enough breach of the rules to merit the sanction. The Applicant was not charged with that allegation and had no opportunity to respond to such an allegation. It would not be in keeping with procedural fairness for the Tribunal to now hold, that although there was insufficient evidence of the alleged possession of the firearm while consuming alcohol, instead his sanction was justified because he left the firearm in his hotel room.

## Decision Contested or Judgment/Order Appealed

The Applicant challenged the disciplinary sanction of separation from service with compensation in lieu of notice and termination indemnity in accordance with staff rule 10.2(a)(viii).

### 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 Tribunal ordered reinstatement or compensation in lieu of one year's net base salary.

### Full judgment

[Full judgment](#)

### Applicants/Appellants

Paris

## Entity

MINUSMA

## Case Number(s)

UNDT/NBI/2018/97

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

11 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)

Staff Rules

- Rule 10.2(a)(viii)