

# UNDT/2021/065, Mdoe

## UNAT Held or UNDT Pronouncements

The Tribunal found that that there was clear and convincing evidence that the Applicant committed the misconduct complained of, and that the established facts qualified as misconduct under the Staff Regulations and Rules, further that the sanction was proportionate to the offence and was therefore lawful. The Tribunal also found that there were no due process violations in the investigation and in the disciplinary process leading up to the disciplinary sanction against the Applicant. The degree of sensitivity of the alleged misconduct did not constitute an exceptional circumstance warranting departure from established Tribunal practice. In cases of alleged sexual harassment there is heightened need for transparency and accountability being that sexual harassment is a scourge in the work place and a message needs to be sent out clearly that staff members who sexually harass their colleagues should expect not only to lose their employment but also to suffer consequences such as the resultant publicity. The Applicant failed to show exceptional circumstances warranting departure from established Tribunal practice. His application for anonymity was rejected. The fact that the Applicant sexually harassed Ms. EB in London, Central African Republic, Sierra Leone and New York were established by clear and convincing evidence. The facts relating to the allegation of sexual harassment of V01 were established by clear and convincing evidence.; The facts relating to the allegation that the Applicant failed to disclose a conflict of interest were established by clear and convincing evidence. The facts relating to the allegation that the Applicant inappropriately conducted himself when he interfered with the OIAI investigation were established by clear and convincing evidence. The facts relating to the allegation that the Applicant inappropriately conducted himself when he accessed pornographic material on a UNICEF device were established by clear and convincing evidence. The Applicant's conduct warranted the sanction of dismissal from service. There were no due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant warranting interfering with the decision maker's discretion.

## Decision Contested or Judgment/Order Appealed

The Applicant was challenging the findings of a 31 January 2020 dismissal letter, the decision to summarily dismiss him from service and the decision to include his information in the United Nation's screening database.

### Legal Principle(s)

The Tribunal's role in disciplinary cases 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, the Administration must prove the facts underlying the alleged misconduct by "clear and convincing evidence", which requires; more than a preponderance of evidence but less than proof beyond reasonable doubt, and "means that the truth of the facts asserted is highly probable". The proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability. The Secretary-General has wide discretion in determining the appropriate disciplinary measure, due deference should be shown to the Secretary-General's disciplinary decisions, it is not the role of the Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, and that the Tribunal is more concerned with how the decision-maker reached the impugned decision, not the merits of the decision. The need for transparency and accountability dictates that names of litigants are routinely included in judgments of the internal justice system of the United Nations and as is well established, the principle of publicity can only be departed from where the applicant shows greater need than any other litigant for

confidentiality. It is for the party making the claim of confidentiality to establish the grounds upon which the claim is based. The Tribunal has discretion to determine the admissibility of any evidence and may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. In the exercise of this discretion the primary consideration is whether or not the evidence lacks probative value and whether it is relevant to the facts in issue.

## Outcome

Dismissed on merits

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Mdoe

## Entity

UNICEF

## Case Number(s)

UNDT/NBI/2020/031

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

7 Jun 2021

## Duty Judge

Judge Tibulya

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Disciplinary matters / misconduct

Abuse of authority

Disciplinary measure or sanction

Sexual harassment

## Applicable Law

UNDT RoP

- Article 18.1
- Article 18.5
- Article 26

UNDT Statute

- Article 11.6

UNICEF Administrative Instructions

- CF/AI/2005/017

UNICEF Executive Directives

- CF/EXD/2008-044
- CF/EXD/2012-007