

# **UNDT/2021/116, Lishchynski**

## **UNAT Held or UNDT Pronouncements**

The Applicant consistently admitted that the verbal and physical altercation took place and that he damaged the officer's umbrella. He only challenged the investigation process which he maintained was biased and unfair since it didn't consider the context of the interaction. He also complained that the most pertinent aspects of the case which were caught on video were never provided to him and he therefore didn't speak to them in the context of the investigation. Since the Applicant did not deny that he was involved in a verbal and physical altercation with a Kenyan police officer and that he damaged the officer's umbrella, the Tribunal found those facts, which formed the basis for the sanction, had been established through clear and convincing evidence. The Tribunal found that the established facts qualified as misconduct under the Staff Regulations and Rules. The Tribunal found that the alleged procedural violations cited by the Applicant were either without basis or of no consequence. The Applicant had for example not shown how any of the witnesses he claims were not interviewed could have provided exculpatory evidence related to the specific misconduct on which the disciplinary measure was based. The Tribunal held that the sanction that was imposed was consistent with the practice of the Secretary-General in similar cases in which measures at the stricter end of the spectrum have normally been imposed by the Organization.

## **Decision Contested or Judgment/Order Appealed**

The Applicant challenged what he described as allegations that he engaged in a verbal and physical altercation with a Kenyan police officer and damaged the police officer's umbrella. The Applicant was separated from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii).

## **Legal Principle(s)**

The Tribunal is guided by established jurisprudence which lays down its judicial review role as being that of determining if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. To this end, the Tribunal examines the following issues: 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 disciplinary sanctions is whether due process rights were observed. The Tribunal, in addition, examines the issue of whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against an applicant. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. And, 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 high. 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.

## Outcome

Dismissed on merits

## Outcome Extra Text

Not Applicable

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Lishchynski

## Entity

UNON

## Case Number(s)

UNDT/NBI/2020/25

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

10 Oct 2021

## Duty Judge

Judge Tibulya

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Disciplinary matters / misconduct

Assault (verbal and physical)

## Applicable Law

### Staff Rules

- Rule 10.2(a)(viii)