

2020-UNAT-982, Asghar

UNAT Held or UNDT Pronouncements

UNAT held that there was no difficulty in principle regarding the admissibility of the secretly recorded conversation based on the way it was procured, even though it may have involved an element of entrapment; however, UNAT was concerned that the probative value of the evidence depended upon the credibility of a person who did not testify before the UNDT. UNAT noted that the content of the contemporaneous emails which supported the transcript of the telephone conversation remained hearsay unless it was confirmed by the authors or recipients of the emails and that none of the authors or recipients were called to testify. UNAT held that: there was nothing in the UNDT judgment to indicate that it determined on the facts whether it was in the interests of justice to admit hearsay evidence of the recorded conversation; UNDT made no attempt to analyse the evidence of the witnesses or other evidence; and UNDT did not overtly examine the content of the recorded telephone conversation or the contemporaneous correspondence to evaluate the probabilities of whether the elements of fraud had been sufficiently established by the totality of the evidence found to be reliable, credible and cogent. UNAT held that a document purporting to be a transcript of a telephone conversation, without evidence identifying it, and without any elucidation of the reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depended, was not alone sufficiently cogent to constitute clear and convincing evidence of fraud. UNAT held that UNDT failed to undertake a coherent fact-finding exercise by considering the admissibility, credibility, and reliability of all the evidence before it, the facts were not adequately established, and consequently, there was not a proper and fair trial of the issues. UNAT held that UNDT failed to exercise the jurisdiction vested in it and committed consequent factual errors, resulting in a manifestly unreasonable decision. UNAT upheld the appeal, vacated the UNDT judgment, and remanded the case to UNDT for fresh determination by a different judge and in accordance with UNAT's directions.

Decision Contested or Judgment/Order Appealed

The Applicant contested the decision to dismiss her for having committed fraud, causing financial and reputational loss to UNICEF. UNDT upheld the application in part, affirming the dismissal decision on the strength of a transcript of a telephone conversation said to have taken place between the Applicant and a consultant with the local government.

Legal Principle(s)

A finding of fraud should only be made on the basis of sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to deceive, and prejudice) has been established in accordance with the standard of clear and convincing evidence. Where evidence has been obtained in an improper or unfair manner, it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness. Hearsay evidence, before a tribunal such as UNDT which is an inquisitorial body, can and should be admissible in the interests of justice. The test for determining whether a staff member has committed fraud is to consider if the evidence establishes guilt on the higher standard of probability, beyond mere preponderance; the logical corollary is that the staff member should be acquitted of the charge if there is a reasonable chance that she might be innocent.

Outcome

Appeal granted

Full judgment

[Full judgment](#)

Applicants/Appellants

Asghar

Entity

UNICEF

Case Number(s)

2019-1281

Tribunal

UNAT

Registry

New York

Date of Judgement

27 Mar 2020

President Judge

Judge Murphy

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Dismissal/separation

Fraud, misrepresentation and false certification

Evidence

Audio-recordings

Corroboration/hearsay

Separation from service

Termination of appointment (see also, Termination of appointment)

Standard of proof

Disciplinary cases

Termination (of appointment)

Disciplinary sanction

Applicable Law

Staff Rules

- Rule 1.2(b)
- Rule 1.2(g)

UNAT Statute

- Article 2.3
- Article 2.5

UNDT RoP

- Article 16.2
- Article 17
- Article 18

UNICEF Executive Directives

- CF/EXD/2013-008

Related Judgments and Orders

UNDT/2019/074