

UNDT/2022/014, Desbois

UNAT Held or UNDT Pronouncements

In sum, based on the record on file and the oral evidence provided at the hearing held on 12-14 October 2021, the Tribunal finds that it is established that the Applicant slapped MK on 25 November 2016 but the rest of the allegations by MK are not established. Since it is established by clear and convincing evidence that the Applicant slapped MK, the established facts amount to misconduct. Considering the nature and gravity of the Applicant's misconduct, mitigating circumstances that the Administration took into account, as well as the past practice of the Organization in matters of comparable misconduct, the Tribunal finds that the imposed disciplinary measure was adequate in light of the Administration's scope of discretion in this matter. It is regrettable that the Administration failed to disclose certain records obtained by OIOS during the investigation and disciplinary process, especially the second interview record of EK, one of the key witnesses in this case. However, this evidence was eventually disclosed to the Applicant during the current proceedings, which enabled the Applicant to use it at the hearing. Further, at the hearing, the Tribunal conducted a *de novo* review of the facts and made findings on the credibility of witnesses and whether certain allegations were substantiated or not. Despite some flaws in the process described above, the Applicant's due process right was largely respected as she was informed of the allegations against her with key supporting evidence and she was given the opportunity to comment on the allegations set forth in the charge letter. Moreover, as already discussed in detail, there is clear and convincing evidence that the Applicant slapped MK. Therefore, in light of the jurisprudence of the Appeals Tribunal, the Tribunal finds that there were no substantial procedural irregularities that rendered a disciplinary measure unlawful.

Decision Contested or Judgment/Order Appealed

The imposition of disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, for physical assault

Legal Principle(s)

The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, Nyawa 2020-UNAT-1024). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, Molari 2011-UNAT-164, and Ibrahim 2017-UNAT-776). Under the jurisprudence of the Appeals Tribunal, it is undisputed that physical assault amounts to misconduct (see, for instance, Toukolon 2014-UNAT-407; Ouriques 2017-UNAT-745; Majut 2018-UNAT-862; Sall 2018-UNAT-889; Halidou 2020-UNAT-1070). The principle of proportionality in a disciplinary matter is set forth in the staff rule 10.3(b), which provides that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless "the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" (see Portillo Moya 2015-UNAT-523, paras. 19-21; and also Sall 2018-UNAT-889, Nyawa 2020-UNAT-1024). The Appeals Tribunal held that "the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose" (see Toukolon 2014-UNAT-407, para. 31). The Appeals Tribunal has

further stated, “But due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair”. The Appeals Tribunal further explains that this means that the Dispute Tribunal should “objectively assess the basis, purpose and effects of any relevant administrative decision” (see Samandarov 2018-UNAT-859, para. 24). The Appeals Tribunal held that “only substantial procedural irregularities will render a disciplinary measure unlawful”.

Outcome

Dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

Desbois

Entity

UNEP

Case Number(s)

UNDT/NY/2021/12

Tribunal

UNDT

Registry

New York

Date of Judgement

15 Feb 2022

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary matters / misconduct

Applicable Law

Staff Regulations

- Regulation 1.2(f)

Staff Rules

- Rule 1.2(f)

Related Judgments and Orders

2020-UNAT-1024

2011-UNAT-164

2017-UNAT-776

2014-UNAT-407

2017-UNAT-745

2018-UNAT-862

2018-UNAT-889

2020-UNAT-1070

2015-UNAT-523

2018-UNAT-859