

2022-UNAT-1280, AAA

UNAT Held or UNDT Pronouncements

AAA appealed and the Secretary-General cross-appealed. The UNAT disagreed with the UNDT's position that AAA could not be required to report a rape allegation "which he heard from another person who attended court" and that Section 4.1 of ST/AI/2017/1 "does not apply to an individual who merely hears second-hand about a case of misconduct since much of what such a person has to report would be hearsay and possibly misleading and devoid of the kind of detail the rule is seeking to elicit from the staff member". This approach erroneously imposes a requirement that the staff member must have a certain type of evidence, namely "first hand" or direct knowledge of misconduct, for a staff member to be obligated to report. There is no such requirement in Staff Rule 1.2(c), Section 4.1 of ST/AI/2017/1, or Section 3.2(e) of ST/SGB/2003/13. The latter requires that any "concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker" must be reported. The UNAT noted that Section 4.5 of ST/AI/2017/1 stated that "Information received from either a staff member or non-staff member alleging unsatisfactory conduct should contain sufficient details for it to be assessed under the present instruction, such as: (a) A detailed description of the unsatisfactory conduct, (b) The names of the implicated staff member(s).....". The section clearly outlines that the information "should contain sufficient details" for it to be assessed and then provides examples of information that would assist in assessing the conduct; it does not mandate that all or some of the enumerated information is required, only a requirement of "sufficient details" to assess the conduct, and then lists the type of details that could be provided. As a result, the Dispute Tribunal erred in law in its interpretation of Section 4.1 and 4.5 of ST/AI/2017/1. The UNAT noted that there was no dispute that AAA had not reported the allegations despite having information about the charges against CE, a fellow staff member, not only from the local court but also from CE, the victim, and her family from his meetings with them. There was also no dispute that AAA did not attend an interview with OIOS despite repeated requests to do so and failed to respond to multiple interview requests. It is clear from AAA's conduct that he was not cooperating with the investigation and therefore, the Administration exercised its discretion in the circumstances to proceed with allegations of misconduct on this basis. The UNAT held that due process rights fully apply only to the disciplinary stage of the process. During the disciplinary process, AAA was provided with the allegations against him, with specifics, and was given an opportunity to comment, which he in fact did. Such comments were duly taken into account and considered, as extensively reflected in the contested decision. In addition, AAA as well as several witnesses were interviewed in the investigation of CE, and these interviews and transcripts were available to the investigators. Therefore, there were no substantial procedural irregularities that vitiated the disciplinary sanctions such that the contested decision was irrational, unreasonable and unlawful. The UNAT found that the Secretary General's imposition of the disciplinary sanction of separation of service was a reasonable exercise of his discretion in imposing sanctions for misconduct. As the disciplinary decision was upheld, the UNAT rejected AAA's claims for compensation. The UNAT dismissed AAA's appeal and granted the Secretary General's cross-appeal, reversing Judgment No. UNDT/2021/091.

Decision Contested or Judgment/Order Appealed

AAA, a former staff member, challenged the sanction decision of his separation from service with pay in lieu of notice and without termination indemnity for failure to report alleged sexual abuse by a fellow worker and for refusal to participate, without justification, in an interview investigating his failure to report. By Judgment No. UNDT/2021/091, the Dispute Tribunal held that the evidence was not sufficiently convincing to establish AAA's misconduct, rescinded the contested decision and ordered that, in lieu of reinstatement, AAA should be paid compensation of 12 months' net base salary.

Legal Principle(s)

In an application concerning disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, and iii) whether the sanction is proportionate to the offence. The Administration has broad discretion in disciplinary matters which will not be lightly interfered with on judicial review. This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct, and proportionate. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it or to substitute its own decision for that of the Administration. 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, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. Staff members have the duty to report any breach of the Organization's regulations and rules to the official whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members are required to fully cooperate with all duly authorized investigations and to provide any records, documents, information and communications technology equipment or other information under the control of the Organization or under the staff member's control, as requested. Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct. Only substantial procedural irregularities can render a disciplinary sanction unlawful. The Secretary General has wide discretion in applying disciplinary sanctions for misconduct, but the disciplinary measure must be proportionate to the misconduct.

Outcome

Appeal dismissed on merits; Cross-appeal granted

Outcome Extra Text

The UNDT Judgment is reversed.

Full judgment

[Full judgment](#)

Applicants/Appellants

AAA

Entity

MONUSCO

Case Number(s)

2021-1608

Tribunal

UNAT

Registry

New York

Date of Judgement

6 Dec 2022

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Evidence of harm

Disciplinary measure or sanction

Failure to report misconduct

Due process
Disciplinary cases
Disciplinary cases
Compensation
Disciplinary matters / misconduct
Investigation
Standard of proof
Standard of review (judicial)
Applicable Law
Administrative Instructions

- ST/AI/2017/1

Secretary-General's bulletins

- ST/SGB/2003/13

Staff Rules

- Rule 1.2(c)
- Rule 6.2
- Rule 10.2(a)(viii)

UN Charter

- Article 101.3

Related Judgments and Orders

2018-UNAT-859
2019-UNAT-956
2010-UNAT-084
2015-UNAT-550
2019-UNAT-918
2019-UNAT-918
2017-UNAT-781
2015-UNAT-523
2018-UNAT-874