

2023-UNAT-1401, Moïse Alain

Nkoyock (Fils)

UNAT Held or UNDT Pronouncements

The UNAT found that the UNDT made several errors of law and of fact leading to a manifestly unreasonable outcome.

In particular, the UNAT found that the UNDT erred in refusing to hold a hearing of evidence that Mr. Nkoyock sought to call to establish his defence to the allegations against him and to impeach the Secretary-General's witnesses. The UNDT further erred when it failed to reach its own conclusions on disputed facts and relied overly on the internal investigation's findings. The UNAT found that the UNDT also erred in relying on evidence that it had ruled irrelevant and inadmissible and that it had withheld from disclosure to Mr. Nkoyock. Turning to the investigation panel, the UNAT found that the UNDT erred in applying wrongly the rules relating to the appointment of the panel and erred when it failed to find that the official who appointed the panel and who was also a potential witness in its investigation, was conflicted. Finally, the UNAT found that the UNDT erred in excluding investigation reports which may have assisted Mr. Nkoyock with his challenges to the credibility of witnesses; and the UNDT erred in assessing the lawfulness of the sanctions imposed on Mr. Nkoyock by failing to take proper account of his prior work performance records.

Having found that Mr. Nkoyock succeeded on appeal, the UNAT ordered that the emoluments removed from his salary from the date the sanctions had been imposed until the date of his separation from service (for reasons unrelated to the case) should be paid to him with interest. The UNAT rescinded the disciplinary sanctions and set aside the UNDT Judgment. However because of the nature of the sanctions imposed and Mr. Nkoyock's cessation of employment, the UNAT did not grant any other remedies.

Decision Contested or Judgment/Order Appealed

Before the UNDT, Mr. Nkoyock contested several disciplinary sanctions that had been imposed on him, including loss of three steps in grade, deferment for three years of eligibility for consideration for promotion, and a requirement to attend on-site or online interactive training on workplace civility and communication. These sanctions had been imposed for creating a hostile, offensive and humiliating work environment between 2015 and 2018, when Mr. Nkoyock was Officer-in-Charge (OiC) of a department in UNODC.

The UNDT did not hold a hearing, having declined Mr. Nkoyock's request to present evidence and question witnesses about disputed factual issues in the proceedings. The UNDT also refused to allow disclosure to Mr. Nkoyock of several investigation reports about or related to the complaints that had been made against him including complaints that he had retaliated against some of the complainants. Instead, the UNDT relied solely on the comprehensive internal investigation report on the allegations made by the complainants and on the written submissions of the parties made to the UNDT.

The UNDT found that the witnesses' statements established by a preponderance of evidence the facts forming the basis for the disciplinary sanctions; and it had been established on the preponderance of evidence that Mr. Nkoyock had abused his authority and created a hostile, offensive and humiliating work environment. The UNDT further held that the sanction was proportionate and that Mr. Nkoyock's due process rights had been respected. Accordingly, the UNDT granted no remedies in the absence of any illegality and rejected the application entirety.

Mr. Nkoyock appealed.

Legal Principle(s)

Witnesses who are consistent in their own accounts or corroborative of each other are not necessarily also thereby witnesses of truth and independent objectivity.

The OIOS's role is not to determine the truth or otherwise of the allegations against the staff member, irrespective of whether this is to the clear and convincing or to the preponderance (balance of probabilities) evidential standard. The investigator's role is to investigate facts and report to the Organization. The Organization's role is

to determine administratively whether it is satisfied that there was misconduct and, if so, the consequence of that. The UNDT's role is to consider judicially an appeal against the Organization's decision.

The UNDT's statutory role is not limited to a judicial review of the internal investigative process and report, or of the decision of the Organization to impose sanctions for misconduct by a staff member. The UNDT's statutory role is to hear, consider and decide an appeal brought against the Organization's decisions in relation to the staff member.

To decide a case on evidence that is known to one party and to the Dispute Tribunal but is kept from the other party is antithetical to an independent and neutral Dispute Tribunal. It is a fundamental principle of fairness that parties to litigation are entitled to know the cases against them and thereby have an opportunity to accept or contradict these including by calling impeaching evidence, by cross-examination, and by submissions made to the tribunal.

Bias in law is not just blatant prejudice against someone or predetermination of an issue, but perhaps, more commonly, the perception of potential bias, the inappropriate participation of someone in a process that may affect adversely the rights of others.

Outcome

Appeal granted

Outcome Extra Text

The appeal is granted, the impugned decisions are rescinded and Judgment UNDT/2022/115 is reversed. The emoluments removed from Mr. Nkoyock's salary from 25 September 2020 until the date of his separation from service, reflecting the difference between P-5 Step 1 and Step 4, are to be paid to him, with interest at the US prime rate.

Interest is to be calculated at the US Prime Rate applicable at the due date of the entitlement (i.e. the payday of each month during the period in question, from 25 September 2020 until the date of his separation from service) to the date of payment. The Judgment shall be executed within 60 days of the date the Judgment

is issued to the parties. If this Judgment is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

Full judgment

[Full judgment](#)

Applicants/Appellants

Moïse Alain Nkoyock (Fils)

Entity

UNOV/UNODC

Case Number(s)

2022-1767

Tribunal

UNAT

Registry

New York

Date of Judgement

13 Dec 2023

President Judge

Judge Colgan

Judge Forbang

Judge Savage

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Burden of proof

Disciplinary

Compensation

Pecuniary (material) damages

Disciplinary matters / misconduct

Abuse of authority

Disciplinary measure or sanction

Due process

Evidence

Admissibility

Credibility assessment

Production of evidence

Investigation

Due process

Procedure (first instance and UNAT)

Production of documents

Remedies

Compensation (see also, Compensation)

Rescission

Standard of review (judicial)

Disciplinary cases

Applicable Law

Secretary-General's bulletins

- SGB/2008/5

UNAT Statute

- Article 9.1
- Article 9.2

Related Judgments and Orders

2021-UNAT-1077