

UNDT/2023/140, Maruschak

UNAT Held or UNDT Pronouncements

After consulting the Staff Regulations and Rules and the Respondent's submissions, the Tribunal has found nothing to contradict the Applicant that the breathalyzer test was conducted illegally.

The Tribunal will not accept evidence obtained in violation of the Staff Regulations and Rules.

The Tribunal finds that the Respondent has failed to discharge his burden of proof to show by clear and convincing evidence that the Applicant drove his vehicle after consuming alcohol.

The evidence is clear that the Respondent's argument that a Military Officer was authorized to conduct a breathalyzer test on the Applicant is not correct. The Respondent violated paragraph 9(b) of UNIFIL AI/2011/007.

The Tribunal finds that the documents were false. In so finding, the Tribunal does not agree with the Respondent that fraud was committed. A finding of fraud requires 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.

The various documents pulled from the internet, excerpts from files and email correspondence without witnesses to attest under oath as to their accuracy or veracity may not be deemed clear and convincing evidence substantiating an allegation of fraud. It is, however, sufficient to prove a case of abuse of process.

Decision Contested or Judgment/Order Appealed

The Applicant is challenging his separation from service for misconduct, with compensation in lieu of notice and without termination indemnity.

Legal Principle(s)

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.

The Respondent must prove by clear and convincing evidence that the facts on which the sanction was based are established, that the facts constitute misconduct, that the Applicant's due process rights were respected and that the sanction is proportionate.

The UNDT must consider the evidence adduced and the procedures utilized during the investigation by the Administration.

The UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud has been established in accordance with the standard of clear and convincing evidence.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The application partially succeeds in so far as the facts on which the contested decision was based were not established under the applicable standard but rescission of the contested decision was declined because of the Applicant's manifest abuse of proceedings.

The Tribunal awards USD500 costs against the Applicant for manifest abuse of proceedings.

Full judgment

[Full judgment](#)

Applicants/Appellants

Maruschak

Entity

UNIFIL

Case Number(s)

- UNDT/NBI/2019/86

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

20 Dec 2023

Duty Judge

Judge Sikwese

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Manifest abuse

Disciplinary measure or sanction

Dismissal/separation

Facts (establishment of) / evidence

Admissibility

Rescission

Abuse of process before UNDT/UNAT

Disciplinary matters / misconduct

Evidence

Remedies

Applicable Law

Staff Regulations

- Regulation 1.2(f)
- Regulation 1.2(q)

Staff Rules

- Rule 1.7

TANU Statut du Tribunal

- Article 10.5(a)

UNAT Statute

- Article 10.6

Related Judgments and Orders

2020-UNAT-982

2023-UNAT-1377

2019-UNAT-955

2020-UNAT-1060

2020-UNAT-1014

2020-UNAT-1070

2012-UNAT-274

2010-UNAT-024

2022-UNAT-1239