

# UNDT/2024/064, Tomeci

## UNAT Held or UNDT Pronouncements

The Tribunal held that:

- a. The Applicant's continued violations over a year and one-half, despite a prior reprimand, numerous warnings, a clear directive, and a new investigation, clearly showed that he willfully disregarded the applicable rules prohibiting his wife from living with him in a non-family duty station.
- b. By the preponderance of the evidence, the Tribunal was persuaded that the Applicant threatened another staff member, as was found by the Organization.
- c. The Applicant's threats and repeated violation of the housing rules amounted to serious misconduct.
- d. The record was clear that the Applicant was not deterred by the rules, a prior reprimand, and clear direction of the DMS on the subject. He simply was determined to have his wife live with him in the non-family compound. In the face of such wilful refusal, along with the serious nature of threats by a staff member whose job entailed access to weapons, the sanction of termination was appropriate and proportionate.
- e. The Applicant had cited no authority for applying the *ne bis in idem* doctrine in the present context, nor was the Tribunal aware of any case in which it was applied in the modern United Nations Internal Justice System. Even if it were to be applied the *ne bis in idem* doctrine would not preclude the Organization from bringing any of the allegations in this case. There was no *idem* or same circumstances in this case because the historical facts giving rise to the two cases covered different time periods.

## Decision Contested or Judgment/Order Appealed

The Applicant challenged the 30 June 2023 decision to impose upon him the disciplinary measure of separation from service with compensation in lieu of notice for serious misconduct.

## Legal Principle(s)

In reviewing disciplinary cases: the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General". In this regard, the Tribunal is not conducting a merit-based review, but a judicial review. A judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

In disciplinary cases when termination is a possible outcome, the evidentiary standard is that the Administration must establish the alleged misconduct by clear and convincing evidence, which "means that the truth of the facts asserted is highly probable.

Clear and convincing evidence can either be direct evidence of events or may be of evidential inferences that can be properly drawn from other direct evidence.

## Outcome

Dismissed on merits

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Tomeci

## Entity

UNMISS

## Case Number(s)

UNDT/NBI/2023/066

## Tribunal

UNDT

## Registry

Nairobi

## Date of Judgement

25 Sep 2024

## Duty Judge

Judge Wallace

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Disciplinary measure or sanction

Disciplinary matters/ misconduct

Disciplinary matters / misconduct

## Applicable Law

Administrative Instructions

- ST/AI/2016/6
- ST/AI/2018/10
- UNMISS AI No. 005/2011

Information Circulars

- ST/IC/2020/9

Laws of other entities (rules, regulations etc.)

UNDT Statute

- Article 9.4

## Related Judgments and Orders

2023-UNAT-1370

2015-UNAT-550

2020-UNAT-1024

2010-UNAT-084

2020-UNAT-1033

2023-UNAT-1340

2021-UNAT-1171

2018-UNAT-859

UNDT/2017/025