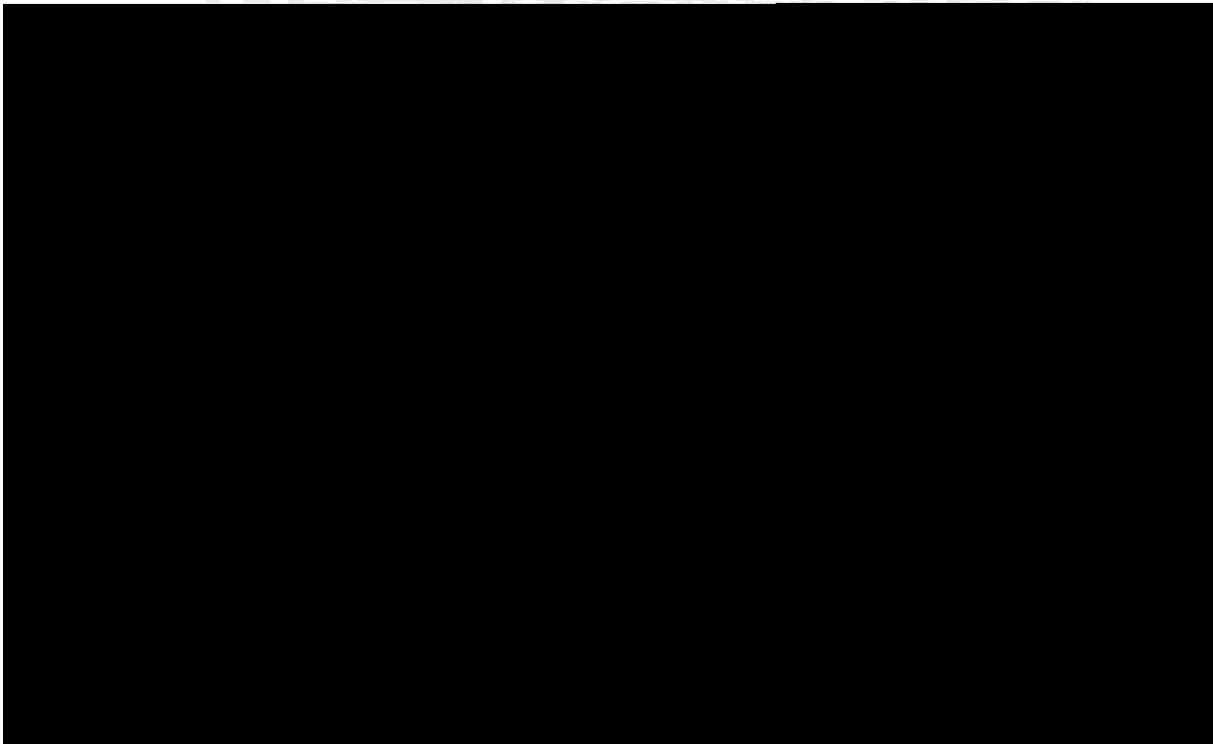


Judgment No. 2016-UNAT-700



JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/057, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 10 May 2016, in the case of *Negussie v. Secretary-General of the United Nations*. Mr. Sisay Negussie filed the appeal on 16 May 2016, and the Secretary-General filed an answer on 15 July 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant was employed by the World Food Programme (WFP)

... The Applicant responded to the charges in a long and detailed response. According to the decision to separate him from service, his response was sent by an email dated 25 September 2014. In his narrative he explained all the facts leading to the incident and the bottom line of his long discourse is that he denied the act of misconduct.

(ii) “obvious discrepancies” in the evidence; and, (iii) “why a finding of a biased investigation did not in [and] of itself amount to a specific damage to [Mr. Negussie]”.

6. The UNDT must provide a reasoned determination that meets certain core requirements, which have not been met in this case. Although it recounts versions of events, it “fails to assess the weight that should be attached to them” and “nothing in the judgement refers to any of the arguments propounded by [Mr. Negussie] [n]or examines why a particular version of events is believed” nor addresses discrepancies in the case—most notably, regarding how the fight started, the report from Gode Hospital adduced in the hearing and the medical certificate that, taken together, provide sufficient doubt as to the facts. As in *Kadri*,⁵ the omission of adjudging Mr. Negussie’s entire application was a violation of his due process rights and constituted a procedural error affecting the decision of the case.

7. Mr. Negussie grabbed Mr. Mudey’s hand in order to escort him out of the cafeteria. Grabbing the hand “[does] not constitute in [and] of itself sufficiency in seriousness to constitute dismissal” and, thus, “raise[s] the specter of proportionality of [the] sanction”.

8. As the UNDT concluded that the investigation was biased, “then it seems illogical to establish that the facts of the case have been made out on clear and convincing evidence”. Given this finding of bias, “then the witnesses adduced in court and the evidence obtained must also be regarded with at the very least an element of suspicion”.

9. Although Mr. Negussie “claimed specific compensatory award for the manner in which he was separated from service and specifically the lack of a transparent process of investigation”, the UNDT “simply concluded that the lack of due-process had not been canvassed by [him] and therefore no damages [were] warranted”.

10. Mr. Negussie respectfully requests that the impugned Judgment be vacated and “either the full transcript of evidence [be] reassessed by a different judge in first instance or that compensation be awarded as originally claimed”.

⁵ *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512, para. 30.

17. The Secretary-General respectfully requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal in its entirety.

Considerations

Standard of review in disciplinary matters

18. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*⁶ citing *Applicant*⁷ and others:⁸

21. The disciplinary sanction from 27 October 2014 to separate Mr. Negussie from service was based on the charge that Mr. Negussie, on 20 November 2013, (i) initiated a fight with Mr. Mudey without being provoked or attacked and (ii) continued to fight in a manner that caused severe physical injury to Mr. Mudey. It also took account of the aggravating factor that it was the second time that Mr. Negussie had used physical force in the workplace.¹⁰

22. In its Judgment, however, the UNDT solely stated that, by grabbing the hand of Mr. Mudey, Mr. Negussie committed a physical assault, and “accordingly finds that the facts on which the disciplinary measure was based have been established and that the act of misconduct was established by clear and convincing evidence”.¹¹

23. In our view, this reasoning falls far too short. As the disciplinary measure is based on two aspects (that Mr. Negussie initiated the fight and continued to fight in a severe manner) and an aggravating factor (that he had previously committed a physical assault in April 2013), it is the task of the Dispute Tribunal to examine whether there is clear and convincing evidence for all these facts.

24. Above all, the UNDT should have examined and stated in its Judgment whether there was clear and convincing evidence that Mr. Negussie continued to fight in a severe manner thus causing physical injury to Mr. Mudey. In his closing submissions, Mr. Negussie had not only questioned the credibility of the witnesses and referred to inconsistencies in their statements with regard to the fight in the canteen, but also doubted the credibility of the medical certification produced by Mr. Mude

27. We note, however, that we do not think that the procedural issues raised by the UNDT render the sanction unlawful. In our view, Mr. Negussie either received a copy of the investigation report or could have e0eq un

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Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Raikos

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar