



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-862



**Majut
(Respondent/Applicant)**

v.

Secretary-General of the United Nations

Counsel for Mr. Majut:

Monyluak Alor Kuol

Counsel for Secretary-General:

John Stompor

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/100, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 December 2017, in the case of *Majut v.*

13. Mr. Mavanga remembered Mr. Moyo entering Mr. Bariyo's office sweating and agitated, and Mr. Moyo telling Mr. Bariyo that Mr. Majut was following him and Mr. Majut had beaten him up in his office. Mr. Mavanga also remembered Mr. Majut entering Mr. Bariyo's office without first knocking and refusing to leave the office initially after Mr. Bariyo had told him to step outside and wait.

14. Mr. Sadrulola recalled waiting for Mr. Moyo and Mr. Majut outside Mr. Moyo's office. Mr. Moyo returned and told Mr. Sadrulola that Mr. Majut had hit him and his ear was swelling. Mr. Sadrulola noticed some bruises on Mr. Moyo's right ear, which was swelling, and a small cut with some dry blood near his right ear.

15. Mr. Moyo went to the clinic, received treatment and medication and was placed on sick leave for one day. The medical officer on duty issued an undated certificate stating that Mr. Moyo had presented himself to the clinic on 5 November 2014, complaining of pain and swelling behind his right ear. He quoted Mr. Moyo as saying that he had been "punched by a colleague 30 minutes earlier at their office". The medical officer examined Mr. Moyo and found a "small 1 x 2 cm swelling surrounded by scratch marks behind the right ear lobe", but he did not notice any active bleeding.

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than Mr. Majut's as it was supported by statements of the witnesses. The USG/DM rejected Mr. Majut's assertion that Mr. Moyo's injury was self-inflicted. He considered that throughout the investigation and disciplinary process, Mr. Majut had been accorded due process and an opportunity to provide comments, provided with all the documentation on which the allegations of misconduct were based and given an extension of time to submit comments, and he did submit comments. In determining the appropriate sanction, the USG/DM took into account the Secretary-General's past practice in similar cases involving physical assault and the mitigating factors in Mr. Majut's case.

27. A personal security risk assessment dated 9 July 2016 indicated that there existed a real threat in the form of physical harm against Mr. Moyo in any place in Wau, in the wake of Mr. Majut's termination from service. The risk assessor therefore recommended that Mr. Moyo be reassigned to be away from Mr. Majut and his relatives. Mr. Moyo was subsequently relocated to Juba and worked there until the expiration of his contract in December 2016.

28. On 16 August 2016, Mr. Majut appealed the separation decision to the Dispute Tribunal. On 29 December 2017, the Dispute Tribunal issued the impugned Judgment. The UNDT found that there was not clear and convincing eviden

Submissions

The Secretary-General's Appeal

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Mr. Majut's Answer

38. Mr. Majut's answer is directed at the Secretary-General's appeal paragraph by paragraph, either admitting, contesting or denying the Secretary-General's contentions. It may be summarized as follows.

39. Mr. Majut did not attack or threaten Mr. Moyo. He only had an argument with Mr. Moyo related to the latter's refusal to give the former the vehicle key. There was no clear evidence to prove that Mr. Majut had assaulted Mr. Moyo. He did not ask Mr. Loguya to leave Mr. Moyo's office. He did not hit or strike Mr. Moyo with his hand. He did not rush into Mr. Bariyo's office. Both Mr. Loguya and Mr. Bariyo stated that they did not notice any cut, bruise or swelling on Mr. Moyo's right ear.

40. The investigation was not properly conducted, as it speculated on Mr. Majut's character and took statements on past incidents that had not been proven by evidence and had not been reported nor recorded, in a "glaring abuse of discretionary authority". It was conducted in an arbitrary and discriminatory manner, and was also biased as it gave weight to the statements of Mr. Moyo, who had given different versions of the alleged assault.

41. The allegations of misconduct letter already considered Mr. Majut guilty before he had had an opportunity to file his comments thereon.

42. The medical certificate did not indicate the date and time of its issuance to corroborate
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61. Furthermore, the medical certificate evidences that Mr. Moyo attended the clinic on 5 November 2014. The attending doctor, Dr. Ngino Alejok, issued a medical certificate in the following terms:

This is to certify that Mr. Thabani Moyo, UNV ID 00858 presented to this clinic on 05- Nov-14 complaining of pain & swelling behind his right ear.

He also reported that he was punched by a colleague 30 minutes earlier at their office.

I examined him and found a small 1 x 2 cm swelling surrounded by scratch marks behind the right ear lobe.

No active bleeding was seen and all vital sings [sic] are within normal limits.

He has been given the necessary medical care and discharged with 1 day rest.

62. The UNDT erred in finding that there was insufficient corroboration of Mr. Moyo's injury. It appears from the evidence that it was not a serious injury, and probably not very prominent, but Mr. Moyo's statement and his incident report, Mr. Sadrulola's evidence and the treating doctor's report put the question beyond doubt that Mr. Moyo suffered an injury.

63. The UNDT found:¹⁰

The Tribunal considers that there is no reasonable link between the alleged physical assault consisting in either punching or slapping Mr. [Moyo's] face and the existing injury consisting in a swelling surrounded by a scratch behind Mr. [Moyo's] right ear.

64. In coming to this conclusion, the UNDT noted that "the medical document does not have a date and the time of issuance, in order to corroborate Mr. [Moyo's] statement that the injury behind his right ear resulted from an incident which took place thirty minutes before the medical examination".¹¹

65. This is not a reasonable finding on the evidence.

66. Contrary to the UNDT's view, the doctor's report corroborates Mr. Moyo's claim that he had been assaulted and had suffered an

alleged physical assault consisting in either punching or slapping Mr. [Moyo's] face and the existing injury consisting in a swelling surrounded by a scratch behind Mr. [Moyo's] right ear.”

67. There is also the evidence of Mr. Sadrulola, who met Mr. Moyo on his way to the clinic and saw his injury.

68. The UNDT found:¹²

[T]here is no supporting evidence to the factual aspect that Mr. [Moyo] requested help from the UNMISS Security while he was in his office in the morning of 5 November 2014 and was allegedly physically assaulted by [Mr. Majut]. No such message was heard and/or recorded by the Duty Security Officer.

69. This finding is not supported by the evidence.

70. Mr. Butili, a UNMISS staff member working in the radio room, stated that he “was working that morning when [he] heard an emergency broadcast come over the Tetra radio” and that “[he] looked at the radio and saw that it had come from [Mr. Moyo]’s radio”.¹³

71. Mr. Majut himself in his witness statement declared: “Mr. Thabani MOYO started shouting at me and shouting over the radi

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81. The witness, Mr. Loguya, in his statement of 28 July 2015, stated that, although he did not witness any assault, he heard loud voices as he entered Moyo's office as Mr. Moyo and Mr. Majut were arguing over a vehicle key, thus supporting Mr. Moyo's report that Mr. Majut was shouting at him in his office over the vehicle keys.

82. Mr. Butili supported Mr. Moyo's statement that he had engaged the emergency button on his radio at the time of the assault. Mr. Butili, in his witness statement of 28 July 2015, stated that "I was working that morning when I heard an emergency broadcast come over the Tetra radio. I looked at the radio and saw that it had come from Mr. Thabani MOYO's radio."

83. The evidence of Mr. Bariyo and Mr. Mavanga supported Mr. Moyo's statement that he had been chased by Mr. Majut as he went from his office to the Security Section.

84. Mr. Mavanga stated on 13 November 2014 that on 5 November 2014 he was in Mr. Bariyo's office when Mr. Moyo entered looking tired and annoyed. He heard Mr. Moyo telling Mr. Bariyo that he had been beaten by Mr. Majut and saying "look at my right ear, it is swelling and I have a headache, I think I am injured". Suddenly, Mr. Majut entered the office without knocking, "looking very serious, he was sweating and his shirt was very wet. Then Mr. Memory Bariyo requested him to go out, and asked him to knock before getting into the office. At first he refused, Mr. Memory BARIYO incited [sic] for him to go out, he again refused and stood there saying 'I am fo

87. Mr. Sadrulola said, in his statement of 31 July 2015, that

I was informed by [Mr. Loguya] that Thabani and Paul went to the Security Office. [Mr. Loguya] said they were arguing and he left as he did not want to be involved. I was waiting for them outside the office. Thabani informed me that Paul hit him and his ear was swelling. I noticed some bruises on his right ear. I noticed Thabani had a small cut with some dry blood near his right ear. Thabani said he informed Security and was on his way to the Medical Unit for a check-up. I asked Paul what happened. Paul said that Thabani [h]it the emergency button on his radio and Thabani stated "I am under attack". I asked Paul why Thabani would say this. Paul said I don't know. Thabani said that I hit him and that he (Thabani) went to Security.

88. In view of the corroborating evidence, we find that the UNDT erred in fact and law in holding that the absence of the oral testimony by Mr. Moyo diminished the credibility of his incident report and witness statement.

89. In conclusion, we find that the UNDT did not evaluate the evidence objectively. It gave misplaced importance to minor inconsistencies, came to unreasonable conclusions on the facts which were not supported by the evidence, and made speculations instead of findings based on the evidence.

90. The UNDT erred in fact and in law in its finding that the facts of misconduct were not established by clear and convincing evidence. A proper consideration of the whole of the evidence could only have led to one conclusion, and that is that Mr. Majut assaulted Mr. Moyo.

The Dispute Tribunal's finding that the investigation had not been properly conducted and that Mr. Majut's due process rights had not been respected

91. The UNDT noted that an e-mail message sent on 7 November 2014 with the subject "Assault incidents in UNMISS Wau" called a town hall meeting to remind staff of the core values of the Organization and the expected conduct. It listed a number of assault cases, including "Paul [Madut] [sic] of Supply chain assaulted Thambani [sic] Moyo on 05 Nov 2014".

92. The UNDT considered that the e-mail identified “a series of incidents which took place between 5 and 7 November 2014 ... prior to the initiation of the investigation in [Mr. Majut’s] case”.¹⁷ The UNDT also noted that Mr. Moyo, in his incident report, “made reference to these prior incidents between [Mr. Majut] and other staff members, even if he was not involved in these incidents”.¹⁸

93. The UNDT found that¹⁹

[T]hese elements created a perception among UNMISS staff members that [Mr. Majut] was and continued to be a serious threat to other staff members. Therefore, the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident that happened between Mr. [Moyo] and [Mr. Majut], which consisted only in physical assault.

94. This finding is purely speculative.

95. Regarding the e-mail message of 7 November 2014, its purpose was to call a town hall meeting. There was no evidence that it was sent to any staff member in the SIU conducting the investigation. Further, there was no evidence that it had created “a perception among UNMISS staff members that [Mr. Majut] was and continued to be a serious threat to other staff members” or that “the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident [...]”.

96. The UNDT found that although from the beginning of Mr. Majut’s interview he was informed that the investigation was concerned with the incident on 5 November 2014 in which Mr. Moyo was assaulted, the findings and conclusions in the investigation report of 17 December 2014 indicate that the investigation was conducted also in relation to incidents prior to the one on 5 November 2014 “without [Mr. Majut] being informed or interviewed regarding this event”.²⁰ The UNDT noted that the first paragraph of the incident report refers to incidents which were investigated “via email after the parties and witnesses were already interviewed in relation to the incident from 5 November 2014”.²¹

¹⁷ Impugned Judgment, para. 61(b).

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 61(c).

²⁰ *Ibid.*, para. 61(e).

²¹ *Ibid.*

97. The UNDT's finding that "the investigation was conducted also in relation with incidents prior to the one alleged to have occurred on 5 November 2014, without [Mr. Majut] being informed or interviewed regarding this event" is not borne out by the facts. The investigation was clearly focused on Mr. Moyo's reported assault. The e-mail messages from other staff members were considered in that context. Mr. Ma 1.7322(AT)5.o545.5(N)23.2giis o5452(ac)-5

107. This finding is purely speculative and is arrived at after an incorrect interpretation of the allegations of misconduct memorandum.

108. The ASG/OHRM stated in the memorandum that “it has been decided to issue these formal *allegations* of misconduct against you. ... *If established, your conduct would constitute* a violation of Staff Regulation 1.2(a), Staff Regulation 1.2(f) and Staff Rule 1.2(f).”²⁶

109. It is clear from the language of the document that the ASG/OHRM did not consider Mr. Majut guilty and was giving him the opportunity to present his case.

110. Staff Rule 10.3, which deals with due process in the disciplinary process, provides:

- (a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

111. We find that there is no evidence that Mr. Majut’s due process rights were infringed in any way. The requirements of Staff Rule 10.3(a) were complied with, as he was fully informed of the charges against him and was able to mount a defence in which he was given ample opportunities to make his case. He was able to present his version of the events and was given, and availed himself of, the opportunity to challenge the allegations against him.

112. We find that the UNDT erred in law and in fact, resulting in a manifestly unreasonable decision, when it determined that the investigation had not been properly conducted and that Mr. Majut’s due process rights had not been respected.

²⁶ Emphases added.

The Dispute Tribunal's holding that "the contested disciplinary decision to separate [Mr. Majut] from the Organization ... is unlawful for both procedural and substantive reasons"

113. Staff Regulation 1.2(b) provides:

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

114. Staff Rule 1.2(f) provides:

Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

115. Staff Rule 10.1 provides in part:

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

116. Mr. Majut's assault on Mr. Moyo amounts to misconduct in that he has violated his obligations under the above provisions.

117. Moreover, the facts of the assault have been proven by clear and convincing evidence, and there were no procedural irregularities.

118. We therefore find that the UNDT erred in law in finding that the decision to separate Mr. Majut from the Organization was unlawful.

Proportionality

119. Staff Rule 10.3(b) provides:

Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

120. In considering an appropriate sanction, the USG/DM took into account the Secretary-General's past practice in similar cases involving physical assault, which normally attracted sanctions at the stricter end of the spectrum. The USG/DM also took into account as mitigating factors Mr. Majut's service of over 10 years with positive performance evaluations and his claimed personal frustration and stress.

121. The Secretary-General has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. We find that the sanction imposed in this case for assaulting a fellow staff member falls well within that discretion and was not disproportionate to the misconduct.

122. It follows, from our findings, that the Judgment of the UNDT cannot be allowed to stand.

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