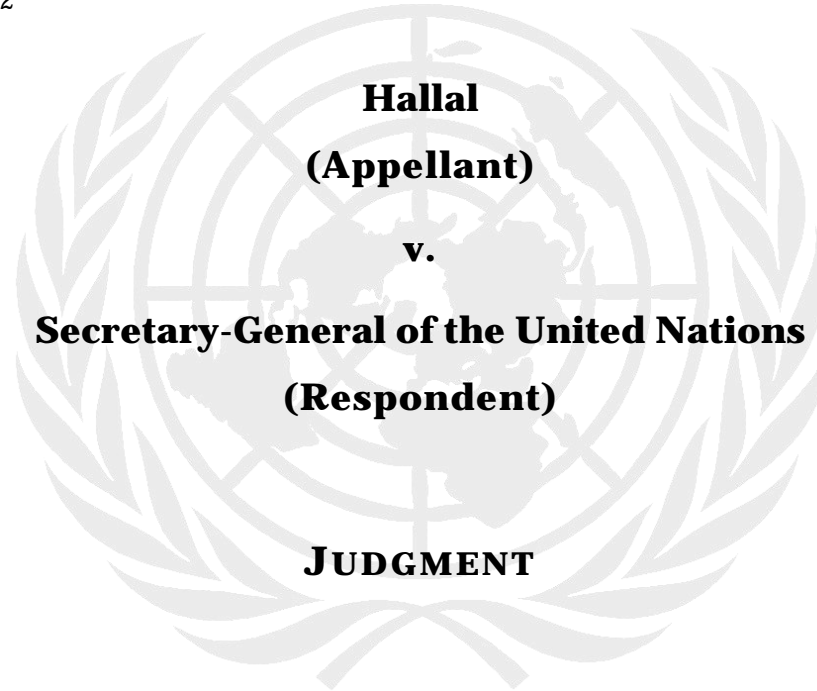




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-212



Before:	Judge Sophia Adinyira, Presiding Judge Jean Courtial Judge Mary Faherty
Judgment No.:	2012-UNAT-207
Date:	16 March 2012
Registrar:	Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Amy Wood

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Mr. Kazeem Hallal against Judgment No. UNDT/2011/046 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 9 March 2011 in the case of *Hallal v. Secretary-General of the United Nations*.

2. Mr. Hallal challenges the UNDT Judgment which rejected his request to overturn his separation on grounds of misconduct and complains of the fact that the UNDT committed procedural errors in allowing the Secretary-General to embark on a de novo fact-finding inquiry while also failing to exercise its jurisdiction and erring on questions of fact.

3. The Appeals Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected. Furthermore, in disciplinary matters, the Administration bears the burden of establishing that the alleged misconduct that resulted in the disciplinary measure against a staff member occurred.

4. “When reviewing a sanction imposed by the Administration, the Tribunal will examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.¹ To that end, under Articles 16 and 18 of the UNDT Rules of Procedure it is within the UNDT’s competence to hold oral hearings as well as to order the production of relevant evidence.

5. We affirm the UNDT Judgment.

Facts and Procedure

6. Mr. Hallal joined the United Nations in 1995. After having served with several entities within the United Nations Organization, Mr. Hallal joined the United Nations Children’s Fund (UNICEF) in April 2007 as a Construction Project Officer in Banda Aceh,

¹ *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

Indonesia in April 2007. Mr. Hallal remained with UNICEF until his separation from service without notice on 26 June 2008.

7. On 9 October 2007, Mr. Hallal and a female United Nations Volunteer (UNV) with the Site Monitoring Unit visited several UNICEF project sites. According to a complaint letter filed by the UNV, Mr. Hallal, while on one of the project sites, “wrapped his arms, crossed on [her] shoulder, reached [for her] breasts and pressed/grip[ped] them”. As a result of Mr. Hallal’s actions, the UNV told him “No, No, No” though she did not immediately confront Mr. Hallal. Upon returning home that evening, the UNV, using notes that she had drafted following the incident, sent Mr. Hallal an e-mail entitled “Sexual Harassment” in which she formally documented the incident that had occurred between them.

8. On 10 October 2007, Mr. Hallal responded to the UNV’s e-mail and stated that “[he was] very sorry. I did not mean what you have mentioned, let’s discuss.” Following this initial e-mail, Mr. Hallal then called the UNV and they agreed to meet to discuss the incident. While the parties provided differing accounts on the discussions that transpired during the meeting, it appears that they at least agreed on the fact that this matter should be handled privately. Nevertheless, on 11 October 2007, Mr. Hallal forwarded the e-mail exchanges to both the Chief of the Field Office and the Operations Manager for UNICEF in Banda Aceh. Seeing that he was not in Banda Aceh at the time, the Chief of the Field Office forwarded the e-mails to the Planning Officer, UNICEF, Banda Aceh and requested that she meet with Mr. Hallal and the UNV.

9. On 22 October 2007, a preliminary investigation panel met with Mr. Hallal and the UNV and on 13 November 2007, the UNV submitted a formal written complaint of sexual harassment against Mr. Hallal to the Human Resources Officer. On 7 December 2007, Mr. Hallal responded to the UNV’s written complaint.

10. On 14 January 2008, the Director, Division of Human Resources, UNICEF, New York, issued Terms of Reference mandating the Chief of Operations, UNICEF and the Human Resources Specialist, UNICEF to conduct an investigation into the UNV’s claims. On 6 February 2008, the formal investigation team issued its report in which it found that Mr. Hallal had “sexually harassed the [UNV]”.

11. On 5 March 2008, the Director of the Division of Human Resources charged Mr. Hallal with misconduct. On 5 May 2008, Mr. Hallal was informed that in accordance with UNICEF's Human Resources Policy, his case would be referred to the ad hoc Joint Disciplinary Committee (JDC).

12. On 26 June 2008, the Executive Director, UNICEF informed Mr. Hallal that she had decided to accept the 24 June 2008 recommendation of the JDC that Mr. Hallal be separated from service without notice.

13. On 28 August 2008, Mr. Hallal appealed the decision to separate him from service without notice to the former United Nations Administrative Tribunal. Following its abolition, the case was transferred to the UNDT effective 1 January 2010.

14. On 9 March 2011, the UNDT issued Judgment No. UNDT/2011/046 in which it rejected Mr. Hallal's claims that the disciplinary measure was not proportionate to the misconduct and that his due process rights were not respected.

Submissions

Mr. Hallal's Appeal

15. Mr. Hallal submits that the UNDT erred in substituting itself for an appellate authority following the referral of the case from the former Administrative Tribunal. Mr. Hallal contends that the UNDT allowed the Secretary-General to "embark on a de novo fact finding inquiry" which equated to a reopening of the disciplinary case against him.

16. Mr. Hallal submits that the Dispute Tribunal erred in not addressing the violation of his due process right during the investigation of the UNV's complaint which resulted in the JDC issuing a "disciplinary decision that was not based on clear and convincing evidence".

17. Mr. Hallal submits that the Dispute Tribunal erred in its interpretation of the facts and, more specifically, in stating that the UNV's statements were more credible or undisputed than his own. Mr. Hallal contends that as a result of the various inconsistent statements, as well as the evidence presented, "he should receive the benefit of the doubt and that separation from service was in any case a disproportionate penalty".

18. Mr. Hallal requests that the Appeals Tribunal rescind the Dispute Tribunal's Judgment, reinstate his service and award him compensation for moral damages.

Secretary-General's Answer

19. The Secretary-General submits that the UNDT did not err when applying the standard of review with regard to disciplinary cases. Furthermore, the Secretary-General contends that Mr. Hallal's submission does not establish that the UNDT committed any procedural errors.

20. The Secretary-General submits that the Dispute Tribunal followed clear standards of review with regard to Mr. Hallal's disciplinary proceedings when the Dispute Tribunal referred to *Abu Hamda* by considering that "it was required to consider four factors, namely: (i) whether the facts on which the disciplinary measure was based had been established; (ii) whether the established facts legally amount to misconduct; (iii) whether the disciplinary measure taken was a valid exercise of the Administration's discretion and the Appellant was afforded due process; and (iv) whether the disciplinary measure imposed was proportionate to the misconduct."

21. The Secretary-General submits that the Dispute Tribunal did not err in examining the evidence before it as this case had not previously been heard by the former Administrative Tribunal and it was therefore "incumbent upon the Dispute Tribunal to examine the evidence and review the conclusions reached by the Administration to determine whether the impugned decision was properly taken".

22. The Secretary-General submits that seeing that there is a presumption that official acts have been regularly performed, simply stating that the "initial investigation was neither thorough nor balanced" is not sufficient to show that the Dispute Tribunal erred in its interpretation of the facts. Furthermore, "a degree of deference must be given to the factual findings by the Dispute Tribunal". Consequently, the Secretary-General submits that the Dispute Tribunal correctly concluded that the evidence submitted by Mr. Hallal was not sufficient to rebut the evidence that he had engaged in misconduct.

23. The Secretary-General submits that Mr. Hallal has not identified any facts that would indicate that the Dispute Tribunal erred in its review of the disciplinary process that was

followed by UNICEF and in its finding that the process “had been [in] full compliance with the applicable investigation and disciplinary procedures”.

24. The Secretary-General requests that the Appeals Tribunal reject Mr. Hallal’s appeal in its entirety and affirm Judgment No. UNDT/2011/046.

Considerations

25. Mr. Hallal submits that the UNDT committed procedural errors in conducting a new investigation of the facts and in allowing the Secretary-General to embark on a *de novo* fact-finding inquiry. Mr. Hallal further submits that the disciplinary measure of separation without notice was disproportionate.

26. We find no merit in these allegations as it is within the competence of the UNDT under Articles 16 and 18 of its Rules of Procedure to hold oral hearings as well as to order the production of evidence “for a fair and expeditious disposal of the proceedings”.

27. The Appeals Tribunal has held that in exercising judicial review in disciplinary cases, the UNDT has to examine “(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the [...] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence”.² It was therefore the task of the UNDT to determine whether a proper investigation into the allegations held against Mr. Hallal had been conducted.

28. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected. “Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”³

29. The UNDT heard and considered the evidence of the UNV, Mr. Hallal, a member of the formal investigation team, and a member of the JDC. The UNDT also had before it the entire case file, including annexes and exhibits received as part of the substantive hearing.

² *Abu Hamda v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-022.

³ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

Based upon the totality of the evidence before it, the UNDT concluded that the facts on which the disciplinary measure was based had been established.

30. Mr. Hallal submits that the UNDT erred in the interpretation of the facts in stating that the UNV's statements were more credible than his own. In this instance, Mr. Hallal failed to present any evidence that contradicted the UNV's evidence or that showed that it was unreasonable to accept her evidence in light of other evidence. The Appeals Tribunal finds that Mr. Hallal merely repeats arguments already thoroughly considered and rejected by the UNDT. Furthermore, Mr. Hallal does not identify any mitigating factors that would enable this Tribunal to conclude that the summary dismissal was disproportionate to the offence.

31. The Tribunal therefore finds that the UNDT was correct in its application of the standard of review, was correct in concluding that the facts on which the disciplinary measure was based had been established, and was correct in not finding any reasons to overturn the sanction.

Judgment

32. The appeal is dismissed. The UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Faherty

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar