UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-407

Toukolon

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Rosalyn Chapman
Case No.:	2013-457
Date:	2 April 2014
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Alexandre Tavadian
Counsel for Appellant/Respondent:	Amy Wood

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/012, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 29 January 2013, in the case of *Toukolon v. Secretary-General of the United Nations*. The Secretary-General appealed on 1 April 2013, and Mr. Albert Toukolon answered on 23 May 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:[1]

> ... The Applicant was a staff member with the United Nations Mission in Sudan (UNMIS) holding a fixed-term appointment as a Disarmament, Demobilization and Reintegration Officer at the P-3 level.
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> ... On 6 July 2011, the Applicant was separated from service for having assaulted one Ms. ... Oduke ..., verbally abusing a Security Officer with UNMIS and engaging in aggressive and uncooperative behaviour towards him. The Applicant contests the disciplinary measure imposed on him and requests to be reinstated and compensated.
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> ...
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> **Facts**
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> ... The Applicant was employed by UNMIS from 3 January 2009 as a P-2 Associate Disarmament, Demobilization and Reintegration (DDR) Officer. He was promoted to P-3 level in August 2011.
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> ... On 4 June 2010, the Applicant while under the influence of alcohol became involved in an altercation with a female friend of his, Ms. Oduke, during a 'happy hour' event at the UNMIS Log Base where he and other UNMIS staff members resided. During the encounter, the Applicant slapped Ms. Oduke. He was accosted by a Security Officer, Mr. Prasanna Perera, and used abusive language in the course of the ensuing struggle between the two of them. Ultimately, the incident ended when Mr. Gordon Benn, the Field Security Coordination Officer (FSCO), was called from his container and ordered the Applicant to return to his accommodation.
>
> ... The following morning, the Applicant apologised to Ms. Oduke and all those involved in the incident, blaming his drunken state for his shameful conduct.

[1] The following text is taken from Judgment No. UNDT/2013/012, paras. 1-14

... An investigation was carried out into the incident by the Special Investigations Unit of UNMIS. On 29 November 2010, the Applicant received a memorandum, dated 3 August 2010, from Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) charging him with misconduct and inviting him to provide comments.

... The charge against the Applicant was brought pursuant to provisional staff rules 10.1(a) and 10.3(a) and paragraph 5 of ST/AI/371, (Revised disciplinary measures and procedures) for the assault of Ms. Oduke and for verbally abusing a UNMIS Security Officer and engaging in uncooperative behaviour towards him. The Applicant was additionally charged with violating staff regulations 1.2(e) and (f).

... The Applicant responded with his comments and apologies over the incident by an email dated 8 December 2010. On 6 July 2011, he received a letter dated 23 June 2011 from Ms. Martha Helena Lopez, Officer in Charge, OHRM, advising him that there was sufficient and credible evidence that he committed serious misconduct and that there were no mitigating factors present. The letter further advised that the Under-Secretary-General for Management was imposing the disciplinary measure of separation from service without [(*sic*)] compensation in lieu of notice and termination indemnity. Finally, the letter stated that the disciplinary measure was proportionate to the gravity of the offence.

...

... In his Application to the [Dispute] Tribunal dated 26 September 2011, the Applicant challenged the proportionality of the disciplinary measure and prayed for reinstatement and compensation.

...

... On 21 May 2012, the matter was heard. During the hearing, the [UNDT] received evidence from the following witnesses:

a. The Applicant;

b. Ms. Oduke; and

c. Mr. Perera.

... Ms. Oduke's testimony is summarized below:

a. The Applicant slapped her three times causing her to fall.

b. The whole incident lasted about one hour.

c. The Applicant continuously attempted to try and assault her after Mr. Perera's intervention.

... Mr. Perera's testimony is summarized below:

a. The Applicant slapped Ms. Oduke and he intervened immediately to prevent any repeat, whereupon the Applicant became verbally abusive.

b. He did not see Ms. Oduke fall.

c. The incident may have lasted less than seven minutes before he went to get Mr. Benn.

3. The Dispute Tribunal, albeit "condemning in the strongest terms the Applicant's physical assault of Ms. Oduke", disagreed with the Administration that it constituted misconduct, finding that "the jurisdictional competence [of the Organization] does not extend to the physical assault of a non-UN staff member by a staff member" and that the Organization was not "discredited in any real or quantifiable way".

4. Relying on paragraphs 9 and 10 of General Assembly Resolution 64/110 (Criminal accountability of United Nations officials and experts on mission) of 15 January 2010, the UNDT opined that the appropriate course of action would have been for the Organization to "advise ... or even assist ... Ms. Oduke to file charges against the Applicant for assault in the appropriate local court, the Administration, *inter alia*, having complied with its rules on waiver of privileges and immunities". Thereafter, "[t]he conclusions of the local courts could then have formed the basis for any subsequent administrative action against the Applicant". In addition, the UNDT condemned the UNMIS Conduct and Discipline Unit for characterising Mr. Toukolon's conduct as a violation of section 142(1) of the Sudan Criminal Act, in the absence of Sudanese legal proceedings.

5. Insofar as the charge of verbally abusing and engaging in aggressive and uncooperative behaviour directed at Mr. Perera was concerned, the Dispute Tribunal found that the established facts amounted to misconduct as defined in ST/AI/371, but that the sanction imposed was disproportionate to this established charge in terms of the more lenient sanctions typically imposed and given the mitigating factors of Mr. Toukolon's drunkenness, his remorse and apologies, and the fact that Ms. Oduke was at the Base after curfew. Accordingly, the UNDT rescinded his separation from service with compensation in lieu of notice and with termination indemnity and ordered that he be paid his salaries and entitlements from 6 July 2011 until the date of the closure of UNMIS.

Submissions

The Secretary-General's Appeal

6. The Secretary-General submits that the UNDT erred in finding the impugned decision unlawful, in view of its understanding of the jurisdictional competence of the Organization. The Secretary-General recalls, *inter alia*, that United Nations staff members are required to "uphold the highest standard of efficiency, competence and integrity", pursuant to staff regulation 1.2, and "to observe the standard of conduct expected of an international civil servant" (staff rule 10.1), which requirements are not limited to actions vis-à-vis other staff members.

7. The Secretary-General contends that his decision and the imposition of the impugned sanction were proper and in line with the Organization's internal legislation as well as the jurisprudence of the Appeals Tribunal, which has upheld disciplinary action taken against staff members for their behavior towards non-staff members. He argues that the UNDT erred in concluding that the Organization's only recourse was to refer the matter to the Sudanese authorities.

8. Accordingly, the Secretary-General submits that the UNDT erred in law in concluding that Mr. Toukolon's actions did not amount to misconduct and, invoking the General Assembly's actions with respect to the elimination of violence against women, expresses that "it would be untenable for the Organization to allow UN staff members to commit assaults against women without risk of disciplinary action on the grounds, as suggested by the UNDT, that the victims of such assaults were not UN staff members".

9. In view of these submissions, the Secretary-General argues that the UNDT erred in law in concluding that the sanction imposed was disproportionate.

10. The Secretary-General requests the Appeals Tribunal to vacate the UNDT Judgment and uphold the Administration's original decision to separate Mr. Toukolon from service, which decision was taken in view of the established, and admitted, facts and which was a proper exercise of the Secretary-General's discretion in disciplinary matters.

Mr. Toukolon's Answer

11. Mr. Toukolon submits that, whilst his conduct was "deplorable", his dismissal was unduly harsh and the Dispute Tribunal correctly determined that it was disproportionate. He draws to the attention of the Tribunal the fact that, even in cases of assault, the typical sanction is censure, loss of steps and deferment of within-grade increment, and/or demotion.

12. He argues that the Secretary-General erred in comparing his actions to sexual misconduct and in citing such cases in support of the proportionality of the impugned sanction in his case. He recalls that, pursuant to staff rule 10.1(b), sexual misconduct is automatically considered as serious misconduct.

13. Mr. Toukolon notes that, in addition to the multiple mitigating circumstances outlined by the UNDT, there was also provocation on the part of Ms. Oduke and he was unused to alcohol or its effects. He contends that the Secretary-General erred in not properly considering mitigation.

Considerations

14. In his case before the UNDT, Mr. Toukolon did not deny the facts, nor did he argue that his actions did not amount to misconduct. His sole contention was that the sanction imposed was disproportionate to the nature and gravity of the misconduct.

15. Nonetheless, the UNDT concluded, on reasoning which is unsupported in law or by the facts, that the assault committed by Mr. Toukolon was not misconduct, finding "[t]he Organization's jurisdictional competence does not extend to the physical assault of a non-UN staff member even where the assault is perpetrated by a staff member".

16. Not only was this issue not raised in the case presented to the UNDT by Mr. Toukolon, but such a proposition has no foundation in the staff regulations, staff rules, administrative instructions or jurisprudence. Nowhere in the written law of the Organization is misconduct defined solely in terms of acts committed by staff members against other staff members, and nor could such a proposition be countenanced, for the reasons set forth below.

17. The UNDT went on to decide that, pursuant to paragraphs 9 and 10 of General Assembly Resolution 64/110, the proper procedure would have been for the Organization to advise or assist Ms. Oduke to bring charges for assault against Mr. Toukolon in the appropriate local court. Thereafter, "[t]he conclusions of the local courts could then have formed the basis for any subsequent administrative action against [him]".

18. Paragraph 9 of General Assembly Resolution 64/110 requests the Secretary-General:

> ... to bring credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission to the attention of the States against whose nationals such allegations are made and to request from those States an indication of the status of their efforts to investigate and, as appropriate, prosecute crimes of a serious nature, as well as the types of appropriate assistance that States may wish to receive from the Secretariat for the purposes of such investigations and prosecutions;

Similarly, paragraph 10 requests the Organization,

> when its investigations into allegations suggest that crimes of a serious nature may have been committed by United Nations officials or experts on mission, to consider any appropriate measures that may facilitate the possible use of information and material for purposes of criminal proceedings initiated by States, bearing in mind due process considerations.

19. The goal of the Resolution, as set out in its preamble, is "to ensure that the original intent of the Charter of the United Nations can be achieved, namely that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized without due process". It is clear that the General Assembly will not tolerate the immunity of the United Nations being used as a shield permitting the criminal behaviour of staff members and experts on mission from being properly prosecuted. Indeed, the preamble of A/RES/64/110 continues to state that the General Assembly is "[d]eeply concerned by reports of criminal conduct, and conscious that such conduct, if not investigated and, as appropriate, prosecuted, would create the negative impression that United Nations officials and experts on mission operate with impunity".

20. However, it would be illogical for the Resolution to be construed as exempting officials and experts on mission from consequences imposed *within* the Organization. Neither paragraph 9 or 10, nor any other provision, creates a right for staff members accused of misconduct which may rise to domestic criminal behaviour to be shielded from internal action and nor does the Resolution require the Organization to predicate its administrative or disciplinary proceedings on the outcome of domestic criminal proceedings.

21. It is, thus, obvious that there is nothing in A/RES/64/110 which could possibly prevent the Organization from taking disciplinary measures against a staff member who fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant.

22. Taking the UNDT's rationale to its ultimate conclusion, it could mean that a staff member suspected of committing a serious felony against a non-staff member could not be disciplined by the Organization until such time as the case had been dealt with by the national justice system, a process which might take years or be stalled or abandoned for reasons quite apart from the culpability of the accused staff member. In the meantime, the Organization would be obliged to keep the suspected offender among its staff.

23. Contrary to the UNDT's reasoning, the United Nations, like intergovernmental organizations world-wide, is empowered by its written law to take disciplinary measures against its staff members in cases of misconduct, irrespective of whether the misconduct is referred to a local court or the accused person is convicted in such proceedings. Indeed, the Appeals Tribunal has already held as such in *Abu Ghali*,

> Misconduct based on underlying criminal acts does not depend upon the staff member being convicted of a crime in a national court. As the former United Nations Administrative Tribunal concluded, 'different onuses and burdens of proof would arise in the ... domestic criminal proceedings than would arise under an investigation for misconduct under the [Agency's] appropriate Regulations and Rules'.[2] Thus, UNRWA could properly determine that Mr. Abu Ghali's actions constituted misconduct despite his acquittal of the criminal charges brought against him.[3]

[2] Former United Nations Administrative Tribunal Judgment No. 951, *Al Khatib* (2000), para. IV.
[3] *Abu Ghali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-366, para. 43.

24. For the aforesaid reasons, we find that the UNDT erred in law in deciding that the assault committed by Mr. Toukolon did not amount to misconduct as the Organization lacked jurisdictional competence.

25. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant v. Secretary-General of the United Nations*:[4]

> Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.[5] In this context, the UNDT is 'to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence'.[6] And, of course, 'the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred'.[7] '[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence', which 'means that the truth of the facts asserted is highly probable'.[8]

26. We have already explained how the UNDT erred with respect to the facts and evidence adduced.

27. On the issue of proportionality, the only misconduct taken into account by the UNDT was Mr. Toukolon's verbal abuse and engaging in aggressive and uncooperative behavior directed at Mr. Perera. It held that these actions could not justify the impugned sanction. It appears, however, that the UNDT was under a misapprehension as to the disciplinary measure imposed. We note from paragraphs 9 and 51(g) of the UNDT Judgment that the UNDT mistakenly treated the sanction as being "separation from service without compensation in lieu of notice and termination indemnity", whereas the actual sanction imposed was: "separation from service *with* compensation in lieu of notice and *with* termination indemnity" (emphasis added). Possibly this misapprehension may have had

[4] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29
[5] *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.
[6] *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.
[7] *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.
[8] *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

some bearing on the UNDT's consideration of the question of proportionality. In any event, the UNDT's decision in this regard was affected by its erroneous finding that Mr. Toukolon's misconduct did not include his assault on Ms. Oduke. As the Appeals Tribunal finds that the assault was properly within the jurisdictional competence of the Organization, it will draw its own conclusions as to proportionality.

28. With respect to the mitigating factors upon which Mr. Toukolon sought to rely, the Appeals Tribunal finds that the UNDT erred in considering that his drunkenness and the fact that Ms. Oduke, a non-UN staff member, was at the Base outside curfew hours, constituted mitigating factors. Mr. Toukolon's voluntary consumption of alcohol, apparently to excess, cannot excuse his conduct and nor does the status of the victim of his assault diminish his culpability.

29. Mr. Toukolon apologized as soon as he sobered up and has shown remorse for his actions. Whether an apology and/or remorse can amount to mitigation depends on the seriousness of the misconduct.

30. The Secretary-General had the discretion to determine whether Mr. Toukolon's physical assault on Ms. Oduke and verbal abuse of a UNMIS Security Officer and engaging in aggressive and uncooperative behavior towards him amounted to misconduct or serious misconduct. The Appeals Tribunal finds that a determination that the said conduct was serious misconduct was a reasonable exercise of that discretion.

31. Moreover, the Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. The Appeals Tribunal finds, again, that it was a reasonable exercise of his discretion to determine that assault, together with the other charges, rendered Mr. Toukolon unfit for further service with the Organization, and is satisfied that separation from service with compensation in lieu of notice and with termination indemnity – which is not, after all, the most severe form of dismissal - was neither unfair nor disproportionate to the seriousness of the offences.

Judgment

32. The appeal is allowed, the Judgment of the Dispute Tribunal is vacated and the Administration's decision is upheld.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Lussick, Presiding	Judge Adinyira	Judge Chapman

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar