



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

Judgment No. 2020-UNAT-1057

**Richard Nsengiyumva
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge John Raymond Murphy
Case No.:	2020-1356
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Maryam Kamali

JUDGE GRAEME COLGAN, PRESIDING.

1. Richard Nsengiyumva appeals against Judgment No. UNDT/2020/006 of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dated 16 January 2020 and finding in favour of the Respondent (Secretary-General or Organization).¹ Mr. Nsengiyumva was a Security Officer with the United Nations Multidimensional Integrated Stabilization Mission (MINUSCA) in the Central African Republic. In June 2017, he was separated from service with payment in lieu of notice but without termination indemnity. This was the outcome of a series of related events that had occurred over several days and nights in mid-July 2016 which the UNDT concluded constituted serious misconduct by Mr. Nsengiyumva. It found that the disciplinary consequences outlined above were a proportionate response to the seriousness of the misconduct. It concluded that there were no procedural or substantive irregularities that would vitiate the outcome.

2. Mr. Nsengiyumva raises a variety of challenges to the correctness of the UNDT'S conclusions and additionally criticizes the justness and fairness of the UNDT's hearing of his case. Possibly because of his unrepresented status and hence his unfamiliarity with the requirements of pleading, it is difficult to identify the remedies he seeks now. We will assume, therefore, that he wishes to have the UNDT's Judgment set aside, his separation revoked and the remedies he claims below, including an order for reinstatement to a permanent role, "a promotion" and "an award" of the remarkable sum of USD five million.

3. For reasons set out below, we dismiss the appeal.

Facts and Procedure

4. The following are introductory remarks about the evidence in the case in general. We will then turn to our summary of the relevant evidence itself.

5. The delay between the events at the heart of this case and the UNDT hearing more than three years later made more difficult obtaining an accurate account of what had happened. Further, although Mr. Nsengiyumva admitted some misconduct to an investigation conducted at the time, he later recanted some of these admissions. Because the facts of the events are complex, crucial and in some respects still disputed, we will set them out in more than usual detail.

¹ *Nsengiyumva v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/006.

6. Next, although Mr. Nsengiyumva sought to explain why he acted as he admitted he did by reference to what he put to the Dispute Tribunal was a previous campaign of antagonistic and provocative denigration of him by his supervisor (whom we will call “H”), the UNDT did not refer to this evidence or make any conclusions about it in the impugned Judgment.

7. Further, because the Appellant criticises an element of the conduct of the hearing by the UNDT Judge (in effect alleging apparent bias in favour of a principal witness for the Secretary-General and thereby against the Appellant), we had recourse to a sound recording of the hearing before the UNDT. Listening to those recordings of the hearing has informed our decision of those issues about the UNDT’s conduct of the case.

8. Finally in these general remarks, although the UNDT did not refer expressly to the requirement to decide important disputed facts of alleged misconduct to the standard of “clear and convincing” proof, the following assessment applies that standard where it is clear from the record that it must have been applied by the Dispute Tribunal.

9. So to the relevant facts of the case. Mr. Nsengiyumva joined the Organization as a Security Officer on a fixed-term appointment in May 2006. He separated from service in July 2007 and rejoined the Organization in June 2008 at MINUSCA. On the late morning of 16 July 2016, he drove a United Nations motor vehicle to a bar in the town of Bangui. Over the period of about four hours that afternoon, and even by his more modest own account, he consumed a substantial quantity of a variety of alcoholic beverages. Mr. Nsengiyumva provoked a confrontation, initially verbal but then physical, with another intoxicated patron of the bar. The adversaries were separated by others and Mr. Nsengiyumva was escorted from the bar at about 1700 hours.

10. About 45 minutes later he was stopped and spoken to by local Police about his involvement in the bar fracas and a “military knife” was confiscated from him. He refused to identify himself but in the absence of a complaint against him, he was released. He went to another bar and consumed more beer. MINUSCA Security became aware of the Appellant’s activities earlier in the day and began an ultimately successful search for its vehicle during the last several hours of that day. During the early hours of the following morning MINUSCA linked Mr. Nsengiyumva to the vehicle and a search for him commenced. Meanwhile, an intoxicated Mr. Nsengiyumva had been arrested by Police elsewhere and detained overnight. Again, he declined to identify himself but was released at about 0740 hours on the following morning, Sunday 17 July.

11. The Appellant's supervisor, H, became aware of these events at about 0800 hours on the morning of 17 July and instructed MINUSCA's Special Investigations Unit (SIU) to locate and interview Mr. Nsengiyumva about the events of the previous day. Meanwhile, the Appellant regained access to the vehicle where it had been left parked but was stopped about 15 minutes later by SIU personnel. He declined to make a statement but said that he would do so on the following day. Mr. Nsengiyumva then drove away claiming that he was going to a stadium to do exercise. The SIU investigators tried unsuccessfully to locate him at his home so they went to the bar where he had been the previous day to make enquiries. Bar staff there were antagonistic towards MINUSCA staff and had to be calmed down before they could be asked questions about those events.

12. The relevant area was subject to a curfew starting at 2200 hours and at about 2215 hours the MINUSCA vehicle that had been used by the Appellant was found parked at the bar where it transpired Mr. Nsengiyumva was. The Appellant decamped in the vehicle and, driving dangerously, was pursued by MINUSCA Security personnel deploying emergency indicia (siren and red/blue strobe lighting). Mr. Nsengiyumva refused to stop and was unable to be apprehended. He continued to drive recklessly until he encountered an armed local Gendarmerie checkpoint. There he refused to unlock or get out of his vehicle until a spare key was used to enter the vehicle and Mr. Nsengiyumva was apprehended. He displayed objective signs of significant intoxication and was conveyed to a hospital, but the Appellant refused to undergo any tests or treatment and became quarrelsome, bellicose and verbally aggressive towards the MINUSCA Security personnel. He displayed objective signs of significant intoxication. He refused to be held in protective Police custody overnight and refused to move. Eventually, nine Police Officers removed him resisting violently, but still sitting in a plastic chair, to an armoured personnel carrier and then to a custodial facility.

13. Early the following morning, 19 July Mr. Nsengiyumva was released from his overnight accommodation and, after going to his home, he was located and transported to the MINUSCA Headquarters. He attempted to telephone his superior, H, but the latter refused to take the call, following which Mr. Nsengiyumva sent a series of SMS (text) messages to H pleading injury and illness, seeking medical leave in his home city Kigali and wishing to speak with H about his medical condition. H refused to respond. The Appellant was put on administrative leave on full pay and was sent home on the following day. The Organization conducted an investigation into these matters.

14. In these circumstances, Mr. Nsengiyumva was subsequently separated from service but contested this decision before the UNDT which upheld the disciplinary sanction. The UNDT held that the facts established that his actions, which included public drunkenness, becoming embroiled in a bar fight and being detained for drunkenness, were unbecoming of an international civil servant, in violation of Staff Regulation 1.2(f) and thereby amounted to misconduct. Mr. Nsengiyumva also violated Staff Regulation 1.2(q) through his failure to operate his vehicle with reasonable care, and Staff Rule 1.2(a) through his failure to follow the instructions issued on behalf of the Secretary-General as communicated to him by his supervisors.

15. The UNDT found no factual basis for the charge of lack of integrity in violation of Staff Regulation 1.2(b), which, nonetheless, had no impact on the extent and seriousness of the misconduct. The UNDT further found the sanctions imposed upon Mr. Nsengiyumva to be proportionate to the offence. Serving as a Security Officer, he was to be held to a higher standard of conduct regarding security and safety than those for whose safety and security he was responsible. His conduct, in addition to breaching formal rules, was irresponsible and dangerous. It engaged security personnel for over 24 hours searching for him and the vehicle and put his and others' safety in peril. His conduct undermined the reputation of MINUSCA in the host country and amounted to serious misconduct. The UNDT found there to be no procedural irregularities in the disciplinary process bearing on the outcome. It also found no mitigating factors present, as his original admission to the conduct was subsequently withdrawn and he refused to cooperate with investigators. His compensation requests were denied.

Submissions

The Appellant's Appeal

16. On appeal, Mr. Nsengiyumva submits principally that the UNDT erred in not considering his allegations of harassment against his supervisor as mitigating factors in reviewing the Organization's imposition of his disciplinary sanction. He says also that the UNDT erred in finding his difficult relationship with his supervisor occurred after the incidents in question, when the difficult relationship actually began in 2014.

17. The UNDT Judge also showed favouritism towards his supervisor and insisted during the hearing that he admit guilt. While he admits he had consumed alcohol in violation of MINUSCA's "zero tolerance" policy, not all accusations against him were true. The UNDT also erred in finding that he did not cooperate with the investigation and withdrew his admission of misconduct.

18. Finally, he argues that the sanction imposed on him was not proportionate, given he has not had any incidents of misconduct before the one in question and had served with the Organization competently since 2005.

The Respondent's Answer

19. The Secretary-General requests the United Nations Appeals Tribunal (Appeals Tribunal) to reject the appeal in its entirety. In support, he argues that the UNDT correctly determined that the imposed disciplinary sanction was lawful and met the three-prong test for lawful imposition of a disciplinary sanction under judicial review. First, the UNDT correctly concluded that the facts upon which the disciplinary sanction was based had been established to the requisite standard of clear and convincing evidence. The Appellant even admitted to the events despite his subsequent backtracking. The investigative record includes sworn testimony of eye-witnesses who confirmed the events. The Appellant furthermore failed to provide any credible explanation or evidence to contradict the Organization's findings. The UNDT correctly determined his testimony was not credible, and replete with contradictions and implausibilities.

20. The UNDT correctly found that the facts established misconduct that amounted to serious misconduct.

21. Finally, the UNDT correctly found that the imposed sanction was proportionate. The UNDT correctly considered and determined the Appellant's alleged difficult relationship with his supervisor was not a mitigating factor. It did not detract from the clear and convincing evidence of his misconduct nor did it serve as an excuse for the Appellant's behaviour. The UNDT found that the imposition of separation from service with compensation in lieu of notice, was not disproportionate, especially given his role as a security officer holding a position of trust which he violated.

22. The UNDT also correctly determined that the Appellant's due process rights were upheld during the investigation. He was given an opportunity to comment on the charges, was informed he could seek the assistance of counsel and received a copy of the investigation report and supporting documentation. Furthermore, the Appellant has not argued that the UNDT committed any errors warranting a reversal of its Judgment.

Considerations

23. Mr. Nsengiyumva's particular grounds of appeal limit the issues that we need to consider. We nevertheless set out the role of this Tribunal on appeals such as his to describe how we reach the conclusions we do. The following criteria are not cumulative but are illustrative individually of what the Appellant must establish under his grounds of appeal.

24. To allow this appeal, first we must be satisfied that the Appellant was not afforded what are called his "due process" rights, both by the Organization in its decision-making leading to the imposition of its sanction(s), and by the UNDT in hearing and deciding his case. By this is meant, among other things, compliance with the relevant Regulations and Rules governing the Appellant's employment, a proper opportunity to present his case to the UNDT, consideration by the Tribunal of all relevant issues, compliance by it with its Statute and Rules of Procedure and with the law as stated by the Appeals Tribunal, observance of the rules of natural justice, and the like.

25. Second, we need to be satisfied that the facts on which the sanction(s) imposed by the Organization were not established to the requisite standard before the UNDT.

26. If so, and third, we must determine whether these established facts did not constitute serious misconduct by the Appellant.

27. If so, and fourth and finally, we must determine whether the sanction(s) were unduly disproportionate to the seriousness of the misconduct and other relevant circumstances.²

² See, for example, this Tribunal's Judgments in *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523 and *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028.

28. Under each of these broad categories, there may be further considerations depending on how the appeal is brought. For example, as a subset of the second test (establishment of relevant facts), if the challenge is one to the justification for a staff member's dismissal and there are contested questions of fact to allow the appeal, we must satisfy ourselves that the standard of proof of these applied by the UNDT was not to the "clear and convincing" level.

29. The Appellant's first ground of appeal (that the UNDT did not take into account what he alleges was harassment by his supervisor as a factor mitigating the sanction imposed on him) engages both the second and fourth considerations set out in paragraphs 25 and 27 above. So, first, did the UNDT fail or refuse to take this factor into account in deciding the proportionality of the sanction imposed by the Organization?

30. Next, did the UNDT err when, as Mr. Nsengiyumva alleges, it concluded that the difficulties in his working relationship with his supervisor began only after the events for which he was dismissed occurred, whereas he says these had existed for several years beforehand?

31. Third, did the UNDT err by showing favouritism (if effect bias) towards his supervisor and against Mr. Nsengiyumva, and by "insisting" that he admit his guilt during its hearing? This question engages the Appellant's due process rights referred to in paragraph 24 above, that is, did he not receive a full, fair and unbiased hearing, consideration and decision of his case by the UNDT?

32. The Appellant did not identify what in particular he considered the UNDT Judge had done or not done which constituted bias, but from our consideration of the audio recordings of the hearing, there was nothing unusual or certainly improper about the Judge's conduct of it. Mr. Nsengiyumva was at some disadvantage during the hearing. He was unrepresented. He took part in the hearing by telephone. Although he appears to have a good command of the language, English (the language of the hearing) was not his first language. And, as with many unrepresented parties in such proceedings, his questions of the witness H were a combination of statement, his own evidence and question. This necessitated a degree of explanation of the process, occasional rephrasing or explanation of the questions, and even at times a succinct re-putting of the Appellant's questions by the Judge. For example, Mr. Nsengiyumva prefaced a number of his questions of the Respondent's witness H with the phrase: "Why did you lie when you said...". Quite properly, the Judge told the Appellant that he could not assume that the witness had lied. The Judge also told Mr. Nsengiyumva that H was unlikely to have lied to

the UNDT. At the outset of his cross-examination the UNDT Judge confined the Appellant's questions solely to the events about which H had spoken and for which the Appellant had been sanctioned. Mr. Nsengiyumva did not object during the hearing to this constraint and he appears to have asked all of the questions of H that he wished to. Those questions did not challenge the essential details of the incidents for which he was sanctioned: rather, they challenged peripheral detail which, even if correct, would not have affected the Organization's witnesses' accounts of those events.

33. There are some aspects of the conduct of the hearing with which issue might be taken, even at the risk of applying a counsel of perfection. Unfortunately, the Judge raised with H questions about Mr. Nsengiyumva's past record of work-related problems, despite these not having formed part of the Organization's evidence-in-chief, although H had alluded to them in his cross-examination. Fortunately, the Judge did not pursue H for further detail of that background, but it nevertheless may have created for the Appellant the appearance of judicial awareness of events disadvantageous to the Appellant, but which were not part of the Organization's case on matters of liability.

34. There is a further issue concerning the Judge's conduct of the hearing. In answer to a question from the Appellant, H said that he took certain steps because of the Appellant's history of manipulation of the medical evacuation system available in appropriate cases to return a staff member to his or her home for treatment. When Mr. Nsengiyumva attempted to challenge H about the veracity of that statement H had made, objection on the ground of irrelevance was taken by counsel for the Secretary-General. The Judge said that although it was clear that previous enmity between the Appellant and H had been raised as an issue in his dispute by Mr. Nsengiyumva, questions about the detail of this were irrelevant. The Judge said, however, that she would take into account this history of discontent between the two men.

35. The Appellant complained that his removal from the mission was unlawful because of non-compliance with processes for such removals but relied solely on the strong recommendation of H. The UNDT Judge is, however, recorded as stating that this issue would not be considered by her. She held that this issue was not "directly relevant" to the case and that the Appellant had had other avenues available to him to make such complaints of procedural failures. Further, the Judge was critical of the Appellant in not cooperating with counsel for the Organization in the making-up of the trial bundle of documents and, without

any apparent reason, refused to use the bundle. Nevertheless, the Judge said that she did not consider that this would disadvantage the Appellant in his ability to lead and discuss evidence.

36. Upon reflection and while able to be criticised, these revelations gleaned from listening to the audio record of the UNDT hearing do not reveal such procedural unfairness to the Appellant that they should affect the soundness of the UNDT's decision. Because of linguistic unfamiliarity and because the Appellant was unrepresented, fair conduct of the hearing was challenging and we should not be thought to be too critical of the Judge. Certainly, the Appellant's specific allegations have not been made out and the aforementioned missteps do not warrant interfering with the result.

37. As to the Appellant's contention that the UNDT exhibited favouritism towards his supervisor H and insisted that he admit his guilt when giving evidence, we conclude that there is no evidence discernible from the record of the hearing that the Judge favoured H. As to the second limb of this allegation, it was permissible for the Tribunal to question Mr. Nsengiyumva about his evidence which recanted admissions he had previously made to investigators. It was not unreasonable for the Judge to have explored this as she did in questions of the Appellant. Doing so did not constitute bias or prejudice against him or in favour of either H or the Secretary-General's case.

38. We turn to what appears to be Mr. Nsengiyumva's other principal concern about the UNDT's findings against him. That is the claim, as we understand it, that his supervisor harassed him before these events to the extent that his actions were mitigated substantially by this prejudice against him. Even if the UNDT did not refer (or at least sufficiently) in its Judgment to this consideration, the link between it and the Appellant's impugned conduct is tenuous. It is notable that H was not involved immediately or personally in the initial inquiries into the Appellant and his missing vehicle and in the attempts to locate it and to restrain him. Regardless of this, however, the scale and duration of his misconduct over the period of two days was so significant that even if the Appellant had established that there had been a dysfunctional relationship with H before those events, this could not have had the effect of nullifying or mitigating these significantly. This ground of the appeal cannot succeed: the UNDT could not have erred in reaching its conclusions even if the Appellant had established his allegations.

39. Addressing the very general submission of the Appellant that “not all accusations [against him] were true”, it is difficult from such a bald statement to discern which he says were not. Nevertheless, we are confident that the UNDT concluded that sufficient of them were established to the appropriate standard (clear and convincing evidence) that this submission cannot succeed.

40. Did the UNDT err factually by concluding that Mr. Nsengiyumva did not cooperate with the Organization’s investigation and withdrew his earlier admission of misconduct? This engages the second appellate principle described in paragraph 25 above. There was evidence presented to the UNDT from which it was entitled to draw the inference that Mr. Nsengiyumva did not cooperate with the Organization’s investigation as it could have reasonably expected him to have done. As to the withdrawal of his earlier admissions of some elements of his conduct, this was a matter of evidence given to the Tribunal and a comparison between that and the uncontested account of the earlier investigation’s findings. There is no case supporting Mr. Nsengiyumva’s allegations in this regard, and this ground of appeal is rejected.

41. Finally, was the UNDT correct to have found the Organization’s sanction proportionate to his serious misconduct in view of what Mr. Nsengiyumva asserted was his unblemished record of long and committed service to the Organization? This ground of appeal engages both the second (relevant factual findings) and fourth (proportionality of outcome) principles outlined in paragraphs 25 and 27 above. There was evidence before the UNDT which it was open to it to accept as it did, that rather than having an unblemished record of service, the Appellant had been formally warned twice for misconduct including for behaviour not dissimilar to that for which he was separated from service. That was a relevant consideration for the UNDT to take into account in assessing the proportionality of the Organization’s sanction and the Tribunal has not been shown to have erred in this regard.

42. None of the Appellant’s grounds of appeal has been established and indeed we are satisfied ourselves that the UNDT reached the correct result in all the circumstances.

Judgment

43. Judgment No. UNDT/2020/006 of the UNDT is hereby upheld and the appeal against it is dismissed.

Original and Authoritative Version: English

Dated this 30th day of October 2020 in New York, United States.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 16th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar