



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

Judgment No. 2020-UNAT-1070

**Ali Halidou
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge John Raymond Murphy, Presiding
Judge Sabine Knierim
Judge Martha Halfeld

Case No.: 2020-1362

Date: 30 October 2020

Registrar: Weicheng Lin

Counsel for Mr. Halidou: Sètondji Roland Adjovi
Counsel for Secretary-General: Francisca Lagos Pola

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The Secretary-General appeals against the Judgment of the United Nations Dispute Tribunal (“UNDT” or “Dispute Tribunal”) holding that Mr. Halidou’s separation from service on grounds of assault was disproportionate. We uphold the appeal and vacate the Judgment of the UNDT.

Facts and Procedure

2. Mr. Halidou joined the service of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) as a Security Officer in 2000. In 2014, he was placed in charge of local security in MINUSCA’s office in Bouar, Central African Republic.

3. On 1 May 2016, Mr. Halidou slapped Mr. G in the face. Mr. G was a security officer employed by Fox Services, a local contractor providing security services for MINUSCA. The incident led to the termination of Mr. Halidou’s employment, which is the subject of this appeal.

4. The evidence led before the UNDT establishes that on, 1 May 2016, Mr. Halidou was driving past the MINUSCA building known as “Villa MINUSCA” when he noticed a driver of a “moto-taxi” give a phone to a security guard at the security post in front of the entrance. He parked his vehicle and asked two local security guards on duty why the moto-taxi driver was there but did not receive any answer. He went inside the security post where Mr. G was stationed. It became evident that the security guards were involved in charging phones for local residents for payment. When Mr. G proved evasive and less than forthcoming about what he was doing, Mr. Halidou slapped him. Mr. Halidou maintains that the assault was a “little slap” or “a tap” on Mr. G’s left cheek and he did not intend to harm Mr. G. He did not notice any injury and Mr. G remained standing behind the desk between them.

5. Mr. G’s version of the incident is different in material respects. In his statement to MINUSCA’s Special Investigations Unit (SIU), he intimated that he was sitting down at the desk (rather than standing) when Mr. Halidou slapped him severely and he fell to the ground. However, at the hearing before the UNDT, he said that he was standing when he was slapped causing him to fall to the ground. He said that “he could not recognize anything when he fell down” and felt strong pain coming from inside the ear. The evidence of the two witnesses

who witnessed the assault is in some respects contradictory or inconsistent with that given by Mr. G as to the positions of the parties and the immediate aftermath of the assault. For reasons that will appear, there is no reason to explore or resolve these inconsistencies.

6. Mr. Halidou noticing that Mr. G was in some pain offered to take Mr. G to hospital. There is contradictory testimony about whether Mr. G was able to walk unassisted to the car. While heading to the hospital, Mr. G told Mr. Halidou that he could go back to work and would return to the hospital the following day if needed. Mr. Halidou gave Mr. G CFA 10,000 with which Mr. G bought some balm and painkillers.¹ Mr. Halidou returned to the Villa MINUSCA and dropped Mr. G there. One of Mr. G's colleagues reported the incident to the supervisor at the local security company by whom they were employed.

7. Mr. G went back to the hospital later the same day. This came to the attention of Mr. Halidou who immediately went to the hospital where he met Mr. G's brother and paid him another CFA 15,000 to cover the first-aid services and the cost of an X-Ray exam, which ultimately did not take place. The following day, Mr. Halidou paid an additional CFA 100,000 to Mr. G's brother. According to a medical certificate dated 7 May 2016 issued by a physician at the Bouar Prefectural Hospital, Mr. G suffered an earache in the left ear and a perforated eardrum. He was placed on temporary incapacity for 60 days.

8. Mr. Halidou reported the incident to the head of MINUSCA's Bouar office on 2 May 2016. The following day, on 3 May 2016, the security officers employed by Fox Services sent a letter of complaint, dated 1 May 2016, to the head of MINUSCA's Bouar office. In the letter, the security officers reported that Mr. Halidou had slapped Mr. G on 1 May 2016 and that he had on other occasions doused another security officer with water and targeted a security officer with a baton.

9. The SIU initiated an official investigation into the matter. On 12 May 2016, the SIU concluded its investigation report ("the SIU Report") which found on the basis of the evidence and information gathered that Mr. Halidou had slapped Mr. G on the left side of his face. During its investigation, the SIU interviewed witnesses to the incident and considered various written statements, the medical certificate supplied by Mr. G and his complaint made to the national prosecutor (which Mr. G subsequently withdrew).

¹ CFA stands for the Central African CFA franc. On 1 May 2016, the exchange rate between US Dollar and CFA was approximately 1: 578.

10. In a memorandum dated 19 July 2016 and delivered on 6 August 2016, the Chief, Human Resources Policy Service, Office of Human Resources Management (“HRPS/OHRM”), informed Mr. Halidou of the charge of misconduct against him and requested his comments (“the charge memorandum”). The charge memorandum attached the SIU Report and supporting material.

11. On 27 August 2016, Mr. Halidou responded to the charges and set out his version in writing.

12. By letter dated 15 December 2016 and delivered on 23 December 2016 (“the sanction letter”), Mr. Halidou was informed of the decision by the Under-Secretary-General (“the USG”) for Management to separate him from service, with compensation in lieu of notice, and with termination indemnity for having physically assaulted Mr. G (“the disciplinary measure”). The sanction letter indicated that in determining the appropriate sanction, the USG had considered the nature of Mr. Halidou’s actions, the past practice of the Organization in matters of comparable misconduct, as well as any mitigating or aggravating factors.

13. Mr. Halidou was separated from service in early 2017. On 23 March 2017, he filed an application with the UNDT contesting the decision to separate him from service with compensation in lieu of notice and termination indemnity.

The UNDT’s Judgment

14. On 29 and 30 October 2019, the UNDT held a hearing at which it heard the testimony of five witnesses. In its Judgment No. UNDT/2019/172 dated 9 December 2019, the UNDT held that there was clear and convincing evidence that Mr. Halidou had slapped Mr. G in the face on 1 May 2016 and that the established facts legally amounted to misconduct. However, it found that the disciplinary measure imposed was disproportionate to Mr. Halidou’s conduct.

15. In reaching its conclusion that the disciplinary measure was disproportionate, the UNDT made certain important factual findings. Firstly, it held that the evidence did not clearly and convincingly demonstrate that Mr. G fell to the ground after being slapped. Mr. G’s version was not confirmed by the two eyewitnesses who testified before the UNDT. Thus, Mr. G probably exaggerated the level of force used by Mr. Halidou in the assault. Secondly, the UNDT gave little weight to the medical certificate stating that Mr. G suffered a perforated eardrum. During the investigation, Mr. Halidou disputed the authenticity and

accuracy of the certificate. No further inquiry was conducted into the medical certificate by the SIU; Mr. G refused to undergo an independent medical examination at the request of the SIU; and he cancelled an X-Ray exam which he had scheduled. The UNDT concluded that it was not shown on clear and convincing evidence that Mr. G suffered a perforated eardrum as a result of the assault. Thirdly, while recognising that Mr. Halidou's agreeing to drive Mr. G to hospital and giving him medicine and money supported a finding that some injury had occurred, the UNDT felt that did not establish the extent of the injury as serious.

16. The UNDT concluded on the question of proportionality as follows:²

With regard to the mitigating factors, the Tribunal finds that the facts considered by the Administration as mitigating circumstances are supported by the evidence. In particular, the Administration considered that the Applicant had over 16 years of service with the Organization, he reported the incident himself, he admitted his wrongdoing, he apologized for the incident and he took measures to remedy his wrongdoing by assisting the victim in obtaining medicine and paying for his medical treatment. The Administration also considered that the Applicant was dealing with a difficult situation where security guards were misusing the Organization's property.

The Tribunal notes that the past practice of the Organization in cases involving physical assault since 2011 shows that the disciplinary measure of separation from service to dismissal has been imposed. However, as stated above, the sanction in the present case was based on an incorrect determination of the nature and gravity of the Applicant's acts. Therefore, the Administration was not in a position to compare the Applicant's acts to past practice.

...

The Tribunal agrees with the Respondent that there is no place for physical violence or corporal punishment in the workplace. However, this does not mean that the Administration can only impose a minimum sanction of separation in all cases of physical assault. In the present case, given the serious mistakes and irregularities in the investigation and the disciplinary process, the Tribunal is of the view that the imposition of separation from service with compensation in lieu of notice and with termination indemnity was excessive and disproportionate to the misconduct and a lesser sanction would have been more appropriate under the particular circumstances in this case.

² Impugned Judgment, paras. 55-56 & 58.

17. The UNDT, therefore, rescinded the decision to separate Mr. Halidou from service and modified the sanction imposed to “demotion with deferment, for three years, of eligibility for consideration for promotion under staff rule 10.2(vii), instead of separation from service with compensation in lieu of notice and with termination indemnity”.³ As an alternative to the rescission, the UNDT ordered the payment of 24 months of net base salary “at the rate that he would have been paid had he been demoted at the time of his separation, plus the applicable Organization’s contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation”.⁴

Submissions

The Secretary-General’s Appeal

18. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction in concluding that the separation from service was not proportionate to the offence and in substituting the Secretary-General’s exercise of discretion in imposing disciplinary measures with its own.

19. The Secretary-General contends that the UNDT placed undue weight on the intensity of the slap. By physically assaulting Mr. G, Mr. Halidou did not conduct himself in a manner befitting his status as an international civil servant. Physical assault is specifically prohibited by Staff Rule 1.2(f) and is contrary to the aims and principles of the Organization as enshrined in the Preamble to the Charter of the United Nations. Moreover, the UNDT erred in attaching insufficient weight to the medical evidence showing a perforated eardrum. The UNDT accordingly erred in finding that the disciplinary measure imposed was based on an incorrect determination of the nature and gravity of the assault.

20. The irregularities identified by the UNDT had no substantial impact on Mr. Halidou’s due process rights, nor did they have any impact on the establishment of the ultimate relevant facts of the assault.

21. The Secretary-General accordingly asks for the appeal to be upheld and the Judgment of the UNDT to be vacated.

³ *Ibid.*, para. 59.

⁴ *Ibid.*, para. 60.

Mr. Halidou's Answer

22. Mr. Halidou submits that the UNDT did not err in finding that the disciplinary measure was disproportionate. Its factual findings in relation to the exaggeration of the severity of the assault and the procedural irregularities are unassailable.

23. The UNDT appropriately took account of the mitigating factors of Mr. Halidou's length of service and the fact that he self-reported the assault and made an honest and unreserved admission of his wrongdoing.

24. He accordingly requests that the appeal be dismissed.

Considerations

25. The issue on appeal is whether the UNDT erred in law and exceeded its jurisdiction in concluding that the separation from service was not proportionate to the offence and in substituting the Secretary-General's exercise of discretion in imposing disciplinary measures.

26. While exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity, and he is accountable to the Member States of the United Nations in this regard.

27. In determining the appropriate sanction for the physical assault, the Administration considered the nature of Mr. Halidou's actions, the past practice of the Organization in matters of comparable misconduct and mitigating factors that applied to Mr. Halidou's case. Having weighed these factors, the Administration imposed a sanction that it considered to be appropriate.

28. The UNDT, as intimated, placed significant weight on the intensity of the slap. While the severity of an assault is always relevant, it is not necessarily determinative. Under Staff Regulation 1.2(b), staff members are required to uphold the highest standards. By physically assaulting Mr. G, Mr. Halidou did not conduct himself in a manner befitting his status as an international civil servant. Physical assault is specifically prohibited by Staff Rule 1.2(f) and is contrary to the aims and principles of the Organization as enshrined in the Preamble to the Charter of the United Nations. Hence, when a staff member physically

assaults another person without justification, a decision to separate the staff member will normally fall within the bounds of reasonableness and proportionality. The staff member will bear a considerable evidentiary burden to justify or mitigate the assault.

29. The UNDT erred in attaching no weight to the medical evidence. The contemporaneous medical certificate was signed by Dr. Yves Kpanga, head of the Bouar Prefectural Hospital. It indicated that on 1 May 2016, Dr. Kpanga examined Mr. G and recorded that Mr. G presented with earache in the left ear and was diagnosed with a perforated eardrum. Although hearsay (Dr. Kpanga did not testify), the certificate is documentary evidence which remained of evidentiary value, especially considering its contemporary nature. There is no basis to assume that Dr. Kpanga acted fraudulently in issuing it. Moreover, and in any event, it is not in dispute that the assault was of an order that Mr. G sought medical assistance and Mr. Halidou was prepared to make a financial contribution to the medical costs. One may infer a degree of severity from those facts alone, which takes the assault to a higher level of unacceptability.

30. The UNDT further erred in essentially finding that the disciplinary measure imposed was based on an incorrect determination of, and disproportionate reliance on, the nature and gravity of the assault. Other more important operational considerations were also at play. A relatively minor assault (if it were that) by a senior security officer on a local subordinate is a serious matter because it offends the ethos of the Organisation in an egregious manner. Mr. Halidou was the United Nations staff member in charge of local security in Bouar. His assault of Mr. G demonstrated a readiness on his part to resort to violent conduct inconsistent with the methods of policing expected by the ethos of the Organisation. His conduct was an abuse of authority and oppressive of a local inhabitant. It was intolerable for that reason, irrespective of the gravity of the assault, and accordingly damaged the substratum of trust required of a staff member in his position. Mr. Halidou's behavior revealed a violent predisposition which the Organisation legitimately would prefer not to see in the person responsible for security in the field.

31. The UNDT in finding that the disciplinary measure was disproportionate placed some weight on procedural errors during the investigation. The procedural irregularities were: (i) Mr. Halidou was not given the opportunity to comment on the sanction letter, which allegedly had mistakenly relied on the statements of witnesses "who did not actually witness the incident"; and (ii) two witnesses were not interviewed during the investigation or the

disciplinary processes despite them being “both present when the incident occurred”. In light of the irregularities identified, the UNDT concluded that “a lesser sanction would have been more appropriate under the particular circumstances in this case”.⁵

32. The irregularities identified by the UNDT had no substantial impact on Mr. Halidou’s due process rights, nor did they have any impact on the establishment of the facts relevant to the determination of proportionality. The test of proportionality requires a comparison between the misconduct and the sanction, not the investigation and disciplinary process and the sanction. The UNDT accordingly erred in taking these irrelevant considerations into account when determining the proportionality of the sanction. The fact of the matter is that the assault occurred and only the gravity of it and the nature of the abuse were in contestation.

33. In any event, had the SIU taken evidence from the witnesses it ignored, and included that testimony in the SIU Report, it would not have changed the outcome. Mr. Halidou’s due process rights were not violated merely by the fact that the investigation could have interviewed additional witnesses. Incorrect statements of fact in the sanction letter are also inconsequential in light of the undisputed facts and the conclusions that can be drawn from them. Mr. Halidou admitted the assault and the need for Mr. G to obtain medical assistance.

34. The Administration has a broad discretion in determining the disciplinary measure imposed on staff members as a consequence of wrongdoing. It is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. Thus, in determining the proportionality of a sanction, the UNDT should observe a measure of deference, but more importantly, it must not be swayed by irrelevant factors or ignore relevant considerations.

35. As discussed, the procedural mistakes of the SIU, if that, were irrelevant and the UNDT clearly ignored the fact that Mr. Halidou’s position in the Organisation required a much higher standard of behaviour. Assaulting another human being is a fundamental violation of the values of the Organization, which directly contravenes the obligation of all staff to uphold and respect the principles set out in the United Nations Charter, including the dignity and worth of the human person. Regardless of the force involved, there is no place

⁵ *Ibid.*, para. 58.

for physical violence or corporal punishment in the workplace. Separating Mr. Halidou from service in these circumstances was not arbitrary and fell within the range of reasonable disciplinary options. Mr. Halidou's failure to observe the applicable standard damaged the substratum of trust in a manner rendering the continuation of the employment relationship intolerable. The termination of his employment was accordingly proportionate and the UNDT erred in holding otherwise.

Judgment

36. The appeal is upheld and Judgment No. UNDT/2019/172 is vacated.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 18th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar