



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

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Judgment No. 2022-UNAT-1259

**Maguy Bamba  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1574
Date of Decision:	1 July 2022
Date of Publication:	16 August 2022
Registrar:	Weicheng Lin

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Counsel for Appellant: Julia Kyung Min Lee, OSLA

Counsel for Respondent: Rupa Mitra

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. Ms. Maguy Bamba (the Appellant), former staff member and Nurse at a United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) clinic, contested the decision to dismiss her from service with compensation in lieu of notice and without termination indemnity for misconduct. The misconduct was for applying for maternity leave on the basis of fraudulently obtained medical certification without being pregnant and taking said maternity leave. She had argued that she had a legitimate expectation that an earlier investigation into her conduct was closed with no further action and that the subsequent reopening of the investigation was unlawful. Further, she said she did not have the mental capacity to commit fraud due to her mental state at the time.

2. In Judgment No. UNDT/2021/051 (the Impugned Judgment), the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) found her evidence not credible and dismissed her application. Ms. Bamba appeals and argues the Dispute Tribunal erred because she did not have mental capacity to commit the fraud, the Administration failed to undertake a thorough investigation, and the disciplinary sanction is disproportionate.

3. For the reasons below, we dismiss the appeal and affirm the Judgment.

**Facts and Procedure**

4. Ms. Bamba joined MONUSCO in 2004 as a Nurse on a fixed-term appointment. At the time of her separation, she was a Nurse at the G-4 level at a MONUSCO clinic in Bukavu.

5. The following summary of relevant facts is taken from the Impugned Judgment (footnotes omitted):

6. On 4 May 2015, the Applicant attended the Centre Hospitalier Biopharm to undergo a pregnancy check-up. This medical test confirmed that she was four and a half months pregnant.

7. On or around June 2015, six months into her pregnancy, the Applicant suffered a miscarriage. She became depressed as a result of the miscarriage, was admitted to the Centre Psychiatrique Sosame in Bukavu and received treatment for major depressive disorder.

8. On 30 September 2015, the Applicant's maternity leave request for the period 5 October to 24 January 2016 was approved by her immediate supervisor.

9. On 17 December 2015, the Investigations Division of OIOS received a report implicating the Applicant in child trafficking. In or around December 2015, OIOS opened an investigation under case no. 0572/15, to investigate the allegations of child trafficking implicating the Applicant. Specifically, there were four allegations: i) child trafficking; ii) knowingly obtaining a medical certificate for maternity leave without being pregnant; iii) submitting fraudulent medical insurance claims; and iv) accepting money from colleagues to assist with A pregnancy.

10. The Applicant was interviewed in connection with these allegations on 1 July 2016.

11. On 29 September 2016, OIOS informed the Applicant that the alleged misconduct was not substantiated and that the case was closed. She was also informed that a further investigation might be considered if new evidence was discovered.

12. On 19 December 2016, OIOS finalized its Investigation Report in Case No. 0495/16 which found that, in 2015, the Applicant had fraudulently sought and was granted maternity leave using a medical certificate obtained by deceit. OIOS referred the report to the Department of Field Support for its consideration.

13. On 13 July 2017, the Applicant received a memorandum from the Chief, Human Resources Policy Service, Office of Human Resources Management (“OHRM”) charging her with misconduct. Specifically, it was alleged that on 25 September 2015, she misrepresented to Dr. [M. C.] that she was pregnant to obtain a medical certificate attesting to her pregnancy, and based on this certificate, she sought and obtained maternity leave from the Organization from 5 October 2015

14. The Applicant responded to the allegations on 4 October 2017. She did not deny them but instead proposed to compensate for the maternity leave days she took by replacing them with her unutilized annual leave and certified sick leave for the period she was admitted to the Centre Psychiatrique Sosame.

15. On 9 February 2018, the Applicant was informed that based on a review of the entire dossier, including her comments, the Under-Secretary-General for Management had concluded that the allegations against her were established by clear and convincing evidence, and that she had decided to impose the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, and to recover the loss to the Organization equal to 78 days’ maternity pay, by way of financial recovery pursuant to staff rule 10.1(b).

16. Effective 1 March 2018, the Applicant was separated from service. The loss to the Organization equal to 78 days’ maternity pay was recovered from the Applicant’s final entitlements.

*The UNDT Judgment*

6. In her application to the Dispute Tribunal, in addition to her arguments regarding capacity, Ms. Bamba advanced the legal argument that she had a legitimate expectation that a previous investigation into her misconduct which included these allegations was closed and that the Administration's subsequent reopening of the investigation was unlawful. The Dispute Tribunal does not opine on this legal argument in the Impugned Judgment and Ms. Bamba does not raise it as a ground of appeal before the Appeals Tribunal. As a result, we make no determination on this argument.

7. In the Impugned Judgment, the Dispute Tribunal held that Ms. Bamba was evasive in her testimony on the question of whether she lied to the Organisation in order to secure maternity leave.<sup>1</sup> However, the UNDT noted that she admitted using a fraudulently obtained certificate to request and receive maternity leave with the knowledge that she was not pregnant.<sup>2</sup> The UNDT held that these admissions were corroborated by Dr. M.C.'s statement and the medical certificate he issued which was not based on a medical examination but his reliance, in good faith, on her statement that she was pregnant.<sup>3</sup> The 25 September 2015 medical certificate was used to support Ms. Bamba's request for maternity leave which she received from 5 October 2015 to 24 January 2016. The UNDT held that this evidence supported a finding that there was clear and convincing evidence that Ms. Bamba misrepresented to Dr. M.C. that she was pregnant, obtained a medical certificate attesting to her pregnancy, and then sought and obtained maternity leave to which she was not entitled.<sup>4</sup>

8. On the issue of her mental capacity to commit the fraud, the Dispute Tribunal held that the submission and evidence that Ms. Bamba's alleged mental incapacity occurred two months after the misconduct did not provide the nexus required. On the contrary, the UNDT considered that Ms. Bamba's conduct over the relevant days suggested that she made deliberate and calculated decisions throughout the time.<sup>5</sup> Specifically, the UNDT considered that her choice of doctor, discussion on prenatal care and delivery date, submission of the request for maternity leave

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<sup>1</sup> Impugned Judgment, para. 22.

<sup>2</sup> Impugned Judgment, para. 24.

<sup>3</sup> Impugned Judgment, paras. 25-26.

<sup>4</sup> Impugned Judgment, para. 27.

<sup>5</sup> Impugned Judgment, para. 29.

in the United Nations Field Support Suite, arrangement of her replacement, and her second visit to Dr. M.C. with two babies, all suggested deliberation, premeditation and presence of mind.<sup>6</sup>

9. The Dispute Tribunal found that the credibility of Ms. Bamba's account of her pregnancy, miscarriage and mental incapacity, allegedly resulting from her loss of a pregnancy, and her partner's violence and subsequent desertion, was put into question by "grave" contradictions and inconsistencies in her evidence. It considered these contradictions and inconsistencies to be: the incorrect date of birth on the pregnancy test issued by the Centre Hospitalier Biopharm; and Ms. Bamba's statement that her partner left in September 2015 and had not heard from him since, yet she claimed that on that same date, she went to the hospital and pretended to be pregnant so that her partner would not leave her. The UNDT held that this further contradicted her statement that her partner did not permit her to leave the house and forced her to have an abortion at home.<sup>7</sup> There was a further contradiction in her assertion that she applied for maternity leave because she was ashamed that she had lost a child, when she had also claimed she was ashamed to say she had miscarried because she had already been given maternity leave.<sup>8</sup>

10. Further, the UNDT found that, even accepting Ms. Bamba's above evidence, it did not explain why she requested maternity leave based on a fraudulently obtained medical certificate.<sup>9</sup>

11. Noting that Ms. Bamba was interviewed, her interview was recorded, she was informed of the right to seek the assistance of counsel, she was given the opportunity to comment on the allegations, and her comments were considered, the Dispute Tribunal held that her due process rights were respected throughout the investigation and the disciplinary process.<sup>10</sup> The UNDT held that any translation flaws did not amount to a failure by OIOS to conduct a proper investigation as there was sufficient uncontroverted evidence that Ms. Bamba was not mentally incapacitated when she committed the misconduct.<sup>11</sup> The UNDT found that she was given sufficient opportunity to present her account and the investigators intended to obtain corroborative evidence but for the insufficient leads such as the lack of the full addresses and contact details of key witnesses such as her partner and those that performed the abortion procedure. The UNDT held that any alleged

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<sup>6</sup> Impugned Judgment, paras. 30-33.

<sup>7</sup> Impugned Judgment, para. 37.

<sup>8</sup> Impugned Judgment, para. 39.

<sup>9</sup> Impugned Judgment, para. 38.

<sup>10</sup> Impugned Judgment, para. 55.

<sup>11</sup> Impugned Judgment, para. 60.

translation mistakes did not have a material impact on either Ms. Bamba's due process rights or on the established facts relevant to proportionality of the sanction imposed.<sup>12</sup>

12. In summary, the Dispute Tribunal held there was clear and convincing evidence that Ms. Bamba committed the misconduct, that the established facts qualified as misconduct under the Staff Regulations and Rules, and that the sanction was proportionate and lawful. The UNDT further found that there were no due process violations in the investigation and the disciplinary process leading up to the sanction.

### **Submissions**

#### **Ms. Bamba's Appeal**

13. Ms. Bamba submits that the Dispute Tribunal erred in fact resulting in a manifestly unreasonable judgment in finding that she was not credible and that there were grave contradictions and inconsistencies in her account of events surrounding her pregnancy, the violence by her partner, the enforced abortion and the resulting trauma and mental illness. Specifically, Ms. Bamba submits that the UNDT erred in finding that she was evasive during cross-examination and her testimony was contradictory. Ms. Bamba submits that she was not evasive. She submits that she only disagreed with the question that she had "lied" in her maternity leave application but agreed that she had made an "error".

14. Further, Ms. Bamba contends that the UNDT erred in finding that she was never pregnant on the basis that the error in the age (32 years) indicated in the hospital's pregnancy test report "could only mean" that she, aged 39, was not the subject of the test. The UNDT failed to address the fact that Ms. Bamba was identified by name in the report as the subject of the test and the possibility that there was a simple typographic error made in relation to her age.

15. In addition, Ms. Bamba submits that the UNDT failed to look at the totality of the evidence on record which corroborated the fact that she was pregnant from January to June 2015. This evidence included:

- a. Ms. Bamba's sworn testimony that she became pregnant in January 2015 and that everyone, including Dr. M.C. could see that her stomach was getting bigger (which

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<sup>12</sup> Impugned Judgment, para. 62.

explained why Dr. M.C. provided her with a medical certificate attesting to her pregnancy without conducting any physical examination);

b. the evidence of Dr I. A., Ms. Bamba's immediate supervisor, who had indicated by email to the OIOS Investigator that "there were external evidences of pregnancy" which was one of the reasons for approving her maternity leave;

c. the factual finding of the OIOS Investigator that Ms. Bamba became pregnant sometime in January 2015 but had subsequently miscarried and the OIOS Investigator's testimony that there was no other evidence to suggest differently; and

d. the fact that the letter outlining the allegations of misconduct and the sanction letter did not dispute the fact that Ms. Bamba had been pregnant and that she subsequently lost her pregnancy.

16. Ms. Bamba, relying on *Ganbold*<sup>13</sup>, submits that the UNDT may not ignore the findings of the investigation and that completely ignoring the factual findings of the investigation in a disciplinary case would be an error of law and procedure.

17. Regarding the circumstances surrounding her partner's departure and the enforced abortion, Ms. Bamba says that that there was no contradiction and that she has been consistent in her evidence in this regard. Nor did she contradict herself by asserting that she applied for maternity leave because she was ashamed of having lost a child (as per the OIOS interview) yet she also claimed that she was ashamed to say that she had miscarried because she had already been given maternity leave. She submits that there was no evidence that she stated she was ashamed to say that she had miscarried because she had already been given maternity leave.

18. Ms. Bamba submits that the UNDT's finding that she did not comment and remained silent on the alleged contradiction in her evidence as advanced by the Respondent is factually incorrect. On the contrary, she says that she responded to each and every argument raised by the Respondent in her evidence chart, which she annexed to her Closing Submissions.

19. Ms. Bamba submits that due to these innumerable errors of fact and law in finding that she had never been pregnant, never endured enforced abortion and was not labouring under any violence, mental incapacity, or trauma at the time of the misconduct, the entire reasoning of UNDT

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<sup>13</sup> *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 29.

is “misconstrued”, leading a manifestly unreasonable finding that her account of events was “very unreliable thereby leaving the Respondent’s contention [...] uncontroverted.”

20. Further, Ms. Bamba argues that the UNDT completely disregarded her evidence relating to her mental state at the time of the alleged misconduct and that it erred in law by ignoring her arguments that the elements constituting misconduct were not established as required, namely that there was no intention to commit the act of fraud (see *Ashgar*<sup>14</sup>) based on the chronology of events leading up to the moment of the alleged misconduct and based on her suffering from major depression affecting her cognitive ability. This was corroborated by the testimony and medical opinion of Dr. P.I. who was the Appellant’s treating physician, which the Dispute Tribunal ignored.

21. Ms. Bamba contends that, the UNDT erred by finding that there was no nexus between the departure of her partner and the subsequent act of misconduct to seek maternity leave after losing her baby, and then her hospitalisation two months after the act of misconduct.

22. Further, she submits that the UNDT erred in law by finding that her due process rights were respected throughout the investigation and the disciplinary process because she was not properly heard, and the decision-maker misunderstood the “central elements” of Ms. Bamba’s case. In addition, she says the translation flaws in her narrative to the OIOS investigator was a failure by the OIOS to conduct a proper investigation. Noting that she did not speak and has a very limited understanding of the English language, the Appellant submits that the facts of the forced abortion and the curettage procedure were not clearly put to the decision-maker at the time the sanction was imposed.

23. Also, Ms. Bamba argues that the UNDT erred in finding that the OIOS investigation was balanced because she had provided sufficient leads to the investigator to obtain corroborative evidence relating to her account of the events surrounding her pregnancy, forced abortion, trauma and mental illness, and OIOS could have taken further action to secure such evidence. Rather, the OIOS investigation, although admitting that it was possible that she was mentally unwell at the time of seeking the certificate for maternity leave after she had lost her baby, but chose only to pursue inculpatory evidence in this regard, therefore evidence of her mental illness was not put before the decision-maker.

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<sup>14</sup> *Ashgar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982, paras. 35-36.



24. Finally, Ms. Bamba submits that, even if the facts established misconduct, the UNDT erred in finding that the sanction imposed was proportionate because the UNDT erred in fact and law in its finding that Ms. Bamba's narrative of her pregnancy, physical abuse, forced abortion, trauma and mental illness was unreliable. The UNDT failed to consider Ms. Bamba's narrative on these events and the context in which she sought maternity leave as mitigating factors, contrary to *Rajan*<sup>15</sup>.

25. Ms. Bamba requests that the Impugned Judgment be overturned by rescission of the contested decision and requests an order for her reinstatement. In the alternative, Ms. Bamba requests the payment of two-year net-based salary, based on her salary at the time of her separation. She also seeks compensation for the financial and moral harm caused by her separation, taking into consideration the unlawful recovery of 78 days of leave from her final pay slip.

### **The Secretary-General's Answer**

26. The Secretary-General or Respondent asks that the Impugned Judgment be upheld and the appeal be dismissed in its entirety. He states that Ms. Bamba is simply repeating arguments she had already made before the Dispute Tribunal and is using the appeal as an opportunity to relitigate her case.<sup>16</sup>

27. Specifically, the Respondent submits that the UNDT was well within its judicial discretion to find Ms. Bamba's account of events not credible, including whether Ms. Bamba was "evasive" due to grave contradictions and inconsistencies in her account of events. The Respondent submits that Ms. Bamba has failed to demonstrate that the UNDT made any reversible error of fact and that, the Appeals Tribunal will give some degree of deference to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard.<sup>17</sup>

28. As for Ms. Bamba's submission that the UNDT made an erroneous factual finding that she was never pregnant, the Respondent submits that although the UNDT did reject the 4 May 2015 pregnancy test result, there was no subsequent finding that Ms. Bamba was never pregnant.

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<sup>15</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 41.

<sup>16</sup> *Muhsen v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-793, para. 9; *Antaki v. Secretary-General of the United Nations*, para. 21; and *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097, para. 19.

<sup>17</sup> *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

Moreover, even if the UNDT had accepted the test result in question, it would not have changed the UNDT's finding that the contested decision was lawful, as the material fact was that she was not pregnant at the time of the request for maternity leave and that she had not given birth when she took the maternity leave.

29. The Respondent submits that Ms. Bamba does not demonstrate any error on the part of the UNDT in its finding that her statements on being ashamed about her miscarriage were contradictory, but rather Ms. Bamba simply disagrees with the Impugned Judgment in this regard and reiterates her submissions before UNAT.

30. As for her argument that the Dispute Tribunal failed to see that she had "responded to each and every argument raised by the Respondent", the Respondent submits that the Dispute Tribunal admitted her evidence and submissions but found them "unresponsive or unreliable".

31. As for whether the elements constituting misconduct were established, the Respondent submits that the Dispute Tribunal correctly found that the facts upon which the sanction was based were established by clear and convincing evidence and the established facts constituted misconduct.

32. The Respondent argues that the UNDT did not ignore Ms. Bamba's claims that she lacked the mental capacity to commit fraud due to a serious depression as she submits, but rather the Dispute Tribunal clearly considered the submissions and found them unpersuasive. It properly exercised its discretion in rejecting those submissions, because it found that there was insufficient evidence of a nexus between Ms. Bamba's actions and her diagnosis of depression two months later. In addition, Ms. Bamba had taken many concerted and coordinated actions that clearly required planning and presence of mind, such as making the appointment, giving the doctor false details, making a request for maternity leave and arranging for someone to replace her in her official functions, and visited the doctor with two babies, claiming they were hers and indicating she had given birth to a third baby who was in an incubator. These actions appeared deliberate, calculated and premediated.

33. The Respondent submits that the UNDT correctly noted that Ms. Bamba had admitted to obtaining medical certification by misrepresenting that she was pregnant and using that certificate to request and receive maternity leave. Further, even if Ms. Bamba's claims of difficult personal

circumstances had been verified, it would not have justified her knowingly requesting and receiving a benefit from the Organisation to which she was not entitled and putting her own interests before those of the Organisation and at the expense of the Organisation.

34. In addition, the Respondent submits that the UNDT correctly found that Ms. Bamba's due process rights had been respected in the investigation and the disciplinary process. On the claim that OIOS allegedly failing to seek sufficient exculpatory evidence, the Respondent states that the UNDT rightly held that Ms. Bamba had been given sufficient opportunity to present her account and that there was enough indication that the investigators had tried to obtain corroborative evidence. Further, the Respondent submits that suggestions as to how the OIOS investigators could have tried to seek additional information were not before UNDT. The Respondent submits that it is not clear that any such efforts would have supported Ms. Bamba's case and notes that she does not provide an explanation as to why she did not volunteer or suggest these avenues of information to the investigators herself.

35. Finally, the Respondent argues that the UNDT correctly found that the sanction imposed was proportionate and that the Appeals Tribunal's findings in *Rajan*<sup>18</sup> do not support her claim. The Dispute Tribunal thoroughly addressed all aspects of the proportionality of the sanction and Ms. Bamba has failed to demonstrate any error in this analysis.

### **Considerations**

36. It is largely not disputed that Ms. Bamba was not pregnant when she made her request for maternity leave, that she obtained a medical certificate based on a misrepresentation that she was pregnant, and that she sought and obtained maternity leave benefits based on this inaccurate certificate.<sup>19</sup> She states that the Dispute Tribunal erred by not accepting that she did not have the mental capacity to commit fraud because of she was in a major depression at the time.

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<sup>18</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 41.

<sup>19</sup> Impugned Judgment, paras. 23-27.

*Standard of Review in Disciplinary Cases:*

37. In disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, iii) whether the sanction is proportionate to the offence, and iv) whether the staff member's due process rights were observed in the investigation and the disciplinary process.<sup>20</sup>

38. In the present case, we find Ms. Bamba merely repeats arguments raised before the Dispute Tribunal regarding the evidence. The appeals procedure is not an opportunity for a party to reargue their case, which is essentially what Ms. Bamba has done in this appeal.<sup>21</sup> Nevertheless, we find the Dispute Tribunal did not err in fact or in law in the Judgment.

*Whether there is clear and convincing evidence to establish the facts in the allegation and whether these facts amount to misconduct under the Staff Regulations and Rules*

39. Ms. Bamba essentially does not dispute that if the facts establish the allegations, these facts amount to misconduct under the Staff Regulations and Rules. She argues the facts do not establish the allegations due to her lack of mental capacity. We disagree and accept the Dispute Tribunal's finding that there is clear and convincing evidence to establish the facts underlying the allegations of misconduct.

40. In reaching its findings, the Dispute Tribunal applied the appropriate legal standard, namely that the "Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".<sup>22</sup> "[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".<sup>23</sup> Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest

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<sup>20</sup> *Samandarov v. Secretary-General of the United Nations*, Judgment No 2018-UNAT-859, para. 21.

<sup>21</sup> *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30; *Muhsen v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-793, para. 9; *Antaki v. Secretary-General of the United Nations*, para. 21; and *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097, para. 19.

<sup>22</sup> *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15; *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

<sup>23</sup> *Ibid.*, footnote 22.

and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance.<sup>24</sup>

41. As for the Dispute Tribunal’s review of the evidence, the Appeals Tribunal has consistently held that the Dispute Tribunal “ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced”.<sup>25</sup> That is what the Dispute Tribunal did in the present case.

42. Article 2(1)(e) of the UNAT Statute provides that the UNAT shall be competent to hear and pass judgment on an appeal of a UNDT Judgment when it is asserted that the UNDT has erred on a question of fact, resulting in a manifestly unreasonable decision. We cannot find the Dispute Tribunal erred in its findings of fact or that any factual errors led to a manifestly unreasonable decision. The Dispute Tribunal heard oral testimony from Ms. Bamba, her treating physician (Dr. P.I.) and the OIOS investigator, as well as reviewed the documentary evidence including the investigation report with supporting evidence. There is no dispute that Ms. Bamba obtained a false medical certificate to support her application for maternity leave and benefits when she was not pregnant and received maternity leave and benefits despite not being pregnant and not giving birth. As for Ms. Bamba’s testimony and version of events, the Dispute Tribunal considered her testimony and found her not credible because she was “evasive” and “inconsistent” and outlined contradictions in her testimony. Contrary to Ms. Bamba’s submissions, the Dispute Tribunal did not “ignore” her evidence but found it not credible and not persuasive. It considered her argument that she lacked the mental capacity to commit an act of fraud because she was hospitalised at the psychiatric hospital with major depression two months after the alleged misconduct. Given the timing, it found there was no significant “nexus” between the hospitalisation and the alleged misconduct.

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<sup>24</sup> *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

<sup>25</sup> *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819, para. 29.

43. The Appeals Tribunal in *Ashgar*<sup>26</sup> confirmed that “(f)raud consists in the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.” She argues that she could not have the mental capacity to defraud or deceive.

44. In her interview with the investigator, Ms. Bamba confirmed the following:

- i) She miscarried sometime in the month of June 2015.<sup>27</sup>
- ii) On 25 September 2015, she obtained the medical certificate from Dr. M. who confirmed she was pregnant based on her representation to him that she was and not based on a medical exam. She did this as she “felt this because my husband wanted to abandon me”.<sup>28</sup>
- iii) She admitted to the investigator that she told the doctor that she was pregnant “knowing” that she was not at the time to “protect” herself.<sup>29</sup> When asked by the investigator whether she “lied” to the doctor, she replied in French “J’accepte, j’avais déjà dit, j’étais dépassé, in other words, she accepts and she was “upset”.<sup>30</sup>

45. She went on her maternity leave as she “was ashamed to say that [she] miscarried.”<sup>31</sup> The foregoing evidence of Ms. Bamba herself indicates that she did have the mental capacity to know and understand that she was wrong in misrepresenting a pregnancy and in obtaining the false medical certificate and maternity leave. She knew it was wrong but was “ashamed” and “upset” and did so to keep her partner.

46. Ms. Bamba may have been depressed and even suffering from trauma at the time, but this alone is insufficient to support a finding that she did not have the requisite mental capacity to commit fraud. There is no medical evidence provided as to her state of mind at the time of her obtaining the false medical certificate and applying for maternity leave and benefits. Rather, there is evidence that she acted deliberately and with planning by obtaining the medical certificate, making application for maternity leave and benefits from her employer, receiving approval, and arranging for someone to replace her while on that leave. This course of action shows not only intent but a degree of premeditation and planning on the part of Ms. Bamba,

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<sup>26</sup> *Ashgar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982, para. 36.

<sup>27</sup> Ms. Bamba’s Interview Transcript, Line 3307 (page 216 of case file).

<sup>28</sup> *Ibid.*, Lines 3428 and 3444 (pages 221 and 222 of case file).

<sup>29</sup> *Ibid.*, Lines 3476 to 3486 (pages 223 and 223 of case file).

<sup>30</sup> *Ibid.*, Lines 3489 to 3492 (page 224 of case file).

<sup>31</sup> *Ibid.*, Line 2031-2032 (page 160 of case file).

and clearly and convincingly supports the finding that in making the misrepresentation of being pregnant, she had the requisite “intent to defraud or deceive”.<sup>32</sup> Ms. Bamba also argues that the Dispute Tribunal erred in making factual findings that she was never pregnant, never endured enforced abortion and was not labouring under any violence at the time of the misconduct.

47. In the Impugned Judgment, the Dispute Tribunal questioned Ms. Bamba’s credibility of her whole account due to “grave contradictions and inconsistencies in her evidence”.<sup>33</sup> The UNDT assessed the evidence for each of these subjects in light of Ms. Bamba’s arguments, making appropriate findings on the reliability and weight of contradictory evidence, and providing reasons for its findings. As we have previously indicated, the trial Judge is best placed to assess the nature and probative value of the evidence placed before them by the parties to justify their factual findings.<sup>34</sup>

48. Further, we find that any error in these factual findings has not resulted in an “manifestly unreasonable decision” as required by Article 2(e) of the Appeals Tribunal Statute. The question of whether she was pregnant at all, endured an abortion, and suffered from domestic violence is materially not relevant to whether the facts supporting the alleged misconduct, namely that she obtained a medical certificate based on a misrepresentation that she was pregnant at the time, and that she fraudulently sought and obtained maternity leave benefits based on this certificate, had been established by clear and convincing evidence, .<sup>35</sup> As indicated above, she may have been in difficult, traumatic circumstances, but this by itself is a defence to the fact that she was well aware that she was not pregnant at the relevant time, and misrepresented this in order to wrongfully obtain maternity leave and benefits.

49. Therefore, the Dispute Tribunal correctly found there was clear and convincing evidence establishing the facts underlying the misconduct contrary to the Staff Rules and Regulations.<sup>36</sup>

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<sup>32</sup> *Ashgar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982, para. 36.

<sup>33</sup> Impugned Judgment, para. 34.

<sup>34</sup> *George M’mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 63; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 26; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20.

<sup>35</sup> Impugned Judgment, paras. 23-27.

<sup>36</sup> See Staff Regulation 1(2) and MONUSCO Code of Conduct.

*Whether the disciplinary sanction of separation was disproportionate*

50. Ms. Bamba was separated from service with compensation in lieu of notice and without termination indemnity and recovery of the loss to the Organisation equal to 78 days' maternity pay. She argues that these sanctions were disproportionate because the Dispute Tribunal erred in its findings that Ms. Bamba's narrative of her pregnancy, physical abuse, forced abortion, trauma and mental illness was unreliable and because the Dispute Tribunal failed to consider the context in which Ms. Bamba sought maternity leave as mitigating factor contrary to *Rajan*<sup>37</sup>.

51. It is a well-established principle in our jurisprudence that the Secretary-General has wide discretion in applying disciplinary sanctions for misconduct but the disciplinary measure must be proportionate to the misconduct as proven by appropriate evidentiary methods. "However, due deference must be shown to the Secretary-General's decision on sanction because Article 101(3) of the United Nations 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."<sup>38</sup>

52. Therefore, "(t)he ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline."<sup>39</sup>

53. In *Rajan*<sup>40</sup>, the Appeals Tribunal held that "(t)he most important factors to be taken into account in assessing proportionality of a sanction include the seriousness of the offence, then length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency."

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<sup>37</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 41.

<sup>38</sup> *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-890, paras. 15-16.

<sup>39</sup> *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, para. 25.

<sup>40</sup> *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.



54. In the Impugned Judgment, the Dispute Tribunal appropriately assessed the proportionality of the disciplinary sanction of dismissal, in particular, it reviewed whether the decision-maker considered the context of the alleged misconduct, the mitigating factors such as Ms. Bamba's long service and her admissions, and aggravating factors such as her position of trust. The Administration could have imposed more severe sanctions such as dismissal without compensation in lieu but chose in its discretion not to. Both the Dispute Tribunal and Administration considered Ms. Bamba's difficult personal circumstances and mental state but found they were not sufficient to justify obtaining an entitlement for which she was not eligible and not to be sanctioned for it. Committing fraud and receiving unlawful benefits from an employer seriously and fatally damages the relationship of trust between and employer and employee. In this instance, the damage was irreparable and justifies separation.

55. There is no evidence the disciplinary sanction imposed against Ms. Bamba was blatantly illegal, arbitrary, or excessive but rather it has a rational connection to the nature of the of misconduct and rationale of the discipline as imposed.

*Was due process respected in the course of the disciplinary proceedings?*

56. In reviewing due process in disciplinary proceedings, the Appeals Tribunal has consistently held that only substantial procedural irregularities can render a disciplinary sanction unlawful.<sup>41</sup>

57. Ms. Bamba submits that the investigator and Dispute Tribunal Judge were biased which violated her due process rights and that the Dispute Tribunal erred in procedure by refusing to hear all "relevant" witnesses "without ground".

58. Ms. Bamba says there were flaws in the investigation, including translation flaws, OIOS allegedly failing to seek sufficient exculpatory evidence, and the decision-maker misunderstanding the "central elements" of Ms. Bamba's case. We find that these submissions are unfounded.

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<sup>41</sup> *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. UNDT/2017/051; *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39, 40, and 42; *Muindi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-782.

59. The Dispute Tribunal reviewed these allegations and dismissed them. The translation flaws identified (improper translation of “curettage” or lack of translation/transcription of the word “complot” or “plot”) were not substantial procedural irregularities. In the investigation interview, the investigator asked multiple times for the names and contact information of key witnesses but she indicated that she did not have them; without this information, it would be almost impossible for the investigator to obtain evidence from those persons.

60. Ms. Bamba was informed of the allegations against her, informed of her right to seek assistance of counsel, and given the opportunity to comment and respond to the allegations which she did. She was interviewed in connection with the investigation, which interview was audio-recorded with a transcript. There is no evidence that her right to procedural fairness was breached during the investigation or disciplinary process.

**Judgment**

61. The appeal is hereby dismissed, and UNDT Judgment No. UNDT/2021/051 is upheld.

Original and Authoritative Version: English

Decision dated this 1<sup>st</sup> day of July 2022 in New York, United States.

*(Signed)*

Judge Sandhu, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Raikos

Judgment published and entered into the Registry on this 16<sup>th</sup> day of August 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar