



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEGUSSIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Filippo Pucci, WFP

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the World Food Programme (WFP). On 22 December 2014, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi challenging the decision to separate him from service with compensation in lieu of notice and with termination indemnities following a disciplinary process. This case was registered as Case No. UNDT/NBI/2014/115.

2. The UNDT held oral hearings on 13-15 October 2015 and 26 January 2016 in which about eight witnesses testified. In delivering its Judgment No. UNDT/2016/057 on 10 May 2016, the Tribunal found that a charge of misconduct was established against the Applicant. It also found that the Applicant's rights to due process were prejudiced because he was not provided with the investigation report. The Tribunal held that the Applicant did not canvass the issue of procedural breaches and that it was not shown that the Applicant suffered any specific damages resulting from a breach of his fundamental rights and accordingly dismissed the Application.

3. The Applicant appealed Judgment No. UNDT/2016/057 to the United Nations Appeals Tribunal (UNAT/the Appeals Tribunal).

4. In its Judgment No. 2016-UNAT-700, the Appeals Tribunal recalled the standard of review in disciplinary matters as laid down in *Mizyed*¹ and other cases.² It found that the UNDT did not apply the said standard and had therefore committed errors of fact and law and not rendered a fully reasoned judgment.

5. Particularly, UNAT found that the UNDT's reasoning that by simply grabbing the hand of Mr. Mudey, the Applicant had committed a physical assault, and that this act alone, had sufficiently established that the facts upon which the disciplinary measure was based were proven by clear and convincing evidence, fell far short of the standard required to establish misconduct.

¹ *Mizyed v Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

² *Applicant v Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29. See also: *Diabagate v Secretary-General*, 2014-UNAT-403; *Molari v Secretary-General*, 2011-UNAT-164.

6. Additionally, UNAT expressed the view that if all the facts on which the disciplinary sanction was based could be established by clear and convincing evidence, the Applicant's behavior would constitute misconduct and the disciplinary sanction imposed on him would be a proportionate measure. It added that if only part of the allegations could be so established, the disciplinary sanction could be upheld even though proportionality of the sanction would be an issue.

7. The Appeals Tribunal therefore remanded this matter to the UNDT for the full determination of three specific questions.

8. At a Case Management Discussion (CMD) on 29 November 2018, it was agreed that the most efficient manner to proceed would be for the parties to review the audio recording and transcripts that emanated from the hearings that were held on 13-15 October 2015 and 26 January 2016 and inform the Tribunal if there were any witnesses they would wish to recall.

9. At a CMD on 4 April 2019, the parties informed the Tribunal that they were satisfied with the evidence adduced during the hearings of 13-15 October 2015 and 26 January 2016 and had no objection to the Tribunal relying on the audio recordings and transcripts of the said hearings to adjudicate the matter.

10. Since counsel had reviewed the audio recordings and the transcripts and expressed their satisfaction that the evidence had been fully explored during the hearings of 13-15 October 2015 and 26 January 2016, the Tribunal saw no value being added in having a supplemental hearing. Instead, the Tribunal invited the parties to file closing submissions on the issues raised in Judgment No. 2016-UNAT-700 by 2 May 2019, which they did.

Facts

11. On 16 August 2011, the Applicant was recruited by the World Food Programme (WFP) as a member of its locally recruited field staff based at its Ethiopia Country Office. In July 2013, he was appointed under a fixed-term appointment (FTA) as a Finance and Administrative Assistant at the GS-5 level in

WFP's Gode Sub-Office. He held this position at the times material to this Application.

12. In the morning of 20 November 2013, the Head of the Gode Sub-Office, Mr. Faryabi, reported by phone to Mr. John Corpuz, the WFP Field Security Officer (FSO) based in Addis Ababa that the Applicant had assaulted one Mr. Ibrahim Mudey, a generator operator employed by an outsourced company known as Midnimo Labor Association (Midnimo). He asked for the assistance of Mr. Corpuz but the said call was ended when Mr. Faryabi told Mr. Corpuz that the Police was already at the gate of the Gode WFP compound to look for the Applicant and that he had to hang up.

13. Later that day, Mr. Faryabi sent a detailed email of the incident to Mr. Corpuz and the senior management of WFP, Ethiopia. It was decided by WFP Ethiopia management that Mr. Corpuz should travel to Gode to ensure the safety of the Applicant who was being detained by the Police and to gather the facts for an investigation. Meanwhile, Mr. Corpuz who had informed the WFP Office of Inspections and Investigations (OIGI) received guidance from it regarding how he was to conduct the fact-finding mission he was required to undertake in Gode.

14. He travelled to Gode on 22 November 2013 where he conducted an initial fact-finding and interviewed several witnesses who gave written and signed statements in relation to the incident. He tried to get a statement from the Applicant while he was detained but was told by the Applicant that he preferred to give a statement after his release.

15. On 23 January 2014, he interviewed the Applicant and received his written statement by email on 24 January. He also interviewed six other witnesses while in Gode.

16. Following the initial fact-finding investigation by Mr. Corpuz for which he issued a report dated 20 December 2013, the investigation was then continued by the OIGI. The final investigation report signed by Mr. Godefroid, an investigation officer with OIGI, was issued on 19 February 2014.

17. Disciplinary proceedings were then initiated against the Applicant. By a letter of 19 August 2014, he was informed of the charges against him and his rights were explained.

18. The charges were that he physically assaulted and engaged in a physical altercation with Mr. Ibrahim Mudey, a generator operator for Midnimo causing him physical injuries on WFP premises. It was also alleged in the charge letter that the Applicant had, by his actions, exposed WFP to reputational risk both internally and with external parties. It was additionally stated that an aggravating factor in the case was that the Applicant had physically pushed a WFP driver in April 2013.

19. The Applicant responded to the charges by email dated 25 September 2014. In his response, he sought to explain all the facts leading to the incident and denied any act of misconduct.

20. By a memorandum dated 27 October 2014, the Applicant was informed that he was adjudged to have committed serious misconduct and that the disciplinary sanction of “separation from service with compensation in lieu of notice and without termination indemnities” was imposed on him pursuant to staff rule 10.2 (a)(viii).

21. On 22 December 2014, the Applicant filed his Application challenging the decision to separate him from service. He sought the remedy of rescission of the decision to separate him, and in the alternative, he asked for compensation in an amount representing 15 months’ net base salary.

Considerations

22. The Appeals Tribunal remanded this matter for the full determination of the following three questions: (a) whether there is clear and convincing evidence that the Applicant initiated the fight and continued to fight in a severe manner; (b) whether there is clear and convincing evidence that the Applicant caused physical injury to Mr. Mudey; (3) whether there is clear and convincing evidence regarding the aggravating factor considered by the Respondent, which is, that the Applicant used physical force against a driver in April 2013.

Did the Applicant initiate the fight and continue to fight in a severe manner?

23. On 27 October 2014, the Respondent imposed the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities on the Applicant. According to the memorandum conveying the decision to impose the disciplinary measure, it was established that the Applicant engaged in a physical altercation with Mr. Mudey causing him physical injuries while on WFP premises. The memorandum also stated that it was established that the Applicant initiated the fight and continued to fight in a manner that had serious consequences for Mr. Mudey and WFP.

24. The memorandum stated further that the Gode hospital medical certificate provided by Mr. Mudey and a settlement agreement signed by the Applicant whereby he accepted to pay 40,000.00 ETB to Mr. Mudey both constituted credible documentary evidence that supported the Applicant's culpability in the allegations against him.

25. In its review of this case, the Tribunal finds that there is evidence that a report was made to the WFP Head of the Gode sub-office on 18 November 2013 after an altercation between the Applicant and Mr. Mudey over the installation of an air conditioner. It was decided that Mr. Mudey would be suspended and not allowed into the office and he was asked to leave. The next day, Midnimo, the company he was working for apologized in writing to the Applicant although the Applicant felt that the apology should have been more detailed.

26. Evidence shows also that on 20 November 2013, just two days after the said altercation between the Applicant and Mr. Mudey, the Applicant who was resident in the WFP premises was leaving the residential shower room when he saw Mr. Mudey nearby. When he later went to the cafeteria for breakfast, he again saw Mr. Mudey there.

27. The Applicant testified that he grabbed him by the hand, told him to leave and tried to escort him out of the place since he had been suspended from coming to the premises. He claimed that Mr. Mudey freed his hand of his grasp and punched him on the forehead. The Applicant continued that he then held him by

the waist and as Mr. Mudey struggled, they both fell to the ground with him on top. They were later separated by other persons who came to the scene.

28. Mr. Mudey's testimony before the Tribunal on 26 January 2016 was that when he returned to the WFP offices on 20 November 2013, he went to look for Mr. Faryabi, the head of the sub-office and ran into the Applicant who angrily asked him who gave him permission to return. He said did not respond but instead entered the canteen and asked the cook, Ms. Leyla Abdi, to help him find Mr. Faryabi.

29. He continued that as he tried to leave the canteen a while later, the Applicant entered and they met again. His account is that the Applicant then grabbed him and threw him to the floor. When his head hit the floor, he became dizzy and on opening his eyes, the Applicant was on top of him with his leg on top of his chest. He then tried to defend himself but the Applicant hit him on his face with his head. Other people who came to the scene separated them and he reported the assault to the Police.

30. Mr. Mudey continued in his testimony that one of his front teeth was knocked out and that he sustained an injury on the back of his head. He stated that he attended the Gode hospital the same day and that x-rays were carried out on his chest and teeth. However, in his witness statement of 28 September 2015 made as part of the response to this Application, Mr. Mudey stated that after the attack on him on 20 November 2013 by the Applicant, he noticed that four of his teeth were bent inwards and a dental x-ray at the hospital showed that the four teeth were damaged.

31. The witness also stated that on 23 November 2013, the Applicant's relatives visited him and some elders of his family and apologized for the injuries caused him and he accepted their apology. An agreement was written and signed in which it was stated that the Applicant would pay him 40,000.00 ETB, the equivalent of USD1, 900.

32. On 19 February 2014, the OIGI issued a final investigation report of the incident. The report relied on the statements collected from witnesses by the FSO

Mr. Corpuz, during an earlier fact-finding exercise, a medical certificate submitted by Mr. Mudey, the settlement agreement between the Applicant and Mr. Mudey and other supplemental statements collected by the OIGI from the Applicant, Ms. Leyla Abdi and others. The investigation concluded that OIGI found sufficient evidence to substantiate allegations of physical assault committed during working hours and inside WFP premises by the Applicant against Mr. Mudey which also resulted in reputational risk for WFP.

33. In determining the question whether the Applicant initiated the fight and continued to fight in a severe manner, it is fairly settled that following a previous encounter two days before after which Mr. Mudey was suspended from going to the WFP offices in Gode, the Applicant saw him on the premises. It is not disputed that the Applicant accosted him and told him to leave.

34. It is also not in doubt that a fight then ensued during which both parties were on the floor with the Applicant who was bigger being on top of Mr. Mudey and evidently having the upper hand. Others on the premises managed to separate the fighters who both sustained some injuries. The investigation established that there was only one eye witness to the initiation of the fight. That lone eye witness is Ms. Leyla Abdi who worked in the WFP canteen in the premises. She and Mr. Mudey both worked for the same contractor, Midnimo.

35. In her statement to Mr. Corpuz who conducted the initial fact-finding on behalf of OIGI just two days after the incident, she stated that the Applicant had entered the cafeteria, approached Mr. Mudey and punched him in the head before grabbing him and throwing him to the floor to sit atop him. She also stated that she tried to intervene but was pushed aside by the Applicant so that she fell against some refrigerators. In her witness statement for this application, she mostly maintained this account.

36. When led in evidence during the hearing in this case, the same witness told the Tribunal that the Applicant entered the cafeteria while shouting at Mr. Mudey and questioning why he was on the premises. She continued that he then started punching Mr. Mudey on the head and at some point, sat on him. Under cross-

examination, she asserted that she did not try to intervene physically in the fight between the two men but was only shouting for help.

37. In her second sworn statement to OIGI investigators dated 4 January 2014, Ms. Abdi stated that when she returned to the cafeteria after informing Mr. Faryabi that Mr. Mudey was waiting for him in the cafeteria, she saw the Applicant beating Mr. Mudey. Did this mean that she did not witness the start of the fight?

38. In its investigation report, the OIGI reproduced and accepted the story as to how the fight started as told by Ms. Abdi to Mr. Corpuz in her first statement dated 11 December 2013 during the fact-finding stage as an established fact. Noting that Ms. Abdi made three different and conflicting statements about the initiation of the fight at different times, and especially that her second statement to the OIGI investigator conflicted with her statement to Mr. Corpuz, it is strange that the OIGI would choose one account given by her over her other accounts.

39. As already stated above, her first account is that she saw the Applicant walk into the cafeteria screaming at Mr. Mudey and then started punching him in the face and that she tried to intervene but the Applicant pushed her and she fell against some refrigerators. Less than a month later, she claimed in her second statement to OIGI that she saw the Applicant beating Mr. Mudey when she returned from giving a message to Mr. Faryabi. This second account suggests that she did not see the start of the physical altercation. It is on record also that she testified that she did not try to physically intervene in the fight between the two men but only shouted for help.

40. Considering that Ms. Abdi is the sole eye witness as to how the fight started, the Tribunal finds that the evidence she provides are contradictory and not reliable. In the charge letter dated 19 August 2014 to the Applicant, the Respondent noted that Ms. Abdi was the only witness to the beginning of the fight on 20 November 2013 and that she provided testimony that the Applicant entered the cafeteria and attacked Mr. Mudey without being provoked.

41. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held that the weight to be attached to admitted evidence is within the discretion of the UNDT Judge. The reliance placed on one version of Ms. Abdi's contradictory accounts by the Respondent is both unfortunate and fatal to the Respondent's case. In view of the contradictions in her different statements and testimony, the Tribunal finds that she is an unreliable witness. Noting that the parties to the physical altercation each claim that they did not initiate the fight, what ought to be the only independent evidence provided by Ms. Abdi does not meet the standard of clear and convincing evidence required to establish that the Applicant initiated the fight between him and Mr. Mudey.

42. As to whether the Applicant continued to fight in a severe manner, it is well established by evidence of the parties to the fight and others who came to the scene to separate them that the Applicant was on top of Mr. Mudey. Did that fact alone amount to fighting severely on the part of the Applicant? There is oral evidence from witnesses that Mr. Mudey's mouth was bleeding from the fight. There is also evidence attested to by Mr. Corpuz during cross-examination that the Applicant sustained a human bite on his back during the fight.

43. The Respondent had suggested that since the Applicant was on top of Mr. Mudey during the fight and was only pulled off by those who separated them, the Applicant could have stopped the fight by himself by getting off Mr. Mudey. In other words, the Respondent submitted that the Applicant was in a position to end the fight by himself. This argument is not borne out by evidence and the Tribunal is not persuaded by this it especially considering that both parties had sustained some injuries in the fight.

The veracity of documents relied on as constituting the proof of the extent of Mr. Mudey's injuries

44. Further, as proof of the allegation that the Applicant continued to fight in a severe manner and caused injury to Mr. Mudey, both the OIGI investigation report and the Respondent relied on a medical certificate from Gode Hospital presented by Mr. Mudey to show that he visited the hospital after his physical altercation with the Applicant on 20 November 2013. As proof of his culpability,

the Respondent also relied on a settlement agreement brokered between the families of Mr. Mudey and the Applicant in which the Applicant agreed to pay compensation to Mr. Mudey. The Applicant attacked the credibility of and reliance placed on these pieces of documentary evidence by the Respondent in imposing disciplinary sanctions on him.

45. In this regard, the Tribunal has reviewed the medical certificate in issue. The document which is solely in English does not appear to be made on a letter-head paper of the Gode hospital although it bears a stamp. The writing is illegible and information is scanty. It is not a medical report and does not refer to any x-rays of the teeth and chest that Mr. Mudey claimed were done on him. It does not show either that he lost a tooth as claimed by Mr. Mudey in his testimony. It does not describe the medical condition of Mr. Mudey when he attended the hospital. It has also been pointed out by the Applicant that the date shown on the certificate which is 10 March 2006 of the Ethiopian calendar is 19 November 2013 under the Gregorian calendar which the Organization uses.

46. What this means is that the date on the certificate reflects that the Applicant attended the hospital a day before the incident which is the subject matter of this Application. However, in OIGI's investigation report, it is stated that the medical certificate was made on 11 March 2006 of the Ethiopian calendar which is 20 November 2013. The Tribunal can confirm that the medical certificate clearly bears two dates, the "recovery" date which is 10 March 2006 and another date of 11 March 2006 on which it was signed. Two critical concerns arise here and they are: (1) why would OIGI misrepresent the date of this medical report by choosing one of the two dates on it without further inquiry on its part? (2) Is this a negligent act of the OIGI or a deliberate attempt to misstate a fact for the convenience of its preferred outcome?

47. The Applicant has provided a report from Gode hospital dated 12 December 2014 certifying that the hospital has no record of Mr. Mudey visiting it on 20 November 2013 or thereafter. This means in effect that the medical report submitted by Mr. Mudey on which the Respondent partly relies in this case is a forgery. At paragraphs 49 and 50 of his Reply, the Respondent contends that

though “the certificate bears a mistaken date, there is no evidence to suggest that it was falsified or to explain a motivation for such a forgery because the fact established by the medical certificate - that Mr. Mudey was seriously injured is not in dispute.” The Tribunal’s observation in reviewing the said medical certificate is that the document is not a medical report and does not state the extent of any injuries suffered by Mr. Mudey. Rather it showed that Mr. Mudey was placed on sick leave for a period, prescribed some medication and asked to report back to the hospital after a certain number of days.

48. The Respondent also added that there is no evidence to support the authenticity of the Applicant’s report from Gode hospital which asserts that Mr. Mudey did not visit or obtain a medical certificate from the hospital. He submitted further that the Applicant did not challenge the authenticity of the medical certificate presented by Mr. Mudey during the investigation or disciplinary process.

49. During the hearing of this matter and in answer to a question by the Tribunal, the Applicant explained that he first obtained proof of the falsity of Mr. Mudey’s medical certificate after the conclusion of the disciplinary process because he had been placed on administrative leave and banned from visiting Gode throughout the disciplinary process. He then went to Gode thereafter, obtained the proof and submitted his complaint regarding the falsity of the medical certificate.

50. Regarding Mr. Mudey’s attendance at the Gode hospital, the Tribunal notes that in Mr. Faryabi’s testimony, the witness stated that after the Applicant and Mr. Mudey were separated, he saw that Mr. Mudey’s face was bleeding and he immediately asked a driver and one of the guards to take Mr. Mudey to hospital. He continued that when the car came, he assumed Mr. Mudey would go to the hospital. Mr. Faryabi stated that he then went to talk to the Applicant and returned to see that Mr. Mudey was back at the office with the Police and upon asking the driver why he did not take Mr. Mudey to the hospital, he was informed that Mr. Mudey went to the Police Station instead. He said that he again instructed that Mr. Mudey be taken to the hospital as he was still bleeding.

51. It is mention-worthy that when he was led in evidence, Mr. Mudey described in detail how the Applicant assaulted him leading to the fight between them as he defended himself. When asked by the Respondent's counsel if he sought medical attention, he responded that he went to hospital and had x-rays of his chest and mouth and that he had sustained an injury to his head and one front tooth was knocked out. His medical certificate was not shown to him nor was he questioned about it by the Respondent's counsel who led him in evidence. When it was pointed out to him in cross-examination that there was a discrepancy in the date of the medical certificate he submitted, he stated that there could be a clerical error and that he attended the hospital.

52. It is disappointing that investigators in the Organization or any of its agencies would not demand a proper medical report beyond the scanty and unreliable medical certificate provided by Mr. Mudey before asserting in its investigation report that "he suffered dental damages." This was probably based on Mr. Corpuz's fact-finding report where he stated that it was established that a doctor determined that four of Mr. Mudey's teeth were damaged and would require expensive dental treatments. The impugned medical certificate which is part of this case certainly does not state or establish that claim.

53. Did OIGI investigators find it difficult to confirm the authenticity of a medical certificate that constituted part of the evidence it relied upon for its findings and which the Respondent himself claims "reflects a mistaken date"? It must be emphasized that the said medical certificate, even if the date on it was correct, does not stand up to any scrutiny and cannot be accepted within the medical office/unit of this Organization as medical certification or the medical report of injury sustained.

54. Professional investigators in the Organization such as the OIGI have no excuse for conducting less than painstaking investigations or for not seeking to verify the credibility of questionable documents relied upon in their investigations such as the medical certificate in issue here. Also, it should not be difficult for them to verify the authenticity of the Applicant's disclaimer document of that medical certificate from Gode hospital made on 11 December 2014.

55. The Tribunal has also reviewed the Respondent's case that the Applicant acknowledged responsibility for the injuries of Mr. Mudey and agreed to pay him the equivalent of USD1, 900. The Respondent submitted that the seriousness of the altercation required the involvement of the local community in Gode and that three community leaders who conveyed their support for Mr. Mudey met with Messrs. Corpuz and Faryabi and "wanted WFP to assure them that the Applicant would not leave Gode without settling his liabilities." He added that local townspeople started a vigil across from the Gode sub-office because they feared the Applicant would leave Gode without settling matters with Mr. Mudey.

56. It was argued for the Applicant that the failure of the investigation and the intent of the Respondent to blame the Applicant are demonstrated by evidence of promises made to the Gode community by WFP through the investigator, Mr. Corpuz. The Applicant's counsel referred to Mr. Corpuz's initial fact-finding brief which showed that before he interviewed the Applicant and other witnesses, he held a meeting with community leaders from Mr. Mudey's Gode community during which they expressed support for their son Mr. Mudey and demanded and obtained Mr. Corpuz's assurances that WFP would not take action to disadvantage Mr. Mudey. In its charge against the Applicant, WFP also stated that the incident caused significant tension in the local community and that community representatives threatened to take action against WFP if it shielded the Applicant from assuming responsibility in relation to the incident.

57. The Applicant testified that to free himself from Police detention, he agreed to sign a settlement agreement negotiated with Gode community elders, whose conditions included that he was to pay the equivalent of USD1, 900.00 to Mr. Mudey. Under cross-examination, Mr. Corpuz stated that the Gode community was told that the Applicant assaulted their family member and they were protecting the interest of that family member. He stated that he made the promise to the Gode community elders that Mr. Mudey would not suffer any disadvantage because they thought he had come to take the Applicant away from Gode so that he would not answer for his infractions to Mr. Mudey. He stated also that he reassured them that he would not take the Applicant away from Gode until negotiation had been concluded.

58. It cannot be ignored that because Gode community to which Mr. Mudey belonged wanted the Applicant punished and Mr. Mudey's job protected, Messrs. Corpuz and Faryabi practically assured the community that WFP would do so. Mr. Corpuz also stated, when cross-examined, that during his fact-finding, he was informed that Gode community was restless and keeping vigil outside WFP premises to make sure the Applicant didn't fly out with him the following morning without negotiations. Therefore, the Applicant's case that he entered a settlement agreement to pay the equivalent of USD1,900 solely to free himself from police detention and from the pressure on WFP to take action against him regardless of the evidence tainted the investigation, cannot easily be dismissed.

59. The Tribunal finds therefore that in its decision to impose disciplinary sanction on the Applicant, the Respondent relied in part on a medical certificate which did not support the claim of serious injuries inflicted on Mr. Mudey and whose authenticity is in doubt. The Respondent also relied on a settlement agreement which appears to be largely coerced to establish the culpability of the Applicant. While the WFP may have legitimately sought to preserve its goodwill with its host community of Gode, the extent of threats by the local Gode community, its involvement and interference with Mr. Corpuz during his fact-finding and with Mr. Faryabi and the WFP in this matter resulting in the community practically eliciting assurances from Mr. Corpuz and others that the Applicant would be punished is worrisome. The Tribunal finds that these interferences detracted from the professionalism and detachedness that ought to attend the investigative process and tainted it irredeemably in this case.

Is there clear and convincing evidence?

60. In the light of its foregoing review, the Tribunal finds that the Applicant had attempted to physically remove Mr. Mudey from WFP Gode sub-office in the morning of 20 November 2013. It also finds that in so doing, the Applicant was imprudent and reckless since he could have sought the assistance of security personnel to remove Mr. Mudey. However, the allegations that he initiated the fight with Mr. Mudey and continued to fight severely and inflicted serious injuries on him were not established by clear and convincing evidence.

Was there similar facts evidence that the Respondent could rely on as aggravating factor in this case?

61. The Respondent, in imposing the disciplinary sanction of “separation from service with compensation in lieu of notice and with termination indemnities” on the Applicant, considered as an aggravating factor, “the prior display of aggressive behavior in the workplace” by the Applicant. This prior display of aggressive behavior referred to was based on an allegation cited in Mr. Corpuz’s investigation report that in April 2013, the Applicant had pushed a WFP driver while at the Gambela sub-office.

62. In his investigation report dated 20 December 2013, Mr. Corpuz listed among evidence he considered in establishing that the Applicant had previously engaged in aggressive conduct in the workplace to include: (a) “email correspondence from the local security assistant of Gambela regarding a previous reported abuse involving (the Applicant)”; and (b) “email apology of (the Applicant) to a WFP driver in Gambela.”

63. Mr. Corpuz stated in his report that an aggravating factor is that the Applicant had physically assaulted a driver when he was at the Gambela sub-office. The investigator remarked that although the alleged conduct was never investigated, he had assessed that it occurred. In arriving at the disciplinary sanction which he imposed on the Applicant, the Respondent stated clearly that the alleged prior and unproven physical assault of a driver by the Applicant was relied upon by him as constituting an aggravating factor.

64. In the final investigation report by the OIGI, it was similarly stated that in April 2013, the Applicant had had an altercation with a driver and then later apologized to the said driver in an email dated 19 April 2013 for pushing him. The investigation report stated that one Mr. Pickering who witnessed the incident told IOGI that in an email that that he heard the Applicant shouting at the driver before pushing him on the chest out of his office. Although the alleged incident was neither reported nor investigated, the OIGI concluded that it was the second time that the Applicant used physical force against a person on WFP premises.

65. In criminal law where similar facts evidence may be admitted, its singular purpose is to prove that the defendant committed the crime of which he is accused because he has a propensity to commit that type of crime. Similar facts evidence may also be used to rebut a defense of accident or coincidence. Many safeguards are usually however considered before they can be admitted. In admitting similar facts evidence, the crucial test is that its probative value must outweigh its prejudicial tendencies.

66. When applying the principle of similar facts evidence in civil cases, the court must be satisfied that the evidence is relevant, uncontroversial and probative. Can it be asserted that this piece of evidence that the Applicant had previously pushed a driver is uncontroversial and probative?

67. As already stated above, the letter imposing disciplinary sanction against the Applicant stated, that the sanction is justified among other reasons, by the Applicant's prior display of aggressive behavior in the workplace.

68. The alleged conduct was never reported, investigated or established. It was therefore illegal for the Respondent to consider it as it is clearly controversial and cannot therefore properly be admitted as similar facts evidence or constitute an aggravating factor in this case.

Remedies

69. The Applicant seeks the following remedies:

- a. Rescission of the decision to separate him from service or in the alternative, 15 months' net based salary for compensation and moral damages; and
- b. Referral of Mr. Corpuz to the Secretary-General, under art. 10.8 of the UNDT Statute, for possible action to enforce accountability regarding his "biased and inaccurate Investigation Report".

70. The Respondent's position is that since the evidence amply supports the finding of misconduct in this case, the imposed disciplinary measure was both

warranted and proportionate. Consequently, he requests that the Tribunal dismiss the Applicant's claims in its entirety.

71. Pursuant to art. 10.5(a) of its Statute, the Tribunal may rescind a contested administrative decision or order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) regulates awards of compensation. The General Assembly, by its resolution 69/203, amended art. 10.5(b) of the UNDT Statute to ensure that compensation is ordered only for harm and that the existence of such harm is proven or supported by adequate evidence.

72. In *Cohen* 2011-UNAT-131, the Appeals Tribunal highlighted the right of staff to an effective and equitable remedy once the Dispute Tribunal has concluded that an administrative decision is unlawful. Accordingly, the Applicant should be granted a remedy that takes into account his employment with WFP that was unlawfully taken away from him.

73. In *Sarrouh* 2017-UNAT-783, the Appeals Tribunal reiterated its long-standing view that the UNDT is in the best position to decide on the level of compensation given its appreciation of the case.

74. In *Mihai* 2017-UNAT-724, the Appeals Tribunal enjoined the UNDT to order rescission of the impugned decision pursuant to art. 10.5(a) of the UNDT Statute before awarding in-lieu compensation.

Judgment

75. The Tribunal finds that the Respondent unfairly dismissed the Applicant because the reasons upon which the Applicant's separation from service is based were not established by clear and convincing evidence.

76. The Tribunal orders the Respondent to rescind the administrative decision and to reinstate the Applicant.

77. Considering that at the time of the Applicant's separation from service, he had successfully served with WFP as locally recruited field staff for about two years and on a fixed-term appointment for 15 months, the Tribunal considers that minus his unlawful separation from service, he would have continued to serve on an FTA for at least another year. The Tribunal therefore sets in-lieu compensation in the amount of 12 months' net base salary.

78. The Appeals Tribunal has consistently held that the Dispute Tribunal shall not award compensation for moral damages when there is no evidence whatsoever to sustain such harm or prejudice.³ Since the Applicant did not provide corroborating evidence, his claim for moral damages is refused.

79. With respect to the accountability referral urged on the Tribunal by the Applicant, the Tribunal notes that the Respondent has asserted that he did not rely entirely on Mr. Corpuz's report during his decision-making process. Consequently, the Tribunal refuses the Applicant's request. Nevertheless, the Tribunal is of the view that if Mr. Corpuz is to continue conducting investigations, WFP should ensure that he receives training as to the proper role of an investigator and on the investigative process.

80. The compensation ordered shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 17th day of June 2019

³ *Al Hallaj* 2018-UNAT-810 quoting *Kallon* 2017-UNAT-742, *Tsoneva* 2017-UNAT-714, *Ademagic et al.* 2016-UNAT-684 and *Oummih* 2015-UNAT-518/Corr.1.

Entered in the Register on this 17th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi