| UNITED NATIONS DISPUTE TRIBUNAL | Case No.: | UNDT/NBI/2014/115 |
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| | Judgment No.: | UNDT/2016/057 |
| | Date: | 10 May 2016 |
| | Original: | English |

**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

## Introduction

1. The Applicant was employed by the World Food Programme (WFP) on 16

one in his own office. The Applicant was not happy that Mr. Mudey installed one AC unit in his own office and approached Mr. Mudey with "his closed fist and pressed his knuckles" against his face.

48. On 20 November 2013, he went to the compound as he had been requested on 19 November by Mr. Faryabi to attend work. In his 11 December 2013 statement to Mr. John Corpuz, he said that it was the deputy of Midnimo, Mr. MM, who called him on 19 November and asked him to report for work on the compound. He reached the compound at 8:00 a.m. and he could not find Mr. Faryabi in his room. He then saw the Applicant who yelled at him and asked him what he was doing on the compound.

49. Mr. Mudey did not respond and went straight to the cafeteria. Ms. Mohamed Abdi told him to wait there while she would look for Mr. Faryabi. Ms. Mohamed Abdi came back and told Mr. Mudey that Mr. Faryabi had requested that he should go home and come back at 10:00 a.m. because the Applicant was upset by his presence on the compound.

50. As he was leaving the cafeteria, Mr. Mudey saw the Applicant who approached him, held him by the waist and pushed him on the floor. When he hit the floor he fell "unconscious for a moment" – c

Mr. ***D i r i y e ' s i n v e s t i g a t i o n s t a*** and his ***n d*** court ***o f 29 S e p*** testimony.

59. On 18 November at about 11:30 a.m., he was parking his vehicle in the parking area near the generator area in the WFP compound. He saw the Applicant running towards the generator area and he looked angry. He was shouting at Mr. Mudey and was telling him repeatedly "Are you refusing me?" The Applicant approached Mr. Mudey and pushed him.

60. At the hearing he added that he saw the Applicant run towards Mr. Mudey and push him. Then both Mr. Mudey and the Applicant "started pushing each other". He conceded that he had received two warning letters from the Applicant.

**Considerations**

61. In disciplinary matters the role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral

can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse[5].

64. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and Office of Human Resources Management (OHRM)[6].

65. UNAT further observed in Hallal[7] that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

66. In Nyambuza[8], UNAT stated: "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration".

Whether the facts on which the disciplinary measure was based have been established and whether the established facts legally amount to misconduct

67. The determination of the present case rests on an evaluation of the credibility of the Applicant and of the witnesses called by the Respondent.

68. The Applicant was the sole witness on his own behalf. The Respondent relies on the testimony of Mr. Mudey, the alleged victim as well as Ms. Mohamed Abdi, the cook, and Mr. Diriye,

The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from to st the careor d beoubtfel. 0 1 318.79 38.88 Tm[(285509(e)7(l)-21(y)2

73. The Tribunal will now analyze and evaluate the testimony of the witnesses in the light of the above principles.

74. The Applicant does not deny e n nhe

Evidence of bad character in a criminal case means a disposition to commit an offence and is only admissible subject to strict conditions.

90. The same approach should be taken in disciplinary proceedings where investigators should obey the paramount considerations of fairness, detachment and scrupulous objectivity. Evidence of bad character or disposition to establish that show that an individual being investigated has a propensity to commit an act of misconduct should not be relied on unless a past act of misconduct is also part of the investigation. Such evidence cannot lightly be invoked or presented in a court of law and it should not influence the findings of an investigator or those whose responsibility it is to initiate disciplinary proceedings.

91. This evidence of bad character or bad disposition contained in the report of the investigators may have unduly influenced the decision-makers in taking the action that was taken against the Applicant without giving him an opportunity to comment or respond to the 19 April 2013 incident.

92. Due process also requires that a staff member who has been under investigation for a matter that may lead to a disciplinary measure be given an opportunity to comment on the report of the investigation. This was not done here. In Bertucci[17] it was held that the Administration's refusal to give the staff member access to the investigation file was unlawful.ct c

93. Though the Applicant did not request for the report it was incumbent on the Respondent to communicate it