



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

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**Mizyed  
(Appellant)**

**v.**

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

**JUDGMENT**

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<b>Before:</b>	Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Mary Faherty
<b>Case No.:</b>	2014-634
<b>Date:</b>	2 July 2015
<b>Registrar:</b>	Weicheng Lin

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**JUDGE RICHARD L**

... On 16 November 2011, Mr. Zvika Pyankevich, a colleague of the Applicant in the MOVCON unit, went to collect new fuel cards issued by the PAZOMAT Company on behalf of the PX. The cards collected by

Officer-in-Charge (OIC) of the MOVCON unit and Ms. Riva Ghoury also of the MOVCON office who was mentioned by the Applicant in his statements and interviews. Statements were also obtained from other witnesses.

... The Applicant eventually handed in the missing card on 16 February 2012.

... The SIU investigator forwarded her investigation report to Mr. Khaled Awar, Deputy Chief Security Officer, on 17 January 2012 recommending that the enquiries should be followed up by the UNTSO Administration and appropriate disciplinary measures taken. The report stated that:

- a. The Applicant was in illegal possession of two duty free PAZOMAT Company fuel cards; one being the missing card and the other a second fuel card. National Staff cannot buy or use such duty-free fuel cards.



5. The Dispute Tribunal also failed to exercise jurisdiction vested in it by ignoring the issues in connection with the decision-making process that led to the decision to terminate Mr. Mizyed's service. The letter from the ASG/OHRM was *ultra vires*, because, on 19 March 2013, the USG/DM had not even received the recommendation from the ASG/OHRM, let alone taken the contested decision. The Office of the USG/DM received the ASG/OHRM's recommendation on 21 March 2013 and approved it on 25 March 2013. If the decision to dismiss Mr. Mizyed's service was taken by an incompetent person, as in the present case, the decision was illegal and must be cancelled. The Administration failed to respect Administratw( )TjEt9ves I6.93nsprc fSh/AI/374.54(1/Aenda5.1

9. Mr. Mized requests that the Appeals Tribunal reverse the Judgment and order his reinstatement and “three years’ salary for moral, psychological/emotional, health and

dissatisfaction with the UNDT's rulings in the management of the case, but fails to demonstrate how it affected his right to a fair trial or to provide evidence in this sense.

13. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Mizyed's appeal and affirm the Judgment.

### **Considerations**

14. Mr. Mizyed requests an oral hearing "to provide and brief the court with all evidence that was not taken into consideration neither at the hearing nor during the trial of the UNDT". This Tribunal is satisfied that all relevant issues have been clearly defined in the submissions of the parties. Mr. Mizyed's request therefore does not come within Article 18(1) of the Appeals Tribunal Rules of Procedure in that an oral hearing would not assist in the expeditious and fair disposal of the case. Mr. Mizyed's request is therefore denied.

15. Mr. Mizyed was separated from service with compensation in lieu of notice and without termination indemnity after the USG/DM concluded that there was sufficient evidence that he had stolen a duty free gasoline card and used it to refuel his private vehicle, and had later attempted to use the card again.

16. Mr. Mizyed contested the Administration's decision to separate him. His case before the UNDT was that, while admitting to using the missing fuel card to refuel his personal car, he was not aware that it was stolen and believed it to be the one he had previously received from a fellow staff member. He believed that the missing fuel card had been exchanged with one he had kept in his desk drawer. He suspected it was exchanged either by Mr. Pyankevich or Ms. Ghoury, both of whom shared an office with him and two other colleagues, in order to get him into trouble and force him out of the Organization.

17. The UNDT found that the facts on which the sanction was based were established, that such facts amounted to serious misconduct and that the sanction was proportionate to the offence. In challenging that decision, Mr. Mizyed claims that the UNDT committed errors of fact and law as mentioned earlier.



18. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant*:<sup>4</sup>

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[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”.

*Clear and convincing evidence established that Mr. Mizyed stole a duty free gasoline card and used it to refuel his private vehicle*

19. In reviewing the Administration’s decision, the UNDT had before it the documentary evidence on the record and heard the testimony of three staff members and an investigator, together with the evidence of Mr. Mizyed and his witness Mr. Zreiq.

20. The UNDT was clearly unconvinced by Mr. Mizyed’s explanation as to how he came into possession of the stolen fuel card. The UNDT found material inconsistencies in the separate accounts given by Mr. Mizyed at various times during the SIU investigation and at the hearing of the case. The UNDT concluded that Mr. Mizyed “was not truthful and contradicted himself in the various accounts he gave at different interviews with investigators on different dates and during his testimony before the Tribunal”.<sup>5</sup>

21. Regarding other claims made by Mr. Mizyed, the UNDT made the following observations and findings:

(i) It was telling that although Mr. Mizyed was first contacted by investigators to make a statement on 15 December 2011, and despite the seriousness of being suspected of stealing the fuel card, it t

(ii) Mr. Mizyed entered a fake registration number while using the missing card at the gas station. He explained that he did not remember his vehicle registration number, but if he had nothing to hide he could have easily entered the correct information by looking at the license plate of the very car he was refueling. The UNDT was “not in any doubt that [Mr. Mizyed] put in fake registration numbers in order to cover his tracks and avoid detection”;<sup>6</sup>

(iii) Mr. Mizyed’s account that he had kept a fuel card in his office desk drawer which was exchanged by one or more of his work colleagues with the missing card was unconvincing, especially considering that they had no way of knowing that he used duty-free fuel cards which were not meant for national staff;

(iv) Mr. Mizyed claimed that he obtained the duty-free fuel cards from others outside the MOVCON office, yet there was no evidence that he discussed his use of them with his MOVCON colleagues. It was thus far-fetched to claim that his colleagues set him up by exchanging a stolen fuel card with the one he had kept in his desk drawer;

(v) It was “highly improbable and unbelievable” that his office colleagues, who did not know that he procured duty-free

(vii) It was not credible that Mr. Pyankevich would embark on such a plot due to the high risk of discovery and the overall complexity of the plot. As to Mr. Mizyed's explanation of Mr. Pyankevich's motive, there was no guarantee that Mr. Pyankevich would get Mr. Mizyed's job following a competitive recruitment process.

22. The UNDT found that the case made out in the application before it was "unreliable, unconvincing, evasive and untenable".<sup>9</sup> After carefully and thoroughly examining the evidence on which the Administration had based the sanction, the UNDT concluded:<sup>10</sup>

... Given the inconsistencies in the Applicant's statements to investigators, his unreliable and unconvincing testimony, his apparent inability to explain how he came to use a stolen fuel card, as well as the untenable explanations of a suspected conspiracy to set him up by his work colleagues[,] the Tribunal finds that the Applicant has not told the truth and has not successfully discharged the burden of establishing that the Administration wrongfully imposed a disciplinary measure on him in this case.

... The Tribunal is not in any doubt that the facts upon which the sanction imposed on the Applicant was based have been established and that the said facts amount to serious misconduct on the part of the Applicant.

23. The UNDT also considered Mr. Mizyed's argument that the investigation was procedurally defective, but dismissed it as being without merit.

24. In the view of this Tribunal, the evidence against Mr. Mizyed uncovered by the investigation was so overwhelming that the only reasonable conclusion available to the UNDT was that the facts were established by clear and convincing evidence. The evidence that Mr. Mizyed was in possession of the stolen card and that he used it to refuel his own private vehicle was not contested by Mr. Mizyed. His explanation of how he came into possession of the stolen card and how he came to use it is incapable of belief.

*The established facts qualify as misconduct*

25. This Tribunal agrees with the finding of the UNDT that the established facts amount to serious misconduct on the part of Mr. Mizyed.

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<sup>9</sup> *Ibid*, para. 123.

<sup>10</sup> *Ibid.*, paras. 111-112.

26. Staff Regulation 1.2(b) provides:

Staff Members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

Staff Rule 10.1 provides in part:

Misconduct

- (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct



every claim made by a litigant, especially when a claim has no merit”.<sup>12</sup> Having examined Mr. Mizyed’s closing statement, we are of the view that it was open to the UNDT to consider that the arguments set forth therein were without merit. We do not find that the UNDT’s failure to specifically refer to Mr. Mizyed’s closing statement had any effect on the outcome of the case.<sup>13</sup>

36. However, there is one matter on which we wish to comment. Mr. Mizyed argues that the UNDT failed to exercise the jurisdiction vested in it by ignoring the illegality of his separation from service and by ignoring the UNDT judgment in *Bastet*.<sup>14</sup> Mr. Mizyed claims that the letter from the ASG/OHRM dated 19 March 2013 establishes that “the USG-Management has illegally sub-delegated to the ASG-OHRM his responsibility to exercise on behalf of the Secretary-General the decision to separate from service the Applicant”. Mr. Mizyed’s claim is based on the fact that the letter clearly states that the USG/DM “has considered” the mitigating circumstances in his case and “has decided” to separate him from service, whereas at that time the USG/DM had not made any such decision.

37. It was clear from documentary evidence that the said letter was sent to the relevant office for delivery to Mr. Mizyed on 26 March 2013, after the approval of the USG/DM had been given on 25 March 2013. Therefore, when Mr. Mizyed received the letter, the decision had been approved by the USG/DM, as is evidenced by the manuscript note on the letter. Further, the letter stated that the decision to separate him from service became effective as at the date of his receipt of the letter.

38. Nonetheless, the letter contained statements that were simply not true as at the date of the letter. In our view, such a procedure is detrimental to the reliability and integrity of the disciplinary process and should be abandoned.

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<sup>12</sup> *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292, para. 47 (internal citation omitted).

<sup>13</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-328, para. 22; *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 26.

<sup>14</sup> See footnote 2.

39. We think it would have been more prudent for the UNDT to have addressed this matter in the context of a judicial review. However, Mr. Mizyed's submission on the illegality of the decision to separate him from service has no merit, nor is the UNDT Judgment in *Bastet* relevant.<sup>15</sup>

40. Mr. Mizyed raises several claims of procedural error by the UNDT, but does not demonstrate how the alleged errors prejudiced him or violated his due process rights. Even assuming, *arguendo*, that such errors occurred, none of them would be a ground to reverse the UNDT Judgment.

41. Being the Appellant, Mr. Mizyed has the burden of satisfying the Appeals Tribunal that the Judgment rendered by the Dispute Tribunal is defective. The Appeals Tribunal finds that Mr. Mizyed has failed to meet that obligation in that he has not established any errors of law, fact or procedure warranting a reversal of the UNDT Judgment.<sup>16</sup>

### **Judgment**

42. The appeal is dismissed in its entirety and the Judgment of the UNDT is affirmed.

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<sup>15</sup> In *Bastet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-511, dated 26 February 2015, the Ap.4863r3.4(o)-2.6(w th)-8.[(26335.4i.car25j/TTnbJ/T.13allow)6.1749-.Oiret3(.4ri)-7Tc[( Tc500-

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of July 2015 in Geneva, Switzerland.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Faherty

Entered in the Register on this 20<sup>th</sup> day of August 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar