

5. On 25 November 2013, the WFP Ethiopia Country Office (CO) informed the Office of Inspections and Investigations (OIGI) that on 20 November 2013 Mr. Negussie had allegedly assaulted M. Mr. Negussie had been taken into police custody almost immediately after the event. Mr. Negussie was bailed and released from police custody on the evening of 22 November 2013

9. By memorandum dated 27 October 2014, Mr. Negussie was informed that the charges of misconduct against him had been confirmed and that he was to be separated from service with compensation in lieu of notice but without termination indemnities. The disciplinary sanction was based on the charge that Mr. Negussie had (i) initiated a fight with M without being provoked or attacked; and (ii) continued to fight in a manner that had serious consequences for M and the Organization. In imposing the disciplinary sanction, the WFP considered as an

... As the disciplinary measure is based on two aspects (that Mr. Negussie initiated the fight and continued to fight in a severe manner) and an aggravating factor (

upper hand. Others on the premises managed to separate Mr. Negussie and M who both sustained some injuries. M's mouth was bleeding and Mr. Negussie sustained a human bite on his back during the incident, although the evidence establishes that this was inflicted not by M, but by one of those people who attempted to break up the fight by pulling Mr. Negussie off M.

16. The UNDT found that the only eyewitness to the initiation of the fight, someone we will call "A" who worked in the WFP canteen in the premises and

the UNDT questioned why the OIGI would “misrepresent” the date of the medical report by choosing one date over the other without apparent further inquiry. The UNDT also considered a written report from Gode Hospital dated 12 December 2014 produced by Mr. Negussie stating that the hospital had no record of M visiting the hospital on 20 November 2013 or thereafter. The UNDT found that the OIGI had failed to verify both the credibility of M’s medical certificate, and the veracity of Mr. Negussie’s disclaimer document of 12 December 2014 relating to that earlier certificate. The UNDT concluded that there was not clear and convincing evidence that Mr. Negussie had

22. The UNDT rescinded the decision to separate Mr. Negussie from service and awarded in-lieu compensation in the amount of 12 months' net base salary.

23. The Secretary-General filed an appeal on 16 August 2019 and Mr. Negussie filed his answer on 9 September 2019.

Submissions

The Secretary-General's Appeal

24. There was clear and convincing evidence that Mr. Negussie physically assaulted M, causing him physical injuries. The WFP Administration's conclusion was supported by the statements of multiple individuals who were present at the time of the incident. M's account was consistent with the statements provided by A and F, both of whom were present during the incident. Mr. Negussie's account of the accidental nature of the collision was at odds with the consistent accounts of M, A, and F that Mr. Negussie had thrown M on the ground and had beaten him. The consistency of these statements provided clear and convincing evidence to conclude that it was highly probable that Mr. Negussie had violently assaulted M.

25. The UNDT erred in law and fact in finding that A was the only witness to the incident and that she was not a reliable witness. A was not the only witness who testified that Mr. Negussie had initiated the fight. Mr. Negussie, M and A all stated that Mr. Negussie made the first physical contact which quickly escalated to the more severe physical assault on M by Mr. Negussie. The UNDT also erred in focusing on minor and immaterial inconsistencies in A's statements to dismiss her as an unreliable witness and by giving undue weight to whether A had specifically stated that she saw Mr. Negussie enter the cafeteria or how she described her role in the fight. These factors did not detract from the overall consistency of A's account of the events, which was consistent with the other evidence on record. The UNDT also had no reason to

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present case, the acknowledgement by Mr. Negussie that he had acted inappropriately in pushing another WFP staff member constituted sufficient evidence that the incident had occurred and could be considered an aggravating factor when assessing the severity of a disciplinary sanction in connection with the incident at issue in this case. Even without relying on the April 2013 incident as an aggravating factor, the sanction imposed on Mr. Negussie was proportionate, as it was not the most severe sanction.

27. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment, affirm the decision to separate Mr. Negussie from service with compensation in lieu of notice and without termination indemnities, and dismiss his application in its entirety.

Mr. Negussie's Answer

28. The Secretary-General mistakenly advocates the UNDT standard of review as the standard of review that the Appeals Tribunal is to undertake in disciplinary cases. The appeals process is

30. The Secretary-General has failed to show why it was unreasonable for the UNDT to conclude that the parties to the fight had each claimed that they did not initiate the fight and that what therefore ought to have been independent evidence provided by A did not meet the standard of clear and convincing evidence to establish that Mr. Negussie initiated the fight. Moreover, the statement given by F that he had witnessed Mr. Negussie smashing M's head to the ground while shouting at him why he had come to the office, was embellished and indeed proved to be entirely inaccurate.

31. It was ultimately left to Mr. Negussie to describe accurately the events of 20 November 2013. He described how he had grabbed M's hand to escort him out of the cafeteria, whereupon M punched him on the forehead; how he then grabbed M by the waist and they fell on the floor; that he was on top of M while M was punching him in the head; that he was lying on M's stomach trying to shield himself from the punches; and how he was bitten on his back during the altercation, an injury subsequently witnessed by C, the investigator.

32. Mr. Negussie refutes the Secretary-General's assertions regarding the allegation that Mr. Negussie initiated the fight and that M was injured as a result. The Secretary-General's first assertion, that Mr. Negussie's aggression towards M would have provided a sufficient basis for his separation, suggests that the Secretary-General is arguing proportionality. He does however not provide any further details as to what this aggression was and how it would be equated to a disciplinary sanction. The extent of Mr. Negussie's actions was that he grabbed M's hand. If such an activity merited dismissal, then it would be incumbent .24 0 0 s0 (i5r6 (.24 0 0 s0 (i8 (.24 0 oBT 46 0 0 46 1634.!

34. As to the third assertion about the apparent injuries sustained by M, the veracity of the “medical certificate” from Gode Hospital was legitimately questioned on the grounds that it was dated 19 November 2013, one day before the incidents, was written only in English and appeared not to be written on Gode Hospital letterhead paper; it was not a medical report and did not refer to any x-rays of the teeth and chest injuries M subsequently claimed he suffered; and Mr. Negussie had admitted into evidence a certified report from Gode

UNDT rightly concluded that the practices of the WFP and specifically the investigator, had detracted from the professionalism and detachment that ought to attend the investigative process and tainted it irredeemably.

37. Finally, the UNDT correctly found that the Administration had unlawfully relied, as an aggravating factor, upon Mr. Negussie's alleged conduct during an incident in April 2013 which had never been reported, investigated or established. The intention of the reference in the investigation report that "[h]aving information of a similar incident that occurred inside Gambella Sub-Office where [Mr. Negussie] manhandled a driver, [makes] it more likely that [Mr. Negussie] did the same with [M]", served to undermine Mr. Negussie's character. Similar fact evidence may be considered in disciplinary matters if the evidence is probative of the matter in question and relevant or significant to the facts of a case. In the present case, however, allegations of unsubstantiated misconduct on the part of Mr. Negussie should have played no part in an investigation report or conclusion, primarily because they did not prove that Mr. Negussie assaulted M.

38. Mr. Negussie requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

39. First, it is necessary to give some context to the events of 20 November 2013 that lead to Mr. Negussie's dismissal. This was not the first contretemps between the two men. A report had been made to the WFP Head of the Gode sub-office on 18 November 2013 after an altercation between Mr. Negussie and M, over the installation of an air conditioner. This resulted in a decision that M would be suspended and not allowed onto the WFP's premises. The following day, the company M was working for apologised in writing to Mr. Negussie. From his conduct a day later, it is apparent that Mr. Negussie was aware of that prohibition upon M returning to the WFP's premises. It is, however, improbable that Mr. Negussie knew of the circumstances in which M was

40. Mr. Negussie's first interaction with M on 20 November was to remonstrate with him and, it is not disputed, to approach and grasp M by the hand or wrist with a view to persuading the latter to leave the premises. This was not the initiation of the fight between the two men. While Mr. Negussie may have, in a strictly technical sense, assaulted M by placing his hand upon him, that alone was not fighting. That initial touching would not have constituted misconduct, certainly not misconduct sufficiently serious to warrant Mr. Negussie's dismissal. There was a subsequent fight between the two men, but which of them struck the other or did something constituting fighting was what the UNDT was directed to focus on and, in particular to determine whether there was clear and convincing evidence that Mr. Negussie initiated that fight as we have described it. The UNDT could not conclude to that standard that Mr. Negussie initiated the fighting and our review of the evidence and the Tribunal's findings confirms that conclusion of the UNDT.

41. There are several additional uncontroverted and incontrovertible facts that were before the UNDT about the events that followed. This included evidence from witnesses other than A, that Mr. Negussie was sitting astride M who was pinned to the floor on his back, largely immobile. M's mouth was bleeding immediately after the altercation, although how severely, and from what particular underlying cause was uncertain. M had been injured but it appears that Mr. Negussie had not, at least in more than a minor way, been injured by M. The bite suffecm BT -0.0192 Tc 46 0

Mr. Negussie must be established before the UNDT, is that of “clear and convincing” evidence. If the UNDT had set to one side and ignored the allegations about Mr. Negussie’s conduct about which it decided it did not have clear and convincing evidence, there was still evidence of other aspects of Mr. Negussie’s behaviour towards M. Mr. Negussie began the confrontation by assaulting M, albeit technically and minimally: Mr. Negussie was seen to have pinned M to the ground by sitting astride him; and M suffered an injury or injuries as a result of that incident.

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47. Finally, not only must such an analysis be applied by the UNDT to each individual piece of disputed evidence, but it must then be applied likewise to the totality of the evidence in support of

documentation pointed, if anything, away from M's account of his injuries and, thereby, how severely he may have been beaten. The undisputed fact that M had suffered an internal mouth injury was insufficient to conclude that this had been brought about by Mr. Negussie's serious assault upon him. It did not meet the clear and convincing standard required for the UNDT to be satisfied that this injury was caused by Mr. Negussie continuing to fight M "in a severe manner".

52. So, we cannot conclude that the UNDT was wrong to have held that the evidence of this element of its directions to the UNDT did not meet the clear and convincing standard.

53. Next, we conclude that the UNDT did determine correctly that the prior altercation in April 2013 could not provide propensity evidence to corroborate witnesses' accounts of the fight with M. That incident was not investigated properly or sufficiently for it to have become a legitimate and significant consideration in addressing the consequences of Mr. Negussie's altercation with M several months later.

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site, could constitute legitimately such an aggravating factor that his proven misconduct towards M warranted the sanction of separation from service.

56. We have considered whether this Judgment and our reasoning are consistent with this Tribunal's earlier Judgment between the same parties,

, Judgment No. 2016-UNAT-700 which gave the UNDT directions about how it was to re-decide Mr. Negussie's case. We consider that the UNDT followed correctly the directions of this Tribunal and, with one exception that is not decisive of the appeal, has not been found to

