UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. On 28 March 2013, the Applicant, former Chief Procurement Officer ("CPO") at the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed two separate applications before the Tribunal. The applications concern decisions by the Assistant Secretary-General, Office of Central Support Services ("ASG/OCSS"), affecting the Applicant's delegated authority to perform significant functions in the management of financial, human and physical resources (referred to at the United Nations as "designation").

2. The first application, registered under Case No. UNDT/NY/2013/018, contests the decision, dated 4 October 2012 and notified to the Applicant on 5 October 2012, to deny him the required designation to take up the post of CPO at the United Nations Interim Security Force for Abyei ("UNISFA") ("the UNISFA designation decision"), a mission deployed to a disputed area bordering the Republic of Sudan and the Republic of South Sudan. The second application, registered under Case No. UNDT/NY/2013/019, contests the decision, dated 28 November 2012 and notified to the Applicant on 5 December 2012, to remove his designation as CPO for MINUSTAH ("the MINUSTAH designation decision").

3. The cases were subject to an order for combined proceedings on 18 June 2014.

Facts

4. In a joint submission dated 26 June 2015, the parties provided a list of agreed facts. The agreed facts form the basis of the factual background set out below, supplemented, where necessary and relevant, by further factual findings of the Tribunal.

temporary help and not as a CPO. Unfortunately, the opinion of [the Procurement Division] was not requested by either the mission or

reassignment to the post of CPO/UNISFA subject to re6 g2ving 8.5dical clearance,

MINUSTAH consent to release the Applicant to UNISFA

17. On 8 August 2012, Mr. GS, DMS/MINUSTAH, agreed to the release of the Applicant on reassignment as CPO/UNI

21. By email dated 10 September 2012 to the Applicant and eight other colleagues, with three further colleagues copied, Mr. GS requested the Applicant to coordinate a response to the HCC Note. The email further stated: "I would like all [Self Accounting Units] invol

26. Mr. GS stated that the steps to be taken to rectify the shortcomings would include the appointment of a replacement Officer-in-Charge of the Procurement Section and reassignment of the Applicant to another mission. It appears that Mr. GS was not aware, when he sent his facsimile of 8 October 2012, that Mr. WS had

The Applicant's request for information regarding denial of designation for CPO/UNISFA

29. On 25 October 2012 and 9 November 2012, the Applicant wrote to the Field Personnel Division, DFS, requesting: (i) a copy of the memorandum from the Field Personnel Division requesting his designation; (ii) a copy of the memorandum from Mr. WS dated 4 October 2012 stating that he did not support the Applicant's designation; (iii) "notation" made by Mr. WS; and (iv) clarification regarding his position as CPO/MINUSTAH.

The decision to withdraw the Applicant's designation as CPO/MINUSTAH

30. On 28 November 2012, Mr. WS wrote to Mr. AB referring to previous correspondence, including the HCC Note dated 25 July 2012 and the response of Mr. GS dated 8 October 2012, and advising that in view of the documents referred to, he had decided to withdraw the Applicant's designation as CPO/MINUSTAH.

31. On 30 November 2012, Ms. AH informed Mr. GS of the decision of Mr. WS to remove the Applicant's designation, noting that designation is required in order to receive delegation of procurement authority as CPO, and requesting that Mr. GS "take the necessary action under these circumstances".

32. On 5 December 2012, Mr. GS conveyed to the Applicant the decision to withdraw his designation.

The reassignment of the Applicant

33. On 6 December 2012, the Applicant was advised of his reassignment to the Office of the Officer-in-Charge, Administrative Services, effective the same day, where he remained through 5 March 2013.

34.

the administration and management of lease agreements" and "MINUSTAH had not implemented an effective system to monitor planned capital improvements and to ensure that landlords were in agreement with the construction works and the expected associated costs".

The Applicant's 2012–2013 performance appraisal and rebuttal

39. The Applicant's 2012–2013 performance appraisal was completed in September 2013. He was rated as having partially met performance expectations. It is apparent that the evaluation took into account the HCC Note. The Applicant's first reporting officer noted the perceived shortcomings highlighted by the HCC Note and the Applicant's second reporting officer noted that his designation and delegation had been removed. The Applicant rebutted the performance appraisal.

40. A rebuttal panel was convened to review the Applicant's performance assessment rating. On 24 February 2014, the panel delivered its report, in which it noted that there was no structured mid-term review during the critical period of the Applicant's tenure as CPO. The panel further stated that "structured discussions should have taken place to review the seriousness of the shortcomings and to discuss options and remedial actions". However, despite noting procedural and communication issues, the panel upheld the original rating of partially meets performance expectations. At the hearing on the merits in these cases, the Applicant testified that he had raised concerns about the report of the rebuttal panel to the Assistant Secretary-General, Office of Human Resources Management, and that he had not yet received a response. In any event, the Tribunal notes that the 2012–2013 performance appraisal was prepared well after the contested decisions were made.

Procedural history

Inter partes *discussions and extensions of time*

47. In joint requests filed in each case, and dated 11 September 2013, the parties informed the Tribunal that they had commenced *inter partes* discussions aimed at reaching an informal resolution of the matters in these two cases and requested an extension of time to comply with Orders No. 206 and 207 (NY/2013).

48. In response to several further joint requests, the Tribunal granted seven extensions of time to comply with Orders No. 206 and 207, the last deadline being 5 June 2014.

Management evaluation and rec

> which you presented your views, and submitted supporting documentation, on the issues raised. The MEU received confirmation from your counsel on 29 January 2014 that this submission constituted the sum total of your response in the matter. You thereafter submitted additional material on 3 March 2014. The MEU forwarded your submissions to OCSS on 30 January and 3 March 2014, respectively.
>
> On 16 April 2014, the ASG-OCSS submitted a memorandum containing the outcome of the review to the MEU, upholding its original determination. The MEU transmitted the OCSS's memorandum to you on 29 April 2014.

The Tribunal notes that the memorandum dated 16 April 2014, referred to in the letter of the USG/DM, was signed on behalf of Mr. SC (ASG/OCSS) by Mr. DD, Director of the Headquarters Procurement Division. According to an interoffice memorandum from USG/DM dated 28 March 2014, Mr. DD was Officer-in-Charge of OCSS from 13 April 2014 to 24 May 2014 during a period in which Mr. SC was away from Headquarters.

50. By joint submission dated 30 April 2014, the parties informed the Tribunal for the first time about the involvement of the MEU and the reconsideration of the decisions by the Organization's management. The parties indicated that they had agreed that the Applicant "was not accorded his formal due process right to respond in his personal capacity" to the observations of the HCC prior to withdrawal of his designation. The parties informed the Tribunal that the Applicant was given an opportunity to respond to the observations and "a further decision concerning his

Case management discussion

54. A case management discussion ("CMD") was held on 23 July 2015 to discuss the availability and order of witnesses and other matters that might expedite a fair and just hearing of the cases. At the CMD, the Tribunal expressed its concern and reservations about the manner in which the *inter partes* discussions had metamorphasized into a new decision-making process in the first half of 2014, resulting in a "further decision" by the ASG/OCSS, recommendations by the Management Evaluation Unit, and a decision by the Secretary-General to uphold the contested decisions that were already before the Tribunal. This issue is considered further starting at para. 76 of this judgment.

Hearing on the merits

55. A hearing in these cases was held over five days between 27 and 31 July 2015. The Applicant gave evidence on 27, 28 and 31 July 2015.

56. On 29 July 2015, Mr. GB, former CMS of UNISFA and DMS of MINUSTAH, as well as Mr. FE, former Chairman of the HCC, gave evidence. Mr. GB testified by telephone from Kosovo and Mr. FE testified *viva voce* in court.

57. On 30 July 2015, another three witnesses testified: Mr. GS, former DMS/MINUSTAH, testified by telephone from the Democratic Republic of the Congo; whilst Mr. DD, Director of the Headquarters Procurement Division, and Ms. NN, Chief, Peacekeeping Procurement Section, Headquarters Procurement Division, both gave oral evidence in court.

58. On 31 July 2015, Ms. LK, former Administrative Officer, Office of the DMS/MINUSTAH, testified by telephone from Uganda.

64. Section 2 of ST/AI/2004/1 provides (emphasis added):

> **Terms and conditions for the exercise of delegated authority**
>
> 2.1 Exercise of this delegated authority entails responsibility for ensuring full implementation of the relevant financial regulations and rules of the United Nations and related administrative instructions. … *Failure to abide by the terms and conditions of this delegation of authority may result in its withdrawal*.
>
> 2.2 The act of delegating authority and responsibility does not absolve the official to whom authority was initially delegated of accountability for the manner in which the authority is exercised. Accordingly, … the Assistant Secretary-General for Central Support Services may be held personally accountable, and *must likewise hold those to whom they have delegated authority accountable*, for their actions in performance of their delegated authority and responsibility.

65. The further delegation of authority to perform significant procurement functions, referred to as designation, is regulated by ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources). Acting on the basis of delegated authority from the USG/DM, the ASG/OCSS is responsible for the designation of chief procurement officers (secs. 2.1, 2.2 and 7). ST/SGB/2005/7 further provides (emphasis added):

> **Section 3**
>
> **Responsibility and accountability**
>
> 3.1 In the performance of functions related to the management of financial, human and physical resources, *staff members designated under the provisions of this bulletin are accountable to the officials who designate them*, as well as to the head of their respective department or office.
>
> 3.2 In designating staff members performing significant functions in financial, human and physical resources management, *the officials responsible for the designation must ensure that the staff members selected have the requisite qualifications and experience to carry out the functions assigned to them* and to provide consistency in the application of the Organization's regulations, rules, policies and procedures.

66. ST/SGB/2010/2 (Organization of the Department of Field Support) states that DFS, in coordination with relevant departments and offices of the Secretariat, "delegates to field missions and administers and monitors field operations in the areas of … local procurement, conduct and discipline" (sec. 2.1(b)). The Field Procurement and Liaison Team, located within the Office of the ASG/DFS, is responsible for managing and monitoring delegations of procurement authority by the Under-Secretary-General for Field Support to field mission staff (sec. 5.12(a)).

67. The Guidelines on Designation of staff members performing significant functions in the management of financial, human and physical resources ("Guidelines on Designation") were approved by the USG/DM on 15 November 2006 and are intended to clarify issues relating to

68. The United Nations Procurement Manual ("UNPM") provides guidance on procurement policies, procedures and practices to all staff members involved in the procurement process. It is approved by the ASG/OCSS for use by management and staff (sec. 1.1.1(a) of the UNPM). Revision 6 of the UNPM, dated March 2010, was in effect at the time of the contested decisions. The UNPM states:

> **Chapter 3. Delegation of Procurement Authority**
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> …
>
> **3.2 Procurement Authority and Responsibility**
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> …
>
> 2. For Field Missions supported by DFS, the procurement authority is delegated by the ASG/OCSS to the USG/DFS, and further delegated to the DMS/CMS. Delegations of procurement authority and the financial levels of authority to make commitments are granted in writing by the DMS/CMS directly to the CPO and to Procurement Officers and Procurement Assistants on an individual basis.
>
> …
>
> 5. Prior to any commitment being made, officials entrusted with procurement authority are to ensure that:
>
> a. the procurement action strictly complies with all FRRs, SGBs, AIs, the Procurement Manual and other procurement policies;
>
> b. the appropriate and authorized officials have approved the commitment;
>
> c. the required resources are available;
>
> d. the commitment is in the interests of the UN, based on the information available at the time and as documented in the procurement case file.
>
> 6. Delegations of authority require Procurement Staff to exercise their duties and responsibilities with the utmost care, efficiency, impartiality and integrity in accordance with Chapter 4 of this Manual.
>
> …
>
> **3.4 Procurement Authority at Offices Away from Headquarters and Field Missions**
>
> …

2. Field Missions: The ASG/OCSS has issued a delegation of procurement authority to the USG/DFS for awards of $1,000,000 or less for Core Requirements and $500,000 or less for other requirements excluding Special Requirements. Delegations of procurement authority to the DMSs/CMSs are granted by the USG/DFS.

…

3.5 Modification of Individual Procurement Authority

1. Individual procurement authority may be changed at any time by the ASG/OCSS, or by any official who has been duly authorised by the ASG/OCSS to sub-delegate Procurement Authority.

Agreed legal issues

69. In joint submissions dated 5 June 2014 and 26 June 2015, the parties set out the following agreed legal issues:

a. Was the UNISFA designation decision a proper exercise of discretionary authority?

b. Was the MINUSTAH designation decision a proper exercise of discretionary authority?

c. What rights to due process does a staff member have in the conduct of a designation exercise? Were these rights observed in the Applicant's case?

d. If the Applicant's rights of due process were not observed, was the decision not to approve his designation justified on its merits?

e. If the Applicant's rights to due process were not observed, what remedy should be granted? Has the Applicant demonstrated either substantive or moral losses?

f. Has any alleged breach of due process been remedied by the reconsideration of the designation decision by the ASG/OCSS on 16 April 2014?

Consideration

Scope of review

70. The basic principles of judicial review were set out by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084:

> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
>
> …
>
> 42. … As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

71. The first question for the Tribunal is whether the Administration lawfully and properly exercised its discretionary authority in making the contested decisions. In determining this issue the Tribunal will consider the basic principles of judicial review as set out in *Sanwidi*, and in particular, in the circumstances of these cases, whether the decisions were procedurally colese8.1(a)dtining23y45 0 TD.000were proced634o5ulserey

72. As part of the above examination, the Tribunal must consider what rights to due process a staff member has in relation to decisions affecting his or her designation and whether any such rights were observed in these cases. In his closing submission, the Respondent conceded that there was a "formal failur

seems the Applicant was held solely accountable), as the documentary evidence submitted was extensive and uncontested in the material aspects. The Tribunal will comment on the evidence on record in relation to each of these issues in order to

review of the administrative decision is not necessary (*Pirnea* 2013-UNAT-311, para. 42; see also *Kouadio* 2015-UNAT-558, para. 17). The Staff Rules and the Statute and Rules of Procedure of the Dispute Tribunal establish a strict timeline for these actions to take place. Staff rules 11.2(a) and (c) require staff members to submit a request for management evaluation prior to filing an application to the Tribunal, and to do so within sixty days of being notified of the contested decision. Staff rule 11.2(d) states that the Secretary-General's response, reflecting the outcome of the management evaluation, "shall" be communicated within 45 days of receipt of the request if the staff member is stationed outside of New York. However, this deadline may be extended by the Secretary-General pending efforts for informal resolution by the Ombudsman.

79. The General Assembly has repeatedly emphasised the importance of the informal resolution of disputes (see, most recently, paras. 14 and 15 of resolution 69/203 (Administration of justice at the United Nations), adopted on 18 December 2014). The Staff Rules provide for the informal resolution of disputes both before and after the filing of an application to the Tribunal. Staff rules 11.1(b) and (c) provide:

> (b) Both the staff member and the Secretary-General may initiate informal resolution, including mediation, of the issues involved at any time before or after the staff member chooses to pursue the matter formally.
>
> (c) The conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal,

80. While the Tribunal encourages and supports efforts to informally resolve disputes, parties must be aware that, once an application has been filed before the Tribunal, any new decision taken by management, particularly when based on new or different information, constitutes a separate administrative decision, which should be the subject of new and distinct proceedings if the staff members wishes to contest it.

An applicant would then be in a position to consider whether to maintain or withdraw his or her initial application, and if the former, the Tribunal could consider whether the new case should be subject to an order for combined proceedings. However, the Tribunal cannot simply consider a new administrative decision, or a reconsideration of a previous decision, as part of an existing case. As noted by this Tribunal in *Adundo et al*. UNDT/2012/118, the Tribunal cannot adjudicate cases involving decisions of a changing nature (see also *Tredici et al*. UNDT/2014/114, para. 23). No new application was filed by the Applicant in these cases.

81. In the circumstances, and in light of the above discussion, and indeed the Respondent's submission that the proceedings "are boxed as presented", the Tribunal finds that the matters for consideration in this judgment are the decisions dated 4 October 2012 and 28 November 2012, as outlined in para. 2 of this judgment and in the Applicant's requests for management evaluation dated 3 and 12 December 2012. These are the decisions that have been addressed by the parties in written submissions during these proceedings and at the hearing between 27 and 31 July 2015. The Organization's attempts to cure or remedy a breach of due process by initiating, in 2014, more than a year after the contested decisions and long after the Applicant's unanswered requests for management evaluation, a new process for the Applicant to respond to the HCC Note are not properly part of the cases before the Tribunal and will not be considered.

82. In this regard, the Tribunal also notes that although the parties had identified, as one of the agreed legal issues, whether any alleged breach of due process had been remedied by the reconsideration of the designation decision in April 2014, the Respondent conceded that this second decision was not for consideration before the Tribunal. Therefore, it would be improper and without legal basis to hold that any process or alleged remedy or consequences flowing therefrom should be considered or taken into account by the Tribunal.

that role. Though the Tribunal has not made any definitive findings on these matters, it does wish to highlight them as issues of concern.

Were the contested decisions properly made?

The role and function of the HCC

87. The HCC Note was the catalyst for both of the contested decisions. The Tribunal therefore considers it necessary to examine the role and functions of the HCC.

88. The HCC is an advisory rather than a decision-making body. ST/AI/2011/8 (Review committees on contracts) states that the purpose of the HCC is to provide written advice and to act as an advisory body to authorised officials in discharging their procurement-related responsibilities under the Financial Regulations and Rules. Mr. FE, the Chairman of the HCC at the relevant time, also emphasised this distinction in his evidence before the Tribunal. When asked what his objective was in submitting the HCC Note to Mr. WS, Mr. FE responded as follows:

> What I expected to happen was that the senior management would request their counterparts in Peacekeeping to look into what is happening in this area. Beyond that, I did not know what they would find or not find. As I alluded to before, they could have looked into it and said, you know what, yes, there are some problems, but they are understaffed by 75% and, therefore, there are extenuating circumstances. I did not know what they would find. I would not have enough information and, really, it was beyond certainly the Committee's ability and responsibility. But we can only flag an issue based on what came in front of us. And what came in front of us was that there was enough issues to give rise to a concern that people that have accountability and responsibility at higher levels

Accountability for the exercise of delegated authority

90. Section 2.1 of ST/AI/2004/1 states that failure to abide by the terms and conditions of the delegation of authority under the Financial Regulations and Rules *may* result in its withdrawal. Sections 3.2.5 and 3.2.6 of the UNPM, set out above, establish some of these terms and conditions in relation to the procurement function. Staff members with delegated procurement authority must ensure strict compliance

accountability under ST/AI/2004/1 and ST/SGB/2005/7 was ever raised.

The UNISFA designation decision

103. The parties agree that, in accordance with sec. 9.2 of ST/AI/2010/3 (Staff selection system), designation is a pre-requisite for selection to positions involving significant functions in the management of financial resources. However, the Applicant submits that the UNISFA designation decision was unlawful and unjustified, that the ASG/OCSS failed to follow the Guidelines on Designation, and that the Administration failed to provide him with a written explanation or an adequate explanation of the reasons for the decision.

104. The Respondent submits that the Applicant placed the resources of the Organization at risk and, accordingly, his designation for UNISFA was not approved. The ASG/OCSS is obliged to review and assess reliable information communicated to him concerning failures by designated officials to follow the financial rules and procedures of the Organization. The Respondent submits that the ASG/OCSS could not ignore an appreciable risk of a significant problem of carelessness, misjudgment or lack of oversight or accountability in relation to the Applicant’s work. When considering whetat-185 prov45 ce18.7aisthe 16.31 0s035 -1.72 TD0055

106. The discretionary authority of the ASG/OCSS is not unfettered when considering such a request. Any decision must be rational, reasonable, fair and procedurally correct. It is not apparent from the record to what extent Mr. WS, the ASG/OCSS, engaged in any "weighing exercise" before making the UNISFA designation decision, as suggested by the Respondent. The Respondent has not produced any written record containing any detailed reasons for the decision, or indicating that Mr. WS came to any definitive conclusions or findings. The Applicant was not afforded the opportunity to make

performance. In any event, the position of CPO/MINUSTAH was not filled for a significant period of time.

110. Mr. GB gave evidence at the hearing, stating that the UNISFA designation decision put him in "a very difficult situation because [he] had no CPO for almost a year". The Tribunal concludes that there was no particular urgency that required Mr. WS to make the UNISFA designation decision without considering a response from either the Applicant or MINUSTAH to the concerns raised in the HCC Note.

111. The Respondent cited *Mbatha* UNDT/2011/096 in support of his submission that the UNISFA designation decision was justified on the basis of the precautionary principle. In *Mbatha*, a Security Sergeant at the International Criminal Tribunal for the former Yugoslavia was suspended from supervisory duties as a result of his unsatisfactory performance. The Dispute Tribunal held that the decision to suspend the staff member from supervisory duties was justified, noting that there were safety and security issues involved and stating that "the precautionary principle alone would justify a measure of the kind taken" against the staff member in that case.

112. *Mbatha* is distinguishable from the present case. The contested decision in that case was a suspension from supervisory duties due to performance issues that were brought to the attention of the staff member and then formally recorded as part of the performance management and development system. The decision to limit the supervisory functions was an interim measure pending finalisation of the rebuttal process. In the present case, the UNISFA designation decision immediately and summarily resulted in the permanent denial of a career opportunity. The Applicant was never explicitly informed that his performance was a concern or even that his individual performance was the reason for the decision.

113. The UNISFA designation decision was irrational, unreasonable, unfair, and procedurally flawed. The Applicant should have been informed that Mr. WS was considering the issues raised in the HCC Note in relation to the decision whether to approve designation, and he should have been provided with the opportunity to

comment on those issues. Contrary to the principles set out in *Sanwidi*, the Tribunal also finds that relevant material, in the form of the forthcoming response from Mr. GS, was ignored, as it was not in the hands of the decision-maker at the time of the decision. The Tribunal finds that the UNISFA designation decision was flawed and that the Applicant is entitled to be compensated. The issue of remedy is addressed at the end of this judgment.

The MINUSTAH designation decision

114. Ten days after sending his memorandum of 8 October 2012, having become aware that the Applicant's designation for UNISFA was denied by the ASG/OCSS, Mr. GS wrote to the ASG/DFS requesting that the Applicant's designation as CPO/MINUSTAH be reviewed. In his memorandum dated 18 October 2012, he stated that replacing the Applicant as CPO was fundamental to making the changes expected of the Mission. He also alleged that the Applicant's professional relationships had deteriorated to the point that it would be challenging for him to continue to function in the CPO/MINUSTAH post. The Applicant's uncontroverted testimony is that he was never informed by Mr. GS or anyone else of this concern.

115. It is recalled that less than six months earlier, on 30 May 2012, the Applicant's 2011–2012 e-PAS report was completed and he was rated as having exceeded performance expectations. His second reporting officer, Mr. GS, commented that he had produced a "good performance in a difficult environment". In *Simmons* 2012-UNAT-222, the Appeals Tribunal emphasized the importance of e-PAS reports, stating (emphasis added):

> 16. Importance of annual e-PAS reports cannot be under-estimated. These reports are important for the staff member because they *inform the staff member of how well or poorly she has performed* and how her performance has been judged by her reporting officers. *This gives the staff member an opportunity to improve her performance.* …

116. On 5 December 2012, the Applicant was informed by Mr. GS that his designation as CPO/MINUSTAH had been withdrawn effective 28 November 2012. He was effectively stripped of his designation without an opportunity to be heard or any consultation or reasoned explanation. As noted by the rebuttal panel convened to review the Applicant's 2012–2013 performance assessment, there were no structured discussions to review the seriousness of the alleged shortcomings or to discuss options and remedial actions (see para. 40 above).

117. The Tribunal has considered the Respondent's submission that designation is a separate process to performance management and development. While this is true in a sense, it is also clear that the decisions in these cases were based on an assessment that the Applicant had failed to perform his functions to the required standard. It is inescapable that the decisions were connected to the Applicant's performance.

118. The Tribunal appreciates that the delegation of authority in financial matters creates risks to the Organization in terms of its financial liabilities. However, the fact that the ANis termvCSS]TJaccoun3.54l 8t Asview th fcussermexerereeinanJ16.525 0 T0.006 Tw[(pe89 Tv

conclusion reached. He was never informed that he alone was being held personally accountable for one or more of the matters raised in the HCC Note, or for other matters, and the reasons for this decision. He was also not informed what information was taken into account and what weight, if any, was given to the explanations provided by Mr. GS in the 8 October 2012 facsimile.

120. The Administration cannot simply ignore its own performance management and development system as set out in ST/AI/2010/5. Any modification to a staff member's designation resulting from poor performance should be accompanied by appropriate discussions and consultation with the staff member as required by sec. 10 of ST/AI/2010/5, which states:

> When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

121. There is no evidence that the Applicant's performance was managed in a fair, supportive, and consultative manner as required by ST/AI/2010/5. In *Goodwin* UNDT/2011/104 this Tribunal noted that, in general, higher standards of competence and performance are expected of senior managerial employees and the same amount of counselling and sympathetic treatment usually accorded to more junior staff may not apply. However, even if the Applicant as a CPO at the P-4 level was considered a senior staff member, he is still entitled to consultation and due process. He was summarily and permanently stripped of his designation and reassigned to new functions, which he says have no relevance to his qualifications, with no consultation or opportunity to be heard. As stated in the Applicant's closing submissions, the decisions were abrupt, without warning or discussion and appear to be based on personal assessments that were not only at variance with the official record of service

Disguised disciplinary measure

124. The Applicant submits that the MINUSTAH designation decision was a disguised disciplinary measure. Significant or serious lapses in performance, including dereliction of duty, failing to fulfil a proper supervisory role, recklessness or gross negligence, can, in some circumstances, give rise to a finding of misconduct. In *Goodwin* UNDT/2011/104, a staff member was placed on Special Leave with Full Pay while an investigation was conducted into a contract he had entered with a vendor. As a result of the investigation, he was informed that he had been derelict in his managerial responsibilities, failed to exercise sound and prudent oversight, and failed to ensure that the Organization's procurement rule

The "no difference" argument

126. The "no difference principle" presupposes a foregone conclusion without adherence to procedural requirements. The Respondent submits that giving the Applicant an opportunity to respond to the concerns of the Administration would have made no difference. Besides, he avers that the Applicant's interest in presenting all relevant information and explanations in his capacity as CPO/MINUSTAH is wholly consistent with his interest in responding in his personal capacity.

127. The Respondent further submits that when, in 2014, the Applicant was afforded the opportunity to respond to the HCC Note as part of discussions between the two parties, he presented the same information and arguments that he had presented in his capacity as CPO/MINUSTAH. Thus, in substance and in fact, there was no difference between the Applicant presenting a response as CPO/MINUSTAH and presenting a response on his own behalf.

128. The Tribunal does not accept this argument. The Tribunal has already ruled that the process of reconsidering the contested decisions and trying to remedy the breach of due process that occurred is not a matter that is properly before it. Therefore, whatever submissions the Applicant made during that process are irrelevant. Furthermore, the Tribunal repeat

difference in the end. In circumventing procedural requirements, the no difference principle would serve to subvert the very essence of the principles of natural justice, in particular the *audi alteram partem* rule. Procedural propriety and the protection of fundamental rights is a central theme pervading various issuances of the Secretary-General and the General Assembly. Adverse decisions taken as a result or as a consequence of a breach of the fundamental principle of due process cannot be regarded as fair. A breach of the right to due process is both procedurally and substantively unfair.

Conclusion on procedural matters in respect of the contested decisions

131. The contested decisions, in combination, and taking into account the effect on of na-suatheded as Tcamnce o14taking into

of the facts. Instead of following a proper and fair procedure to address the Applicant's alleged shortcomings, the Organization took a shortcut and withheld and withdrew his designation for the UNSIFA and MINUSTAH posts, respectively.

Issues raised in the HCC Note

134. The parties submitted, as one of the agreed legal issues, that the Tribunal consider whether the contested decisions were justified on the merits if the Applicant's rights of due process were found not to have been observed. The Applicant submits that the documentary evidence supports the argument that there was no legal justification for the contested decisions. As the documentary evidence submitted was extensive, and as a significant amount of time was spent by the parties and the .9(nd not tltie Tc.2139 s's -55)-4.8(/12c155)-42 -5-1.s0 TDf folr ii5-1..1(J/TT2 1J1

> authority to take whatever measures had to be taken to sort out the numerous and very significant problems. So this designation … was used extensively by my predecessor … many, many activities took place, many decisions were made—acquisition of land, acquisition of property, rental of property, and various activities were done—and they were not in accordance as we would know with the normal procurement process … And there were a huge amount of activities that were ongoing ... And [the Applicant] arrived only in July, so it is about six months after the earthquake itself. … We tried to cope as much as possible with the rules and when we had to bypass due to the exigencies, we did. Now this is not necessarily related to the cases which are the object of your review … but I just wanted to specify that … some of the procurement activities were not totally in line with the way they should have been due to the exigency and complexity of the situation.

Lease of land to accommodate military contingents

137. There was a strong focus during the hearing on the first of the issues addressed in the HCC Note regarding improvements made by MINUSTAH to a "Greenfield" site leased from a local landlord. In 2006, MINUSTAH entered into an agreement to lease 100,000 square meters (m^2) of land. The lease contained four one year options. In December 2006 the Mission began work on irrecoverable improvements to the land. The work, which included construction of a perimeter wall, watch towers, roads, buildings and internal drainage, as well as the boring of deep wells, was completed in November 2007 and cost more than USD1.9 million. In 2007, the leased area was increased by 140,000 m^2 to a total of 240,000 m^2. The

139. The Applicant noted that the minutes of the HCC meeting held on 8 August 2006 (HCC/06/59), stated that the initial capital investments, amounting to USD400,000, "would be left in-situ at the end of the lease term. The investment formed part of the rent negotiations with the landlord that resulted in the monthly rental". He further noted that the same minutes stated that other infrastructure, such as pre-fabricated buildings, generators, network communications, etc. could be removed at the end of the lease term. The response of Mr. GS on 8 October 2012 to the HCC Note referred to these minutes and noted that recovery was never anticipated either in the lease agreements or in the case presentations or supplementary information submitted to the HCC.

140. The Respondent submits that it is irrelevant whether those managing the lease

143. The Tribunal notes that the 8 October 2012 facsimile from Mr. GS to Ms. AH stated that, at the date of that communication, the landlord had passed a credit note for the undisputed amount of USD26,632.40

Segregation of responsibilities

146. The Applicant testified that he provided the requisitioner guidance on how to interact with the contractor and that the requisitioner went ahead and discussed commercial issues anyway. The Applicant acknowledged that the requisitioner's conduct raised an issue of segregation of responsibilities but stated that he was not present at the meeting and had provided the appropriate guidance. The requisitioner did not report to him. He did not authorise the requisitioner to discuss commercial issues. Therefore, he should not be held responsible.

147. In his closing submission the Respondent summarised this issue by stating that the principle of separation of requisitioning and procurement was not observed, "bringing into question the professionalism and integrity of the procurement process". After hearing five days of evidence, this vague statement does not convince the Tribunal that the Applicant should be held accountable for the concerns raised by the HCC in relation to this issue.

Contract for the provision of medical services

148. The HCC expressed concern over amendments by the Mission to a contract for the provision of medical services that had previously been vetted by the HCC. According to the HCC Note, the contract was amended a total of seven times. The fourth, fifth and sixth amendments resulted in increases to the Not to Exceed Amount that exceeded the Mission's delegated authority. The case was submitted *ex post facto*.

149. The Applicant stated that the delay in submitting the case to the HCC resulted from deficiencies in the technical evaluation of the contract, which were attributable to the Medical Services pe

Applicant failed to take proactive steps to ensure continuation of services while avoiding an *ex post facto* situation.

150. No convincing submissions or evidence were presented to the Tribunal as to why the Applicant's explanation, which was also advanced by Mr. GS in his facsimile of 8 October 2012, was not accurate or acceptable.

Conclusion on the issues raised in the HCC Note

151. The Tribunal has considered each of the five issues raised in the HCC Note. As stated in the scope of review section of this judgment, the Tribunal does not consider it necessary to comment in detail on each of these issues given its findings that the contested decisions were fundamentally flawed.

152. The Tribunal listened carefully to the Applicant's detailed responses to questioning from Counsel for both sides as well as the Tribunal. The Applicant's evidence was cogent and credible and he remained unshaken throughout the hearing. At no point in the hearing was the Applicant's *integrity* questioned in regard to the issues raised in the HCC Note. He supported his testimony with frequent references to the relevant Financial Regulations and Rules, the UNPM, the Guidelines on Designation and other documents pertaining to procurement authority and best practice.

153. The Tribunal notes that, following the removal of his designation, and his reassignment to other, mostly unrelated functions, the Applicant, apparently because of his knowledge and experience, was tasked with preparing a code of best practices for requisitioners and lease management, despite his alleged poor performance.

154. On balance, the Tribunal finds that the Applicant's explanations were acceptable. Having carefully considered the submissions of both parties, the testimony of the Applicant and all of the relevant witnesses, as well as the voluminous documentation on file, the Tribunal is not convinced that the contested

decisions would have been justified notwithstanding the breaches of due process and procedure.

Conclusion

155. The contested decisions were flawed and the Applicant is entitled to be compensated.

Remedy

156. In his closing submission the Applicant stated that his removal from procurement functions had tarnished his reputation and foreclosed his normal career progression. He stated that he has been subjected to severe emotional stress and has been severely traumatised by the treatment of the Organization. The Applicant seeks rescission of the contested decisions, including reinstatement of his designation and procurement authority, revocation of the letter dated 10 June 2013 stating that he would be separated from service, and placement in a suitable post commensurate with his experience. He also requests two years' net base salary in compensation for professional and moral damages.

157. In the circumstances of this case, the Tribunal considers that a hearing is necessary to decide the appropriate remedy to be ordered by the Tribunal, including compensation, if any. A hearing will therefore be convened unless the parties inform the Tribunal that they have reached agreement to settle the matter of remedy.

Judgment

158. The application succeeds.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of December 2015

Entered in the Register on this 31st day of December 2015

(Signed)

Hafida Lahiouel, Registrar, New York