
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/067

Judgment No.:

Introduction

1. The Applicant, a former staff member with the United Nations Mission in South Sudan (“UNMISS”), filed an application before the Dispute Tribunal contesting the decision to separate him from service with compensation in lieu of notice and without termination indemnity. As remedies in the application filed on 16 August 2016, he requested the following relief:

- a. Termination be declared unlawful.
- b. A declaration that the reasons stated in the letter of termination do not constitute proper ground for termination.
- c. The Respondent to withdraw the letter of termination and issue the Claimant a letter clearing him of any wrongdoing.
- d. The Claimant is paid advocates cost, unpaid salaries and appropriate damages for wrongful termination.

2. In the amended application filed on 6 March 2017, the Applicant indicated the relief as follows:

... Lastly, the Separation from Service was clearly based on a biased investigation. The Applicant, would seek the following orders be passed by the honorable tribunal:

- a. That the separation from service be set aside.
- b. That the Applicant be reinstated to his previous position
- c. That the Respondent should pay to the Applicant all unpaid salaries since separation of service.
- d. That the Respondent should pay moral damages as a result of the unlawful separation from service considering the feeling of stress, anxiety and psychological damage the applicant has been subjected to.

3. The Respondent requested the application be dismissed in its entirety because the Applicant failed to establish a basis on which the disciplinary measure imposed on him should be modified or rescinded.

Factual background

4. The disciplinary process was initiated by a memorandum dated 4 September 2015, stating that:

1. [...] The referral was based on a referendum from [name redacted, Ms. EML], Special Representative of the Secretary General, United Nations Mission in South Sudan (“UNMISS”), dated 17 April 2015, and an investigation report prepared by the Special Investigations Unit (“SIU”), UNMISS, dated 17 December 2014, together with supporting documentation. [...]

...

3. You commenced service with the Organization on 11 December 2004. You currently hold a fixed-term appointment and perform the function of Supply Assistant, at the G-4 level.

5. Further, the decision letter of the Officer-in-Charge of the Office of Human Resources Management (“OHRM”) dated 27 April 2016 provided the following:

[...] After a thorough review of the dossier, including your interview

The Under-Secretary-General for Management has noted that you were, throughout the investigation and subsequent disciplinary process, accorded due process in accordance with the regulations, rules, policies and practices of the Organization. In particular, you were interviewed and given the opportunity to provide your comments; you were provided with all of the documentation on which the allegations against you were based; you were afforded an extension of time in which to submit your comments on the allegations; and your comments were duly considered.

In determining the appropriate sanction, the Under-Secretary-General for Management took into account the Secretary-General's past practice in similar cases involving a physical assault, which normally attracted sanctions at the stricter end of the spectrum. The Under-Secretary-General for Management considered that there are mitigating factors present in this case, namely: (i) your over 10 years of service with the Organization with positive performance evaluations; and (ii) your claimed personal frustration and stress.

In light of the above, the Under-Secretary-General for Management has decided to impose on you the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with Staff Rule 10.2(a)(viii), effective upon your receipt of this letter. [...]

6. In the report of allegation of misconduct issued on 4 September 2015 by the Assistant Secretary-General of the Office for the Office of Human Resources Management ("ASG/OHRM"), the following factual elements were included (emphasis removed):

IV. Facts revealed by the investigation

... On 5 November 2014, at around 8:30 a.m., [Mr. TM] requested [Mr. SS], Chief of Supply Section, UNMISS, to give him the key to UN-02387, so that he could use the vehicle. [Mr. SS] gave [Mr. TM] the key.

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... According to [Mr. TM], while he was inside the vehicle starting the engine, you suddenly opened the door and told him to get out of the vehicle. You asked [Mr. TM] to hand over the key, but [Mr. TM] refused to give you the key and said that he would personally bring the vehicle back to you upon his return. You refused to let [Mr. TM] use the vehicle first. According to [Mr. TM], while he was logging off the car

those who would participate from the New York courtroom (the Tribunal, its staff and the Respondent's Counsel), to be in the same location without having to travel, if UNMISS would organize that the parties and their respective Counsel could have access to the VTC facilities during the entire hearing. The Applicant's Counsel indicated that he had no objection to such an arrangement. The Tribunal instructed the Respondent to contact and make the necessary arrangements with UNMISS, including to ensure that the Applicant and his Counsel would have access to the compound for the hearing. The Tribunal directed the parties to jointly propose hearing dates and a time schedule when all witnesses would be available, and to indicate the order in which the witnesses would testify, taking into account that at least two full days would be needed, the time difference between Juba and New York and the security situation in Juba.

24. By Order No. 61 (NY/2017) dated 30 March 2017, as per its instructions provided at the 22 March 2017 CMD, the Tribunal ordered: (a) the parties to file a jointly signed statement by 21 April 2017 setting forth the agreed and disputed facts and the agreed dates for a hearing together with a time schedule for when all witnesses will be available and the order they will appear; and (b) the Respondent to file his response to Applicant's amended application by 21 April 2017 and confirm that: (i) the VTC facilities at UNMISS would be available for the hearing; (ii) the Applicant and his Counsel would have access to these facilities during the entire hearing and thereby be able to fully participate; and (iii) the appropriate arrangements would be in place to ensure the integrity and setting of the hearing, including that witnesses may not overhear other witnesses' testimonies.

25. The Respondent filed his amended reply on 7 April 2017 pursuant to Order No. 61 (NY/2017).

26. On 21 April 2017, the Applicant filed two separate submissions, namely: (a) a joint submission pursuant to Order No. 61 (NY/2017) but only signed by his Counsel and not the Respondent's Counsel; and (b) a response to the Respondent's amended reply.

27. Also on 21 April 2017, the Respondent filed a jointly signed submission to Order No. 61 (NY/2017) and submission pursuant to Order No. 61 (NY/2017) in which Counsel stated that UNMISS had confirmed that its VTC facilities would be made available for the hearing, that the Applicant and his Counsel would be granted access to these facilities during the entire hearing, and that UNMISS would arrange a separate waiting room to ensure that the witnesses cannot overhear other witnesses' testimonies.

28. By Order No. 82 (NY/2017) dated 24 April 2017, the Tribunal q0.00000912 0 612 792 reW*nBT/F

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b. By 5:00 p.m. on Thursday, 1 June 2017, the Ap[p]licant is to file his comments regarding the report, including on its relevancy to the present case;

... The Registry shall arrange to have the hearing recordings transc[r]ipted as soon as possible and, when available, upload them into the eFiling portal and notify the parties thereabout. The parties will have three weeks after the date on which the Registry provides the transcripts to the parties to file their closing statement, which are to be based solely on the evidence and submissions already before the Tribunal.

35. On 17 May 2017, the Respondent filed his submission of additional documents.

36. On 26 May 2017, the Applicant filed his submission of additional documents.

37. On 31 May 2017, the transcripts of the hearing held between 8 and 10 May 2017 were uploaded to CCMS and made available to the parties.

38. On 1 June 2017, the Applicant filed a submission of additional documents.

39. On 22 June 2017, he filed his closing submissions.

40. On 22 June 2017, the Respondent also filed his closing submissions.

41. The Applicant's principal contentions are as follows:

1. I, the claimant, have persistently explained the nature of my defence which takes issue with the allegation that, on 5 November 2014, I[...] physicp

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3. The medical report stated that there was a scratch mark [...] below the ear.

How could be that the face was saved from any injuries if I had directed any blows to his face while the medical report only pointed to seemingly scratched finger marks below the ear?

[Mr. WL] was the only person present in the office where we argued over the car keys with [Mr. TM] and was considered by the investigation as a witness, but when he gave his statements which w[ere] contrary to the statements of [Mr. TM], his statements were unjustifiably considered by the investigation to be unreliable.

2. It was evident that [Mr. SS], who is my supervisor, had tasked me with an official job and issued a vehicle gate-pass for an official purpose[s] and he mentioned that clearly in his statements during the investigation.

3. I proceeded to security office to show [Mr. MB], the security officer, my gate pass and not chasing or pu[r]suing [Mr. TM], as misrepresented. Nothing can lead me to act in that way as concluded by the investigation considering that I even passed through my supervisor's office before I followed [Mr. TM] to the security office. I was just trying to show the validity and priority of my official gate pass to use the vehicle in question.

[Mr. MB] and [Mr. PM] cannot be genuine witnesses in the circumstance[s] for the following reasons:

1. The dispute took place in the office located in the log base, and the offices of [Mr. MB] and [Mr. PM] are located in the sector at a distance of 10 minutes walking.

2. They were not present in the office nor have they heard the argument between me and [Mr. TM] and what was exactly said by each party.

3. It was [Mr. TM] who went to the office of [Mr. MB] and found [Mr. PM] there and started to tell the story that [the Applicant] had assaulted him and he began to show to them the self[-]inflicted action to them.

4. So such people cannot be considered as witnesses as much as [Mr. W

8. In [Mr. TM's] office, the Applicant engaged in an argument with Mr. TM over the use of the vehicle.

9. [Mr. TM] left his office and walked towards the Security office. [Mr. TM] to the office of [Mr. MB], Security Officer UNMISS, where [Mr. MB] was in a meeting with [Mr. PM], Security officer UNMISS.

10. Moments later, the [A]pplicant followed [Mr. TM] for further discussion of the matter in the office and not dramatically put by the investigator that, the Applicant rushed into [Mr. MB's] office without knocking on the door and that it appeared that "[the Applicant] wanted to grab [Mr. TM]". The Applicant also responded politely when [Mr. MB] overreacted by requesting the Applicant to respect his office by knocking on the door before entering the office and asked him to go outside and to come back later. The [A]pplicant left quietly and not as put that he slammed the door on his way out. After hearing from [Mr. TM] the Applicant returned to [Mr. MB's] office to explain the matter between him and [Mr. TM] and not in crude manner as put that he said "[Mr. TM] should surrender the vehicle key".

11. [Mr. MB], unfortunately, went as far as to speculate unjustifiably that the Applicant was "very combative". However, the Applicant proceeded to security office to show the security officer, the gate pass that he was holding and not chasing or pursuing [Mr. TM], a misrepresented. The [A]pplicant contents that nothing could lead him to act in that way as concluded by the investigation considering that he even passed through his supervisor's office before he started to follow [Mr. TM] to the security office. The [A]pplicant was just trying to show the validity and priority of the available official gate pass to use the vehicle in question.

12. The Applicant states that the decision to separate him from service was tainted with prejudice. The Applicant and the witness testimonies of [Mr. WL] were not given credence in the investigation and said to be unreliable. The Special investigation unit, surprisingly, stated that this is because [Mr. WL] did not corroborate [Mr. TM's] statement.

13. The Special Investigation Unit acted arbitrarily and in a discriminatory manner by failing to fairly test credibility and narrative of the alleged assault on [Mr. TM] and to determine the facts in issue independently in order to assess whether the alleged assault occurred. The investigation further did not lend any weight to the fact that the parties' supervisor [Mr. SS], had tasked the [A]pplicant with an official job and issued a vehicle gate-pass to him and he mentioned that clearly in his statements during the investigation. Besides, [Mr. TM] had retained the car in question in order to run personal errands.

14. The Applicant asserts that he did not assault [Mr. TM] as noted in his replies to the witness [s]tatements. The Applicant had been assigned an official duty for which he wanted to use the car vehicle. [Mr. TM] on the other hand wanted to use the vehicle for personal business in contravention of Rule no. 1.2(q) on the use of property and assets. [Mr. TM] alleges that the Applicant pulled him out of the car, an allegation that was not corroborated by [Mr. WL], an eyewitness standing at the scene.

15. [Mr. WL] was the only person present in the office where the [A]pplicant and [Mr. TM] argued over the car keys and was considered by the investigation as a witness, but when he gave his statements which was contrary to the statements of [Mr. TM], his statements were labeled by the then investigation as unreliable.

16. The special investigation unit acted in a discriminatory manner by strongly relying on the statements of [Mr. MB] and [Mr. PM] who were both absent at the scene of the alleged assault hence their statements are hearsay and should be considered inadmissible. Their voluntary interpretation of the emotional appearance of both parties do not conclude or constitute commission of an assault.

17. In seeking the statements of [name redacted, Mr. AL], [name redacted, Mr. JO], [name redacted, Mr. RM] and [name redacted, Ms. LX], the Special Investigation Unit went out of its way to ascertain [the Applicant's] character. The [w]itness statements of the aforementioned are of vague incidents that were supported by no evidence as they had not been reported nor recorded in [the Applicant's] file to be considered in his [electronic performance appraisal, "e-PAS"]. In relying on these witness statements, the Special Investigation Unit failed to uphold the principles of fairness and abused its discretionary authority[.]

[...]

43. The Respondent's principal contentions are as follows (footnotes omitted):

21. Contrary to the Applicant's claim, the evidence considered in the decision letter is relevant to the case, and sufficient to lead to the reasoned conclusion that the incident had occurred in the way described by [Mr. TM]. As noted in the decision letter, the overall circumstances recounted by the witnesses supported the finding that the physical assault had occurred as described by [Mr. TM]. Although the Applicant attacked [Mr. TM] when no-one else was present which left no eyewitness to the assault other than the victim, the witnesses, namely, [Mr. SS, Mr. WL, Mr. MB, Mr. PM and Mr. FB], provided a consistent version of events in that the Applicant engaged in an intense argument over the vehicle key with [Mr. TM], and/or that [Mr. TM] asked for help in the middle of, and after the assault.

22. Specifically, [Mr. WL] stated that the Applicant followed [Mr. TM], and that the Applicant strongly insisted that [

26. Furthermore, the record does not support the Applicant's contention that [Mr. TM] injured himself and there is no indication that [Mr. TM] inflicted the injury during the course of the incident. Also, during the investigation, the Applicant, at no time, claimed that [Mr. TM] inflicted the injury on himself during the argument over the key or in [Mr. MB's] office, which would have been the most critical fact for him to assert his innocence. [Mr. TM's] visibly agitated state and his display of the right ear as injured in [Mr. MB's] office does not square with the contention that [Mr. TM] injured himself after the exchange in [Mr. MB's] office.

27. The Applicant mischaracterized the statement of [Mr. TM] when he challenged [Mr. TM's] credibility in the Application. The Applicant contended that [Mr. TM] stated that the Applicant "was in the

saying that he would not release the vehicle's keys. At this point, [Mr. WL] decided to walk away from [Mr. TM's] office".

34. Contrary to the Applicant's contention, the issue as to whether [Mr. SS] gave the Applicant a gate pass to use in his official assignment is not relevant to this case. Even if it were true that the Applicant had the priority to use of the vehicle, it does not justify a physical assault.

35. The evidence in the record does not support the Applicant's contention that he went to [Mr. MB's] office to show the gate pass and not to chase or pursue [Mr. TM]. During the investigation, [Mr. MB] stated that: "[n]o sooner had [Mr. TM] finished showing [Mr. MB] and [Mr. PM] the bruises he had just sustained from physical beating, [then] [the Applicant] slammed [Mr. MB's] office door [and appeared] to grab [Mr. TM]. Mr. MB further stated that: "[Mr. MB] expected [the Applicant] to have waited around [his] office to give his side of the incident, but he decided not to wait and he left". In his second interview dated 28 July 2015, Mr. MB stated that: "[a]bout two (2) minutes later, [the Applicant] came back into the office and stated that [Mr. TM] must surrender the vehicle key. [The Applicant] was very combative and did not show [Mr. MB] a gate pass". Therefore, the record does not square with the Applicant's claim that he entered the Security Office "just trying to show the validity and e4-3()230()-9(c)4(-126(66(his))-9()-129(9)6(icia)4(l)28(ag)10(te

to join [Mr. TM] in the security office in order to lend his version of the argument,” there is no evidence showing that [Mr. MB] and [Mr. PM] had improper motivation to provide false statements against the Applicant. [Mr. MB] and [Mr. PM] reviewed their statements and signed them affirming their accuracy. Their written statements were under oath. In *Nyambuza* [2013-UNAT-364]

Rule 9.6

Termination

...

Reasons for termination

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

- (i) Abolition of posts or reduction of staff;
- (ii) Unsatisfactory service;
- (iii) If the staff member is, for reasons of health, incapacitated for further service;
- (iv) Disciplinary reasons in accordance with staff rule 10.2(a) (viii) and (ix);
- (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;
- (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

...

47. Staff rules 10.1, 10.2 and 10.3 in Chapter X of the Staff Rules concerning disciplinary measures (ST/SGB/201

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”.

... To observe a party’s right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment. Although it is not necessary to address each and every claim made by a litigant,

occurred (see the former United Nations Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

53. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal decided that it is not sufficient for an applicant to allege procedural flaws in the disciplinary process. Rather, the applicant must demonstrate that these flaws affected her/his rights.

54. The Tribunal is of the view that the purpose of the SIU is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to the OHRM being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect the staff member's rights, including the due process rights.

55. In the following, the Tribunal will analyze the Applicant's contentions regarding the facts and the evidence in relation to each of the allegations, the regularity of the procedure and finally the proportionality of the disciplinary sanction.

Investigative phase

56. The Tribunal notes that during the investigation, the Applicant, Mr. TM, the staff member who filed the incident report for physical assault on 11 November 2014 for the incident that took place on 5 November 2014, and other witnesses were interviewed initially on 13 November 2014 as follows:

- a. The Applicant stated on 13 November 2014 that (emphasis omitted):

My main task as Supply Assistant in the UNMISS Supply Chain is to receive cargo that is sent to Juba and distribute to the respective units. I also prepare

b. Mr. TM stated on 13 November 2014 that (emphasis omitted):

[...] I hereby confirm the facts that occurred on 05 November 2014 in the Supply Base, Wau, when I was verbally and physically assaulted [by the Applicant]. [It] happened in the past that [the Applicant] behaved by shouting at me while complaining because I wanted to use a vehicle for his personal needs. I also confirm that on 05 November 2014, when I was outside my office and [the Applicant] was threatening me, staff member [Mr. WL] was present trying to stop [the Applicant]. I confirm that [the Applicant] ordered [Mr. WL] to leave my office shouting to “go out, go out, I want to teach this guy a lesson”. Despite the fact I beg[ged] [Mr. WL] to remain with me, he left and [the Applicant] assaulted me, beating me with his open hands. I confirm that when I was going to the Security Office to report the case, [the Applicant] was chasing me
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Applicant] did not listen to me and we entered [Mr. TM's] office. Inside the office my colleague

MB] insisted for him to go out, he again refused and stood there saying “I am following this guy” pointing out his fingers to [Mr. TM]. Then for the third time [Mr. MB] shouted at him and said “I want you to go out now.” He went out, at the same time, he knocked and opened the door without being told to come in. Then [Mr. MB] told

is my supervisor, who worked along with [Mr. JA], Chief of HUB, who is of Danish nationality.

and will not release them. I went to [Mr. TM's] office and asked

inform me sometime that day that he did hear an emergency broadcast on the radio.

59. The Tribunal notes that the report prepared on 17 December 2014 by the Security Section of UNMISS mentioned the above-said statements from 13 November 2014 and some documents collected by the investigator (reference to annexes omitted):

[...] The investigator collected the following documents:

Copy, Medical Certificate issued to [Mr. TM] by UNMISS Wau Medical Section on 05 November 2014

Copy, email sent by [Mr. RM] on 21 November 2014

Copy, email sent by [Ms. LX] on 03 December 2014

Copy, email sent by [Mr. JO] on 03 December 2014

Copy, emails sent by [redacted name, Mr. AM] on 24 November 2014 and on 03 December 2014

Copy, email sent by [Mr. JA] on 04 November 2014.

60. The report included the following findings and conclusions in secs. 4 and 5 of the report (reference to annexes and emphasis omitted):

4. FINDINGS

4.1 The investigation established that on 05 November 2014, at approximately 08:30 hours in Wau LogBase staff member [Mr. TM] was verbally abused and physically assaulted by staff member [the Applicant].

4.2 The investigation established that on 05 November 2014, following an argument based on futile motivations [the Applicant] verbally abused staff member [Mr. TM] saying in front of witness [Mr. WL] the words “go out, go out, I want to teach this guy a lesson” and saying to [Mr. TM] the words “if you go to Security I will call National Security to deal with you.”

4.3 The Investigation established that on 05 November 2014, following an argument based on futile motivations staff member [the Applicant] physical[ly] assaulted staff member [Mr. TM] and beat him up with his open hands. As a consequence of the physical assault staff member [Mr. TM] was admitted at the UNMISS Wau [M]edical Section where he was treated for “small 1 x2 cm. swelling sn9g1t t22 Tm sn9g1t t22 Tm sn9x. JAsn9xaf foll

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today arising from delayed IC payment. The cashier in the Finance [Section] PK was badly beaten and he has opened a case. National Police was called in to intervene in cases 3 & 4. FYI. Staff members assaulted have been advised to record statements with Security – and file case to Code of conduct but it is unfortunate that they are being intimidated by those who assaulted them. I will call a town hall meeting to remind staff on UN core values and expected conduct. Regards, [Mr. WB]

1- PM of Supply chain assaulted TM on 05 Nov 2014

1- HJ of Engineering assaulted RK on 06 Nov 2014

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c. The Tribunal considers that these elements created a perception among UNMISS staff members that the Applicant was and continued to be a serious threat to other staff members. Therefore, the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident that happenBT/g0 i2T92 reWf2 0 612 792 reW*nQq0.0000091

November-December 2014 were incomplete. Therefore, all the documents, to which the referral of allegations of misconduct against the Applicant issued by the ASG/DFS to the ASG/OHRM on 22 May 2015 and the contested decision issued on 27 April 2016 which followed refer, are also procedurally flawed, since evidence considered relevant by the investigator was gathered between 31 May 2015 and 31 July 2015 and was thus never brought to the attention of

email, [Mr. RR] gave the names of other staff members who he knew to have been threatened by you, and stated that no report had been made to Security because “[they] all [knew] nothing [would] happen”.

- b) [Mr. JO], who was your second reporting officer at the time, stated that “on many occasions, [you] ha[d] threatened [many] staff [members]” and particularly that around July 2012, when he did not nominate you for a training course, you told him that he “would learn a lesson”. [Mr. JO] stated that in 2012, [Ms. LX], UNMISS staff member, and [Mr. JMC], a UN Volunteer, complained that they had been threatened by you. Your supervisor, [Mr. JA], also stated that he received several complaints about your rude behavior and aggressive language towards colleagues, and that he had several meetings with you concerning the complaints.
- c) [Mr. AL], UNMISS staff member, stated that he had an incident when he was to use a vehicle urgently, but you did not let him use the vehicle because “for [you], [your] work [was the] priority” and you were “too selfish” and “impatient”.

[...]

... As noted in the Section III. [Background] above, the record indicates that you have, in the past, engaged in aggressive and threatening behaviors towards other staff members and that some of them submitted complaints against you, which led to your supervisors having meetings with you to resolve the issue.

- r. The Tribunal is of the view that these aspects were very important to be brought to the attention of the Applicant and for him to properly defend himself since they related to previous incidents in which he allegedly was involved, which were never recorded and/or investigated before, and which have been taken into consideration in relation to the proposed disciplinary measure of separation from service. Having reviewed the Applicant’s comments to the allegation of misconduct filed on 15 October 2015, the Tribunal notes that it is clear he was not aware of the new evidence gathered during the interviews conducted between 28-31 July 2015 from Mr. SS, Mr. FB, Mr. WL and Mr.

MB, or that he was also investigated regarding other aspects except the allegations of physical assault against Mr. TM.

s. The Tribunal notes that in the considerations in para. 21 of the letter of allegation of misconduct issued by the ASG/OHRM on 4 September 2015, it is stated that:

... We consider that, while your account of events is not consistent with the witnesses' statement as noted in the Section V. above, [Mr. TM's] version of events is supported by the evidence, particularly, the other witnesses' statements, as further elaborated below.

- a) [Mr. WL] stated that he "heard loud voices" from [Mr. TM's] office, and entered the office. [Mr. WL] witnessed that you and [Mr. TM] engaged in an argument over the vehicle key. [Mr. WL] left the room in the middle of a heated exchange between you and [Mr. TM]. While [Mr. WL] did not give the specific reason for his departure, [Mr. TM] claimed that you "ordered" [Mr. WL] to leave the office, and [Mr. SS] heard from [Mr. WL] that he did not want to be involved in the matter. Accordingly, the circumstances suggest that the situation was extremely tense, which could escalate to a physical conflict.
- b) The record contains statements of several witnesses, namely, [Mr. SS], [Mr. MB], [Mr. PM], and [Mr. FB], consistently indicating that [Mr. TM] asked for help.
 - (i) During the alleged physical assault, it is clear that [Mr. TM] signaled an emergency through his radio, which you [the Applicant] also admitted during the investigation.
 - (ii) [Mr. MB] and [Mr. PM] stated that [Mr. TM] rushed into the office of [Mr. MB] with a frightened look and in a hurry to escape your pursuit. They witnessed that, immediately after [Mr. TM], you entered the room in a hurry "slam[ing] the office door" trying to "grab" [Mr. TM], which indicates that you were in hot pursuit of [Mr. TM].

he was afraid of the Applicant. The Respondent produced as an explanation for Mr. TM's impossibility to testify before the Tribunal a "personal security risk assessment for [name redacted, Mr. JT]" issued on 9 July 2016, in which reference was made that Mr. TM was "receiving warnings from friends, associates who ha[d] been hearing information of threats against him. This information comes from different sources which cannot be ignored". The recommendations included in this document were that Mr. TM should "[r]efrain from going out of the camp unless really necessary; ask someone to buy goods for him momentarily; in case of urgent issues in town ought to have a buddy to accompany him or in convoy with colleagues [...]", and that he should be "reassigned" "to Juba to be away from the subject and his relatives that could inflict harm to him. In addition due to the Wau crisis, and the semblance of strong tribal connection of the conflict, the relatives will use this to bolster their drive to revenJETQqlaf-9(J) TJETQq0.0

hand held radio in order to ask for the intervention of the Security. As results from the above, Mr. WL, Mr. MB and Mr. PM, which all saw Mr. TM right after the alleged physical assault, looked at Mr. TM's right ear to check if there was any swelling as he was complaining, and they were not able to see any bleeding, injury or scratch in the

79. The Applicant's grounds for appeal therefore are to be granted, and the contested disciplinary decision to separate him from the Organization with compensation in lieu of notice and without termination indemnity, which is unlawful for both procedural and substantive reasons as presented above, is to be rescinded.

Relief

established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, be

law, the applied unlawful sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10(b).

85. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

86. The Organization's failure to comply with all the requirements of a legal termination causes a prejudice to the staff member, since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his/her reinstatement into service with compensation for the lost salaries (*restitutio in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement, together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

87. A severe disciplinary sanction like a separation from service or dismissal is a work-related event which generates a certain emotional distress. A compensation generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction and consequently will consist of a partial compensation.

88. When an applicant requests her/his reinstatement and compensation for moral damages s/he must bring evidence that the moral damages produced by the decision cannot be entirely covered by the rescission and reinstatement.

89. The Tribunal considers that, in cases where the disciplinary sanction of separation from service or dismissal is rescinded and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages, if any, produced by the rescinded decision.

90. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. According to the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased, her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

91. In *Tolstopyatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

92. In *Mmatta* 2010-UNAT-092, the Appeal Tribunal stated:

Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the [Dispute Tribunal] to compensate for loss of earnings in lieu of reinstatement up to the date of judgment.

105. Further in *Kallon* 2017-UNAT-742, the majority of the full bench of the Appeals Tribunal decided (footnotes omitted) that:

62. The authority conferred by the [Dispute Tribunal (“UNDT”)] Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(b) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation. Much will necessarily depend on the evidence before the UNDT.

64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis* 2013-UNAT-309 prior to the amendment of Article 10(5)(b) by General Assembly resolution 69/203. In that case this Tribunal said:

... To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This

Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

...

68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence".

106. The Tribunal notes that, in his application, the Applicant requested to be reinstated in his previous position and the payment of all unpaid salaries since separation of service, together with moral damages as a result of the unlawful separation from service for wrongful termination and, in his amended application, moral damages for the feeling of stress caused by his separation. It results that the Applicant's request for s m# rnt's n desm tMfor

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109. Since the Applicant testified that he suffered mental distress and/or anxiety, the Tribunal considers that all factual elements together with the nature of the breach constitute sufficient evidence in the present case to conclude that harm was caused to the Applicant's dignity and to his career potential.

110. The Tribunal considers that the present judgment, together with an amount of USD5,000, represents a reasonable and sufficient compensation for the moral harm caused to the Applicant and his request for moral damages is therefore to be granted in part.

Conclusion

113. In the light of the foregoing The Tribunal DECIDES:

a. The application is granted in part and the contested decision to terminate the Applicant's contract for disciplinary reasons and to separate him from UNMISS is rescinded, and any references relative to the Applicant's disciplinary sanction of separation from service are to be removed from his official status file.

b. As an alternative to the rescission of the contested decision, the Responde

f. The present judgment is to be included in the Applicant's official status file.

(Signed)

Judge Alessandra Greceanu

Dated this 29th day of December 2017

Entered in the Register on this 29th day of December 2017

(Signed)

Morten Albert Michelsen, Officer-in-Charge, New York