INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the World Food Programme (WFP). On 22 December 2014, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi challenging the decision to separate him from service with compensation in lieu of notice and with termination indemnities following a disciplinary process. This case was registered as Case No. UNDT/NBI/2014/115.

2. The UNDT held oral hearings on 13-15 October 2015 and 26 January 2016 in which about eight witnesses testified. In delivering its Judgment No. UNDT/2016/057 on 10 May 2016, the Tribunal found that a charge of misconduct was established against the Applicant. It also found that the Applicant's rights to due process were prejudiced because he was not provided with the investigation report. The Tribunal held that the Applicant did not canvass the issue of

6. Additionally, UNAT expressed the view that if all the facts on which the disciplinary sanction was based could be established by clear and convincing evidence, the Applicant's behavior would constitute misconduct and the disciplinary sanction imposed on him would be a proportionate measure. It added that if only part of the allegations could be so established, the disciplinary sanction could be upheld even though proportionality of the sanction would be an issue.

WFP's Gode Sub-Office. He held this position at the times material to this Application.

12. In the morning of 20 November 2013, the Head of the Gode Sub-Office, Mr. Faryabi, reported by phone to Mr. John Corpuz, the WFP Field Security Officer (FSO) based in Addis Ababa that the Applicant had assaulted one Mr. Ibrahim Mudey, a generato

17. Disciplinary proceedings were then initiated against the Applicant. By a letter of 19 August 2014, he was informed of the charges against him and his rights were explained.

18. The charges were that he physically assaulted and engaged in a physical altercation with Mr. Ibrahim Mudey, a generator operator for Midnimo causing him physical injuries on WFP premises. It was also alleged in the charge letter that the Applicant had, by his actions, exposed WFP to reputational risk both internally and with external parties. It was additionally stated that an aggravating factor in the case was that the Applicant had physically pushed a WFP driver in April 2013.

19. The Applicant responded to the charges by email dated 25 September 2014. In his response, he vat73(,)-B73 2

Did the Applicant initiate the fight and continue to fight in a severe manner?

23. On 27 October 2014, the Respondent imposed the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities on the Applicant. According to the memorandum conveying the decision to impose the disciplinary measure, it was established that the Applicant engaged in a physical altercation with Mr. Mudey causing him physical inj 10. Tf 0.0-7(a 10.08 d(l).0 0.0 0.0 rgl.bl-7(a 10.(l).0 0(o)-20(n)19( ).0 0W10.Fn)15(P)-4(

73. he Applicanttstifi1-7ead that he abbed im1-7( )750b(y)39( )501(t)-22(h)19(e)-16( )-50(h)19(a)3

the waist and as Mr. Mudey struggled, they both fell to the ground with him on top. They were later separated by other persons who came to the scene.

28. Mr. Mudey's testimony before the Tribunal on 26 January 2016 was that when he returned to the WFP offices on 20 November 2013, he went to look for Mr. Faryabi, the head of the sub-office and ran into the Applicant who angrily asked him who gave him permission to return. He said did not respond but instead entered the canteen and asked the cook, Ms. Leyla Abdi, to help him find Mr. Faryabi.

29. He continued that as he tried to leave the canteen a while later, the Applicant entered and they met again. His account is that the Applicant then grabbed him and threw him to the floor. When his head hit the floor, he became dizzy and on opening his eyes, the Applicant was on top of him with his leg on top of his chest. He then tried to defend himself but the Applicant hit him on his face with his head. Other people who came to the scene separated them and he reported the assault to the Police.

30. Mr. Mudey continued in his testimony that one of his front teeth was knocked out and that he sustained an injury on the back of his head. He stated that he attended the Gode hospital the same day and that x-rays were carried out on his chest and teeth. However, in his witness statement of 28 September 2015 made as part of the response to this Application, Mr. Mudey stated that after the attack on him on 20 November 2013 by the Applicant, he noticed that four of his teeth were bent inwards and a dental x-ray at the hospital showed that the four teeth were damaged.

31. The witness also stated that on 23 November 2013, the Applicant's relatives visited him and some elders of his family and apologized for the injuries caused him and he accepted their apology. An agreement was written and signed in which it was stated that the Applicant would pay him 40,000.00 ETB, the equivalent of USD1, 900.

32. On 19 February 2014, the OIGI issued a final investigation report of the incident. The report relied on the statements collected from witnesses by the FSO

Mr. Corpuz, during an earlier fact-

41. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held that the weight to be attached to admitted evidence is within the discretion of the UNDT Judge. The reliance placed on one version of Ms. Abdi's contradictory accounts by the Respondent is both unfortunate and fatal to the Respondent's case. In view of the contradictions in her different statements and testimony, the Tribunal finds that she is an unreliable witness. Noting that the parties to the physical altercation each claim that they did not initiate the fight, what ought to be the only independent evidence provided by Ms. Abdi does not meet the standard of clear and convincing evidence required to establish that the Applicant initiated the fight between him and Mr. Mudey.

42. As to whether the Applicant continued to fight in a severe manner, it is well established by evidence of the parties to the fight and others who came to the scene to separate them that the Applicant was on top of Mr. Mudey. Did that fact alone amount to fighting severely on the part of the Applicant? There is oral evidence from witnesses that Mr. Mudey's mouth was bleeding from the fight. There is also evidence at(d)-30(ot00((d)-30(ot0d5d)-50(t))19(t)-2org 0.9998 0.0 0.0 1.0 99.36 446.

the Respondent also relied on a settlement agreement brokered between the families of Mr. Mudey and the Applicant in which the Applicant agreed to pay compensation to Mr. Mudey. The Applicant attacked the credibility of and reliance placed on these pieces of documentary evidence by the Respondent in imposing disciplinary sanctions on him.

45. In this regard, the Tribunal has reviewed the medical certificate in issue. The document which is solely in English does not appear to be made on a letter-head paper of the Gode hospital although it bears

though "the certificate bears a mistaken date, there is no evidence to suggest that it was falsified or to explain a motivation for such a forgery because the fact established by the medical certificate - that Mr. Mudey was seriously injured is not in dispute." The Tribunal's observation in reviewing the said medical certificate is that the document is not a medical report and does not state the extent of any injuries suffered by Mr. Mudey. Rather it showed that Mr. Mudey was placed on sick leave for a period, prescribed some medication and asked to report back to the hospital after a certain number of days.

48. The Respondent also added that there is no evidence to support the authenticity of the Applicant's report from Gode hospital which asserts that Mr. Mudey did not visit or obtain a medical certificate from the hospital. He submitted further that the Applicant did not challenge the authenticity of the medical certificate presented by Mr. Mudey during the investigation or disciplinary process.

49. During the hearing of this matter and in answer to a question by the Tribunal, the Applicant explained that he first obtained proof of the falsity of Mr. Mudey's medical certificate after the conclusion of the disciplinary process because he had been placed on administrative leave and banned from visiting Gode throughout the disciplinary process. He then went to Gode thereafter, obtained the proof and submitted his complaint regarding the falsity of the medical certificate.

50. Regarding Mr. Mudey's attendance at the Gode hospital, the Tribunal notes that in Mr. Faryabi's testimony, the witness stated that after the Applicant and Mr. Mudey were separated, he saw that Mr. Mudey's face was bleeding and he immediately asked a driver and one of the guards to take Mr. Mudey to hospital. He continued that when the car came, he assumed Mr. Mudey would go to the hospital. Mr. Faryabi stated that he then went to talk to the Applicant and returned to see that Mr. Mudey was back at the office with the Police and upon asking the driver why he did not take Mr. Mudey to the hospital, he was informed that Mr. Mudey went to the Police Station instead. He said that he again instructed that Mr. Mudey be taken to the hospital as he was still bleeding.

51. It is mention-worthy that when he was led i

58. It cannot be ignored that because Gode community to which Mr. Mudey belonged wanted the Applicant punished and Mr. Mudey's job protected, Messrs. Corpuz and Faryabi practically assured the community that WFP would do so. Mr. Corpuz also stated, when cross-examined, that during his fact-finding, he was informed that Gode community was restless and keeping vigil outside WFP premises to make sure the Applicant didn't fly out with him the following morning without negotiations. Therefore, the Applicant's case that he entered a settlement agreement to pay the equivalent of USD1,900 solely to free himself from police detention and from the pressure on WFP to take action against him regardless of the evidence tainted the investigation, cannot easily be dismissed.

59. The Tribunal finds therefore that in its decision to impose disciplinary sanction on the Applicant, the Respondent relied in part on a medical certificate which did not support the claim of serious injuries inflicted on Mr. Mudey and whose authenticity is in doubt. The Respondent also relied on a settlement agreement which appears to be largely coerced to establish the culpability of the Applicant. While the WFP may have legitimately sought to preserve its goodwill with its host community of Gode, the extent of threats by the local Gode community, its involvement and interference with Mr. Corpuz during his fact-finding and with Mr. Faryabi and the WFP in this matter resulting in the community practically eliciting assurances from Mr. Corpuz and others that the Applicant would be punished is worrisome. The Tribunal finds that these interferences detracted from the professionalism and detachedness that ought to attend the investigative process and tainted it irredeemably in this case.

Is there clear and convincing evidence?

60. In the light of its foregoing review, the Tribunal finds that the Applicant had attempted to physically remove Mr. Mudey from WFP Gode sub-office in the morning of 20 November 2013. It also finds that in so doing, the Applicant was imprudent and reckless since he could have sought the assistance of security personnel to remove Mr. Mudey. However, the allegations that he initiated the fight with Mr. Mudey and continued to fight severely and inflicted serious injuries on him were not established by clear and convincing evidence.

Was there similar facts evidence that the Respondent could rely on as aggravating factor in this case?

61. The Respondent, in imposing the disciplinary sanction of "separation from service with compensation in lieu of notice and with termination indemnities" on the Applicant, considered as an aggravating factor, "the prior display of aggressive behavior in the workplace" by the Applicant. This prior display of aggressive behavior referred to was based on an allegation cited in Mr. Corpuz's investigation report that in April 2013, the Applicant had pushed a WFP driver while at the Gambela sub-office.

62. In his investigation report dated 20 December 2013, Mr. Corpuz listed among evidence he considered in establishing that the Applicant had previously engaged in aggressive conduct in the workplace to include: (a) "email correspondence from the local security assistant of Gambela regarding a previous reported abuse involving (the Applicant)"; and (b) "email apology of (the Applicant) to a WFP driver in Gambela."

63. Mr. Corpuz stated in his report that an aggravating factor is that the Applicant had physically assaulted a driver when he was at the Gambela sub-office. The investigator remarked that although the alleged conduct was never investigated, he had assessed that it occurred. In arriving at the disciplinary sanction which he imposed on the Applicant, the Respondent stated clearly that the alleged prior and unproven physical assault of a driver by the Applicant was relied upon by him as constituting an aggravating factor.

64. In the final investigation report by the OIGI, it was similarly stated that in April 2013, the Applicant had had an altercation with a driver and then later apologized to the said driver in an email dated 19 April 2013 for pushing him. The investigation report stated that one Mr. Pickering who witnessed the incident told IOGI that in an email that that he heard the Applicant shouting at the driver before pushing him on the chest out of his office. Although the alleged incident was neither reported nor investigated, the OIGI concluded that it was the second time that the Applicant used physical force against a person on WFP premises.

65. In criminal law where similar facts evidence may be admitted, its singular purpose is to prove that the defendant committed the crime of which he is accused because he has a propensity to commit that

warranted and proportionate. Consequently, he requests that the Tribunal dismiss the Applicant's claims in its entirety.

71. Pursuant to art. 10.5(a) of its Statute, the Tribunal may rescind a contested administrative decision or order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) regulates awards of compensation. The General Assembly, by its resolution 69/203, amended art. 10.5(b) of the UNDT Statute to ensure that compensation is ordered only for harm and that the existence of such harm is proven or supported by adequate evidence.

72. In *Cohen* 2011-UNAT-131, the Appeals Tribunal highlighted the right of staff to an effective and equitable remedy once the Dispute Tribunal has concluded that an administrative decision is unlawful. Accordingly, the Applicant should be granted a remedy that takes into account his employment with WFP that was unlawfully taken away from him.

73. In *Sarrouh* 2017-UNAT-783, the Appeals Tribunal reiterated its long-standing view that the UNDT is in the best position to decide on the level of compensation given its appreciation of the case.

74. In *Mihai* 2017-UNAT-724, the Appeals Tribunal enjoined the UNDT to order rescission of the impugned decision pursuant to art. 10.5(a) of the UNDT Statute before awarding in-lieu compensation.

Judgment

75. The Tribunal finds that the Respondent unfairly dismissed the Applicant because the reasons upon which the Applicant's separation from service is based were not established by clear and convincing evidence.

76. The Tribunal orders the Respondent to rescind the administrative decision and to reinstate the Applicant.

77. Considering that at the time of the Applicant's separation from service, he had successfully served with WFP as locally recruited field staff for about two years and on a fixed-term appointment for 15 months, the Tribunal considers that minus his unlawful separation from service, he would have continued to serve on an FTA for at least another year. The Tribunal therefore sets in-lieu compensation in the amount of 12 months' net base salary.

78.

Entered in the Register on this 17th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi