UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/021
Judgment No.: UNDT/2013/079
Date: 21 May 2013
Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Jorge Ballestero, UNICEF

Introduction

1. The Applicant filed two Applications. In Application 1, he challenged the imposition of the disciplinary measures of demotion and a reprimand. In Application 2, he challenged the Organization's decision to retain him on a P-4 level after he had been selected for a P-5 position in the Uganda office of the United Nations Children's Fund (UNICEF); his non-selection for a P-5 post in UNICEF Tanzania; the failure to issue him with a written notice of abolition of a post that he held in UNICEF Malawi; and the refusal by the UNICEF Malawi Country Representative to sign his Travel Authorization (TA).

Procedural History

2. When the two Applications were filed on 6 April 2012, the Respondent challenged the receivability of all of the Applicant's claims except that relating to the disciplinary measures (the demotion) on the grounds that they had been filed with the Tribunal out of time. He requested the Tribunal to consider the merits of the allegation regarding the disciplinary sanction after deciding the receivability issue.

3. In Judgment No. UNDT/2012/159 dated 31 October 2012, the Tribunal held that:

> a. The Applicant filed a comprehensive request for management evaluation on 29 September 2011 with the Chief Policy and Administrative Law Section (PALS)/UNICEF. In light of that request and taking into account the Applicant's submissions, the Tribunal finds that the Applicant requested management evaluation of each of the issues and administrative decisions challenged by him.
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> b. On the basis of the documentary evidence submitted by the parties, the Tribunal finds that by 1 February 2012 the Respondent sought and the Applicant agreed to mediation of their dispute.
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> c. The documentary evidence shows that the Ombudsman's engagement was extended over a number of days. As evidenced by the Applicant's letter, by 16 February 2012 the mediation had broken down. Pursuant to Article 8 of the Statute, the 90 days for filing the Application in the Tribunal commenced on 17 February

2012 and expired on 17 May 2012. The Application was filed on 6 April 2012. This was well within the 90 days' time limit.

d. The Tribunal finds that the Applicant submitted the issues he is contesting for management evaluation as required by the rules, and the subsequent Application to the Tribunal was filed within time. The Application is therefore receivable.

4. In response to case management orders in preparation for the hearing on 30 November 2012, the Respondent submitted his submissions on the decision not to select the Applicant for the Tanzania post. On 27 December 2012, the Applicant submitted his version of events and a chronology.

5. The Respondent then filed an appeal against the receivability judgment with the United Nations Appeals Tribunal (UNAT). After the Tribunal had fixed the hearing date, the Respondent moved for the hearing of the substantive claims to be suspended pending the decision from UNAT on appeal. In the alternative the Respondent submitted that if the Tribunal decided to hear the Applications it should delay giving its judgment until UNAT has disposed of the appeal on receivability.

6. In *Benchebbak*[1], the Appeals Tribunal held that any orders rendered by the UNDT require execution even in cases where the order is being appealed. Article 8.6 of the Rules of Procedure of the Appeals Tribunal, which provides that "[t]he filing of an appeal shall suspend the execution of the judgment contested," does not apply to interlocutory appeals. "It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction."

7. In *Wasserstrom*[2], the UNAT stated that the receivability of an interlocutory appeal depends on the subject matter and the consequences of the contested decision.

> "The receivability of an interlocutory appeal from a decision of the UNDT allowing a case to proceed on the basis that it falls within its competence under the UNDT Statute is a different matter. If the UNDT errs in law in making this decision and the issue can be properly raised later in an appeal

[1] *Benchebbak* 2012-UNAT-256 at para 37.
[2] *Wassertrom* 2010-UNAT-060.

> against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision."[3]

8. The Tribunal rejected the Respondent's motions in reliance on these two cases and for the following practical reasons: As the Applicant remains a staff member early resolution of this case is essential; the facts concerning the disciplinary case and the non-disciplinary issues of demotion are ine**x**tricably linked and all of the claims can be expeditiously heard together; the appeal against receivability will take several months to be resolved and will delay the determination of the disciplinary matter. Finally, the issue of receivability may be raised in an appeal against the final judgment on the merits. A substantive decision by the Tribunal on each of the Applications will enable UNAT to consider all of the issues on appeal at once, if required.

9. The Tribunal held a hearing on the merits on 26 and 27 March 2013. Evidence was given on all claims except for the challenge to the non-selection of the Applicant for the Tanzanian post, which the parties agreed could be dealt with on the papers.

10. The Applicant has requested that his Application be treated confidentially. Given the sensitivities of the evidence in this case the names of the Applicant and all other persons named in the proceedings will not be published.

Issues

11. The issues to be determined are:

a. Was the failure to give the Applicant written notice of abolition of post unlawful?

b. Was the first reprimand dated 25 August 2011 and the refusal to sign the Applicant's TA for the Uganda post lawful?

c. Was misconduct by the Applicant established and if so was demotion a proportionate sanction?

[3] *Ibid*. para 19.

d. Were the facts on which the demotion was based established by clear and convincing evidence?

e. Did the established facts amount to misconduct?

f. Was the sanction proportionate to the offence?

g. The Tanzanian Post

h. Remedies

Background

12. The Applicant is a medical doctor. On 6 July 2008, he joined the Malawi Country Office as Chief of Health and Nutrition with UNICEF on a fixed-term contract at the P-4 level expiring on 31 December 2011. In addition to his role as Chief of Health and Nutrition he was also the Office Ombudsperson.

13. On 25 January 2010, the Applicant made a formal complaint to the Office of Internal Audit (OIA) that he was being sexually harassed by Ms. H, a UNICEF staff member who worked as Executive Assistant in Operations, a different section from the Applicant. He alleged that she made telephone calls and sent text messages to him about her work related stress, insomnia and a mental condition.

14. The Applicant told OIA that these text messages and telephone calls progressed from expressions of gratitude for counselling and advice, to polite compliments before changing into messages of a sexual nature. He said that Ms. H began spreading rumours within the office about the two of them having an affair and only discovered what she was saying when he was approached by a colleague and asked if it were true.

15. Ms. H was informed of these allegations and responded with a detailed account of events that she said she recorded in her diary, listing meetings between her and the Applicant between 25 August 2009 and 27 January 2010.

16. She alleged that as a result of her relationship with the Applicant, she became pregnant. When she informed the Applicant of that fact he allegedly told her to get an

abortion. Ms. H said that as a result of the Applicant threatening her career she had an abortion on 21 November 2009.

17. On 16 December 2010, OIA commenced an investigation into the actions of the Applicant. The OIA investigators put it to him that they believed he had been intimately involved with Ms. H. He agreed that he had and that it was a mutually agreed arrangement. He told OIA that she started to harass him with the emails and texts after he tried to end the affair.

18. In February 2010, Ms. H informed OIA that she was again pregnant and the Applicant was the father. The Applicant adamantly denied this. He said that the relationship had ended on 24 November 2009 and he had not had any sexual relations with Ms. H since then therefore proving that it would be biologically impossible.

19. As a result of the developing situation between the two staff members, OIA approached a UNICEF Staff Counsellor in New York to assist. She was asked to help the Applicant and Ms. H to move forward following the end of their relationship and to assist Ms. H deal with the situation she was in i.e. being married and expecting a child that she believed was the product of her extramarital affair with a colleague.

20. The Counsellor visited Malawi for a week at the end of March 2010. She met individually with the Applicant and Ms. H to try to find a solution to their issues which would be not only in the interests of each of the two staff members but also of the Organization. She separately suggested to them that if the Applicant submitted to a paternity test once the child was born Ms. H would withdraw all allegations against him. Ms. H agreed to this. The Counsellor believed the Applicant also agreed but he denied having made such an agreement.

21. Following these meetings the Applicant acknowledged that Ms. H had stopped sending him emails and texts and therefore decided to officially withdraw his allegation of sexual harassment against her. On 9 April 2010, OIA closed that case.

22. On 1 October 2010, Ms. H gave birth to a daughter and proceeded to follow up on the paternity test that she believed the Applicant was to submit to as promised by the Counsellor. Ms. H then enquired with the UNCIEF Malawi management, Ms. CA and Ms. HY about how she could go about organizing a paternity test. The Counsellor contacted the Applicant by

telephone asking him about the agreement she said they had made. His response was that he had never made such an agreement. He reiterated that there was no way he could be the father of the child as the girl was born in October 2010 and his relationship with Ms H ended in November 2009.

23. On 6 December 2010, Ms. H contacted the OIA investigator about having the Applicant take a paternity test. The investigator spoke to the Applicant who confirmed he was not willing to take a paternity test unless obliged to by a court. The investigator wrote to Ms. H on 6 December 2010 to advise that UNICEF was not in a position to compel him to do anything against his will. He suggested that she take a legal approach to resolve the matter.

24. After the Applicant's refusal to submit to a paternity test, Ms. H filed another complaint on 16 December 2010 with OIA alleging that he had abused his authority in sexually exploiting her by forcing her into having an affair with him, starting in August 2010.

25. In May 2011, he was informed orally that his post with UNICEF, Malawi as Chief of Health and Nutrition would be abolished on 31 December 2011, the same date on which his fixed term contract was to expire. He was not advised in writing.

26. The Applicant applied for other vacancies including the post of Chief of Health at the P5 level with the Tanzania Country Office for which he was shortlisted by the Department of Human Resources on 24 May 2011 and interviewed on 29 June 2011.

27. OIA issued its investigation report into Ms. H's allegations against the Applicant in June 2011. It made the following findings and conclusions:

a. Both staff members have shown poor judgment in entering into an extra-marital affair between colleagues in the same office. There are conflicting stories as to how and who started the relationship and this is a key element of the allegation of sexual exploitation. However, from the attached correspondence provided, Ms. H was an active participant in the relationship up until the point that the Applicant ended it.

b. It is clear that Ms. H made the complaint of sexual exploitation, only after the Applicant declined to submit to a paternity test, which was some months after the relationship ended.

c. Recommends that Department of Human Resource (DHR)/PALS consider the evidence and take whatever action that is deemed appropriate.

28. On 11 August 2011 the Applicant was offered the post of Chief of Child Survival and Development in Uganda at the P5 level. The offer letter attached an Acceptance of the Offer of Appointment Form and stated:

> Congratulations once again on your appointment as Chief Child Survival and Development in Kampala, Uganda. I am writing to provide you with the administrative details on [the Applicant's] reassignment and promotion to the level P-5 Step 1…This appointment is for a period of 24 months on a fixed-term basis.

29. He accepted the offer on 16 August 2011 by signing and returning the acceptance form. The contract had an agreed starting date of 19 September 2011.

30. On 25 August 2011, having considered the OIA June 2011 investigation report into the allegation that he had sexually exploited another staff member, the Director of HR sent his decision to the Applicant in a letter.

31. The Director told him that it was decided that there was not enough evidence to establish that the complainant was in a position of vulnerability or that the Applicant abused his position as an international civil servant, therefore disciplinary proceedings would not be commenced against him. However because he had filed a complaint of sexual harassment against his former partner without disclosing their intimate relationship and because he had not taken the paternity test he had allegedly agreed to, his behaviour was not befitting the standards of an international civil servant.

> We thus expect you to honour your commitment to Ms H and proceed with the test before you resume your new responsibilities in Uganda….Please consider this note as a reprimand […]

32. Ms. H also received a reprimand in which she was asked her to facilitate the paternity test process by making her daughter available for testing. The Applicant and Ms. H received these letters on 30 August 2011. The Applicant did not know of Ms. H's reprimand at that time.

33. On 2 September 2011, having made an appointment for the paternity test Ms. H went to the Applicant's office. The Applicant says that he was working at his desk when Ms. H burst into his office with her hands raised above her head and slammed the door behind her. He repeatedly asked her to leave in forceful language and when she didn't he took hold of her clothing near her neck with one hand and tried to open the door with the other to remove her. He said she was fighting and resisting him. Another staff member, hearing the commotion, opened the door to see what was happening. Ms. H left the office. The Applicant said he felt under attack and acted in self-defence. He admitted calling her names in a voice loud enough to be heard by others in the office.

34. In preparation for leaving Malawi to take up his new post in Uganda the Applicant ended the rental on his house. He removed all his belongings and handed them over to a shipping company. On 15 September he and his family moved into a hotel pending his departure on 17 September 2011 to take up his new post on 19 September.

35. However, the Malawi Country Representative declined to approve his travel authorization after the Uganda Country representative expressed dismay that the Applicant's promotion had gone through without consideration of the reprimand and the on-going investigations into the Applicant's conduct. On 21 September 2011, the OIC of the Division for Human Resources, wrote to the Applicant:

> I am hereby inviting you to inform us if and when you are going to take the paternity test required from you in that letter, as per your previous agreement with Ms [H] and the UNICEF's counsellor who assisted in your case…
>
> As staff of the leading UN Agency, promoting and protecting the rights of women and children, UNICEF staff is required to behave in accordance with the highest standards of integrity, placing the interest of children above private disputes and fully complying with their parental obligations.
>
> The current situation, brought about by your own private decisions, requires that you take a paternity test. This is the only way to determine if you have parental obligations with Ms [H]'s child and that child's rights vis-à-vis you. This is the test to which you consented in the past.
>
> We, thus, cannot authorize and pay for your departure from Malawi without having cleared this important matter first…
>
> …the decision to appoint you to Uganda and to allow for your possible promotion at the P-5 level was made without knowledge of the reprimand issued on 25 August 2011. The appointment is thus currently under review.

> This notwithstanding, no decision withdrawing the offer of appointment has been made at this time.

36. On 29 September 2011, the Applicant requested management evaluation of the conditions placed on his re-assignment; the issuance of a reprimand; the refusal by the UNICEF Country Representative to sign his travel authorization; keeping him on a P-4 contract after he had accepted a P-5 position; the failure to issue him with a notice of abolition of post and non-selection for the UNICEF Tanzania post.

37. On 6 October 2011, the Applicant was told that OIA UNICEF had opened investigations into his alleged assault of another UNICEF staff member. He was placed on three months administrative leave with pay pending the investigation as requested by the Country Office and was told it was neither desirable nor reasonable to reassign him nor redeploy him elsewhere.

38. On 25 October 2011, the Recruitment and Staff section of DHR informed the Applicant that "due to evolving changes in our programme interventions in the Tanzania Country Office in Dar-es-Salam, the recruitment process" for the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

39. In a decision dated 13 November 2011, the Deputy Executive Director ("DED"), who was delegated to undertake management evaluations for UNICEF, delivered a decision on the Applicant's request for management evaluation.

40. The decision concluded, *inter alia*, that as there was an absence of sufficient evidence that the Applicant had made a previous commitment to take a paternity test the contested decision was reversed. The DHR was instructed to reissue the reprimand letter making no reference to the paternity test although highlighting the importance of all UNICEF Staff members to comply with their private obligations and particularly their parental obligations. However in light of the assault allegations, the DED informed the Applicant on 16 November 2011 that:

> Until there is clarity about the outcome of the OIA investigation on the assault allegations, your reassignment to Uganda and promotion to Chief, Child Survival and Development (P5) is suspended.

41. The DHR altered the reprimand letter in line with the MEU directive and reissued it on 22 November 2011. It removed the requirement for the Applicant to proceed with the test before assuming his new duties in Uganda.

42. The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P4 contract for his Malawi post from 1 January to 31 March 2012.

43. In the meantime, the investigation into the assault proceeded.

Investigation: Staff Conduct (Assault)

44. On 5 September 2011, the Applicant sent an incident report about the assault in the workplace that took place on 2 September 2011 to the Representative of the Malawi Country Office. In addition to alleging that Ms. H had assaulted him, he said that on 25 July 2011 Ms. H tried to run over his wife with her vehicle in the UNICEF parking lot. Ms. H reported that she had been physically abused by the Applicant.

45. On 6 September 2011, the Representative reported the allegations from both parties to the Regional Director, East and Southern Africa Regional Office. The same day, the Regional Office forwarded the matter to DHR and OIA.

46. On 14 September 2011, the Applicant and Ms. H were informed by OIA that they were the subjects of the investigation into the disturbance that had occurred on 2 September 2011. On 22 October 2011, Investigators from OIA travelled to Lilongwe, Malawi to carry out the investigation into the alleged assault and the alleged incident with the car.

47. OIA issued its investigation report on the Applicant's case in December 2011 and made the following findings and conclusions:

> a. On the morning of 2 September 2011, the Applicant and Ms. H were involved in an altercation of a kind that could only be described as an assault, which took place between the two of them. Ms. H's attempt to inform the Applicant of the appointment she had made for the paternity test and his violent reaction resulted in an incident, which caused a disturbance in the office.

b. Following the history of the relationship between the Applicant and Ms. H, her decision to approach the Applicant without the presence of another staff member was in extremely poor judgment.

c. Ms. H engaged in a struggle with the Applicant and resisted his attempt to physically remove her from his office.

d. Based on the information available, there is no evidence to suggest that Ms. H made any threats against the Applicant's wife or tried to hit her with her vehicle.

e. The Applicant forcibly and physically attempted to remove Ms. H from his office. He shouted violently at Ms. H and used inappropriate language to address her, causing other staff to intervene and separate the two of them.

f. Both the Applicant and Ms. H acted in a manner that is unbecoming of international civil servants.

48. On 10 January 2012 the Applicant received notice that he had been formally charged with:

a. Engaging in a physical altercation with Ms H, grabbing and pushing her out of his office

b. Yelling at Ms H and using inappropriate and offensive language when demanding her to leave his office

c. Breaching the standards of conduct expected of a civil servant.

49. On 15 February 2012, the Applicant sent a comprehensive response to the allegations of misconduct.

50. On the same day, he requested a comparative analysis of the candidates interviewed for the Tanzania post. In response, on 16 February 2012, the Human Resources Specialist informed him that as the interview exercise conducted did not yield a successful candidate the vacancy was cancelled and due to the unique skill set of the position, would be filled from a direct placement of a candidate picked from the 'talent group.' The Tribunal notes that this

reason was different from the one given to the Applicant on 25 October 2011 by the Recruitment and Staff section of the DHR.

51. On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him, it had been decided that the interests of the Organization would be served through an informal resolution approach and that on 30 January his case was referred to the Office of the Ombudsman. He agreed to engage with the Ombudsman's office however no agreement was reached.

52. Following consideration of the facts, the DED further informed the Applicant that it was concluded that there was clear and convincing evidence that he had engaged in misconduct but having considered mitigating facts decided that he should be demoted one level with deferment, during two years, of eligibility for consideration of promotion. The mitigating facts were:

a. Long standing conflict between the Applicant and Ms. H derived from the end of their intimate relationship, which included allegations of sexual harassment, sexual abuse, and death threats.

b. The Applicant was not advised about the instruction given to Ms. H to facilitate the taking of the paternity test requested from him.

c. There is evidence to substantiate that the Applicant's behaviour was an unexpected outburst from a normally respectful, well-mannered, soft-spoken staff member.

53. In the same letter, the Applicant was then directed to take up his re-assignment to Uganda remaining at the P4 level due to demotion. He did so from the beginning of April 2012.

Applicant's submissions

54. The Applicant provided lengthy submissions. The following is a summary of the relevant points made by him.

55. The reprimands were unlawfully and improperly issued because they followed an investigation that was tainted with substantive and procedural irregularities.

56. The Organization had no jurisdictional competence with regard to this private and legal matter. The Applicant was the victim of abuse of position and authority for retaliatory purposes for refusing to comply with an unlawful request from a Stress Counsellor, Chief Investigator, Country Representative and Chief/PALS and DHR. The unlawful request found its way into the reprimand letter.

57. ST/AI/2000/12 (Private Legal Obligations of Staff Members) was deliberately and maliciously misinterpreted for unlawful retention, breach of contract and violation of the Applicant's right to privacy. This unlawful retention caused a serious delay in the schooling of his children, caused irreparable damage to his reputation, and career prospects.

58. There was a failure to ensure fair investigation and treatment according to due process and rule of law principles by the re-opening of a withdrawn and officially closed sexual harassment case solely motivated by vindictive *animus* and prejudicial factors; the violation of section 5.14 of ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority); not being informed of his rights under administrative instruction ST/AI/379 (Procedures for Dealing with Sexual Harassment)[4] to be represented by counsel during the proceedings.

59. The reprimand letter unlawfully made his transfer to Uganda conditional on the paternity test. He never made a commitment to the paternity test. There is no evidence to support this.

60. The disciplinary measure of demotion by one level, with deferment of two years for eligibility for consideration of promotion, was discriminatory, biased and disproportionate

61. The Organization did not give him written notice of abolishment of post in violation of section 9.4 of CF/AI/2010-001 (Separation from Service).

62. The refusal to sign his travel authorization to release him to the Kampala office after his having duly accepted an offer at the P5 level, keeping him on a P4 salary from September

[4] This Administrative Instruction was superseded by ST/SGB/2008/5 which entered into force on 1 March 2008.

to December 2011 and issuing an extended contract at the P4 level from January to March 2012 was a breach of contract in violation of the terms and conditions of his offer of employment.

63. The refusal to appoint him to the UNICEF post in Tanzania after having prevailed in a recruitment process was a violation of due process, United Nations employment rules and regulations and constitutes an unfair and improper denial of employment opportunity.

64. The competency-based interview was conducted against the requirements and competencies set out in the vacancy announcement but the decision was that the Applicant did not meet particular and newly introduced competencies about which they were not questioned at the interview.

Respondent's submissions

65. UNICEF staff are governed by the UNICEF Executive Directive CF/EXD/2008-004 (Prohibition of harassment, sexual harassment and abuse of authority). Issues of sexual exploitation and abuse (SEA) are governed by ST/SGB/2003/13 (Special Measures for Protection from Sexual Exploitation and Sexual Abuse).

66. The allegations made against the Applicant, although also referred to sexual harassment, were of SEA. There is no right in UNICEF disciplinary proceedings to seek counsel during the investigation stage of an investigation into SEA.

67. Reprimand letters issued after a disciplinary investigation is concluded, are governed by specific provisions contained in CF/AI/2009-004 (Disciplinary Process and Measures).

68. There is no basis to legitimately aver that the Applicant was not afforded the opportunity to be heard before the reprimand was issued. Once the Applicant received the amended reprimand, he again had the opportunity to request, within 60 calendar days, a management evaluation of such letter. The Applicant did not file any such request.

69. In determining the appropriate sanction of demotion, the Administration considered the following mitigating factors : a) the long standing personal conflict between the Applicant and Ms. H; b) the Applicant had not been advised about the instruction given to

Ms. H to facilitate the taking of the paternity test; and, c) his behaviour was considered an "unexpected outburst of a normally respectful, well mannered, soft spoken staff member"

70. The Applicant was verbally informed in May 2011 that the post he encumbered was slated for abolition on 31 December 2011, coinciding with the end of his fixed-term contract. The Applicant accepted the offer for the Kampala post four months before the abolition of the post he encumbered would be effective.

Tanzania Post submissions (to be dealt with on the papers)

71. The Applicant's case in relation to the non-selection for the Tanzanian post is moot due to the fact that the Applicant accepted the post in Uganda before (August 2011) he was informed that he had not been selected for the post in Tanzania.

72. On 15 February 2012 he asked to be given the "comparative analysis of the candidates who were interviewed for this position along with [him]". The next day his query was responded to by DHR, explaining that "the interview process [he] participated in did not yield a successful candidate for the position." The Applicant was provided an explanation and informed that "as a result, we cancelled the vacancy and proceeded with a direct placement of a candidate from the Talent Group versus re-advertising the role."

73. In his application, the Applicant presents as facts what are, at best, baseless conjectures. The Applicant applied for the Tanzania post on 18 April 2011, he was short-listed by DHR on 24 May 2011, and interviewed on 29 June 2011.

74. The Applicant has made baseless submissions against the UNICEF Representative in Tanzania of discrimination and prejudice against candidates from donor countries. The facts are that the candidate selected for the post in Tanzania is from Nepal, which is not a donor country.

75. The recruiting office – acting in accordance with section 6.20 of UNICEF Executive Directive CF/EXD/2009-008 (Staff Selection Policy) found that none of the applicants interviewed for the Chief Health and Nutrition Post in Tanzania, including the Applicant, was suitable for the post and, therefore, requested the vacancy to be re-advertised.

Considerations

(i) Was the failure to give the Applicant written notice of abolition of post unlawful?

76. The requirement to give written notice of the abolition of a post is found in section 9 of CF/AI/2010-001 (Separation from service) which deals with termination of appointment for reasons of abolition of post. Section 9 states as follows:

> 9.4 Notice of termination periods (see section 14) will be served in writing to staff occupying posts identified for abolition. This includes staff who encumber or maintain a return right to a specific post which is being abolished, and who are on any form of authorized leave, or on secondment or inter-agency loan.
>
> 9.5 During the period of notice, a staff member is expected to apply for all available posts for which he or she believes he or she has the required competencies. HR managers will assist staff in identifying and applying for available and potentially suitable posts (see paragraphs 9.7 and 9.8). They will include the name of such a staff member on lists of applicants and/or shortlists, even if the staff member did not submit an application. Every effort will be made to keep the staff member informed of the posts for which he or she is being reviewed.

77. This provision requires that a staff member occupying a post identified for abolition is to be given written notice of the termination period. Based on the wording of section 9 the purpose of the written notice is to advise the staff members of the time periods available within which he or she can apply for available posts.

78. It is not in dispute that the Applicant did not receive a written notice but was verbally informed of the abolition of the post he encumbered. While the absence of such a written notice is in breach of this provision the question is whether the Applicant suffered any material harm as a result of this breach.

79. It was held in *Antaki* 2010-UNAT-095 that:

> Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered. A Tribunal may thus award compensation for

> actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. [5]

80. The types of damages that may be compensated are "actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury".[6]

81. The Applicant told the Tribunal that because he did not have notice of abolition of post he was unable to refer to this in is applications for posts and that this would have prejudiced his chances of selection.

82. However, as a matter of fact, after he was informed about the abolition of his post the Applicant promptly applied for and was selected for the Uganda post within the notice period. Apart from the events which intervened, he suffered no break in service and therefore no monetary loss arising from the failure to give written notice.

83. The Tribunal concludes that the Applicant has not demonstrated any actual harm caused by this breach. The claim is dismissed.

(ii) Was the first reprimand dated 25 August 2011 and the refusal to sign the Applicant's TA for the Uganda post lawful?

84. Section 4 of CF/AI/2009-004 states that the Executive Director has the authority to impose disciplinary measures regarding UNICEF staff members in accordance with Chapter X of the Staff Rules. The Executive Director has delegated this authority to the Deputy Executive Director, Management who then imposes disciplinary measures on a staff member for misconduct.

85. Section 10.1 of CF/AI/2009-004 states that following the conclusion of the disciplinary process, the Director, DHR may, "if the conduct depicted in the dossier and the circumstances of the case have shown substandard performance and/or poor judgment on the part of the staff member, issue a letter of reprimand."

86. The non-disciplinary measures, referred to as administrative measures, as per staff rule 10.2 (b) (i-iii) and Section 10.5 of CF/AI/2009-004 includes a written or oral reprimand.

[5] At paras 20 & 21. See also *James* 2010- UNAT-009, *Sina* 2010-UNAT-094.
[6] *Appleton* UNDT/2012/125, para 108.

A reprimand is an administrative measure not a disciplinary measure within the meaning of Staff Rule 10.2. In *Akyeampong*[7], a reprimand is "recorded in the staff member's file to serve as a reminder, should the staff member misconduct [him or] herself again".

87. Under sec. 2 of ST/AI/292 (Filing of Adverse Material in Personnel Records), adverse material is defined as any "correspondence, memorandum, report, note or other paper that *reflects adversely on the character, reputation, conduct* or performance of a staff member." (Emphasis added). It requires that adverse material, as a matter of principle, may not be included in the personnel file unless it was previously shown to the staff member who was accorded an opportunity to make comments.

88. It was held in *Johnson* UNDT/2011/124 that:

> While a reprimand is not considered a disciplinary measure…and therefore does not carry the same procedural safeguards that apply to disciplinary procedures under ST/AI/371 and ST/AI/371. Amend.1…certain protections nevertheless apply under ST/AI/292.[8]

89. As this case demonstrates, when there is an adverse judgment or outcome short of disciplinary action, the subject may feel aggrieved if he or she has not had an opportunity to comment on the allegations and the proposed outcome, disciplinary or not. There may be no requirement to do so in the rules but it is certainly good management practice to take such a decision in a fair and transparent manner.

90. The Applicant's rights are however protected by the remedy of management evaluation. The Applicant exercised that right with some success in relation to the first reprimand but did not take such steps after the second.

91. Although a reprimand is not a disciplinary matter it should not be given arbitrarily and must be warranted on the basis of reliable facts.

92. The Tribunal is satisfied that on the basis of the facts before the Administration it was justified in issuing a reprimand. In his complaint of sexual harassment against Ms. H the Applicant omitted to reveal that they had been in a relationship for some months before the

[7] 2012-UNAT-192 at para 31.
[8] See also *Applicant* UNDT/2010/069 and the former United Nations Administrative Tribunal Judgment No. 1176, *Parra* (2004).

alleged harassment started. It was not until the investigators raised it with him following Ms. H's allegations that he admitted to the relationship.

93. This omission was untruthful and misleading to the investigators and showed a lack of judgment on the part of the Applicant.

94. The management evaluation found that the condition that the Applicant should submit to a paternity test before assuming his new duties in Uganda was inappropriate. The Tribunal agrees with this assessment.

95. This decision was based on the Administration's belief that the Applicant had agreed with the counsellor that he would take the test and then resiled from this undertaking. The Respondent called the counsellor to attest to the Tribunal about the making of the agreement. The Tribunal finds that she sincerely believed that she had obtained the Applicant's agreement but had made no record of it. The management evaluation found no documentary evidence of such an agreement and none was presented to the Tribunal.

96. In the face of the Applicant's conflicting account of their meeting and in the absence of any corroborating evidence the Tribunal is unable to find that there was a mutually agreed undertaking by the Applicant that he would take the test.

97. The Administration unwisely relied on the breach of this alleged agreement by the Applicant to alter his concluded contract of employment and to issue a reprimand.

98. The imposition of this condition amounted to a sanction on the Applicant which had detrimental consequences for him. The adverse effects of the letter of 25 August went beyond those of a mere reprimand. It altered the agreement that he would take up his new post and his promotion from an agreed date. It was also an attempt by UNICEF to do precisely what the OIA investigator had said in 2010 it could not do, namely to compel him to take the test against his will. The condition was not appropriate. This was implicitly acknowledged by the Administration when it acceded to the directive of the management evaluation to remove reference to it.

99. The Administration also acted in haste. Before management evaluation had time to consider the Applicant's request for management evaluation and to issue its decision, DHR

took action expressly on the basis of the facts relied on in the first letter of reprimand including the disputed agreement that the Applicant would take the paternity test. On 21 September, the Administration acknowledged that UNICEF could not compel him to take the test but nevertheless sought to enforce the requirement for him to take it. It was clear from the letter that if he took the test, arrangements would be made for him to travel. Otherwise UNICEF would not authorize and pay for his departure. This was an overt form of compulsion.

100. There was another thinly veiled attempt at coercion in the letter. Although the Applicant had already received formal confirmation of his promotion on 11 August 2011, the letter said that "the decision to appoint [him] to Uganda and to allow for [his] possible promotion at the P5 level was made without knowledge of the reprimand issued on 25 August 2011." It said that the appointment was under review although no decision was made about withdrawing it at this stage. There is a strong inference to be drawn that if the Applicant did not take the test the promotion would be at risk.

101. Although the second letter of reprimand removed the reference to the paternity test by then the Applicant's travel to Uganda and his promotion had been delayed. The damage had been done and the second letter did not repair that damage.

102. The agreement entered into by the Applicant and UNICEF on 16 August 2011 for the employment of the Applicant in Uganda was unconditional and binding.[9] The Applicant was entitled to and should have taken up his appointment in Uganda at the P5 level on 19 September 2011. This was prevented by the imposition of the unlawful conditions placed on his travel in the reprimand and the letter of 21 September. The refusal to issue a TA for the Applicant to take up his duties was unlawful.

103. In reaching this decision the Tribunal is mindful that the physical altercation between the Applicant and Ms. H took place on 2 September and an investigation was underway by 14 September. Although that obviously had a bearing on the decision not to approve his travel to Uganda , this does not detract from the fact that the first reprimand which attempted to place restrictions on his travel by reason of the paternity test occurred before that date and should have been treated as a separate and discrete issue.

[9] See *Gabaldon* UNDT/2011/132.

104. In reaching these conclusions the Tribunal is in no doubt that the Administration tried to do what it thought was the right thing by the Applicant, Ms. H and the child in what were extremely challenging circumstances. It was very mindful of the responsibilities and obligations on UNICEF and its staff to uphold the principles of child protection. Unfortunately the actions it took were in breach of UNICEF's other important obligations to act in accordance with the staff rules and its contractual arrangements with the Applicant.

(iii) Was misconduct by the Applicant established and if so was demotion a proportionate sanction?

105. When a disciplinary sanction is imposed by the Administration, the role of the Tribunal is to examine whether:[10]

(i) the facts on which the sanction is based have been established by clear and convincing evidence.

(ii) the established facts qualify as misconduct,

(iii) the sanction is proportionate to the offence.

(iv) Were the facts on which the demotion was based established by clear and convincing evidence?

106. The demotion was made because the decision maker, the Deputy Executive Director for Management, found that there was sufficient proof that the Applicant had engaged in a physical altercation with Ms. H by grabbing and pushing her out of his office and that he had yelled at her and used inappropriate and offensive language when demanding that she leave his office. The Deputy Executive Director for Management concluded that he had breached the standards of conduct expected of a civil servant.

107. The Tribunal has reviewed the evidence gathered by OIA and considered by the decision maker and heard also from the Applicant who recounted what happened at his office on the day of the altercation.

[10] *Molari* UNAT-2011-164, para. 30

108. In the light of this evidence there is no doubt at all that there was a physical altercation at the Applicant's office between him and Ms. H, and that he did grab and push her out of the office. The Applicant accepts all of this. He also accepts that he used strong language as alleged by the complaint.

109. The Tribunal finds that the facts on which the decision to demote him was based were established by clear and convincing evidence.

(v) Did the established facts amount to misconduct?

110. On the face of it the behaviour of the Applicant as found amounted to misconduct. Misconduct takes many forms and degrees. Without doubt violent and abusive behaviour in the workplace falls within the definition of misconduct. The behaviour in this case was not of the most serious kind given the circumstances but it was nevertheless misconduct. It is certainly behaviour which breaches the standards of behaviour expected of an international civil servant.

(vi) Was the sanction proportionate to the offence?

111. The Administration faced a difficult task in determining the appropriate sanction to be imposed on the Applicant in this case. On the one hand it had the admitted behaviours which clearly amounted to misconduct. On the other it had evidence of Ms. H's behaviour which, although may not have been sufficient to justify the Applicant acting as he did in self-defence, certainly had been highly provocative. Ms. H received no sanction for her part in the altercation because her post was abolished.

112. The mitigating factors considered by the Administration were balanced and appropriate. But for these, the Applicant would likely have faced dismissal.

113. The Tribunal will not lightly interfere with a disciplinary sanction that has been imposed in accordance with proper procedure. In this case the sanction of demotion was appropriate in all the circumstances except for the period of the demotion.

114. The two year period of demotion took effect from the time it was imposed on 9 March 2012. However, the Applicant had been effectively demoted from 19 September 2011, the date when he was originally contracted to take up his P5 post in Uganda but was prevented

from doing so because of the paternity test. The Applicant suffered the detriment of being kept out of his promotion from that date which was 5 months and 19 days longer than the 2 years imposed.

115. The Tribunal finds that although the sanction of 2 years demotion was proportionate in all the circumstances, the calculation of 2 years should commence from 19 September 2011 ending on 19 September 2013.

(vii) The Tanzanian Post

116. The Applicant was short-listed, interviewed but not selected for the Tanzanian post. The vacancy was cancelled and another person was later appointed from the Talent Group.

117. The Applicant made a number of serious allegations about the process and the motivation of the decision-makers. Those allegations are for him to substantiate. He has not done so.

118. The Tribunal accepts the Respondents submission that this claim is moot. The Applicant had been appointed to the Uganda position before he learned of the cancellation of the Tanzanian post. Even if any breaches in relation to this selection exercise had been established, the Applicant has suffered no prejudice that can be linked to this claim.

119. This claim is dismissed.

(viii) Remedies

119. The Tribunal may only award compensation for damage caused as a result of specific breaches. In this case the breaches that have been proven are:

a. the condition that the Applicant should submit to a paternity test before assuming his new duties in Uganda was inappropriate.

a. The 25 August 2011 reprimand by which UNICEF tried to compel the Applicant to take the test against his will;

b. The refusal to issue a Travel Authorization for the Applicant to take up his duties was unlawful.

c. The two year demotion which should have been calculated from 19 September 2011 rather than 9 March 2012.

120. The Applicant requested payment of costs associated with the delay to his travel arrangements for 17 September 2011 made in reliance of his acceptance of the position of Chief Child Survival and Development, P5 in Kampala.

121. The Applicant provided evidence that he paid full rent up to September 2011 to his landlord and vacated the house; his children were taken out of school. He took all their belongings to a shipping company and thereafter checked into a hotel with his family on 15 September 2011.

122. They stayed in the hotel without their belongings for 6 months until 23 March 2012. The hotel bill at the daily rate of Malawi kwacha (MWK) 30,000 or US$182 from 15 September to 15 October was $5,642[11] per month.

123. When he was placed on Administrative Leave on 6 October 2011, he renegotiated the monthly rate to US$1,800. The Applicant has provided proof that he paid *$14,642* in hotel bills.

124. The Applicant also incurred a Kenya Airways Airline penalty for change of travel dates amounting to MWK76,105 (US$ 461). After negotiations with the shipping company it waived the penalty storage charges for three months given the uncertainty of the Applicant's situation. He paid MWK 118,830 (US$720) for the remaining three months.

125. The Tribunal finds that as a direct result of the unlawful delay to his departure based on the requirement to take the paternity test, the Applicant incurred total expenses for hotel, storage and airline penalties of $15,823. He is entitled to a refund of these expenses.

126. The Applicant also sought rescission of the contested decisions; $50,000 for pecuniary loss; 24 months' net base salary for non-pecuniary damage; 12 months' net base salary for stress, anxiety, chronic insomnia; damage to career prospects, damage to professional and social reputation as well as moral damages.

[11] Calculation provided by Applicant: The US Dollar to Malawi Kwacha exchange rate on 24 September 2011 was as follows: 1 USD = 164.9892 MWK: Source: http://www.exchangerates.org.uk.

127. He gave evidence of the stress and anxiety he has suffered as a result of the events in this case. The Tribunal accepts this evidence but finds that although the reprimand and denial of the TA were sources of humiliation and anxiety to him he was, to a considerable extent, the author of his own misfortune.

128. The Tribunal finds that due to his contribution to the events leading to this case, the Applicant is not entitled to any moral damages.

Conclusion

129. In view of the foregoing, the Tribunal DECIDES:

a. The period of the demotion of the Applicant is from 19 September 2011 rather than from 9 March 2012 and therefore shall end on 19 September 2013.

b. The Respondent is to pay the Applicant the sum of $15,823.

c. The above amount shall be paid within 60 days of the date that this Judgment becomes executable. Interest will accrue on the above amount from the date of this Judgment at the current US Prime rate until payment. If the above amount is not paid within the 60 days period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Coral Shaw

Dated this 21st day of May 2013

Entered in the Register on this 21st day of May 2013

(*Signed*)

Abena Kwakye-Berko, Acting Registrar, Nairobi