UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/032
Judgment No.: UNDT/2014/059
Date: 5 June 2014
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

OGORODNIKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Sophie Parent, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal

Introduction

1. By an application filed with the Dispute Tribunal on 21 April 2011, the Applicant is seeking the rescission of the 11 January 2011 decision to separate him from service, with compensation in lieu of notice and with termination indemnity. While not contesting the facts of the case, the Applicant contends that there are several mitigating circumstances which were not considered by the Organization resulting in the sanction not being proportionate to his actions. The Applicant requests the rescission of the contested decision and his reinstatement on an appropriate post within the Organization and, in lieu of reinstatement, an appropriate amount of compensation.

2. The Respondent's 20 May 2011 reply stated that the imposition of the contested disciplinary measure is proportionate to the gravity of the Applicant's misconduct and that all the mitigating circumstances were fully taken into consideration by the Organization.

Background

3. The Applicant joined the United Nations in 1992 as a military observer for the United Nations Transitional Authority in Cambodia ("UNTAC"). From 1995 to 1999 he worked for his national government whilst remaining in Cambodia. In 2000, the Applicant returned to the United Nations as a Camp Manager for the United Nations Transitional Administration in East Timor ("UNTAET"). From 2001 until 2007 the Applicant worked as a Human Rights Officer for various United Nations agencies, including: United Nations Peace Building Support Office in Central African Republic ("BONUCA") in 2001–2002; United Nations Mission in the Democratic Republic of Congo ("MONUC") in 2004–2005; and United Nations Mission in Ethiopia and Eritrea ("UNMEE") in 2005–2007. In December 2007, the Applicant joined the United Nations Assistance Mission in Afghanistan ("UNAMA") as a Civil Affairs Officer until his separation from service in January 2011. In December 2010,

the Applicant was appointed to a post of Civil Affairs Officer with MINUSTAH that was supposed to commence on 2 February 2011.

4. By Order No. 172 (NY/2012), dated 21 August 2012, the Tribunal directed the parties to submit a consolidated list of agreed facts and legal issues, identifying, where applicable, the issues, facts or statements on which they disagreed. In response to the Tribunal's order, the parties stated that they did not dispute the factual description of the Applicant's conduct, as set out in the allegations of misconduct, dated 18 May 2009, and the separation letter, dated 11 January 2011.

5. For the purpose of efficiency, the Tribunal, unless indicated otherwise, reproduces the relevant agreed upon facts below:

> ii. On 1 October 2008, the Applicant left on a Welfare and Health trip to Turkmenistan. Upon his return, he submitted an Annual Leave Report to UNAMA Personnel Section indicating that he was away from 1 to 2 October 2008, along with a copy of page 26 of his [United Nations Laissez Passer "UNLP"], showing a re-entry stamp to Afghanistan dated 2 October 2008.
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> iii. Around the second week of October 2008, the Applicant submitted his UNLP to the UNAMA Personnel Section for renewal. While reviewing his UNLP, a Human Resources Assistant in the UNAMA Personnel Section noticed a discrepancy between the stamp in his UNLP which showed a re-entry date of 4 October 2008, and the copy of page 26 of his UNLP previously submitted, as described in point (ii) above.
>
> iv. The Human Resources Assistant alerted her supervisor to the apparent discrepancy. By memorandum dated 28 November 2011, the matter was reported to the Conduct and Discipline office by [HO], UNAMA Chief Civilian Personnel. The Conduct and Discipline Office transmitted the matter to the UNAMA Security Section by memorandum dated 7 December 2008, and informed the Applicant of the same by memorandum of the same date. This documentation and material attached thereto is appended to the Special Investigations Unit (SIU) investigation report (Annex D). The SIU commenced an investigation into the matter.
>
> v. As part of the investigation, on 15 December 2008 the SIU interviewed the Applicant and obtained an interview statement signed by the Applicant. The key points from the Applicant's interview

statement are set out in paragraphs 7 through 11 of the allegations of misconduct [added below]:

> 7. According to your statement to the SIU investigators, when you left for your Welfare and Health trip on 1 October 2008, you thought it would only be for two nights and three days. However, you admitted that you did not return to Afghanistan until 4 October 2008.
>
> 8. Also according to your statement, while you were at the border of Afghanistan and Turkmenistan, you noticed that the Afghan border officer "*did a test stamp of his immigration stamp*" and "*[you] asked him if [you] could have the paper that the test stamp was on*". You further declared that "*it was only later when [you had] returned to [your] office in Herat that [you] noticed that the date on the test stamp said 2nd of October 2008*". However, it is noted that at no point during the investigation did you provide the SIU with an explanation as to why you requested the "*test stamp*" from the border officer while you declared "*being in a rush*" when you were at the border.
>
> 9. You admitted using the "*test stamp*" which indicated 2 October 2008 "*by cut[ing] and pasting it over the stamp in [your] UNLP that said 4th of October 2008*". You also admitted that you then completed your Annual Leave Report to match the forged stamp and indicated 1 and 2 October 2008 as your leave days. You later submitted the Annual Leave Report together with a copy of the page 26 of your UNLP showing the forged stamp to UNAMA Personnel Section.
>
> 10. You stated to the investigators that you took this course of action because you realized that you had made a mistake and would have to explain the extra day of leave and "*[you] did not know what to do so [you] panicked*." You further stated that you were in a panic because it was your understanding that Welfare and Health trips were only allowed for two nights and three days.
>
> 11. You also admitted to the SIU investigators that you signed your own Annual Leave Report. You declared that you did so given that your supervisor was away from the mission at the time and you were the designated Officer-in-Charge and that you did not

> know that you could not sign as your own supervisor. You were requested by the Personnel Section to re-submit a new Annual Leave Report signed by your supervisor, which you did.

vi. The SIU investigation report was issued on 16 December 2008. The SIU found, *inter alia*, that the Applicant had acted in violation of Staff Regulation 1.2(b), then staff rule 101.2(g) and ST/AI/1999/13, section l.2(c).

vii. By memorandum dated 31 March 2009, [KP], then Director, Department of Field Support, referred the matter to OHRM for appropriate disciplinary action.

viii. By memorandum dated 18 May 2009, the Applicant was alleged to have engaged in misconduct.

> 1. Specifically, the Applicant was charged with: (i) "forging a stamp in [his] UNLP of which [he] submitted a copy to UNAMA Personnel Section as an official record of [his] leave date"; (ii) providing false information in his Annual Leave Report; and (iii) signing his own Annual Leave Report as supervisor. The Applicant was informed that his conduct, if established, would constitute a violation of the standards of conduct expected of staff members of the United Nations. In particular, that such conduct would violate staff regulation 1.2(b), former staff rules 101.2(b) and 101.2(g), and section 1.2 of ST/AI/1999/13 ("Recording of attendance and leave").
>
> 2. The Applicant was provided with documentary evidence of the alleged misconduct in accordance with paragraph 6(b) of ST/AI/371, namely, a copy of the Investigation Report and supporting material. The Applicant was informed of his right to submit comments, if any, within two weeks of receiving the charges, and was further informed of his right to seek the assistance of counsel. On 18 June 2009, the Applicant signed for receipt of the allegations of misconduct.

ix. The Applicant submitted his comments to OHRM via email dated 4 September 2009. In particular:

> 1. The Applicant admitted to altering a copy of his UNLP so that an entry stamp showed the date of 2 October 2008 (instead of the genuine date of 4 October 2008). The Applicant also admitted to

entering false information on his Annual Leave Report to correspond with the altered entry date, and to submitting this information to the Personnel Section. The Applicant admitted to signing off on his falsified Annual Leave Report in his capacity as Officer-in-Charge, but stated that he was not aware that this was not permitted. The Applicant stated that when this error was brought to his attention, he duly submitted a new Annual Leave Report. It was done well before the investigation began.

2. The Applicant reiterated that his actions were not motivated by monetary benefit, pointing out that the consequent payment of moneys for which he was not entitled "was not calculated", and that the moneys had already been recovered by the Organization.

3. The Applicant explained that Eid Holidays fell on October 1st and 2nd. Thus October 3rd and 4th were approved as weekend days for UNAMA employees.

4. The Applicant stated that, when he submitted his original Leave Request form, he had intended to be away from 1 to 3 October 2008 and to be traveling as part of a group. However he decided to visit an historical sight in Uzbekistan, and left the remainder of his group in Turkmenistan before traveling on alone to Uzbekistan. He was unable to cross the border from Turkmenistan to Afghanistan as planned on 3 October 2008, and as a result, on 4 October 2008, he had to cross two borders (from Uzbekistan to Turkmenistan and from Turkmenistan to Afghanistan). He was compelled to travel the entire day through unknown terrain in a private taxi with strangers, "which caused him lot of stress and anxiety." The Applicant stated that he was genuinely worried about whether he could reach his duty station within the time indicated on his Annual Leave Request. The Applicant was worried that by arriving late, it would negatively impact on his entitlement to take further leave.

5. The Applicant stated that it was when the border police officer stamped his UNLP with the date entry of 4 October 2008 that he "realized that [he] would have to explain why [he] had arrived one day later than indicated on [his] [A]nnual [L]eave [R]eport." He was not aware of how long he was permitted to be outside of UNAMA for a Welfare and Health trip. He stated

> that he was never given any written document containing the rules and guidelines pertaining to Welfare and Health trips. However, he had "heard" that he could be outside the UNAMA area for two nights and three days, and that if he exceeded this period, he would "break" his leave cycle and would not be permitted to take his next planned leave;
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> 6. The Applicant stated that his actions were motivated by panic and his desire to see his family. The Applicant had already purchased a ticket to visit his family, and "the thought of not being able to travel away from [his] duty station to visit [his] family affected [his] judgment and ultimately led [him] to do what he did." The Applicant stated that he experienced "stressful working conditions" in Afghanistan. He stated that his post was stressful due to "the restrictions on one's liberty in terms of physical movement in the country and also the isolation." Ultimately, he engaged in this conduct because he wanted to be "on the safe side" and "could not bear the thought of having to forfeit [his] visit home"; and
>
> 7. The Applicant stated that he did not alter the UNLP itself, as he was "fully aware" that an alteration to his UNLP "could be discovered by a [sic] technical expertise". Rather, he intentionally "cut and paste the date of 2 October [2008] instead of 4 October [2008], from the test stamp onto a photocopy of [his] UNLP and attached that copy to [his] Leave Report that [he] submitted" so as to "make the dates of arrival consistent with the Leave Request Form."
>
> 8. The Applicant repeatedly admitted to his use of poor judgment. He fully understood that it was not the right thing to do. He emphasized that these were the first allegations ever brought against him.

x. By letter dated 11 January 2011, the Applicant was informed of the outcome of his case [namely]:

> …
>
> … there is insufficient evidence that [the Applicant] violated section 1.2 of ST/AI/1999/13. Accordingly, [the ASG for Human Resources Management] decided to drop this charge.
>
> … there is sufficient evidence … that [the Applicant]: (i) forged a stamp in a copy of [his] UNLP, which [he]

> submitted to UNAMA Personnel Section as an official record of [his] leave date; and (ii) provided false information in [his] Annual Leave Report.
>
> The Under-Secretary-General for Management, on behalf of the Secretary-General, has further concluded that, in so doing, [the Applicant]: (i) failed to uphold the highest standards of efficiency, competence and integrity required by staff regulation 1.2(b); (ii) violated [his] obligation under former staff rule 101.2(b) to follow directions and instructions issued by the Secretary-General and their supervisors; and (iii) breached the prohibition on *inter alia*, internationally altering any official document, record or file, prescribed by former staff rule 101.2(g).
>
> …
>
> … the explanations for your actions which [the Applicant] provided in [his] comments do not justify [his] conduct, or amount to mitigating circumstances in [his[case.
>
> Accordingly, the Under-Secretary-General for management, on behalf of the Secretary-General, has decided to impose on [the Applicant] the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity … The imposition of this measure is proportionate to the gravity of [the Applicant's] misconduct.

6. On 4 November 2013, the parties attended a hearing on the merits in front of the Dispute Tribunal in New York for the purpose of clarifying facts at issue in the case.

7. By Order No. 305 (NY/2013), dated 11 October 2013, the Tribunal requested that the parties each file closing submissions. Following the granting of extensions of time to file closing submissions, for the purpose of enabling the parties to attempt to resolve the matter informally, they each filed their closing submission on 14 January 2014.

Parties' submissions

8. As part of its 4 November 2013 oral hearing, and the ensuing Order No. 305, the Tribunal discussed the parties' joint submission of 1 November 2013 and clarified the issues and submissions before the Tribunal.

9. The Applicant stated that the facts are not at issue in this case and that he is only contesting the proportionality of the sanction due to the fact that not all of the mitigating circumstances were taken into account by the Organization when it took the decision to separate him from service.

10. In light of the mitigating circumstances, the Applicant asked the Tribunal to rescind the contested decision; substitute the sanction of separation from service with that of a written censure; reinstate him and, in the alternative, award him an appropriate amount in lieu of reinstatement.

11. The Respondent stated that his decision was neither absurd nor arbitrary and that taking into considering the seriousness of the misconduct, the sanction was proportionate. The Respondent asked the Tribunal to reject the application.

12. The Respondent further submitted that, should the Tribunal decide that the facts of the case merit the Applicant's reinstatement then, at most, a demotion would be the lowest reasonable sanction as the sanction of a written censure proposed by the Applicant was too low. The Respondent also requested that should the Tribunal set an alternative compensation in lieu of reinstatement, it take into consideration the termination indemnity already provided to the Applicant.

Consideration

Receivability

13. The present case meets all of the receivability requirements identified in art. 8 of the Dispute Tribunal's Statute.

Applicable law

14. ST/AI/1999/13 (Recording of attendance and leave) states:

> 1.2 The supervisor shall designate a time and attendance assistant who, under the supervisor's authority, shall:
>
> (a) Verify attendance and compliance with working hours, especially for staff on staggered or flexible working hours, and inform the supervisor of unexplained absences;
>
> (b) Record night-time and overtime work, indicating whether it is to be taken as compensatory time off or paid as overtime;
>
> (c) Prepare reports on attendance, night-time work, compensatory time off and overtime, to be certified by the supervisor;
>
> (d) Prepare an annual or sick leave form upon return to duty of a staff member after any period of such leave, and obtain endorsement of the completed form by the staff member and the supervisor;
>
> (e) Keep all relevant records.
>
> …
>
> 1.7 Staff members shall also promptly:
>
> (a) Inform the supervisor of absence due to illness or emergency;
>
> (b) Sign and return to the time and attendance assistant every annual leave or sick leave form;
>
> (c) Complete, sign and return to the time and attendance assistant the annual record of attendance prepared in accordance with section 1.5.
>
> Should the time and attendance assistant, for any reason, fail to prepare the appropriate annual or sick leave report in a timely manner, the staff member shall bring this to the attention of the time and

attendance assistant and, if necessary, to the attention of the supervisor.

15. Staff rule 101.2, dated 1 January 2003, states:

> **Rule 101.2**
>
> **Basic rights and obligations of staff**
>
> **General**
>
> …
>
> (b) Staff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors.
>
> …
>
> (g) Staff members shall not intentionally alter, destroy, misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization.

16. ST/SGB/2002/1 (Amendment to the 100 Series of the Staff Rules (ST/SGB/2002/1) dated 1 January 2002 states in relevant parts:

> Rule 110.3
>
> Disciplinary measures
>
> (a) Disciplinary measures may take one or more of the following forms:
>
> (i) Written censure by the Secretary-General;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for within-grade increment;
>
> (iv) Suspension without pay;
>
> (v) Fine;
>
> (vi) Demotion;
>
> (vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
>
> (viii) Summary dismissal.

17. ST/SGB/2006/1 (Amendments to the 100 Series of the Staff Rules (ST/SGB/2002/1)) dated 1 January 2006 states in relevant parts:

> **Rule 110.3**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms:
>
> (i) Written censure by the Secretary-General;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for within-grade increment;
>
> (iv) Suspension without pay;
>
> (v) Fine;
>
> (vi) Demotion;

18. Staff Rule 10.2 dated 1 January 2011, state:

> **Rule 10.2**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
>
> (i) Written censure;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for salary increment;
>
> (iv) Suspension without pay for a specified period;
>
> (v) Fine;
>
> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
>
> (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
>
> (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
>
> (ix) Dismissal.

19. Staff regulation 1.2, dated 1 January 2008, states:

> **Regulation 1.2**
>
> **Basic rights and obligations of staff**
>
> **Core values**
>
> …
>
> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;
>
> …

Scope of the review

20. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

21. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnity.

22. The International Labor Organization ("ILO") Convention on termination of employment (Convention No. C158) (1982), which is applicable to all branches of economic activity and to all employed persons (art. 2), states in art. 9.2:

> In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation … shall provide for one or the other or both of the following possibilities:
>
> (a) the burden of proving the existence of valid reason for the termination … shall rest on the employer
>
> (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for

> termination having regard to the evidence provided by the parties and according to procedures … and practice.

23. Similarly to the principle of the burden of proof in disciplinary cases in the ILO Convention No. C158, the Tribunal, in *Hallal* UNDT/2011/046, held that:

> 30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

24. In the present case, the Applicant is not contesting the regularity of the procedure. In light of the uncontested nature of the facts, the Tribunal will analyze whether, as determined by the Respondent, these facts constituted misconduct. The existence of misconduct is determined by the following cumulative conditions:

a. The *objective element* which consists of either:

i. an illegal act (when the staff member takes an action which violates a negative obligation);

ii. an omission (when the staff member fails to take a positive action); or

iii. mixture of both which negatively affects other staff members, including the working relationships and/or the order and discipline in the workplace.

b. The *subjective element* which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence.

c. The *causal link* between the illegal act/omission and the harmful result.

d. The *negative effect* on labour relations, order and discipline in the workplace.

Annual leave

25. The Applicant joined UNAMA in December 2007 as a Civil Affairs Officer. On 24 September 2008 he completed a leave request form for the purpose of travelling to Turkmenistan with some colleagues as part of a welfare trip. The leave request form indicated that his last day of work would be 30 September 2008 with a return date of 5 October 2008. In the section "Type of Leave", the Applicant indicated that he would be taking Annual Leave ("AL") and that for the purpose of this trip the Total Working Days during which he would be on leave was "0 AL".

26. The Applicant's trip took place between 1–4 October 2008 (1–2 October were official United Nations Holidays and 3–4 October consisted of two weekend days. The Tribunal notes that the work week at UNAMA runs from Sunday through Thursday, with Friday and Saturday consisting of the weekend. Consequently, the Applicant's welfare trip did not require the use of any days of annual leave which is consistent with the Applicant's request for zero days of annual leave, regardless of whether the leave request form referred to outbound and inbound dates of 1 October 2008 and 3 October 2008.

27. The Tribunal observes that the form which the Applicant was required to complete for his welfare trip referred specifically to leave days. Under the Types of Leave section, the leave request form referenced: annual leave, home leave, family visit, special leave with/without pay. There was no alternative option for official United Nations holidays and/or weekend. As requested, the Applicant applied for "0" days of annual leave even though he was not using any days of annual leave for this trip. Furthermore, he also completed a Movement of Personnel form ("MOP") which correctly reflected his absence from 1–4 October 2008.

28. The Applicant returned to UNAMA on 4 October 2008, thereby respecting the dates reflected on the MOP, but a day later than the "inbound" date reflected on his leave request form. However, 4 October 2008 was a weekend day and there was therefore no need for him to request any days of annual leave. The Applicant returned

to work on Sunday, 5 October 2008, as scheduled on the leave form request. Upon his return the Applicant submitted another form, along with a copy of page 26 of his UNLP, titled "Annual Leave Report", on which he indicated that his first day of leave was 1 October 2008 with his last day of leave being 2 October 2008. The annual leave report also reflected that the Applicant had used "0" days of annual leave.

29. The Tribunal considers a leave request needs to be completed when a staff members uses any type of leave. However, in the present case, there were no justifiable reasons for the Organization to require a staff member to complete a request for "0" days of annual leave, and the use of such a form was therefore not warranted. Seeing that the dates in contention do not correspond to any actual annual leave, the days indicated in the annual leave report cannot be considered false. The Applicant returned to UNAMA one day later than originally indicated on the 24 September 2008 leave request form but it was still the weekend and there was no need for him to request any annual leave.

30. It is unclear why the staff members participating in the welfare trip were asked to complete annual leave reports, in addition to the MOP form, if they were not using any days of leave for the trip. Taking into consideration the scope of the information contained in the MOP forms, these appear to meet any need the Organization may have in the present circumstances. Due to security reasons, the Applicant had to indicate the period of his absence, and his leave request form of 24 September 2008 was actually an information note and not a genuine leave request for annual leave with specific legal effects. The Applicant's absence indicated on the 24 September 2008 form covered four days, 1–4 October 2008 and that same period of absence was reflected on the MOP form. The fact that the Applicant indicated on the leave request form an estimated period of absence of three days, 1–3 October 2008, does not contradict the dates reflected as his last work date and the date on which he resumed work date (30 September 2008 to 5 October 2008).

31. The Tribunal concludes that the facts presented above and reflected by the evidence do not represent a breach of the legal provisions regarding the procedure

for annual leave requests and the Applicant did not provide false information on his leave request form or annual leave report regarding the period used as annual leave, which is zero days. While the annual leave report contained a false statement regarding his return date, it had no effect on the information related to his annual leave. Consequently, the Applicant did not commit the misconduct with regard to the filing of either his leave request form or the annual leave report and he did not provide the false information in his annual leave report.

UNLP

32. The Applicant intentionally forged a stamp reflecting a return date of 2 October 2008, instead of 4 October 2008, on a copy of page 26 of his UNLP to be in accordance with his leave request form of 24 September 2008 in which he had indicated a return date of 3 October 2008 and he submitted it together with the annual leave report upon his return.

33. These actions breached the rules identified in the contested decision, including former staff rule 101.2(g), which states that "staff member shall not intentionally alter, destroy, misplace ore render useless any official document", and the Respondent correctly decided that the Applicant had "breached the prohibition on *inter alia*, intentionally altering any official document, record or file ", prescribed by former staff rule 101.2(g) and implicitly "the obligation to follow directions and instructions issued by the Secretary-General ".

34. The Tribunal considers that the Applicant should have reasonably been aware that his behavior was immoral and in breach of the Staff Regulations and Rules. By virtue of the relations of subordinations that characterize social relations in the workplace, the employee must observe not only general contractual obligations, the staff regulations and rules, but also general principles of moral conduct. The Applicant's behavior also breached the highest standards of integrity which includes, but is not limited, to honesty and truthfulness in all matters affecting his work (see staff regulation 1.2(b)).

35. Regarding the prejudice suffered by the Organization, SIU's investigation report mentions that on the basis of the false information provided in his annual leave report the Applicant received compensation, such as hazard duty pay to which he was not entitled. However, the monies were already recovered by the time the investigation report was issued on 18 May 2009.

36. The Tribunal notes that in accordance with the Guide to mobility and hardship arrangements, hazard pay is a special allowance established for staff members that are required to work under hazardous conditions. Hazard pay is authorized for a limited period, normally up to three months at a time, subject to ongoing review and is lifted when hazardous conditions are deemed to have abated. For internationally recruited staff members the amount is calculated per month. It results from the above that this payment was not made exclusively based on the annual leave report, even if by mistake two days from the Applicant's absence were included in his monthly payment. The monies were recovered and there was no actual prejudice to the Organization. As the Tribunal stated above, the Applicant's leave request form did not contain false information and cannot be considered the source of the material prejudice referred to in SIU's investigation report.

37. The Tribunal concludes that, as results from the evidence, with the exception of the charge that the Applicant "provided false information on [his] annual leave [report]", the Respondent correctly determined the objective and subjective elements of the remaining charges underlying the misconduct.

Proportionality of the sanction

38. The decision as to whether to impose a disciplinary measure falls within the discretion of the Organization and, in the present case, the sanction applied to the Applicant was separation from service with compensation in lieu of notice and with termination indemnities.

39. The Tribunal will review whether the actual disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnities imposed on the Applicant was proportionate.

40. The Tribunal considers that an employee's disciplinary liability has a contractual nature. It consists of a constraint applied by the employer, mainly physical or moral, and exercises both sanctioning and preventive (educational) functions.

41. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

42. The individualization of a sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

43. Staff rule 10.3(b) states that one of the rights afforded to staff members during the disciplinary process is that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

44. The Tribunal considers that the rule reflects not only the staff member's right to a proportionate sanction, but also the criteria used for the individualization of the sanction. Further, the nature of the sanction is related to the finding of conduct which is in breach of the applicable rules.

45. The "gravity of misconduct" is related to the subjective element of misconduct (guilt) and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability.

46. In order to appreciate the gravity of a staff member's misconduct, all of the existing circumstances that surround the contested behavior, which are of equal importance, have to be considered and analyzed in conjunction with one another, namely: the exonerating, aggravating and mitigating circumstances.

47. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, *force majeure*, disability or error of fact.

48. As stated in *Yisma* UNDT/2011/061:

> Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

49. The sanctions which can be applied to the Applicant in the present case are listed under former staff rule 110.3. They are listed from the lesser sanction to the most severe and generally they must be applied gradually based on the particularities of each individual case.

50. The consequences of the misconduct, previous behaviour, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

51. As the Tribunal held in *Galbraith* UNDT/2013/102:

> 79. The Tribunal notes that the Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".
>
> 80. Staff regulation 9.3 and staff rule 9.6(c) contain the following provision: "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 reasons (grounds) listed".
>
> 81. The Tribunal considers that the above-mentioned legal provisions applicable in the present case reflect the staff member's right to be informed about the reason and the explanation for it and the Secretary-General correlative obligation to give the reason and the explanation for the termination.

52. The present disciplinary decision is a termination decision which therefore must include the legal reason and the explanation for it. The Tribunal considers that the analysis of the exonerating, aggravating and mitigating circumstances are part of the mandatory justification (explanation) of the disciplinary decision in relation to the staff member's right to a proportionate sanction.

53. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction. Consequently, in the absence of such an analysis or in cases where these circumstances where partially observed by the Organization, the Tribunal

has to determine the relevance of any circumstances which may have been ignored previously.

54. The Tribunal will therefore review whether the sanction applied in the present case is consistent with those applied in similarly situated cases by the Secretary-General based on the Secretary-General's 2010–2012 reports on disciplinary cases.

55. ST/IC/2009/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), dated 19 August 2009, states:

> **Fraud/Misrepresentation**
>
> 18. Three staff members misused United Nations telephone personal identification number (PIN) codes assigned to other staff members.
>
> …
>
> 24. A staff member knowingly arranged a trip outside the mission area without authorization, and falsely claimed illness to the supervisor.
>
> *Disposition*: written censure and a one-year deferment for a within-grade increment after advice of a Joint Disciplinary Committee.

56. ST/IC/2011/20 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2010 to 30 June 2011), dated 27 July 2011, states:

> **Fraud/Misrepresentation**
>
> 37. A staff member forged a stamp in a copy of his United Nations laissez-passer, which the staff member submitted to the Personnel Section of a mission as an official record of his leave date, and provided false information in his annual leave report.
>
> *Disposition*: separation from service with compensation in lieu of notice and with termination indemnity.
>
> 38. A staff member submitted to the Organization, in connection with his recruitment, a secondary school report card containing altered grades.
>
> *Disposition*: demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

> 39. A staff member cheated on a written test administered by the Organization by submitting the model answers prepared by others for the test.
>
> *Disposition*: demotion by one grade with deferment, for a period of three years, of eligibility for consideration for promotion.
>
> 40. A staff member made material omissions in his Personal History Profile in relation to his employment history with the United Nations and accepted duties in a post at the G-4 level, for which he was ineligible.
>
> …
>
> 44. A staff member altered and falsified an official document and left the mission area without prior authorization.
>
> *Disposition*: censure.
>
> …
>
> 47. A staff member altered an official document, namely a request for equipment, without authorization so as to increase the quantities of items requested.
>
> *Disposition*: demotion of one grade with deferment, for two years, of eligibility for consideration for promotion and censure.

57. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offence, the penalty, in general, should be comparable.

58. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138,

> 31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [see *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022]
>
> 32. … A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

59. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however, identify the following aggravating and mitigating circumstances.

Aggravating circumstances

60. The Applicant, a Civil Affairs Officer at the P-4 level, step 4, admitted that he intentionally used a test stamp dated 2 October 2008 and cut and pasted it over the copy of page 26 of his UNLP, which reflected the accurate date of his return to Afghanistan, so as to create the impression that the test stamp was in fact the genuine stamp. The forged copy of his UNLP was then submitted by him to the Personnel Section together with his annual leave report which indicated the same date of return.

61. Two weeks later, the Applicant had to resubmit his annual leave report signed by his supervisor. He did not use this opportunity to correct the erroneous date that he previously reported.

Mitigating circumstances

62. The Applicant joined the United Nations in 1992 as a military observer in Cambodia. He worked in six United Nations peacekeeping missions before joining his latest assignment with UNAMA. The Applicant was a devoted staff member until he was separated from service in January 2011, just a day prior to his official travel to his next assignment with MINUSTAH.

63. The Applicant was never investigated prior to or after December 2008 and no administrative or disciplinary sanctions were previously imposed on him. The Applicant was sincere, cooperated with the investigators, recognized and explained the circumstances surrounding his behavior, and expressed his sincere regrets for what happened.

64. As part of the comments he provided in response to the SIU's investigation report, the Applicant explained that on 1 October 2008, as soon the trip to Turkmenistan with his colleagues had started, he decided to visit Uzbekistan under the belief that he had enough time to complete this trip. On his way back to Afghanistan, due to unexpected operating hours at the Uzbek and Turkmen border, the Applicant was unable to cross the border until 3 October 2008, resulting in his

arrival from Turkmenistan to Afghanistan being delayed by a day until 4 October 2008 instead of 3 October 2008.

65. Upon his return to work on 5 October 2008 the Applicant was, for the first time, the Officer-in-Charge. Without knowing that he could not submit and approve his own annual leave report, he prepared the report and the related documents for the following day, including a copy of page 26 of his UNLP which indicated 2 October 2008 as his date of re-entry. The Applicant admitted that he made errors and exercised poor judgment as a result of the stressful context in which UNAMA operated. The Applicant further expressed that he truly believed that he would have lost his right to a planned leave to visit his family in November 2008 as a result of his delayed return. He also explained that the trip took place across an official United Nations holiday and weekend, resulting in him not using any actual days of annual leave.

66. With respect to the hazard pay, the Applicant stated that he never intended to benefit financially from his action. He recognized that the above factors affected his judgment and he acted in haste and without seeking guidance. He regretted his actions which were his first and only offence. He further stated that he would not knowingly engage in a similar conduct in the future and he requested that the mitigating factors be taken into consideration.

67. During his testimony before the Tribunal, the Applicant stated that UNAMA was his longest, toughest and most challenging assignment yet. He explained that in Afghanistan staff members lived in a combat zone, with shelling and bombing occurring around them on a daily basis, that the security situation was terrible and that day and night they had to concentrate on their security which resulted in a constantly stressful situation. The welfare trips were organized from time to time and the participants had to travel in heavily armored United Nations vehicles when escorted to the border. Even these trips, which together with the family visits represent the only possibility for staff members to travel away from the UNAMA compound, were very dangerous. Similarly, a family visit must be prepared carefully

and is not allowed if the staff member did not previously complete a cycle of eight weeks at the mission.

68. Regarding the objective element of misconduct, while the disciplinary sanction was applied for certain elements of misconduct, it was decided by the Tribunal that the Applicant did not commit the misconduct of providing false information on his annual leave report.

69. The Tribunal notes that the Applicant reported his return to the security officer as soon as he arrived back at UNAMA on 4 October 2008, so the date and the hour of his return together with the date and the hour of his departure were already part of UNAMA's official record, before the fraudulent copy of page 26 of his UNLP was submitted. The copy of page 26 of his UNLP was supposed to be reviewed and corroborated in conjunction with the other documents submitted by the Applicant. This document was submitted to support the annual leave report and had no binding value and/or force of evidence itself.

70. The Tribunal considers that since no compulsory rules were identified regarding the Applicant's obligation to complete a leave request for the use of zero days of annual leave or to provide a copy of his passport and/or UNLP when zero days of annual leave were used, the annual leave report and the leave request form appear to be unnecessary. Consequently the documents containing incorrect information—the copy of page 26 of his UNLP, the annual leave report and the leave request form submitted upon his return—were not supposed to be part of the official record and appear to only have been submitted by the Applicant in accordance with the practice in UNAMA.

71. The other documents, namely the MOP form and the security registry referenced the correct date and hour of the Applicant's return, namely 4 October 2008.

72. With regard to the subjective element of the misconduct, the Tribunal considers that the Applicant experienced distress from the unexpected delay of his

arrival to Afghanistan and the travel conditions in an extremely insecure environment. The Applicant was convinced that he had to prove the date of his return in accordance with the estimated day of his return as reflected in his 24 September 2008 request form. However, he was afraid that this delay could affect his planned November 2008 home leave, which required the completion of a complete cycle of eight weeks. The Applicant stated that "he thought [he] had to be in the framework of [his] leave request" and "was blinded by the fact that [he] couldn't travel on the prearranged travel to Moscow".

73. It was the first time that the Applicant was Officer-in-Charge and he was convinced that he had to submit the report to himself. This element contributed to his mistake because he had no time to reflect further on his options on how to explain his delayed return and he was not in the position to ask more information and guidance from his supervisor. The method used to forge the stamp on the copy of page 26 of his UNLP reflects both his determination and his desperation to do anything to justify his delay and not to lose the chance to visit his family. The Applicant was requested to resubmit his report, signed by his supervisor, and during the hearing he declared that he doubted himself after he had submitted the false copy, that in his life he never lied and that he knew that what he did was wrong, but that he did not find the right answer on what to do next. He was ashamed to discuss this matter and he did not consider the option of requesting an exception for his delayed return.

74. The Applicant never sought to obtain any personal gain or to create a prejudice to the Organization. The Tribunal notes that even though the Applicant was at the P-4 level, his misconduct did not affect in any way his duties following the events of October 2008 or UNAMA's image with regard to the other actors in Afghanistan. After the conclusion of the SIU's investigation in December 2008, the Applicant continued to work with UNAMA for two more years. Further, his performance appraisal for the 2008-2009 cycle reflects that he received a positive evaluation. Similarly, his performance evaluation for the 2009–2010 cycle reflects that he "frequently exceed[ed] performance expectations". Finally, in December

2010, he was selected and appointed to a new position with MINUSTAH, starting in February 2011.

75. In the light of the above-mentioned mitigating circumstances, the Tribunal considers that the relation of trust between the employer and the Applicant was not irremediably affected since he continued working successfully for the Organization on the same post for another two years until his appointment with MINUSTAH. The Applicant was before and after the isolate incident from October 2008 a devoted staff member until his separation from service which was decided in January 2011 and notified to him on 1 February 2011, a day prior to him travelling to his next assignment with MINUSTAH.

76. After reviewing all the circumstances, the Tribunal considers that the sanction of separation from service with termination indemnity, even though it is not the harshest sanction applicable in disciplinary cases, is disproportionate with the gravity of misconduct.

77. In *Yisma* UNDT/2011/061, the Dispute Tribunal stated:

> Separation from service or dismissal is often justified in the case of misconduct or such gravity that it makes the continued employment relationship intolerable, especially where the relationship of trust has been breached. What is required is a conspectus of all circumstances. This does not mean that there can be no sufficient mitigating factors in cases of dishonesty. However, if the dishonesty is of such a degree as to be considered serious or gross and such that it renders a continued relationship impossible, the cessation of the employment relationship becomes an appropriate and fair sanction.

78. The Tribunal considers that taking into consideration the particular circumstances of the present case, the sanction applied to the Applicant was too severe. While the mitigating circumstances presented by the Applicant in his response to the allegations of misconduct were partially analyzed, they were not entirely and correctly evaluated by the Organization.

79. The Tribunal agrees with the Organization's findings that the circumstances presented by the Applicant do not justify his acts and that the sanction applied is not the harshest one, namely a dismissal. However, the Tribunal considers that the decision-maker rejected without reasons or ignored, among others, the mitigating circumstances identified by the Tribunal. The disciplinary sanction of separation from service is considered one of the most severe sanctions and has to reflect the gravity of the illegal act and the serious prejudice suffered by the Organization.

80. The Applicant's continuity of employment with UNAMA following the conclusion of the SIU's investigation into the Applicant's misconduct, and his high performance evaluations clearly contradict the conclusion that his conduct was "incompatible with further service". The trust between the Applicant and the Organization was not temporarily or irremediably affected by his misconduct since the contractual relationship continued for another two years in UNAMA on the same post. Further, he was then supposed to continue working for the Organization for another year in MINUSTAH. As evidenced by the declarations submitted to the Tribunal, as well as his performance evaluations, the Applicant's supervisors and his colleagues highly appreciated his work until the end of his mandate with UNAMA and the Applicant's misconduct did not result in any negative impact upon the Organization.

Delay

81. The Tribunal observes that the disciplinary process was initiated in December 2008 and that the sanction was not applied until 11 January 2011, with the Applicant being notified on 1 February 2011—one year and six months after the Applicant had provided his comments on the allegations of misconduct. Such a long period of delay cannot be considered reasonable in the present case. Further, in accordance with the Secretary-General's latest report on his practice in disciplinary cases (ST/IC/2013/29), it also represents a mitigating circumstance.

82. A disciplinary sanction must not only be proportional with the gravity of the misconduct, it must also be applied within a reasonable period of time (which is usually appreciated in connection with the complexity of the case) in order to achieve its purpose: to promptly punish the guilty staff member and also to prevent him and/or other staff members from committing similar offences in future.

83. Consequently, the Tribunal finds that the contested decision is unlawful and that the sanction applied to the Applicant—separation from service with compensation in lieu of notice and with termination indemnities—is too harsh and manifestly disproportionate when compared to the gravity of the misconduct, especially considering that, as found by the Tribunal, the Applicant did not commit misconduct with regard to the filing of his leave request form and annual leave report. In reaching this conclusion the Tribunal analyzed the sanctions applied by the Secretary-General in cases comparable to that of the Applicant's. For example, ST/IC/2009/30 (Practice of the Secretary General in disciplinary matters and cases of criminal behavior 1 July 2008–30 June 2009) covers the date of the present misconduct and states that a staff member who fraudulently used United Nations training funds with the intent to fraud the Organization was sanctioned by a written censure and a demotion by one grade without the possibility for promotion for another two years, while another staff member who knowingly arranged for a trip outside the mission area without authorization and falsely claimed illness to the supervisor was sanctioned by a written censure and one year deferment for a within-grade increment.

84. The Applicant's sanction is referred to in ST/IC/2011/20. After the Applicant had been sanctioned, in a case comparable to the present one, another staff member who altered and falsified an official document and left the mission area without prior authorization was sanctioned with a written censure.

85. In conclusion, the Applicant's ground of appeal that consideration was not properly given to several mitigating circumstances and that the impugned decision was disproportionate to the misconduct is legally correct.

Relief

86. Under art. 10.5 of the Dispute Tribunal's Statute, when the Tribunal considers an appeal against a disciplinary decision, it may:

a. Confirm the decision;

b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or

c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation (*Abu Hamda* 2010-UNAT-022). In this case the Tribunal considers that it is not directly applying the sanction but is partially modifying the contested decision by replacing, according with the law, the applied 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.

d. Set an amount of compensation in accordance with art. 10.5(b).

87. 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 reinstatement into service with compensation for the lost salaries (restitution *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.

88. A severe disciplinary sanction like a separation from service is a work-related event which generates a certain emotional distress. The above-mentioned legal remedy 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.

89. 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.

90. The Tribunal considers that in cases where the disciplinary sanction of separation from service or dismissal is replaced with a lower sanction 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.

91. 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 produced by the rescinded decision.

92. 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. In accordance with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Further, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example if during the proceeding in front of the Tribunal the staff member reached the retirement age, is since deceased or her/his contract expired during the judicial proceedings.

93. In *Tolstopiatov* 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.

94. In the present case, the Applicant expressly requested his reinstatement as part of his appeal and the contested decision concerns a separation from service. In December 2010, the Applicant was appointed as a Civil Affairs Officer with MINUTAH for one year, starting 2 February 2011. It results that, had he not been separated from service, his contract with the Organization would have expired on 2 January 2012. The Dispute and the Appeals Tribunals have consistently held that a fixed-term contract does not carry any expectation of renewal. The Tribunal cannot therefore order the Applicant's reinstatement and the Applicant's request for reinstatement on an appropriate post is to be rejected. In light of the conclusions presented in this Judgment, parties may consider new opportunities for future collaboration.

95. The Tribunal concludes that the impugned decision is to be rescinded and the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnities is to be replaced with the sanction of a written censure plus a fine of one month's net base salary.

96. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated:

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

97. The Tribunal considers that in the present case the rescission of the contested decision and the imposition of a lesser sanction is *per se* a fair and sufficient remedy for the moral prejudice caused to him as a result of the disproportionality of the disciplinary measure imposed by the contested sanction. The Tribunal notes that the Applicant did not request an award of moral damages prior to the filing of his closing submissions. Such a relief, in the absence of substantive submissions by the parties, can therefore not be considered by the Tribunal and stands to be rejected.

98. The Respondent is to pay the Applicant a compensation for his loss of earnings (net base salary and entitlements) from 2 February 2011 until the expiration of his contract with MINUSTAH, minus the fine of one month's net base salary and the amount of termination indemnity already paid to the Applicant. The Tribunal considers that such compensation is appropriate seeing that, as results from the Applicant's statement during the oral hearing, he returned home on 2 February 2011, after having worked for nine years for the United Nations and had to resume his studies. The Applicant was only able to find new employment and resume his career in 2012.

Alternative to rescission

99. According to art. 10.5(a) of the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision, subject to art 10.5(b). The compensation that is to be awarded as an alternative to the rescission shall not normally exceed the equivalent of two years' net base salary, however, a higher compensation may be ordered by the Tribunal in exceptional cases.

100. In *Cohen* 2011-UNAT-131, the Appeals Tribunal recalled that in cases where the Dispute Tribunal rescinds an illegal decision to dismiss a staff member, the Administration "must both reinstate the staff member and pay compensation for loss of salaries and entitlements". The Appeals Tribunal further held that

> if, in lieu of execution of the judgment the Administration elects to pay compensation in addition to the compensation which the Tribunal ordered it to pay for the damage suffered by the Applicant, that election may, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of Article 10.5(b) of the Statute of the [Dispute Tribunal]. … [In such a situation], the option given to the Administration … to pay compensation in lieu of a specific [performance] … should not render ineffective the right … to an effective remedy.

101. As previously stated, the Tribunal considers that in cases where it decides to rescind a decision, the legal alternative of paying compensation afforded to the Respondent replaces the principal remedy of rescission with that of a payment.

102. In light of the particular circumstances of the present case, namely that the Applicant worked for the Organization as a devoted staff member for nine years in different field missions, the amount of compensation to be awarded as an alternative to the rescission of the Applicant's separation from service is to be: USD5,000 plus the compensation ordered by the Tribunal for his loss of earnings (one year net base salary and entitlements).

Conclusion

In the view of the foregoing, the Tribunal DECIDES:

103. The application is granted in part.

104. The contested decision to separate the Applicant from service, dated 11 January 2011, is rescinded. His requests for reinstatement and moral damages are rejected.

105. The disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnities is replaced with the sanctions of a written censure, plus a fine of one month's net base salary.

106. The Respondent is also ordered to pay the Applicant compensation for loss of earnings (net base salary and entitlements) starting from 2 February 2011 until

the date of expiration of his contract with MINUSTAH (2 January 2012), minus the fine of one month's net base salary and the amount of termination indemnity already paid to the Applicant.

107. The present Judgment is to be included in the Applicant's official status file. The Respondent is to remove and replace references relating to the Applicant's previous sanction—separation from service with compensation in lieu of notice and with termination indemnity—by references to the lesser sanctions ordered in the present judgment.

108. In the event that the Respondent decides not to rescind the decision, he is ordered to compensate him in the amount of USD5,000, plus the compensation for loss of one year's net base salary and entitlements minus the deductions as indicated in paras. 98 and 106 above.

109. These amounts are to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Alessandra Greceanu

Dated this 5th day of June 2014

Entered in the Register on this 5th day of June 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York