



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PIRRAKU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALS/OHRM
Elizabeth Gall, ALS/OHRM

Introduction and Procedural History

1. On 12 March 2012, the Applicant, who serves as a Logistics Assistant at the FS-4 level with the United Nations Mission in the Republic of South Sudan (UNMISS), filed an Application before the Dispute Tribunal. The Applicant is challenging the Respondent's decision of 7 July 2009 rescinding his selection for, and offer of promotion to the FS-5 level after his reappointment to the then United Nations Mission in Sudan (UNMIS)¹ on 11 February 2008 at the FS-4 level (Contested Decision).
2. On 26 April 2012, the Respondent filed his Reply to the Application. The Respondent's principal submission is that the Application should be dismissed on grounds that it has been settled through mediation, and that the terms agreed have been implemented by the Administration.
3. The Applicant responded to the Respondent's submissions on 30 April 2013.
4. The Parties were invited to attend a directions hearing on 15 May 2013.
5. The Parties reiterated their respective positions on this Application.
6. The Applicant contends that his issues remain that canvassed in his Application: a) delay; b) breach of due process; c) legitimate expectation of promotion; d) deprivation of the right to compete for posts at the FS-6 level; and e) impact of the impugned decision on him.
7. On 22 May 2013, the Tribunal issued Order No. 122 (NBI/2013) directing the Parties "to consult and deliberate, in good faith, on having this matter informally resolved". The Tribunal also directed the Parties to report on the progress of their "joint deliberations" and/or to indicate if a formal referral to mediation is necessary.

¹ UNMIS closed its operations on 9 July 2011 and UNMISS was created on the same day.

8. On 1 July 2013, the Respondent filed submissions in response to Order No. 122 (NBI/2013). The Respondent informed the Tribunal that the matter could not be resolved informally between the Parties.

9. On 26 August 2013, the Tribunal issued Order No. 190 (NBI/2013) formally referring the matter to the Mediation Division, and directed the Division to advise the Tribunal if the matter is amenable to being mediated.

10. On 13 September 2013, the Tribunal received a letter from Mr. Marc Vaucher of the Mediation Division informing the Tribunal that the:

Division contacted the parties to this case to assess if the matter was amenable to mediation. Unfortunately, *it appears that there is no matter to discuss at this stage*. Accordingly the matter is not suitable for mediation. [Emphasis added]

11. The matter was heard in Nairobi on 29 October 2013.

FACTS

12. The Applicant entered into the service of the United Nations on 30 August 2004 at the United Nations Mission in Burundi as a Logistics Assistant at the FS-4 level.

13. On 24 June 2007, the Applicant received an email from UNMIS informing him that he had been shortlisted for the post of Administrative Assistant at the FS-5 level. The Applicant was asked to confirm his interest and to provide contact details so that he could be contacted for the interview which was scheduled for later that week.²

14. The interview took place on 28 June 2007. The Applicant informed the panel during the interview that they were interviewing him for a post he had never applied for.

² Applicant's Annex 1.

15. On 20 August 2007, the Applicant received another email from Human Resources in UNMIS informing him that he had been “considered for an Administrative Assistant position” with UNMIS at the FS-5 level, and that³

[I]n order for UNMIS-RECRUITMENT CELL to proceed with the recruitment, we kindly request that you submit your application in the Galaxy for a generic FS-5 Admin Assistant position. We recommend that you proceed as soon as possible and advise us of the vacancy number for further action.

16. On the same day, the Applicant forwarded the Galaxy application confirmation receipt to Human Resources in UNMIS.⁴

17. On 27 December 2007, the Applicant received the offer of appointment for a contract of Limited Duration at his current level and step “pending Field Personnel Division approval” of movement to a higher level.⁵

18. On 2 January 2008, the Applicant accepted the offer and joined UNMIS on 12 January 2008.

19. On 21 February 2008, the UNMIS Chief Civilian Personnel Officer (CCPO) was instructed by the UNMIS Director of Mission Support (DMS) to deploy the Applicant to the Nasser Team Site as an Administrative Officer.⁶

20. After deploying to Nasser, the Applicant and his supervisors wrote several emails to the Human Resources section in UNMIS requesting information and updates as to movement to the FS-5 level. No response was received.⁷

21. On 1 June 2009, the Applicant received a Reassignment Directive by email instructing him to travel to Khartoum at his “earliest convenience to commence JLOC induction training” following which he was to be deployed to El Obeid.⁸

³ Applicant’s Annex 2.

⁴ Applicant’s Annex 3.

⁵ Applicant’s Annex 4.

⁶ Applicant’s Annex 5.

⁷ Applicant’s Annex 6.

22. On 23 June 2009, the Applicant received a memo entitled “Reassignment Letter” from the UNMIS CCPO’s Office.⁹

23. In the midst of these instructions and movements, the Applicant continued to request updates as to his movement to the FS-5 level. No update was forthcoming.

24. On 7 July 2009, Human Resources in UNMIS wrote to the Applicant¹⁰:

Reference is made to your selection and movement to higher level (MTHL) as Administrative Assistant, FS-5 with UNMISS, effective 12 February 2008.

We regret to inform you that the Field Personnel Division, New York has decided not to proceed with your movement to higher level.

In the meantime, please be advised that FPD approved the granting of the special post allowance (SPA) to the FS-5 level from 12 February 2008 to 11 February 2010, subject to the staff member’s remaining in the same function. You were redeployed as a Logistics Assistant to JLOC El Obeid, effective 1 June 2009. Therefore the SPA to the FS-5 level will be granted to you effective 12 February 2008 through 31 May 2009.

A copy of the relevant personnel action will be sent to you in due course.

25. On 8 July 2009, emails were exchanged between the UNMIS JLOC Chief, Chief of the Logistics Base and Human Resources querying whether the Applicant was still on an FS-5 post and if the SPA should be continued. The JLOC Chief confirmed that the post in El Obeid should remain FS-5 and instructed his staff to commence the reclassification process for the post.¹¹

⁸ Applicant’s Annex 7.

⁹ Applicant’s Annex 8.

¹⁰ Applicant’s Annex 9.

¹¹ Applicant’s Annex 10.

26. On 30 July 2009, the Applicant wrote to the UNMIS CCPO asking for the rationale behind the Field Personnel Division's (FPD) decision not to proceed with his promotion to FS-5.¹² He did not receive a response.

27. On 30 August 2009, the Applicant wrote to the CCPO reminding her of his email dated 30 July 2009.

28. On 31 August 2009, the Applicant received an email from UNMIS Human Resources:

We are in response to your memorandum to Human Resources in regards to your Movement to Higher Level case. Kindly note, that we are reviewing the latest developments with your case and will prepare a reply. We will respond to your memorandum shortly.

29. On 7 October 2009, the Applicant's second reporting officer (SRO) wrote to UNMIS Human Resources for an update. She received a reply on the same day informing her that the matter was being dealt with and instructing the Human Resources Officer in charge of this case to urgently respond to the staff member.

30. On 29 October 2009, the Applicant's SRO again wrote to Human Resources for an update.

31. On the same day, UNMIS Human Resources replied as follows:

In reference to my email below, I have consulted with Mr. Kamal, HRO on Mr. Pirraku's case. After further review and consultation of the case, Mr. Kamal has advised that an official memorandum will be sent to Mr. Nicholson with regard to the case.

Please contact Mr. Kamal, HRO regarding future inquiries of Mr. Pirraku's case. As stated below, Mr. Kamal is the HRO for MSD cases.

Shahid – Please advise.

¹² Applicant's Annex 11.

32. On 3 December 2009, a Memo "Staff in Confidence" was sent from the Chief of JLOC to the DMS, requesting the DMS to: “ i) Request FPD to approve his move to higher level (FS-5), and ii) If FPD do not approve his move to higher level (FS-5), then FPD provide him with a detailed written explanation why the move is rejected, and iii) Grant him SPA from 1 June 09, until his move to higher grade is approved.”

33. On the same day, the Officer-in-Charge in the Office of the DMS (OIC/DMS) confirmed receipt of the memo and instructed the UNMIS CCPO to: “i) prepare fax to NYHQ requesting reconsideration of case; ii) Provide formal explanation to S/M”.

34. On 7 February 2010, the Applicant wrote to the DMS seeking updates on the memo sent to his office on 3 December 2009.

35. A similar request was sent by the Chief of JLOC on 11 April 2010, attaching the correspondence of 3 December 2009 and 7 February 2010.

36. On 19 May 2010, the DMS instructed the CCPO to provide the Applicant with feedback.¹³

37. On the advice of the UNMIS Ombudsperson, the Applicant forwarded a dossier of relevant documents to the CCPO.

38. On 10 August 2010, the Chief of JLOC sent another email, again attached the memos of 3 December 2009 and 7 February 2010, to the Chief of Administrative Services (CAS) seeking assistance in having this matter resolved.

39. On 15 September 2010, the Chief of JLOC sent a follow up email to the CAS, attaching the same memos; this time also informing her that the Applicant had been FCRB (Field Central Review Body) cleared for a post at the FS-5 level.

40. On 6 November 2010, the CCPO wrote to the Applicant:

¹³ Applicant's Annex 13.

Dear [Applicant],

I refer to your two letters of 3 December 2009 and 7 February 2010 respectively addressed to the DMS seeking information and clarification concerning FPD's decision to stop your movement to higher level during your recruitment with UNMIS effective 12 February 2008. I also refer to various meetings I have had with the Ombudsman, Ms. Gabrielle Kluck, on the subject matter.

You were reappointed from BINUB to UNMIS on 12 February 2008 as a result of down-sizing exercise in BINUB. The reappointment as Administrative Assistant at UNMIS was at your current level (FS-4) but subject to movement to higher level (FS-5) upon FPD review and approval of the competitive selection process.

The selection and interview documents were, forwarded to FPD for review and/or approval on 3 June 2009. On 3 July 2009, FPD reverted confirming that the request for your movement to higher level (FS-5) was not approved for technical reason that you did not have initial nor technical clearance for the position of Administrative Assistant at FS-5 level notwithstanding that you were short-listed, interviewed and recommended. Your inclusion in the short-list came about when the programme manager provided the terms of reference for the post to include logistics experience in addition to administrative field experience and it was an oversight to have you short-listed for the interview based on your logistics experience without initial and technical clearance for the post. However, FPD approved SPA instead in recognition of the higher level duties you were performing at FS-5 level.

I have noted that you are now FCRB rostered and technically cleared for Logistics Assistant at FS-5 level in Nucleus. I will be in Juba for two days from 10 November 2010 and would like to meet with you during the visit to discuss options that we have for considering you for movement to higher level (FS-5) given that you are now FCRB rostered and initially/technically cleared at FS-5 level though in a different occupational group from administration.

Please let me know your availability during my visit to Juba.

Best regards. Martin Ojjero

41. On 16 November 2010, the Applicant wrote to the Management Evaluation Unit (MEU).¹⁴

42. On 30 December 2010, the Applicant received an email from MEU informing him that there had been discussions with the Department of Field Support (DFS) on whether an informal resolution of this dispute would be appropriate, and seeking the Applicant's views on whether he would be amenable towards an extension of the management evaluation deadline.¹⁵

43. On 22 January 2011, the Applicant received another email from MEU outlining the different options for an informal settlement of the dispute.¹⁶

44. On 24 January 2011, the Applicant responded to MEU indicating his readiness for the matter to be resolved informally. The Applicant also "warned MEU" of UNMIS' incapacity to respond to staff members in a timely manner.¹⁷

45. On 2 February 2011, MEU wrote to the UNMIS CCPO:

Dear Mr. Ojjerro,

With regard to the subject case, as we understand UNMIS has undertaken to search for an FS-5 level post for [the Applicant]. DFS has also advised us as well that it has requested an SPA panel be set up to look into the possibility of an SPA as from 1 June 2009 when apparently [the Applicant] took up other FS-5 functions as Logistics Assistant until whenever he actually stopped performing FS-5 functions [the Applicant] has advised that he has been functioning at the FS-5 level continuously since June 09).

As you know, delays in follow-thru on undertakings for informal settlement will more often than not cause a s/m to doubt the Administration's good faith or simply become frustrated and abandon the settlement process. In this particular case we're concerned in addition that compensation for administrative delays

¹⁴ Applicant's Annex 14.

¹⁵ Applicant's Annex 15.

¹⁶ Applicant's Annex 16.

¹⁷ Applicant's Annex 17.

may need to be awarded if the case goes to management evaluation. In order to avoid this, since we understand the mission agreed in November 2010 to look for the FS-5 we'd propose a timeframe of no more than two weeks to try to identify the post and, if found, to finalize the designation, or at least to commence the process to finalize. We would be grateful if you could confirm this or, in the alternate, advise as to what you believe would be a reasonable time frame.

In addition, we'd be grateful if you could advise as to when the SPA panel will meet to look into that matter. Also, we'd appreciate if you could advise as to a focal person with whom we can consult in the future on this case.

Please don't hesitate to contact me with any questions you may have. Kind regards,
Marco

46. On 14 April 2011, the Applicant wrote to MEU expressing his frustration with the delays in this case and seeking a management evaluation decision.¹⁸

47. On 9 May 2011, the Applicant wrote to MEU once again. MEU was at this time still waiting for a response from UNMIS.¹⁹

48. On 10 May 2011, the Applicant, feeling that he needed "neutral and impartial support/opinion" sought the assistance of the Office of Staff Legal Assistance (OSLA).

49. On 11 May 2011, OSLA advised the Applicant to wait for MEU to complete its efforts at having the dispute informally resolved.²⁰

50. Three months later, after numerous exchanges between the Applicant, OSLA, UNMISS and MEU, on 26 August 2011 OSLA informed the Applicant that an informal agreement was at hand.²¹

¹⁸ Applicant's Annex 19.

¹⁹ Applicant's Annex 20.

²⁰ Applicant's Annex 21.

²¹ Applicant's Annex 22.

51. On 30 August 2011, the Applicant received an email from MEU attaching an Annex "Release Form" outlining details of the informal resolution settlement.
52. On 13 September 2011, the Applicant wrote to OSLA seeking clarification on some of the issues in the Release Form.
53. On 13 September 2011, the Applicant wrote to OSLA

Dear Esther

Thank you for your email and your assistance in my case. I tried to call but it seems you were away from your desk. Before I sign and send the doc. back to you, I want you to confirm the following.

1- If any of the items (a, b) under paragraph II, is not fulfilled, I can still appeal to UNDT.

2- The 60 days period is given for the establishment of an SPA panel.

What about the result of this panel, is there a deadline for that, or is this also going to drag on for another year. I apologize, but I need to be clear on what I am signing.

As soon as I get your input, I will sign and send it back to you.

54. OSLA replied:

Dear [Applicant],

Thanks for your email. With regard to point 1, yes, if either item a or b is not performed, we will appeal to the Tribunal.

With regard to the second point, while we cannot put a specific time limit on the decision by the SPA panel, if it appears that they are stalling unreasonably, or that something else is wrong with the process, this too would be grounds to appeal to the tribunal, arguing that management was not complying with the agreement in good faith.

Please let me know if you require, further clarification. I should be available today in my office.

Best, Esther

55. On 15 September 2011, the Applicant signed the document and it was forwarded to MEU by OSLA on the same day.²²

56. On 15 December 2011, following numerous requests for updates from UNMISS, including through MEU and OSLA, the Applicant sought the assistance of the Field Staff Union to expedite the implementation of the settlement agreement.

57. On the same day, the Applicant wrote to the UNMISS Ombudsperson apprising her of the latest developments with his case and seeking her assistance in having the settlement agreement implemented.

58. On 5 December 2011, the Applicant received an email from an UNMISS HR Officer, Jesse, asking him to "call urgently". During the phone conversation, Jesse confirmed that they had received an instruction from UNHQ, and "wanted to know if we were on the same page". The Applicant requested that they communicate with him by email as he was about to go on leave. This was the only email the Applicant received from UNMIS HR, regarding the informal resolution process.²³

59. On 23 January 2012, the Applicant wrote to OSLA asking if they knew what the status of the implementation of the settlement agreement was. The Applicant also informed OSLA that there were plans to deploy him to a remote field site where logistics support was required.

60. On 30 January 2012, after several attempts to get information from the Mission's Human Resources section, OSLA wrote to Jesse seeking an update. No response was received.

61. On 7 February 2012, MEU requested a conference call between itself, OSLA and the Applicant regarding his SPA.

²² Applicant's Annex 23.

²³ Applicant's Annex 24.

62. On 16 February 2012, in response to a query by MEU as to whether the Applicant's supervisors thought he was functioning at the FS-5 level, the Applicant responded *via* OSLA:

Esther,

For them, I was interviewed, for an FS5, was told to apply for the FS5 post after the interview, was selected for FS5, and therefore performed and still continue to perform at FS-5 level. But, maybe the best would be if Marco gets this information through UNMISS HR. They can ask my supervisors.

I would like to talk to you, but don't know if you are in or out of the office. It has been four years now, and it is about time to close this case, and move on.

63. On 22 February 2012, the Applicant instructed OSLA to formally inform MEU that he had withdrawn from the MEU informal resolution process "as no UN Office has formally informed/confirmed that the informal resolution settlement on [his] case has been implemented". The Applicant was therefore looking forward to receiving a management evaluation decision in two weeks.²⁴

64. As at 13 March 2012, the Applicant had not received a management evaluation decision and so filed the present Application with the UNDT.

SUBMISSIONS

The Applicant

65. UNMIS created a reasonable and legitimate expectation that he would be promoted to the FS-5 level. This was the only reason the Applicant left the Mission in Burundi.

66. The administrative errors being claimed by the Respondent, was through no fault of the Applicant. He followed the instructions given to him at all stages of the

²⁴ Applicant's Annex 25.

recruitment process. The actions of the Respondent, especially given the time that passed between the various stages of the process and the silence meted out to him in the face of all of his and his supervisors' queries, was a clear breach of his due process rights.

67. The Applicant's career progression was affected. He was deprived of the opportunity to apply for posts at the FS-6 level given the limbo he was placed in by the Mission.

68. During the course of four years of service with UNMIS, the Applicant served in four different locations and was also temporarily deployed to two additional sites where logistic support was required. The Applicant acted in good faith and performed his function to the best of his abilities throughout this period, despite the stress of the uncertainty.

69. FPD received the interview and selection documents, twenty-five months after the Applicant was interviewed. It is possible, therefore, that new staff selection rules were applied retroactively. The delays in the process were excessive and inordinate.

70. The Applicant seeks compensation in the amount of twenty-four months net base salary for the delays in the process and breach of his due process rights; five months net base salary for loss of opportunity and five months net base salary for emotional distress.

The Respondent

71. The Dispute Tribunal is required to satisfy itself that the Application is receivable under article 8 of its Statute which provides that an Application shall not be receivable if the dispute arising from the contested administrative decision has been resolved by an agreement reached through mediation.²⁵ The same principle must reasonably apply also to disputes resolved through other means of informal dispute

²⁵ *Zoughy*, UNDT/2010/204.

resolution. This is supported by staff rule 11.1(b), which clearly envisages that disputes may be resolved informally by other means than mediation. In the same vein, General Assembly resolutions have affirmed that informal resolution of conflict is a crucial element of the system of administration of justice. A broad and purposeful application of article 8.2 of the Statute is necessary to ensure that informal dispute resolution can play a critical part in the system of administration of justice. The Administration's interest in resolving disputes informally would be set back significantly if all agreements reached as a result of informal resolution did not serve to bar formal litigation of the same dispute.

72. On 10 November 2010, the Applicant submitted a request for management evaluation of the contested decision. Following negotiations, the Administration and the Applicant agreed to settle the Applicant's claims. On 15 September 2011, the Applicant signed a Release, which recorded the terms of the agreement.

73. The Administration has implemented its obligations under the agreement in full. On 23 February 2012, FPD waived the eligibility requirements in section 6 of ST/AI/2010/3 (Staff Selection System) to allow the Applicant to be considered for positions at the FS-6 level through making the appropriate notations in the Nucleus system. The Occupational Group Managers within FPD/DFS have been informed of the waiver of the eligibility requirements. Following the establishment of an SPA panel, the Applicant was granted an SPA for the period from 12 February 2010 to 13 July 2010.

74. On 23 February 2012, the Applicant was informed in writing by the DMS, UNMISS of the implementation of the terms of settlement under the Release.²⁶

75. Following the Applicant's agreement to the terms of settlement with the Administration on 15 September 2011, the Applicant applied for one FS-6 position. On 12 March 2012, the Applicant applied to be placed on the roster for the position of Contingent-Owned Equipment Officer at the FS-6 level, in response to Generic

²⁶ Respondent's Annex 1.

Job Opening No. 425593. In accordance with section 7.1 of ST/AI/2010/3, the Recruitment Unit of FPD/DFS determined that the Applicant did not meet the minimum relevant work experience requirements of the Generic Job Opening. On 12 December 2012, the Applicant was notified of his non-selection by email.²⁷

76. As from 1 April 2012, the Applicant was promoted to the position of Logistics Assistant in UNMISS, at the FS-5 level.²⁸ As from that date, the Applicant did not require the waiver in order to be eligible to apply for positions at the FS-6 level under ST/AI/2010/3.

77. The Applicant agreed to release the Administration from all “actions, claims, demands and liability” arising from or by reason of the contested decision. The Applicant also agreed that he would not pursue any further action “including any appeal of the Claim to the United Nations Dispute Tribunal, arising from or by reason of the Claim, without prejudice to [his] right to appeal any matter arising out of the aforementioned SPA process.” The Applicant is bound by his undertaking in the agreement not to pursue an appeal of the contested decision to the Dispute Tribunal. Accordingly, he does not have recourse to the Dispute Tribunal.

78. The Respondent notes that the Applicant has submitted documents that are confidential and privileged as they relate to informal conflict resolution efforts.²⁹ Under article 15.7 of the UNDT Rules of Procedure, such documents shall never be disclosed to the Dispute Tribunal. These documents should be removed from the official records of the proceedings. To that end, the Dispute Tribunal may strike the documents from the record or order the Applicant to withdraw them.

²⁷ Respondent’s Annex 3.

²⁸ Respondent’s Annex 4.

²⁹ See Annexes 15, 16, 17, 18, 19, 20, 21, 22, and 24 to the Application.

DELIBERATIONS

The Issues

79. The Tribunal will begin by discussing the manner in which this matter was handled by the Mediation Division after the matter was referred to it by the Tribunal.

80. The three issues that the Tribunal will then consider are:

i) the confidentiality of the Release Agreement for the purposes of the present proceedings;

ii) whether the matter is receivable;

iii) whether the Applicant is entitled to relief for the late implementation of the terms of the Release Agreement and for the withdrawal of the FS-5 position.

Mediation

81. On 26 August 2013, the Tribunal issued Order No. 190 (NBI/2013) formally referring the matter to the Mediation Division, and directed the Division to advise the Tribunal if the matter is amenable to being mediated.

82. On 13 September 2013, the Tribunal received a letter from Mr. Marc Vaucher of the Mediation Division informing the Tribunal that the:

Division contacted the parties to this case to assess if the matter was amenable to mediation. Unfortunately, *it appears that there is no matter to discuss at this stage.* Accordingly the matter is not suitable for mediation. [Emphasis added]

83. The Tribunal is concerned at this laconic answer from the Mediation Division. Mediation cannot be resorted to without the consent of the Parties. For the Division to blithely suggest that there was “no matter” to be discussed smacks of an attitude that can only be described as unhelpful and disinterested.

84. The Tribunal is in fact even left wondering if the Parties were in fact contacted; and if they were what they could have told the mediator that would have led him to conclude that there was “no matter”.

85. That answer suggests that no serious attempt was made by the Mediation Division to bring the Parties together with a view to having this matter resolved.

86. The General Assembly has consistently pressed for a revamping and strengthening of the informal dispute resolution process. The Tribunal will quote the latest call of the General Assembly in support of the informal system. At its 67th session held in December 2013 the General Assembly resolved as follows³⁰:

Informal system

21. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;

22. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, and in this regard requests the Secretary-General to recommend to the General Assembly at its sixty-eighth session additional measures to encourage recourse to informal resolution of disputes and to avoid unnecessary litigation;

23. Encourages the Secretary-General to ensure that management responds to requests of the Office of the United Nations Ombudsman and Mediation Services in a timely manner;

24. Stresses the importance of developing a culture of dialogue and amicable resolution of disputes through the informal system, and requests the Secretary-General to propose, at the main part of the sixty-eighth session of the General Assembly, measures to encourage informal dispute resolution.

³⁰ General Assembly Resolution A/RES/67/241 [on the report of the Fifth Committee (A/67/669)]

87. The Tribunal recalls that there was an attempt to reach a settlement in this case but it broke down. The Tribunal's attempt at having this matter resolved by a mediator met with such disinterest that it has had to result in litigation.

88. It is obvious that meaningful consultations towards the resolution of a dispute, when deliberated on in good faith, would serve the interest of management and the staff member. It would engender a collegial work environment and remove the antagonism and friction that usually results from workplace disputes. Treating litigation as the absolute last resort allows for the efficient use of the Tribunal's (tight) resources and for proceedings to be conducted expeditiously.

89. The Mediation Division would be well advised to be minded of its role within the internal justice mechanism and the bigger picture that is the interests of the Organization.

90. A copy of this Judgment should be brought to the attention of the Ombudsman and the Mediation Division.

Confidentiality

91. The Respondent raises the issue of the confidentiality of an informal agreement the contents of which should not be disclosed to the Tribunal. Both Parties have referred to it in their respective pleadings.

92. The Applicant refers to the agreement to substantiate his assertion that the terms were not implemented timely. The Respondent refers to it to substantiate his claim that the matter is not receivable.

93. Can the reference to the Release Agreement by both Parties amount to a waiver of the confidentiality rule on agreements laid down in article 15.7 of the Rules of Procedure. Should the rule embodied in section 15.7 be considered absolute?

94. The basis for confidentiality of a settlement agreement is to create the space for free and meaningful negotiations so that parties need not fear that what they say or write can later be brought to the court's attention and thereby cause prejudice in their proceedings.

95. Any statement made, discussed or recorded in the course of a settlement process are without prejudice and cannot be used by either party in support of his/her case. To that extent the agreement cannot and should not be acted upon by the court. Without prejudice discussions and communications cannot therefore be used as evidence in legal proceedings.

96. Article 15.7 places the Tribunal in an invidious situation when faced with the issue of receivability of a claim following a purported or implemented agreement. If the agreement is implemented and the Respondent takes the point to submit that the matter is not receivable should not the Tribunal be made aware at least of some evidence that this is so in order to determine the issue? If the parties are unwilling to release some evidence to the Tribunal that does not mean that the Tribunal should accept such refusal. The Tribunal may by virtue of the powers granted to it by articles 19 and 36 of the UNDT Rules of Procedure make an appropriate order to have the required information. In the present case the issue does not arise as both parties have provided the information either deliberately or unwittingly. The Tribunal will therefore use this information solely for the purpose of determining whether the matter is receivable and whether there was in fact an agreement and whether it was implemented so as to make the present application moot.

Receivability

97. The Release Agreement was signed on 15 September 2011, more than three years following the withdrawal of the FS-5 offer/position and after the Applicant had sent several letters to the Administration.

98. The issue on which the Applicant signed the release was the same one for which he requested a management evaluation. The request to the Management Evaluation Unit was for “FPD to approve [his] MTHL case effective 12 February 2008, [his] EOD UNMIS”.

99. The Release was subject to two substantive conditions: (i) that the Applicant be granted an exception to apply for an FS-6 position while encumbering an FS-4 position; and (ii) that a panel be established within 60 days from 15 September 2011 to review his eligibility for an SPA as from June 2008.

100. As at 22 February 2012, none of the conditions of the Release had been implemented and the Applicant chose to withdraw from the Release Agreement and pursue the matter with MEU.

101. On 27 February 2012, the Applicant received a letter dated 23 February 2012 informing him that the terms of the Release Agreement are being implemented.

102. Once it became obvious to the Applicant that the terms of the Release Agreement had not been implemented, he had no choice but to pursue the matter further with MEU before filing a case with the Tribunal.

103. There is no issue of receivability. The Agreement was not implemented within the stipulated 60 days, as a result of which there cannot be said to have been an ‘agreement.’ A release agreement is valid if the terms within it are implemented *as agreed between the parties*, within the deadlines stipulated therein or in the absence of a deadline within a reasonable time thereafter or within a time frame agreed by the parties if the original deadline(s) cannot be met.

104. The Respondent never came forward with a plausible explanation or justification as to why it took so long to implement or to start implementation of the terms of the Agreement. Bad faith on the part of the Respondent may be inferred from this unexplained procrastination. A litigant or an aggrieved individual who is in

the process of vindicating his/her rights cannot by the mere signing of an agreement or settlement be deemed to have waived his/her right to access the internal justice system if the agreement he signed *with the Respondent* is not implemented or is reneged upon. He/she cannot be considered to have waived all rights to pursue a remedy judicially by the mere refusal or laches of the Administration to move forward.

105. It is the considered view of the Tribunal that in the absence of any timely and concrete acts of implementation of the terms of the Agreement, there was in fact no agreement that the Applicant be properly be held to.

106. The Respondent cannot, in the face of his own dilatory conduct, hold the Applicant to the terms of an agreement which he himself violated.

107. The Application is therefore held to be receivable.

The withdrawal of the offer of an FS-5 position

108. The Respondent informed the Applicant that he had been mistakenly interviewed and cleared for the post. This mistake or inadvertence on the part of the Respondent cannot properly be held against the Applicant.

109. The Tribunal will here refer to two decision of the United Nations Appeals Tribunal (UNAT) where the effect of an offer was discussed. In *Sprauten*³¹, UNAT held that although formal employment within the United Nations system is triggered by the issuance of a letter of appointment, there *is* legal effect to an offer of employment “when the candidate for employment has met all of the conditions of the offer and has accepted it unconditionally.”

110. Similarly, in *Gabalton*³² UNAT observed that:

³¹ 2011-UNAT-111.

³² 2011-UNAT-120.

[T]he legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (El Khatib, Judgment No. 2010-UNAT-029).

However, this does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2 (a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization.

111. The Tribunal concludes that it was unreasonable and wrong to have withdrawn the offer of the FS-5 position. The matter is made worse as the offer was withdrawn after a long period of protracted exchange of correspondence between the Applicant and the Respondent.

The non-implementation of the Release Agreement

112. The Release Agreement was signed on 15 September 2011. The Applicant agreed not to pursue any matter raised in his request for management evaluation, namely his appointment to a higher post and not to pursue any further action relating to his employment but without prejudice to his request for an SPA.

113. The Release was subject to two conditions namely: (i) that he be granted an exception to apply for an FS-6 position as he was still at the FS4- level; and ii) that a panel be established within 60 days to decide on his SPA.

114. As at February 2012, that is five months later, the agreement had not been implemented. The Applicant then withdrew from the agreement in a correspondence

dated 22 February 2012. It was only then that he received on 27 February 2012, correspondence dated 23 February 2012 informing him that the agreement will be or was in the process of being implemented.

115. In the absence of any reasonable explanation for the inordinately long delay and breach of the Release Agreement, the Tribunal concludes that this state of affairs has been highly prejudicial to the Applicant and for which he needs to be compensated.

116. The conduct of the Respondent in this case – the habitual silence when faced with queries from the Applicant – can only be described as unreasonable and dilatory. The amount of time and the number of interlocutors that had to get involved in resolving what should have been a rather simple matter is disturbing. The conduct of the officials acting on behalf of the Secretary-General in this case displays an impressive lack of respect towards the rights and entitlements of a staff member. The Applicant deserved better.

117. The Tribunal therefore orders the payment of compensation in the form of 6 months' net base salary at the FS-5 level.

(signed)

Judge Vinod Boolell

Dated this 3rd day of July 2014

Entered in the Register on this 3rd day of July 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi