UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/149
Judgment No.: UNDT/2016/109
Date: 16 August 2016
Original: English

Before: Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

OURIQUES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Adrien Meubus, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision to impose on him a sanction of separation from service with compensation in lieu of notice and with termination indemnity for misconduct, in respect of an assault.

2. By way of remedies, he requests:

a. Rescission of the contested decision and payment of salary and benefits since the time of his separation (less the compensation paid in lieu of notice and termination indemnity) or, in the alternative, compensation in the amount of two years' net base salary, at the scale the Applicant enjoyed at the time of his separation, less the compensation paid in lieu of notice and termination indemnity, in pecuniary damages for past and future loss of income;

b. Compensation in the amount of one year's net base salary, at the scale the Applicant enjoyed at the time of his separation, for moral/non-pecuniary damages for distress and enduring damage to reputation and professional employment prospects;

c. Pre-judgement interest, and post-judgment interest for up to 30 days after the date of judgment, upon the unpaid amounts detailed under para. 2.a above, set at the US Prime Rate, compounded semi-annually from the date at which each payment would have been due but for the contested decision; and

d. Post-judgment interest upon all the foregoing amounts, set at the US Prime Rate plus 5% accruing from 30 days after the date of judgment by the Tribunal, including through any period of unsuccessful appeal.

Facts

3. The Applicant joined the Organization in June 1999, as a Messenger (G-3) with the United Nations Office at Geneva ("UNOG"), where he worked until the contested decision was implemented on 7 May 2015. There is no record of any previous disciplinary incident.

4. From late August to early October 2014, the Applicant was in Brazil, his home country, visiting his father who was then gravely ill and passed away on 12 February 2015. Upon his return to Geneva, in October 2014, the Applicant's wife told him that she had been advised in September that she had a suspected tumour requiring surgery. The Applicant visited his treating doctor, who advised him to go on sick leave to avoid a breakdown, as he was suffering from loss of appetite and sleeplessness. The Applicant did not follow this advice.

5. On 5 November 2014, while driving to work on his motorcycle, the Applicant had a verbal dispute with another motorcyclist who allegedly insulted and criticised him for driving on French and not Swiss plate numbers. This motorcyclist happened to also be a staff member and the Applicant recognized him in the course of their argument.

6. Upon arriving at the UNOG premises drive-in entrance, the Applicant stopped in front of the security guard posted there and stepped off his scooter. The other motorcyclist arrived at the entrance moments later and also stopped behind the boom gate and in front of the gate's guard. The Applicant approached the other staff member, who was wearing a helmet, and punched him repeatedly in the head. Several security guards immediately intervened to stop the altercation. The incident at the gate, which lasted approximately four seconds, was recorded by security cameras.

7. Shortly after the incident, the other staff member complained by email to the Security and Safety Service ("SSS") and, following instructions received, he provided a description of the incident by email of the same day.

8. After talking with him at his workplace, SSS took the Applicant's official statement on the very same afternoon. He described the traffic altercation that occurred prior to his arrival at the United Nations premises gate, and stated that his recollection of the incident itself was blurred and that he believed that he had hustled the complainant without injuring him.

9. The complainant went to the Medical Service Section ("MSS"), UNOG, which certified that he had a swollen cheek and a small laceration in the internal face of the cheek. The following day, 6 November 2014, an external doctor certified that he had a bruise on his right cheek and a laceration of approximately one centimetre in the buccal mucosa.[1]

10. After the incident, the Applicant saw his doctor and was prescribed anti-depressants.

11. On 7 November 2014, the complainant reported the incident to the Swiss police.

12. By letter of the Director, Division of Administration, dated 7 November 2014, the Applicant was informed that an investigation of the incident had been launched and that he was placed, with immediate effect, on administrative leave with pay pending the investigation.

13. On 11 November 2014, SSS rendered its preliminary investigation report. It concluded that the Applicant had physically assaulted the complainant within the United Nations territory and that both had previously engaged in a verbal altercation on the road to the United Nations on their respective motorcycles, during which the complainant had insulted the Applicant. The conclusions of the preliminary investigation were based on: the initial report of the complainant, the Applicant's statement, the medical certificates provided by the complainant, the video footage, and the statement of one of the guards who witnessed the incident.

[1] The inner lining of the cheeks and lips.

14. On or about 13 November 2014, the Applicant provided the investigators with a medical certificate indicating that he had been under treatment for two months due to a particularly difficult family situation, which could justify a possible loss of self-control. It further stated that the Applicant had been advised, before the incident, to go on sick leave, which he had declined out of commitment to his work.

15. On 20 November 2014, the Chief, Human Resources Management Service, UNOG, requested the Applicant to undergo an examination by MSS to assess his ability to return to work without endangering third persons' security. He was examined on 21 November 2014, and MSS concluded that he represented no risk and that he could return to work.

16. On 23 November 2014, the Applicant sent a written apology to the complainant.

17. The Applicant produced a medical certificate, dated 24 November 2014, stating that he was fit to resume full time work, and that he would remain under psychotherapeutic treatment.

18. The Applicant returned to work on 25 November 2014.

19. On 25 November 2014, the Officer-in-Charge, Division of Administration, UNOG, transmitted the 11 November 2014 report on the incident, with supporting documents, to the Office of Human Resources Management ("OHRM") for appropriate action.

20. By memorandum dated 11 December 2014, the Chief, Human Resources Policy Service, OHRM, issued formal charges of misconduct against the Applicant and requested him to provide comments on them, which he did on 19 January 2015.

21. On 24 April 2015, the Swiss judicial authorities decided not to press charges following the criminal complaint lodged by the staff member who sustained the assault. This decision was reiterated and made known to the Applicant by an order (*Ordonnance de non-entrée en matière*) dated 25 June 2015.

22. By letter dated 29 April 2015, the Applicant was informed of his separation from service with compensation in lieu of notice and with termination indemnities, as a disciplinary measure for assault. The letter read, in relevant part:

> In determining the appropriate sanction, the Under-Secretary-General for Management, on behalf of the Secretary-General, has considered the nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to your case. The Under-Secretary-General for Management, on behalf of the Secretary-General, has noted, among other things, that conduct of the nature in which you engaged usually results in dismissal. However, your long, satisfactory service with the Organization, your personal circumstances (namely, the exceptional amount of stress that you are experiencing at the time due to the illness of your father and wife), and the fact that the victim of the assault may have directed abusive language towards you prior to the assault, operate as mitigating factors in your case.

23. The present application was filed on 27 July 2015. The Respondent filed his reply on 26 August 2015.

24. A case management discussion took place on 2 October 2015.

25. Pursuant to Order No. 187 (GVA/2015) of 5 October 2015, the Applicant filed additional comments on 19 November 2015, and the Respondent responded thereto on 10 November 2015.

Parties' submissions

26. The Applicant's principal contentions are:

a. The Applicant was under extreme stress at the time of the incident. His inexperience, as he had never suffered a mental illness, led him to misjudge the gravity of his condition and decline the proposed sick leave;

b. The video footage of the incident makes patent that the Applicant's actions were in no way rational. The assault occurred immediately in front of a security guard, which would inevitably result in disciplinary action.

This indicates that the Applicant was not capable of considering his actions. He was unable to control himself due to his mental state at the time;

c. The description of the Applicant's temper in his performance evaluations and his 15 years of exemplary service show that, absent his mental condition, the incident would not have occurred. He was treated after the incident and both MSS and the Applicant's treating physician found that he represented no threat in resuming work, hence dealing with his capability to return to work as a purely medical issue. Thereby, they accepted that the Applicant's mental state at the material time was the primary cause of the incident, and that it had been successfully addressed to remove the risk;

d. After the incident, the Applicant admitted the assault, recognised his culpability and demonstrated genuine remorse. He also apologised to the complainant;

e. The incident itself was caused by a momentary and entirely out of character loss of control on the part of the Applicant. It lasted no more than a few seconds and caused minimal injuries to the complainant, who had possibly engaged in provocation, and caused no reputational damage to the Organization;

f. A review of the proportionality of the contested sanction includes whether the decision-maker failed to take into account relevant factors or has taken into account irrelevant factors;

g. The sanction was disproportionate in that it was not necessary to achieve the Administration's objectives. After treating the Applicant's mental state after the incident, and given his sincere remorse, there was no risk of him exhibiting again the same sort of behaviour;

h. While referring to the Applicant's "personal circumstances (namely, the exceptional amount of stress that [he was] experiencing at the time due to the illness of [his] father and wife" as mitigating factors, the ASG/OHRM misrepresented the nature of this mitigation, demonstrating that it was not

correctly applied. The stress the Applicant was under had been medically diagnosed. The Administration seemingly adopted the position that this stress was the substantial cause of the Applicant's misconduct when it addressed the question of whether the Applicant posed a threat by resuming work as a medical rather than a security issue. It is inconsistent not to take the medical factor into account in determining the relevant sanction;

i. No enquiries into the Applicant's mental state were made by investigators, who did not even approach MSS for information in this respect. The Organization failed to uphold the duty of care to its staff members, stemming from staff rule 1.2(c). Such duty must extend to considering a staff-member's mental health prior to terminating their employment where there is a clear indication that he or she may be suffering from a mental health condition that may have created the conditions purportedly requiring his separation. Moreover, as a matter of investigative thoroughness, once the Applicant had provided a medical report stating that he suffered from a mental condition at the material time, the investigators were obliged to enquire into this issue, which needed to be substantiated as a potential mitigating factor; instead, it appears that the investigators considered that their role ended once sufficient evidence for charge had been gathered. Since the investigation failed to ascertain the role that the Applicant's mental health played in the incident, the decision-maker did not have the requisite information to weigh this factor;

j. Additionally, the Respondent's argument that the Applicant's mental state was not so severe as to prevent him from understanding the nature and quality of his actions is misplaced, as it comes to applying the test from a defence of criminal insanity. This test, which is extremely high, is immaterial for the purpose of considering the Applicant's mental condition, not as a criminal defence, but as a mitigating factor. Equally misplaced is the Respondent's reliance on the fact that it was the Applicant's choice to decline the sick leave. It cannot be assumed that a person suffering from mental issues will make the best decisions regarding his care and, in any

event, this is irrelevant for the purpose of taking into account his condition as a mitigating circumstance;

k. The Respondent contends that the Applicant's stress as a mitigating factor was properly considered, and that it prevented his dismissal. However, mitigating factors sighted in assault charges in the last four years include provocation by the complainant and delay in referring the matter for disciplinary action, which are not of the same level of mitigation as those present in the instant case. Moreover, the Administration failed to take into account the absence of any aggravating circumstances, as well other mitigating features, such as the short duration of the incident, lack of premeditation, low seriousness of the injuries, genuine remorse, absence of risk of reoccurrence, and lack of follow-up by the national authorities. Hence, the decision is vitiated by the failure to weigh the importance of the relevant mitigating circumstances;

l. No witness statement was taken from the complainant; the email annexed to the investigation report has no status in evidentiary terms. In the absence of such a statement, several factual aspects of the incident are not supported by clear and convincing evidence. Also, as regards the interactions between the Applicant and the complainant immediately before the event, the only valid evidence remains the Applicant's account; despite his unchallenged account that there had been provocation, that is, a circumstance routinely taken as a mitigating one, the Administration did not consider that the existence of provocation was an established fact;

m. Even if the incident was to be considered as having occurred on United Nations premises, it was in no way work-related. The Swiss national authorities, faced with a formal complaint by the victim and a complete confession from the Applicant, considered that the incident was not sufficiently serious to require any further action. This demonstrated that there was no potential for reputational damage to the Organization and evidences that the sanction was manifestly disproportionate;

n. According to the principle of progressive discipline, the ultimate sanction of separation should not be applied to address a first infraction. Having characterised the issue as medical, and in view of the relatively low level of the assault, the separation was far from the only sanction open to the Administration;

o. Contrary to that stated in the sanction letter, assault does not usually result in dismissal. The practice of the Secretary-General in disciplinary cases since 2010 reveals that 44% of the cases did not lead to separation, and those that did, included aggravating factors and never the level of mitigation existing in the Applicant's case. The Administration has misrepresented the practice in dealing with assault and, as a result, calculated his sanction from an inappropriate starting point, thus taking into account an incorrect consideration which vitiates the decision;

p. Beyond that, a radical change can be seen in the sanctions handed down in assault cases since 2002: prior to 1 July 2010 only 17% of the staff members found responsible of assault were separated; between 1 July 2010 and 30 June 2011, slightly less of half of them were separated; and from July 2011, 85% of the staff members charged with assault were separated. These figures demonstrate that a policy decision was taken to apply a more severe sanction to assault cases. However, according to sec. 1.2 of Secretary-General bulletin ST/SGB/2009/4 (Procedures for the Promulgation of Administrative Issuances), such policies must be published to be lawful (as it was done, for instance, regarding sexual abuse and exploitation with the promulgation of ST/SGB/2003/13). A review of past disciplinary practice reveals that more serious assaults than the one at issue and with less mitigation, resulted in the same sanction that the Applicant received. The only explanation seems to be that mitigating factors were not weighed, but were instead simply applied in a mathematical fashion such that assault plus mitigation result in a particular sanction; and

q. The separation decision caused the Applicant to fall into depression. Aged 53, with 15 years of service with the Organization, and with this blot in his employment history, his chances of securing further employment are greatly diminished.

27. The Respondent's principal contentions are:

a. In determining the appropriate sanction, the Administration has discretion to weight aggravating and mitigating circumstances. In this case, it considered the nature and gravity of the misconduct and the applicable mitigating or aggravating factors. It was a proper exercise of its discretion to impose a sanction on the more severe end of the spectrum. The Tribunal may disturb a sanction imposed on the grounds of proportionality only if it is blatantly illegal, arbitrary, adopted beyond the limits stated in the respective norms, excessive, abusive, discriminatory or absurd in its severity;

b. The Applicant's misconduct is serious. It took place in the drive-in entrance of UNOG and resulted in physical injury. Abuse within the workplace is prohibited by staff rule 1.2(f), and sec. 2(d) of ST/AI/371 (Revised disciplinary measures and procedures) explicitly cites assault to other staff members as constituting misconduct. It runs contrary to the aims and principles of the Organization and constitutes an unlawful and intentional violation of a victim's right. Management has a duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offense and any form of abusive conduct;

c. A review of recent past practice in disciplinary matters shows that since July 2011, dismissal has most often been imposed in cases involving assault with no mitigating factors; where mitigating factors were present, separation from service with compensation in lieu of notice, with or without termination indemnity, have most often been imposed. Since 2011, the Respondent's consistent approach to disciplinary matters involving workplace violence solidified around the principle that workplace violence constitutes serious misconduct and is not tolerated;

d. The unusual amount of stress that the Applicant was experiencing at the material time was taken into account as a mitigating factor, as were his unblemished record and long service with the Organization, as well as the complainant's actions. The Applicant concedes that his mental state was not so severe to prevent him from appreciating the nature and quality of his actions. The decision to remain at work despite his treating doctor's recommendation is attributable to the Applicant himself;

e. In view of the mitigating circumstances, the sanction imposed on the Applicant was not the most severe one available to the Respondent; both dismissal and separation from service with compensation in lieu of notice and without termination indemnity are more severe sanctions;

f. The Respondent enjoys discretion to attribute weight to a given factor. The fact that the assault resulted in injury of the victim renders it more serious. In any case, the minor character of the injuries is not mitigating. The remorse expressed by the Applicant in his apology email does not constitute a mitigating factor, in view of the gravity of the facts. Additionally, he does not seem to have appreciated the full gravity of his conduct, since he repeatedly qualifies the consequences of his misconduct on the victim as "minor". While premeditation would amount to an aggravating factor, its absence is not a mitigating circumstance. The chance of reoccurrence is not relevant in determining the sanction being imposed. The fact that national authorities did not pursue the case in national courts is not relevant to the workplace disciplinary process. Disciplinary and criminal proceedings are distinct in nature, objectives and consequences; the Organization is not bound by any domestic authorities' findings;

g. The 5 November 2014 email by the complainant constitutes a "signed written statement" under ST/AI/371, as nowhere the latter prescribes that statements must contain a handwritten or specific electronic signature. In any event, the instruction does not require that statements be taken, but if they exist and are relevant, that they be forwarded to the Under-Secretary-General for Management. The facts described in the complainant's email

were corroborated by other evidence. The Appeals Tribunal has held that, where facts are clear, there is no need for additional investigation;

h. There is no duty on the Administration to investigate the mental state of a staff member before the imposition of a disciplinary sanction. The letter provided by the Applicant's treating physician, on a date unknown to the Respondent, did not state that he was suffering from a mental condition, but only that he was experiencing "difficult family circumstances" which could explain a "change in mood" and a "possible loss of self-control; and

i. A sufficient nexus exists between the Applicant's conduct and the workplace for it to be considered as having occurred at the workplace.

Consideration

Framework of judicial review

28. It is trite law that the Secretary-General enjoys broad discretion as to the institution, conduct and outcome of disciplinary proceedings against its staff. This discretion is not to be lightly interfered with by the Tribunal, which should not substitute its own opinion for that of the Administration.

29. When reviewing an impugned disciplinary measure, the Tribunal's role is to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence (*Haniya* 2010-UNAT-024, *Wishah* 2015-UNAT-537, *Portillo Moya* 2015-UNAT-423, *Applicant* 2013-UNAT-302, *Kamara* 2014-UNAT-398, *Walden* 2014-UNAT-436, *Koutang* 2013-UNAT-374, *Nasrallah* 2013-UNAT-310, *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Aqel* 2010-UNAT-040, *Maslamani* 2010-UNAT-028).

30. In the instant case, the Applicant does not deny, and, having examined the file, the Tribunal is satisfied, that the reality of the facts imputed was indeed proven to the required standard and that they were rightfully characterised as a violation of staff rule 1.2(f). Therefore, it is not necessary for the Tribunal to further analyse these aspects. Rather, the main issue in contention is the

proportionality of the sanction imposed and, in this connection, whether the decision is vitiated for failing to take into account relevant matters and taking into account irrelevant matters when making it (*Sanwidi* 2010-UNAT-084, *Jaffa* 2015-UNAT-545).

31. Indeed, under staff rule 10.3(b), due process in the disciplinary process requires that "[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

32. The determination of the adequate sanction for a given misconduct falls in principle within the Administration's remit. Only where the sanction imposed is found to be blatantly illegal, arbitrary, adopted beyond the limits set in the relevant norms, excessive, abusive, discriminatory or absurd in severity, the Tribunal must declare such sanction unlawful and modify it (*Portillo Moya* 2015-UNAT-423; see also *Abu Jarbou* 2013-UNAT-292, *Aqel* 2010-UNAT-040).

33. The Secretary-General's discretion to decide upon the appropriate sanction to impose includes the latitude to weight relevant aggravating and mitigating factors (*Toukolon* 2014-UNAT-407). In turn, it is properly within the scope of a judicial review to examine the totality of the circumstances surrounding the choice of the sanction at stake, including mitigating factors, as part of the Tribunal's assessment of proportionality (*Ogorodnikov* 2015-UNAT-549).

34. Also, it is the Tribunal's task to determine if a proper investigation has taken place, or if substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028, *Hallal* 2012-UNAT-207).

Circumstances considered in determining the impugned measure

35. The letter of 29 April 2015 notifying the Applicant of his termination made clear that, in essence, two sets of considerations guided the Under-Secretary-General for Management in choosing the sanction imposed: on the one hand, the measures adopted in past cases involving misconduct of the same nature, and, on the other hand, a series of mitigating factors. In its review, the Tribunal will focus on the elements stated by the decision-maker at the time of the imposition of the

contested termination, rather than other factors that the parties might have elaborated on in their subsequent pleadings for completeness.

Organization's past practice in matters of assault

36. The Under-Secretary-General for Management stated in the decision letter that "the nature of [the Applicant's] actions" would be considered in determining his sanction, coupled with the "past practice of the Organization in matters of comparable misconduct".

37. The Applicant's conduct by punching another staff member was correctly characterised as assault. Undisputedly, this behaviour is contrary to staff rule 1.2(f) and has been expressly qualified as misconduct in sec. 2(d) of ST/AI/371. The parties are in agreement, and the Tribunal has verified, that most of the assault matters since 2011 have resulted in dismissal or termination sanctions, especially if they involved not only verbal but physical violence. Nevertheless, the Applicant argues that since 2011, the Respondent has engaged, without any valid legal basis, in a sort of "forfeit approach", by which physical assault invariably leads to separation from service of the responsible staff member.

38. In defence, the Respondent maintains that the systematic imposition of dismissal/termination measures further to physical assault merely reflects that the Organization regards assault as serious misconduct. Generally, this falls within the Secretary-General's discretion and cannot be said to be an unreasonable stance. In addition, it is legitimate for the Administration, as a matter of fairness and equality of treatment among staff, to follow the principle of "parity of sanctions", whereby comparable conducts should bring about similar sanctions.

39. However, the Tribunal is greatly concerned that a review of the recent *Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour*[2] tends to support the Applicant's position, since cases of physical assault of similar or higher gravity than the Applicant's and/or with lesser

[2] Information Circulars ST/IC/2011/20, ST/IC/2012/19, ST/IC/2013/29, ST/IC/2014/26 and ST/IC/2015/22.

mitigating circumstances result in the same sanction.[3] This would indeed suggest that the Administration takes the approach that termination with indemnity is the minimum sanction acceptable for an act of physical assault.

40. Notwithstanding this worrisome trend, the Tribunal opines that this is too thin a basis to find that the Administration applies an "automated response" or "forfeit approach" to assault matters. However, it wishes to underline that such line of action would be inconsistent with the duty to issue proportionate sanctions, because it would mean that the general nature and characterization of the misconduct would almost exclusively dictate the penalty, leaving little room to appreciate individual circumstances, including the actual, rather than comparative, severity of each case. It would notably constrain the consideration of aggravating and mitigating factors, with the risk of effectively preventing the Secretary-General from choosing measures that are truly commensurate to the nature *and the gravity* of the facts.

Mitigating factors

41. The Under-Secretary-General for Management's letter of 29 April 2015 explicitly cites three circumstances as mitigating factors:

a. The Applicant's long and satisfactory service;

b. His personal circumstances, namely, "the exceptional amount of stress that [he was] experiencing at the time due to the illness of [his] father and wife"; and

c. The fact that the victim "*may have* directed abusive language towards [him] prior to the assault" (emphasis added).

42. The Applicant's key contention is that his mental condition was not fully considered as a mitigation, whereas the Respondent asserts in contradiction that the exceptionally stressful personal situation that the Applicant was going through was taken into account, suggesting that this contributed to him not receiving a

[3] See ST/IC/2015/22, paras. 52, 53 and 58 ; ST/IC/2014/26, paras. 46 and 47.

more severe measure among those envisaged in staff rule 10.2 (that is, dismissal or separation without termination indemnity).

43. It must be emphasised that the decision letter of 29 April 2015 mentions the "stress" undergone by the Applicant. At no point does it refer to the Applicant having a medical condition, although this is a qualitatively different circumstance than mere high stress. Indeed, the Applicant suffered from a diagnosed mental health condition that required months of treatment through anti-depressants and psychotherapy, which had manifested and been detected by a doctor prior to the incident. As the Applicant points out, the omission of the Applicant's illness throughout the disciplinary proceedings seems somehow contradictory with the fact that the Organization treated his case as a medical matter for the purpose of assessing his fitness to resume work; specifically, he was directed to undertake an assessment of his health state by the medical services of UNOG and admitted back to his post further to a positive assessment by a physician.

44. It is noteworthy that the investigation conducted into the incident in early November 2014 lacked any inquiry or step tending to substantiate the existence or the seriousness of the Applicant's state of mental health at the time of the assault. In fact, the investigation was closed by 11 November 2014, that is, just six days since the incident. As a result, by the time the Applicant provided, on or about 13 November 2014, a medical certificate attesting to his mental health problems, the report had already been handed by SSS to the UNOG Administration two days earlier.

45. This could have carried no major consequences if the inquiry had been simply a preliminary fact-finding endeavour, as it seems to have been the initial intention, since the report itself was titled "Report of preliminary investigation". However, no complementary inquiries were subsequently made, even after the Applicant produced a medical certificate signed by his treating doctor pointing directly to his mental health issues. The Tribunal holds that, although the said certificate did not name or identify his condition, it contained sufficient indications of an illness and its treatment, to have oriented the Administration to inquire further in order to fully discharge its duty of full, adequate and proper

consideration of the matter before making a determination of its consequences for the Applicant.

46. Additionally, the investigation was incomplete on another point, namely the traffic altercation that occurred between the Applicant and the complainant immediately before the assault. More precisely, the Applicant stated that the complainant had repeatedly insulted him on the road to United Nations premises, including invectives of xenophobe connotation. Yet, neither the investigators, nor UNOG or OHRM at a later stage, made efforts to shed light on these allegations. Indeed, if the Applicant's assertions in respect of the complainant's conduct had been properly considered, they should have been cause to commence a separate investigation, as such conduct, if proven, may itself have amounted to misconduct by the complainant. The Applicant's allegations at the time of his interview required, at the very least, to be put to the complainant.

47. The Tribunal is aware that other reliable evidence existed, but only regarding the episode of a few seconds that occurred at the entrance of the UNOG compound, not the altercation prior to it. This reinforces its impression that the investigation was strictly circumscribed to the very assault itself, neglecting the alleged surrounding circumstances. In this regard, it is noticeable that the complainant's formal witness statement was never taken; rather, the investigators relied on the account he gave by email hours after the incident.

48. It is not an absolute requirement in the course of an investigation to take a statement of the complainant on a misconduct case, nor to have such a statement formally recorded and signed by hand (see *Oh* 2014-UNAT-480). If clear and convincing evidence exists from other sources there is no obligation to bring the inquiries further (*Nasrallah* 2013-UNAT-310). This has to be determined on a case by case basis. In the case at hand, however, the absence of an interview with and a formal statement of the complainant implied that the complainant was never questioned about his own conduct, nor confronted with the Applicant's allegations, and, more importantly, that certain facts remained to be elucidated.

49. This significantly affected the integrity of the investigation, as it was relevant in this case to establish if and to what extent the complainant had engaged in provocation, as it was alleged by the Applicant. Indeed, its pertinence is evidenced by the fact that the Under-Secretary-General for Management brought into consideration as a mitigating factor the *possibility* that such a provocation had taken place. The logical inference would be that, had it been proven that the Applicant was subjected to strong provocation by the complainant, this circumstance could have been attached greater weight when determining the sanction. However, the Organization did not make the necessary effort to gather evidence on this.

50. Despite its shortcomings on at least two relevant questions, the investigation of SSS, UNOG, ended up being the one and only investigation carried out, and was transmitted to OHRM as the investigation on which basis, as per art. 3 of Administrative Instruction ST/AI/371, disciplinary proceedings should be launched. Interestingly, the *Rapport d'enquête préliminaire* of 11 November 2014, when sent to the Assistant Secretary-General, OHRM, on 25 November 2014, is referred to as "[t]he Investigative Report". The fact that the report was a preliminary one, and may thus not have been complete, is not alluded to in the 29 April 2015 memorandum conveying the decision. The only reference is to the conclusion being reached "[a]fter a thorough review of the entire dossier". The evidence is that the dossier included the following documents:

a. Investigation Report titled "Agression physique d'un fonctionnaire";

b. A medical certificate concerning the complainant;

c. A letter placing the Applicant on administrative leave; and

d. A letter of referral of the matter to OHRM dated 25 November 2014, to which said documents were annexed.

51. OHRM offered the Applicant an opportunity to comment on the charges against him. On that occasion, he was able to raise his mental health condition and the altercation that preceded the assault. Notwithstanding that, according to the

record before the Tribunal, even then, OHRM sought no additional information in this regard.

52. It is noted that there was already on the Applicant's personnel file, a medical report of 24 November 2014 specifically referring to the Applicant requiring to undergo psychotherapy. There is no evidence that this report was brought to the attention of the decision-maker, although the Applicant may have quite reasonably assumed that it was. The Applicant was not advised of the precise material that was to be sent to the decision-maker, and in respect of which he should be able to comment when he was requested to do so as part of his due process rights, as set out in a memorandum to him of 11 December 2011. As a medical report of the Applicant indicating more precisely his need for psychotherapy was provided on or about 24 November 2014, it is reasonable for the Applicant to assume that it was to be taken into account. It transpires that it was not in fact included in the dossier provided to the decision-maker. It should have been, as it was directly relevant.

53. The dangers of relying upon preliminary reports when making decisions are disclosed in this case. If the 24 November 2014 medical report in respect of the Applicant had been included in the dossier sent to the decision–maker, it would have been sufficient to ensure that enquiries as to the mental health condition of the Applicant at the time of the assault were made and then taken into account when making a decision. The decision-maker was not put in a position to fully and properly consider this matter in this respect. Those involved failed in their duty to ensure the decision-maker had all relevant material upon which to base the decision.

54. Based on all the foregoing, the Tribunal finds that the Applicant was disciplined on the basis of a significantly incomplete preliminary investigation, which was deemed as a complete investigation. Moreover, its shortcomings were such that, whereas solid inculpatory evidence was gathered, it was less thorough regarding exculpatory evidence, notably on the mitigating circumstances in respect of provocation and mental illness of the Applicant at the time of the assault. Yet, the basic conclusions, that remained unchanged until the end of the

disciplinary proceedings, were reached and expressed at the outcome of the investigation. This not only affected the quality of the disciplinary process, but may in addition reveal a dereliction of the duty of care towards the Applicant as a staff member of the Organization, inasmuch as his health and security were not properly taken into account before deciding upon the termination of his service as the sanction to be applied to him.

55. It is the Tribunal's finding that the decision-maker received insufficient or incomplete information on two relevant circumstances, namely, the Applicant's mental health condition and the alleged provocation that took place before the assault. This had the effect that these fundamental considerations could not be properly appreciated as mitigating factors. This finding is clearly supported by the language of the termination letter itself, which, as noted, did not even allude to the Applicant's mental health condition, but solely to his "extraordinary amount of stress", and referred only to the possibility that the Applicant had been provoked.

56. Additionally, the Tribunal notes that neither the fact that the Applicant expressed credible remorse, nor his apologies to the victim were mentioned in the 29 April 2015 letter; thus, they do not seem to have been taken into account, although they usually operate as mitigating factors, including in assault cases. There is no evidence of the provision of this information to the decision-maker by those dealing with the matter. Again, the decision-maker was denied the opportunity to fully and properly consider the matter.

57. In conclusion, the Tribunal finds that the decision-maker was not in a position to adequately weigh all mitigating factors present in this case, and notably, the issues of the Applicant's mental state and the alleged provocation. The decision fails to stand on the grounds of the decision-maker's failure to take into account fundamentally relevant material, as it was either not properly or at all obtained, or not brought to the Under-Secretary-General's attention. On this basis, the decision is rescinded.

58. In the alternative, when all relevant circumstances that are now the subject of evidence before the Tribunal are duly considered, the Applicant's separation is disproportionate to the nature and gravity of the behaviour that triggered it.

Remedies

59. Having concluded that the impugned disciplinary measure was disproportionate to the conduct sanctioned, it is appropriate to rescind the decision to impose it. This implies the reinstatement of the Applicant on his post and under the same kind of contract he held at the time of his separation, as well as payment of the full emoluments that he would have received from the date his separation from service was implemented to that of his effective reinstatement, including the applicable Organization's contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation.

60. As part of the remedies it may grant, when the Tribunal finds a disciplinary sanction to be unlawful, it has the power to modify it by setting a different one (*Portillo Moya* 2015-UNAT-423). Exercising such prerogative, the Tribunal decides to impose on the Applicant a two-year deferment of eligibility for consideration for promotion, under staff rule 10.2(vi), instead of separation from service with compensation in lieu of notice and with termination indemnity.

61. However, since this case undeniably concerns the termination of the Applicant's appointment, the Tribunal is bound, pursuant to art. 10.5(a) of its Statute, to set an amount that the Respondent may elect to pay as an alternative to its effective rescission. In doing so, the Tribunal recalls that at the time of the issuance of this Judgment, the Applicant has been out of employment with the Organization for nearly 16 months following the imposition of the disciplinary measure at issue. With this in mind, the Tribunal sets the alternative compensation in this case at 24 months of the Applicant's net salary at the rate that he was paid at the time of his separation, plus the applicable Organization's contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation.

62. Also, the Applicant has provided medical evidence that the implementation of the separation from service sanction, which this Tribunal has now found to have been disproportionate, had a direct and serious impact on the Applicant's mental health state. The Tribunal is mindful, nonetheless, that the Applicant did indeed engage in misconduct eliciting a certain degree of punishment, albeit less

severe than the one applied. Accordingly, the Applicant is to be compensated only to the extent that the sanction initially imposed was in excess of the measure that his conduct should reasonably have attracted. On this account, the Tribunal orders that the Applicant be paid moral damages in the amount equivalent to three months of his net salary at the rate he received at the time of his separation.

Conclusion

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

a. The disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity is rescinded and replaced by that of a two-year deferment of eligibility for consideration for promotion;

b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision as per paragraph 59 above, the Applicant shall be paid, as an alternative, a sum equivalent to 24 months of the Applicant's net salary at the rate that he was paid at the time of his separation, plus the applicable Organization's contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation.

c. The Applicant shall also be paid moral damages in the amount of three months of his net salary at the rate he received at the time of his separation; and

d. The aforementioned compensations shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(*Signed*)
Judge Rowan Downing
Dated this 16th day of August 2016

Entered in the Register on this 16th day of August 2016

(*Signed*)

René M. Vargas M., Registrar, Geneva