



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/067

Judgment No.: UNDT/2017/100

Date: 29 December 2017

Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

MAJUT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Mr. Monyluak Alor Kuol, PC

**Counsel for Respondent:**

Ms. Miryoung An, ALS/OHRM, UN Secretariat

Ms. Susan Maddox, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member with the United Nations Mission in South Sudan (“UNMISS”), filed an application before the Dispute Tribunal contesting the decision to separate him from service with compensation in lieu of notice and without termination indemnity. As remedies in the application filed on 16 August 2016, he requested the following relief:

- a. Termination be declared unlawful.
- b. A declaration that the reasons stated in the letter of termination do not constitute proper ground for termination.
- c. The Respondent to withdraw the letter of termination and issue the Claimant a letter clearing him of any wrongdoing.
- d. The Claimant is paid advocates cost, unpaid salaries and appropriate damages for wrongful termination.

2. In the amended application filed on 6 March 2017, the Applicant indicated the relief as follows:

... Lastly, the Separation from Service was clearly based on a biased investigation. The Applicant, would seek the following orders be passed by the honorable tribunal:

- a. That the separation from service be set aside.
- b. That the Applicant be reinstated to his previous position
- c. That the Respondent should pay to the Applicant all unpaid salaries since separation of service.
- d. That the Respondent should pay moral damages as a result of the unlawful separation from service considering the feeling of stress, anxiety and psychological damage the applicant has been subjected to.

3. The Respondent requested the application be dismissed in its entirety because the Applicant failed to establish a basis on which the disciplinary measure imposed on him should be modified or rescinded.

## **Factual background**

4. The disciplinary process was initiated by a memorandum dated 4 September 2015, stating that:

1. [...] The referral was based on a referendum from [name redacted, Ms. EML], Special Representative of the Secretary General, United Nations Mission in South Sudan (“UNMISS”), dated 17 April 2015, and an investigation report prepared by the Special Investigations Unit (“SIU”), UNMISS, dated 17 December 2014, together with supporting documentation. [...]

...

3. You commenced service with the Organization on 11 December 2004. You currently hold a fixed-term appointment and perform the function of Supply Assistant, at the G-4 level.

5. Further, the decision letter of the Officer-in-Charge of the Office of Human Resources Management (“OHRM”) dated 27 April 2016 provided the following:

[...] After a thorough review of the dossier, including your interview statement during the investigation and the comments that you provided following your receipt of the allegations memorandum, the Under-Secretary-General for Management has concluded that they do not displace the evidence on the record against you. In reaching this conclusion, the Under-Secretary-General for Management has had regard, among other things, to the following:

(a) [Name redacted, Mr. TM]’s version of events is more credible than yours because:

a. [Mr. TM’s] statements are consistent with the evidence on the record, particularly, the statements of witnesses to the lead-up and the aftermath of the assault. In particular, [name redacted, Mr. WL’s] statement supported the fact that the argument over the vehicle key was intense and possibly escalated to a physical conflict. The statements of [name redacted, Mr. FB], [name redacted, Mr. MB] and [name redacted, Mr. PM] corroborated Mr. TM’s version of events that he asked for help in the middle of, and after the incident. Furthermore, [name redacted, Mr. SS] stated that he met [Mr. TM] after the assault and noticed [Mr. TM’s] injury on his ear, which is consistent with the medical certificate issued to [Mr. TM] and the statements of [Mr.

MB] and [Mr. PM] that [Mr. TM] was frightened and “emotional with tears” when he rushed into the room and claimed that he had an injury on his ear.

b. [Mr. WL] left the scene before the assault and, therefore, his statement does not support your version of events.

c. With respect to your contention regarding the gate pass, a priority to use the vehicle would not justify your physical assault of [Mr. TM].

(b) Your statement is not consistent with the witnesses’ statements. For instance, [Mr. MB] denied that you showed him a gate pass. Before the argument over the key arose between you and [Mr. TM], [Mr. SS] recounted that he found [Mr. TM] in his office when he went to discuss the issue, while you stated that [Mr. TM] was not in his office.

(c) The record does not support your contention that [Mr. TM’s] injury was self-inflicted. It appears from the record that there was no reason for [Mr. TM] to injure himself as he had the key and there is no information on the record to suggest that [Mr. TM] had malicious motive to raise a false accusation against you. Furthermore, the record showed that the incident occurred within a fairly tight timeframe, and you at no time claimed that [Mr. TM] inflicted the injury on himself during the argument between you and him or in [Mr. MB’s] office. Given [Mr. TM’s] visibly agitated state and his display of his ear as injured when he was in [Mr. MB’s] office, the record does not support the contention that he injured himself after the exchange in [Mr. MB’s] office.

(d) In your comments on the allegations, [name redacted, Mr. LA] was not presented as a witness to the incident, rather to the alleged defamation of you by [Mr. PM]. In this regard, it is noted that [Mr. PM’s] statement bears little probative value given the other evidence on the record. Thus, [Mr. LA] would not disprove the assault or exculpate you from the liability arising from the physical assault.

In light of the foregoing, the Under-Secretary-General for Management has concluded that it is established that you engaged in misconduct by assaulting [Mr. TM] by hitting him in the face with your hands on 5 November 2014.

The Under-Secretary-General for Management has further concluded that your actions violated Staff Regulation 1.2(a), Staff Regulation 1.2(f) and Staff Rule 1.2(f).

The Under-Secretary-General for Management has noted that you were, throughout the investigation and subsequent disciplinary process, accorded due process in accordance with the regulations, rules, policies and practices of the Organization. In particular, you were interviewed and given the opportunity to provide your comments; you were provided with all of the documentation on which the allegations against you were based; you were afforded an extension of time in which to submit your comments on the allegations; and your comments were duly considered.

In determining the appropriate sanction, the Under-Secretary-General for Management took into account the Secretary-General's past practice in similar cases involving a physical assault, which normally attracted sanctions at the stricter end of the spectrum. The Under-Secretary-General for Management considered that there are mitigating factors present in this case, namely: (i) your over 10 years of service with the Organization with positive performance evaluations; and (ii) your claimed personal frustration and stress.

In light of the above, the Under-Secretary-General for Management has decided to impose on you the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with Staff Rule 10.2(a)(viii), effective upon your receipt of this letter. [...]

6. In the report of allegation of misconduct issued on 4 September 2015 by the Assistant Secretary-General of the Office for the Office of Human Resources Management ("ASG/OHRM"), the following factual elements were included (emphasis removed):

IV. Facts revealed by the investigation

... On 5 November 2014, at around 8:30 a.m., [Mr. TM] requested [Mr. SS], Chief of Supply Section, UNMISS, to give him the key to UN-02387, so that he could use the vehicle. [Mr. SS] gave [Mr. TM] the key.

... On the same day, at around 9:00 a.m., you and [Mr. WL], Supply Assistant, UNMISS, asked [Mr. SS] to give you the key of the same vehicle to perform assigned tasks, and [Mr. SS] told you that he already had given the key to [Mr. TM]. You telephoned [Mr. TM] to ask for the key, but [Mr. TM] refused to release the key to you. You reported this to [Mr. SS] and he went to [Mr. TM's] office, together with [Mr. WL], and asked him "what the problem was". [Mr. TM] said that he needed the vehicle and that he had to leave immediately. [Mr. SS] then went to the Transport Section to "arrange for an additional vehicle" for you.

... According to [Mr. TM], while he was inside the vehicle starting the engine, you suddenly opened the door and told him to get out of the vehicle. You asked [Mr. TM] to hand over the key, but [Mr. TM] refused to give you the key and said that he would personally bring the vehicle back to you upon his return. You refused to let [Mr. TM] use the vehicle first. According to [Mr. TM], while he was logging off the car log system and removing his personal things from the vehicle, you suddenly grabbed him and pulled him out of the vehicle.

... [Mr. TM] went back to his office with the key and you followed him to his office demanding the release of the key. [Mr. TM] claimed that, when he told you that “any form of abuse [was] not tolerated and the next time [you] put [your] hands on [him] in that manner, [he] would report [you] to Security”, you said: “what [was] security to [you?]” and “what will security do to [you?]”. [Mr. WL] “heard loud voices”, and entered [Mr. TM’s] office following you.

... In [Mr. TM’s] office, you engaged in heated arguments with [Mr. TM] over the use of the vehicle. [Mr. WL] stated that he asked you to let [Mr. TM] use the vehicle first, but you did not listen to him. [Mr. TM] claimed that you threatened to hit him, and refused to leave the office despite his request. According to [Mr. TM], as he did not give you the key, you told [Mr. WL] to get out of the office so that you could “teach [Mr. TM] a lesson”. [Mr. TM] asked [Mr. WL] to stay, but [Mr. WL] left the office.

... [Mr. TM] then stretched his hand out to his Tetra hand-held radio and pressed the “emergency” button. [Mr. FB], a UNMISS staff member working in the radio room, stated that he “was working that morning when [he] heard an emergency broadcast come over the Tetra radio”, and that “[he] looked at the radio and saw that it had come from [Mr. TM]’s radio[”].

... After [Mr. WL] exited the room, you started hitting [Mr. TM] in his face with your hands. [Mr. TM] tried to defend himself and told you that he would report you to Security. You replied that “Security would do nothing to [you]”. According to [Mr. TM], you told him that, “if [he] [did] lodge a complaint to the relevant authorities ..., [he] [should] have to be prepared to leave [South Sudan] because [you] [would] send [your] national security associates to attack [him]”. [Mr. TM] then told you that his Tetra hand-held radio was on emergency mode, and that it was broadcasting what was happening. You then stopped attacking [Mr. TM].

... [Mr. TM] left his office and walked towards the Security Office. You started following [Mr. TM], and shouted at him that “if [he] [went] to security, [you] [would] call National Security to deal with [him]”. [Mr. TM] ran to the office of [Mr. MB], Security Officer, UNMISS, where [Mr. MB] was in a meeting with [Mr. PM], Security Officer,

UNMISS. According to [Mr. MB], [Mr. TM] looked frightened as if someone were chasing him. [Mr. TM] told [Mr. MB] and [Mr. PM] that he had been beaten by you, and that he was injured. [Mr. TM] showed them his right ear and said: “Look at my right ear, it is swelling and I have a headache, I think I am injured”.

... Following [Mr. TM], you rushed into [Mr. MB’s] office without knocking on the door. According to [Mr. MB], it appeared that “you wanted to grab [Mr. TM]”. [Mr. MB] requested you to respect his office by knocking on the door before entering the office, and asked you to go outside. You refused to go outside and said that you were following [Mr. TM]. [Mr. MB] again requested you to leave the office, and you exited the office. Immediately after exiting the office, you knocked on the door and entered the room again without being invited in. [Mr. MB] asked you to wait outside and come back later. You left the office and slammed the door on your way out. After hearing from [Mr. TM] as to what had occurred, [Mr. MB] told him to seek medical treatment, and submit an incident report. You returned to [Mr. MB’s] office, and told him that “[Mr. TM] should surrender the vehicle key[”]. According to [Mr. MB], you were “very combative”.

... In the meantime, [Mr. SS] went to [Mr. TM’s] office, but could not find you or [Mr. TM]. [Mr. WL] informed [Mr. SS] that you and [Mr. TM] had gone to the Security Office. [Mr. TM] told [Mr. SS] that you “hit him and his ear was swelling”. [Mr. SS] saw “some bruises on [Mr. TM’s] right ear” and that he had “a small cut with some dry blood near his right ear”, so [Mr. TM] told [Mr. SS] that “he [had] informed Security and was on his way to the Medical Unit for a check-up[“]. [Mr. SS] later asked you what had happened, and you told him that “[Mr. TM] hit the emergency button on his radio” and said that: “I am under attack”.

... On 5 November 2014, [name redacted, Dr. NA], Medical Officer, UNMISS, found that [Mr. TM] had a small swelling in size of 1 x 2 cm surrounded by scratch marks behind his right earlobe. [Dr. NA] discharged [Mr. TM] with one day of rest.

#### V. Your account of events

... You denied having attacked [Mr. TM]. You stated that, on 5 November 2014, you went to [Mr. TM’s] office and asked him to give you the key to the UN-02387 as you needed the vehicle to perform your assigned tasks. When [Mr. TM] said he would use the vehicle to buy bread, you asked [Mr. TM] to give priority to official tasks, but [Mr. TM] did not give you the key.

... According to you, [Mr. TM] started shouting at you, called the radio room and claimed that “[he] [was] under attack, someone [was] attacking [him] in [his] office”. [Mr. TM] then went outside his office.

... You left [Mr. TM's] office, went to your supervisor, [Mr. SS], and reported the situation." When you left [Mr. SS's] office, you saw [Mr. TM] walking, and you followed him trying to catch him.

... You told [Mr. MB] that you needed the vehicle key which [Mr. TM] had. [Mr. MB] replied that the issue should be resolved within the Supply Section. After you talked to [Mr. MB], you were told by a national staff member whose name you do not remember that [Mr. TM] was in [Mr. MB's] office. You rushed into [Mr. MB's] office and saw [Mr. MB, Mr. PM, Mr. TM] and another Security Officer whose name you do not remember. According to you, the Security Officer whose name you do not remember asked why you did not knock on the door and asked you to leave the office. In [Mr. MB's] office, you told them that you had to use UN-02387, and that [Mr. TM] had the key to the vehicle. The Security Officer whose name you do not remember told you that the issue should be resolved within the Supply Section, and that you might file a complaint.

## VI. Considerations

... We consider that, while your account of events is not consistent with the witnesses' statement as noted in the Section V. above, [Mr. TM's] version of events is supported by the evidence, particularly, the other witnesses' statements, as further elaborated below.

a) [Mr. WL] stated that he "heard loud voices" from [Mr. TM's] office, and entered the office. [Mr. WL] witnessed that you and [Mr. TM] engaged in an argument over the vehicle key. [Mr. WL] left the room in the middle of a heated exchange between you and [Mr. TM]. While [Mr. WL] did not give the specific reason for his departure, [Mr. TM] claimed that you "ordered" [Mr. WL] to leave the office, and [Mr. SS] heard from [Mr. WL] that he did not want to be involved in the matter. Accordingly, the circumstances suggest that the situation was extremely tense, which could escalate to a physical conflict.

b) The record contains statements of several witnesses, namely, [Mr. SS, Mr. MB, Mr. PM, and Mr. FB], consistently indicating that [Mr. TM] asked for help.

(i) During the alleged physical assault, it is clear that [Mr. TM] signaled an emergency through his radio, which you also admitted during the investigation.

(ii) [Mr. MB] and [Mr. PM] stated that [Mr. TM] rushed into the office of [Mr. MB] with a frightened look and in a hurry to escape your pursuit. They witnessed that, immediately after [Mr. TM], you entered the room in a hurry "slam[ming] the office door" trying to "grab"



[Mr. TM], which indicates that you were in hot pursuit of [Mr. TM].

c) It is evident that [Mr. TM] was injured that day and advised to take leave for one day. No information suggests that [Mr. TM's] injury was self-inflicted.

... As noted in the Section III. above, the record indicates that you have, in the past, engaged in aggressive and threatening behaviors towards other staff members, and that some of them submitted complaints against you, which led to your supervisors having meetings with you to resolve the issue. [...]"

### **Procedural background**

7. The case was filed on 18 August 2016 and registered as Case No. UNDT/NBI/2016/061.

8. On 16 September 2016, the Respondent filed his reply.

9. Following the decision taken at the Plenary of Dispute Tribunal judges held in May 2016, to balance the Tribunal's workload, the present case was selected to be transferred to the Dispute Tribunal in New York.

10. By Order No. 473 (NBI/2016) dated 3 November 2016, the parties were instructed to express their views, if any, on the transfer of the present case by 10 November 2016.

11. From Order No. 491 (NBI/2016) dated 23 November 2016, it follows that the Tribunal considered the Applicant's reservations to the change of venue to be lacking basis, whereas, considering the heavy case-load of the Dispute Tribunal in Nairobi, a transfer of the case to the Dispute Tribunal in New York would serve the interest of justice by expediting the disposal of the case. Pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, the case was, therefore, transferred to the Dispute Tribunal in New York, where it was registered under Case No. UNDT/NY/2016/067.

12. On 29 November 2016, the case was assigned to the undersigned Judge.

13. By Order No. 13 (NY/2017) dated 17 January 2017, the Tribunal instructed the parties to attend a Case Management Discussion (“CMD”) on 7 February 2017.

14. At the 7 February 2017 CMD, the Applicant and his Counsel, Mr. Monyluak Kuol, participated via telephone (the skype connection malfunctioned) from Juba, South Sudan, and the Respondent was represented by his Counsel, Ms. Miryoung An, who appeared in person. The Tribunal, *inter alia*, inquired about the possibility of resolving the case informally; if the informal resolution of the case was not possible; the Tribunal noted that, since the case concerned an appeal against an administrative decision imposing a disciplinary measure, a hearing should normally be held in accordance with art. 16.2 of the Dispute Tribunal’s Rules of Procedure.

15. On 7 February 2017, the Respondent filed his submission as per the Tribunal’s instructions at the 7 February 2017 CMD, stating that he had “again reached the conclusion that an informal resolution of this case is not acceptable to the Respondent [...] and wishes to proceed with the formal proceedings, including a possible hearing of witnesses”.

16. By Order No. 27 (NY/2017) dated 13 February 2017, the Tribunal instructed the parties to state whether there were any reasons why a hearing on the merits should not be held and, if any of the parties wished to adduce additional written evidence, the party was to submit all the relevant documents or identify what documents he wishes the other party to produce. Insofar as any of the parties wished to call any witnesses, the party was to state: (a) the names and titles of all the witnesses proposed to be called; and (b) for each specific witness, the relevance of the suggested testimony by outlining, in a written witness statement, the facts that each of the suggested witnesses is expected to corroborate.

17. On 3 March 2017, the Respondent filed his submission pursuant to Order No. 27 (NY/2017), stating that a hearing on the merits was not necessary as all possible relevant witnesses have provided “sworn written statements, which were also provided to the Applicant for his comments during the disciplinary process, and submitted to the

Tribunal for its consideration”. The Respondent further indicated that, should the Tribunal decide to hold a hearing, he would call the following three witnesses: Mr. SS; Mr. MB; and Mr. PM, and the Respondent attached copies of their statements obtained during the investigation. The Respondent mentioned that he would not propose to call as witnesses Mr. MT, Mr. WL and Mr. FB.

18. On 6 March 2017, the Applicant filed an “amended application” wherein, with regard to Order No. 27 (NY 12017), the Applicant stated that he is ready to give oral evidence and he proposed the following two witnesses, Mr. WL and Mr. LAK (name redacted).

19. On 10 March 2017, the Respondent filed a motion in response to the Applicant’s amended application, wherein he submitted that new factual contentions and allegations of prejudice and abuse of authority were put forward in the “amended application” that have not been addressed in the reply or during the CMD. Furthermore, the Respondent indicated that the Applicant had not fully complied with Order No. 27 (NY/2017) as he had failed to attach written statements for his proposed witnesses.

20. On 14 March 2017, the Applicant filed copies of two statements given by Mr. WL during the investigation (dated 14 November 2014 and 28 July 2015).

21. On 15 March 2017, the Applicant filed a copy of a written statement given by Mr. LAK, dated 13 March 2017.

22. By Order No. 44 (NY/2017) dated 15 March 2017, the Tribunal instructed the parties to attend a CMD on 22 March 2017.

23. At the 22 March 2017 CMD, the Respondent’s Counsel, *inter alia*, stated that his witnesses had confirmed that they could participate at the hearing from UNMISS by video teleconference (“VTC”) and that they would not be able to travel to Nairobi. The Tribunal noted that, except for the Applicant, all the other witnesses, including the two proposed by the Applicant are currently UNMISS staff members. Furthermore, the Tribunal noted that it would be possible for all participants at the hearing, except from

those who would participate from the New York courtroom (the Tribunal, its staff and the Respondent's Counsel), to be in the same location without having to travel, if UNMISS would organize that the parties and their respective Counsel could have access to the VTC facilities during the entire hearing. The Applicant's Counsel indicated that he had no objection to such an arrangement. The Tribunal instructed the Respondent to contact and make the necessary arrangements with UNMISS, including to ensure that the Applicant and his Counsel would have access to the compound for the hearing. The Tribunal directed the parties to jointly propose hearing dates and a time schedule when all witnesses would be available, and to indicate the order in which the witnesses would testify, taking into account that at least two full days would be needed, the time difference between Juba and New York and the security situation in Juba.

24. By Order No. 61 (NY/2017) dated 30 March 2017, as per its instructions provided at the 22 March 2017 CMD, the Tribunal ordered: (a) the parties to file a jointly signed statement by 21 April 2017 setting forth the agreed and disputed facts and the agreed dates for a hearing together with a time schedule for when all witnesses will be available and the order they will appear; and (b) the Respondent to file his response to Applicant's amended application by 21 April 2017 and confirm that: (i) the VTC facilities at UNMISS would be available for the hearing; (ii) the Applicant and his Counsel would have access to these facilities during the entire hearing and thereby be able to fully participate; and (iii) the appropriate arrangements would be in place to ensure the integrity and setting of the hearing, including that witnesses may not overhear other witnesses' testimonies.

25. The Respondent filed his amended reply on 7 April 2017 pursuant to Order No. 61 (NY/2017).

26. On 21 April 2017, the Applicant filed two separate submissions, namely: (a) a joint submission pursuant to Order No. 61 (NY/2017) but only signed by his Counsel and not the Respondent's Counsel; and (b) a response to the Respondent's amended reply.

27. Also on 21 April 2017, the Respondent filed a jointly signed submission to Order No. 61 (NY/2017) and submission pursuant to Order No. 61 (NY/2017) in which Counsel stated that UNMISS had confirmed that its VTC facilities would be made available for the hearing, that the Applicant and his Counsel would be granted access to these facilities during the entire hearing, and that UNMISS would arrange a separate waiting room to ensure that the witnesses cannot overhear other witnesses' testimonies.

28. By Order No. 82 (NY/2017) dated 24 April 2017, the Tribunal ordered that the hearing was to take place from 8 to 10 May 2017 and set out a schedule for the witness testimonies. The Tribunal further ordered the Respondent to ensure the proper handling of the hearing from UNMISS and to facilitate all necessary arrangements with DFS and UNMISS to make the VTC bridging between UNMISS and the Dispute Tribunal's courtroom.

29. From 8 to 10 May 2017, the hearing took place at the courtroom of the Dispute Tribunal in New York. The Applicant together with his Counsel, Mr. Monyluak Kuol (accompanied by two associates), attended from Juba, South Sudan, via VTC, while the Counsel for the Respondent was present in person in the court room in New York. The following witnesses gave testimony: the Applicant, Mr. PM, Mr. WL, Mr. LAK, Mr. MB, and Mr. SS. All witnesses attended via the VTC connection in Juba, except for Mr. SS, who attended via a triangular VTC connection from Wau as the local security situation did not allow him to travel to in Juba.

30. After the hearing, the Tribunal informed the parties that transcripts of the hearing would be ordered and that the parties would be notified by the Registry as soon as they were available and uploaded into the eFiling portal. The Tribunal further instructed the parties to inform the Tribunal if Mr. WL contested the letter of caution placed on his file after the alleged incident between the Applicant and Mr. TM, together with a short statement signed by Mr. WL thereon. Furthermore, the Tribunal directed the Counsel for the Applicant to provide relevant evidence related to his fee, as indicated in the application.

31. Upon the Tribunal's inquiry, Counsel for Respondent indicated that she wished to adduce additional written evidence, namely the personal risk assessment report that had been prepared in connection with Mr. TM's transfer from Wau to Juba. Counsel for the Applicant objected to the request, contending that the report would not be relevant in the present case. The Tribunal provided Counsel for the Respondent with one week, by 17 May 2017, to file the report, if any, after which Counsel for the Applicant would have three days, by 22 May 2017, to submit his comments, if any. For administrative reasons, the Tribunal further extended the deadlines, and Counsel for the Respondent had until 26 May 2017 to file the report and Counsel for the Applicant had until 1 June 2017 to file his comments, including on its relevancy to the present case. The Tribunal was then to determine whether the report was admissible as evidence.

32. The Tribunal recommended the parties to consider, when reviewing the entire evidence, including the transcripts for preparing the closing submissions, whether the case could be resolved informally and, if they agreed thereto, to inform the Tribunal if the proceedings are to be suspended during such informal discussions.

33. On 13 May 2017, Counsel for the Applicant filed documentation regarding the letter of caution issued against Mr. WL.

34. By Order No. 96 (NY/2017) issued on 16 May 2017, the Tribunal ordered as follows (emphasis omitted):

... By Friday, 26 May 2017, the Counsel for the Applicant is to inform the Tribunal if Mr. WL contested the letter of caution placed on his file after the alleged incident between the Applicant and Mr. TM and to provide a short statement signed by Mr. WL thereon;

... Regarding the personal risk assessment report of Mr. TM for his transfer from Wau to Juba:

a. By 5:00 p.m. on Friday, 26 May 2017, if available, the Respondent is to file a copy of the report and his comments regarding the report, including on its relevancy to the present case;

b. By 5:00 p.m. on Thursday, 1 June 2017, the Ap[p]licant is to file his comments regarding the report, including on its relevancy to the present case;

... The Registry shall arrange to have the hearing recordings transc[r]ipted as soon as possible and, when available, upload them into the eFiling portal and notify the parties thereabout. The parties will have three weeks after the date on which the Registry provides the transcripts to the parties to file their closing statement, which are to be based solely on the evidence and submissions already before the Tribunal.

35. On 17 May 2017, the Respondent filed his submission of additional documents.
36. On 26 May 2017, the Applicant filed his submission of additional documents.
37. On 31 May 2017, the transcripts of the hearing held between 8 and 10 May 2017 were uploaded to CCMS and made available to the parties.
38. On 1 June 2017, the Applicant filed a submission of additional documents.
39. On 22 June 2017, he filed his closing submissions.
40. On 22 June 2017, the Respondent also filed his closing submissions.

#### **Parties' submissions**

41. The Applicant's principal contentions are as follows:

1. I, the claimant, have persistently explained the nature of my defence which takes issue with the allegation that, on 5 November 2014, I[...] physically assaulted [Mr. TM] by hitting him in his face with the hands. I repeatedly reiterated that:

The alleged physical assault was untrue and the indicated bodily injury might be a self[-]inflicted action for the following reasons:

1. [Mr. TM] mentioned that I am 2m tall and weighed 100kg and he is 1.6m and weighed 57kg which means that there is a difference in the physical body building between me and him.
2. [Mr. TM] mentioned that I had directed blows to his face and the area of the face is the location of the mouth, teeth nose and eyes.

3. The medical report stated that there was a scratch mark [...] below the ear.

How could be that the face was saved from any injuries if I had directed any blows to his face while the medical report only pointed to seemingly scratched finger marks below the ear?

[Mr. WL] was the only person present in the office where we argued over the car keys with [Mr. TM] and was considered by the investigation as a witness, but when he gave his statements which w[ere] contrary to the statements of [Mr. TM], his statements were unjustifiably considered by the investigation to be unreliable.

2. It was evident that [Mr. SS], who is my supervisor, had tasked me with an official job and issued a vehicle gate-pass for an official purpose[s] and he mentioned that clearly in his statements during the investigation.

3. I proceeded to security office to show [Mr. MB], the security officer, my gate pass and not chasing or pu[r]suing [Mr. TM], as misrepresented. Nothing can lead me to act in that way as concluded by the investigation considering that I even passed through my supervisor's office before I followed [Mr. TM] to the security office. I was just trying to show the validity and priority of my official gate pass to use the vehicle in question.

[Mr. MB] and [Mr. PM] cannot be genuine witnesses in the circumstance[s] for the following reasons:

1. The dispute took place in the office located in the log base, and the offices of [Mr. MB] and [Mr. PM] are located in the sector at a distance of 10 minutes walking.

2. They were not present in the office nor have they heard the argument between me and [Mr. TM] and what was exactly said by each party.

3. It was [Mr. TM] who went to the office of [Mr. MB] and found [Mr. PM] there and started to tell the story that [the Applicant] had assaulted him and he began to show to them the self[-]inflicted action to them.

4. So such people cannot be considered as witnesses as much as [Mr. WL].

Equally, [Mr. FB] is not a witness for the following reasons:

1. [Mr. FB] said in his statement that he saw an emergency button and when he checked he knew that it was a call [...] from Mr. TM's radio and he stated that he could not hear anything meaningful.



2. [Mr. FB's] office is in Comms Office in the sector HQ and the dispute took place in the office located in the log base. So [Mr. FB] neither witnessed nor heard the argument between me and [Mr. TM.] So he cannot be a witness as sharing a call from the radio does not necessarily mean that there was any attack as alleged by [Mr. TM].

I cannot guarantee the lack of [Mr. TM's] malicious motive to raise false accusations against [me].

At any rate, [Mr. WL] denied that there was [any] physical assault as claimed and it was not long before me and [Mr. TM] also left the room after him. In addition:

1. [Mr. TM's] claim that I was in the habit of using a UN vehicle for my personal purposes was false and the evidence in point is that my supervisor [Mr. SS] stated clearly that he issued the gate pass to conduct UN business in this particular circumstance.

2. [Mr. TM] accused me that I am a member of the South Sudan [S]ecurity Agency. However [Mr. TM] has no evidence to show that I am a security agent.

3. [Mr. TM] has charged that my tribe members to be troublesome people. This is also enough to show that [Mr. TM] was ready to insult me and my entire tribe without any justification.

4. [Mr. TM] went as far as misquoting [Mr. WL] by giving statements to be said by [Mr. WL] which were later denied by [Mr. WL] in his statements.

There is a contradiction of a statement between what was mentioned in the investigation and what appeared in the separation letter. In the investigation report it was mentioned that I refused to attend counseling se[ss]ion and refused to sign and follow a performance improvement plan. That does not rhyme the conclusion in the separation letter, where the Under Secretary for Management has considered my 10 years [of] service with the United Nations with a positive performance evaluation.

In a nutshell, the security officers, turned witnesses to abuse the process of investigation, are interested in the success of their narrative considering their negligible camaraderie towards me, probably for being a mere national/local staff, when I sought to join [Mr. TM] in the security office in order to lend my version of the argument. Their evidence should have been tested in the same way any other interested witness would be in need of an independent corroboration. In that context, it could be observed that their testimony did not inspire

confidence it deserved to support such drastic administrative conclusion or decision.

I, the claimant, insist that [I] never laid hands on [Mr. TM] at any point during the [...] argument over the car keys and therefore the medical report in question would not alone be a ground to validate [Mr. TM's] allegation.

The administrative decision was also concluded in reference to e-mail messages of former staff members whose hearsay evidence would not be admissible to rely upon without corroboration.

No any witness other than [Mr. WL] was able to present any factual testimony relevant to [Mr. TM's] allegations. In this regard [...], it is essential to consider that "The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone": Barwick CJ in *Wilson* (1970) 123 CLR 334 at 337

This test refutes the conclusion in the administrative decision that the claimant's statement:

" . .... . do not displace the evidence ... .. depending on;

1. [Mr. TM's] version of events is more credible for the reason that:

a. They were consistent with the statement of witnesses to the lead-up and the aftermath of the assault.

b. [Mr. WL's] statement supported the fact that the argument over the vehicle was intense and possibly escalated to a physical conflict.

c. The statements of [Mr. FB, Mr. MB and Mr. PM] corroborated [Mr. TM's] version of events that he asked for help in the middle of, and after the assault and noticed [Mr. TM's] injury on his ear, which is consistent with the medical certificate issued to [Mr. TM] and that [Mr. TM] was frightened and "emotional with tears[]" when he rushed into the room and claimed that he had an injury on his ear.

2. It appears from the record that there was no reason for [Mr. TM] to injure himself as he had the key and there is no information on the record to suggest that [Mr. TM] had malicious motive to raise a false accusation against you."

42. In the amended application dated 6 March 2017, the Applicant further submitted that (emphasis and reference to footnotes omitted):

1. The [m]ain issue raised in this Application is whether the facts on which the disciplinary measure was based have been established. The Applicant denies the physical assault on [Mr. TM] and claims that he never laid hand on him as alleged. He did not know anything about the claimed injury suffered by [Mr. TM]. Equally, The Applicant argues that the witness statements, except for [Mr. WL], are not relevant to the event in dispute but gathered people who were not eyewitnesses to the encounter. In this regard[s], it is essential to consider that “The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone”: Barwick CJ in *Wilson* (1970) 123 CLR 334 at 337.”

[...]

2. In addition to the main issue of whether the facts are established and in accordance with the jurisprudence of the Dispute Tribunal and Appeals Tribunal, the Applicant will briefly address the following three other elements that the Tribunal may examine when reviewing disciplinary decisions:

- i) Whether the established facts legally amount to misconduct under the Rules and Regulations;
- ii) Whether the disciplinary measures were disproportionate; and
- iii) Whether the Applicant’s rights to procedural fairness were respected.

3. The Applicant denied all the allegations made by the respondent, except where expressly admitted.

4. On 5 November 2014, at around 8:30 a.m, [Mr. TM] requested [Mr. SS], Chief of Supply Section, UNMISS, to give him the key to UN-02387, so that he could use the vehicle. [Mr. SS] gave [Mr. TM] the key. At around 9:00 a.m, the Applicant and [Mr. WL], Supply Assistant, UNMISS, asked [Mr. SS] to give them the key to the same vehicle to perform assigned tasks, and [Mr. SS] told the Applicant that he had already given the key to [Mr. TM].

5. The Applicant then asked for the [k]ey, but [Mr. TM] refused to release the key to the Applicant.

6. The Applicant asked [Mr. TM] to hand over the key, but [Mr. TM] refused to give him the key and that he would personally bring the vehicle back to the Applicant upon his return.

7. [Mr. TM] went back to his office with the key and the Applicant followed him to his office demanding the release of the key. [Mr. WL] entered [Mr. TM’s] office following the Applicant.

8. In [Mr. TM's] office, the Applicant engaged in an argument with Mr. TM over the use of the vehicle.

9. [Mr. TM] left his office and walked towards the Security office. [Mr. TM] to the office of [Mr. MB], Security Officer UNMISS, where [Mr. MB] was in a meeting with [Mr. PM], Security officer UNMISS.

10. Moments later, the [A]pplicant followed [Mr. TM] for further discussion of the matter in the office and not dramatically put by the investigator that, the Applicant rushed into [Mr. MB's] office without knocking on the door and that it appeared that "[the Applicant] wanted to grab [Mr. TM]". The Applicant also responded politely when [Mr. MB] overreacted by requesting the Applicant to respect his office by knocking on the door before entering the office and asked him to go outside and to come back later. The [A]pplicant left quietly and not as put that he slammed the door on his way out. After hearing from [Mr. TM] the Applicant returned to [Mr. MB's] office to explain the matter between him and [Mr. TM] and not in crude manner as put that he said "[Mr. TM] should surrender the vehicle key".

11. [Mr. MB], unfortunately, went as far as to speculate unjustifiably that the Applicant was "very combative". However, the Applicant proceeded to security office to show the security officer, the gate pass that he was holding and not chasing or pursuing [Mr. TM], a misrepresented. The [A]pplicant contents that nothing could lead him to act in that way as concluded by the investigation considering that he even passed through his supervisor's office before he started to follow [Mr. TM] to the security office. The [A]pplicant was just trying to show the validity and priority of the available official gate pass to use the vehicle in question.

12. The Applicant states that the decision to separate him from service was tainted with prejudice. The Applicant and the witness testimonies of [Mr. WL] were not given credence in the investigation and said to be unreliable. The Special investigation unit, surprisingly, stated that this is because [Mr. WL] did not corroborate [Mr. TM's] statement.

13. The Special Investigation Unit acted arbitrarily and in a discriminatory manner by failing to fairly test credibility and narrative of the alleged assault on [Mr. TM] and to determine the facts in issue independently in order to assess whether the alleged assault occurred. The investigation further did not lend any weight to the fact that the parties' supervisor [Mr. SS], had tasked the [A]pplicant with an official job and issued a vehicle gate-pass to him and he mentioned that clearly in his statements during the investigation. Besides, [Mr. TM] had retained the car in question in order to run personal errands.

14. The Applicant asserts that he did not assault [Mr. TM] as noted in his replies to the witness [s]tatements. The Applicant had been assigned an official duty for which he wanted to use the car vehicle. [Mr. TM] on the other hand wanted to use the vehicle for personal business in contravention of Rule no. 1.2(q) on the use of property and assets. [Mr. TM] alleges that the Applicant pulled him out of the car, an allegation that was not corroborated by [Mr. WL], an eyewitness standing at the scene.

15. [Mr. WL] was the only person present in the office where the [A]pplicant and [Mr. TM] argued over the car keys and was considered by the investigation as a witness, but when he gave his statements which was contrary to the statements of [Mr. TM], his statements were labeled by the then investigation as unreliable.

16. The special investigation unit acted in a discriminatory manner by strongly relying on the statements of [Mr. MB] and [Mr. PM] who were both absent at the scene of the alleged assault hence their statements are hearsay and should be considered inadmissible. Their voluntary interpretation of the emotional appearance of both parties do not conclude or constitute commission of an assault.

17. In seeking the statements of [name redacted, Mr. AL], [name redacted, Mr. JO], [name redacted, Mr. RM] and [name redacted, Ms. LX], the Special Investigation Unit went out of its way to ascertain [the Applicant's] character. The [w]itness statements of the aforementioned are of vague incidents that were supported by no evidence as they had not been reported nor recorded in [the Applicant's] file to be considered in his [electronic performance appraisal, "e-PAS"]. In relying on these witness statements, the Special Investigation Unit failed to uphold the principles of fairness and abused its discretionary authority[.]

[...]

43. The Respondent's principal contentions are as follows (footnotes omitted):

21. Contrary to the Applicant's claim, the evidence considered in the decision letter is relevant to the case, and sufficient to lead to the reasoned conclusion that the incident had occurred in the way described by [Mr. TM]. As noted in the decision letter, the overall circumstances recounted by the witnesses supported the finding that the physical assault had occurred as described by [Mr. TM]. Although the Applicant attacked [Mr. TM] when no-one else was present which left no eyewitness to the assault other than the victim, the witnesses, namely, [Mr. SS, Mr. WL, Mr. MB, Mr. PM and Mr. FB], provided a consistent version of events in that the Applicant engaged in an intense argument over the vehicle key with [Mr. TM], and/or that [Mr. TM] asked for help in the middle of, and after the assault.

22. Specifically, [Mr. WL] stated that the Applicant followed [Mr. TM], and that the Applicant strongly insisted that [Mr. TM] surrender the vehicle key. [Mr. FB] and, even the Applicant himself, stated that [Mr. TM] pressed an emergency button on his radio that morning. [Mr. MB] and [Mr. PM] both stated that [Mr. TM] ran into [Mr. MB's] office with a frightened look, and that the Applicant followed [Mr. TM] into the room "as if to grab [Mr. TM]". According to [Mr. MB], [Mr. TM] was "emotional" with "tears in his eyes". [Mr. SS] stated that he "noticed some bruises" and "a small cut with some dry blood" on [Mr. TM's] ear when he met him after the assault. Contrary to the Applicant's contention, in addition to the medical certificate, the witnesses' statements supported [Mr. TM's] account of events.

23. [Mr. TM's] injury was also supported by the documentary evidence, namely, the medical certificate issued to [Mr. TM] by UNMISS Wau Medical Section on the date of the incident. [Dr. NA] wrote in the certificate that [Mr. TM] had a small swelling surrounded by scratch marks behind his right earlobe, and that [Mr. TM] reported to [Dr. NA] that he had been "punched by a colleague 30 minutes earlier at their office". [Dr. NA] further wrote that he gave "the necessary medical care and discharged [Mr. TM] with 1 day rest".

24. Contrary to the Applicant's claim, there is no evidence suggesting that [Mr. TM's] bodily injury might be a "self-inflicted action." According to the Applicant, because of "a difference in the physical body building between [the Applicant and Mr. TM]," the alleged "blows to [Mr. TM's] face" would not have just caused "scratch marks below the ear". The Applicant argued that a more severe injury should have resulted if [Mr. TM] had been attacked as alleged. The location and the degree of the injury do not displace the evidence in the record. The injury was on [Mr. TM's] face, namely, his right ear, which is consistent with the attack described by [Mr. TM]. [Mr. TM] stated that he defended himself by "trying to block some of the blows directed at [his] face" during the attack, which may explain how a more severe injury was prevented.

25. With respect to the Applicant's contention that [Mr. TM] falsely accused him out of a malicious motive, the Applicant has not produced evidence to show any alleged improper motivation. The Applicant stated in his Application that he could not "guarantee the lack of [Mr. TM's] malicious motive to raise false accusations," but did not submit evidence to suggest that there may have been malicious motive by [Mr. TM]. In *Oh* [2014-UNAT-480], the Appeals Tribunal held that "[t]he burden of proving improper motivation lies with the staff member raising such claims".

26. Furthermore, the record does not support the Applicant's contention that [Mr. TM] injured himself and there is no indication that [Mr. TM] inflicted the injury during the course of the incident. Also, during the investigation, the Applicant, at no time, claimed that [Mr. TM] inflicted the injury on himself during the argument over the key or in [Mr. MB's] office, which would have been the most critical fact for him to assert his innocence. [Mr. TM's] visibly agitated state and his display of the right ear as injured in [Mr. MB's] office does not square with the contention that [Mr. TM] injured himself after the exchange in [Mr. MB's] office.

27. The Applicant mischaracterized the statement of [Mr. TM] when he challenged [Mr. TM's] credibility in the Application. The Applicant contended that [Mr. TM] stated that the Applicant "was in the habit of using a UN vehicle for personal purposes". However, [Mr. TM] did not make such a claim. Rather, he stated that the Applicant "misbehaved by shouting at [Mr. TM] while complaining because [the Applicant] wanted to use a vehicle for his personal needs" on a previous occasion. Therefore, contrary to the Applicant's claim, whether the Applicant had an official business to use a UN vehicle on the day of the incident has no relation to the credibility of [Mr. TM].

28. Contrary to the Applicant's claim, [Mr. TM] did not claim that the Applicant was a member of the South Sudan security agency. Rather, [Mr. TM] stated that the Applicant had told him that: "[the Applicant] will send [his] National Security associates to deal with [Mr. TM]"; and "if [Mr. TM] go to Security, [the Applicant] will call National Security to deal with [Mr. TM]". Therefore, [Mr. TM's] credibility is not dependent upon whether the Applicant was actually a member of the security agency. The Applicant's verbal threats towards [Mr. TM] did not form part of the allegations for which the Applicant was disciplined.

29. Contrary to the Applicant's claim, [Mr. TM] did not claim that the Applicant's tribe members were "troublesome." In the incident report dated 11 November 2014, [Mr. TM] stated that, after the incident, [Mr. WL] told him that: "[Mr. WL] did not want to become a witness of the incident because [the Applicant's] tribe can be dangerous people and [Mr. WL] too might end up in problems". [Mr. TM] was conveying what he had been told by [Mr. WL]. The Applicant's claim that [Mr. TM] "misquoted" [Mr. WL] is not supported by the evidence in the record, and would not discredit [Mr. TM's] statement. During the investigation, [Mr. WL] was not asked, and did not make a statement, about the alleged remark about the Applicant's tribe.

30. Contrary to the Applicant's contention that the decision "was also concluded in reference to e-mail messages of [...] staff members", i.e., supported by the e-mail statements from UNMISS staff members,

namely, [name redacted, Mr. RR, Ms. LX, Mr. JO, Mr. JA (name redacted), and Mr. AL], these e-mail statements did not constitute part of the evidence pertaining to the physical assault. Therefore, contrary to the Applicant's contention that the emails be excluded from the record, the admissibility of the e-mail statements is not at issue. Further, the incidents mentioned in these e-mails were not investigated, and did not form part of the reason for which the Applicant was disciplined, namely, the Applicant's assault of [Mr. TM]. The e-mail statements were only introduced as background to the matter, in order to inform the Applicant that there were several staff members who were afraid of the Applicant and expressed concerns about his aggressive behaviour.

31. Contrary to the Applicant's contention that [Mr. WL] denied the physical assault in contradiction with [Mr. TM's] statement, the Respondent notes that [Mr. WL] left the scene before the assault. Accordingly, [Mr. WL's] statement may, at best, provide circumstantial evidence and as a matter of fact, was not used as direct evidence of the assault. Contrary to the Applicant's contention, [Mr. WL's] statement is not the only evidence to "present factual testimony relevant to [Mr. TM's] allegations".

32. Contrary to the Applicant's contention that [Mr. WL's] statement was "unjustifiably considered by the investigation to be unreliable," the statement was accorded due consideration, particularly, in determining whose version of events was more credible. [Mr. WL's] statement corroborated [Mr. TM's] account of what had occurred prior to the assault, and did not contradict [Mr. TM's] account of the assault itself.

33. Specifically, [Mr. TM] stated that, when the Applicant "was threatening [him]" in his office, Mr. WL "was present trying to stop [the Applicant]", and that the Applicant "ordered [Mr. WL] to leave [Mr. TM's] office ... despite the fact [Mr. TM] beg[ged] [Mr. WL] to remain with [him], he [Mr. WL] left". During the investigation, Mr. WL stated that he "was telling [the Applicant] to let [Mr. TM] to go and buy the bread so that [they] could get the vehicle key and proceed with [their] work". According to [Mr. TM], [Mr. WL] "followed trying to calm [the Applicant] down who at that point in time had already fallen into a rage ... [the Applicant] entered [Mr. TM's] office and ... continued shouting and threatening to beat [Mr. TM] as [Mr. WL] tried to restrain him". [Mr. TM] stated in the incident report that: "[the Applicant] then harshly told [Mr. WL] to get out of the office and leave himself alone with [Mr. TM] ... [Mr. TM] pleaded with [Mr. WL] to stay but he just said he does not want to be a witness as he proceeded to leave the office". [Mr. WL] also stated that: "[the Applicant] followed [Mr. TM] into his office. [Mr. WL] also followed them ... Inside the office, [the Applicant] was continuing [to ask] for the vehicle's keys and [Mr. TM] was answering



saying that he would not release the vehicle's keys. At this point, [Mr. WL] decided to walk away from [Mr. TM's] office”.

34. Contrary to the Applicant's contention, the issue as to whether [Mr. SS] gave the Applicant a gate pass to use in his official assignment is not relevant to this case. Even if it were true that the Applicant had the priority to use of the vehicle, it does not justify a physical assault.

35. The evidence in the record does not support the Applicant's contention that he went to [Mr. MB's] office to show the gate pass and not to chase or pursue [Mr. TM]. During the investigation, [Mr. MB] stated that: “[n]o sooner had [Mr. TM] finished showing [Mr. MB] and [Mr. PM] the bruises he had just sustained from physical beating, [then] [the Applicant] slammed [Mr. MB's] office door [and appeared] to grab [Mr. TM]. Mr. MB further stated that: “[Mr. MB] expected [the Applicant] to have waited around [his] office to give his side of the incident, but he decided not to wait and he left”. In his second interview dated 28 July 2015, Mr. MB stated that: “[a]bout two (2) minutes later, [the Applicant] came back into the office and stated that [Mr. TM] must surrender the vehicle key. [The Applicant] was very combative and did not show [Mr. MB] a gate pass”. Therefore, the record does not square with the Applicant's claim that he entered the Security Office “just trying to show the validity and priority of [his] official gate pass to use the vehicle in question”.

36. Contrary to the Applicant's contention, the fact that [Mr. MB, Mr. PM, and Mr. FB] were not present in [Mr. TM's] office or in the vicinity where they would have been able to hear the argument between the Applicant and [Mr. TM] does not reduce the credibility of the witnesses. Again, those witnesses were not used as direct witness[es] of the physical assault, but they provided circumstantial evidence which led to the reasoned conclusion that the physical assault of [Mr. TM] had occurred.

37. Contrary to the Applicant's contention, [Mr. MB and Mr. PM] did not simply repeat what [Mr. TM] had told them. Rather, they provided their own observation of the situation following the assault by stating how and in what condition [Mr. TM] and the Applicant entered [Mr. MB's] office and what had transpired in the office. For instance, [Mr. MB] stated that [Mr. TM] appeared “frightened” and “very emotional” with “tears in his eyes”. [Mr. MB] further stated that the Applicant “appeared that he wanted to grab” [Mr. TM]. Accordingly, the statements of [Mr. MB] and [Mr. PM] provided relevant facts relating to the aftermath of the physical assault and, in so doing, they added more weight to [Mr. TM's] version of events.

38. Contrary to the Applicant's contention that [Mr. MB] and [Mr. PM] were “interested in the success of their narrative” and showed “negligible [sic] camaraderie towards [the Applicant] ... when he sought

to join [Mr. TM] in the security office in order to lend his version of the argument,” there is no evidence showing that [Mr. MB] and [Mr. PM] had improper motivation to provide false statements against the Applicant. [Mr. MB] and [Mr. PM] reviewed their statements and signed them affirming their accuracy. Their written statements were under oath. In *Nyambuza* [2013-UNAT-364], the Appeals Tribunal held that “[w]ritten witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member”. Further, as staff members, [Mr. MB] and [Mr. PM] were under an obligation to be truthful in their statements to the investigators, which offers a further assurance of their truthfulness. Again, the statements of [Mr. MB] and [Mr. PM] are in line with the statement of [Mr. TM] in describing the aftermath of the assault. Given the foregoing, the Respondent respectfully submits that, contrary to the Applicant’s claim, there is no further “need of an independent corroboration”, in order to ascertain the probative value of the statements of [Mr. MB] and [Mr. PM].

[...]

40. By physically assaulting [Mr. TM] at the workplace, the Applicant violated Staff Rule 1.2(t). Furthermore, through his physical assault of [Mr. TM], the Applicant failed to uphold the faith in the dignity and worth of human person, as required by Staff Regulation 1.2(a), and failed to conduct in a manner befitting his status as an international civil servant, in violation of Staff Regulations 1.2(t).

[...]

43. The Applicant’s separation was consistent with the practice of the Secretary-General in cases involving a physical assault. Cases of physical assault have typically attracted sanctions at the more severe end of the spectrum, i.e., separation or dismissal. In fact, since mid-2011, all disciplinary cases involving physical assault have resulted in such sanctions.

- (i) The information circular addressing the Secretary-General’s practice in disciplinary matters for 2014-2015 included ten cases of assault and abusive conduct. The disciplinary measure of dismissal was imposed in two cases. Six cases resulted in the respective staff members’ separation from service with compensation in lieu of notice of which four included the payment of a termination indemnity and two were without termination indemnity. The remaining two cases did not involve a physical assault and resulted in a demotion and a loss of steps.

(ii) The information circular addressing the Secretary-General's practice in disciplinary matters for 2013-2014 included three cases of assault. The disciplinary measure of dismissal was imposed in one case while the other two cases resulted in the respective staff members' separation from service with compensation in lieu of notice and with termination indemnity.

(iii) The information circular addressing the Secretary-General's practice in disciplinary matters for 2012-2013 included only one case involving verbal abuse and assault. That case resulted in the staff member's separation from service, with compensation in lieu of notice and without termination indemnity.

(iv) The information circular addressing the Secretary-General's practice in disciplinary matters for 2011-2012, included four cases involving assault. Each case resulted in the sanction of dismissal.

44. The sanction imposed on the Applicant was not the most severe available (dismissal) because, as set out in the decision letter, the Respondent properly considered whether there were any mitigating factors in this case that would diminish the otherwise applicable disciplinary measure. The decision letter expressly noted that mitigating circumstances in the case included: (i) the Applicant's more than 10 years of service with the Organization with positive performance evaluations; and (ii) his claimed personal frustration and stress.

45. With respect to the Applicant's contention that the decision letter considered his long service with a positive performance in contradiction with the investigation report which stated that the Applicant refused to attend counseling session and refused to sign and follow a performance improvement plan, the Respondent submits that his long and satisfactory service was considered as mitigating factor based on the Applicant's comments on the allegations of misconduct and his e-PAS reports submitted by the Applicant in support of his comments. Therefore, the Applicant's argument is not persuasive.

[...]

48. During the investigative and disciplinary processes, the Applicant has not contended that his procedural fairness rights were breached. As set out above, the Applicant had a sufficient opportunity to respond to the allegations against him and he actually availed himself of the opportunity and submitted his comments and evidence".

[...]

44. The Respondent's submissions on the remedies were included as part of the closing submissions filed on 22 June 2017:

- ... The Respondent submits that the Application should be dismissed in its entirety and that, therefore, the issue of remedies does not arise. In the event that the Tribunal should find in favour of the Applicant, the Respondent submits that the Applicant failed to produce evidence in support of the claimed harm.
- ... With respect to the attorney's fees, the Respondent submits that there was no manifest abuse of the proceedings before the Tribunal, and therefore, the Applicant's costs should be borne by him. Further, the Applicant did not submit evidence of actual payment of US\$ 25,000, e.g., receipt or financial record.
- ... With respect to moral damages, the Applicant has provided no evidence showing that he suffered harm. The Tribunal may only award compensation on the basis of evidence of harm. The Applicant has not produced evidence by way of a medical, psychological report of otherwise of harm, stress or anxiety caused to him directly linked or reasonably attributed to a breach of his substantive or procedural rights. No medical evidence was produced of illness arising from the Organization's actions.
- ... Furthermore, with respect to the alleged display of the Applicant's photo at the entrance of the compound, by his own testimony, the Applicant indicated that it was for the purpose of access control to the compound following the delivery of the sanction letter to the Applicant. The Applicant further indicated that the photo was removed shortly upon his request. No evidence shows that the Applicant's substantive or procedural entitlements were breached, and/or that the Applicant suffered harm from this.
- ... In addition, the Applicant's testimony indicated that the claimed familial situation and health conditions had existed prior to the disciplinary action, and thus there is no causal link between those pre-existing circumstances and the Administration's action. The Respondent further notes that the Applicant's claimed personal frustration and stress was explicitly taken into account as a mitigating factor.
- ... With respect to his failure to find other employment, no evidence was produced to support the Applicant's account that "information was circulated" which prevented him from obtaining a job. It is not clear what information was circulated

to whom, and why the Administration should be held responsible for the alleged dissemination of information.

- ... In addition, the Respondent submits that no evidence was produced to the effect that he had made reasonable efforts to obtain other employment to limit his income loss during the relevant time period. There is no indication that the Applicant had searched for or engaged gainfully in any work since his separation. Further, it appears from his testimony that the Applicant failed to provide a potential employer a truthful account of the reason for his separation from UNMISS.
- ... Lastly, the total amount of compensation sought by the Applicant, namely US\$ 225,000 (US\$ 200,000 for moral damage and US\$ 25,000 for advocate fee), exceeds the normal scope of compensation to be awarded, i.e., the equivalent of two years' net base salary of the Applicant. According to the letter of appointment dated 25 May 2015, submitted by the Applicant after the hearing, his net salary per annum was recorded as SSP (South Sudanese Pound) 60,354, which is equivalent to approximately, US\$ 525. According to a spreadsheet entitled "General service category - annual salaries and allowances" (effective 1 November 2016), a staff member at the G-4 level at step 10 in Juba should receive net salary in the amount of US\$ 19,969 per-annum.

## **Considerations**

### *Receivability*

45. In the application filed on 16 August 2017, the Applicant contested the disciplinary decision to separate him from service that was notified to him on 17 June 2016. The Tribunal notes that the present application was filed on 16 August 2017 within 90 days from the date of notification, and that the contested decision is not subject to a management evaluation. The Tribunal concludes that the application meets all the receivability requirements of art. 8 of the Dispute Tribunal's Statute.

### *Applicable law*

46. On termination of an appointment, staff regulation 9.3 and staff rule 9.6 of ST/SGB/2016/1, in relevant parts, stated as follows:

### **Regulation 9.3**

(a) 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 his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

(ii) If the services of the staff member prove unsatisfactory;

(iii) If the staff member is, for reasons of health, incapacitated for further service;

(iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

## **Rule 9.6**

### **Termination**

...

### **Reasons for termination**

(c) 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 following grounds:

- (i) Abolition of posts or reduction of staff;
- (ii) Unsatisfactory service;
- (iii) If the staff member is, for reasons of health, incapacitated for further service;
- (iv) Disciplinary reasons in accordance with staff rule 10.2(a) (viii) and (ix);
- (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;
- (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

...

47. Staff rules 10.1, 10.2 and 10.3 in Chapter X of the Staff Rules concerning disciplinary measures (ST/SGB/2016/1) provide that:

## **Rule 10.1**

### **Misconduct**

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to

constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be willful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

## **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.

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

- (i) Written or oral reprimand;
- (ii) Recovery of monies owed to the Organization;
- (iii) Administrative leave with full or partial pay or without pay pursuant to staff rule 10.4.

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b)(i) above.



### Rule 10.3

#### Due process in the disciplinary process

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

(d) An appeal against a judgement of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations.

#### *Scope of review*

48. As stated in *Yapa* UNDT/2010/169 (upheld in this regard in *Yapa* 2011-UNAT-168), 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.

49. In *Negussie* 2016-UNAT-700, paras. 18 and 19, the Appeals Tribunal reiterated the standard of the judicial review in disciplinary cases (footnotes omitted):

... In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed* 2015-UNAT-550 citing *Applicant* 2013-UNAT-302 and others:

Judicial review of a disciplinary case requires the [Dispute Tribunal, “UNDT”] to consider the evidence adduced and the procedures utilized during the course of the investigation by the

Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

... To observe a party’s right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment. Although it is not necessary to address each and every claim made by a litigant, the judge has to take the party’s submissions into consideration and lay down, in its judgment, whether the above mentioned criteria are met.

50. In the present case, the Applicant’s contract was terminated as a result of the application of the disciplinary sanction of separation from service.

51. 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. 2.1), 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.

52. 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 in para. 30 that:

... In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has

occurred (see the former United Nations Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

53. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal decided that it is not sufficient for an applicant to allege procedural flaws in the disciplinary process. Rather, the applicant must demonstrate that these flaws affected her/his rights.

54. The Tribunal is of the view that the purpose of the SIU is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to the OHRM being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect the staff member's rights, including the due process rights.

55. In the following, the Tribunal will analyze the Applicant's contentions regarding the facts and the evidence in relation to each of the allegations, the regularity of the procedure and finally the proportionality of the disciplinary sanction.

#### *Investigative phase*

56. The Tribunal notes that during the investigation, the Applicant, Mr. TM, the staff member who filed the incident report for physical assault on 11 November 2014 for the incident that took place on 5 November 2014, and other witnesses were interviewed initially on 13 November 2014 as follows:

- a. The Applicant stated on 13 November 2014 that (emphasis omitted):

My main task as Supply Assistant in the UNMISS Supply Chain is to receive cargo that is sent to Juba and distribute to the respective units. I also prepare any cargo that is shipped from Wau to any other location. To fulfil my task I also prepare a Cargo Movement Request (CMR) that is hand[ed] over to MovCon together with the cargo. Therefore I use the unit pick-up vehicle plate number UN-02387 most of the times.

Immediately after I complete my duty, I usually hand over the vehicle's keys to the [S]ection [C]hief [Mr. SS]. On 05 November 2014 at approximately 09:00 hours I went to pick up the UN vehicle's keys from my supervisor [Mr. SS] who informed me that the vehicle's keys were with the Asset & Material Manager [Mr. TM]. I then left the chief's office and went to [Mr. TM's] office and asked him for the vehicle keys. He told me that he had to go and buy bread and that he would give me the vehicle's keys once back to the office. I told him that we should give priority to the official task but [Mr. TM] still did not give me the vehicle's keys. [Mr. TM] insisted saying that the vehicle's keys were with him and that he would not give them to me. We started arguing over the issue and [Mr. TM] insisted on not giving me the vehicle keys. [Mr. TM] started shouting at me and shouting over the radio that he was under attack. [Mr. TM] called radio room and said "I am under attack, someone is attacking me in my office." [Mr. TM] then left the office and went out. I also stepped out from [Mr. TM's] office and I went to my supervisor to report the situation. I then immediately stepped out of my supervisor's office and I was able to see [Mr. TM] walking towards the headquarters. I walked towards the same direction as I increased my speed with intention to reach [Mr. TM]. I was carrying with me the vehicle gate pass to prove I needed to use the [S]ection's vehicle when I met Security Officer OIC [Officer-in-Charge] FSCO [unknown abbreviation] [Mr. MB], I explained [to] him that [Mr. TM] had the vehicle's key to our [S]ection vehicle and I needed the vehicle key. Security Officer OIC FSCO [Mr. MB] replied that the issue should be solved within my [S]ection. After I talked to Security Officer OIC FSCO [Mr. MB] I saw a male national staff member [whose name] I cannot remember, I explained [to] him what happened between me and {Mr. TM} and this person told me that [Mr. TM] was in Security Officer OIC FSCO [Mr. MB's] office and I saw Security Officer [Mr. PM], [Mr. TM] and another Security Officer [whose name] I cannot remember. The Security [O]fficer [whose name] I cannot remember asked me why I entered the office without knocking and invited me to go outside. I stepped out of the office, I knocked the door and I was invited to enter. I found that they were having a meeting and I explained to them that [Mr. TM] had the [S]ection vehicle's key and that I needed to use mentioned vehicle. The Security Office[r] [whose name] I cannot remember also added that I might also write a complain[t] about this issue. I stepped out from the office and went back to my unit. I want to specify that I did not attack and harm [Mr. TM].

- b. Mr. TM stated on 13 November 2014 that (emphasis omitted):

[...] I hereby confirm the facts that occurred on 05 November 2014 in the Supply Log Base, Wau, when I was verbally and physically assaulted by [the Applicant]. [It] happened in the past that [the Applicant] misbehaved by shouting at me while complaining because he wanted to use a vehicle for his personal needs. I also confirm that on 05 November 2014, when I was inside my office and [the Applicant] was threatening me, staff member [Mr. WL] was present trying to stop [the Applicant]. I confirm that [the Applicant] ordered [Mr. WL] to leave my office shouting to him “go out, go out, I want to teach this guy a lesson”. Despite the fact I beg[ged] [Mr. WL] to remain with me, he left and [the Applicant] assaulted me, beating me with his open hands. I confirm that when I was going to the Security Office to report the case, [the Applicant] was chasing me shouting “if you go to Security I will call National Security to deal with you”. I managed to enter the office of the FSCO where I found [Mr. MB], who is the OIC FSCO, and Security Officer [Mr. PM] who stopped [the Applicant], who [in the] meantime stormed inside the office. I want to specify that after this incident I feel threatened because of the words of [the Applicant], who stated he would call the national Security if I ever report this case to UN Security [...].

- c. Mr. WL stated on 14 November 2014 that (emphasis omitted):

On 05 November 2014, at around 09:30-10:00 hours, I was in the Supply Log Base, Wau, together with my colleague [the Applicant]. We had to collect the cargo from MovCon therefore we went to see our supervisor [Mr. SS] because we needed the key of the Unit pick up vehicle UN-02387. We saw that our supervisor [Mr. SS] already gave the vehicle’s keys to [Mr. TM]. I specify that I do not drive the UN vehicles because I do not have an UNMISS driving permit. Therefore my colleague [the Applicant] asked [...] [Mr. TM] the vehicle’s keys. [Mr. TM] replied saying that he only needed to go to buy bread to the shop which is located just outside the main gate. My colleague [the Applicant] insisted and again asked for the vehicle’s keys. [Mr. TM] put the vehicle’s keys into the pocket of his trousers and walked into his office. I remember that my colleague [the Applicant] followed [Mr. TM] into his office. It also followed them and I was telling [...] my colleague [the Applicant] to let [Mr. TM] [...] go and buy the bread so that we could get the vehicle’s keys and proceed with our work. My colleague [the

Applicant] did not listen to me and we entered [Mr. TM's] office. Inside the office my colleague [the Applicant] was continuing asking for the vehicle's keys and [Mr. TM] was answering saying that he would not release the vehicles keys. At this point I decided to walk away from [Mr. TM's] office and I went back to my office [...].

Mr. MB stated on 13 November 2014 that (emphasis removed): On 05 November at around 0900 hrs, I had a meeting with [the Officer-in-Charge of] SIU, [Mr. PM] in my office. Suddenly, [Mr. TM] hastily and frightened entered my office as if someone was chasing him. [Mr. TM] informed me that he was seeking help as a national staff [the Applicant] had assaulted him. No sooner had [Mr. TM] finished showing me and [Mr. PM] the bruises he had just sustained from physical beating, than [the Applicant] slammed my office door as if to grab [Mr. TM] to but I told him to respect my office and wait outside until I finish with [Mr. PM] and [Mr. TM] then I attend to him. Initially [the Applicant] did not want to leave my office but I insisted that he had to wait outside until which he reluctantly heeded to. [Mr. TM] explained that he was going to use a UN vehicle then [the Applicant] approached him and demanded that he [Mr. TM] should give him the vehicle keys so that he uses it instead. An argument ensued and reportedly [Mr. TM] decided to go to his office where [the Applicant] followed him still demanding the vehicle keys. Because [Mr. TM] did not hand over the keys, [the Applicant] resorted to beating him which prompted him to run to security office for assistance.

I advised [Mr. TM] to file an assault case with SIU and go for medical treatment which he did and I expected [the Applicant] to have waited around my office to give his side of the incident but he decided not to wait and he left [...].

d. Mr. PM stated on 13 November 2014 that (emphasis removed):

On 05 November 2014 at around 09:30 hours, I was invited by the FSCO a.i [Mr. MB] for a meeting in his office, in the processes [Mr. TM] entered the office and he appeared tired and annoyed, and at the same time he started telling [Mr. MB] that he was beaten by his colleague [the Applicant] and at the same lime he indicated and said "look at my right ear, it is swelling and I have a headache, I think I am injured." Suddenly [the Applicant] entered the office of [Mr. MB] without knocking, he was looking very serious, he was sweating and his shirt was very wet. Then [Mr. MB] requested him to get out, and asked him to knock before getting into the office. At first he refused, [Mr.

MB] insisted for him to go out, he again refused and stood there saying “I am following this guy” pointing out his fingers to [Mr. TM]. Then for the third time [Mr. MB] shouted at him and said “I want you to go out now.” He went out, at the same time, he knocked and opened the door without being told to come in. Then [Mr. MB] told him that he was having a meeting, you go and wait out and come later. So he did not come back, we did not see him again. Thereafter we asked [Mr. TM] to go to UNMISS Level I hospital and submit a medical report and statement to [Mr. MB]. That is all.

57. After the first round of interviews took place, the Tribunal notes that in an email dated 7 November 2014, Mr. WB (name redacted) informed Mr. PE (name redacted) that:

Dear [Mr. PE],

There is a worrying trend developing in Wau where National staff have assaulted other UNMISS staff. Cases 3 & 4 happened today arising from delayed IC payment. The cashier in the Finance [name redacted, Mr. PK] was badly beaten and he has opened a case. National Police was called in to intervene in cases 3 & 4. FYI. Staff members assaulted have been advised to record statements with Security- and file cases to Code of [C]onduct but it is unfortunate that they are being intimidated by those who assaulted them. I will call a town hall meeting to remind staff on UN core values and expected conduct. Regards, [Mr. WB]

1-[the Applicant] of Supply chain assaulted [Mr. TM] on 05 Nov 2014

2-[name redacted, Mr. HJ] of Engineering assaulted [name redacted, Mr. RK] on 06 Nov 2014

3-[name redacted, Mr. MM] former Security Guard (IC) assaulted [name redacted, Mr. PK] (National Finance Staff) on 01 Nov 2014

4-[name redacted, Mr. JM] former security guard (IC) assaulted [Mr. PM] on 07 Nov 2014”.

58. An additional interview was conducted with the following staff members: the Applicant, Mr. WL, Mr. SS, Mr. FB and Mr. MB:

a. The Applicant stated on 14 May 2015 that (emphasis omitted):

I have worked with [redacted name, Mr. RM] who is from Guatemala for a period of about two and half years in Wau. He

is my supervisor, who worked along with [Mr. JA], Chief of HUB, who is of Danish nationality.

I can recall that sometime in 2013, I was not nominated for training in Supply Chain Management; I may have spoken to [Mr. JA] in a raised voice requesting an explanation as to why I was not selected for training; I did not shout at him. [Mr. JA] did not provide me with an answer. At no time did I intend to threaten or intimidate him [Mr. JA]. I cannot recall stating to anyone that “you are in my country and you do not know what I am capable of, I can send you to your country right away.” On the contrary I have said to many UNMISS staff that I will report them meaning the UNMISS senior management when I am not happy.

Sometime in July 2012, I can recall that I had a conversation with [redacted name, Mr. JO] and I may have pointed my finger at him, however, I did not threaten him, I did not state to him that he would learn a lesson, saying that he was in South Sudan. At no time did I threate[n] [Ms. LX] who is from Kosovo and [name redacted, Mr. JMC] who is from Sierra Leone in any way fashion or form.

- b. Mr. WL stated on 28 July 2015 that (emphasis removed):

I have been informed by Investigator [name redacted, Mr. ROM] that additional questions need to be clarified in regards to an incident that occurred on 05th of November 2014 at approximately 0835 hrs. here at the Wau camp. I did not hear [the Applicant] say to [Mr. TM] that “I am going to teach you a lesson” as I left [Mr. TM’s] office. I did not see [the Applicant] pull [Mr. TM] out of his vehicle. I did not see them arguing outside of the office. I heard loud voices and I entered [Mr. TM’s] office. I did not witness [the Applicant] assault [Mr. TM]. I did not notice any cuts, bruises or swelling on [Mr. TM]. I did not witness [the Applicant] threaten [Mr. TM] in any way. They were just arguing over a vehicle key. I then decided to leave.

- c. Mr. SS stated on 31 July 2015 that (emphasis removed):

I have been informed by Investigator [Mr. ROM] that additional questions need to be clarified in regards to an incident that occurred on 05th of November 2014 at approximately 0835 hrs. [Mr. TM] had the keys for the vehicle, [the Applicant] requested the keys. I had given [the Applicant] a gate pass that morning. I informed him [the Applicant] that [Mr. TM] had the keys. [The Applicant] called on the phone and said [Mr. TM] has the keys



and will not release them. I went to [Mr. TM's] office and asked what the problem [was]. [Mr. WL] was also present. [Mr. TM] said he needed the vehicle and that he has to leave immediately. I then went to transport to arrange for an additional vehicle. When I went back to [Mr. TM's] office both had left. I was informed by [Mr. WL] that [Mr. TM] and [the Applicant] went to the Security Office. [Mr. WL] said they were arguing and he left as he did not want to be involved. I was waiting for them outside the office. [Mr. TM] informed me that [the Applicant] had hit him and his ear was swelling. I noticed some bruises on his right ear. [Mr. TM] said he informed Security and was on his way to the Medical Unit for a check-up. I asked [the Applicant] what happened. [The Applicant] said that [Mr. TM] [h]it the emergency button on his radio and [Mr. TM] stated "I am under attack." I asked [the Applicant] why [Mr. TM] would say this. [The Applicant] said I don't know, [Mr. TM] said that I hit him and that he [Mr. TM] went to Security.

- d. Mr. FB stated on 28 July 2015 that (emphasis removed):

I have been informed by Investigator [ROM] that additional questions need to be clarified in regards to an incident that occurred on 05th of November 2014 at approximately 0835 hrs. here at the Wau camp. I was working that morning when I heard an emergency broadcast come over the Tetra radio. I looked at the radio and saw that it had come from [Mr. TM's] radio.

- e. Mr. MB stated on 28 July 2015 that (emphasis removed):

I have been informed by Investigator [ROM] that additional questions need to be clarified in regards to an incident that occurred on 05th of November 2014 at approximately 0835 hrs. here at the [S]ecurity [O]ffice. [The Applicant] came into my office twice. The first time he came into the office in a hurriedly fashion right behind [Mr. TM]. I did not observe any cuts, bruises or swelling on [Mr. TM]. [Mr. TM] was very emotional and had tears in his eyes. [Mr. TM] did state that he was assaulted by [the Applicant]. [The Applicant] appeared that he wanted to grab [Mr. TM]. I told [the Applicant] to get out of my office. [The Applicant] left and slammed the door on his way out. About two (2) minutes later [the Applicant] came back into the office and stated that [Mr. TM] must surrender the vehicle key. [The Applicant] was very combative and did not show me a gate pass. [name redacted, Mr./Ms. F] from the radio room did

inform me sometime that day that he did hear an emergency broadcast on the radio.

59. The Tribunal notes that the report prepared on 17 December 2014 by the Security Section of UNMISS mentioned the above-said statements from 13 November 2014 and some documents collected by the investigator (reference to annexes omitted):

[...] The investigator collected the following documents:

Copy, Medical Certificate issued to [Mr. TM] by UNMISS Wau Medical Section on 05 November 2014

Copy, email sent by [Mr. RM] on 21 November 2014

Copy, email sent by [Ms. LX] on 03 December 2014

Copy, email sent by [Mr. JO] on 03 December 2014

Copy, emails sent by [redacted name, Mr. AM] on 24 November 2014 and on 03 December 2014

Copy, email sent by [Mr. JA] on 04 November 2014.

60. The report included the following findings and conclusions in secs. 4 and 5 of the report (reference to annexes and emphasis omitted):

#### 4. FINDINGS

4.1 The investigation established that on 05 November 2014, at approximately 08:30 hours in Wau LogBase staff member [Mr. TM] was verbally abused and physically assaulted by staff member [the Applicant].

4.2 The investigation established that on 05 November 2014, following an argument based on futile motivations [the Applicant] verbally abused staff member [Mr. TM] saying in front of witness [Mr. WL] the words “go out, go out, I want to teach this guy a lesson” and saying to [Mr. TM] the words “if you go to Security I will call National Security to deal with you.”

4.3 The Investigation established that on 05 November 2014, following an argument based on futile motivations staff member [the Applicant] physical[ly] assaulted staff member [Mr. TM] and beat him up with his open hands. As a consequence of the physical assault staff member [Mr. TM] was admitted at the UNMISS Wau [M]edical Section where he was treated for “small 1 x2 cm. swelling surrounded by scratch marks behind the right ear lobe” and discharged with one (1) day rest.

4.4 The investigation established that the statement of staff member [the Applicant] is not consistent with the development of the events and there are clear discrepancies between his and the complainant and witnesses['] statements.

4.[5] The investigation established that in the past staff member [the Applicant] was involved in incidents in which he threatened different staff members and his supervisors. The [i]nvestigation also established that mentioned cases were not officially reported to UN Security. The investigation also established that several staff members who witnessed [the Applicant's] misconduct did not report nor confirm the facts because they were afraid of [the Applicant's] retaliation. The Investigation also established, that [the Applicant] refused to attend counselling se[ss]ions and refused to sign and follow a Performance Improvement Plan.

## 5 CONCLUSIONS

5.1 The investigation concluded that on 05 November 2014, at 08:30 hours in Wau Log Base staff member [Mr. TM] argued with staff member [the Applicant] about the use of a UN vehicle. The investigation also concluded that the argument was based on futile motivations and that staff member [the Applicant] verbally abused staff member [Mr. TM] saying in front of witness [Mr. WL] the words “go out, go out, I want to teach this guy (referring to Mr. TM) a lesson” and saying to [Mr. TM] the words “if you go to Security I will call National Security to deal with you”.

5.2 The investigation concluded that on 05 November 2014, staff member [the Applicant] physical[ly] assaulted staff member [Mr. TM] and beat him up with his open hands. As a consequence of the physical assault staff member [Mr. TM] was admitted to the UNMISS Wau [M]edical Section where he was treated for “small 1x2 cm. swelling surrounded by scratch marks behind the right ear lobe” and discharged with one (1) day rest.

5.3 The investigation [...] concluded that in the past staff member [the Applicant] was involved in incidents in which he threatened different staff members and his supervisors. The investigation also concluded that neither mentioned cases were [...] officially reported to UN Security and that several staff members who witnessed [the Applicant's] misconduct did not report nor confirm the facts because they were afraid of [the Applicant's] retaliation. The investigation also concluded that [the Applicant] refused to attend counselling sessions and to sign and follow a Performance Improvement Plan.

5.4 The investigation concluded that staff member [the Applicant's] statement is not reliable. Staff member [the Applicant] denied that he was chasing staff member [Mr. TM], while it has been ascertained that

he did chase staff member [Mr. TM]. Staff member [the Applicant] was sweating when he entered OIC FSCO [Mr. MB's] office. Staff member [the Applicant] stated that he met OIC FSCO [Mr. MB] outside his office while it has been established that staff member [the Applicant] stormed inside OIC FSCO [Mr. MB's] office with the intent to grab the complainant staff member [Mr. TM]. Staff member [the Applicant] stated that he did not attack nor harm staff member [Mr. TM]. It has been established that he hit staff member [Mr. TM] causing slight injuries as certified by the UNMISS Medical Section.

5.5 The investigation concluded that the incident between staff member [Mr. TM] and staff member [the Applicant] was witnessed by staff member [Mr. WL]. The witness staff member [Mr. WL's] statement is not reliable. Staff member [Mr. WL] did not corroborate staff member [Mr. TM's] statement confirming that [the Applicant] ordered to [Mr. WL] to leave the office shouting at him "go out go out, I want to teach this guy a lesson" referring to staff member [Mr. TM]. Staff member [Mr. WL] was lately questioned by staff member [Mr. TM] about the reasons why he left staff member [Mr. TM's] office allowing staff member [the Applicant] to assault and beat him up and to the reason why he did not inform UN Security about the ongoing incident. Staff member [Mr. WL] replied saying that he did not want [to] become a witness against staff member [the Applicant] because he would have problems considering that staff member [the Applicant's] Tribe members could be dangerous. Staff member [Mr. WL] also advised staff member [Mr. TM] to be careful because he is aware [that] staff member [the Applicant] connections with the [the Applicant's] tribe members could be dangerous. Staff member [Mr. WL] also advised staff member [Mr. TM] to be careful because he is aware of staff member [the Applicant] connections with the Sudanese NSA and that staff member [Mr. TM] would be safer inside the compound".

61. The Tribunal having reviewed the evidence provided by the Respondent, together with the elements of the investigation report of 17 December 2014, considers that the investigation was not correctly conducted for the following reasons:

- a. On 7 November 2014, an email was sent by [Mr. WB] to [Mr. PE] with the subject "Assault incidents in UNMISS Wau" and copied to two other staff members in UNMISS:

Dear [Mr. PE],

There is a worrying trend developing in Wau where [n]ational staff have assaulted other UNMISS staff. Cases 3 & 4 happened

today arising from delayed IC payment. The cashier in the Finance [Section] PK was badly beaten and he has opened a case. National Police was called in to intervene in cases 3 & 4. FYI. Staff members assaulted have been advised to record statements with Security – and file case to Code of conduct but it is unfortunate that they are being intimidated by those who assaulted them. I will call a town hall meeting to remind staff on UN core values and expected conduct. Regards, [Mr. WB]

- 1- PM of Supply chain assaulted TM on 05 Nov 2014
- 1- HJ of Engineering assaulted RK on 06 Nov 2014
- 2- MM former Security Guard (IC) assaulted PK (national Finance Staff) on 07 Nov 2014
- 3- JM former security guard (IC) assaulted PM on 07 Nov 2014”.

b. The Tribunal considers that from the above-mentioned email, it results that a series of incidents which took place between 5 and 7 November 2014 were identified prior to the initiation of the investigation in the Applicant’s case. Furthermore, the Tribunal notes that, in his incident report, Mr. TM made reference to these prior incidents between the Applicant and other staff members, even if he was not involved in these incidents. In the first paragraph of his incident report/complaint filed on 11 November 2014, Mr. TM stated as follows:

First I would like to bring to your attention that below stated incident is a reoccurrence of actions by [the Applicant], some directed to me and others to colleagues. This individual has previously verbally abused me and threatened to physically abuse me on [unreadable]. He has verbally abused and threatened to [unreadable] following staff members and some accounts I bared witness to [Ms. LX] ([his] previous supervisor), [Mr. RM] ([his] present supervisor) who [...] used to share an office with [the Applicant] but had to relocate to another office because of [the Applicant’s] abusive tendencies, [Mr. JO] (previous supervisor), [Mr. JA] (previous supervisor/Wau Hub Administrator), [Mr. JMC], [Mr. AL], [name redacted, Mr. DM]. These [...] individuals have encountered some sort of abuse from the said individual.

c. The Tribunal considers that these elements created a perception among UNMISS staff members that the Applicant was and continued to be a serious threat to other staff members. Therefore, the investigation was put under pressure from the beginning, to refer to and investigate elements which were extraneous to the alleged incident that happened between Mr. TM and the Applicant, which consisted only in physical assault.

d. As results from the beginning of the Applicant's interview, he was informed that the investigation is conducted "in regards to the incident that occurred on 05 November 2014 in which Mr. TM was assaulted".

e. However, as results from the findings and conclusions included in the report of 17 December 2014, the investigation was conducted also in relation with incidents prior to the one alleged to have occurred on 5 November 2014, without the Applicant being informed or interviewed regarding this event. The Tribunal notes that, even if he was not involved in these prior incidents, the first paragraph in the complaint refers to these incidents which were investigated via email after the parties and witnesses were already interviewed in relation to the incident from 5 November 2014.

f. After the report was issued on 17 December 2014, the investigation continued and consisted in interviews conducted in relation to para. 5.3 of the investigation report conclusion (as quoted above) and, therefore, long after the report was issued, which resulted in a breach of the Applicant's due process rights.

#### *Investigative phase*

g. The purpose of the SIU is to conduct a neutral fact-finding investigation into, in cases such as the present one, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to the Human Resources Department being seized of the matter, its findings, including any incriminating statements made by the staff member,

become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.

h. In *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once a staff member has become the target of an investigation he or she should be accorded certain basic due process rights. Once the Administration forms an opinion as to the likelihood that the staff member committed the acts in question, due process rights must be respected.

i. The fundamental human right to defend oneself and present evidence in one's own support is proclaimed in art. 14 of the International Covenant on Civil and Political Rights, a general legal instrument on human rights, and also mirrored in the regional instrument of the European Convention on Human Rights (art. 6). Consequently, once a staff member becomes aware of the allegations held against him or her, the staff member then has the right to defend himself or herself in person.

j. The Tribunal considers that the subject of an investigation must always be informed by the investigators in a clear manner of each of the specific allegations against him or her and of the rights and obligations with regard to the interview process before any questioning begins. In *Borhom* UNDT/2011/067, the Tribunal observed that an investigator must be neutral, without bias and must approach each case from the standpoint of a presumption of innocence of the subject of the investigation.

k. The Tribunal finds that the Applicant was not informed of the allegations held against him at the beginning of the interview and he did not get the opportunity to respond to them in full.

l. The Applicant's additional interview took place on 14 May 2015. The Tribunal notes that the investigator did not inform the Applicant of the purpose

of the additional interview and the Applicant was only aware that he was being interviewed “in regards to possible misconduct”. Two of the witnesses, namely Mr. WL and Mr. MB, who had an additional interview on 28 July 2015, were interviewed only in relation to the incident that occurred on 5 November 2014. Their statements were taken after the Applicant was interviewed on 14 May 2015, and he was never given the chance to address the aspects from these statements. On 28 July 2015 and 31 July 2015, Mr. FB and Mr. SS were interviewed for the first time in relation with the incident of 5 November 2014, and the elements that they provided were also not brought to the Applicant’s attention in order for him to prepare a proper defense.

m. Having reviewed the content of the reports, the Tribunal notes that the facts presented during the above-mentioned interviews of 14 May 2015 and 28 and 31 July 2015 were not mentioned in the findings of the initial report of 17 December 2014, but only directly in its conclusions in para. 5.1:

The investigation concluded that on 05 November 2014, at 08:30 hours in Wau Log Base staff member [Mr. TM] argued with staff member [the Applicant] about the use of a UN vehicle. The investigation also concluded that the argument was based on futile motivations and that staff member [the Applicant] verbally abused staff member [Mr. TM] saying in front of witness [Mr. WL] the words “go out, go out, I want to teach this guy (referring to Mr. TM) a lesson” and saying to [Mr. TM] the words “if you go to Security I will call National Security to deal with you.

n. The Tribunal considers that the investigation panel made conclusions without making findings in this regard. These aspects were no longer mentioned in the following UNMISS reports: the report from 25 March 2015, the report from 17 April 2015 sent to the Under-Secretary-General for the Department of Field Support (“USG/DFS”) by the Special Representative of the Secretary-General, or the report of 22 May 2015 sent by the Assistant Secretary-General for Field Support (“ASG/DFS”) to the ASG/OHRM. It results that two main reports based on the investigation which took place in



November-December 2014 were incomplete. Therefore, all the documents, to which the referral of allegations of misconduct against the Applicant issued by the ASG/DFS to the ASG/OHRM on 22 May 2015 and the contested decision issued on 27 April 2016 which followed refer, are also procedurally flawed, since evidence considered relevant by the investigator was gathered between 31 May 2015 and 31 July 2015 and was thus never brought to the attention of the Applicant and/or the decision-maker.

o. It results that the investigation continued without any specific request in this regard from the USG/DFS or ASG/OHRM, and the evidence gathered during this period was never brought to the attention of the Applicant in order for him to submit a full response or to the attention of the decision-maker for a full evaluation of the factual elements of the case.

p. However, in the letter of allegation of misconduct sent on 4 September 2015 by the ASG/OHRM to the Applicant, para. 22 indicates that:

[A]s noted in the Section III above, the record indicates that you have in the past engaged in aggressive and threatening behaviors towards other staff members and that some of them submitted complaints against you which led to your supervisors having meetings with you to resolve the issue.

q. As results from paras. 5 and 22 of the letter of allegation of misconduct issued on 4 September 2015, the ASG/OHRM mentioned as background:

... The investigation report made reference to the following prior incidents, which caused concern to other staff members:

- a) [Mr. RR], UNMISS staff member, stated that he “had a problem with [you] more than [once]” and had raised the issue with your supervisor, [Mr. JA], and that he was “not the only one threatened by [you]”. According to [Mr. RR], you “always” said: “you are in my country and you do not know what I am capable of, I can send you to your country right away”. [Mr. RR] said that you were a “very problematic” and “very dangerous person”. In the

email, [Mr. RR] gave the names of other staff members who he knew to have been threatened by you, and stated that no report had been made to Security because “[they] all [knew] nothing [would] happen”.

- b) [Mr. JO], who was your second reporting officer at the time, stated that “on many occasions, [you] ha[d] threatened [many] staff [members]” and particularly that around July 2012, when he did not nominate you for a training course, you told him that he “would learn a lesson”. [Mr. JO] stated that in 2012, [Ms. LX], UNMISS staff member, and [Mr. JMC], a UN Volunteer, complained that they had been threatened by you. Your supervisor, [Mr. JA], also stated that he received several complaints about your rude behavior and aggressive language towards colleagues, and that he had several meetings with you concerning the complaints.
- c) [Mr. AL], UNMISS staff member, stated that he had an incident when he was to use a vehicle urgently, but you did not let him use the vehicle because “for [you], [your] work [was the] priority” and you were “too selfish” and “impatient”.

[...]

... As noted in the Section III. [Background] above, the record indicates that you have, in the past, engaged in aggressive and threatening behaviors towards other staff members and that some of them submitted complaints against you, which led to your supervisors having meetings with you to resolve the issue.

- r. The Tribunal is of the view that these aspects were very important to be brought to the attention of the Applicant and for him to properly defend himself since they related to previous incidents in which he allegedly was involved, which were never recorded and/or investigated before, and which have been taken into consideration in relation to the proposed disciplinary measure of separation from service. Having reviewed the Applicant’s comments to the allegation of misconduct filed on 15 October 2015, the Tribunal notes that it is clear he was not aware of the new evidence gathered during the interviews conducted between 28-31 July 2015 from Mr. SS, Mr. FB, Mr. WL and Mr.

MB, or that he was also investigated regarding other aspects except the allegations of physical assault against Mr. TM.

s. The Tribunal notes that in the considerations in para. 21 of the letter of allegation of misconduct issued by the ASG/OHRM on 4 September 2015, it is stated that:

... We consider that, while your account of events is not consistent with the witnesses' statement as noted in the Section V. above, [Mr. TM's] version of events is supported by the evidence, particularly, the other witnesses' statements, as further elaborated below.

- a) [Mr. WL] stated that he "heard loud voices" from [Mr. TM's] office, and entered the office. [Mr. WL] witnessed that you and [Mr. TM] engaged in an argument over the vehicle key. [Mr. WL] left the room in the middle of a heated exchange between you and [Mr. TM]. While [Mr. WL] did not give the specific reason for his departure, [Mr. TM] claimed that you "ordered" [Mr. WL] to leave the office, and [Mr. SS] heard from [Mr. WL] that he did not want to be involved in the matter. Accordingly, the circumstances suggest that the situation was extremely tense, which could escalate to a physical conflict.
- b) The record contains statements of several witnesses, namely, [Mr. SS], [Mr. MB], [Mr. PM], and [Mr. FB], consistently indicating that [Mr. TM] asked for help.
  - (i) During the alleged physical assault, it is clear that [Mr. TM] signaled an emergency through his radio, which you [the Applicant] also admitted during the investigation.
  - (ii) [Mr. MB] and [Mr. PM] stated that [Mr. TM] rushed into the office of [Mr. MB] with a frightened look and in a hurry to escape your pursuit. They witnessed that, immediately after [Mr. TM], you entered the room in a hurry "slam[ing] the office door" trying to "grab" [Mr. TM], which indicates that you were in hot pursuit of [Mr. TM].

- c) It is evident that [Mr. TM] was injured that day and advised to take leave for one day. No information suggests that [Mr. TM's] injury was self-inflicted”.

62. The Tribunal finds that in the letter of allegation of misconduct, the ASG/OHRM already considered that the Applicant was guilty before he had the opportunity to file his comments on the allegations of misconduct, since she indicated that the account of events presented by the Applicant was not consistent with the witnesses' statements, and that, on the contrary, Mr. TM's version of events is supported by the evidence, particularly the other witnesses' statements. The Tribunal considers that this represents a breach of the Applicant's due process rights during the investigation.

63. The letter of misconduct issued by the USG/OHRM on 27 April 2016 referred to the Applicant's comments to the allegations of misconduct, but endorsed the views of the ASG/OHRM presented above in the sense that he engaged in misconduct by engaging in assaulting Mr. TM.

64. The Tribunal concludes that the Applicant's due process rights during the investigation were not respected for the reasons presented above.

*Analysis of the facts based on which the disciplinary sanction was applied. Comparison of the evidence gathered during the investigation with the written and oral evidence presented before the Tribunal*

65. Based on the statements made during the investigation, the Tribunal notes that, actually, in the alleged incident of physical assault on 5 November 2014, only Mr. TM and the Applicant were involved, and only these two staff members had a direct knowledge about the alleged incident itself.

66. Mr. TM stated during the investigation that the Applicant assaulted him by punching/slapping his face and then he had a scratch behind his ear, which was treated on the same day. Mr. TM was contacted by the Respondent in order for him to testify in front of the Tribunal in the present case, but he was not available, apparently because

he was afraid of the Applicant. The Respondent produced as an explanation for Mr. TM's impossibility to testify before the Tribunal a "personal security risk assessment for [name redacted, Mr. JT]" issued on 9 July 2016, in which reference was made that Mr. TM was "receiving warnings from friends, associates who ha[d] been hearing information of threats against him. This information comes from different sources which cannot be ignored". The recommendations included in this document were that Mr. TM should "[r]efrain from going out of the camp unless really necessary; ask someone to buy goods for him momentarily; in case of urgent issues in town ought to have a buddy to accompany him or in convoy with colleagues [...]", and that he should be "reassigned" "to Juba to be away from the subject and his relatives that could inflict harm to him. In addition due to the Wau crisis, and the semblance of strong tribal connection of the conflict, the relatives will use this to bolster their drive to revenge on him".

67. The Tribunal considers relevant this report filed by the Respondent on 17 May 2017 and notes that the recommendation was for Mr. TM to be reassigned to Juba, the city where the Applicant travelled to on 5 July 2016 and where he was living after his separation from service on 17 June 2016. Mr. TM was reassigned from Wau to Juba and worked there until the expiration of his contract in December 2016 and his departure to his home country. Therefore he lived in the same place as the Applicant for a number of months without him being exposed to any proved danger by the Applicant and his friends/family before or after his departure to his home country, and there is no relevant evidence supporting Mr. TM's impossibility to testify before the Tribunal.

68. As results from the Applicant's statement, during the investigation on 13 November 2014 and from his testimony before the Tribunal on 8 May 2017, the Applicant explained that he had only an argument with Mr. TM related to his refusal to give him the key for the pick-up vehicle in order to be able to follow the instruction that the Applicant received on the morning of 5 November 2014, and that he never threatened and/or physically assaulted Mr. TM. Nobody participated and/or assisted to the discussion which took place in Mr. TM's office, except Mr. TM and the Applicant,

and therefore the Tribunal considers that only Mr. TM and the Applicant had direct knowledge about the facts, including the alleged assault.

69. Mr. WL, who was together with the Applicant and Mr. TM when the argument started in the morning of 5 November 2014, confirmed during the investigation in his interview statements from 13 November 2014 and 28 July 2015 and in his testimony before the Tribunal on 9 May 2017 that he did not see the Applicant threatening or physically assaulting Mr. TM before these two staff members went into Mr. TM's office, and that they had only a strong argument about Mr. TM giving the key of one of the UN pick-up vehicles to the Applicant. He also testified that he did not see/notice any cuts, bruises or swelling on Mr. TM.

70. Mr. FB, the Security Officer who was on duty in the morning of 5 November 2014, stated during his investigation interview on 28 July 2015 that on that morning at 08:35 a.m. an emergency broadcast came over the Tetra radio from Mr. TM's radio.

71. Further, the Tribunal notes that during his testimony before the Tribunal on 10 May 2017, Mr. SS stated that, if the red button is activated by a staff member on the hand held Tetra radio, the Security Officer can hear everything that is happening in the staff member's office.

72. The Tribunal concludes that there is no supporting evidence to the factual aspect that Mr. TM requested help from the UNMISS Security while he was in his office in the morning of 5 November 2014 and was allegedly physically assaulted by the Applicant. No such message was heard and/or recorded by the Duty Security Officer.

73. Further, the Tribunal notes that in his statement provided during the investigation on 13 November 2014 and on 28 July 2015, Mr. MB declared that he did not notice any physical injury on Mr. TM, including scratches and swelling on his right ear when he entered into his office. The same statement was made by him before the Tribunal on 8 May 2017 where he stated that Mr. TM was not bleeding and he had no open injuries but he insisted that he had a headache and Mr. MB sent him to the clinic.

The other witness, Mr. PM, who was in MB's office when Mr. TM entered into the room complaining that he was beaten by the Applicant and that he was injured on his right ear, had also confirmed in his testimony before the Tribunal on 8 May 2017 that he did not see any injury consisting in scratches or swelling on Mr. TM's right ear.

74. Both Mr. PM and Mr. MB testified that the Applicant followed Mr. TM shortly in Mr. MB's office, also trying to explain to them why he was running after Mr. TM. Mr. PM, in his testimony before the Tribunal, also stated that he never saw Mr. TM and the Applicant fight, and that "all this is real fabricated. [...] I don't know, they did not really fight, I didn't see that. What I know everywhere you hear, [...] no one can fight within the UN premises [...] they did not fight in my presence and this is what I wrote in my statement".

75. The alleged injury of Mr. TM was confirmed only by one witness, Mr. SS, who saw Mr. TM and the Applicant after they came from the SIU Office, and there is no reasonable explanation why the scratch behind Mr. TM's right ear was not seen by any of the other witnesses which saw Mr. TM before Mr. SS. The scratch was also certified by the Medical Section in a document which states as follows: "Mr. TM presented to this clinic on 5 November 2014 complaining of pain and swelling behind his right ear. He also reported that he was punched by a colleague 30 minutes earlier at their office. I examined him and found a small 1x2 cm swelling surrounded by scratch marks behind the right ear lobe". The Tribunal considers that there is no reasonable link between the alleged physical assault consisting in either punching or slapping Mr. TM's face and the existing injury consisting in a swelling surrounded by a scratch behind Mr. TM's right ear.

76. Having reviewed all the details of the facts established during the investigation and corroborating with the oral and written evidence presented before it, the Tribunal considers that the factual findings established by the investigation are not correct because they are not supported by clear and convincing evidence. Mr. TM presented different versions of the physical assault: in one version, he was punched and, in another version, he was slapped on his face and had to press the red button on his Tetra

hand held radio in order to ask for the intervention of the Security. As results from the above, Mr. WL, Mr. MB and Mr. PM, which all saw Mr. TM right after the alleged physical assault, looked at Mr. TM's right ear to check if there was any swelling as he was complaining, and they were not able to see any bleeding, injury or scratch in the mentioned area. The Tribunal also notes that the medical document does not have a date and the time of issuance, in order to corroborate Mr. TM's statement that the injury behind his right ear resulted from an incident which took place thirty minutes before the medical examination. Based on the inconsistencies identified in Mr. TM's statement during the investigation as mentioned above, together with the absence of his testimony in the present appeal, as the only direct witness except the Applicant, the Tribunal considers that Mr. TM's version of facts does not corroborate the other witnesses' statements, except Mr. SS's, who had only an indirect knowledge of the alleged incident.

*Disciplinary measures and disciplinary liability*

77. As discussed in *Khan* UNDT/2013/140 and upheld by the Appeals Tribunal in 2014-UNAT-486, the existence of misconduct is determined by the meeting of four cumulative conditions, namely (1) the objective element (an illegal act and/or an omission); (2) the subjective element (negative mental attitude); (3) the causal link between the illegal act/omission and the harmful result; and (4) the negative effect on labour relations, order and discipline in the workplace.

78. In light of the above-mentioned considerations, the Tribunal concludes that the procedure followed was irregular, the facts that the Applicant physically assaulted Mr. TM on 5 November 2014 were not correctly established during the investigation since they were not supported by clear and convincing evidence, and therefore these facts do not constitute misconduct. Further, the Tribunal concludes that there was no factual basis to apply the disciplinary sanction of separation from service by the Administration.



79. The Applicant's grounds for appeal therefore are to be granted, and the contested disciplinary decision to separate him from the Organization with compensation in lieu of notice and without termination indemnity, which is unlawful for both procedural and substantive reasons as presented above, is to be rescinded.

## **Relief**

### *Legal framework*

80. The Statute of the Dispute Tribunal states:

#### **Article 10**

...

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

81. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as

established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression “[t]he Dispute Tribunal shall ... determine an amount of compensation”.

b. Article 10.5(b) refers to a compensation.

82. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute.

83. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately “shall normally not exceed the equivalent of two years net base salary of the applicant”, respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

84. When the Tribunal considers an appeal against a disciplinary decision, the Tribunal can decide to:

- a. Confirm the decision; or
- 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. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the

law, the applied unlawful 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; and/or

d. Set an amount of compensation in accordance with art. 10(b).

85. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

86. 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/her reinstatement into service with compensation for the lost salaries (*restitutio 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.

87. A severe disciplinary sanction like a separation from service or dismissal is a work-related event which generates a certain emotional distress. A compensation 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 and consequently will consist of a partial compensation.

88. 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.

89. The Tribunal considers that, in cases where the disciplinary sanction of separation from service or dismissal is rescinded 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. 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, if any, produced by the rescinded decision.

90. 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. According to the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased, her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

91. In *Tolstopyatov* 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.

92. In *Mmatta* 2010-UNAT-092, the Appeal Tribunal stated:

Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the [Dispute Tribunal] to compensate for loss of earnings in lieu of reinstatement up to the date of judgment.

*The party's submission on remedies*

93. As remedies in the application filed on 16 August 2016, the Applicant requested:

- a. Termination be declared unlawful.
- b. A declaration that the reasons stated in the letter of termination do not constitute proper ground for termination.
- c. The Respondent to withdraw the letter of termination and issue the Claimant a letter clearing him of any wrongdoing.
- d. The Claimant is paid advocates cost, unpaid salaries and appropriate damages for wrongful termination.

94. The above-mentioned remedies were amended on 6 March 2017 in para. 19 of the amended application as follows:

... Lastly, the Separation from Service was clearly based on a biased investigation. The Applicant, would seek the following orders be passed by the honorable tribunal:

- a. That the separation from service be set aside.
- b. That the Applicant be reinstated to his previous position
- c. That the Respondent should pay to the Applicant all unpaid salaries since separation of service.
- d. That the Respondent should pay moral damages as a result of the unlawful separation from service considering the feeling of stress, anxiety and psychological damage the applicant has been subjected to.

95. The aspect of remedies was addressed by the Respondent in his closing submissions.

*Reinstatement*

96. The Tribunal notes that the Applicant requested his reinstatement as the contested decision concerns a dismissal. In light of the above considerations and in accordance with art. 10.5(a) of the UNDT Statute, the contested decision issued on 27 April 2016 imposing the disciplinary measure of separation from service with

compensation in lieu of notice and without termination indemnity, which was implemented on 17 June 2016, is to be rescinded and any reference related to the Applicant's sanction are to be deleted from his file. The Tribunal takes note that as results from the Applicant's "Letter of Appointment" signed by him on 25 May 2015, he was offered and accepted a fixed-term appointment with UNMISS starting from 1 July 2015 for one year with the expiration date on 30 June 2016; this is in accordance with ST/AI/2013/1 (Administration of fixed-term appointments), sec. 1.2, which provides that:

... In accordance with staff regulation 4.5(c) and staff rule 4.13(c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b).

97. Consequently, the Tribunal considers that, had the Applicant not been separated from service on 17 June 2016 for disciplinary reasons, his fixed-term appointment would have expired on 30 June 2016, and his request for reinstatement is to be rejected.

*Alternative to rescission*

98. According to art. 10.5(a) from 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 decision. The amount of compensation to be awarded as an alternative to the rescission of the contested decision is USD5,000 for the emotional distress suffered by the Applicant (the emotional distress will be otherwise covered by the rescission of the decision).

*Material damages*

99. The Tribunal takes note that as results from the Applicant's "Letter of Appointment" signed by him on 25 May 2015, he was offered and accepted a fixed-term appointment with UNMISS starting from 1 July 2015 for one year with the expiration date on 30 June 2016, in accordance with ST/AI/2013/1 sec. 1.2.

100. Taking into consideration that he was separated before the expiration of his contract, the Applicant's request for payment of salaries and benefits since the time of separation is to be granted in part for the period 17-30 June 2016. The Tribunal takes note that the Applicant received compensation in lieu of notice corresponding to the relevant notice period, respectively 30 days, as a result of his separation from the Organization, and that this aspect is also to be taken in consideration by the Administration in the implementation of the present judgment.

*Moral damages*

101. Art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and the text introduced a mandatory new requirement, according to which the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

102. In Black's Law Dictionary, 6th Ed. (1990), the word "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (see p. 718).

103. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

104. In *Benfield-Laporte* 2015-UNAT-505, the Appeals Tribunal held that (see para. 41, footnote omitted):

... [W]hile not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

105. Further in *Kallon* 2017-UNAT-742, the majority of the full bench of the Appeals Tribunal decided (footnotes omitted) that:

62. The authority conferred by the [Dispute Tribunal (“UNDT”)] Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(b) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation. Much will necessarily depend on the evidence before the UNDT.

64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis* 2013-UNAT-309 prior to the amendment of Article 10(5)(b) by General Assembly resolution 69/203. In that case this Tribunal said:

... 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.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

... We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

65. The distinction drawn between the two categories of moral injury or non-patrimonial damages in *Asariotis* [Judgment No. 2013-UNAT-309] has two dimensions. On the one hand, it speaks to the kinds of moral damage ordinarily at issue and, on the other, mentions the kind of evidence necessary to prove each kind of moral damage.

66. The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases.

Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

...

68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence".

106. The Tribunal notes that, in his application, the Applicant requested to be reinstated in his previous position and the payment of all unpaid salaries since separation of service, together with moral damages as a result of the unlawful separation from service for wrongful termination and, in his amended application, moral damages for the feeling of stress caused by his separation. It results that the Applicant's request for moral damages relates to the first category of moral damages identified in *Asariotis*.

107. As results from para. 70 from *Kallon*, additional evidence is required in case of mental distress or anxiety allegedly produced by the contested decision, evidence which can consist in the Applicant's testimony and/or medical or psychological

reports/evidence to prove that the harm can be directly linked or is reasonably attributable to the breach or violation.

108. This Tribunal agrees with the majority decision taken in *Kallon* and considers that, in the present case, the Applicant suffered moral harm as a result of the unlawful termination decision, and the harm caused to him by the unlawful discontinuation of his fixed-term contract with UNMISS results from the totality of evidence according to the standard of proof established by the Appeals Tribunal in *Kallon*: “[t]he evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence”. The Applicant testified on 8 May 2017 and stated as follows:

First of all, I am a breadwinner to a large family, including my near family, my wife, four children, and I have two sisters with children, they have passed away, and I’m the one in charge of them, plus a niece put up by me. These, I’m fully responsible to their daily life. Now -- it is very difficult now since I lost my job. I was living in a rental house; I didn’t have my own house. The landlord dismissed me from the house; that’s one point. So now I live in a very simple house with an open roof, that’s one thing.

I was having -- me, I am sick, I have diabetes and having blood pressure. The records of my medical file in the United Nations can confirm that. Due to my termination, my health was not properly -- the diabetes and hypertension used to go up and down because of my thinking of the situation of my family, how are they going to be. Number 3, when I was terminated, they display[ed] my photo in the vicinity of United Nations Mission in Wau, which is showing that (indistinct) is a process, those who are caught in theft or robberies, they’re photos are posted. So they put me with the same people.

[...]

[...] They discovered their mistake, all the photos were removed, and on (indistinct), on Monday, I came to the compound, [...] check-out process, [...] all the photos were being removed, and are evidence [...] ... is one of the problems. This has affected me, as like someone who was [...] because I was in the warehouse, maybe [...] the assets of the United Nations, because that is the process: Whenever somebody’s caught in theft, they display that he’s not allowed to enter the compound [...]. Plus, it was very difficult for me to get a job because the information was circulated.

109. Since the Applicant testified that he suffered mental distress and/or anxiety, the Tribunal considers that all factual elements together with the nature of the breach constitute sufficient evidence in the present case to conclude that harm was caused to the Applicant's dignity and to his career potential.

110. The Tribunal considers that the present judgment, together with an amount of USD5,000, represents a reasonable and sufficient compensation for the moral harm caused to the Applicant and his request for moral damages is therefore to be granted in part.

*Lawyer's cost*

111. The Applicant claims he paid a private counsellor the amount of USD20,000 for the handling of his case. The Tribunal, after reviewing the "Agreement for Legal Services" signed on 1 August 2016 between the Applicant and his Counsel, takes note that the fee for the legal services was established to be USD20,000; an amount which was to be paid by the Applicant to his Counsel in full on or before the conclusion of the proceedings, and that a minimum USD5,000 was to be paid in advance before the start of the UNDT hearing. The Tribunal notes that no evidence of the initial payment of USD5,000 and/or the payment for the entire amount of USD20,000 were provided by the Applicant together with the closing submissions, as requested by the Tribunal at the end of the hearing on 10 May 2017. Therefore, the request for the legal costs consisting in the Applicant's Counsel's fees is to be rejected due to the lack of evidence.

112. Moreover, art. 10.6 of the Dispute Tribunal's Statute provides that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party." In the present case, the Tribunal notes that the Respondent did not manifestly abuse the proceedings before the Tribunal, and therefore there is no reason for the Tribunal to grant such compensation to the Applicant.

## **Conclusion**

113. In the light of the foregoing The Tribunal DECIDES:

- a. The application is granted in part and the contested decision to terminate the Applicant's contract for disciplinary reasons and to separate him from UNMISS is rescinded, and any references relative to the Applicant's disciplinary sanction of separation from service are to be removed from his official status file.
- b. As an alternative to the rescission of the contested decision, the Respondent is to pay to the Applicant USD5,000.
- c. The Respondent is to pay the Applicant the equivalent of his net salary for the period 17-30 June 2016 as material damages, and USD5,000 as moral damages.
- d. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.
- e. The Applicant's request for legal costs is rejected.

f. The present judgment is to be included in the Applicant's official status file.

*(Signed)*

Judge Alessandra Greceanu

Dated this 29<sup>th</sup> day of December 2017

Entered in the Register on this 29<sup>th</sup> day of December 2017

*(Signed)*

Morten Albert Michelsen, Officer-in-Charge, New York