UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/062
Judgment No.: UNDT/2018/056
Date: 4 May 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Anne Eyrignoux, Officer-in-Charge

SALL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Abbe Jolles, PC

Counsel for Respondent:
Jonathan Croft, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations African Union Mission in Darfur ("UNAMID"), filed an application before the United Nations Dispute Tribunal contesting the decision to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity. As remedy, the Applicant requested his reinstatement with back pay and benefits.

2. The Respondent requested the application to be rejected.

Procedural background

3. On 29 July 2016, the Applicant filed the present application before the Dispute Tribunal in Nairobi, where the case was registered as Case No. UNDT/NBI/2016/057.

4. On 1 September 2016, the Respondent filed the reply.

5. Following the decision taken at the plenary meeting of Dispute Tribunal Judges held in May 2016, in order to balance the Tribunal's workload, the present case was selected to be transferred to the Dispute Tribunal in New York.

6. By Order No. 471 (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.

7. From Order No. 485 (NBI/2016) of 18 November 2016 follows that neither party objected to the transfer and, pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, the case was transferred to the Dispute Tribunal in New York. The case was registered by the New York Registry under Case No. UNDT/NY/2016/062.

8. On 21 November 2016, the case was assigned to the undersigned Judge.

9. By Order No. 11 (NY/2017) dated 17 January 2017, the Tribunal ordered the parties to attend a Case Management Discussion ("CMD") in the Tribunal's courtroom on 26 January 2017, also indicating that, if requested, Counsel for the Applicant could participate via telephone, skype or video link.

10. At the 26 January 2017 CMD, both Counsel appeared in person, Ms. Abbe Jolles for the Applicant and Mr. Jonathan Croft for the Respondent.

11. By Order No. 19 (NY/2017) dated 27 January 2016, the Tribunal: (a) referred the case to the Mediation Division of the United Nations Ombudsman and Mediation Services ("UNOMS") for consideration pursuant to art. 15 of the Tribunal's Rules of Procedure; (b) suspended the proceedings until 27 April 2017; and (c) instructed the parties to inform the Tribunal as to the progress of the mediation discussions by 28 April 2017.

12. On 10 February 2017, the Respondent informed the Tribunal by a "notice of withdrawal of consent to mediation" that the matter of the case was "not one which lends itself to alternative dispute resolution", noting the Tribunal's emphasis on "the importance of saving the Organization valuable resources, and[that] the Respondent shares this desire to do so".

13. By Order No. 35 (NY/2017) dated 21 February 2017, the Tribunal instructed the parties to attend a CMD on 7 March 2017.

14. At the 7 March 2017 CMD, both Counsel appeared in person, Ms. Abbe Jolles for the Applicant and Mr. Jonathan Croft for the Respondent. Counsel for the Applicant stated that she wished for a hearing for the Applicant to testify and also to hear several other witnesses and that she intended to submit some further motions on case-related issues. Counsel for the Respondent contended that, while he believed that the case could be determined on the papers before the Tribunal, he would not object to the holding of a hearing.

15. By Order No. 42 (NY/2017) dated 8 March 2017, the Tribunal ordered the parties as follows (emphasis omitted):

> … By 5:00 p.m. on […] 28 April 2017, the parties are to provide, either by a jointly-signed submission or separate submissions, information on:
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> a. Agreed date(s) for a hearing;
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> b. The names and titles of all witnesses proposed to be called by each party;
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> c. For each proposed witness, the relevance of the testimony by outlining facts that each of them is expected to prove;
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> d. How each witness can be heard by the Tribunal by providing:
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> i. Video conference information, if the witness ha[s] access to such facilities, for instance, at a United Nations [O]ffice;
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> ii. A skype name; and/or
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> iii. Telephone numbers—preferably two numbers, to a cellular phone and a land-line.

16. By motion dated 27 April 2017, Counsel for the Applicant requested the hearing to be held on 14, 15, and 16 November 2017, which had been agreed with the Respondent. Counsel for the Applicant further requested that she be granted an extension of time until 15 September 2017 to "locate witnesses, submit proposed testimony and file other [m]otions necessary in the interest[…] of justice".

17. By motion filed on 28 April 2017, Counsel for the Applicant restated her request for extension of time until 15 September 2017 to "locate witnesses, submit proposed testimony and file other [m]otions necessary in the interest[…] of justice" and requested that the Respondent be ordered to respond to this request by 15 May 2017.

18. On 28 April 2017, Counsel for the Respondent filed his submission in response to Order No. 42 (NY/2017), proposing the following witnesses: Ms. RA (name redacted), former Budget Assistant, UNAMID and current Supply Assistant,

United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic ("MINUSCA"); Dr. KJ (name redacted), Medical Officer (medical physician), UNAMID; Mr. BS (name redacted), Director, Investigations Division, Office of Internal Oversight Services ("ID/OIOS"), or Ms. SS (name redacted), Section Chief, Operational Standards & Support Section, ID/OIOS; Ms. SaS (name redacted), former United Nations Volunteer ("UNV").

19. On 9 May 2017, Counsel for the Respondent informed the Registry by telephone that the Respondent did not object to the Applicant's request for being granted until 15 September 2017 to "locate witnesses, submit proposed testimony and file other [m]otions necessary in the interests of justice".

20. By Order No. 89 (NY/2017) dated 10 May 2017, the Tribunal provided the following orders (emphasis omitted):

> … The hearing is to be held on 14, 15, and 16 November 2017;
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> … The Applicant's request as per motion of 26 April 2017 is granted and, by 15 September 2017, the Applicant is to respond to Order No. 42 (NY/2017) regarding:
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> a. The names and titles of all witnesses proposed to be called by the Applicant;
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> b. For each proposed witness, the relevance of the testimony by outlining facts that each of them is expected to prove;

21. On 15 September 2017, Counsel for the Applicant filed a motion for extension of time to file information as per Order No. 89 (NY/2017) until 20 October 2017, explaining that she had "not been able to locate and prepare a final list of all essential witnesses" and that she had a serious family emergency.

22. By Order No. 202 (NY/2017) issued on 26 September 2017, the Tribunal granted the Applicant's request for a time extension and provided the following additional orders:

> … With reference to Order No. 89 (NY/2017), by 5:00 p.m. on […] 20 October 2017, the Applicant is to respond to Order No. 42 (NY/2017) regarding:
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> a. The names and titles of all witnesses proposed to be called by the Applicant;
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> b. For each proposed witness, the relevance of the information that each of them is expected to provide;
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> c. For each witness if s/he is available to appear in person before the Tribunal or if s/he is to testify via skype or telephone.

23. On 20 October 2017, the Applicant submitted a list of proposed witnesses, proposed anticipated testimony and a request for a change of date of the hearing, stating in paras. 1-4 that (references to footnotes omitted):

> … [The] Applicant […] anticipates calling the following potential witnesses but ha[s] not yet received confirmation that they will testify.
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> 1. [Name redacted, Mr. MS], former Director, Investigations Division, OIOS. [Mr. MS] will testify about his memo closing the investigation of [the Applicant] [the MS memo]. [Mr. MS] is anticipated to testify in person.
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> 2. [Name redacted, Mr. PG], former OIOS investigator and whistle blower, who has testified before [United States] Congress. [Mr. PG] will testify about the procedure employed at OIOS when conducting investigations and closing investigations and [the MS memo]. [Mr. PG] is anticipated to testify in person.
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> 3. [Name redacted, Mr. AB], former Assistant Secretary General for Field Support [("ASG/DFS")]. He is anticipated to testify regarding his [m]emos relating to [the Applicant]. Further we expect him to testify "[…] thanks to colossal mismanagement, the United Nations is failing." He is anticipated to add that it is impossible to get rid of [United Nations] senior staff for poor performance and that decisions are driven by political expediency not the facts. In addition, we anticipate he will testify the United Nations is governed by a "[...] blur of Orwellian admonitions and Carrollian logic." He is further expected to testify "[i]f you locked a team

> of evil geniuses in a laboratory, they could not design a bureaucracy so maddeningly complex, requiring so much effort but in the end incapable of delivering the intended result." He will further point out that there is "dysfunction" and "minimal accountability" regarding personnel decisions. While there has been almost no effort to investigate and prosecute child rape by United Nations Staff and Civilians a lot of effort has gone into accusing and firing [the Applicant] in a private ongoing domestic dispute. [Mr. AB] recommends an outside independent panel to review and overhaul the United Nations personnel system. [Mr. AB] is anticipated to testify in person.
>
> … It is anticipated that all witnesses will testify that the decision to impose discipline and separation from service in the case of [the Applicant] was improper and violated [s]taff [r]Rule 10.2(a)(viii).
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> … [The Applicant] remains open to mediation as recommended.
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> ... [The Applicant] hereby requests the hearing in this matter be held [on] 16, 17, and 18 of January 2018 in place of the originally agreed proposed November 2017 dates.

24. On 23 October 2017, the Tribunal instructed the Respondent via email to file a response to the Applicant's submission by 30 October 2017.

25. On 27 October 2017, the Respondent filed a submission regarding the Applicant's proposed witness list, proposed anticipated testimony and change of date request. He stated that the Applicant had provided no justification for the change of date for hearing, noting that the Applicant received multiple extensions in this matter expressed his opposition to unwarranted delay.

26. On 1 November 2017, the Tribunal instructed the Respondent to confirm if Ms. SaS (the proposed additional witness) would testify in the present case. On the same day, the Respondent informed the Tribunal that to date he had not been able to reach Ms. SaS.

27. By Order No. 245 (NY/2017) dated 2 November 2017, the Tribunal issued the following orders (emphasis omitted):

> … By 5:00 p.m. […] 9 November 2017, the Respondent is to file additional written evidence:
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> a. All the responses which UNAMID, with reference [N]o. "Ref. UNAMID 20121103-492", sent to OIOS regarding "ID Case No. 0300/13";
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> b. [C]larifications and further evidence based on which the case was considered closed by the then OIOS Director on 25 August 2015.
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> … The parties request for oral evidence is granted in part. The parties and the following witnesses: [Ms. RA] and [Dr. KJ] are to attend a hearing on the merits on […] 14 and 15 November 2017;
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> … The Applicant's request to postpone the hearing is rejected;
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> … By 5:00 p.m. […] 9 November 2017, the parties are to file a joint signed submission regarding what hour the hearing should start […], confirming the location of the Applicant, the location of the witnesses and the order of their appearance. In case the parties consider that all three testimonies can take place in the same day — 14 November 2017, they are to inform the Tribunal accordingly […].
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> … The Tribunal will decide on the admissibility of the testimonies of [Mr. MS, Mr. PG, Mr. BS and Mr. AB] after reviewing the written additional evidence requested from the Respondent.

28. On 3 November 2017, the Applicant filed a motion "to bar the Respondent's witnesses, allow [Counsel for the Applicant] to appear by Skype and excuse [the] Applicant's appearance or suspend proceedings for mediation".

29. On 9 November 2017, the parties filed a joint submission pursuant to Order No. 245 (NY/2017) in which they stated as follows:

> Pursuant to Order No. 245 of Case No. UNDT/NY/2016/062, and notwithstanding any pending submissions of the parties, the following is submitted:
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> a. The parties agree that a hearing shall not be held in this matter.
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> b. The parties request that the Tribunal allow for a written closing submission due to the Tribunal by 5:00 p.m., 14 December 2017.

30. On the same date (9 November 2017), the Respondent filed additional written evidence in response to Order No. 245 (NY/2017).

31. By Order No. 252 (NY/2017) issued by the Tribunal on 10 November 2017, the Tribunal informed the parties that the hearing on the merits scheduled for 14 and 15 November 2017 was cancelled and instructed them to file their closing statements by 5:00 p.m. on 14 December 2017 based only on the written evidence of the record. The closing statements for the Applicant were to be signed both by the Applicant's Counsel and by the Applicant.

32. On 14 December 2017, both parties filed their closing submissions.

33. On 18 December 2017, the Applicant filed a supplement to the closing submissions consisting in the last page of the closing submissions signed by both the Applicant and his Counsel as instructed in Order No. 252 (NY/2017).

34. By email sent on 18 December 2017, the Respondent was instructed to submit a copy of the Applicant's last Letter of Appointment, which was filed on 19 December 2017.

Factual background

35. In the application, the Applicant presents the facts as follows (emphasis omitted):

> … [The Applicant] served as a [P]rocurement [A]ssistant [in the] United Nations Secretariat [African Union ("AU")] Hybrid Operation in Darfur, duty station El Fasher. He had a fixed term […] appointment.
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> … [The Applicant] has more than 25 years […] experience in Procurement, Contracts Management, Logistics, Finance and Budget both nationally and internationally including more than fourteen [14] years [United Nations] service. He has an unblemished record of perfect service to the United Nations while serving in conflict zones.
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> … On [19 January] 2016 [the Applicant] was in his residence in El Fasher when he was served with several hundred pages of

[United Nations] official documents (hereinafter reports of alleged 2012 misconduct). Nearly all the reports of alleged 2012 misconduct contained double and/or triple hearsay and were made more than a year after the alleged misconduct.

… The reports of alleged 2012 misconduct detailed an alleged sexual assault by [the Applicant] on his longtime girlfriend, [Ms. SaS]. On 11 December 2013 [Security Officer] [name redacted, Ms. VN] of [United Nations] Security, UNAMID, sent an "Addendum to the Alleged Physical Assault on [Ms. SaS], […] by [the Applicant] […]" to [name redacted, Mr. MAR], [Officer-in-Charge, ("OIC")] [Special Investigations Unit, ("SIU")] UNAMID […] ([Hereinafter referred to as] [Ms. VN's] summary of alleged 2012 misconduct"). Therein [Ms. VN] summarizes witness statement often specifying 2013 as the year within which the alleged assault took place.

… Attached to "[Ms. VN's] summary of alleged 2012 misconduct" are several statements and photos. It is not possible to identify when or by whom the photos were taken or even who appears in the photos. One purports to be of "[Ms. SaS's] torn bra." Others, titled "photos of ransacked residence" fail to show who took them and when, fail to tie photos to the victim and do not show a "ransacked residence." They are photos of what appears to be a wood floor not specified. Other[…] photos show dishes neatly stacked on a counter.

… None of the photos are credible relevant evidence.

… The "[Ms. VN's] summary of alleged 2012 misconduct" explains that the investigator, [name redacted, Mr. MF], who conducted all of the "initial interviews", went on leave [on] 4 November […] 2012 (the morning after the alleged assault) without submitting a report of any kind or handing over his investigation to a colleague. On 23 November […] 2012, while on leave from a remote location, [Mr. MF] provided a statement to the newly assigned investigator.

… Thus […] "[Ms. VN's] […] summary of alleged 2012 misconduct" contains triple hearsay. [Ms. VN] summarizes [Mr. MF's] statement (made [ten] days after the alleged 2012 misconduct while away from the mission on leave) of what he had heard about the victim's condition from [the staff member] [ten] days earlier. No eyewitness statements are included in the investigation of "[Ms. VN's] summary of alleged 2012 misconduct". None of [the] witnesses were contacted after December 2012.

… [Ms. SaS] left the mission several years ago and has disappeared. There have been no allegations before or since, involving [the Applicant].

> … There is no DNA evidence.
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> … On 25 August 2015, nearly [three] years after the alleged 2012 misconduct, [Mr. MS], then Director of Investigations, [OIOS], reviewed the matter and recommended it be closed without further action because [t]here was no credible evidence of misconduct by [the Applicant].
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> … After [Mr. MS] found no credible evidence of a sexual assault and closed the matter, on 11 September […] 2015, then [ASG/DFS], [Mr. AB], referred the alleged 2012 misconduct to [name redacted, Ms. CWW], Assistant Secretary-General for Human Resources Management [("ASG/OHRM")], recommending dismissal of [the Applicant]. [Mr. AB] relies on a medical report containing alleged injuries without reference to an alleged sexual assault. The doctor signing the medical report did not [conduct an examination] for the alleged sexual assault. This appears to be a report of a different assault making that medical report irrelevant to the case of [the Applicant].
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> … On 19 January 2016 [the Applicant] was served with notice of the investigation of the 2012 alleged assault.

36. The Respondent presents the facts related to the physical assault as follows in the reply (references to footnotes omitted):

> … The Applicant joined the Organization on 1 July 2005 and resigned with an effective date of 28 May 2008. The Applicant rejoined the Organization on 14 June 2008 and, prior to his separation from service in May 2016, held a fixed-term appointment at the FS-4 level, as Procurement Assistant in the Procurement Section, El-Fasher, UNAMID.
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> … From April 2011, [Ms. SaS] was involved in a romantic relationship with the Applicant. The Applicant had a key to her room and vice-versa. [Ms. SaS] stated that on 3 November 2012, around 2:20 p.m., she went from her office to her room in Super Camp El-Fasher to collect an item and, when she entered the room, the Applicant was standing in the middle of the room, speaking on his mobile phone. [Ms. SaS] asked the Applicant what he was doing in her room and, according to [Ms. SaS], the Applicant responded that he was looking for his driving permit and vehicle keys and that the Applicant had "turn[ed] [her room] upside down" in the process. [Ms. SaS] stated that she then took what she needed and attempted to leave, when the Applicant "jumped in front of [her]" and locked the door, refusing to let her leave until she gave the Applicant his driving permit and keys.

… [Ms. SaS] stated that the Applicant "pushed [her] on the bed [and] then [she] started shouting and [...] [the Applicant told her] to close [her] mouth". [Ms. SaS] added that […] the Applicant "beat [her] seriously" and squeezed her mouth hard causing her "left side of [her] jaw [to be] very painful and swollen". […] When the Applicant "saw that [she] was shouting louder, he took the pillow and covered [Ms. SaS's] mouth. [Ms. SaS] then pretended to have fainted and the Applicant "took the pillow from [her] face".

… [Ms. SaS] stated that the Applicant then got up, and asked again about his driving permit. The Applicant subsequently "held [her] [T-] shirt and pulled it from [her] [...] and tore [her] bra[ss]i[è]r[e]."

… [Ms. SaS] stated that the Applicant then pushed her outside […]. [Ms. SaS] began to scream and as the Applicant tried to take her back inside, she started running away from him but tripped and fell on the ground. [Ms. SaS] stated that the Applicant then "caught up with [her] and dragg[ed] [her] on the bare ground". The Applicant then covered her mouth as she shouted for help and [Ms. SaS] bit his thumb. A medical report, dated 7 November 2012, found that the Applicant had two wounds on the lateral and medial aspect of the Applicant's thumb with no clear margins.

… The Applicant then "bit [her] hard in front of [her] head which forced [her] to release his thumb". A medical report, dated 6 November 2012, found that [Ms. SaS] had sustained multiple injuries on her body including, but not limited to, a bite mark on her scalp.

… [Ms. SaS] stated that "a lady from the next cluster", [Name redacted, Ms. RA], Budget Assistant, UNAMID, came outside and the Applicant ran away. [Ms. RA] explained that, around 2:45 p.m. that same day, she was in her room and, on hearing "a voice of someone screaming continuously", ran outside where she saw [Ms. SaS] sitting on the ground, […] behaving as if she was fending off an attack from someone or something [Ms. RA] could not see". [Ms. SaS] began crying for help.

… [Ms. SaS] initially signaled to [Ms. RA] to come to her but [Ms. RA] was scared and signaled to [Ms. SaS] to come to her instead. […] [Ms. SaS] quickly went to [Ms. RA] and the two of them ran into [Ms. RA's] room and locked the door.

… [Ms. SaS] noted that she had sustained multiple injuries […]. [Ms. RA] saw that [Ms. SaS] "[had been] brutally beaten and she was bleeding from her lips, her hand, her leg and her ankle" and was crying "seriously" and "h[y]st[e]rically". [Ms. SaS] told [Ms. RA] that the Applicant had done this to her.

… [Ms. RA] suggested calling security but [Ms. SaS] asked her to refrain from doing so because "the matter w[ould] get worse". [Ms. SaS] explained that she did not want [Ms. RA] to call security initially as she feared that the Applicant would "harm [her children] or [her] in retaliation". [Ms. SaS] instead asked [Ms. RA] to call [name redacted, Mr. AK], one of her "Liberian brothers" and a staff member in the Communications and Information Technology Service Section, CITS. [Ms. RA] gave some clothing to [Ms. SaS] to wear. [Name redacted, Ms. SE], [Ms. RA's] friend, also in CITS, arrived around 2:55 p.m. and stated that [Ms. SaS] was "in bad shape like dirty no shoes [...] and looked so much in pain".

… [Mr. AK] arrived around 3:05 p.m. and stated that "[he] saw [Ms. SaS] sitting with stains of blood on her hand, legs and partly swelled left side of the head". [Ms. RA, Ms. SE and Mr. AK] took [Ms. SaS] to hospital. On the way, [Ms. SaS] asked [Mr. AK] "what [she] should tell the doctors." [Ms. SaS] initially told the doctors at the hospital that she slipped and fell.

… A medical report, dated 6 November 2012, based on an examination that occurred on 5 November 2012, found that [Ms. SaS] had sustained multiple injuries on her body including a bite mark on her scalp and injuries to her cheek, mucosa inside the buccal cavity, buttock, thigh, arm, wrist, knee, thumb and little finger, including the partial avulsion of the nail of the little finger on her right hand. [Ms. SaS] was diagnosed with multiple abrasion wounds and severe bodily contusions with soft tissue injuries.

… [Name redacted, Mr. CD], a staff member in CITS, stated that, around 3:15 p.m., he received a call from [Mr. AK] regarding [Ms. SaS's] admittance to hospital. [Mr. CD] went to the hospital and took [Ms. SaS] back to her accommodation, around 3:50 p.m., where she asked him and [Mr. AK] not to report her assault officially. While in her accommodation, [Mr. CD] noted blood stains on a pillow and the dresser mirror. The investigators found that [Ms. SaS's] room had items scattered about, consistent with a struggle. Traces of blood were found on a pillow in [Ms. SaS's] room and on a glass cup and a bed cover in [Ms. RA's] room.

… The Applicant was then called to [Ms. SaS's] room where he gave "no direct answers about whether he had assaulted [Ms. SaS] "rather he got into [a] hot argument or exchange of words which related to car keys and [a] driving permit". Shortly after, [name redacted, Mr. WH], the Chief of the Conduct and Discipline Team [("CDT")], came to speak with the Applicant and [Ms. SaS] was taken to the [SIU] [O]ffice.

… [Ms. SaS] stated that when she officially reported the matter she "came under enormous pressure from [the Applicant] and other people asking [her] to withdraw the case". Specifically, [Ms. SaS] explained that the Applicant told her that "what affects him and [his] children will also affect [her] and [her] own children".

… The evening of the incident, [Ms. SaS] stated that the Applicant had asked her to "retrieve" her statement and, afraid, she spent the night with two friends. The following day, [Ms. SaS] stated that the Applicant called her twice but she ignored the calls and informed the SIU, who in turn requested that the Applicant cease contact with [Ms. SaS].

… It is noted that a medical report, dated 7 November 2012, found that the Applicant had two wounds on the lateral and medial aspect of the Applicant's thumb with no clear margins.

… [Ms. SaS] stated that, on 29 November 2012, [the Applicant's] wife called [her] fiancé. [Ms. SaS] explained that during that conversation, [the Applicant's] wife told [Ms. SaS's] fiancé that, with [the Applicant's] assistance, she would make life "unbearable for [Ms. SaS]" and "cause her pain". [Ms. SaS] stated that on 1 December 2012, [the Applicant] called her son and sent him an SMS message but [the Applicant] did not speak with him.

… [Ms. SaS] checked out from UNAMID on 31 March 2015.

[The Applicant's] account of events during the investigation

… When investigators interviewed [the Applicant], he denied assaulting or beating [Ms. SaS], […] pushing her outside on 3 November 2012. [The Applicant] further denied beating [Ms. SaS] on any previous occasion, claiming. that there was one incident where [Ms. SaS] slipped and fell.

… [The Applicant] claimed that, on 3 November 2012, he saw [Ms. SaS] in the morning before he went with [name redacted, Mr. AD], a staff member in CITS, to the market. [The Applicant] stated that he returned from the market with [Mr. AD] and they saw [Ms. SaS] at the entrance to his residential cluster. [Mr. AD] denied going to the market with [the Applicant] that day.

… [The Applicant] claimed that he "mistakenly cut [his] thumb and small finger" as he was preparing food during the afternoon on 3 November 2012.

… The Applicant claimed that later in the afternoon, [name redacted, Mr. H] came to his room with [Ms. SaS], and informed him that a complaint had been made against the Applicant.

> … [The Applicant] confirmed that his wife called [Ms. SaS's] fiancé on 29 November 2012 and stated that his wife did not make any threats and [the Applicant] denied having asked his wife to call [Ms. SaS's] fiancé. [The Applicant] also confirmed that he called [Ms. SaS's] son but could not hear anything clearly, claiming that the call was accidental. [The Applicant] stated that he sent [Ms. SaS's] son an SMS message telling him that he could not hear him clearly.
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> … Based on the information obtained during the investigation, the matter was referred to the Office of Human Resources Management (OHRM) by memorandum, dated 11 September 2015. [The r]eferral attached an investigation report, compiled by the UNAMID SIU, regarding the Applicant's alleged conduct of 3 November 2012.

Parties' submissions

37. The Applicant's grounds of appeal are as follows (emphasis in the original):

> … The alleged incident occurred [on] 3 November 2012. In December 2012 the investigation was concluded. Thereafter reports were written containing second and third hand information. There is no medical evidence. There is no credible photographic evidence.
>
> … The alleged victim has disappeared. Between December 2012 and December 2013 the case appeared closed for all practical purposes. In December of 2013 [Ms. VN] prepared a summary without conducting any interviews. Several years later OIOS Investigations Director closed the case. Several weeks after that then [ASG/DFS] recommended [the Applicant's] employment be terminated.
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> … More than four months after the [ASG/DFS's] dismissal recommendation, on 19 January 2016, [the Applicant] was notified that based on an alleged 2012 incident, involving his ex-girlfriend, his dismissal from service was recommended.
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> … Before a United Nations [s]taff member can be dismissed the misconduct must be proven to be serious misconduct. The evidence in support of the alleged misconduct must be found to be credible. In other words, do the facts presented permit one and only conclusion that proof has been made out. The evidence must be capable of leading to the irresistible and reasonable conclusion that the act of misconduct has been proved.
>
> … The facts are undisputed. The alleged victim has withdrawn her complaint against her long[…]time boyfriend and they have had no contact for more than three years. There have been years of breaks in the investigative process. It is now certain that relevant exculpatory

> evidence has been lost or likely never [been] collected. The investigation was completely haphazard. The lead investigator filed his report [ten] days after the incident while on holiday. The process is so flawed by a myriad of irregularities that [the Applicant's] dismissal under these circumstances is prohibited by due process guarantees.
>
> … [The Applicant] has denied the allegations. The investigative reports that are relied on in this matter were [...] prejudiced, full of innuendos, riddled with ridiculous findings and completely and unjustly [tarred] the Applicant with a brush of criminality.
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> … The considerable defects in this investigation cast serious doubt on its quality. The necessary evidential basis to prove a charge of serious misconduct is not present in this matter. Many relevant areas of investigation were not pursued including re-interviewing the alleged victim during the four years it took to complete the investigation. In fact there was no follow-up with any of the witnesses. This follow[-]up could have shed some light on the veracity of [the] Applicant's assertion.
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> … It is well advised in staff misconduct investigations to avoid the impression of a prejudgment having been made. It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.
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> … […] Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence. Here, as seen, there is no offence at all, let alone a first offense.

38. The Respondent's submissions are as follows (references to footnotes omitted):

> ***Allegations of misconduct***
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> … On the basis of the evidence and findings contained in the investigation report and supporting documentation, and in accordance with paragraph 5 of ST/AI/371 as amended ("Revised disciplinary measures and procedures") and Chapter X of the [s]taff [r]ules, by [M]emorandum dated 15 December 2015, [the Applicant] was asked to respond to the allegation that, on 3 November 2012, he physically assaulted [Ms. SaS], a [UNV] at the time, in her room, in the UNAMID compound.

… The Applicant was informed that, if established, his conduct would constitute a violation of [s]taff [r]egulation 1.2(b) and (f) and former [s]taff [r]ule 1.2(e) (current [s]taff [r]ule 1.2(f)), which provide as follows:

> **Staff Regulation 1.2(b)**
>
> "Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."
>
> **Staff Regulation 1.2(f)**
>
> "[Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations."
>
> **Former Staff Rule 1.2(e)**
>
> "[...] abuse in any form at the workplace or in connection with work, is prohibited."

Applicant's response to the allegations

… [The Applicant] received the allegations of misconduct on 19 January 2016. Accordingly, his response would have been due by 3 February 2016. However, on 26 January 2016, the Applicant requested an extension of time until 3 March 2016 to provide comments. This request was granted. Despite this extension, by mail on 17 February 2016, the Applicant requested an extension of 45 days to provide comments. The Applicant was granted an extension until 17 March 2016. On 9 March 2016, the Applicant requested yet another extension, this time until 31 March 2016, to submit comments. This request was granted and the Applicant was informed that no further extensions would be granted in the absence of extenuating circumstances.

… By e-mail dated 20 April 2016, the Applicant submitted his comments on the allegations of misconduct. The Applicant requested that the "investigation be closed and [that] no action be taken against him". It is noted that in his comments, the Applicant raised many of the same points as he raises under the heading of "[Facts]" in the [a]pplication.

Disposition of the [d]isciplinary [c]ase

… After a thorough review of the entire dossier in the Applicant's case, including, but not limited to, the [i]nvestigation [r]eport[…] and the Applicant's comments on the [a]llegations of [m]isconduct, the Under-Secretary-General for Management [("USG/DM")] concluded that it was established by clear and convincing evidence that on 3 November 2012, [the Applicant] physically assaulted [Ms. SaS], a [UNV] at the time, in her room, in the UNAMID compound. The [USG/DM] further concluded that, through his conduct, the Applicant violated [s]taff [r]egulations 1.2(b) and 1.2(f) and former [s]taff [r]ule 1.2(e) (current [s]taff [r]ule 1.2(f)). The [USG/DM] concluded that the passage of time since the incident at issue constituted a mitigating factor and further concluded that the Applicant's procedural fairness rights were respected throughout the investigatory and disciplinary processes. On the basis of the foregoing, the [USG/DM] decided to impose on the Applicant, the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, in accordance with [s]taff [r]ule 10.2(a)(viii).

… Via letter dated 4 May 2016, the [ASG/OHRM] informed [the Applicant] of the decision of the [USG/DM]. The Applicant signed for having received this [M]emorandum on 8 May 2016.

IV. Submissions on the [m]erits

The allegations of fact pleaded in the [a]pplication are denied, except as expressly admitted herein.

Evidentiary standard

… In the [a]pplication, the Applicant references the language from *Elbadawi* [UNDT/2010/073] stating that "[b]efore a United Nations staff member can be dismissed[,] the misconduct must be proven to be serious misconduct. The evidence in support of the alleged misconduct must be found to be credible. In other words, do the facts presented permit one and only conclusion that proof has been made out. The evidence must be capable of leading to the irresistible and reasonable conclusion that the act of misconduct has been proved." […] By doing so, the Applicant seems to be contending that the relevant evidentiary standard is the "beyond a reasonable doubt" standard as opposed to the "clear and convincing" standard.

… However, it has been settled law since 2011 that the applicable evidentiary standard in cases of termination is the "clear and convincing" evidence standard. In its judgment in

Molari [2011-UNAT-164], the United Nations Appeals Tribunal […] made reference to the [Dispute Tribunal's] holding in *Elbadawi*, in confirming that while "beyond a reasonable doubt is the standard at the ILOAT [International Labor Organization Administrative Tribunal], this has never been the standard at the United Nations". Further, the [Appeals Tribunal] held that in cases involving termination, whether by separation or dismissal, "[m]isconduct must be established by clear and convincing evidence but less than proof beyond a reasonable doubt". In so holding, the [Appeals Tribunal] stated that this "means that the truth of the facts asserted is highly probable".

The facts are established by clear and convincing evidence

… Contrary to the Applicant's central contention that the facts have not been established to the requisite standard, the records contain[…] clear and convincing evidence that the Applicant seriously assaulted his then girlfriend on 3 November 2012. This conclusion is supported by the following evidence:

(a) The statement from [Ms. SaS] describing the assault in detail.

(b) Statements from witnesses, [Ms. RA, Mr. AK, Ms. SE and Mr. AD], taken between 4 November and 8 November 2012, who were present. Shortly after the incident and provided accounts of [Ms. SaS's] physical state at the time.

(c) The medical reports for [Ms. SaS] and [the Applicant], which are consistent with the assault described by [Ms. SaS].

(d) The SIU report and a statement from [Mr. AD] which describe [Ms. SaS's] room after the alleged incident and note the presence of blood stains on a pillow and on a dresser mirror.

(e) [Mr. AD's] statement that he did not see [the Applicant] until the evening of the incident, and that he had not gone to the market with the Applicant on the day of the incident, which directly contradicted the Applicant's own account of events.

… The evidence noted above is consistent with [Ms. SaS's] account of events. Her account is corroborated by both the medical report and [Ms. RA's] statement regarding finding [Ms. SaS] […] screaming outside her room. Moreover, the statements of [Mr. AK and Ms. SE] provide additional evidence of [Ms. SaS's] apparent physical condition after the alleged incident and also serve to corroborate the statements of [Ms. SaS and Ms. RA] from the standpoint of the timing and location of events. [Mr. AD's] statement that, despite the Applicant's claim that they had gone to the market together during the day on 3 November 2012, he did not

see the Applicant on 3 November 2012 until the evening, casts doubt on the Applicant's credibility.

… Further evidence lessening the Applicant's credibility regards his claim in his comments and in the application[,] that he has an "unblemished record of perfect service to the United Nations". Contrary to this claim, the Applicant received a Letter of Reprimand on 22 November 2009 for "driving a United Nations vehicle while under the influence of alcohol, being involved in an accident that resulted in serious damage to the vehicle and lying to investigators that he had been kidnapped by unidentified persons["]. Furthermore, [the Applicant] did not challenge the legality of the reprimand.

Due [p]rocess

… [The Applicant] contends that "the process" was "flawed by a myriad of irregularities" […]. However, the Respondent submits that the Applicant's procedural fairness rights were respected throughout the investigatory and disciplinary processes, in accordance with the Organization's regulations, rules and other administrative issuances. The Applicant was afforded the opportunity to provide his account of the relevant events during the investigation and after the issuance of allegations of misconduct. After requesting and receiving four extensions of time to do so, the Applicant submitted comments on the allegations, and those comments were duly considered.

… The Applicant's statement that [Mr. MS] recommended that this matter "be closed without further action" is incorrect. The memorandum dated 25 August 2015 from [Mr. MS] does state that the [OIOS] "considers the case closed" but [Mr. MS] by way of the memorandum transmits the memorandum dated 13 April 2013 from [name redacted, Mr. MC], then Joint Special Representative, UNAMID, which contains a recommendation that the matter of the Applicant's assault of [Ms. SaS] be referred through DFS to OHRM. [Mr. MS's] memorandum of 25 August 2015 was in keeping with his memorandum of 11 July 2013 wherein he acknowledged that SIU had already conducted an investigation into the matter and that, as a result, he considered that the matter would be handled by DFS. Contrary to the Applicant's statement in his comments and in the [a]pplication, [Mr. MS] made no recommendation that the matter be closed without further action and certainly did not state that he is of the view that there was insufficient "credible evidence" as the Applicant stated in the [a]pplication. Rather, it is clear that [Mr. MS] was merely indicating that there would be no further action on the part of OIOS as the matter would be handled by SIU.

… The Respondent submits that the record amply supports the decision as to the disciplinary measure imposed and there was nothing in the process leading to the decision that vitiates that decision.

Proportionality

… In the present case, the Applicant physically assaulted a [UNV] and left her injured […] and screaming. In the [a]pplication, the Applicant contends that measures to address such conduct should be progressive in nature and that this should be treated as a first offense. In this regard, the Applicant cites to the case of *Yisma* [UNDT/2011/061] for the proposition that "separation from service or dismissal is not an appropriate sanction for a first offence". However, [the] Respondent would point out that the language following in that judgment includes: "However, the gravity of the misconduct is an important factor in determining the appropriateness of separation or dismissal as a sanction. [...] Separation from service or dismissal is often justified in the case of serious or gross misconduct of such gravity that it makes the continued employment relationship intolerable, especially where the relationship of trust has been breached."

… In this case, the Applicant's physical assault of a female [UNV] is beyond intolerable. The Organization strives to defeat violence of this sort in its global efforts and it will not condone such behavior within its ranks. The Respondent submits that [the Applicant's] conduct is inexcusable.

… In this case, the amount of time that passed since the incident was alleged to have occurred was found to constitute a mitigating factor. However, it is noted that in the case of *Nasrallah* [2013-UNAT-310], the [Appeals Tribunal] found that while taking nearly two years to finalize the disciplinary proceedings constituted an egregious error, the Tribunal also found that the undue delay did not prejudice the applicant. The Tribunal found, instead, that the delay worked in the applicant's favor by allowing him to benefit from nearly two years' further service, with full salary, and delaying his termination.

… Despite the Respondent's finding that the passage of time, in this case, constituted a mitigating factor, on the basis of the facts and the misconduct at issue, it would not have been inappropriate or disproportionate for conduct of this nature to have resulted in the Applicant's dismissal. Accordingly, the disciplinary measure imposed was not even the most severe among the available options.

… The Respondent submits that the facts upon which the disciplinary sanction was based were sufficiently established, and that the sanction imposed on the Applicant was justified, appropriate, proportionate, and consistent with the Applicant's conduct.

Submissions of miscellaneous contentions in the [a]pplication

… The Applicant contends that "[…] the summary of alleged 2012 misconduct contains triple hearsay" as a result of the investigation being handled by multiple investigators and the occurrence of "handing over" procedures between investigators. However, such "handing over" between investigators is not evidence per se and therefore, does not render evidence as hearsay or "triple hearsay" for that matter, it is simply a part of the preparation of a portion of an investigation report. The evidence is contained in the interview/witness statements.

… As to the Applicant's claim that "[i]t is now certain that relevant exculpatory evidence has been lost or likely never collected", the Applicant does not identify the exculpatory evidence, if any, to which he is referring.

… As to the Applicant's claim that [Ms. SaS] has "withdrawn her complaint", he has introduced no evidence of this. Even if [Ms. SaS] had, in fact, withdrawn her complaint, this would not relieve the Applicant of responsibility vis-a-vis facing disciplinary consequences for his actions. The Organization's disciplinary framework does not rely on a victim filing or maintaining a complaint against a staff member in order for action to be taken.

… As concerns the Applicant's statement that no "DNA evidence" was collected, such evidence is not necessary to establish that the Applicant assaulted [Ms. SaS].

… Moreover, despite the Applicant's contentions that the record lacks medical and or DNA evidence, as noted above, the medical evidence indicated that [Ms. SaS] had sustained multiple injuries on her body including a bite mark on her scalp and injuries to her cheek, mucosa inside the buccal cavity, buttock, thigh, arm, wrist, knee, thumb and little finger, including the partial avulsion of the nail of the little finger on her right hand. [Ms. SaS] was diagnosed with multiple abrasion wounds and severe bodily contusions with soft tissue injuries. A medical report regarding the Applicant indicated that he had two wounds on his thumb. Accordingly, not only is there medical evidence with respect to the victim, [Ms. SaS], but there is medical evidence with respect to the Applicant. In both cases, the evidence is consistent with the Applicant having engaged in a brutal physical assault against [Ms. SaS] and [t]he account thereof.

> ***Remedies***
>
> … The Respondent submits that the [a]pplication ought to be dismissed in its entirety, and that, therefore, the issue of remedies does not arise. Should the [Dispute] Tribunal decide not to dismiss the [a]pplication, the Respondent respectfully requests the opportunity to make additional submissions on compensation, once the specific grounds therefor have been delineated.

Consideration

Receivability framework

39. In the application filed on 29 July 2016, the Applicant contested the disciplinary decision to separate him from service that was notified to him on 8 May 2016 and became effective on 11 May 2016. The Tribunal notes that the present application was filed on 29 July 2016, 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

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

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefore, 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 [s]taff [r]egulations and [s]taff [r]ules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in [A]nnex III to the present [r]egulations;

(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 [s]taff [r]egulations.

[…]

Rule 9.6

Termination

[…]

Reasons for termination

[…]

(c) The Secretary-General may, giving the reasons therefore, 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.

…

41. 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 [s]taff [r]egulations and [r]ules 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 [s]taff [r]ules.
> (d) An appeal against a judg[…]ment of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations.

42. Paras. 3 and 9 of ST/AI/371 of 1 August 1991 as amended by ST/AI/371/Amend. 1, effective 11 May 2010 provides as follows:

> … If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the [ASG/OHRM], giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.
>
> […]
>
> … Upon consideration of the entire dossier, the [ASG/OHRM], on behalf of the Secretary-General shall proceed as follows:
>
> > (a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The [ASG/OHRM] may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or
> >
> > (b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.
>
> Decisions on recommendations for the imposition of disciplinary measures shall be taken by the [USG/DM] on behalf of the Secretary-General. The Office of Legal Affairs [("OLA")] shall review recommendations for dismissal of staff under staff rule 10.2 (a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the [ASG/OHRM].

43. The ID/OIOS Investigations Manual issued in January 2015 provides as follows in relevant parts:

> […]
>
> Sec. 1.2.1 - Office of Internal Oversight Services
>
> OIOS has overall responsibility for internal United Nations investigations.
>
> […]
>
> Sec. 6.3 – Report Types
>
> To meet reporting obligations, OIOS issues different types of standard reports.
>
> (a) Investigation Report: Designed to support a decision on whether to initiate disciplinary proceedings against United Nations personnel. The report must include all evidence of misconduct that might be required and normally concerns a single subject.
>
> (b) Contingent Report: Designed to inform a [Troop Contributing Country, ("TCC")] of the facts revealed through a preliminary fact-finding inquiry and/or an investigation into the conduct of contingent personnel.
>
> (c) Closure Report: Designed to record the investigation methodology and established facts for a conclusion that an investigation report is not warranted, as the evidence obtained does not substantiate the reported misconduct, and that accordingly the investigation is considered closed.
>
> (d) Advisory: Designed to inform managers of facts and observations that arise during an investigation, which are not necessarily relevant for a disciplinary process.
>
> Sec. 6.3.1 – Investigation Report
>
> Investigation reports are used to present facts established through the investigation process that substantiate misconduct committed by United Nations personnel in contravention of United Nations regulations, rules and administrative issuances. Investigation reports can address multiple contraventions, however separate reports must generally be issued for each subject. Investigation reports reference all evidentiary documents that support the facts and findings therein.
>
> "Investigation report" means an issued report which contains information about the reported misconduct, applicable legal norms,

employment history of implicated personnel, investigative methodology and details, findings and conclusions. It also contains recommendations to relevant programme managers, which may include:

> (a) appropriate action (disciplinary or administrative) to be taken against implicated United Nations personnel found to have contravened regulations, rules and administrative issuances;
>
> (b) referral to national authorities, in consultation with the [OLA], where evidence obtained indicates possible criminal activity, (see Chapter 7); and
>
> (c) financial recovery.

Further, where retaliation or mala fide claims arise from a reported case of misconduct, a separate investigation report must be issued.

The investigation report writing process starts during the intake stage when the applicable legal norms and relevant United Nations jurisprudence supporting the reported misconduct are identified. Jurisdiction is also considered during this stage, which includes determining the status of United Nations personnel implicated (see Chapters 2 and 3). After completing investigations, assigned investigators, under direction of their supervisors, are responsible for preparing the investigation report.

Investigation reports are submitted to the Director of the Investigations Division of OIOS (hereafter the "Director") for his or her final approval and issuance.

Before issuance by the Director, investigation reports are also reviewed by the Under- Secretary-General (USG) of OIOS. Only after the investigation reports are signed by the Director are they considered as issued and therefore final products reflecting the OIOS position.

[…]

Sec. 6.3.3 – Closure Report

Closure reports are used to outline facts established through the investigation process that suggest that there is no basis on which to pursue an investigation, that the available evidence does not substantiate the reported misconduct or, that an investigation is no longer possible due to extenuating circumstances. Closure reports address reported misconduct involving implicated United Nations personnel.

"Closure report" means a signed report by the Director, signifying approval for closure of an investigation. Closure reports contain descriptions of the reported misconduct, applicable legal norms,

> implicated personnel, investigative methodology, and facts established that justify a conclusion that the case can be closed.
>
> Closure reports are prepared to ensure accountability of the process involving decisions to close investigations. Closure reports are not shared with programme managers. However, the Ethics Office is provided with the results of investigations concerning retaliation claims. All closure reports are subject to periodic review by the USG[/OIOS] and may be re-opened if deemed appropriate.
>
> Implicated United Nations personnel who were interviewed as subjects are notified by letter that the available evidence did not substantiate the reported misconduct, but that the matter may be re-opened if incriminating evidence is provided in the future. Closure notices are forwarded to relevant programme managers advising of the closure status of investigations against implicated United Nations personnel.
>
> Sec. 6.3.4 – Advisory
>
> Advisories are used to inform relevant programme managers about weaknesses or potential areas of risk in administrative or operational policies which could affect their areas of responsibility.

Scope of review

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

45. In *Negussie* 2016-UNAT-700, paras. 18 and 19, the United Nations 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] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the [Dispute Tribunal]

> 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 [J]udge has to take the part[ies'] submissions into consideration and lay down, in its judgment, whether the above[-] mentioned criteria are met.

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

47. 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 its art. 9.2 that:

> … 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.

48. Similar to the principle of the burden of proof in disciplinary cases in the ILO Convention No. C158, the Dispute 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)).

49. In *Zoughy* UNDT/2010/204 and *Hallal*, the Dispute 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.

50. The Tribunal is of the view that the purpose of the SIU/UNAMID/DFS and ID/OIOS is to conduct a neutral fact-finding investigation, in cases such as the present one, into 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 a 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, including his/her due process rights.

51. The Tribunal will analyze whether the procedure followed was regular.

Investigative phase and disciplinary proceedings

52. The Tribunal notes the following uncontested procedural elements of the investigation:

a. On 3 November 2012, Ms. SaS filed an incident report claiming that the Applicant physically assaulted her and that the incident occurred in her accommodation. She was taken to Level I Hospital at the Super Camp in El Fasher by Ms. RA and Mr. AK.

b. The SIU/UNAMID/DFS initiated an investigation into the matter. The incident scene was visited by a team of investigators led by Mr. MF. On 4 November 2012, the investigation into the incident was transferred to Ms. VN.

c. Interviews were conducted and statements obtained from the alleged victim, the Applicant and other witnesses as follows:

i. Ms. SaS on 3, 5, 11, 18 and 29 November 2012;

ii. Mr. AK on 3 November 2012;

iii. Ms. RA on 4 November 2012;

iv. Mr. AK, and Mr. SE on 5 November 2012;

v. Mr. AD, [name redacted, Mr. EN] and [name redacted, Ms. SM] on 7 November 2012;

vi. The Applicant on 7 and 11 November and on 4 and 9 December 2012;

vii. On 7 November 2012, Mr. EN and Ms. SM, two of the investigators who responded to the scene of the alleged incident on 3 November 2012, submitted their observations/statements;

viii. Mr. CD on 8 November and on 4 December 2012;

ix. [Name redacted, Mr. KO] on 11 November 2012;

x. [Name redacted, Mr. DB] on 14 May 2012: The Tribunal observes that the date of the interview is recorded as 14 May 2012 and even if it appears to be a clerical mistake, no correction of this document was made before the issuance of the contested decision. However, since its content refers to the alleged incident from 3 November 2012, the Tribunal is therefore of the opinion that this statement is to be considered part of the evidence;

xi. Ms. SU on 15 November 2012.

d. Two medical reports issued on 6 and 7 November 2012, respectively, were included as part of the evidence.

e. In an investigation report dated 10 January 2013 (SIU/ELF/IR/1058/12), the SIU/UNAMID concluded and recommended that, in view of the repeated cases of violence against Ms. SaS in which the Applicant was involved, including the incident of 3 November 2012, substantiated by all the available evidence, the Applicant "should be removed from the premises with immediate effect pending the outcome of the latest case of physical assault against him".

f. This report was sent to [name redacted, Mr. WW], the DMS [unknown abbreviation]/UNAMID, by the OIC SIU/UNAMID. The Tribunal observes that the date of sending the report is 14 January 2012, as well as all the stamps and signatures, even though the alleged event took place on 3 November 2012, that the date of issuance of report 1058/12 was 10 January 2013, and that this aspect was further addressed at the beginning of the report of 13 April 2013, where it was considered that the report 1058/12 was dated 14 January 2013.

g. On 13 April 2013, after reviewing the report of 10 January 2013 [14 January 2013—see infra in para. 52(f)], UNAMID concurred with the findings of this investigation report that the Applicant's actions constituted physical and sexual assault and recommended the matter to be referred to OHRM through the USG/DFS for appropriate action against the Applicant.

h. On 16 June 2013, the matter was referred by SIU/UNAMID to ID/OIOS.

i. On 28 October 2013, ID/OIOS requested clarifications regarding the factual findings from SIU/UNAMID, including an evidential statement of Mr. WH (UNAMID/CDT).

j. On 11 December 2013, an additional report entitled "Addendum to the alleged physical assault on Ms. SaS […] by the Applicant […]" was prepared by the SIU/UNAMID as requested by ID/OIOS. This report, which included factual findings, was sent by Ms. VN, United Nations Security Officer/UNAMID, together with additional evidence gathered in the conduct of the investigation against the Applicant, namely a copy of Mr. MF's interview of 23 November 2013, to the OIC SIU/UNAMID and to ID/OIOS. The report mentioned in the section "Findings" that the investigator "[f]ailed for a second time to obtain a statement from Mr. WH", a proposed witness in the case, who allegedly visited the scene before the arrival of the SIU/UNAMID.

k. The investigation continued until April 2015. On 26 January 2015, (name redacted, Mr. AR) and on 4 April 2015 Mr. WH were interviewed by the SIU/UNAMID as requested by ID/OIOS.

l. On 25 August 2015, ID/OIOS issued a report titled "Assessment of the Special Investigations Unit report on a physical and sexual assault by a staff member at the [UNAMID]", in which it concluded that "In as far as circumstances allowed it, SIU/UNAMID conducted a full and thorough investigation of the reported misconduct. OIOS considers the case closed".

m. On the same day (25 August 2015), the then Director of ID/OIOS, Mr. MS, informed by email the USG/DFS, copying [name redacted, Mr. AOB], the Joint Special Representative ("JSR") of UNAMID, [name redacted, Ms. MG], Chief CDU/DFS, and Mr. WH, Chief CDT/UNAMID, that ID/OIOS acknowledged receipt of the responses from UNAMID regarding the Applicant's case and mentioned that "OIOS notes the clarifications and further evidence provided, and considers the case closed".

n. On 11 September 2015, Mr. AB, ASG/DFS, sent to Ms. CWW, the then ASG/OHRM, copying the JSR/UNAMID and the Chief CDU/DFS, a referral of allegation of misconduct against the Applicant, informing her in paras. 1, 2 and 4 that:

> … Reference is made to the attached memorandum, dated 13 April 2013, from the African Union - United Nations Hybrid Operation in Darfur (UNAMID) to the Department of Field Support (DFS), transmitting a report of the UNAMID [SIU], dated 10 January 2013, together with supporting documentation.
>
> … The memorandum recommends that appropriate action be taken against an international staff member of UNAMID, [the Applicant]. [The Applicant] holds a fixed-term appointment until 31 December 2015 as a Procurement Assistant with UNAMID at the FS-4 level.
>
> […]
>
> … DFS has reviewed the SIU[/UNAMID] report together with the supporting materials and concurs with the SIU[/UNAMID] that [the Applicant's] evidence is not credible and that there is clear and convincing evidence that he physically and sexually assaulted [Ms. SaS] on 3 November 2012. Accordingly, there is prima facie evidence that [the Applicant] engaged in conduct that violated United Nations [r]egulations and [r]ules, including, inter alia, [s]taff [r]egulation 1.2 and [s]taff [r]ule 10.1. DFS therefore concurs with the recommendation of UNAMID that [the Applicant] be subject to appropriate disciplinary action. In this case, DFS believes the appropriate disciplinary action is dismissal.

o. By a memorandum issued on 15 December 2015, transmitted by [name redacted, Mr. MS], the Chief of OHRM, Human Resources Policy Service, the Applicant was officially informed of the allegations of misconduct and was requested to provide written statements or explanations within two weeks. The memorandum was effectively received by the Applicant on 19 January 2016 and his comments would have been due by 3 February 2016. On 26 January 2016, the Applicant's Counsel requested an extension until 3 March 2016 to submit comments, and this request

was granted. On 17 February 2016, the Applicant's Counsel requested another extension of 45 days, which was granted until 17 March 2016. On 9 March 2016, another extension was requested by the Applicant's Counsel which was granted until 31 March 2016.

p. On 25 March 2016 and on 20 April 2016, the Applicant filed a request to close the investigation because no action was required as ID/OIOS had closed the matter. In his request for closure of investigation from 20 April 2016, the Applicant indicated that Ms. SaS had withdrawn her complaint.

q. By letter dated 4 May 2016, the ASG/OHRM informed the Applicant of the decision of the USG/DM to impose on him 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) for having physically assaulted Ms. SaS.

53. The Tribunal notes that the contested decision issued on 4 May 2016 was issued based on the following evidence: (a) the statement of Ms. SaS describing the alleged assault; (b) the statement of Ms. RA of 3 November 2012; (c) the statements of Mr. AK, Ms. SE and Mr. CD taken between 4 and 8 November 2012; (d) the medical reports for both the Applicant and Ms. SaS; (e) Mr. AD's statement. It results that the contested decision was taken exclusively based on the evidence that was included in the SIU/UNAMID reports of 10 January 2013 and 11 December 2013, and only in relation to the allegations of physical assault, without any mention to the allegations of sexual assault.

54. However, the Tribunal notes that, as it clearly results from the evidence on record, even though the contested decision was taken based on the two above-mentioned reports issued in January 2013 and December 2013, respectively, the investigation was not finalized in December 2013, but instead continued until April 2015 because, as requested by ID/OIOS, the SIU/UNAMID interviewed

two additional witnesses in January 2015 and April 2015: Mr. AR on 26 January 2015 and Mr. WH on 9 April 2015.

55. The Tribunal notes that, as results from Mr. AR's interview which took place on 26 January 2015, the investigator, referring to the incident of 3 November 2012, asked Mr. AR if he was aware of this incident and if he knew that "[the Applicant] told Ms. SaS to change her statement provided to the SIU/UNAMID so that it corresponds to his statement which she did". The Tribunal notes that no such statement of Ms. SaS was mentioned and/or documented as part of the evidence on the record, even if there is a clear reference to it in the above-mentioned interview.

56. The Applicant indicated in his submission filed on 20 April 2016 that Ms. SaS had withdrawn her complaint, but this crucial exculpatory element, which was reflected in the investigator's question addressed to Mr. AR regarding the change of statement of Ms. SaS in the sense that she confirmed the Applicant's version of facts, was not verified during the disciplinary process and/or before the issuance of the contested decision.

57. The Tribunal considers that, if this is the case and Ms. SaS changed her previous statements based on which the investigation reports from January 2013, April 2013 and December 2013 were issued, such a statement would have constituted a confirmation of the Applicant's version of facts and therefore important exculpatory evidence, which was not presented to and taken into consideration by the decision-maker.

58. The Applicant was not informed after 9 December 2012 (the date of his last interview) that the investigation was still ongoing and that two new additional witnesses were interviewed in 2015. He was not re-interviewed in relation to the factual elements presented by these two new witnesses and he had no opportunity to present any additional explanations and/or evidence in his defense. The document the investigator referred to during Mr. AR's interview conducted on 26 January 2015, namely Ms. SaS's withdrawal statement, confirming the Applicant's version of facts,

was not included as part of the evidence during the investigation, the disciplinary process and/or the disciplinary decision, and was not included in the evidence presented before the Tribunal.

59. The Tribunal notes that the last and therefore final report during the investigation was prepared on 25 August 2015 by the ID/OIOS, based on which the then ID/OIOS Director issued a confidential document/memorandum on 25 August 2015 titled "Completion on referral response (IC Case No. 0300/13 [C])" with the following content:

> … The [ID/OIOS] acknowledges receipt of the responses from the UNAMID […]. [ID/OIOS] notes the clarifications and further evidence provided and considers the case closed.

60. This memorandum was sent without the 25 August 2015 assessment report to the USG/DFS and to several other officials. The above-mentioned document was issued one-and-a-half years after the date of issuance of the last SIU/UNAMID report from December 2013.

61. The Tribunal underlines that the parties agreed not to have a hearing and for the present case to be decided on the papers.

62. The Respondent stated in his reply, in para. 40, the following:

> ... The Applicant's statement that [Mr. MS, former ID/OIOS Director] recommended that this matter "be closed without further action" is incorrect. The memorandum dated 25 August 2015 from [Mr. MS] does state that the [ID/OIOS] "considers the case closed" but [Mr. MS] by way of the memorandum transmits the memorandum dated 13 April 2013 from [Mr. MC], then Joint Special Representative, UNAMID, which contains a recommendation that the matter of the Applicant's assault of [Ms. SaS] be referred through DFS to OHRM. [Mr. MS's] memorandum of 25 August 2015 was in keeping with his memorandum of 11 July 2013 wherein he acknowledged that SIU[/UNAMID] had already conducted an investigation into the matter and that, as a result, he considered that the matter would be handled by DFS. Contrary to the Applicant's statement in his comments and in the [a]pplication, [Mr. MS] made no recommendation that the matter be closed without further action and

> certainly did not state that he is of the view that there was insufficient "credible evidence" as the Applicant stated in the [a]pplication. Rather, it is clear that [Mr. MS] was merely indicating that there would be no further action on the part of [ID/]OIOS as the matter would be handled by SIU[/UNAMID].

63. The current ID/OIOS Director, in his written statement of 8 November 2017, stated that in his view (emphasis in the original), "[…] the memorandum dated 25 August 2015, was conveyed for the purpose of informing the USG/DFS that the matter [had] been reviewed by [ID/]OIOS and that the review was complete. The statement "*OIOS… and considers the case closed*" should be interpreted as meaning that [ID/]OIOS had closed the case in its case management system and would be taking no further action in respect of the matter". He further stated that "[…] such memoranda are regularly issued by [ID/]OIOS when [ID/]OIOS determines that it would not investigate a report of possible misconduct but considers that it should be handled by other investigatory bodies of the Organization", and that he was of the view that "[…] such was the case in this matter as the related documentation makes clear that the investigation was conducted by the SIU, UNAMID, and indicates a recommendation from UNAMID that the documents related to the case would be forwarded to the [CDT] of the DFS and that the matter would be referred to the OHRM for appropriate action against [the Applicant]".

64. According to the Respondent's submissions, the document issued on 25 August 2015 by the then ID/OIOS Director concluded the investigation based on the ID/OIOS assessment report dated the same day, according to which "[…] in as far as circumstances allowed it, UNAMID/SIU conducted a thorough investigation of the reported misconduct" and "[ID/]OIOS consider[ed] the case closed".

65. On 11 September 2015, the ASG/DFS, who, as it results from the correspondence filed in the case, was aware that the case was considered by ID/OIOS and that new evidence was requested by and transmitted to ID/OIOS after December 2013, sent a referral of allegations of misconduct against the Applicant to the ASG/OHRM, based only on the evidence gathered by

the SIU/UNAMID as presented in the reports issued in January 2013 [14 January 2013—see infra in para. 52(f)] and April 2013. In this referral, the ASG/DFS stated that DFS concurred with the recommendations of UNAMID that the Applicant be subjected "to the appropriate disciplinary action [and in] this case, DFS believe[d] the appropriate action [was] dismissal".

66. The Tribunal notes that the referral of 11 September 2015 was sent by the ASG/DFS and not by the USG/DFS, and that there is no mention of the additional evidence gathered by SIU/UNAMID after the issuance of the report of December 2013, namely in January and April 2015, in any of the subsequent documents issued by [name redacted, Mr. MS], Chief Human Resources Policy Service, OHRM, on 15 December 2015 and in the contested decision issued by the USG/DM on 4 May 2016.

67. Further, the Tribunal notes that the SIU/UNAMID investigation report of 11 December 2013 does not contain any recommendations for the matter to be referred to OHRM for further action. These recommendations are included in the 13 April 2013 report, which was not updated with the new evidence gathered during the investigation between December 2013 and April 2015. The ID/OIOS assessment report dated 25 August 2015, which was strictly confidential, was not communicated to SIU/UNAMID, was not part of the documentation presented to the ASG/OHRM and/or to the USG/DM, and therefore remained unknown to the decision-maker. This document was only filed during the proceedings before the Tribunal, on 9 November 2017.

68. The Tribunal notes that, as it results from the evidence submitted in the present case, the ID/OIOS memorandum issued on 25 August 2015 and sent to the USG/DFS by the then ID/OIOS Director, indicating in para. 2 that "OIOS notes the clarifications and further evidence provided, and considers the case closed", was the first document of a documentation containing 179 pages filed by the Respondent on 1 September 2015. The Tribunal further notes that such submission did not include the ID/OIOS assessment report of 25 August 2015,

the memorandum of 13 July 2013 mentioned in the Respondent's reply, and the last two witness statements of Mr. AR of 26 January 2015 and of Mr. WD of 9 April 2015.

69. The ID/OIOS assessment report issued on 25 August 2015 only makes reference to the testimony of Mr. WD, and the memorandum issued on 25 August 2015 does not contain any of the explanations provided in the present case by the Respondent and by the current ID/OIOS Director regarding the ID/OIOS memorandum of 11 July 2013 (wherein, as stated by the Respondent in his reply, the then ID/OIOS Director acknowledged that the SIU/UNAMID had already conducted an investigation and considered that the matter would be handled by DFS).

70. Further, the memorandum of 25 August 2015 is not including any determination by ID/OIOS that it would not investigate the allegation of misconduct against the Applicant because ID/OIOS considered that such an investigation had already been handled by another competent investigatory body within the Organization, namely the SIU/UNAMID, and that the matter was to be closed in the ID/OIOS case management system and would continue to be handled by DFS.

71. The exculpatory aspects invoked by the Applicant during the investigation and the disciplinary process were not examined and corroborated with the entire evidence.

72. As results from the above considerations, the contested disciplinary decision is unlawful, since it was taken based on the evidence and recommendations of the SIU/UNAMID investigation reports issued in January 2013 and December 2013, even though the SIU/UNAMID, following ID/OIOS's instructions, continued the investigation and gathered additional evidence from two witnesses in January 2015 and April 2015. The new evidence was never brought to the attention of the Applicant or the decision-maker before the contested decision was issued, and the exonerating evidence was never evaluated and taken into consideration during the investigation and the disciplinary process. The Tribunal concludes that

no new or additional investigation report was prepared by SIU/UNAMID between 5 April 2015 (after the last witness was interviewed on 4 April 2015) and 25 August 2015, or after 25 August 2015, based on the entire evidence gathered in the case, as mandatorily required by staff rule 10.3(a), paras. 3 and 9 of ST/AI/371/Amend. 1 and as provided for in sec. 6.3.1 of the OIOS Manual. All these aspects constitute a breach of the Applicant's due process rights during the investigation and the disciplinary process.

73. In *Buendia et al*. UNDT/2010/176, para. 42, the Tribunal held that it could not uphold the findings and conclusion of a disciplinary process where the due process rights were breached. The Tribunal rescinded the decisions to impose disciplinary sanctions against the applicants, stating:

> … Due process safeguards which are enshrined in the rules are and must be regarded by all concerned within the United Nations as essential components of a fair and just system of dealing with and resolving disputes. This Tribunal has been established to give effect to principles enshrined in the Charter of the United Nations, highlighted in various decisions and utterances of appropriate organs of the United Nations System and further emphasized and developed by the case law of the former Administrative Tribunal. In paragraph XIV of Judgment No. 815, *Calin* (1997), the Administrative Tribunal stated with regard to due process:
>
> > The Tribunal […] respects the Secretary-General's authority to exercise his discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent's exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors.

74. In addition, the Tribunal notes that the Applicant contends that the document issued on 25 August 2015 by the then ID/OIOS Director, based on the ID/OIOS assessment report issued on the same day, represents a closure notice based on which

the then ID/OIOS Director closed the investigation in his case, and that the disciplinary decision is therefore unlawful.

75. Regarding the same document, the Respondent states that the Applicant's position is incorrect because:

> […] The memorandum dated 25 August 2015 from [Mr. MS] does state that the [ID/OIOS] "considers the case closed" but [Mr. MS] by way of the memorandum transmits the memorandum dated 13 April 2013 from [Mr. MC], then Joint Special Representative, UNAMID, which contains a recommendation that the matter of the Applicant's assault of [Ms. SaS] be referred through DFS to OHRM. [Mr. MS's] memorandum of 25 August 2015 was in keeping with his memorandum of 11 July 2013 wherein he acknowledged that SIU[/UNAMID] had already conducted an investigation into the matter and that, as a result, he considered that the matter would be handled by DFS. […]

76. The Tribunal observes that the plain language used in the last sentence of the ID/OIOS memorandum of 25 August 2015, together with the non-communication of the ID/OIOS strictly confidential assessment report, created the appearance of a closure process. As results from the parties' contentions, the memorandum was susceptible to opposite interpretations regarding its nature and legal effects.

77. As any document that is susceptible to different legal interpretations is subject to the application of the principle "*in dubio pro reo*" ("[when] in doubt, for the accused"), this principle applies in the present case.

78. Taking into consideration the particular circumstances of the present case and in light of the above considerations, the Tribunal concludes that the grounds of appeal related to the procedural irregularities are to be granted, and that the contested decision to separate the Applicant from the Organization with compensation in lieu of notice and without termination is to be rescinded.

79. The Tribunal considers that there is no need to further review whether the facts in question were established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

Relief

Legal framework

80. The Statute of the Dispute Tribunal states that:

> 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", namely 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 Dispute 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 to 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 for 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 caused 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 s/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 requested material and/or moral 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 *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Dispute 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, para. 27, the Appeals 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 Applicant's submission on remedies

93. As remedies in the application, the Applicant requested that he be reinstated with back pay and benefits.

Reinstatement

94. 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 Dispute Tribunal's Statute, the contested decision issued on 4 May 2016 imposing the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, which was implemented on 8 May 2016, is to be rescinded and any references related to the Applicant's sanction are to be deleted from his official status file. The Tribunal takes note that, as it results from the Applicant's "Letter of Appointment" signed by him on 1 January 2016, he was offered a fixed-term appointment with UNAMID for a period of six months until 30 June 2016.

95. ST/AI/2013/1 (Administration of fixed-term appointments), sec. 1.2, 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).

96. Consequently, the Tribunal considers that, had the Applicant not been separated from service on 8 May 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

97. According to art. 10.5(a) of the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the decision. The amount of compensation to be awarded as an alternative to the rescission of the contested decision is USD5,000.

Material damages

98. The Tribunal takes note that, as it results from the Applicant's "Letter of Appointment" signed by him on 1 January 2016, he was offered and accepted a fixed-term appointment with UNAMID starting from 1 January 2016 for six months with the expiration date on 30 June 2016.

99. Taking into consideration that he was separated before the expiration of his fixed-term 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 8 May 2016-30 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

100. The Tribunal notes that the Applicant did not request moral damages as part of the relief indicated in his application or in his closing submission.

Conclusion

101. In light of the foregoing The Tribunal DECIDES:

a. The application is granted in part, the contested decision to terminate the Applicant's contract for disciplinary reasons and to separate him from the UNAMID 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. The Applicant's request for reinstatement is rejected.

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 8 May-30 June 2016 as material damages. The compensation in lieu of notice corresponding to the relevant notice period, respectively 30 days, as a result of his separation from the Organization received by the Applicant, is to be taken into consideration by the Administration in the implementation of the present judgment.

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.

Observation

102. The Tribunal observes that, according to sec. 6.3.3 of the ID/OIOS Investigations Manual, ID/OIOS issues different types of standard reports: investigation reports, contingence reports, closure reports (which are the only reports not shared with Programme Managers), and advisory reports.

103. The Tribunal underlines that all the reports must be written in a clear, concise and accurate language specific to each type of recommendation/decision in a manner which leaves no space for further interpretations regarding the nature and/or the legal effects of such report(s).

104. The Tribunal recommends that in the future, investigation reports, including the ones issued by ID/OIOS as a result of a review of the investigation conducted by another investigatory body within the United Nations system, clearly indicate in the final section and/or conclusion that "the investigation is considered completed" and/or "approved", instead of the language currently being used "case closed", in order to avoid any interpretations and to distinguish them from closure reports.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of May 2018

Entered in the Register on this 4th day of May 2018

(Signed)

Anne Eyrignoux, Officer-in-Charge, New York