UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/011
Judgment No.: UNDT/2018/086
Date: 3 September 2018
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

SIDDIQI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Esther Uwazie, UNICEF
Bart Willemsen, UNICEF

Introduction

1. By application filed on 1 February 2018, the Applicant, a former Education Officer (NO-1) working in the Bagdhis Outpost Office of the United Nations International Children's Fund ("UNICEF") in Afghanistan, challenges the decision to summarily dismiss him for misconduct.

2. The application was served on the Respondent on 2 February 2018 and he submitted his reply on 5 March 2018.

3. On 23 March 2018, the Respondent filed additional documents and five audio-recordings of interviews of witnesses conducted during the investigation as required by the Tribunal in its Order No. 60 (GVA/2018) of 15 March 2018.

4. A hearing took place from 23 through 25 May 2018.

5. Both parties submitted additional documents on 25 and 28 May 2018, as ordered by the Tribunal at the hearing.

Facts

6. On 18 April 2010, the Applicant joined UNICEF on a fixed-term appointment as a Project Officer (NO-2) in Kunduz Province, Afghanistan.

7. In January 2013, the Applicant separated from the Organization following the abolition of his post. On 14 April 2013, he was re-appointed on a fixed-term appointment as an Education Officer (NO-1) in the UNICEF Bagdhis Office, still in Afghanistan.

8. On 23 April 2017, a mandated Harmonized Approach to Cash Transfers ("HACT") spot check took place and certain irregularities concerning the potential misuse of UNICEF funds were raised against several staff members in Bagdhis province.

9. On 17 May 2017, Mr. A.E., the Applicant's first reporting officer ("FRO"), reported to Ms. A.K., Representative, UNICEF Afghanistan Country Office, and Mr. D.H., former Chief of Operations, that "on Tuesday 16 May 2017 while [he] was on the way to Qalai-Naw [the Applicant] told in front of Ms. L.M. who was coming for a mission for spot check and other Bagdhis colleagues that 'if his contract be terminated he will bring a pistol and kill Mr. [M.Y.], [Mr. A.E.] and some others'". Mr. A.E. added that he considered this as a potential threat to his life.

10. On 11 July 2017, the Applicant was placed on administrative leave with full pay pending the investigation by the Office of Internal Audit and Investigations ("OIAI") concerning allegations of threats to kill "for an initial period of [three] months or upon OIAI's completion of its investigation and any subsequent disciplinary process, whichever comes first".

11. Between June and August 2017, OIAI investigators interviewed the Applicant as well as several staff members. The staff members interviewed were Mr. A.E.—the complainant and the Applicant's FRO—Mr. M.Y., Head of UNICEF Herat Zone Office, Ms. E.K., Chief Field Office, Herat, and three staff members who attended the conversation in which the alleged threats were made, namely Mr. E.M., Programme Assistant, Mr. M.R., Child Survival and Development Officer, and Ms. L.M., Senior Finance/Accounts Associate.

12. In August 2017, the OIAI issued its investigation report entitled "Allegation of threats to kill", finding that the Applicant made a "genuine threat" to "bring a gun to the office to kill staff if his contract was ended with the [O]rgani[z]ation".

13. On 5 September 2017, the Applicant was notified of the charges against him, namely "issuing threat to kill other staff members in the Afghanistan Country Office in violation of [s]taff [r]egulation 1.2 (b) and [s]taff [r]ules 1.2 (g) and 10.1 (a) and constituting misconduct under CF/EXD/2012-005 [Disciplinary process and measures], s[ecs]. 1.4 (a), (c) ad (m)".

14. On 23 October 2017, the Applicant filed his response to the charges denying all allegations of misconduct. He also pointed to numerous inconsistencies in the evidence gathered by the investigators and raised mitigating factors.

15. On 6 November 2017, the Deputy Executive Director, Management, UNICEF, issued the contested disciplinary measure, finding that:

a. "There is clear and convincing evidence that [the Applicant] threatened to kill other staff members in the Afghanistan Country Office in violation of [s]taff [r]egulation 1.2(b) and [s]taff [r]ules 1.2(g) and 10.1(a)";

b. "This constitutes misconduct under CF/EXD/2012-005, s[ecs]. 1.4(a), (c) and (m)"; and

c. "[T]he appropriate sanction is dismissal".

Parties' submissions

16. The Applicant's principal contentions are:

Failure to properly establish the alleged statement or threat

a. The investigation did not establish the exact threat allegedly made by the Applicant nor its seriousness and unequivocal character;

b. The evidence collected contains inconsistencies between witness statements regarding crucial aspects of the investigation. Three witnesses who took part in the conversation reported three different versions. They also changed their statements throughout times in respect of the seriousness of the threat;

c. The Administration failed to make a clear finding as to whether the Applicant had mentioned any specific names;

Manipulation of evidence

d. The witness statements do not reflect the testimonies provided by the witnesses and they were edited by the investigators;

e. The complainant, who was not present during the conversation, did not make any reference to the alleged threat or to the security situation in Afghanistan in his statement to the investigators. Nonetheless, the Administration relied heavily on his complaint;

f. The language used in the witness statements is similar and the statements all follow the same logic;

Inconceivable nature of the allegations

g. The Applicant has consistently denied he has made these threats. He simply indicated that other staff members working on the same project should suffer if the HACT spot checks negatively impacted his employment and mentioned names of other staff members to highlight the individual roles and respective responsibilities of all those involved in the projects under review;

Procedural flaws

h. The investigation report refers to other allegations against the Applicant which were said to be investigated separately. The decision to split the investigation procedures based on the nature of allegations resulted in an improper assessment of the evidence, particularly considering the fact that other allegations made against the Applicant are relevant to this case and may assist in clarifying the context;

i. The additional allegations were made by the same staff members who testified against the Applicant, and two of the three persons taking part in the conversation had an obvious interest to testify against the Applicant in the present case;

j. All interviews were conducted remotely, via Skype from New York, which affect the reliability of the evidence collected;

k. No proper recording of the interviews with the witnesses was made in the instant case;

l. No verbatim statements were taken from the witnesses even in relation to the alleged threat;

m. The witnesses were questioned in writing by the investigator prior to their interview;

n. The decision-maker was provided with an incomplete investigation record;

Failure to consider mitigating and/or exonerating factors

o. The Administration failed to consider the Applicant's poor health at the time of the incident and the fact that he had just returned from sick leave the day before the incident;

Remedies

p. The Applicant requests the Tribunal to:

i. Rescind the contested decision and set aside the disciplinary sanction;

ii. Reinstate him or, in the alternative, to be paid a sum equivalent to two years net salary, based on his salary of November 2017; and

iii. Award him moral damages for serious violations of due process.

17. The Respondent's main submissions can be summarized as follows:

a. The Applicant committed the act alleged since multiple witnesses stated that he threatened to kill other staff members with a gun;

b. The witnesses signed their statements attesting to the full and complete truth of their contents;

c. The UNICEF investigator summarized the interview for the witnesses to review and to sign, which is standard practice;

d. The Applicant's acts demonstrate an intent to interfere with the ability of staff members to discharge their official functions and must be taken seriously in the context of the security situation in Afghanistan. They therefore amount to misconduct as per staff rule 1.2(g);

e. The sanction was proportionate to the seriousness of the Applicant's conduct;

f. The burden to provide medical evidence about his health lays on the Applicant and he did not submit such evidence in a timely fashion;

g. The allegations of procedural flaws are without merit since, *inter alia*, the Applicant has not identified a legal obligation UNICEF has not complied with; and

h. The application should be dismissed in its entirety.

Consideration

Scope of judicial review

18. In disciplinary cases, the Appeals Tribunal has consistently held that when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is to examine the following elements:

a. Whether the facts on which the sanction is based have been established;

b. Whether the established facts qualify as misconduct; and

c. Whether the sanction is proportionate to the offence (see *Walden* 2014-UNAT-436 and *Diabagat*e 2014-UNAT-403).

19. It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (see *Maslamani* 2010-UNAT-028 and *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

20. In light of the recent jurisprudence from the Appeals Tribunal in *Mbaigolmen* 2018-UNAT-819, the Dispute Tribunal has, in some cases, to operate a full trial of the issues at stake and should not restrict its review to the investigative process:

> 27. The right of a staff member to "appeal" an administrative decision imposing a disciplinary measure in terms of Article 2 (1) (b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of the case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.

21. The crux of the Applicant's case is that the facts were not established through clear and convincing evidence (*Diabagate* 2014-UNAT-403, *El Kkalek* 2014-UNAT-442) as the witnesses present during the alleged threats provided inconsistent testimonies, and the evidence was not properly collected and, consequently, is unreliable. Given that the Applicant essentially challenges the first element of the three-prong test described above and that the evidence is essentially based on witness testimonies, the Tribunal held a hearing to review the methodology employed by the investigators to collect the evidence and to hear the direct witnesses of the alleged facts on their account of the events. The following witnesses were heard:

a. Ms. N.A., Investigation Specialist, OIAI;

b. Ms. L.M., Senior Finance/Accounts Associate;

c. Mr. K.R., Child Survival and Development Officer;

d. Mr. E.M., Program Assistant and;

e. Mr. B.N., Field Security Coordination Officer, Afghanistan.

Whether the investigation was vitiated by procedural flaws

22. The Applicant raises several issues regarding the appropriateness of the investigation process which affected the credibility and the reliability of the evidence collected, particularly concerning the way the witness statements were collected.

23. The Tribunal notes that CF/EXD/2012-005 does not contain an exhaustive set of norms concerning the main steps of the investigation's procedure nor does it include any details on how this procedure should be conducted. The legal framework is vague in this respect and includes only a limited set of rights of the suspect (see sec. 7 of CF/EXD/2012-005).

24. The investigation report in the present case does not detail the way the investigation was conducted. As to the evidence taken during the investigation from the direct witnesses of the incident, which is key to the establishment of the facts, the report only refers to witness statements collected following interviews conducted by Skype, with the exception of the Applicant who was interviewed in person and for whom a verbatim transcript of the interview was prepared. Following orders issued by the Tribunal, the audio-recording of the witness interviews were produced and it appeared that the witnesses had been asked questions in writing in advance. Those written answers from the witnesses had not been disclosed to the decision-maker or otherwise mentioned in the investigation report. The audio-recordings had not been provided either to the decision-maker.

25. Having reviewed the whole investigation file, which was not entirely disclosed to the Deputy Executive Director, Management, UNICEF, and heard the witnesses as to the way the evidence was collected, the Tribunal finds that the procedure used to collect the statements of the three key witnesses of the incident, namely Ms. L.M., Mr. K.R. and Mr. E.M., did not present sufficient guarantees to ensure their reliability and credibility for the following reasons.

26. Firstly, the investigator asked detailed questions in writing about the "allegations of threats made by a UNICEF staff member in the Herat field office" to the direct witnesses prior to formally interviewing them. The questions were also tendentious, starting by saying "I understand that you were present when the threat(s) was made" and thus starting from the point of view that a threat had indeed been made. This process is particularly concerning given that two of the direct witnesses, Mr. E.M. and Mr. K.R., share the same office and were thus in a position to coordinate their account of events. Indeed, their written answers are largely similar and differ from the ones provided by the third witness, Ms. L.M. This first step of the procedure used by the investigator prevented her from obtaining spontaneous statements and had the potential to corrupt the evidence.

27. Secondly, the witness statements do not constitute an accurate record of the testimonies of the witnesses. The Tribunal notes that it appears to be a practice of OIAI, and indeed of other investigative bodies in the Organization, not to take a verbatim of the testimonies but rather to prepare a summary of the testimony and have it signed by the witness. The Tribunal does not agree with the Applicant that this practice, *per se*, constitutes a procedural flaw as there is no formal requirement that verbatim be taken and this practice may be justified by economic reasons. However, the absence of a verbatim significantly affects the reliability of the evidence, especially in a case such as the present one, where the crux of the matter lays in the exact words that were allegedly pronounced by the Applicant, as reported by the direct witnesses of the incident. In this connection, the Appeals Tribunal insisted that when reviewing the testimony of a witness, it is necessary to examine his or her complete statement (*Finniss* 2012-UNAT-210, *Nyambuza* 2013-UNAT-364).

28. Particularly worrying in the present case is the fact that the investigator who collected the statements testified at the hearing that she did not prepare them based solely on the interviews she had conducted with the concerned witnesses, but also on other material that she had collected during the investigation. She also testified, in reference to the testimony of Ms. L.M., that the written statement reflects "how she interpreted what [the witness] said".

29. For example, the witness statement of Ms. L.M. states that the Applicant said that "he would get a gun and kill between six to ten people". The audio-recording of this interview shows that the witness never mentioned the word "gun". Moreover, in her written answer to the investigator's questions, dated 23 May 2017, Ms. L.M. did not mention a gun, reporting the Applicant's statement as follows: "I will kill six to seven persons or eithers it would be [Mr. A.E.], [Mr. M.Y.], You or any others."

30. At the hearing, the investigator admitted that she included the word "gun" in the written statement of Ms. L.M. on her own initiative, based on a security report that she had on file.

31. This matter is of serious concern. It is trite law that a witness statement must be an accurate and faithful record of what the witness said during the interview. No other source of information may be used to complete the statement, whatever it is. The investigator must have been aware of this basic principle of investigation, which casts doubts as to her impartiality or, at the very least, her competence to act as an investigator. Not only the investigator inappropriately used outside source of information to prepare the witness statement, which is in itself entirely unacceptable, but the word "gun" that she added was of significant import for this investigation, as she acknowledged herself. Furthermore, the security report that the investigator allegedly used as a source to include the word "gun" in Ms. L.M.'s statement, which will be more amply discussed later, does not even report Ms. L.M.'s statement. This misrepresentation of the witness testimony on a fundamental aspect of the case renders the written statement of Ms. L.M. entirely unreliable and also affects the reliability of the other statements collected in similar circumstances by the same investigator.

32. Thirdly, the witness statements were not taken under oath. Although there is no formal requirement in CF/EXD/2012-005 that witness statements be collected during the investigation, this is an important element that affects their reliability since the oath means that the witness is aware of the fact that he or she is under the duty to tell the truth and they can be held responsible for the content of their statements. The Appeals Tribunal repeatedly insisted on the importance that

statements be made under oath to be reliable (see *Nyambuza* 2013-UNAT-364, *Mbaigolmem* 2018-UNAT-819). It held in *Nyambuza* that:

> 35. Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.

33. Fourthly, the witness testimonies at the hearing revealed that the Applicant was speaking in *farsi* when he made the contentious statement and not in English. Neither the witness statements nor the investigation report mentions that the witnesses in fact reported their translation of the statement allegedly made by the Applicant. This fact is very important since it cannot be excluded that the statement was not accurately translated.

34. Fifthly, there are some inconsistencies between the witness statements collected by the investigator and their previous written answers to her questions, as will be discussed below. These were not discussed with the witnesses nor brought to the attention of the decision-maker, who was not even provided with these previous answers. In this connection, the Tribunal recalls that the role of the investigators is not only to collect inculpatory evidence but also, to test the evidence and to search for exculpatory evidence. Pursuant to the Uniform Guidelines for Investigations, "[i]nvestigators should maintain objectivity, impartiality and fairness throughout the investigative process". [1]

35. The lack of challenge to the witness evidence, together with the investigator's tendentious written questions (see para. 26 above), cast serious doubts as to the impartiality of the investigation.

36. Another element that points towards a potential lack of impartiality is the reference to "allegations of fraud and sexual exploitation against [the Applicant], of which [the Applicant] had not been officially notified because OIAI was still in the process of reviewing those allegations" in the first section of the investigation

[1] Uniform Guidelines for Investigations, 2d edition, as endorsed by the 10th Conference of International Investigators held in Jordan between 10 and 12 June 2009.

report entitled "allegation". The reference to these allegations, which had not been investigated, was irrelevant and entirely inappropriate as it had the potential to negatively influence the decision-maker. In this connection, the Tribunal notes that the Investigator testified at the hearing that the investigation into these allegations of fraud and sexual exploitation was "put on hold" following the Applicant's dismissal. This means that despite the fact that these serious allegations were mentioned in the investigation report against the Applicant, their truthfulness was never established.

37. The Applicant also takes issue with the fact that the witness interviews, except that of the Applicant, were done remotely, through Skype from New York. The Tribunal finds that this fact *per se* does not constitute a procedural flaw since no evidence was adduced to demonstrate that this way of communicating with the witnesses had a real impact on their testimonies. Particularly, while the Applicant alleges that it is possible that Mr. E.M. and Mr. K.R. were together when they were interviewed via Skype since they sit in the same office, this was not established through any evidence.

38. The Tribunal is of the view that Skype was used for the purpose of procedural economy and, most likely, due to the scarcity of resources and, even though it is not the ideal way of questioning witnesses, it does not amount to any procedural irregularity nor does it constitute a breach of the Applicant's due process rights.

39. In view of the above, the Tribunal finds that the witness statements of the three direct witnesses of the incident, which form the basis of the contested decision, are not sufficiently reliable and credible to establish the alleged facts in accordance with the required standard.

Whether the facts were established by clear and convincing evidence

40. The burden of demonstrating that the actions for which a sanction was issued truly occurred rests with the Administration (*Liyanarachchige* 2010-UNAT-087, *Nyambuza* 2013-UNAT-364, para. 31, *Diagabate* 2014-UNAT-403, para. 35). The Appeals Tribunal has consistently held that when termination is a possible sanction, the misconduct must be established by "clear and convincing evidence" (*Diabagate* 2014-UNAT-403, *El Kkalek* 2014-UNAT-442).

41. At the outset, the Tribunal notes that the contested decision is unclear and to some extent self-contradictory as to the facts that form the basis of the misconduct. The Deputy Executive Director, Management, UNICEF, concluded that he was "satisfied that there is clear and convincing evidence that [the Applicant] threatened to kill other staff members in the Afghanistan Country Office (ACO)", without making any specific finding as to the underlying facts for reaching this conclusion. He refers to different versions of a statement allegedly made by the Applicant in front of three colleagues, as expressed in the charge letter and by the three direct witnesses, but does not indicate which account of events he finds has been established. Most importantly, he makes no conclusion as to who the Applicant threatened to kill. Rather, he states that the Applicant's "discipline does not depend on an identified threat to kill six or more staff members" and that "[a] credible threat to kill one identified person would suffice", without even identifying who this single person would be.

42. The Deputy Executive Director, Management, UNICEF, also concluded that the above-mentioned threat constitutes misconduct under staff rule. 1.2(g) and insisted that "the intent required is, intent, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions (…) i.e. it is the intent that [the] threat be taken seriously". However, he makes no express finding that the Applicant intended to interfere with the work of any specific staff member nor does he describe the functions that the concerned staff member(s) would have been performing. He solely made reference to allegations that the Applicant threatened to kill "at least six members of staff in the ACO, including Mr. [A.E.], Provincial Project Officer, Bagdhis Outpost, Mr. [M.Y.], Operations

Manager, Herat Zonal Office, and Ms. [L.M.], Senior Finance/Accounts Assistant and Harmonized Approach to Cash Transfer (HACT) focal point, Herat Zonal Office" "in the context of discussions around certain irregularities and potential misuse of UNICEF funds revealed during HACT mandated spot checks, in relation to a project [the Applicant] supervised", without assessing if these allegations were established. The only finding he makes in this connection is that the threat was taken seriously as Mr. A.E. (who was not present during the incident) reported it to the Afghanistan Country Office, two of the witnesses present stated that threats of that sort in Afghanistan "cannot be taken lightly" and the United Nations Security Office in Afghanistan considered the threat sufficiently serious to warrant special measures for Messrs. A.E. and M.Y.'s protection.

43. Having heard the three direct witnesses and the Applicant under oath and considered previous statements they made, the Tribunal finds that there is clear and convincing evidence that, on 16 May 2017, the Applicant participated in a discussion with Ms. L.M. and Mr. E.M. about a spot check exercise concerning, *inter alia*, a project in which he was involved. Mr. K.R. was also present, although it is unclear whether he was also directly involved in the discussion. It is established that the Applicant became upset and stated in *farsi*, as translated by the witnesses, that "[he] had heard that some spot checks implicating him were conducted and if [he] is terminated, [he] will kill some people". Ms. L.M., Mr. E.M. and Mr. K.R. explained to him that no one was trying to get his appointment terminated and the Applicant quickly calmed down. The testimonies of the three witnesses present during the incident, Ms. L.M., Mr. E.M. and Mr. K.R., are consistent in this respect, although their account vary slightly as to the exact words pronounced by the Applicant.

44. However, the evidence is not consistent on the following aspects:

a. Whether the threat was directed at any specific staff member and, if so, at whom;

b. Whether the Applicant made reference to the use of a gun or a pistol; and

c. Whether the threat was real and serious.

45. According to Ms. L.M.'s testimony at the hearing, the Applicant said that "if he was blamed for abuse of money and got terminated, before [he] go out of UNICEF, [he] will kill six to ten persons". He mentioned four names: hers, Mr. M.Y., Mr. A.E. and a fourth person named "Somaye". This is generally consistent with her prior statements, although she initially wrote to the investigator in an email dated 23 May 2017 that the Applicant threatened to kill "six to seven persons" and did not mention the name of "Somaye".

46. When reporting the statement made by the Applicant to the investigator, in writing and orally during her interview, Ms. L.M. did not mention that he had pronounced the word "gun". As discussed above, the investigator admitted that she added it herself to Ms. L.M.'s witness statement. Thus, the Tribunal cannot rely on this witness statement but retains that the testimony of Ms. L.M. did not mention the word "gun".

47. Ms. L.M. testified at the hearing that she did not take the threat seriously, although she clearly expressed that she did not appreciate the language used by the Applicant and that she was initially disturbed by his behaviour. She testified that the Applicant had calmed down a few minutes later after they discussed with him and explained that nobody was trying to get his appointment terminated. She confirmed that she did not fear for her life. She indeed did not report the threat to the authorities and only mentioned it to Mr. A.E., who was the Applicant's direct supervisor.

48. Her statement at the hearing recants in this respect the witness statement collected by the investigator, dated 1 August 2017, which reads: "I personally have never faced such threat before and I am not sure [the Applicant] would do what he said. But you must also realise that in Afghanistan this is something that can be done. It's very easy to buy a gun in Afghanistan, even children of 12 can have access to a gun. One can also hire people for money to do such an act. Such threats should

not be taken lightly in Afghanistan". Again the Tribunal finds that the circumstances surrounding the collection of this witness statement render it unreliable and will therefore retain Ms. L.M.'s testimony at the hearing instead.

49. According to Mr. E.M., the Applicant said that "there were some spot checks being done and if he got terminated, he will take a gun and kill some people, and then he would go to prison and he would not care". He said that the Applicant was speaking very fast and that he mentioned two names, Mr. A.E. and Mr. M.Y.. According to Mr. E.M., the Applicant did not refer to Ms. L.M. when making his threat. In his statement to the investigator, Mr. E.M. did not mention any name, although he did mention these two names in his written answers to the investigator's questions in an email dated 24 May 2017.

50. At the hearing, Mr. E.M. testified that he did not take the threat seriously and confirmed that he did not report the incident. In an email to the investigator on 25 May 2017 where he was asked if the threat was credible, he wrote: "Well, he was only looked to be more verbal problematic rather than to act what he said therefore, I don't think he would be able to do but he said crazily in that time – after few days he was looking normal, that's what I felt".

51. Mr. K.R., for his part, testified at the hearing that the Applicant said the following: "If I get terminated due to this case [referring to the spot checks exercise being conducted] I will kill these people". According to Mr. K.R., the Applicant "wanted to kill the people who wrote the spot check report and those in the spot check team". He talked very fast and was very emotional. He mentioned two names, Mr. A.E. and Mr. M.Y. He further testified that the Applicant only mentioned these two names and did not refer to any specific number of persons.

52. This is generally coherent with his previous statement to the investigator, which was reported as follows in his written statement, although the witness did not refer to the word "pistol" or "gun" at the hearing:

> When he came in, [the Applicant] stopped our discussion and said that someone was making cases against him and that if he was terminated due to the cases, he will bring a pistol to the office and he will kill some people. He mentioned two names of the people he was going to kill: the provincial Project Officer, Dr. [A.E.] and the Operation Manager in Herat, Mr. [M.Y.].

53. Mr. K.R. testified at the hearing that after they had reassured him that nobody was making a case against him, the Applicant "calmed down and everything got normal". He further stated that he did not have any further discussion with Ms. L.M. and Mr. E.M. about this as there was "no issue to discuss further". He also stated that he thought that the Applicant does not have "the courage to do it" and that he rather intended to scare people, so as to avoid that a report be made against him. He confirmed that he did not report the threat and that the threat "for him was not serious".

54. His testimony at the hearing on that point coincides with his written answers to the investigator's questions in an email of 23 May 2017, where he wrote:

> I think the aim of this threat was just to scare our colleagues not to write the weak points against him, I think he has no courage to bring the pistol or fire it and kill someone because as I know him since last 4 years, he cannot do it easily.

55. However, it is not consistent with his witness statement collected by the investigator dated 31 July 2017, which states that "[i]n Afghanistan, the kinds of threats that [the Applicant] made cannot be taken lightly." During the hearing, the witness was not able to clarify these differences nor did he offer a reasonable explanation as to why the two versions did not coincide. The Tribunal will retain the witness testimony at the hearing, which was taken under oath and is more reliable.

56. The Applicant consistently denied the allegations that he made any threat to kill. He testified at the hearing that after Ms. L.M. had accused him of hiding documents required for the spot checks, he stated that "if anything happens to [him], others, including Mr. [E.M.] who was the focal points for the spot checks and Mr. [A.E.], who certified the documents, had an equal share of responsibility".

57. During the interview, the investigator told the Applicant that "there are three people who said that [he] threatened to kill (…) at least six people whose names are [A.E.], [M.Y.], [L.M.] and [S.S.]". The Applicant responded that he just said: "I will complain against these people".

58. In his answer to the charge letter dated 23 October 2017, the Applicant wrote:

> I did say that six other people working on my team should also "suffer" if this spot-check negatively affect my employment with UNICEF. What I meant to say was that six other people on my team were equally responsible for the management and check-up of the documents and that their employment should also suffer as well if my employment was negatively affected.

59. The Applicant presented various versions of events which are not credible enough to refute the evidence provided by the three direct witnesses. While the Applicant made the contested statement in *farsi*, which may explain some differences in the way it was reported by the various people involved, the Tribunal finds that the evidence of three direct witnesses is sufficiently coherent to conclude that the Applicant said that he would "kill" some staff members.

60. However, the Tribunal finds that the evidence is not sufficiently consistent to conclude that the Applicant threatened to kill any specific staff member or the number of people he threatened to kill. The only two names that were consistently mentioned were Mr. A.E. and Mr. M.Y., but the testimonies are contradictory as to whether Ms. L.M. and a forth individual named "Somaye" were also targeted. This contradiction is not insignificant since Mr. E.M. and Mr. K.R. testified that the Applicant wanted to scare those who were conducting the spot check exercise and Ms. L.M. was in charge of the spot checks whilst Mr. A.E. and Mr. M.Y. were not involved in conducting this exercise, as confirmed by Ms. L.M.'s testimony. Ms. L.M. also testified that the Applicant stated that he would kill six to ten people while the others stated that he did not refer to any specific number.

61. Most importantly, it appears from the testimony of all the direct witnesses that the Applicant did not make any specific and serious threat to kill but rather made a spontaneous and confused statement where he referred to the killing of "some" staff members while mentioning the names of various staff members in the course of the discussion about the spot check exercise. Although the Applicant used the word "kill", his statement was not coherent and specific enough to denote an intent to execute a threat to kill an identified individual. The witnesses confirmed that they did not take the "threat" seriously and did not report it to the relevant authorities. Placed in its context, the Applicant's statement rather appears to be an outburst triggered by the Applicant's fear that his employment may have been at jeopardy.

62. The Tribunal notes that the Deputy Executive Director, Management, UNICEF, also relied upon the witness statement of Mr. A.E. and two personal security risk assessments conducted in respect of Mr. A.E. and M.Y. to conclude that the threat was serious. The Tribunal considers that this constitutes irrelevant and unreliable evidence, which should not have been taken into consideration.

63. Firstly, the perception expressed by Mr. A.E. about the seriousness of the threat has no probative value as he was not present when the Applicant made his statement.

64. Secondly, the personal security risk assessments are not sufficiently reliable to be used as evidence for a number of reasons. They are not signed nor dated. They apparently originate from a request made by the Country Representative on 25 May 2017. According to the testimony of Mr. B.N., a Security Officer in Afghanistan, he was asked to prepare the assessments on 15 June 2017 and these were completed on 19 June 2017. Still according to Mr. B.N.'s testimony, the reports were based on an interview he conducted with Mr. A.E. on 15 June and an interview conducted by one of his colleague with Mr. M.Y. at an unspecified date, none of whom were present during the incident. The reports also refer to a phone call made by the Chief of Operations, Mr. D.H., on 17 May 2017 to Ms. L.M., which is before the assessment was even requested. It also makes a vague reference to "other persons" having confirmed that threats were made "including Mr. K.R.

when contacted by Mr. D.H.", without any specific date but apparently before the assessment was requested. There are no formal records of these interviews. As confirmed by Mr. B.N., the assessments were not aimed at assessing the truthfulness of the alleged threats but solely to examine whether security measures should be considered.

65. The Tribunal also finds that the issue of the seriousness of the threat goes to the heart of the investigation conducted by OIAI as per sec. 3 of CF/EXD/2012-005. Thus, the assessment conducted by the United Nations Security Office in Afghanistan duplicates the OIAI investigation on that point. The United Nations Security Office in Afghanistan was neither mandated to collect information for the purpose of the disciplinary proceedings against the Applicant nor to make any factual finding in respect of these proceedings. Investigations on allegations of misconduct are within the purview of the OIAI or other United Nations entities if the case is referred to them by the OIAI under sec. 3.5(b) of CF/EXD/2012-005, which is not the case here. The fact that the United Nations Security Office in Afghanistan considered appropriate to recommend protection measures for Mr. A.E: and Mr. M.Y., based on information they collected outside of the disciplinary procedure envisaged in CF/EXD/2012-005, does not constitute evidence of the seriousness of the threat as reported by the witnesses in the context of the disciplinary procedure and cannot be used for that purpose. This is an assessment to be made first by the OIAI investigators based on the evidence they collected, and ultimately by the decision-maker, namely the Deputy Executive Director, Management, UNICEF, exclusively on that basis.

66. In view of the foregoing, the Tribunal finds that the facts upon which the disciplinary measure is based were not established through clear and convincing evidence insofar as the Applicant's statement cannot be interpreted as a real and serious threat to kill identified staff members in the Afghanistan Country Office or any staff member. The Applicant's statement was nevertheless intimidating and aggressive in its tone and content. It was directed to Ms. L.M. and Mr. E.M., who were conducting and discussing the HACT spot checks, and alluded to Mr. A.E. and M.Y., who apparently were also involved in the transactions that were under review. It referred to possible consequences if the Applicant was terminated as a

result of the spot check exercise. The Tribunal therefore finds that the Applicant's statement denotes an intent to interfere with the spot check exercise conducted by Ms. L.M. and Mr. E.M.

67. The Tribunal will now turn to consider whether these facts, which it finds were established by clear and convincing evidence, constitute misconduct.

Whether the facts amount to misconduct

68. Staff rule 1.2(g) provides that "[s]taff members shall not … threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions".

69. Pursuant to sec. 1.4(a) of CF/ EXD/2012-005, misconduct includes "acts or omissions in conflict with the general obligations of staff members set forth in … Chapter 1 of the UN Staff Rules".

70. In view of the facts established above, the Tribunal finds that the Applicant made an intimidating statement intended, directly or indirectly, to interfere with the ability of other staff members, namely Ms. L.M. and Mr. E.M., to discharge their official functions. There is no clear and convincing evidence that these two individuals were the direct subject of the threat but the reference to negative consequences that may ensue to their colleagues constitutes intimidation in the discharge of their official functions. Even if Ms. L.M. and Mr. E.M. did not take the threat seriously, it was not acceptable for the Applicant to suggest that their investigative work could result in negative consequences, whatever they may be.

71. Similar to the Deputy Executive Director, Management, UNICEF, the Tribunal finds that the Applicant's conduct amounts to misconduct under staff rule 1.2(g) and sec. 1.4(a) of CF/ EXD/ 2012-005, although based on a different factual matrix.

Proportionality of sanction

72. Pursuant to sec. 4.3 of CF/EXD/2012-005, disciplinary measures "shall be proportionate to the nature and gravity of the staff member's misconduct".

73. The Appeals Tribunal has consistently recalled that "the degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behaviour of the staff member involved" (*Portillo Moya* 2015-UNAT-523). Therefore, "only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, … the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one)" (*Portillo Moya* 2015-UNAT-523).

74. Since the Tribunal found in the present case that the facts upon which the disciplinary sanction was based were not all established, the sanction cannot stand. The role of the Tribunal is thus slightly different from the one described above as the Tribunal is not reviewing the proportionality of the sanction imposed by the Deputy Executive Director, Management, UNICEF, to the misconduct he found had been established in the contested decision.

75. Given that the Tribunal reached a different conclusion on the facts that form the basis of the misconduct, it has to determine what is the appropriate sanction in relation to this new factual matrix. This exercise does not involve the same level of deference to the discretion exercised by the Administration.

76. The Tribunal is of the view that its power to impose a different disciplinary sanction than the one initially imposed by the Administration (see para. 73 above) also allows it to determine the appropriate sanction when it reaches a conclusion that a staff member engaged in misconduct based on established facts that are different from the ones considered by the decision-maker. The Tribunal further notes that in light of the recent decision in *Mbaigolmem* 2018-UNAT-819, where the Appeals Tribunal ruled against the remanding of disciplinary cases after they have reached the merits stage, the option of making a determination of the

appropriate sanction shall be preferred to remanding the case to the Deputy Executive Director, Management, UNICEF, to take a new decision based on the facts established by the Tribunal. This is also in the interest of all the parties, who are entitled to an expeditious resolution of these proceedings. It is also in the interest of judicial economy to resolve the matter in a definitive matter, subject to the possibility of an appeal.

77. Having reviewed the practice of the Secretary-General in disciplinary matters, as notably reflected in its Information Circulars, the Tribunal notes that the severity of the sanctions varied in cases where staff members were involved in threats to other staff members of the Organization, but in no case they involved termination of employment.

78. For instance, in a case where "[a] staff member used threatening language, including veiled threats, towards another staff member", the sanction imposed was "demotion with deferment, for one year, of eligibility for consideration for promotion" (see ST/IC/2015/22).

79. In another case where a staff member serving as officer-in-charge of a unit "performed an act that was intimidating in nature", the sanction imposed was a censure (see ST/IC/2013/29).

80. In the present case, the Tribunal found that the Applicant made an intimidating statement intended, directly or indirectly, to interfere with the ability of other staff members, namely Ms. L.M. and Mr. E.M., to discharge their official functions. This misconduct is relatively serious as it involved an aggressive behaviour towards other staff members, which is not acceptable in the Organization. It also had the potential to impact the conduct of internal investigations, which shall not only be conducted without interference but also requires the cooperation of staff members.

81. The only mitigating circumstance that can be considered in the present case is the fact that the Applicant had suffered serious health issues a few months before the incident. The Applicant had undergone a surgery and he had just returned to work from sick leave the day before the incident. This fact may have caused him stress and anxiety and, from the Tribunal's point of view, may in part explain his outburst at the meeting on 16 May 2017.

82. Consequently, the Tribunal finds it appropriate to replace the previous sanction of dismissal, which was the most severe one, by a suspension without pay for a period of three months, pursuant to sec. 4.3(d) of CF/EXD/2012-005.

Remedies

83. Article 10.5 of the Statute of the Dispute Tribunal states:

> As part of its judgement, the Dispute Tribunal may only 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 for harm, supported by evidence, 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.

84. Having found that the contested decision is unlawful because the facts upon which it is based were not established, the Tribunal rescinds it pursuant to sec. 10.5(a) of its Statute. However, since it found that misconduct was established based on a more limited set of facts, the Tribunal imposes a disciplinary sanction of suspension without pay for a period of three months, pursuant to the same provision.

85. In accordance with sec. 10.5(a), the Tribunal shall set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission as the contested decision concerns termination.

86. In calculating the *quantum*, the Appeals Tribunal stressed that the determination of the "in lieu compensation" must be done on a case-by-case basis and carries a certain degree of empiricism (*Mwamsaku* 2011-UNAT-265). The Appeals Tribunal further held that in setting the amount of compensation in lieu of reintegration, the Tribunal may take into account the grounds on which the decision to dismiss was rescinded, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed term), the remaining time, chances of renewal and the two-year limit imposed by the Statute of the Dispute Tribunal, which constitutes a maximum and cannot be the average "in lieu compensation" established by the court (see e.g. *Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188).

87. Considering that the contested decision was rescinded on the basis that part of the facts upon which it was based were not established, but that the facts established before the Tribunal still amount to misconduct although of a less severe nature, the Tribunal finds it adequate, fair and reasonable in the present case to award compensation in lieu of rescission in an amount equal to one-year net base salary, based on the Applicant's salary on the date of the termination of his fixed-term appointment, i.e., on 6 November 2017.

88. Turning to the Applicant's request to "be paid a financial compensation equivalent to two years' net salary based on his salary in November 2017", the Tribunal may, pursuant to art. 10.5(b) of its Statute, award compensation for harm suffered as a result of the contested decision if such harm has not been compensated by the rescission. For such compensation to be awarded, the applicant must identify the harm suffered and adduce evidence thereto.

89. In the instant case, the Applicant did not present evidence of any specific damage, moral or material, for which he requests compensation. When questioned by the Respondent about any possible loss of income following the termination of his appointment, the Applicant reluctantly admitted that he has been working as a contractor for another International Organization since 27 February 2018, earning USD2,700 per month. The Applicant was ordered to produce his contract but he did not comply. The Tribunal thus concludes that no financial loss has been established for the period after 27 February 2018 and that the Applicant's loss of income would be limited to the period between 7 to 27 February 2018 taking into account the three-month suspension ordered by this Tribunal.

90. In this respect, the Tribunal stresses that its decision above to rescind the contested decision fully compensates the Applicant's loss of salary as it either entails that the Applicant will be paid his salary retroactively to 7 February 2018 until his reintegration or, if the Respondent elects to pay the amount of compensation in lieu of rescission, that he will be paid the equivalent of one-year net base salary.

91. Absent any allegation and evidence of any additional harm that the Applicant may have suffered as a result of the contested decision, his request for compensation under art. 10.5(b) of the Tribunal's Statute must be rejected.

Conclusion

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

a. The contested decision dismissing the Applicant from his position of Education Officer is hereby rescinded and replaced by a suspension without pay for a three-month period;

b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid a sum equivalent to one-year net base salary, based on his salary on 6 November 2017;

c. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

d. All other claims are rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 3rd day of September 2018

Entered in the Register on this 3rd day of September 2018

(*Signed*)
René M. Vargas M., Registrar, Geneva