UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/015
Judgment No.: UNDT/2018/090
Date: 19 September 2018
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RICKS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

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

Introduction

1. The Applicant is a former staff member of the United Nations Mission in Liberia (UNMIL), based in Monrovia.

2. On 13 February 2016, he filed an application contesting a decision dated 24 November 2015 to impose on him the disciplinary sanction of termination from service for serious misconduct, consisting of verbally and physically abusing Mr. Fedrick Jarbah, a security guard employed by an UNMIL contracted company, Executive Security Consultancy (EXSECON). The Applicant prays that the Tribunal rescind the contested decision, order his reinstatement without loss of salary from the date of separation, and, if reinstatement were no longer possible, payment of compensation in lieu of reinstatement.

3. The Respondent filed a reply to the application on 11 March 2016.

Procedure

a. Investigation

4. On 24 October 2014, UNMIL's Special Investigations Unit (SIU) received a report that the Applicant assaulted Mr. Jarbah during a routine security inspection at the UNMIL compound entrance.[1]

5. SIU launched an investigation which resulted in an investigation report dated 24 February 2015.[2]

6. By memorandum dated 30 May 2015, the Applicant's case was referred to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM).[3]

7. By memorandum dated 25 June 2015, delivered on 6 July 2015, the Applicant was requested to respond to formal allegations of misconduct.[4] Specifically, it was alleged that on 24 October 2014 he verbally abused and physically assaulted Mr. Jarbah, a security guard working for UNMIL contractor, EXSECON Security, by saying that Mr. Jarbah was stupid

[1] Reply – annex 1.
[2] Reply – annex 2.
[3] Reply – annex 1.
[4] Application – annex 4.

and did not know his security guard functions; that Mr. Jarbah was not qualified to serve as a security guard; that all the security personnel assigned at the United Nations facility were stupid and "fuck to all security guards", and by hitting him in the face and emptying a bottle of beer on him.[5]

8. On 20 July 2015, the Applicant submitted his comments on the allegations of misconduct.[6] The Applicant denied all the allegations and stated, *inter alia*, that the four EXSECON guards "tailored and manipulated their testimonies".

9. On 20 August 2015, the Applicant was requested to respond to an addendum report on the alleged assault which he did on 2 October 2015 having received an extension of time to do so.[7]

10. By letter dated 24 November 2015, the ASG/OHRM informed the Applicant that the Under-Secretary General for Management (USG/DM) had concluded that it had been established by clear and convincing evidence that, on 24 October 2014, he verbally abused and physically assaulted Mr. Jarbah and that, therefore, it was imposed 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 violating staff rule 1.2(f) as his actions amounted to serious misconduct.[8]

11. The Applicant was also informed that at the time of the incident, he was in breach of UNMIL administrative issuances by using an UNMIL vehicle outside official working hours and transporting unauthorized passengers for which his driving permit was later withdrawn.

b. Procedure before the UNDT

12. The Tribunal commenced hearing the case on 27 June 2017 and subsequently adjourned to allow the Respondent to confirm the availability of witnesses. During this first hearing the Tribunal received oral evidence from the Applicant for himself and from Messrs. Kamara and Fahnbulleh for the Respondent. On 18 October 2017, the Tribunal held another hearing during which oral evidence was received from Messrs. Jarbah and Mr. Jusu for the Respondent. Another witness for the Respondent, Mr. Victor Walley, was not produced due

[5] *Ibid*, at para. 4.
[6] Reply - annex 5.
[7] Reply - annex 9.
[8] Application – annex 1.

to the fact that, as reported by the Respondent's Counsel, he had demanded to be paid for giving testimony in an amount exceeding by far what would have been a reasonable cost of appearance, including any attendant loss of wages.[9] The Applicant did not request any witness to be heard.

13. The Applicant and Respondent were afforded time to file their closing submissions which they did on 24 October 2017 and 2 November 2017 respectively.

Considerations

14. As well established in the UNAT jurisprudence,[10] 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 UNDT is to examine:

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

b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and

c. whether the sanction is proportionate to the offence.

15. Moreover, as confirmed by UNAT in *Applicant*, part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.[11] The present application challenges the decision on the first three prongs of the required analysis. The Tribunal shall address them below, starting with the Applicant's averment that the acts attributed to him, regardless of the question of proof, do not qualify as misconduct, whereby the charge would be void *ab initio*.

[9] Respondent's Motion for authorization of payment of compensation to witnesses dated 18 August 2017.
[10] *Majut* 2018-UNAT-862, para. 48; *Ibrahim*, 2017-UNAT-776, para. 234; *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; and *Molari* 2011-UNAT-164, paras. 29 and 30.
[11] 2012-UNAT-209, para. 36.

i. Whether acts attributed to the applicant qualify as misconduct under the Staff Regulations and Rules.

16. The USG/DM concluded that the Applicant's actions of verbally abusing and physically assaulting Mr. Jarbah by hitting him on the face on 24 October 2014 constituted a violation of staff rule 1.2(f) and amounted to serious misconduct. It was on this basis that 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) was imposed on him.

17. Staff rule 1.2(f), titled "specific instances of prohibited conduct", proscribes:

> Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

18. Staff rule 10.2(a)(viii) stipulates that disciplinary measures may take the form of:

> 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;

19. Moreover, the then applicable section 2(d) of ST/AI/371 (Revised disciplinary measures and procedures) described conduct for which disciplinary measures may be imposed as including "assault upon, harassment of, or threats to other staff members".

Applicant's case

20. The Applicant submits that, initially, he was charged with contravening section (g) of ST/A1/371, which deals with acts or behaviour that would discredit the United Nations. Subsequently, the charge was amended to contravention of part II, section 2(d) of ST/A1/371, "assault upon, harassment or threats to other staff members", as well as possibly violating staff rule 1.2(f), "any form of discrimination or harassment, including sexual as well abuse in any form at the workplace or in connection with work, is prohibited".

21. The context of staff rule 1.2(f) is sexual harassment and cannot be divorced from it. No evidence whatsoever was adduced that would relate to complaints of a sexual nature. The charges under section 2(d) of ST/A1/371, in turn, are premised upon the fact that a United Nations staff member had to be involved, however, EXSECON guards are not staff members

and are not covered by the applicable Staff Regulations and Rules. That being the case, the charge is void *ab initio*.

22. His driving permit was withdrawn for a period of seven months. To make a finding on an offence whereby his driving permit was withdrawn amounts to double jeopardy.

Respondent's case

23. The Applicant's contention that, because Mr. Jarbah was an EXSECON guard and therefore not a staff member, verbally abusing and assaulting such an individual does not constitute misconduct under the Staff Rules cannot be accepted. In *Toukolon* 2014-UNAT-407, the Appeals Tribunal held that there is nowhere in the written law of the Organization that misconduct is defined solely in terms of acts committed by staff members against other staff members.[12] In *Wishah* 2015-UNAT-537, the UNAT held that serious violence even when committed in the private life of a staff member cannot be tolerated.[13]

24. Contrary to the Applicant's contention that staff rule 1.2(f) only applies in the context of sexual harassment or other sexual misconduct, it is clear that the said rule applies to all types of abuse at the workplace. The misconduct in question occurred at the workplace.

Considerations

25. The Tribunal concurs with the Respondent's legal arguments, it moreover points out that the alleged abuse, that is, a verbal and physical assault, would have been either at the work place or in connection with work; in any event, it would fall within the ambit of staff rule 1.2(f). The function of section 2(d) of ST/A1/371, on the other hand, was only to exemplify and not to define misconduct in a legalistic manner. As such, there is no prohibition of interpreting the description of the prohibited conduct by analogy. In this instance, an assault on a co-worker in connection with work constitutes misconduct, no matter the type of contract or appointment.

26. A mention of the administrative measure of withdrawal of the driving permit for using an UNMIL vehicle outside official working hours and transporting unauthorized passengers

[12] At para. 16.
[13] At para. 34.

does not amount to double jeopardy. These circumstances do not form part of the sanctioning decision.

ii. Have the facts on which the disciplinary sanction was based been established?

27. The Tribunal reviewed evidence relied upon by the USG/DM and, to the extent enabled by the availability of witnesses, confronted it with their live testimony. This evidence is summarised further below.

28. It is undisputed and confirmed by several witnesses that on 24 October 2014, a United Nations official holiday, between 9.38 p.m. and 9.48 p.m., the Applicant was driving a United Nations vehicle registration number UN 1747 in the company of his girlfriend. It was confirmed in the investigation by the Applicant's superiors that no United Nations ceremony was held on that day in Gbarpolu and that the Applicant was not authorized to use any United Nations vehicle. The Applicant arrived at the entrance of the UNMIL compound at 9.45 p.m.[14] Mr. Jarbah, EXSECON security guard, did not let the Applicant's companion in the compound, hence she disembarked and waited outside.

29. In establishing the subsequent events, which gave rise to charging the Applicant with misconduct and imposing on him the disciplinary measure, the USG/DM's decision dated 24 November 2015 was informed by the following:

Statements given to SIU

30. The alleged victim of the assault, Mr. Jarbah, provided the following statement on 27 October 2014:[15]

a. While he was searching the Applicant's vehicle at the gate, the Applicant opened the vehicle door using abusive language. The Applicant asked his girlfriend to disembark from the vehicle and drove into the UNMIL compound at 9.53 p.m.

b. The Applicant went into his office, then returned to where Mr. Jarbah was, again speaking in abusive language. He then head-butted Mr. Jarbah in the face, in the

[14] Annexes to the allegations of misconduct sent to the applicant – annex 4 to the application, at pages 6 – 51.
[15] *Ibid,* at page 29.

presence of three other EXSECON Security guards, Victor Walley, Saymon Fahnbulleh and Foday Jusu, at 10.05 p.m.

c. Mr. Walley told Mr. Jarbah not to take any action.

d. "While going home", the Applicant "wasted" a large Heineken beer bottle on him, soaking his uniform, in the presence of Sgt. Walley (in the re-typed copy erroneously inserted "followed him"). He took Mr. Jarbah's flashlight, his "face cap" and dropped it on the ground, he also hit him in the darkness near the Central High Campus.

e. Mr. Jarbah managed to escape from the Applicant and went to complain to Abbas Kamara, UNMIL Security Assistant. He also informed Sgt. Charles Willie at 10.20 p.m.

f. Mr. Jarbah later received his flashlight from the Applicant through Mr. Kamara at 10.42 p.m. at a night club. At the same time as he received the flashlight, the Applicant and his girlfriend apologized to him for the Applicant's actions.

31. This statement was supplemented by one taken on 15 February 2015 where Mr. Jarbah described the abusive language used by the Applicant during the incident:

> "My parents did not train me well neither my commanders"; "I am stupid, I don't know my security functions"; "I am not qualified to serve as security guard"; and "fuck to all security guards".

32. Another EXSECON Security, an alleged eye-witness, Mr. Fahnbulleh, 27 October 2014 statement to SIU:[16]

a. At the main gate of the UNMIL compound, when Mr. Jarbah attempted to search the vehicle as part of his normal duties, the Applicant "violently" got out of the vehicle and started to insult Mr. Jarbah.

b. Later, after parking the vehicle, the Applicant returned to the security booth, walked up to Mr. Jarbah, insulted him, hit him on his head with his *head* (in the re-typed copy of the statement wrongly typed as "hand") and later emptied the remainder of a drink he had on Mr. Jarbah's head.

[16] *Ibid.*, at page 43.

33. Another EXSECON Security and alleged eye-witness, Mr. Jusu, statement to SIU dated 25 October 2014:[17]

a. On 24 October 2014, at around 9.50 p.m., he arrived at UNMIL compound to commence his shift as EXSECON security guard. He saw the Applicant shouting and moving with a green bottle of beer in his hand, using abusive language towards Mr. Jarbah and "measuring" him.

b. He inquired what the argument was about with the Applicant, who did not answer, but then he saw Mr. Jarbah, coming from the direction of the TV room. He asked Mr Jarbah what was going on and when Mr. Jarbah was about to explain the issue concerning coming late with the United Nations vehicle, the Applicant went and "headed" his forehead, regarding which Mr. Jarbah turned to Sgt. Walley and said, "have you see what he has done to me"? Sgt. Walley told Mr. Jarbah to forget about the matter.

c. The Applicant told Mr. Jarbah to get out of the UNMIL compound then waited for him outside. Mr. Jarbah was about to leave as he had finished work. As soon as Mr. Jarbah got out on the street, closer to the main gate, the Applicant removed Mr. Jarbah's EXSECON cap and poured the remaining "wine" on him. Both were heading towards Bopulu Central High opposite the United Nations compound.

34. Sgt. Victor Walley, EXSECON Security and alleged eye-witness, statement on 27 October 2014:[18]

a. The Applicant arrived at the main entrance to the UNMIL compound with his girlfriend at 2145hours. Mr. Jarbah went to search the vehicle. In the process, the Applicant disembarked from the vehicle and started using profane language by saying that all the security personnel assigned at the UNMIL facility are stupid.

b. He told the Applicant to move the vehicle from the gate as it was causing an obstruction. The Applicant went to park the vehicle and returned using insulting language in his presence and in the presence of other guards including Mr. Fahnbulleh, Mr. Jusu and the Applicant's girlfriend, Dekontee.

[17] *Ibid.*, at page 38.
[18] *Ibid.*, at page 36.

c. While he was standing at the gate, Mr. Jarbah asked the Applicant whether that was the right time to park a United Nations vehicle. The Applicant's reaction was to, later, hit Mr. Jarbah on his head and, later, to "waste" liquor on his uniform. He stepped in to calm the situation. Mr. Jarbah left the scene after turning over his post to the incoming guard. But the Applicant followed Mr. Jarbah towards the Bopolu Central High School campus and continued beating him.

d. This had always been the Applicant's attitude towards the security personnel assigned to the United Nations facility in Bopolu.

35. Ms. Massa Sherif, EXSECON Security, statement dated 13 August 2015:[19]

a. On 24 October 2014, she was on duty at the main gate of UNMIL. She left earlier, having handed over her duties to Jarbah at 2130 hours. As such, she was not on duty at the time when the incident with the Applicant and Jarbah occurred.

b. When Jarbah came to work the following day, 25 October 2014, she noticed the front of his uniform shirt "crush like someone grab it and drag it up". She also noticed something like a water stain on the shirt. Mr. Jarbah told her that the Applicant had "wasted liquor" on his shirt. He explained that the Applicant, while being drunk, had yelled at him for taking long to open the gate, slapped him, "wasted the beer" on his clothes, followed him after he had left duty and beat him up.

36. UNMIL security assistant Mr. Kamara in his statement dated 27 October 2014:[20]

a. He was at his residence at about 10.30 p.m. when Mr. Jarbah came to lodge a complaint against the Applicant, alleging that the latter had hit him on the face and wasted a bottle of alcohol on his head. Mr. Jarbah's uniform was all wet.

b. When he later attempted to speak to the Applicant about the incident, the Applicant insulted him.

37. Mr. Yorker, statement of 13 August 2015:[21]

[19] SIU Addendum Report - annex 2 to the application - at page 13.
[20] Annexes to the allegations of misconduct sent to the applicant – annex 4 to the application, at page 19.
[21] SIU Addendum Report, *op. cit.*, at page 14.

a. He is the Manager of Gbarpolu Community Bank and a good friend to the Applicant.

b. Sometime in 2014, he was sitting at a friend's "yard" having drinks with others including the Applicant and the Applicant's girlfriend, Dekontee, as well as Commander Jones. At around 6.30 or 7.00 p.m. the Applicant got up and left saying that he had to park the United Nations vehicle. There were two people in the car when it left.

c. The Applicant returned walking on foot 30 minutes later. He was angry and his mood had changed. He explained that one of the Security Guards had molested him and that they had had a serious confrontation. The Applicant said that the Security Guard had refused to show him respect because he is a national and not an international staff member.

d. They calmed the Applicant down and told him to make an official complaint about the incident.

38. Mr. Tom Karmala Jnr, statement of 19 August 2015:[22]

a. He is a Corrections Officer and the Deputy Superintendent for Prison at Bopolu City, Gbarpolu County, Liberia.

b. On 24 October 2014, he was walking on the road in Bopolu City going to a shop when he saw Abass Kamara. He stopped to talk to him and whilst they were talking, one EXSECON Security Guard came to Abass Kamara and was complaining to him that the Applicant assaulted him and "wasted liquor" on his clothes.

c. Mr. Kamara decided to go with the EXSECON Security Guard to find out from the Applicant what happened between them. As he was going in the same direction, he walked along with them. He saw the Applicant at a little Entertainment Centre in Bopolu. Mr. Kamara began asking the Applicant what happened between him and Jarbah. The Applicant became angry and told Mr. Kamara that "I can't talk to you, I have nothing to say to you, I don't recognize you". At this time, Jones, the Commander of the Liberia National Police Support Unit at Bopolu and one Anthony

[22] *Ibid.*, at page 18.

Yorker the Manager of the Bopolu Community Bank was also present and could have heard what was said between Kamara and the Applicant

d. He left them and went on his way.

39. As to the general character of the Applicant as being "aggressive" and "arrogant" the USG/DM relied on two witnesses, suggested by Mr. Kamara.

40. Mr. Kwikiriza statement dated 22 September 2015:[23]

a. He has been working at UNMIL since April 2004 and is currently a Regional Security Officer (RSO). He knew the Applicant and was a supervisor of Mr. Kamara, although he did not meet either of them very often. However, Mr. Kamara submitted daily reports of the happenings at the field office either by phone or by email to the former RSO and him.

b. On several occasions, Mr. Kamara verbally complained about the Applicant's arrogant behavior and abuse of United Nations vehicles allegedly while under the influence of alcohol, among other, through email of 21 April 2013.

c. He did not doubt Mr. Kamara's reports of abuse of United Nations assets by the Applicant because prior to this incident, he had investigated an incident involving damage to a UNMIL vehicle that the Applicant operated. In the course of that investigation, he noticed that the incident had occurred on a Sunday whereas National staff were not authorized to drive United Nations vehicles outside normal working hours.

d. The discovery prompted him to go through the Applicant's driving record and a random check in the Electronic Fleet Management and Monitoring System (Car log) revealed that between 1 August and 30 October 2012, the Applicant operated a UNMIL vehicle for 1208.2 kilometers on weekends. The case was logged as RTO/MON/0010/12 and submitted to the Chief Security Advisor (CSA).

41. Mr. Chihota, statement of 11 August 2015.[24]

[23] Application – annex 3.
[24] SIU Addendum Report, *op. cit.*, at page 10.

a. He has been a Civil Affairs Officer in UNMIL since 6 January 2006.

b. He is aware of the Applicant being under the influence of alcohol and being insulting and disrespectful on a number of occasions. In those instances the Applicant was usually aggressive, loud, uncontrollable and disruptive.

42. The Applicant gave a voluntary sworn statement on 27 October 2014 and submitted his comments on the allegations of misconduct on 20 July 2015. He denied all the allegations and stated, *inter alia*, that the four EXSECON guards "tailored and manipulated their testimonies":

> On October 24/10/14, Human Rights Officer assigned in Gbarpolu County celebrated UN day in Gbarpolu County along with some youths of Farwenta, Gbarpolu County. Stephen Ricks, Human Rights Officer return to UNMIL compound around 8.30 PM. At the entry of the UN Compound, an Exsecon security officer whom has just ended his daily duty approached me and asked me where I came from at about 8.30. I said to him, I came from the field. Then I […] asked him what the question was about? He said to me it was after 6PM. I said to him if you are the one on duty then just log me in with the time I am entering the compound. He did not stop there. He said to me I don't know how to talk to him and he will not respect me in this compound. I said to him you don't have to respect me. All this happen in the absence of UNMIL security officer (Abbas Kamara). I left the compound to go home and this Exsecon security officer follows me in the present of the (duty head) along with other Exsecon security officers. While I went home sitting with friends in my community, UNMIL security officer (Abbas Kamara walk to me and informed me that Exsecon security officer informed him that I […] assaulted him in the UNMIL Compound. I said to him know I never did that.[25]

> … there was no physical contact between me and Mr. Jarbah. We submit that Mr. Jarbah searched my vehicle in the way and manner that is strange to the normal practice and protocol. He had spent over five minutes checking the glove compartment, under the seats of the car, and the car's floor mats. After repeating the process for the second time in what was clearly a deliberate attempt to simply delay me, I inquired why he was acting in such a strange manner. His response was that unless I salute talk (sic) to him with respect, he will not allow the car into the compound until he is satisfied, and that there is nothing I can do about it even if he keeps me there at the gate the whole night. I disembarked from the car and told him to take his time and check every inch of the car as he may wish. I did not insult nor attack Mr. Jarbah. [26]

[25] Reply - annex 3 – Applicant's voluntary statement dated 27 October 2014.
[26] Reply - annex 5.

Testimonies before the Tribunal are summarised below:

43. Mr. Jusu:

a. On the material day, as he approached the gate, he saw Mr. Jarbah and the Applicant arguing. He asked the Applicant what was happening but the Applicant did not answer. As he was not assigned to the gate but elsewhere, he went to the conference room and waited. When he saw Mr. Jarbah he inquired about what was going on with him. Mr. Jarbah did not say anything but he was not in a happy mood.

b. He recalled that there was a lady standing close to the gate; he understood that Mr. Jarbah had not allowed her to enter into the UNMIL compound.

c. It was later that he saw the Applicant with a bottle in his hand. The Applicant and Mr. Jarbah were exchanging bitter words. Mr. Jarbah's uniform was wet. There was a supervisor there. It was Mr. Victor Walley who told him that the Applicant had poured water on Jarbah but personally he did not see this happen. He was present though when words were said about the loss of respect. He insisted on having seen a wet shirt on Jarbah when he arrived and that it was inside the compound.

d. He confirmed that Mr. Kamara told those present that they had to write statements which, he did in the early morning hours. Mr. Kamara did not threaten that they would be fired if they refused but he said that those who were present had to give statements and given that he was the boss no one wanted to cross him.

e. He, just as the other EXSECON guards, is no longer an employee of the United Nations as his contract has not been extended.

44. Mr. Kamara:

a. The day in question was a United Nations holiday. EXSECON were in charge of security in the compound. He, however, was in the UNMIL compound earlier when the Applicant took the United Nations vehicle.

b. Later that day he went to his uncle's place but, on the way, he stopped by the shop on the side of the main road. There he was approached by one of the EXSECON contractors, Mr. Jarbah, who told him to touch the uniform shirt which he was

carrying in his hands whilst wearing a white t-shirt. The shirt was wet with alcohol; he knew that the uniform was doused in alcohol because of the smell. Mr. Jarbah told him that the Applicant had come to the UNMIL compound late in a car with other occupants playing loud music and parked at the entrance and refused to put his lights on. There was an argument and the Applicant first pushed Jarbah and then poured alcohol on him.

c. He took Mr. Jarbah and other guards who accompanied him and walked back to the UNMIL compound where he saw the alcohol bottle. He told the guards to keep the bottle. He then walked to the bar where he spoke with the Applicant.

d. At the bar, the Applicant told him that instead of protecting him he was protecting the EXSECON guard. The Applicant started insulting him in the presence of Liberian police by saying "I do not recognize you". He decided to leave and told Mr. Jarbah that they would discuss the matter the following day.

45. Mr. Jarbah:

a. He knew the Applicant as a very calm and jovial Human Rights advocate. The Applicant always joked with the EXSECON guards.

b. He had just graduated from high school and it was very difficult to get a job in Liberia at the time. It was common for people to get sacked from their jobs sometimes for no reason. There was also a lot of corruption involved in getting employment in Liberia at the time. Mr. Kamara from UNMIL was responsible for recruitment of the EXSECON security guards who worked in the UNMIL compound. The reason he stated all the falsehoods against the Applicant was to preserve his job and at the behest of Mr. Kamara. He did not sign his statement.

c. He did not know what was going on between Mr. Kamara and the Applicant. Mr. Kamara used to complain a lot about the Applicant and told the guards to keep a watch on him in the compound. Since he needed a job he just wrote the false statements which are before the Tribunal.

d. On the material date, the Applicant arrived at the gate in a vehicle wearing a mufti. They joked around and the Applicant went into the compound, parked the

vehicle and went into his office. The Applicant came back carrying a bottle of mineral water because he came to do jogging. They talked a bit as he was packing up to finish his shift.

e. He was in the process of handing over from his shift when the Applicant left the UNMIL compound. He and the Applicant left the compound together. Contrary to the statement he gave, he was not in a fight with the Applicant. He neither went to Mr. Kamara's house to show him the wet shirt nor did he ever go to complain about the Applicant having assaulted him.

f. After leaving the compound he did not see the Applicant. Mr. Kamara came into the compound and they interacted. On 27 October 2014, Mr. Kamara assembled him and others to write statements. All that he wrote against the Applicant was a lie and the only reason he wrote the statement was to avoid losing his job. He did not sign the witness statement authored by him. Mr. Kamara had once informed him and the other guards to keep surveillance on the Applicant when he was within the UNMIL compound.

46. Mr. Fahnbulleh:

a. On the day in question, Mr. Jarbah was harsh with the Applicant. Mr. Kamara told him to write the report and he did not want to lose his job. His signature is on the statement but this is not what happened because he had already left. He did not sign it.

b. The Applicant was holding a mineral water bottle which he always carried with him, just as many other UNMIL staff.

c. As a God-fearing man he felt that he needed to set the record straight by stating the truth.

47. The Applicant:

a. The material day was also Human Rights Day and he had been working with local human rights institutions outside the UNMIL compound. Earlier he was at a provisional shop which served both alcoholic and non-alcoholic drinks. He was with

one Ms. Mondae but when he returned to the UNMIL compound, Ms. Mondae disembarked from the car.

b. There were several people at the gate, however, he could not see clearly because it was dark. Mr. Jarbah came to search his car. He asked Mr. Jarbah to log him in. Mr. Jarbah asked him why he was travelling late and whether it was an appropriate time to park the United Nations vehicle, he also told the Applicant that he did not know how to talk to people and that he could not respect him.

e. They got into an argument but he was eventually allowed into the compound. He parked his car and went to his office to file a report on the day's activities.

f. He did not have a bottle of beer as alleged; he did not pour liquor on Mr. Jarbah.

g. It is only when he returned to the entrance gate that he saw the other people present, namely Messrs. Jusu, Walley and Fahnbulleh. Mr. Jarbah followed him when he left the UNMIL compound as they walked in the same direction. He was walking ahead of Mr. Jarbah and did not speak to him. He neither approached nor hit him.

j. He confirms that he told the witness Antony Yorker that "the security guy was asking me silly questions about coming late and carrying a woman in my car" but this was the entirety of what he spoke with Mr. Yorker.

The Applicant's case

48. Mr. Kamara's evidence was mainly hearsay.

49. Mr. Fahnbulleh gave evidence that there was a bottle of water, and not beer as stated in the charges against the Applicant. He was forced to write a statement against the Applicant otherwise his employment contract would not be renewed and he did not sign the witness statement which was said to have been authored by him.

50. Before the Tribunal, Mr. Jarbah denied having been assaulted thereby making the Respondent's case unsustainable. In his testimony at the hearing, he said that a bottle of water and not beer was what the Applicant had. He also concurred with Mr. Fahnbulleh that he had

been told to fabricate the allegations against the Applicant or risk the non-renewal of his employment contract and that he did not sign any statement.

51. Mr. Jusu informed the Tribunal that he was not present at the time of the alleged assault. He was simply asked to write a statement the next day based on the account of a third party.

52. Thus, statements which the Respondent sought to rely on were disowned by the alleged authors and were not signed by them. In any event, they were crafted under duress.

53. Concerning the material gathered in the investigation, the Applicant points out to insufficiency of evidence regarding the following issues: that he insulted Mr. Kamara when the latter intervened with him after the incident and where that intervention took place; that he had a bottle of beer with him, because had it been true he would have been charged also for bringing an alcoholic beverage in the United Nations vehicle/compound; that he had inappropriate attitude towards security personnel and did not respect rules; that he head-butted Mr. Jarbah whereas some witnesses allege that he had hit him with his hand; where precisely the assault happened; that since the photos used to support the charge are not clear and have no date as to when they were taken and by whom; they cannot be relied upon.[27]

The Respondent's case

54. While there are some differences between the witnesses' recollection of the exact sequence of events, this is often the case where events occur quickly and unexpectedly. In addition, the witnesses' testimony during the hearing related to events that took place almost three years ago.

55. While Messrs. Jarbah, Walley, Fahnbulleh and Jusu may have remembered some of the details of the incident differently, their accounts support the conclusion that the Applicant verbally abused Mr. Jarbah and physically assaulted him. Thus, the evidence collected by the SIU meets the required standard of proof upon the direct and collaborating evidence.

56. In respect of Mr. Fahnbulleh's and Mr. Jarbah's testimonies, they should not be considered and the Tribunal should instead rely on their statements made during the

[27] Applicant's closing submissions at page 6 and annex 8 to the application – Applicant's response to addendum report.

investigation. There are numerous inconsistencies and implausibility in the testimony before the Tribunal, moreover, the witnesses were markedly reticent in answering questions from the Respondent and the Tribunal.

Considerations

57. As the starting point the Tribunal recalls that as per the UNAT full bench holding in *Applicant*, "[j]udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration." [28] The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When 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.[29] In its jurisprudence since *Applicant*, the UNAT has maintained that this is not the role of the UNDT to conduct a *de novo* review of the evidence and place itself "in the shoes of the decision-maker"[30], as well as that the definition of "judicial review" articulated in *Sanwidi* retains actuality in disciplinary cases:

> During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.[31]

58. In connection with the Applicant's contention that the testimony at the hearing prevails over the evidence adduced in the investigation, the Tribunal is mindful of one of the recent judgments by UNAT in *Mbaigolmen* where a preference has been expressed for making determinations of misconduct in a hearing:

[28] 2013-UNAT-302 at para 29, citing to *Messinger* 2011-UNAT-123, presumably in that "it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations", and confirmed since in *e.g.*, *Nyambuza* 2013-UNAT-364, *Diabagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486 and *Mayut* 2018-UNAT-862 para 48.
[29] *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18, *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.
[30] *Wishah*, 2015-UNAT-537, paras. 21 and 23.
[31] See *Ouriques* 2017-UNAT-745 paras. 14 and 15, citing to *Sanwidi* 2010-UNAT-084.

> Firstly, cases of alleged misconduct typically require determination of disputed factual issues. This is best done in an oral hearing involving an adversarial fact-finding process which tests the credibility, reliability and probabilities of the relevant testimony. Secondly, factual findings of misconduct are of far-reaching import. A judicial finding that a staff member has committed sexual harassment, fraud, theft or the like has life-altering consequences. Hence, the determination of misconduct should preferably be done in a judicial hearing by conventional adversarial methods.
>
> …
>
> 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.[32]

59. This Tribunal takes it that the UNAT in *Mbaigolmen* does not mean to divorce from the full bench holding in *Applicant* 2013-UNAT-302 in creating a *de novo* determination as a new model of proceeding. The judgment does not expressly pronounce such a divorce. Moreover, on a formal side, for such a shift of paradigm it would seem appropriate to have the whole bench decision. At the same time, on the substantive side, to have the factual determination made *de novo* by the UNDT would clash with the statutory features of the current model of the disciplinary process, in terms of division of competences and attendant legal instruments.

60. First, it would call in question the significance of the decision of the Secretary-General, who is equipped and primarily responsible for making factual determinations, *and* has the competence to mete out the punishment with, as often underlined in the jurisprudence, a large degree of discretion.[33] If the determination were to be principally made by the Tribunal as a matter of *right*, then consistent with it the Secretary-General's power should be reduced to investigating, securing evidence and bringing an action before the Tribunal, possibly to plea-bargaining and proposing the punishment. Alternatively, when appealed, the Secretary-General's decision would need to be automatically vacated, as it is, to use an

[32] *Mbaigolmen* 2018-UNAT-819, at paras. 26 and 27.
[33] *E.g.*, as noted by UNAT in *Portillo Moya*, 2015-UNAT-523, para. 20, and recently cited with approval in *Samandarov* 2018-UNAT-859, "It is undeniably true that the Administration is best suited to select an adequate sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance".

example from municipal settings, in the case of opposition against a judgment *in absentia* or an administrative fine in petty offence cases, while in the judicial process so triggered the case would be examined *de novo* with all the consequences stemming from the new determination. Thus, for example, instead of separating a disciplined staff member, pending UNDT proceedings he or she could only be suspended, with full or partial pay. However, any redesigning of the model would need to be based on an informed decision whether the Secretary-General is trusted to competently decide disciplinary measures which are thus presumed regular[34] and, as such, are immediately enforceable[35], or is not. Second, as the other side of the coin, practical considerations regarding capability on the part of UNDT would need to be weighed in. Unlike in national jurisdictions, the parties before the UNDT have limited access to the Tribunal in the terms of appearing and leading evidence directly before it due to the geographical distance from the incidents this, in particular in missions, being aggravated by a high turnover of personnel. Adding the unfortunate but inescapable reality of a lag between the incidents and the time when the cases reach the Tribunal, the effect is that having a hearing as a principal method of fact-finding would often irreparably frustrate the process, to the detriment for the cause of both the Administration and the applicants, and, for the latter, render the right to redetermination illusory. Thirdly, the UNDT has no subpoena nor sanctioning power over non-employees. When non-employees appear before the UNDT, they do it on their own volition and veracity of their testimony is secured only by a declaration on "honour and conscience" but not under any institutional sanction. As such, hearing the evidence by the Tribunal certainly has the practical advantage of direct and adversarial examination but reliance on legal superiority of statements made under "oath" must be taken with a pinch of salt. As such, an investigation launched immediately after the possible misconduct remains the most potent tool for an efficient fact-finding, and hence the more important that it be competent, thorough and objective.

61. Reading *Mbaigolmen* in the context of that case, moreover, reveals that the UNAT, in a situation where evidence gathered in the investigation is found in some way deficient whereas the live evidence is available, expresses an imperative of calling the witnesses before the Tribunal rather than dismissing the charge. As such, the preference for having an

[34] See for example *Verma* 2018-UNAT-829, at para. 14 citing *Rolland* 2011-UNAT-122, paras. 20-21 and 26; see also *Niedermayr* 2015-UNAT-603, para. 23 and *Staedtler* 2015-UNAT-547, para. 27 - There is always a presumption that official acts have been regularly performed.
[35] Article 8(5) of the UNDT Statute - The filing of an application shall not have the effect of suspending the implementation of the contested administrative decision.

adversarial hearing over disputed facts is not meant to be a matter of right, but rather a matter of utility. This is confirmed by the following *passus*:

> 28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.
>
> 29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

62. At this juncture, given that, as per a stable line of UNAT jurisprudence, "[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred"[36], there arises, of course, a question whether the Tribunal which actively seeks evidence until it "suffices", can remain the neutral arbiter over an adversarial dispute. The burden of proving the case cannot be shifted onto the UNDT, both because it is impracticable, as discussed supra, and because it would be irreconcilable with its impartiality. Therefore, this Tribunal takes it that *Mbaigolmen* confirms an authorisation and not the obligation for the UNDT to conduct a re-determination and to seek evidence under certain circumstances. The exercise of this authority is to be guided by what is necessary to determine disputed and doubtful material facts in view of a readily available evidence, without, however, placing the UNDT "in the shoes" of the entity responsible for discharging the burden of proof. Once again, the function of the Respondent in properly conducting the investigation and litigation rests at the crux of the matter.

63. For all the aforesaid reasons, and absent a full UNAT bench decision to the contrary, the full UNAT bench holding in *Applicant* remains determinative for the question of the

[36]See, for example *Diabagate* 2014-UNAT-403 at para. 30; *Hallal* 2012-UNAT-207, at para. 28; *Liyanarachchige* 2010-UNAT-087, at para. 17.

standard of review. This specifically includes the question of unavailability of witnesses, with respect to which it said:

> II]t proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held against it. The United Nations operates globally and in situations which can prove highly transient or volatile. The Appeals Tribunal accepts that the Organization was unable to produce witnesses in the South Sudan almost five years after the complained-of incidents.[37]

64. In the same vein, the UNAT pronounced in *Nyambuza*:

> The UNDT determined that the [witnesses'] evidence … had "little probative value" because these witnesses did not appear before the UNDT and were not subject to cross-examination. This rationale is not correct as a matter of law under our jurisprudence in *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 (full bench). Nevertheless, the UNDT's determination that the evidence had "little probative value" is correct, for the reasons discussed below.
>
> 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.[38]

65. It should be noted that this standard has recently been reiterated in the UNAT Judgment in *Majut* which relies on *Applicant* [39], and which also confirms:

> Cross-examination is not an absolute right and it is not always necessary for a complainant to be present in court. Indeed, there are cases in which it is impossible, or inadvisable, for a witness to attend court. The attendance of a witness can be dispensed with so long as the Tribunal is satisfied that the staff member accused of misconduct is given a fair and legitimate opportunity to defend his position.[40]

66. This jurisprudence expressly allows the Tribunal to rely on witness statements from the investigation. This Tribunal takes it that considering witness statements from the investigation is likewise legitimate where the witness testifies before the Tribunal in a manner inconsistent with the prior statement, on which the Applicant had an opportunity to

[37] *Applicant*, *ibid.*, at para. 38.
[38] *Nyambuza* 2013-UNAT-364 at paras. 34 and 35.
[39] *Majut* 2018-UNAT-862 para. 48.
[40] *Ibid*., at para. 74.

comment. It will be for the Tribunal to weigh the probative value of the conflicting narrations for their quality and against the entirety of evidence.

67. In the case before it the Tribunal undertook to hear all the alleged eye-witnesses, the Applicant and Mr. Kamara. One witness, Mr. Walley, who is no longer a United Nations employee, was unavailable, in that he had demanded to be paid for testifying an amount exceeding what would be a reasonable reimbursement for the cost incurred by him. The Tribunal concedes that under the circumstances the Respondent should not have undertaken to effect Mr. Walley's appearance.

68. Two other witnesses, the complainant, Mr Jarbah, and a security guard, Mr. Fahnbulleh, at the hearing recanted the versions of events they had narrated to the SIU investigators and insisted that Mr. Kamara, who allegedly had some grievance against the Applicant, had coerced them into writing statements against their will. They had complied with the wishes of Mr. Kamara, because their jobs depended on him. They further testified that their consciences and religious beliefs had now made them come forward to give the correct version of the events that had transpired on the material day. For the following reasons, the Tribunal does not find their testimony credible:

69. During the hearing, both witnesses denied that the impugned incident ever happened. Such a radical change in their version of events is inherently suspicious. Regarding their alleged motivation, the Tribunal accepts that Mr. Kamara might have urged the security guards to write up their statements, an action genuinely necessitated by the procedure and his duty as a supervisor. The Tribunal finds it however implausible that Mr. Kamara would have forced the guards – all of them - to falsely accuse the Applicant by fabricating a story that had never taken place. Mr. Jusu, who testified before the Tribunal, does not claim that any content of statement had been imposed. He had written his on 25 October 2014 at early morning hours, two days ahead of the other guards, yet the content is similar. At no time before the hearing did Mr. Jarbah or Mr. Fahnbulleh inform the Respondent of their claim that they had been forced to make false statements to investigators; to the contrary - Mr. Jarbah even supplemented his in February 2015. In August 2015, Ms. Massa Sheriff, who at the time was no longer employed by UNMIL, *i.e.*, no longer having a reason to "fear" Mr. Kamara, confirmed that Mr. Jarbah had complained to her about the assault by Mr. Ricks the morning after.

70. The testimonies are also incoherent. While Mr. Fahnbulleh testified to the Tribunal that he could recall that the Applicant and Mr. Jarbah had had a "conversation" on the night of 24 October 2014, Mr. Fahnbulleh could not explain what stood out about the conversation that would have been noteworthy in any way. It was only when specifically pressed by the Tribunal that Mr. Fahnbulleh conceded that Mr. Jarbah had felt disrespected by the Applicant. Mr. Jarbah, notably, gives a version incoherent even with those of the Applicant and Mr. Fahnbulleh, by entirely eliminating from the story that there had been an argument between him and the Applicant, maintaining that it was a jovial encounter and denying that he had complained to Mr. Kamara. This is belied by the totality of evidence which, leaving aside members of the alleged "conspiracy", includes also the Applicant and the neutral witness, Mr. Tom Karmala Jnr, who on the night in question was present when Mr. Jarbah reported the assault to Mr. Kamara and who accompanied them as Kamara went to intervene with the Applicant.

71. The Tribunal observed that both Mr. Fahnbulleh and Mr. Jarbah were markedly reticent in answering questions from the Respondent and the Tribunal. Both witnesses frequently hesitated and asked the Respondent's Counsel to repeat questions in a way that suggested that they were stalling rather than genuinely seeking to truthfully respond to the questions. To most of the questions, no matter the substance, Mr. Jarbah kept repeating that he had falsely attested because he needed his job. On the other hand, both witnesses strangely insisted on certain details. As the Respondent rightly points out, both Mr. Fahnbulleh and Mr. Jarbah volunteered to the Tribunal that the Applicant was in possession of a bottle of water on the night of the incident. When asked by the Tribunal to explain why he had remembered that the Applicant had a bottle of water with him, Mr. Fahnbulleh offered that he recalled that detail because the Applicant had always brought water with him on trips. Mr. Jarbah offered the implausible explanation that the Applicant had a bottle of water with him because he had been exercising. Neither could explain what had been noteworthy about the bottle of water that would warrant bringing up that detail during their testimonies.

72. As concerns their prior statements, Mr. Fahnbulleh at one point stated that he had signed and at another point that he had not signed the statement authored by him. Mr. Jarbah maintains that Kamara signed for him but confirms that he had written the statement and that he had posed for a photo taken by Mr. Kamara. The Tribunal has noted that statements which have not been signed by the witnesses but rather signed and stamped by the investigator, are

re-typed copies of the original statements, the latter ones also included in the file. The original statements are handwritten by authors, they contain affirmation of having been made freely, "without any force, intimidation and threat", as well as being a true account of what the witness knew about the incident. Signatures affixed at the bottom of each page closely resemble signatures on the witnesses' ID cards, copies of which attach to the statements. As such, the Tribunal has no grounds to doubt that the original statements were duly signed; rather, by denying it, the witnesses intended to mislead the Tribunal.

73. Altogether, these factors discredit the testimony of Mr. Jarbah and Mr. Fahnbulleh. The Tribunal is aware of the fact that all security guards implicated by the case have since lost their jobs due to the downsizing of the Mission. It is probable that now, once there is no bond between them and the United Nations, their testimony is a result of a collusion.

74. Regarding the evidence of Mr. Jusu, he denies having eye-witnessed the physical assault on Mr. Jarbah, he however confirms that a verbal altercation took place in his presence and that he immediately came to know further details from Mr. Walley, such as Mr. Jarbah being head-butted and that liquid had been poured on him. He insists that he had seen a wet uniform shirt on Mr. Jarbah. The Tribunal observes that, whereas in his written statement Mr. Jusu was not explicit about what he had witnessed himself and what he had been told, his testimony at hearing does not drastically depart from the written statement, save that it is less detailed and confused as to chronology, which might be attributed to the lapse of time, and that he now transforms beer into water just like the other witnesses, which may be due to peer pressure. At the same time, however, he does not seem to be biased in any direction and does not recant his statement given in the investigation. The Tribunal will therefore rely on Mr. Jusu, assuming that the detail of the physical assault in his written statement had been a hearsay. This said, this written statement, having been the one produced at the earliest time after the event and being detailed has "indicia of reliability or truthfulness" which give it probative value: it confirms Mr. Walley as an eye-witness to the head-butting, it also explains that the pouring of the beer on Mr. Jarbah occurred after he had been asked by Mr. Ricks to step outside the compound, closer to the main gate. While this part of the incident happened indeed when Mr. Jarbah was about to leave having finished his shift, it was not, however, at Bopolu Central High campus.

75. Mr. Kamara's testimony confirms what he had stated in the investigation and the Tribunal finds it credible. This testimony proves to the fact of Mr. Jarbah complaining and having with him a shirt soaked in alcohol immediately after the incident.

76. Mr. Walley's written statement confirms that the verbal and physical assault, the first one in the form of calling Mr. Jarbah stupid, the second in the form of hitting Mr. Jarbah on the head and later pouring liquor on him, happened in his presence, whereas he, being the supervisor, tried to dissuade the incident. Mr. Walley does not disclose that part of the confrontation took place upon an invitation from the Applicant to "step outside", but he confirms that it was only afterwards that Mr. Jarbah turned over his shift to the incoming officer – which explains how Mr. Jusu could see Mr. Jarbah wear a wet shirt. Mr. Walley's statement is also clear as to that Mr. Jarbah eventually headed toward Bopolu Central High campus, where he allegedly was followed and again attacked by the Applicant; his statement thus distinguishes two stages of the incident: first, in or around the UNMIL compound, consisting in verbal assault, the head-butting and pouring of beer; and second, the latter assault alleged by Mr. Kamara, which is not part of the charge. The Tribunal finds Mr. Walley's statement credible in light of all persons agreeing as to his presence during the course of the first part of the incident.

77. Mr. Jarbah's written statement is also quite detailed as concerns the use of abusive language and the circumstances of the Applicant having "butt" him in the face in the presence of security guards. Mr. Jarbah also asserts that Mr. Walley was present when the Applicant poured a Heineken beer on him 'while going home" and describes how during the altercation he lost, and then regained, his assets. Mr Jarbah does not specify a precise location where the physical assault took place, however, contrary to the Applicant's averment, he does not state that the pouring beer on him happened in the darkness of the Central High Campus – this part of his narration concerns the alleged hitting him again by the Applicant, an event which is not part of the charge. The Tribunal finds the written statement of Mr. Jarbah credible, despite that he probably downplays his own role in the incident.

78. In relying on the written statements, the Tribunal weighed that the complainant had made a report about the incident at the first opportunity in the immediate aftermath thereof. The guards, apart from the complainant, had no personal conflict with the Applicant and no reason to falsely incriminate him before Mr. Kamara. The incident, as regards the pouring of

beer on Mr. Jarbah, is quite unusual and must have been humiliating; it is thus rather unlikely for Mr. Jarbah to have concocted it as such. The guards present on the site described it in a similar fashion, there is no discrepancy as to hitting with the head or a hand and there is consistency that the Applicant had poured beer or "liquor" or "wine". The only one who spoke of "slapping" was Ms. Massa Sheriff, but her statement is admittedly a hearsay taken months after the incident, so details of what she had been told could have escaped her easily. In this connection, the Tribunal was mindful that, as noted by UNAT, at some duty stations the conduct of investigations is more challenging than at others due to the local conditions and the circumstances and these factors ought to be borne in mind when due consideration is given to the conduct of investigations and the evidence gathered.[41] In this instance, the Tribunal considered that all the direct evidence originates from persons who are anything but eloquent – as may be ascertained by the formulation of the hand-written statements and the testimony that the Tribunal heard itself – and that it accounts for the relative paucity of their narration. It is moreover rightly noted by the Respondent that the incident consisted of acts happening in a quick sequence, difficult to notice and memorize. The Tribunal, however, did not find it safe to rely on the statement of Mr. Fahnbulleh as eye-witness, given that his statement is exceptionally lacking in detail and, given that Mr. Fahnbulleh's credibility is questionable, could have been all, or in part, hearsay, notwithstanding his unquestioned presence on site.

79. As concerns the evidence from the Applicant, he consistently admitted that when he arrived at the gate of the compound, he was not allowed to enter and that he got into an argument with Mr. Jarbah. He confirmed that he and Mr. Jarbah left the compound gate at the same time and walked in the same direction and that Mr. Walley was also present. His denial that he resorted to a verbal and physical assault on Mr. Jarbah is belied by the evidence discussed *supra*. With respect to the Applicant's demeanour after the incident, Mr. Tom Karmala Jnr., the Deputy Superintendent of Corrections for Bopolu County, indicated that, later that night, when Mr. Kamara asked the Applicant about the incident, the Applicant became angry and was verbally abusive when Mr. Kamara asked the Applicant about the matter. This Tribunal considers that words like "I do not recognize you" which are attributed to the Applicant, are not abusive and it is subjective whether they are insulting, however, what is important for the issue, Mr. Karmala Jnr., a neutral witness, confirms that Mr.

[41] *Mobanga* 2017-UNAT-741 at para. 23.

Kamara sought to intervene with the Applicant regarding the incident soon thereafter. Details raised by the Applicant concerning Mr. Kamara's intervention are peripheral and of no bearing for the principal question. Mr. Antony Yorker, the Applicant's friend, who saw the Applicant after the incident also described the Applicant as angry due to, on the words attributed to the Applicant, a "serious confrontation" with the security. Clearly, there would be no reason for these facts had the exchange between the Applicant and Mr. Jarbah been just a banal verbal altercation as the Applicant presently maintains.

80. Moreover, the Applicant's credibility is undermined by the nonchalance with which he utters statements which, albeit not directly related to the incident, are presumably aimed at putting him in a better light and which are contradicted by reliable evidence. Regarding his whereabouts before the incident, in the investigation he maintained that prior to the incident he had been working, namely attending a United Nations Human Rights Day celebration, which was refuted by information from his supervisor that no such celebration had been organized and no use of service vehicle had been authorized for the Applicant outside office hours. It was moreover belied by Mr. Yorker –the Applicant's friend – who stated that prior to the incident the Applicant had been with him and other persons and they enjoyed drinks. Before this Tribunal, when parties were asked about their recent contacts with the witnesses who recanted their previous statements, he stated that he "did not know who Fahnbulleh was"; however, his responses in the investigation mention Mr. Fahnbulleh, including by his first name, as present on the site of the incident. Finally, he also stated that he had never received an addendum to the investigation report, although the file contains his response to that addendum.

81. In total, the Tribunal concludes that the direct evidence from written statements, confirmed by strong circumstantial evidence adduced both in the investigation and at the hearing, taken cumulatively constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred. The factual determination made by the Administration, notwithstanding certain modifications established by this Tribunal, was correct in the result and evidence adduced in the hearing did not undermine it.

iii. Whether the sanction is proportionate

The Applicant's case

82. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.[42] In *Yisma* UNDT/2011/061, the Dispute Tribunal held that a disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline. Therefore, ordinarily, separation from service or dismissal is not an appropriate sanction for a first offence.

Respondent's case

83. The Secretary-General has wide discretion in determining the appropriate disciplinary measure. It is only if the sanction appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence by imposing a different one. In the present case, the Applicant assaulted and "verbally abused United Nations personnel acting in line with his duties". Such behaviour does not accord with the goals of the United Nations as enshrined in the Preamble to the Charter, namely the reaffirmation of the dignity and worth of the human person.

84. As set out in the decision letter, the Respondent properly considered that the fact that Mr. Jarbah was exercising his functions as an EXSECON guard, when the Applicant verbally and physically assaulted him, was an aggravating factor.

Considerations

85. The Tribunal recalls that it is a consistent jurisprudence of the Appeals Tribunal that physical aggression is not to be tolerated among United Nations personnel, no matter the degree of provocation on the part of the victim or personal circumstances of the attacker.[43] In the instant case, even had Mr. Jarbah indeed used his status of security guard to harass the Applicant as the Applicant describes, it would still have been inexcusable for the Applicant to resort to verbal insult and, in particular, physical violence. Physical violence is not a case for

[42] *Sanwidi* 2010-UNAT-084, at para. 39.
[43] See for example *Majut*, at paras. 120-121; *Toukolon*, at para. 30; and *Ouriques* at para 20.

progressive discipline in general. In the Applicant's case, moreover, whereas the Tribunal would not be inclined to rely heavily on "character witnesses" heard rather selectively, the mere fact that the Applicant had been using the United Nations vehicle without authorisation and transported an unauthorised passenger demonstrate disrespect for the organisational order and constitute a factor speaking against any mitigation. As such, the disciplinary punishment imposed is not disproportionate.

Conclusion

86. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 19th day of September 2018

Entered in the Register on this 19th day of September 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi