Before: Judge Eleanor Joye Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HOSSAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Miryoung An, AAS/ALD/OHR
Susan Maddox, AAS/ALD/OHR

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction and Procedural History

1. At the time of the application, the Applicant served as a Security Coordination Officer at the United Nations Assistance Mission for Iraq ("UNAMI"). He held a fixed-term appointment at the P-4 level and was based in Kirkuk.

2. On 14 December 2018, the Applicant filed this case challenging the Respondent's decision to separate him from service with compensation in lieu of notice without termination indemnity in accordance with staff rule 10.2(a)(viii).

3. The Applicant challenges the disciplinary sanction of separation from service for two charges of misconduct namely, transporting ammunition from UNAMI Kirkuk to Trans-Atlantic Viking Security ("TAV") premises and asking the witness to the misconduct to give false evidence.

4. It is the Applicant's case that the impugned decision should be rescinded on grounds that the investigation and ensuing report were flawed. He also moves the Tribunal to order his reinstatement with retroactive payment of his wages and entitlements from 17 September 2017.

5. The Applicant challenges the decision on the basis that it was not based on clear and convincing evidence. He contends that it was based mainly on comments from several staff members who may have wanted to redirect blame from themselves or may have been part of the "mobbing" against him based on improper motives such as ethnic bias and vindictiveness. Further, he says relevant information, including interviews of certain witnesses, was not part of the investigation and there were no official records to support the existence of the ammunition, the movement of it or that it reached the private warehouse. He also says the sanction was not proportionate considering his years of service, nearness to retirement and exemplary performance record. It is not disputed that he was due to retire within four years of the date of his separation.

6. The Respondent filed his reply to the application on 25 January 2019. The Respondent's case is that the impugned decision was based on clear and convincing evidence that the Applicant's conduct amounted to serious misconduct in violation of staff regulations 1.2(b), (f) and (q) and staff rules 1.2(c) and (g).

7. The application was assigned to the instant Judge in April 2020. The Tribunal issued Order No. 074 (NBI/2020) setting the matter down for a case management discussion ("CMD"). The CMD took place on 30 April 2020, with Counsel for both parties in attendance.

8. At the CMD, both parties informed the Tribunal that they were amenable to this matter being resolved *inter partes*. The Applicant reminded the Tribunal of the indication in his initial application that the case had been filed quickly and that he would be applying to supplement it.

9. At the CMD, the Applicant was granted leave to file a rejoinder to address matters not canvassed in the original application, including the quantum of damages sought. The Applicant expressed the view that an oral hearing may not be necessary. The Respondent agreed. The Respondent was of the view that this matter could be decided on the papers as the Applicant was not seeking to adduce new evidence.

10. The parties failed to arrive at a resolution of the matter in their settlement talks. The Applicant filed his rejoinder on 21 May 2020. On 11 June, the Respondent moved the Tribunal to find some of the additional evidence filed with the Applicant's rejoinder inadmissible. Specifically, the evidence challenged is in the statements of Victor Krokmalov and Thomas Nunana Woanya respectively, annexed as A/16 and A/17 to the rejoinder.

11. On 15 June 2020, the Tribunal informed the parties that the case would be determined on the papers and the considerations would include the Respondent's challenge to admissibility of the Applicant's evidence. The parties were directed to file closing submissions, and they did, concluding on 10 August 2020.

Issues

12. The Tribunal is not conducting a merit-based review of the Respondent's decision. The adjudication function of the Tribunal is that of judicial review. In other words, the Tribunal will examine how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This concept has been explained in many appellate judgments including *Sanwidi* 2010-UNAT-084.

> Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

13. In *Rajan* 2017-UNAT-781, the Appeals Tribunal explained that a greater level of deference is afforded to the Administration in the review by the Tribunal of disciplinary decisions regarding dishonesty. This is in recognition of the duty of the Administration to hold staff members to the highest standards of integrity. In this regard:

> The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements.

14. However, due deference does not eradicate the role of the UNDT in reviewing decisions of the Administration relating to misconduct. The Appeals Tribunal in *Rajan* underscored that

> Due deference does not mean that the UNDT cannot review whether the Administration has met its evidential burden to prove misconduct on the basis of facts that are clear and convincing and to substitute its judgment accordingly.

15. The basic facts that the Tribunal must review to determine whether the Administration had clear and convincing evidence for a sanction imposed in

disciplinary proceedings where separation from service is a likely outcome were identified in *Haniya* 2010-UNAT-024 as follows:

> 31. When reviewing a sanction imposed by the Administration, the Tribunal will examine, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

16. In light of the foregoing, the Tribunal in the instant case had to consider whether,

> a) there was on record before the Administration clear and convincing evidence of each fact cited in the allegations of misconduct such that each fact could appropriately be treated as having been established;
>
> b) the established facts qualify as misconduct; and
>
> c) the sanction imposed was proportionate to the proven misconduct, if any.

17. A secondary issue raised by the Applicant was whether there was a proper investigation to form the basis for the impugned decision; in particular, whether the Respondent failed to interview and/or duly consider relevant witnesses e.g. former Field Security Coordination Officer ("FSCO") Viktor Krokhundov, Mr. Nawaz Khan, Mr. Herbert Lang, and Mr Filipowicz. In light of this concern, there was discussion during the CMD on whether an oral hearing would be required to address the shortcomings of the investigation identified by the Applicant. The parties agreed that an oral hearing by the Tribunal of these previously excluded witnesses is not required. The determination of the case turns on whether, when the decision was made, there was clear and convincing evidence on the Respondent's record based on which the impugned decision could be justified.

Facts

Background

18. The Applicant commenced service with the Organization in 2005; and from April 2015 until his separation, he served at the P-4 level at UNAMI stationed at Kirkuk, Iraq, as an FSCO. The Applicant, as FSCO, was responsible for supervising the Personnel Security Detail ("PSD") team which consists of several Close Protection Officers ("CPOs") (also known as Personal Protection Officers, ("PPOs)").

19. On 24 November 2016, the Office of Internal Oversight Services ("OIOS") received a report that 24 firearms of differing types and caliber were missing from the UNAMI Baghdad armoury. This incident was unrelated to both the Applicant and his Kirkuk duty station except that, it is alleged that after hearing about the loss of weapons and ammunition in UNAMI Baghdad, the Applicant told Mr. Ghotabaya Piyatunga, then Deputy FSCO, that there was ammunition stored at UNAMI Kirkuk which had been provided by the American military upon their departure from Iraq in 2011.

20. Following the incident in Baghdad, security measures were undertaken to account for the weapons and ammunition stored in all UNAMI compounds, including in Kirkuk. In November 2016, Mr. Roland Filipowicz, then PSD Team Lead, was appointed as Head Weapons Custodian of the Kirkuk armoury and Mr. Cedric Steffens, CPO, was appointed as Deputy Weapons Custodian. They were thenceforth charged with responsibility for the weapons and ammunition in UNAMI custody at Kirkuk.

21. The duties of Messrs. Filipowicz and Steffens included maintaining all records of weapons and ammunition. They created monthly joint inspection records, some of which the Applicant signed off on as FSCO.

The Weapons and Ammunition in Custody

22. There are three locations of weapons and ammunition custody that would have fallen within the new Weapons Custodians' responsibilities. These are all storage locations in relation to which the monthly joint inspection records of the Weapons Custodians would have been relevant. The first two locations are relevant only as a matter of comparison as to accountability for the said custody, which will be addressed in the considerations of this Judgment. The third location is the subject of these proceedings as it is supposed to have contained the ammunition alleged to have been moved by the Applicant. The details of each ammunition and weapons custody location are explained in turn.

23. First, there is the armoury where weapons are secured. Records were kept of the weapons in this location.

24. Secondly, there is a location entitled ASF 1 - which is a cabinet in building 370 - where there was storage of ammunition procured through United Nations administrative processes. The OIOS investigation report dated 15 March 2019, at Annex 5 to the application, indicates at paragraph VI. A.20 that as at August 2017, there was around 11,663 rounds of ammunition housed in ASF 1. The ammunition in ASF 1 was issued only for official duties. Records were kept of this ammunition.

25. Thirdly, there is a location called ASF 2 which is a 20-foot container located outside building 370 and adjacent to the armoury. This location is said to have housed ammunition provided to the United Nations by the United States of America military. The OIOS report indicates that ASF 2 contained 150,000 to 200,000 rounds of ammunition valued at approximately USD70,000.00. Thus, the alleged quantum of American sourced ammunition in ASF 2 was vastly greater than the United Nations procured ammunition in ASF 1.

26. This provision of ammunition said to have ended up in ASF 2 is alleged to have arisen from a 29 December 2004 agreement whereby the United States of America agreed to support UNAMI on a reimbursable basis. The agreement was,

according to the OIOS report and paragraph 4 of the allegation letter issued to the Applicant, extended to the year 2011 when the American military forces left Iraq. The OIOS report does not cite any documentation of exactly what ammunition was supplied by the United States of America under this agreement and in what quantum. It is noted however in the report, that the United States of America mission to the United Nations has not responded to OIOS inquiries as to what was supplied. No records reflecting the existence and contents of ASF 2 were maintained by the Organization. The ammunition in ASF 2 was said by the Respondent to have been used by the PSD officers for training purposes and they all knew it was there for training purposes.

The Investigation

27. On 5 July 2017, OIOS received a report of possible misconduct implicating the Applicant and commenced an investigation. OIOS did not identify the source. However, the Applicant later became aware that the report to OIOS came from a fellow staff member (the informant/complainant) at UNAMI Kirkuk.[1] The OIOS investigation pursuant to this report concerned the alleged engagement by the Applicant in "ammunition, uniform and weapons deals with the owner/operator of a private security firm".

28. Mr. Filipowicz resigned effective 1 August 2017. During the investigation, he did not respond to the OIOS invitation for an interview. On 6 August 2017, Mr. Cedric Steffens took over the duties of Head Weapons Custodian and Mr. Marthinus Pretorius, CPO, was appointed as Deputy Weapons Custodian.

29. The Applicant was informed of the investigation by letter dated 14 September 2017 and placed on administrative leave with full pay ("ALWFP") from that date. This was to prevent the Applicant from interfering with witnesses and hindering the OIOS investigation. On 15 March 2018, OIOS produced its investigation report. The report did not cite the initial subject matter of the investigation - weapons deals - as

[1] Annex 20, application.

worthy of further proceedings. Instead, the subject matter was changed to focus on unauthorized transfer of ammunition and interference with the investigation.

30. Following a review of the report, on 23 March 2018, the then Assistant Secretary-General for Field Support referred the case against the Applicant to the then Office of Human Resources Management ("OHRM"), now the Office of Human Resources ("OHR"), for appropriate action.

31. After the referral, additional information was provided to the OHR for review. On 21 May 2018 ("the Allegations Memorandum"), formal allegations of misconduct were issued against the Applicant. These allegations did not include the original misconduct that was reported. Instead the charges concerned movement of ammunition without authorization and interference with the investigation.

32. On 2 June 2018, the Applicant received the allegations of misconduct memorandum and its supporting documentation including a CD-ROM containing testimony of some of his subordinates in the CPD team accusing him of directing their actions. By memorandum dated 14 July 2018, the Applicant submitted his comments on the allegations of misconduct. He was interviewed. Thereafter, he submitted a clarification of his testimony.

33. On 14 September 2018, the Applicant was informed that based on a review of the entire dossier, including his comments, the Under-Secretary-General for Management had concluded that the allegations against him were established by clear and convincing evidence, and that she had decided to impose on him the disciplinary measure of separation from service with compensation *in lieu* of notice and without termination indemnity.

The factual matrix of the alleged movement of ammunition

34. In March or April 2017, UNAMI personnel went from Baghdad to Kirkuk and recorded an inventory of ammunition and weapons at the UNAMI Kirkuk ASF 1

armoury. The American-provided ammunition in ASF 2 was not shown to the personnel and, as a result, its presence was not recorded as part of the inventory.

35. On or around 8 or 9 May 2017, all PSD personnel were requested to come to the ASF 2 container and assist with the transfer of all the American-provided ammunition from ASF 2 to the premises of TAV. According to the Respondent, the request came from the Applicant. The PSD Team Lead, Mr. Filipowicz, conveyed the Applicant's alleged request to other PSDs/CPOs, including Mr. Steffens, Mr. Pretorius, Mr. Seniloli Tabuatausole, Mr. George Enache, Mr. Andrejs Barinskis, Mr. Vatiliai Nailatica, and Mr. Robert Daou.

36. Specifically, Mr. Filipowicz told Mr. Steffens that the Applicant had arranged for "the Americans to take the ammunition out of [UNAMI] compound", and that they "need to get it out of [the] compound because this [was] ammunition that ha[d] not been accounted for by the UN, [it] shouldn't be here." Mr. Filipowicz also told Mr. Pretorius that the Applicant had "organized for the ammunition that doesn't belong to the UN to be taken back to the US people [sic]". Mr. Filipowicz told Mr. Nailatica that the Applicant had "already done the arrangement […] for the ammunition to be taken back to the Americans".

37. Around 6:30 p.m. or 7:00 p.m. on an unspecified date, the CPOs, namely, Mr. Filipowicz, Mr. Steffens, Mr. Pretorius, Mr. Tabuatausole, Mr. Enache, Mr. Barinskis, Mr. Nailatica, and Mr. Daou came to the ASF 2 container, and moved boxes alleged to contain American-provided ammunition from the container to three United Nations vehicles. The Applicant, they say, came to the container as well and assisted them in loading the boxes into the vehicles. The boxes being transferred filled the backs of three United Nations vehicles. While the boxes were being loaded into the vehicles, the Applicant is alleged to have told Mr. Steffens: "Hey listen, we have to get the … I've made arrangements with the Americans to take this ammunition there [sic]". When asked where the ammunition was to be taken, Mr. Filipowicz told Mr. Tabautausole that the location for handing over the American-

provided ammunition "ha[d] been arranged by [the Applicant] with [his] friend who normally [came] with [him] to the bar".

38. Mr. Herbert Lang, Chief Executive Officer of TAV, is the Applicant's friend and he had visited the UNAMI Kirkuk compound as the Applicant's guest on multiple occasions.

39. The UNAMI Kirkuk compound was guarded by a detachment of Nepalese military personnel, the Nepalese Guard Unit ("NGU"). Sergeant (Sgt.) Anil Khatri of the NGU stated that during the first and second week of May 2017, he was on night-guard duty at the compound's 'Tango One' post, which is located inside the base and to the left of the main gate. One evening in early May 2017, around 7:30 – 8:00 p.m., four or five United Nations vehicles arrived at the main gate and prepared to leave the compound. Sgt. Khatri found this occurrence unusual as all vehicular movement in and out of the base normally stops after 6:00 p.m. Sgt. Khatri telephoned his supervisor, Captain ("Capt.") Ayushman Acharya, Operations Officer, NGU, to seek instruction as to whether the vehicles should be permitted to leave the base. Sgt. Khatri reported to Capt. Acharya that four United Nations vehicles were waiting to exit the compound, and that it was not a normal occurrence for United Nations vehicles to leave the compound after 6 p.m. Sgt. Khatri also informed Capt. Acharya that he saw the Applicant in one of the United Nations vehicles. Capt. Acharya directed Sgt. Khatri to check identifications, and let the vehicles exit the compound.

40. The United Nations vehicles transported the boxes to the premises of TAV, located approximately 500 meters from the main gate of the UNAMI Kirkuk base. At TAV, Mr. Lang was waiting for the vehicles to arrive and he directed the PSD personnel to unload the boxes from the vehicles and to place them in a room. The PSD personnel unloaded the boxes and put them inside a room, as directed.

41. After unloading, the PSD personnel got back into the United Nations vehicles, and waited for the Applicant to return. The Applicant remained with Mr. Lang for approximately 10 minutes and then returned to the vehicles. Upon returning to the

UNAMI Kirkuk compound, Mr. Filipowicz told Mr. Daou that the ammunition was "not official". Mr. Filipowicz told Mr. Tabautausole that the ammunition was not United Nations ammunition and that Mr. Filipowicz would get rid of it and "everything has been arranged by [the Applicant] [sic]". It is alleged that the Applicant also told Mr. Daou that the ammunition had to be transferred to TAV because of something that had happened in Baghdad.

The factual matrix of the alleged interference with the OIOS investigations

42. The persons the Applicant is alleged to have sought to influence, thereby interfering with the investigation, are Mr. Cedric Steffens and Mr. Enache who were both PSD/CPO team officers lead by Mr. Filipowicz at the time of the alleged incident. The Applicant was their Second Reporting Officer.

43. It is alleged that in August 2017, prior to the date when the Applicant was sent on ALWFP, he told Mr. Steffens that there would be an investigation involving the ammunition, and that it was important that the PSD team "keep the same story that nothing ever happened [and] that there was never any American ammunition in the compound [sic]". According to Mr. Steffens, the Applicant told him:

> [S]o guys, if we keep our same story, nothing is going to happen. I have talked with Herbert and Herbert is going to deny ever having received any ammunition from us, so if there is no ammunition in the compound, the American ammunition in the compound and there is nothing in the containers or whatever, there is nothing for them to investigate. Nobody… everybody is happy if we all stick to our story [sic].

44. On 5 September 2017, OIOS investigators undertook onsite inquiries in Kirkuk. Before that date, it is alleged that on multiple occasions, the Applicant had told Mr. Steffens not to disclose any details about the loading and transporting of the American-provided ammunition from ASF 2 to TAV premises. Five minutes after OIOS investigators departed Kirkuk on 5 September 2017, the Applicant is said to have urged Mr. Steffens to provide false information in the investigation and asked

him what he had discussed with the investigators. The Applicant's conduct made Mr. Steffens feel uncomfortable and harassed.

45. The Applicant is also said to have approached Mr. Enache and told him that he was having "problems" and that it would be better to tell the OIOS investigators that there had been no American-provided ammunition at the UNAMI Kirkuk base.

46. On 20 October 2017, while on ALWFP, the Applicant telephoned Mr. Steffens. He allegedly told him that Mr. Lang had been interviewed by OIOS and told OIOS investigators that he had not received any ammunition from the Applicant. The Applicant then told Mr. Steffens that, when the Applicant would be interviewed by OIOS investigators, he would "be relating the same information", and that, if asked by OIOS about the ammunition, Mr. Steffens should "say the same thing". Mr. Steffens discussed with the other CPOs the Applicant's attempt to interfere with the investigation and he told them to tell the truth. For instance, Mr. Steffens told Mr. Tabautausole that the Applicant had asked Mr. Steffens to provide false information to the investigators that "nothing ha[d] been removed here [UNAMI compound]" and that "if something comes up nobody ha[s] to admit that we moved these boxes of ammunition [sic]".

Applicant's submissions

47. The Applicant's contentions may be summarized as follows:

a. The evidence on which the allegations rest is neither clear nor convincing and it does not support the contention that the Applicant committed the specific acts of misconduct alleged.

b. The investigation comprised mainly a collection of comments made *ex post facto* against the Applicant by staff members who were themselves potential targets of allegations of misconduct. They had a motive for redirecting blame away from themselves. The informant/complainant and the staff members also had a motive to join in a process of "mobbing" against the

Applicant. This was brought to the Respondent's attention during the investigation as it was referred to at paragraphs 31 and 32 of his response.[2] There was evidence in the testimony of Mr. Steffens that the improper motive was based on bias against the Applicant's race or ethnicity.[3] Mr. Steffens made the following comments

> "Line #1498 -1502 -…All of these staff member know each other and they all speak the same language and Yashpal[4] tends to hire a lot of these..for a whole year that's all he did, hire Indians and Pakistanis and Bangladeshis and people… staff members and stuff like that. It was so bluntly obvious that this is wrong and you know it can't happen like this."

c. The informant/complainant also had reason to be vindictive and act against the Applicant. This was so because the Applicant prevented her from leaving the compound to go to TAV where she had a relationship with a non-staff member connected to Lang. The evidence on record of two of the CPO Team witnesses corroborates that the informant/complainant did not get along with the Applicant for this reason. She at one time said "I am going to mess [the Applicant]. I am finished with him"

d. The evidence from these staff members comprised coordinated hearsay as to the Applicant being the directing force behind the movement of the ammunition. It was based on what their Team Leader, Mr. Filipowicz, told them.

e. The evidence of the CPOs was less than reliable for a number of ways. Several points on their unreliability are listed in the Applicant's final submission.

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[2] Annex 7, application.
[3] Annex 13, application.
[4] Statement of former FSCO Ghotabuya explains that Yashpal Singh was Principal Security Advisor stationed at MINUSMA Baghdad. He was the person who initiated the additional security checks for weapons and ammunition after the 2016 incident of stolen items in Baghdad. He appointed Filipowicz and Steffens to be the Weapons Custodians as part of these added checks.

f. Some of the evidence upon which the finding of misconduct was based was circumstantial. This included the fact that the Applicant was a friend of the owner of TAV, Mr. Lang. However, the Applicant rebutted the inference drawn that because of the friendship the Applicant was the mastermind in the movement of ammunition to TAV. His rebuttal was by his testimony that this friendship was used by Mr. Filipowicz who asked the Applicant for Mr. Lang's contact information to arrange to get rid of a few "extra items." The evidence of the Nepalese guards was another source of circumstantial evidence with no probative value, according to the Applicant. No record corroborates the occurrence spoken of by those guards who may also have been part of the mobbing. In any event, the date of their observation of vehicles leaving late is unknown and they did not see what was being transported.

g. The evidence that the Applicant informed his then Deputy FSCO, Mr Pitayunga in 2016 of the existence of ammunition from the Americans is not clear and convincing as proof of the Applicant's knowledge of a large quantum stored in ASF 2. The Applicant may have had such a discussion, but it was to tell his deputy that he heard Mr. Filipowicz had a few rounds of extra ammunition that he kept in his room. Mr. Piyatunga therefore must have been confusing the issues. As a responsible Deputy FSCO, if Mr. Piyatunga knew of a large quantum of unaccounted for ammunition in ASF 2 since 2016 he would have been required to report it. Yet he made no such report.

h. The investigation failed to properly take into account the Applicant's evidence submitted in rebuttal. This included the testimony of Victor Krokhmalov, the Applicant's predecessor, whose hand over email in April 2015 confirmed that there was no American ammunition in the inventory handed over to the Applicant. It follows that if the Applicant was unaware of the ammunition in ASF 2 that he could not have been the mastermind in a scheme to dispose of it.

i. The investigation failed to take into consideration relevant evidence by failing to interview critical witnesses. Most importantly Mr. Filipowicz, who played a central role, was neither charged nor interviewed.

j. What the Respondent ought to have found clear from the investigation was that it was most probable that Mr. Filipowicz and his team acted without authorization to dispose of the contents of ASF 2 which, according to the CPOs, included American ammunition. Thereafter, when a report was made against "someone higher up" i.e. the Applicant, they sought to blame him. The fact that the CPO team needed to dispose of ammunition they should have accounted for before it was discovered was the true reason for the movement of the contents of ASF 2 to TAV. This was evident from the statement of CPO member Mr. Pretorious. He said:

> I think this whole thing happened in Baghdad, the ammunition and the firearms had got lost, like this ammunition is there for years, that's what I understood and now all of a sudden…we all thought this was…it's normal because we have it and then people became tense and jumping around "What we going to do with this? We are going to get into trouble.

k. At all times prior to his interview on 25 October 2017, the Applicant was not fully informed as to what was being investigated. While on ALWFP the Applicant was not instructed not to speak with his colleagues. He never asked them to lie or impede the investigation. There was no proof of this alleged interference save for the evidence of the Applicant's colleagues who were potential suspects with a motive to deflect findings of misconduct from themselves. In these circumstances, there was no wrongdoing either intended or committed when he spoke with his colleagues.

l. The sanction imposed is disproportionate to the alleged offense and unduly harsh in light of the Applicant's prior lengthy and exemplary record of service with just four years then left for his retirement. On the other hand, no

action was taken against the specially appointed custodians of weapons and ammunition, Mr. Filipowicz and Mr. Steffens and their team.

Respondent's submissions

48. The Respondent's contentions may be summarized as follows:

a. The Applicant knew that the American-provided ammunition was in the Kirkuk compound. As FSCO, the Applicant was the Mission's most senior security official in Kirkuk from April 2015 and he was responsible for all aspects of security management, crisis readiness and preparedness at the Kirkuk duty station.

b. The absence of physical/photographic evidence or an official record of the American-provided ammunition does not lead to the conclusion that there was no such ammunition stored in the Kirkuk compound before 8/9 May 2017. The evidence from one of the CPOs, Mr. Andrejs Brinski, demonstrates that in 2013, when the United States military forces withdrew from Iraq (and before the Applicant arrived at the Kirkuk compound), American ammunition was transferred from the United States airbase in Kirkuk to the Kirkuk compound of UNAMI.

c. Seven CPOs provided consistent and detailed evidence in their witness statements that, before 8/9 May 2017, there was American-provided ammunition in the Kirkuk compound. It was stored in ASF 2 and they used it for training purposes. That they did not know the quantum of the ammunition was not dispositive as they all consistently said that the quantum was enough to fill the back of three United Nations vehicles.

d. The Applicant has not provided any credible explanation for why the evidence of Mr. Piyatunga (the Deputy FSCO), who had no involvement in the removal of the ammunition, should be disbelieved or his reliability doubted. The Applicant's argument that Mr. Piyatunga was just "confused"

about a "casual discussion" he had with the Applicant about "a few rounds of extra ammunition Mr. Filipowicz kept in his own room" is not persuasive.

e. The Applicant's contentions that the CPOs colluded to implicate him to avoid liability for their wrongdoings have no merit. The Applicant has provided no evidence in support of his allegation. If the CPOs had wished to find a "scapegoat" for their own alleged wrongdoing, it would have made more sense to blame Mr. Filipowicz solely. There was no need for the CPOs to implicate the Applicant in addition to Mr. Filipowicz. The Applicant's contention that there was "solidarity" among the CPOs lacks specifics and provides no credible basis for concluding that they targeted the Applicant.

f. The issue of whether Sgt. Khatri, the NGU guard saw the Applicant direct the CPOs to transport the ammunition or whether he saw the ammunition in the vehicles is not relevant. Sgt. Khatri saw the Applicant in one of the vehicles and Capt. Acharya told him to "let them go outside".

g. Mr. Lang's witness statement is not credible or reliable. His evidence appears coached or rehearsed. Mr. Lang - a personal friend of the Applicant - was not a staff member at the time he gave the statement therefore, the possibility of administrative or disciplinary action offered little assurance of his truthfulness.

h. The Applicant has not provided any new arguments or evidence to demonstrate that the finding that he interfered with the investigation was without sufficient foundation. The Applicant's account that he was checking on the well-being of his subordinates remains without support. The Applicant's request to the potential witnesses that they lie in their interviews cannot be justified regardless of whether or not OIOS gave him any instruction to refrain from contacting them.

i. The Applicant's contention that the person who had submitted a report of his possible misconduct with OIOS, was in personal conflict with him is

not relevant. The alleged conflict does not negate or displace the fact that the investigation uncovered sufficient evidence establishing the Applicant's misconduct.

Considerations

Findings on admissibility of evidence

49. The Respondent's objection to the admission into evidence of the statement of Nunana Woanya at A/17 to the rejoinder is upheld as this witness was not put forward by the Applicant during the investigation process. Additionally, he is neither the author nor the intended recipient of the documents attached to his statement. The prejudicial effect of the evidence is greater than any probative value.

50. The Respondent's objection to the admission into evidence of the statement of former FSCO [2012-2015] Viktor Krokhundov is dismissed. The relevance of this witness was a clear factor that was on the decision maker's record before the sanction decision taken. Specifically, the Applicant spoke of this former FSCO who handed over to him the duties of FSCO but had no information about United States ammunition gifted to the mission. This is stated in the Applicant's interview which was part of the investigation on 25 November 2017.[5]

51. The Applicant offered to provide email contact information so that Mr. Krokhundov could be contacted. Later, at paragraph 22 of a document entitled "Clarification on interview of 25/11/17," OIOS was provided by the Applicant with the contact information for this former FSCO.[6]

52. The evidence of the former FSCO is relevant as to whether the arms said to have been gifted by the United States army in 2013 existed. Although a junior CPO officer Andrejs Barinski provided eye witness evidence that he was present when in 2013 one Jean Christopher Deslandes who was deputy FSCO and then Team Leader,

[5] Annex R2.
[6] Annex R2.

Mr. Filipowicz, collected the gifted ammunition,[7] it is also relevant to hear from the person then in charge, Mr. Krokhundov. The Applicant told OIOS during the investigation that Mr. Krokhundov did not know anything about the gifted ammunition. Accordingly, my determination is that the statement at A/16 is admissible.

Findings on the evidence as to the substantive issues

53. The critical issue to be determined is whether there was clear and convincing evidence of each fact cited in the allegations of misconduct. In *Nyambuza* 2013-UNAT-364, the Appeals Tribunal observed at para. 31 that:

> [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." When termination is a possible sanction, the "misconduct must be established by clear and convincing evidence," which means, that "the truth of the facts asserted is highly probable.

54. The Appeals Tribunal made clear in *Hallal* 2012-UNAT-207 at para. 28 that in a system of administration of justice governed by law, the presumption of innocence must be respected.

> Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

55. The offences alleged in the instant case are of a complex nature and have been framed in a manner that required several discrete facts to be established so that a sanction of separation could be justified. Each element of the allegations of misconduct the Administration found to have been established is therefore subject to review. The Tribunal's findings on review of the evidence that was on record in support of each fact when the sanction was imposed are hereafter set out separately.

The Applicant used the United Nations *vehicles to transfer ammunition.*

[7] Transcript at R2.

56. The most important fact that the Respondent had to have clear and convincing evidence of, before finding that the Applicant engaged in the alleged misconduct, is that he was the mastermind behind the alleged transfer of ammunition. The credibility of the sources of information on this fact had to be examined by the Respondent before concluding that the evidence was clear and convincing. There were two sources. Firstly, the person who made the initial report in July 2017 and secondly, the seven CPOs who were involved in the alleged movement around two months before but did not themselves report it.

57. The Applicant's case is that these persons were improperly motivated by ethnic bias and vindictiveness. This aspect of the Applicant's case is supported by the testimony of CPOs Messrs. Steffens and Pretorious. The inference of improper motive for testifying against the Applicant, to be drawn from their evidence, was on record before the sanction decision was made. The Applicant also specifically drew the Respondent's attention to it. The Respondent appears to the Tribunal to have ignored it or dismissed the suggestion of bias and vindictiveness as irrelevant, as there is nothing on the record to rebut it.

58. Apart from these sources, the Respondent relied on circumstantial evidence, namely the fact that the Applicant was a close friend of Mr. Lang of TAV. The inference was drawn that because of the friendship it must have been the Applicant who arranged the transfer of ammunition to TAV. The Applicant, by his own testimony during the investigation, however, gave a plausible explanation. He said that Mr. Filopwicz, who knew of their friendship, asked him repeatedly for the contact information for Mr. Lang so he could dispose of "some extra items" for himself and other CPOs. The Applicant gave him the contact information without knowledge of the nature of the items, or that it may have been United Nations-owned ammunition.

59. The Respondent further relies on the information given by Mr. Steffens that the Applicant came and joined in during the packing of the boxes into the vehicles. Mr. Steffens says the Applicant told him he had made the arrangements. The

credibility of this evidence had to be properly considered in light of the improper motives alleged against Mr. Steffens.

60. In the circumstances, the Tribunal finds that the evidence that the Applicant was the mastermind for an unauthorized movement of ammunition was neither clear nor convincing. On the other hand, there is ample evidence pointing to Mr. Filipowicz as the mastermind behind the activities of transferring items from ASF 2 to TAV. He had just been appointed Custodian, making him responsible for the accountability and safe custody of ammunition. This evidence was also before the Respondent, but appears not to have been considered.

61. Yet Mr. Filipowicz kept no record to account for the ammunition in ASF 2 which, based on the evidence from his team member Andrejs Barinski, he had collected from the United States military base in 2013. On the CPOs account, the amount of ammunition in ASF 2 was far more than that in ASF 1; yet it was unaccounted for. Mr. Filipowicz did not reveal its existence to the inspectors visiting from Baghdad a few weeks before. By all accounts, he was the person who conveyed the request to his subordinates, the CPOs, to help transfer the boxes to the TAV. CPO Mr. Senioli said in his interview with the OIOS that after the CPO team had dropped off the boxes at TAV.

> "Roland was happy because everything here, all the ammunitions out here, he was really worried about all these ammunitions…
>
> ALAN: Mhmm.
>
> SENILOLI: Because they said it will be checked because it is not the UN ammunitions, so he said he is going to get rid of it."

62. There was therefore no clear and convincing evidence that the Applicant was the mastermind or in charge of the transfer of ammunition from ASF 2 to the TAV.

The transfer was unauthorized.

63. In reviewing this aspect of the facts, it was necessary to consider the basis on which the Respondent held the view that authorization was required, and from whom

the authorization was required. The Applicant was charged under staff regulation 1.2(q) which stipulates that staff members shall use the property and assets of the Organization only for official purposes. It is in this context that the absence of authorization cited in the allegation can only be interpreted as absence of authorization from the Organization. Thus, the fact that needed to be established was that the ammunition that was alleged to have been moved was the property of the Organization and/or that the Applicant did not have the authority to use the United Nations vehicles to move it.

64. It is my finding that there was no clear or convincing evidence that the alleged ammunition was the property of the Organization. There is absolutely no record of it in any of the carefully compiled inventories of ammunition, weapons and other property present at UNAMI Kirkuk as being assets owned by/in the custody of the United Nations.

65. Additionally, the evidence before the Respondent when the sanction was imposed was that the ammunition was collected in 2013. The eye witness to the collection of the ammunition by then DFSCO Jean Christopher Deslands and then Team Leader Roland Filipowicz in 2013 was CPO Andrejs Barinski. There was nothing from his description of this occurrence to support the suggestion that the items were being collected on behalf of the United Nations. According to Mr. Barinski, the then FSCO Viktor Krokhomalov was not informed of the collection.

66. Thus, even if ammunition was collected in 2013 and taken to the Kirkuk base, there is no evidence that it belonged to the United Nations. The Respondent's witness, CPO Daou, says he was told by his Team Leader Filipowicz that the ammunition in ASF 2 was "not official". It was not United Nations ammunition and he would get rid of it.

67. There is no evidence from any of the PSD/CPOs that they were of the view that the ammunition belonged to UNAMI. Instead what can be gleaned from what the PSD/CPO witnesses said is that:

a. Mr. Filipowicz collected ammunition in 2013,

b. the CPOs were using it unofficially for their own training,

c. it was unaccounted for though kept in UNAMI,

d. it was the duty of their team leaders to account for all ammunition,

e. this had not been done regarding the ASF 2 ammunition,

f. there was heightened focus on accounting for ammunition since the Baghdad incident; and thus,

Mr. Filipowicz felt they had to get rid of it.

68. The Applicant's evidence, corroborated by the statement of his predecessor Victor Krokhomalov, is that when he took over from his predecessor, the April 2015 hand over email sent by Mr. Krokhomalov made no mention of American ammunition in ASF 2 owned by the Organization. The only reasonable inference that can be drawn from information on record when the sanction decision was made by the Organization is that the CPOs, headed by Mr. Filipowicz, unofficially obtained some ammunition in 2013 and were keeping it without proper accountability in Kirkuk. They wanted to get rid of it because it was not properly accounted for, which was a failing on their part as the Weapons Custodians.

69. The informant/complainant got wind of the unusual movements and seized the opportunity to make a report of misconduct against the Applicant. All the CPOs and Deputy Custodian Cedric Steffens, who were involved in the transfer but had not reported it, then chose to support the report that had already been made against the Applicant by pinpointing him as being to blame for any wrongdoing, thereby exculpating their entire team headed by Mr. Filipowicz.

70. In all the circumstances, there was no evidence of ownership by the United Nations of the ammunition based on which the Respondent could have determined that the movement of it required United Nations authorization.

It was a large but unknown quantity of ammunition.

71. Proof was required that ammunition provided by the Americans existed in ASF 2. The quantum of it as to size is also a relevant fact. There was however, neither any record in the Organization nor any photographs that the Respondent could have relied on as to the alleged large quantum.

72. It was very strange and defied logic that whereas records were kept of the far smaller quantum in ASF 1, no records were ever kept of what was in ASF 2 which is supposed to have been a large quantity. The inference that could be drawn from the lack of record keeping is that there was no such large quantum. *Prima facie* therefore at the time of the investigation, the Organization had no evidence that a large quantum of ammunition owned by the Organization existed in ASF 2.

73. The Respondent's case as to the existence of the American Military-donated ammunition is based essentially on two sources. Firstly, the eye-witness testimony of the seven CPOs who claimed to have known of its existence for training purposes and secondly, Mr. Ghotabuya who says that the Applicant told him about it in 2016. This evidence was enough, in my view, to provide clear and convincing proof that the ammunition existed, but not that it belonged to the United Nations.

74. The sources did not provide clear and convincing evidence as to the quantum of the ammunition and whether it was a large amount. There is no confirmation from the alleged donor of the ammunition, the United States of America, as to what ammunition if any was donated and if so how much.

75. As to the circumstances of the donation, the Respondent relies on the evidence of CPO Andrejs Barinski as an eye witness to how the United States

ammunition was obtained in 2013.[8] This evidence further discredits the Respondent's case as to the date, quantity and circumstances of provision of the ammunition.

76. The 2013 date when the ammunition was collected was two years after the expiry of the alleged agreement with the Americans who on the Respondent's case had left Iraq by then. The alleged quantum collected was a mere two boxes and Mr. Barinski said this filled only a rear corner of the ASF 2 container. This contradicts the Respondent's case that the ammunition filled three to five vehicles when the CPOs were moving it to TAV.

77. The information provided to OIOS by Mr. Ghotabuya did not assist to establish the large quantum, location or ownership of the ammunition he heard the Applicant casually mention in 2016. In fact, Ghotabuya made clear that he knew nothing about a large quantum of ammunition in the container. There were many containers on the compound and the one time he saw ASF 2 open all he saw inside was some paper and one or two cardboard boxes in it.

78. Given these facts, the Tribunal finds that there was no clear and convincing evidence that ammunition owned by the Organization existed in ASF 2 in the large quantum alleged by the Respondent.

The ammunition was moved by the Applicant from the UNAMI Kirkuk compound.

79. The evidence of this move comes solely from the CPOs who were themselves involved in packing boxes they knew were filled with ammunition into United Nations vehicles and transporting them off the compound. This evidence is unreliable for lack of clarity. There is no information on the description or exact quantum of the ammunition. Some record as to the inventory in ASF 2 before and after this movement is required to establish the fact of what was moved by clear and convincing evidence.

[8] R2, paras. 41-46 and 84 onwards.

80. More importantly, it must be established by clear and convincing evidence that the Applicant participated in the move and knew what was in the boxes. He has made it clear during the OIOS investigation that he knew nothing about moving ammunition. He admitted that he may have been going out with the CPOs when the Nepalese guards observed the movements. However, the evidence of the CPOs is that the Applicant joined them sometime after the loading of the vehicles started.

81. The Respondent's case that the CPOs' evidence of movement of ammunition is corroborated by the Nepalese guards Sgt. Khatrik and Capt. Acharya is without merit. Those guards could only speak to an unusual departure of four to five United Nations vehicles with CPOs and the Applicant on board one evening after dusk. Capt. Acharya was informed by Sgt. Khatrik that they were all going to dinner which seemed unusual. The date of the occurrence is unknown, there is no record of it and the guards did not check what was in the vehicles.

82. There is no clear and convincing evidence that ammunition was moved from ASF 2 out of the Kirkuk base by the Applicant one evening in May 2017.

The ammunition was moved to TAV premises.

83. The evidence of this delivery comes solely from the CPOs who were themselves involved in delivering boxes they claim to have known were filled with ammunition to the TAV premises.

84. The owner of TAV, Mr. Lang, denies receiving any such delivery and the Organization did not conduct any inspections at TAV to see whether the delivery could be verified.

85. The Applicant's case that the CPO officers had reason to deflect attention from their own failures in accounting for ammunition, if considered by the Respondent, would render their testimony less than reliable in proving a clear and convincing case of movement of the ammunition to TAV premises.

Between August to October 2017, Messrs. Steffens and Enache were potential witnesses and the Applicant would have been so aware.

86. There is no clear and convincing evidence that the Applicant would have been aware at the time when he was alleged to have contacted Mr. Steffens and Mr. Enache, either that they were potential witnesses, or the nature of the matter being investigated. Those contacts were said to have been made in August 2017, early September 2017 and 5 September 2017. The Applicant is said to have told the two officers that they should stick to the story that "there was never any American ammunition in the compound". At that time, no letter had been sent to the Applicant informing him that he was the subject of an investigation. It was not until 17 September 2017 that he was sent on Administrative Leave on grounds that it had been reported that he had engaged in ammunition, uniform and weapons deals with the owner/operator of a private security firm.

87. At the time of the pre-17 September 2017 discussions, however, it is not in dispute that there had been a concern amongst the CPOs about their unaccounted-for storage of ammunition in ASF 2. The case for the Applicant is that he knew of no such ammunition.

88. As to the alleged contact with Mr. Steffens made in October 2017, the Applicant would by then have known about the investigation because he had been placed on ALWFP in Mid-September. However, as aforementioned, the nature of the matter being investigated was not then the same as the ultimate charge of movement of ammunition. It was not until 21 May 2018 that the charge of movement of ammunition was clearly identified against the Applicant.

89. There is no clear and convincing evidence that if the Applicant contacted Messrs. Steffens and Enache in August, September and October 2017 he would have been aware that they were potential witnesses in relation to the disciplinary charges for which he was sanctioned.

The Applicant, in breach of staff rules 1.2(c) and (g) attempted by communicating with Messrs. Steffens and Enache to interfere with the OIOS investigation.

90. The alleged misconduct of interference with the investigation is said to have been committed when the Applicant contacted CPOs Messrs. Steffens and Enache on the dates mentioned above. In order to have properly supported this aspect of the challenged decision, the Respondent needed to have clear and convincing evidence that the alleged contacts were in fact made.

91. On the record before the Respondent at the time of the decision, it was clear that the Applicant denied the substance of the alleged contacts. The Applicant's version of events is that while on administrative leave he contacted several staff members, including CPOs, to inquire about their well-being after security concerns were heightened by Kirkuk being overrun by Iraqi forces. This is corroborated by Mr. Steffens who admits that when the Applicant called him in October 2017, he first spoke of security concerns. The Applicant admits to speaking with Mr. Steffens but denies there was any discussion about Mr. Lang because he had never called Mr. Lang.

92. With the account of one person to be weighed against another, the Respondent had to properly consider issues of credibility on the record. There is no indication that the Respondent considered the two possible motives for the CPOs, and Mr. Steffens in particular, to give false information about the Applicant. Firstly, they were potential suspects who always were concerned about their own failure to properly account for ammunition being detected. The possibility that they may have sought by these reports of interference to further cement the case against the Applicant as a scapegoat for their own incompetence, thereby deflecting attention from their own Team and Team leaders, ought not to have been overlooked. Secondly, there was unrebutted evidence of Mr. Steffens' hostility towards the Applicant based on his ethnicity.

93. Further, even if the Respondent considered that there was sufficient basis to accept the word of Messrs. Steffens and Enache over that of the Applicant, there was insufficient evidence that in discussions with them he requested that they provide information to the investigation that was false. In light of the Tribunal's findings that there was no clear and convincing evidence at the time the Respondent's decision was made as to any misconduct related to ammunition movement, it is not possible to find that the content of what the Applicant was alleged to be telling the CPOs to say to the investigators was false information.

94. To tell the CPOs in August 2017 and early September 2017 to stick to the story that there was no American ammunition cannot *per se* have been accepted as clear and convincing evidence of his interference with an investigation. An alternate inference that could be drawn is that the Applicant was simply reassuring them that they should tell the truth.

95. The Applicant's alleged call to Mr. Steffens in October 2017 was to inform him that Mr. Lang had been interviewed by OIOS and that Mr. Lang told them he received no ammunition from the Applicant. Mr. Steffens says the Applicant told him he would "relate the same thing" and asked Mr. Steffens to do the same.

96. In the context of an ongoing investigation in relation to which the Applicant would by then have clearly known he was the target of a probe on the matter of ammunition deals, it would have been imprudent for him to have contacted Mr. Steffens in this way. As aforementioned, this alleged content of the conversation is denied by the Applicant in its entirety. A call to Mr. Steffens by the Applicant is admitted but not Mr. Steffen's version of the contents of the discussion.

97. The Applicant had not been directed that there should be no communication with the CPOs. There is also no clear and convincing evidence that what he spoke of was in an attempt to influence Steffens to give a false account so as to prejudice the investigation. As aforementioned, the position of the Applicant has consistently been that he did not move any ammunition from the compound to be given to Mr. Lang.

98. In all the circumstances, my finding is that there was no clear and convincing evidence before the Respondent at the time the sanction decision was made that the Applicant by speaking with the CPOs sought to interfere with the investigation.

Did the established facts qualify as misconduct?

99. On a thorough review of the evidence on record prior to the sanction decision, it is clear that the information, such as it was, based on which the Respondent decided on the Applicant's separation sanction, came from the CPOs. However, the credibility of these officers ought to have been scrutinised. There is no indication from the record that the Respondent duly weighed the unreliability of the information being provided during the investigation. The Applicant's final submission succinctly sets out several factors which point to the unreliability of the information provided to the OIOS by these staff members. Among the more glaring of these factors is that all of these CPOs kept the information they claim to have had about movement of the ammunition to themselves for several months. They did not volunteer any of the information, which in fact was more directly incriminating to the CPOs themselves, until the investigation started. Their Team Leader left the Organization just after the investigation started and has not to date given his account of what may have transpired to the investigators.

100. On the totality of the evidence that was before the Respondent when the challenged sanction decision was made, the Tribunal finds that the established facts did not in any clear or convincing way qualify as misconduct.

Was the sanction imposed proportionate to the proven misconduct, if any?

101. There can be no gainsaying that, if as alleged by the Respondent there had been clear and convincing evidence that the Respondent was in possession of the alleged large amount of ammunition and the Applicant moved it to the private TAV premises without permission, an act of gross misconduct meriting separation from service would have been committed. However, in the absence of any proof whatsoever that the ammunition from the alleged source, in the alleged quantum and

in the location it was alleged to have been, belonged to the Respondent, the inference remains open that movement of the contents of ASF 2 may have been merely a slipshod housekeeping exercise by incompetent CPOs.

102. To the extent that the Applicant helped by passing to Mr. Filipowicz the contact information for Mr. Lang, this may have been an attempt by the Applicant to help the CPOs tidy up the contents of ASF 2, the nature of which was not known by the Applicant to be other than innocuous things like targets for training. It would not have amounted to gross misconduct.

Relief to be Awarded

103. The Applicant seeks an award of damages based on arts. 10.5 (a) and (b) of the Statute of the UNDT. The relevant provisions of the article allow for the Dispute Tribunal to order either or both rescission of the contested decision and 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 for harm, supported by evidence, and shall provide the reasons for that decision."

104. The Applicant seeks rescission of the decision or damages in lieu thereof plus moral damages as compensation for harm. The quantum of moral damages sought by the Applicant for harm is three years' net base salary.

105. UNAT jurisprudence[9] has interpreted art. 10 as establishing that

> the UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury. … Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (i.e. temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal, or whether a case

[9] *Faraj* 2015-UNAT-587.

> was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit.

106. There are several factors underscored by the Applicant in support of his claim for an exceptionally higher award of compensation. These include his long prior service with the Organization with satisfactory performance appraisals and the fact that he was just a few years away from retirement when he was separated. The severity of the allegations against the Applicant would also have had an adverse effect on his reputation at the end of his career. These factors sufficiently justify an award at the higher end but do not merit the treatment of this application as an exceptional case for more than two year's salary to be awarded.

107. The Applicant seeks moral damages for stress and the harm caused to his professional reputation because of the harsh and unjustified period for which he was placed on administrative leave. However, as noted by the Respondent, the Applicant's placement on administrative leave was with pay. After being informed of the reasons for placing him on administrative leave, the Applicant did not contest the decision to place him on administrative leave.

108. The claim for moral damages is also based on the effects of the separation decision on the Applicant's financial and emotional well-being. Regarding his financial well-being he cites long-term consequences for his retirement but provides no particulars. He says he had to take a reduced pension but this is not explained. Additionally, the Applicant refers to a house building loan taken out from UNFCU in 2016 and a personal loan taken out in 2018 with a view to return the amount from United Nations salary deductions before retirement age. He says he had to repay over USD50,000 in monthly installments. The connection of these transactions to the separation and how an unexpected financial loss was suffered in relation to the transactions because of the separation is unclear.

109. As to the emotional harm sustained by the Applicant, he relies on medical reports which indicate that he has suffered Post Traumatic Stress Disorder ("PTSD")

that was work related since April 2018. The said time frame encompasses the period of the investigations that led to his separation and the aftermath of the separation.

110. The Appeal's Tribunal's jurisprudence establishes that the UNDT may award compensation for harm only when the existence of such harm has been proven to the required standard. In *Kallon* 2017-UNAT-742 this standard was explained as follows;

> Compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.

111. To meet the requirement for sufficient evidence, the Applicant's testimony must be "corroborated by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred."[10]

112. There is merit to the Respondent's argument that the Applicant has not put forward sufficient evidence proving any causal link between the loans cited and any financial losses due to the separation decision. No moral damages can be awarded in relation to the loans.

113. The Respondent further contends that no damages can be awarded for the PTSD suffered by the Applicant because the condition pre-existed the May 2018 date when charges were laid and the September 2018 date of the contested separation decision. The case of *Kebede*, 2018-UNAT-874, para. 25. is cited where the Appeals Tribunal held that the Dispute Tribunal erred by awarding moral damages for "pre-existing distress". That case is distinguishable from the instant one however in that in *Kebede* the pre-existing stress was due to factors unrelated to the circumstances of the challenged decision. In the instant case it would be impossible to separate the stress

[10] *Ross* 2019-UNAT-926, para. 57.

caused by the investigation from the stress of the separation that resulted from the investigation.

Conclusion

114. The decision to impose the sanction of separation is rescinded. If the Respondent elects to pay compensation *in lieu* of rescission, the Applicant is to be paid two years' net-base salary in compensation under art. 10.5(a) of the Dispute Tribunal's Statute.

115. The Applicant is awarded an additional USD5000 in compensation under art. 10.5(b) of the Dispute Tribunal's Statute;

116. The compensation amounts shall bear interest at the United States of America 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.

(Signed)
Judge Eleanor Donaldson-Honeywell

Dated this 9th day of September 2020

Entered in the Register on this 9th day of September 2020

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi