UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/032
Judgment No.: UNDT/2014/059
Date: 5 June 2014
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

OGORODNIKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Sophie Parent, ALS/OHRM, UN Secretariat

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

Introduction

1. By an application filed with the Dispute Tribunal on 21 April 2011, the Applicant is seeking the rescission of the 11 January 2011 decision to separate him from service, with compensation in lieu of notice and with termination indemnity. While not contesting the facts of the case, the Applicant contends that there are several mitigating circumstances which were not considered by the Organization resulting in the sanction not being proportionate to his actions. The Applicant requests the rescission of the contested decision and his reinstatement on an appropriate post within the Organization and, in lieu of reinstatement, an appropriate amount of compensation.

2. The Respondent's 20 May 2011 reply stated that the imposition of the contested disciplinary measure is proportionate to the gravity of the Applicant's misconduct and that all the mitigating circumstances were fully taken into consideration by the Organization.

Background

3. The Applicant joined the United Nations in 1992 as a military observer for the United Nations Transitional Authority in Cambodia ("UNTAC"). From 1995 to 1999 he worked for his national government whilst remagtIiac
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> know that you could not sign as your own supervisor. You were requested by the Personnel Section to re-submit a new Annual Leave Report signed by your supervisor, which you did.

vi. The SIU investigation report was issued on 16 December 2008. The SIU found, *inter alia*, that the Applicant had acted in violation of Staff Regulation 1.2(b), then staff rule 101.2(g) and ST/AI/1999/13, section l.2(c).

vii. By memorandum dated 31 March 2009, [KP], then Director, Department of Field Support, referred the matter to OHRM for appropriate disciplinary action.

viii. By memorandum dated 18 May 2009, the Applicant was alleged to have engaged in misconduct.

> 1. Specifically, the Applicant was charged with: (i) "forging a stamp in [his] UNLP of which [he] submitted a copy to UNAMA Personnel Section as an official record of [his] leave date"; (ii) providing false information in his Annual Leave Report; and (iii) signing his own Annual Leave Report as supervisor. The Applicant was informed that his conduct, if established, would constitute a violation of the standards of conduct expected of staff members of the United Nations. In particular, that such conduct would violate staff regulation 1.2(b), former staff rules 101.2(b) and 101.2(g), and section 1.2 of ST/AI/1999/13 ("Recording of attendance and leave").
>
> 2. The Applicant was provided with documentary evidence of the alleged misconduct in accordance with paragraph 6(b) of ST/AI/371, namely, a copy of the Investigation Report and supporting material. The Applicant was informed of his right to submit comments, if any, within two weeks of receiving the charges, and was further informed of his right to seek the assistance of counsel. On 18 June 2009, the Applicant signed for receipt of the allegations of misconduct.

ix. The Applicant submitted his comments to OHRM via email dated 4 September 2009. In particular:

> 1. The Applicant admitted to altering a copy of his UNLP so that an entry stamp showed the date of 2 October 2008 (instead of the genuine date of 4 October 2008). The Applicant also admitted to

entering false information on his Annual Leave Report to correspond with the altered entry date, and to submitting this information to the Personnel Section. The Applicant admitted to signing off on his falsified Annual Leave Report in his capacity as Officer-in-Charge, but stated that he was not aware that this was not permitted. The Applicant stated that when this error was brought to his attention, he duly submitted a new Annual Leave Report. It was done well before the investigation began.

2. The Applicant reiterated that his actions were not motivated by monetary benefit, pointing out that the consequent payment of moneys for which he was not entitled "was not calculated", and that the moneys had already been recovered by the Organization.

3. The Applicant explained that Eid Holidays fell on October 1st and 2nd. Thus October 3rd and 4th were approved as weekend days for UNAMA employees.

4. The Applicant stated that, when he submitted his original Leave Request form, he had intended to be away from 1 to 3 October 2008 and to be traveling as part of a group. However he decided to visit an historical sight in Uzbekistan, and left the remainder of his group in Turkmenistan before traveling on alone to Uzbekistan. He was unable to cross the border from Turkmenistan to Afghanistan as planned on 3 October 2008, and as a result, on 4 October 2008, he had to cross two borders (from Uzbekistan to Turkmenistan and from Turkmenistan to Afghanistan). He was compelled to travel the entire day through unknown terrain in a private taxi with strangers, "which caused him lot of stress and anxiety." The Applicant stated that he was genuinely worried about whether he could reach his duty station within the time indicated on his Annual Leave Request. The Applicant was worried that by arriving late, it would negatively impact on his entitlement to take further leave.

5. The Applicant stated that it was when the border police officer stamped his UNLP with the date entry of 4 October 2008 that he "realized that [he] would have to explain why [he] had arrived one day later than indicated on [his] [A]nnual [L]eave [R]eport." He was not aware of how long he was permitted to be outside of UNAMA for a Welfare and Health trip. He stated

> that he was never given any written document containing the rules and guidelines pertaining to Welfare and Health trips. However, he had "heard" that he could be outside the UNAMA area for two nights and three days, and that if he exceeded this period, he would "break" his leave cycle and would not be permitted to take his next planned leave;
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> 6. The Applicant stated that his actions were motivated by panic and his desire to see his family. The Applicant had already purchased a ticket to visit his family, and "the thought of not being able to travel away from [his] duty station to visit [his] family affected [his] judgment and ultimately led [him] to do what he did." The Applicant stated that he experienced "stressful working conditions" in Afghanistan. He stated that his post was stressful due to "the restrictions on one's liberty in terms of physical movement in the country and also the isolation." Ultimately, he engaged in this conduct because he wanted to be "on the safe side" and "could not bear the thought of having to forfeit [his] visit home"; and
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> 7. The Applicant stated that he did not alter the UNLP itself, as he was "fully aware" that an alteration to his UNLP "could be discovered by a [sic] technical expertise". Rather, he intentionally "cut and paste the date of 2 October [2008] instead of 4 October [2008], from the test stamp onto a photocopy of [his] UNLP and attached that copy to [his] Leave Report that [he] submitted" so as to "make the dates of arrival consistent with the Leave Request Form."
>
> 8. The Applicant repeatedly admitted to his use of poor judgment. He fully understood that it was not the right thing to do. He emphasized that these were the first allegations ever brought against him.

x. By letter dated 11 January 2011, the Applicant was informed of the outcome of his case [namely]:

> …
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> … there is insufficient evidence that [the Applicant] violated section 1.2 of ST/AI/1999/13. Accordingly, [the ASG for Human Resources Management] decided to drop this charge.
>
> … there is sufficient evidence … that [the Applicant]: (i) forged a stamp in a copy of [his] UNLP, which [he]

Parties' submissions

8. As part of its 4 November 2013 oral hearing, and the ensuing Order No. 305, the Tribunal discussed the parties' joint submission of 1 November 2013 and clarified the issues and submissions before the Tribunal.

9. The Applicant stated that the facts are not at issue in this case and that he is only contesting the proportionality of the sanction due to the fact that not all of the mitigating circumstances were taken into account by the Organization when it took the decision to separate him from service.

10. In light of the mitigating circumstances, the Applicant asked the Tribunal to rescind the contested decision; substitute the sanction of separation from service with that of a written censure; reinstate him and, in the alternative, award him an appropriate amount in lieu of reinstatement.

11. The Respondent stated that his decision was neither absurd nor arbitrary and that taking into considering the seriousness of the misconduct, the sanction was proportionate. The Respondent asked the Tribunal to reject the application.

12. The Respondent further submitted that, should the Tribunal decide that the facts of the case merit the Applicant's reinstatement then, at most, a demotion would be the lowest reasonable sanction as the sanction of a written censure proposed by the Applicant was too low. The Respondent also requested that should the Tribunal set an alternative compensation in lieu of reinstatement, it take into consideration the termination indemnity already provided to the Applicant.

Consideration

Receivability

13. The present case meets all of the receivability requirements identified in art. 8 of the Dispute Tribunal's Statute.

Applicable law

14. ST/AI/1999/13 (Recording of attendance and leave) states:

> 1.2 The supervisor shall designate a time and attendance assistant who, under the supervisor's authority, shall:
>
> (a) Verify attendance and compliance with working hours, especially for staff on staggered or flexible working hours, and inform the supervisor of unexplained absences;
>
> (b) Record night-time and overtime work, indicating whether it is to be taken as compensatory time off or paid as overtime;
>
> (c) Prepare reports on attendance, night-time work, compensatory time off and overtime, to be certified by the supervisor;
>
> (d) Prepare an annual or sick leave form upon return to duty of a staff member after any period of such leave, and obtain endorsement of the completed form by the staff member and the supervisor;
>
> (e) Keep all relevant records.
>
> …
>
> 1.7 Staff members shall also promptly:
>
> (a) Inform the supervisor of absence due to illness or emergency;
>
> (b) Sign and return to the time and attendance assistant every annual leave or sick leave form;
>
> (c) Complete, sign and return to the time and attendance assistant the annual record of attendance prepared in accordance with section 1.5.

attendance assistant and, if necessary, to the attention of the supervisor.

15. Staff rule 101.2, dated 1 January 2003, states:

> **Rule 101.2**
>
> **Basic rights and obligations of staff**
>
> **General**
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> …
>
> (b) Staff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors.
>
> …
>
> (g) Staff members shall not intentionally alter, destroy, misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization.

16. ST/SGB/2002/1 (Amendment to the 100 Series of the Staff Rules (ST/SGB/2002/1) dated 1 January 2002 states in relevant parts:

> Rule 110.3
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> Disciplinary measures
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> (a) Disciplinary measures may take one or more of the following forms:
>
> (i) Written censure by the Secretary-General;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for within-grade increment;
>
> (iv) Suspension without pay;
>
> (v) Fine;
>
> (vi) Demotion;
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> (vii) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;
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> (viii) Summary dismissal.

17. ST/SGB/2006/1 (Amendments to the 100 Series of the Staff Rules (ST/SGB/2002/1)) dated 1 January 2006 states in relevant parts:

> **Rule 110.3**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms:
>
> (i) Written censure by the Secretary-General;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for within-grade increment;
>
> (iv) Suspension without pay;
>
> (v) Fine;
>
> (vi) Demotion;

18. Staff Rule 10.2 dated 1 January 2011, state:

> **Rule 10.2**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
>
> (i) Written censure;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for salary increment;
>
> (iv) Suspension without pay for a specified period;
>
> (v) Fine;

19. Staff regulation 1.2, dated 1 January 2008, states:

> **Regulation 1.2**
>
> **Basic rights and obligations of staff**
>
> **Core values**
>
> …
>
> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;
>
> …

Scope of the review

20. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

21. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnity.

22. The International Labor Or

> termination having regard to the evidence provided by the parties and according to procedures … and practice.

23. Similarly to the principle of the burden of proof in disciplinary cases in the ILO Convention No. C158, the Tribunal, in *Hallal* UNDT/2011/046, held that:

> 30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

24. In the present case, the Applicant is not contesting the regularity of the procedure. In light of the uncontested nature of the facts, the Tribunal will analyze whether, as determined by the Respondent, these facts constituted misconduct. The existence of misconduct is determined by the following cumulative conditions:

a. The *objective element* which consists of either:

i. an illegal act (when the staff member takes an action which violates a negative obligation);

ii. an omission (when the staff member fails to take a positive action); or

iii. mixture of both which negatively affects other staff members, including the working relationships and/or the order and discipline in the workplace.

b. The *subjective element* which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence.

c. The *causal link* between the illegal act/omission and the harmful result.

d. The *negative effect* on labour relations, order and discipline in the workplace.

to work on Sunday, 5 October 2008, as scheduled on the leave form request. Upon his return the Applicant submitted another fo

35. Regarding the prejudice suffered by the Organization, SIU's investigation report mentions that on the basis of the false information provided in his annual leave report the Applicant received compensation, such as hazard duty pay to which he was not entitled. However, the monies were already recovered by the time the investigation report was issued on 18 May 2009.

36. The Tribunal notes that in accordance with the Guide to mobility and hardship arrangements, hazard pay is a special allowance established for staff members that are required to work under hazardous conditions. Hazard pay is authorized for a limited period, normally up to three months at a time, subject to ongoing review and is lifted when hazardous conditions are deemed to have abated. For internationally recruited staff members the amount is calculated per month. It results from the above that this payment was not made exclusively based on the annual leave report, even if by mistake two days from the Applicant's absence were included in his monthly payment. The monies were recovered and there was no actual prejudice to the Organization. As the Tribunal stated above, the Applicant's leave request form did not contain false information and cannot be considered the source of the material prejudice referred to in SIU's investigation report.

37. The Tribunal concludes that, as results from the evidence, with the exception of the charge that the Applicant "provided false information on [his] annual leave [report]", the Respondent correctly determined the objective and subjective elements of the remaining charges underlying the misconduct.

Proportionality of the sanction

38. The decision as to whether to impose a disciplinary measure falls within the discretion of the Organization and, in the present case, the sanction applied to the Applicant was separation from service with compensation in lieu of notice and with termination indemnities.

39. The Tribunal will review whether the actual disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnities imposed on the Applicant was proportionate.

40. The Tribunal considers that an employee's disciplinary liability has a contractual nature. It consists of a constraint applied by the employer, mainly physical or moral, and exercises both sanctioning and preventive (educational) functions.

41. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

42. The individualization of a sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

43. Staff rule 10.3(b) states that one of the rights afforded to staff members during the disciplinary process is that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

44. The Tribunal considers that the rule reflects not only the staff member's right to a proportionate sanction, but also the criteria used for the individualization of the sanction. Further, the nature of the sanction is related to the finding of conduct which is in breach of the applicable rules.

45. The "gravity of misconduct" is related to the subjective element of

50. The consequences of the misconduct, previous behaviour, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can dire

has to determine the relevance of any circumstances which may have been ignored previously.

54. The Tribunal will therefore review whether the sanction applied in the present case is consistent with those applied in similarly situated cases by the Secretary-General based on the Secretary-General's 2010–2012 reports on disciplinary cases.

55.

39. A staff member cheated on a written test administered by the Organization by submitting the model answers prepared by others for the test.

Disposition: demotion by one grade with deferment, for a period of three years, of eligibility fo

Aggravating circumstances

60. The Applicant, a Civil Affairs Officer at the P-4 level, step 4, admitted that he intentionally used a test stamp dated 2 October 2008 and cut and pasted it over the copy of page 26 of his UNLP, which reflected the accurate date of his return to Afghanistan, so as to create the impression that the test stamp was in fact the genuine stamp. The forged copy of his UNLP was then submitted by him to the Personnel Section together with his annual leave report which indicated the same date of return.

61. Two weeks later, the Applicant had to resubmit his annual leave report signed by his supervisor. He did not use this opportunity to correct the erroneous date that he previously reported.

Mitigating circumstances

62. The Applicant joined the United Nations in 1992 as a military observer in Cambodia. He worked in six United Nations peacekeeping missions before joining his latest assignment with UNAMA. The Applicant was a devoted staff member until he was separated from service in January 2011, just a day prior to his official travel to his next assignment with MINUSTAH.

63. The Applicant was never investigated prior to or after December 2008 and no administrative or disciplinary sanctions were previously imposed on him. The Applicant was sincere, cooperated with the investigators, recognized and explained the circumstances surrounding his behavior, and expressed his sincere regrets for what happened.

64. As part of the comments he provided in response to the SIU's investigation report, the Applicant explained that on 1 October 2008, as soon the trip to Turkmenistan with his colleagues had started, he decided to visit Uzbekistan under the belief that he had enough time to complete this trip. On his way back to Afghanistan, due to unexpected operating hours at the Uzbek and Turkmen border, the Applicant was unable to cross the border until 3 October 2008, resulting in his

arrival from Turkmenistan to Afghanistan being delayed by a day until 4 October 2008 instead of 3 October 2008.

65. Upon his return to work on 5 October 2008 the Applicant was, for the first time, the Officer-in-Charge. Without knowing that he could not submit and approve his own annual leave report, he prepared the report and the related documents for the following day, including a copy of page 26 of his UNLP which indicated 2 October 2008 as his date of re-entry. The Applicant admitted that he made errors and exercised poor judgment as a result of the stressful context in which UNAMA operated. The Applicant further expressed that he truly believed that he would have lost his right to a planned leave to visit his family in November 2008 as a result of his delayed return. He also explained that the trip took place across an official United Nations holiday and weekend, resulting in him not using any actual days of annual leave.

66. With respect to the hazard pay, the Applicant stated that he never intended to benefit financially from his action. He recognized that the above factors affected his judgment and he acted in haste and without seeking guidance. He regretted his actions which were his first and only offence. He further stated that he would not knowingly engage in a similar conduct in the future and he requested that the mitigating factors be taken into consideration.

67. During his testimony before the Tribunal, the Applicant stated that UNAMA was his longest, toughest and most challenging assignment yet. He explained that in

and is not allowed if the staff member did not previously complete a cycle of eight weeks at the mission.

68. Regarding the objective element of misconduct, while the disciplinary sanction was applied for certain elements of misconduct, it was decided by the Tribunal that the Applicant did not commit the misconduct of providing false information on his annual leave report.

69. The Tribunal notes that the Applicant

79.

82. A disciplinary sanction must not only be proportional with the gravity of the misconduct, it must also be applied within a reasonable period of time (which is usually appreciated in connection with the complexity of the case) in order to achieve its purpose: to promptly punish the guilty staff member and also to prevent him and/or other staff members from committing similar offences in future.

83. Consequently, the Tribunal finds that the contested decision is unlawful and that the sanction applied to the Applicant—separation from service with compensation in lieu of notice and with termination indemnities—is too harsh and manifestly disproportionate when compared to the gravity of the misconduct, especially considering that, as found by the Tribunal, the Applicant did not commit misconduct with regard to the filing of his leave request form and annual leave report. In reaching this conclusion the Tribunal analyzed the sanctions applied by the Secretary-General in cases comparable to that of the Applicant's. For example,

Relief

86. Under art. 10.5 of the Dispute Tribunal's Statute, when the Tribunal considers an appeal against a disciplinary decision, it may:

a. Confirm the decision;

b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or

c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation (*Abu Hamda* 2010-UNAT-022). In this case the Tribunal considers that it is not directly applying the sanction but is partially modifying the contested decision by replacing, according with the law, the applied sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct.

d. Set an amount of compensation in accordance with art. 10.5(b).

87. The Organization's failure to comply with all the requirements of a legal termination causes a prejudice to the staff member since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his reinstatement into service with compensation for the lost salaries (restitution *in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

88. A severe disciplinary sanction like a separation from service is a work-related event which generates a certain emotional distress. The above-mentioned legal remedy generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction.

89. When an applicant requests her/his reinstatement and compensation for moral damages s/he must bring evidence that the moral damages produced by the decision cannot be entirely covered by the rescission and reinstatement.

90. The Tribunal considers that in cases where the disciplinary sanction of separation from service or dismissal is replaced with a lower sanction and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision.

91. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages produced by the rescinded decision.

92. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. In accordance with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Further, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example if during the proceeding in front of the Tribunal the staff member reached the retirement age, is since deceased or her/his contract expired during the judicial proceedings.

93. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same

position s/he would have been had the Organization complied with its contractual obligations.

94. In the present case, the Applicant expressly requested his reinstatement as part of his appeal and the contested decision concerns a separation from service. In December 2010, the Applicant was appointed as a Civil Affairs Officer with MINUTAH for one year, starting 2 February 2011. It results that, had he not been separated from service, his contract with the Organization would have expired on 2 January 2012. The Dispute and the Appeals Tribunals have consistently held that a fixed-term contract does not carry any expectation of renewal. The Tribunal cannot therefore order the Applicant's reinstatement and the Applicant's request for reinstatement on an appropriate post is to be rejected. In light of the conclusions presented in this Judgment, parties may consider new opportunities for future collaboration.

95. The Tribunal concludes that the impugned decision is to be rescinded and the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnities is to be replaced with the sanction of a written censure plus a fine of one month's net base salary.

96. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated:

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

97. The Tribunal considers that in the present case the rescission of the contested decision and the imposition of a lesser sanction is *per se* a fair and sufficient remedy for the moral prejudice caused to him as a result of the disproportionality of the disciplinary measure imposed by the contested sanction. The Tribunal notes that the Applicant did not request an award of moral damages prior to the filing of his closing submissions. Such a relief, in the absence of substantive submissions by the parties, can therefore not be considered by the Tribunal and stands to be rejected.

98. The Respondent is to pay the Applicant a compensation for his loss of earnings (net base salary and entitlements) from 2 February 2011 until the expiration of his contract with MINUSTAH, minus the fine of one month's net base salary and the amount of termination indemnity already paid to the Applicant. The Tribunal considers that such compensation is appropriate seeing that, as results from the Applicant's statement during the oral hearing, he returned home on 2 February 2011, after having worked for nine years for the United Nations and had to resume his studies. The Applicant was only able to find new employment and resume his career in 2012.

Alternative to rescission

99. According to art. 10.5(a) of the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision, subject to art 10.5(b). The compensation that is to be awarded as an alternative to the rescission shall not normally exceed the equivalent of two years' net base salary, however, a higher compensation may be ordered by the Tribunal in exceptional cases.

100. In *Cohen* 2011-UNAT-131, the Appeals Tribunal recalled that in cases where the Dispute Tribunal rescinds an illegal decision to dismiss a staff member, the Administration "must both reinstate the staff member and pay compensation for loss of salaries and entitlements". The Appeals Tribunal further held that

> if, in lieu of execution of the judgment the Administration elects to pay compensation in addition to the compensation which the Tribunal ordered it to pay for the damage suffered by the Applicant, that election may, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of Article 10.5(b) of the Statute of the [Dispute Tribunal]. … [In such a situation], the option given to the Administration … to pay compensation in lieu of a specific [performance] … should not render ineffective the right … to an effective remedy.

101. As previously stated, the Tribunal considers that in cases where it decides to rescind a decision, the legal alternative of paying compensation afforded to the Respondent replaces the principal remedy of rescission with that of a payment.

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102. In light of the particular circumstances of the present case, namely that the Applicant worked for the Organization as a devoted staff member for nine years

the date of expiration of his contract with MINUSTAH (2 January 2012), minus the fine of one month's net base salary and the amount of termination indemnity already paid to the Applicant.

107. The present Judgment is to be included in the Applicant's official status file. The Respondent is to remove and replace references relating to the Applicant's previous sanction—separation from service with compensation in lieu of notice and with termination indemnity—by references to the lesser sanctions ordered in the present judgment.

108. In the event that the Respondent decides not to rescind the decision, he is ordered to compensate him in the amount of USD5,000, plus the compensation for loss of one year's net base salary and entitlements minus the deductions as indicated in paras. 98 and 106 above.

109. These amounts are to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Alessandra Greceanu

Dated this 5th day of June 2014

Entered in the Register on this 5th day of June 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York