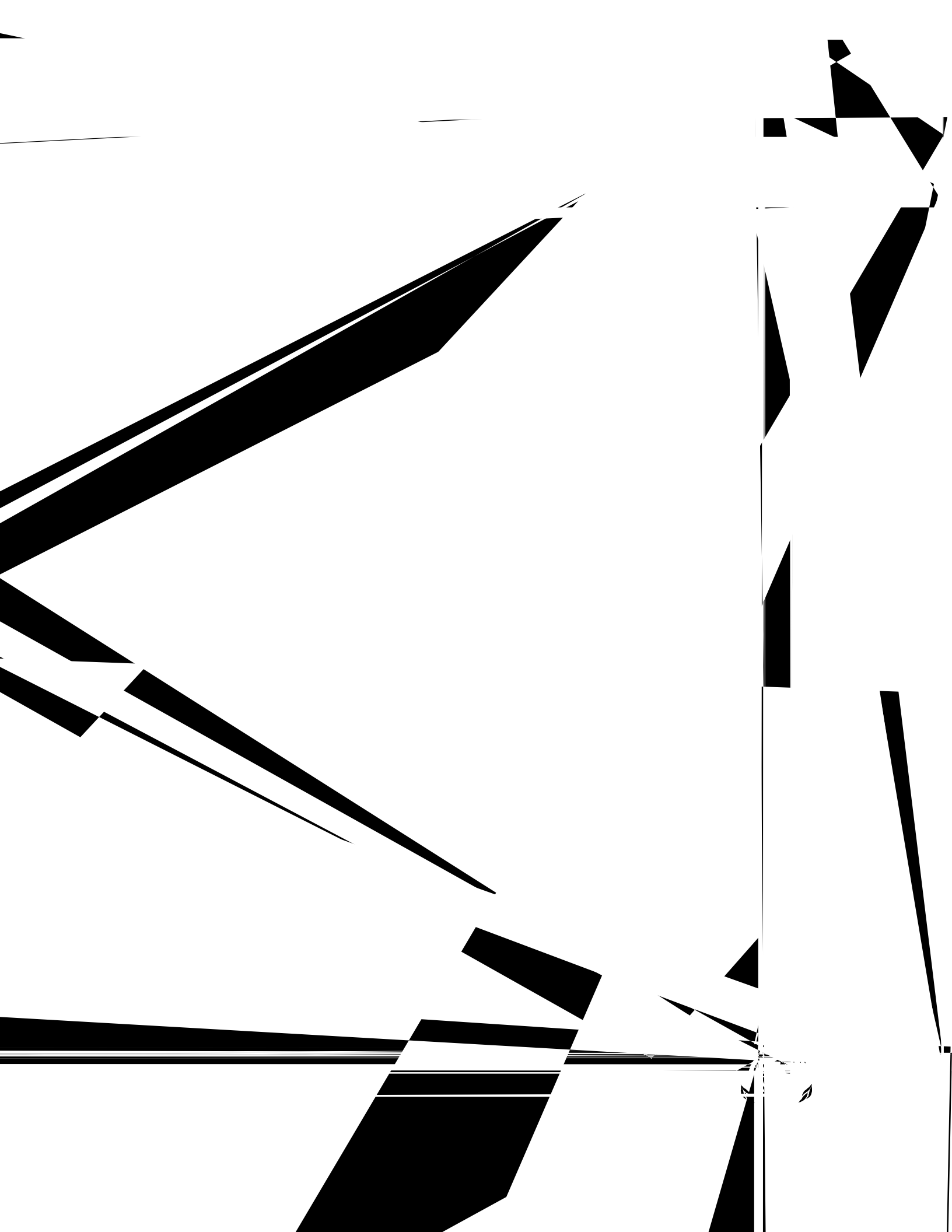

**Introduction and Procedural History**

1. On 12 March 2012, the Applicant, who serves as a Logistics Assistant at the FS-4 level with the United Nations Mission in the Republic of South Sudan (UNMISS), filed an Application before the Dispute Tribunal. The Applicant is challenging the Respondent's decision of 7 July 2009 rescinding his selection for, and offer of promotion to the FS-5 level after his reappointment to the then United Nations Mission in Sudan (UNMIS)[1] on 11 February 2008 at the FS-4 level (Contested Decision).

2. On 26 April 2012, the Respondent filed his Reply to the Application. The Respondent's principal submission is that the Application should be dismissed on grounds that it has been settled through mediation, and that the terms agreed have been implemented by the Administration.

3. The Applicant responded to the Respondent's submissions on 30 April 2013.

4. The Parties were invited to attend a directions hearing on 15 May 2013.

5. The Parties reiterated their respective positions on this Application.

6. The Applicant contends that his issues remain that canvassed in his Application: a) delay; b) breach of due process; c) legitimate expectation of promotion; d) deprivation of the right to compete for posts at the FS-6 level; and e) impact of the impugned decision on him.

7. On 22 May 2013, the Tribunal issued Order No. 122 (NBI/2013) directing the Parties "to consult and deliberate, in good faith, on having this matter informally resolved". The Tribunal also directed the Parties to report on the progress of their "joint deliberations" and/or to indicate if a formal referral to mediation is necessary.

8. On 1 July 2013, the Respondent filed submissions in response to Order No. 122 (NBI/2013). The Respondent informed the Tribunal that the matter could not be resolved informally between the Parties.

9. On 26 August 2013, the Tribunal issued Order No. 190 (NBI/2013) formally referring the matter to the Mediation Division, and directed the Division to advise the Tribunal if the matter is amenable to being mediated.

10. On 13 September 2013, the Tribunal received a letter from Mr. Marc Vaucher

22. On 23 June 2009, the Applicant received a memo entitled "Reassignment Letter" from the UNMIS CCPO's Office.[9]

23. In the midst of these instructions and movements, the Applicant continued to request updates as to his movement to the FS-5 level. No update was forthcoming.

24. On 7 July 2009, Human Resources in UNMIS wrote to the Applicant[10]:

> Reference is made to your selection and movement to higher level (MTHL) as Administrative Assistant, FS-5 with UNMISS, effective 12 February 2008.
>
> We regret to inform you that the Field Personnel Division, New York has decided not to proceed with your movement to higher level.
>
> In the meantime, please be advised that FPD approved the granting of the special post allowance (SPA) to the FS-5 level from 12

26. On 30 July 2009, the Applicant wrote to the UNMIS CCPO asking for the rationale behind the Field Personnel Division's (FPD) decision not to proceed with his promotion to FS-5.[12]

41. On 16 November 2010, the Applicant wrote to the Management Evaluation Unit (MEU).[14]

42. On 30 December 2010, the Applicant received an email from MEU informing him that there had been discussions with the Department of Field Support (DFS) on whether an informal resolution of this dispute would be appropriate, and seeking the Applicant's views on whether he would be amenable towards an extension of the management evaluation deadline.[15]

43. On 22 January 2011, the Applicant received another email from MEU outlining the different options for an informal settlement of the dispute.[16]

44. On 24 January 2011, the Applicant responded to MEU indicating his readiness for the matter to be resolved informally. The Applicant also "warned MEU" of UNMIS' incapacity to respond to staff members in a timely manner.[17]

45. On 2 February 2011, MEU wrote to the UNMIS CCPO:

> Dear Mr. Ojjerro,
>
> With regard to the subject case, as we understand UNMIS has undertaken to search for an FS-5 level post for [the Applicant]. DFS has also advised us as well that it has requested an SPA panel be set up to look into the possibility of an SPA as from 1 June 2009 when apparently [the Applicant] took up other FS-5 functions as Logistics Assistant until whenever he actually stopped performing FS-5 functions [the Applicant] has advised that he has been functioning at the FS-5 level continuously since June 09).

> may need to be awarded if the case goes to management evaluation. In order to avoid this, since we understand the mission agreed in November 2010 to look for the FS-5 we'd propose a timeframe of no more than two weeks to try to identify the post and, if found, to finalize the designation, or at least to commence the process to finalize. We would be grateful if you could confirm this or, in the alternate, advise as to what you believe would be a reasonable time frame.
>
> In addition, we'd be grateful if you could advise as to when the SPA panel will meet to look into that matter. Also, we'd appreciate if you could advise as to a focal person with whom we can consult in the future on this case.
>
> Please don't hesitate to contact me with any questions you may have. Kind regards,
> Marco

46. On 14 April 2011, the Applicant wrote to MEU expressing his frustration with the delays in this case and seeking a management evaluation decision.[18]

47. On 9 May 2011, the Applicant wrote to MEU once again. MEU was at this time still waiting for a response from UNMIS.[19]

48. On 10 May 2011, the Applicant, feeling that he needed "neutral and impartial support/opinion" sought the assistance of the Office of Staff Legal Assistance (OSLA).

49. On 11 May 2011, OSLnt"uqTJ ET g 0.99ET Q q B99ET Q q B99 0 0 043ET Q q

51. On 30 August 2011, the Applicant received an email from MEU attaching an Annex "Release Form" outlining details of the informal resolution settlement.

52. On 13 September 2011, the Applicant wrote to OSLA seeking clarification on some of the issues in the Release Form.

53. On 13 September 2011, the Applicant wrote to OSLA

Dear Esther

55. On 15 September 2011, the Applicant signed the document and it was forwarded to MEU by OSLA on the same day.[22]

56. On 15 December 2011, following numerous requests for updates from UNMISS, including through MEU and OSLA, the Applicant sought the assistance of the Field Staff Union to expedite the implementation of the settlement agreement.

57. On the same day, the Applicant wrote to the UNMISS Ombudsperson apprising her of the latest developments with his case and seeking her assistance in having the settlement agreement implemented.

58. On 5 December 2011, the Applicant received an email from

62. On 16 February 2012, in response to a query by MEU as to whether the Applicant's supervisors thought he was functioning at the FS-5 level, the Applicant responded *via* OSLA:

> Esther,
>
> For them, I was interviewed, for an FS5, was told to apply for the FS5 post after the interview, was selected for FS5, and therefore performed and still continue to perform at FS-5 level. But, maybe the best would be if Marco gets this information through UNMISS HR. They can ask my supervisors.
>
> I would like to talk to you, but don't know if you are in or out of the office. It has been four years now, and it is about time to close this case, and move on.

63. On 22 February 2012, the Applicant instructed OSLA to formally inform MEU that he had withdrawn from the MEU informal resolution process "as no UN Office has formally informed/confirmed that the informal resolution settlement on [his] case has been implemented". The Applicant was therefore looking forward to receiving a management evaluation decision in two weeks.[24]

64. As at 13 March 2012, the Applicant had not received a management evaluation decision and so filed the present Application with the UNDT.

**SUBMISSIONS**

***The Applicant***

65. UNMIS created a reasonable and legitimate expectation that he would be promoted to the FS-5 level. This was the only reason the Applicant left the Mission in Burundi.

66. The administrative errors being claimed by the Respondent, was through no fault of the Applicant. He followed the instructions given to him at all stages of the

[24] Applicant's Annex 25.

recruitment process. The actions of the Respondent, especially given the time that passed between the various stages of the process and the silence meted out to him in the face of all of his and his supervisors' queries, was a clear breach of his due process rights.

67. The Applicant's career progression was affected. He was deprived of the opportunity to apply for posts at the FS-6 level given the limbo he was placed in by the Mission.

68. During the course of four years of service with UNMIS, the Applicant served in four different locations and was also temporarily deployed to two additional sites where logistic support was required. The Applicant acted in good faith and performed his function to the best of his abilities throughout this period, despite the stress of the uncertainty.

69. FPD received the interview and selection documents, twenty-five months after the Applicant was interviewed. It is possible, therefore, that new staff selection rules were applied retroactively. The delays in the process were excessive and inordinate.

70. The Applicant seeks compensation in the amount of twenty-four months net base salary for the delays in the process and breach of his due process rights; five months net base salary for loss of opportunity and five months net base salary for emotional distress.

***The Respondent***

71. The Dispute Tribunal is required to satisfy itself that the Application is receivable under article 8 of its Statute which provides that an Application shall not be receivable if the dispute arising from the contested administrative decision has been resolved by an agreement reached through mediation.[25]

resolution. This is supported by staff rule 11.1(b), which clearly envisages that disputes may be resolved informally by other means than mediation. In the same vein, General Assembly resolutions have affirmed that informal resolution of conflict is a crucial element of the system of administration of justice. A broad and purposeful application of article 8.2 of the Statute is necessary to ensure that informal dispute resolution can play a critical part in the system of administration of justice. The Administration's interest in resolving disputes informally would be set back significantly if all agreements reached as a result of informal resolution did not serve to bar formal litigation of the same dispute.

72.

## DELIBERATIONS

### The Issues

79. The Tribunal will begin by discussing the manner in which this matter was handled by the Mediation Division after the matter was referred to it by the Tribunal.

80. The three issues that the Tribunal will then consider are:

i) the confidentiality of the Release Agreement for the purposes of the present proceedings;

ii) whether the matter is receivable;

84. The Tribunal is in fact even left wondering if the Parties were in fact contacted; and if they were what they could have told the mediator that would have led him to conclude that there was "no matter".

85. That answer suggests that no serious attempt was made by the Mediation Division to bring the Parties together with a view to having this matter resolved.

86. The General Assembly has consistently pressed for a revamping and strengthening of the informal dispute resolution process. The Tribunal will quote the latest call of the General Assembly in support of the informal system. At its 67th session held in December 2013 the General Assembly resolved as follows[30]:

> Informal system
>
> 21. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;
>
> 22. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, and in this regard requests the Secretary-General to recommend to the General Assembly at its sixty-eighth session additional measures to encourage recourse to informal resolution of disputes and to avoid unnecessary litigation;
>
> 23. Encourages the Secretary-General to ensure that management responds to requests of the Office of the United Nations Ombudsman and Mediation Services in a timely manner;
>
> 24. Stresses the importance of developing a culture of dialogue and amicable resolution of disputes through the informal system, and requests the Secretary-General to propose, at the main part of the sixty-eighth session of the General Assembly, measures to encourage informal dispute resolution.

[30] General Assembly Resolution A/RES/67/241 [on the report of the Fifth Committee (A/67/669)]

87. The Tribunal recalls that there was an attempt to reach a settlement in this case but it broke down. The Tribunal's attempt at having this matter resolved by a mediator met with such disinterest that it has had to result in litigation.

88. It is obvious that meaningful consultations towards the resolution of a dispute, when deliberated on in good faith, would serve the interest of management and the staff member. It would engender a collegial work environment and remove the antagonism and friction that usually results from workplace disputes. Treating litigation as the absolute last resort allows for the efficient use of the Tribunal's (tight) resources and for proceedings to be conducted expeditiously.

89. The Mediation Division would be well advised to be minded of its role within the internal justice mechanism and the bigger picture that is the interests of the Organization.

90. A copy of this Judgment should be brought to the attention of the Ombudsman and the Mediation Division.

**Confidentiality**

91. The Respondent raises the issue of the confidentiality of an informal agreement the contents of which should not be disclosed to the Tribunal. Both Parties have referred to it in their respective pleadings.

92. The Applicant refers to the agreement to substantiate his assertion that the terms were not implemented timely. The Respondent refers to it to substantiate his claim that the matter is not receivable.

93. Can the reference to the Release Agreement by both Parties amount to a waiver of the confidentiality rule on agreements laid down in article 15.7 of the Rules of Procedure. Should the rule embodied in section 15.7 be considered absolute?

94. The basis for confidentiality of a settlement agreement is to create the space for free and meaningful negotiations so that parties need not fear that what they say or write can later be brought to the court's attention and thereby cause prejudice in their proceedings.

95. Any statement made, discussed or recorded in the course of a settlement process are without prejudice and cannot be used by either party in support of his/her case. To that extent the agreement cannot and should not be acted upon by the court. Without prejudice discussions and communications cannot therefore be used as evidence in legal proceedings.

96. Article 15.7 places the Tribunal in an invidious situation when faced with the issue of receivability of a claim following a purported or implemented agreement. If the agreement is implemented and the Respondent takes the point to submit that the matter is not receivable should not the Tribunal be made aware at least of some evidence that this is so in order to determine the issue? If the parties are unwilling to release some evidence to the Tribunal that does not mean that the Tribunal should accept such refusal. The Tribunal may by virtue of the powers granted to it by articles 19 and 36 of the UNDT Rules of Procedure make an appropriate order to have the required information. In the present case the issue does not arise as both parties have provided the information either deliberately or unwittingly. The Tribunal will therefore use this information solely for the purpose of determining whether the matter is receivable and whether there was in fact an agreement and whether it was implemented so as to make the present application moot.

**Receivability**

97. The Release Agreement was signed on 15 September 2011, more than three years following the withdrawal of the FS-5 offer/position and after the Applicant had sent several letters to the Administration.

98. The issue on which the Applicant signed the release was the same one for which he requested a management evaluation. The request to the Management Evaluation Unit was for "FPD to approve [his] MTHL case effective 12 February 2008, [his] EOD UNMIS".

99. The Release was subject to two substantive conditions: (i) that the Applicant be granted an exception to apply for an FS-6 position while encumbering an FS-4 position; and (ii) that a panel be established within 60 days from 15 September 2011 to review his eligibility for an SPA as from June 2008.

100. As at 22 February 2012, none of the conditions of the Release had been implemented and the Applicant chose to withdraw from the Release Agreement and pursue the matter with MEU.

101. On 27 February 2012, the Applicant received a letter dated 23 February 2012 informing him that the terms of the Release Agreement are being implemented.

102. Once it became obvious to the Applicant that the terms of the Release Agreement had not been implemented, he had no choice but to pursue the matter further with MEU before filing a case with the Tribunal.

103. There is no issue of receivability. The Agreement was not implemented within the stipulated 60 days, as a result of which there cannot be said to have been an 'agreement.' A release agreement is valid if the terms within it are implemented *as agreed between the parties*, within the deadlines stipulated therein or in the absence of a deadline within a reasonable time thereafter or within a time frame agreed by the parties if the original deadline(s) cannot be met.

104. The Respondent never came forward with a plausible explanation or justification as to why it took so long to implement or to start implementation of the terms of the Agreement. Bad faith on the part of the Respondent may be inferred from this unexplained procrastination. A litigant or an aggrieved individual who is in

the process of vindicating his/her rights cannot by the mere signing of an agreement or settlement be deemed to have waived his/her right to access the internal justice system if the agreement he signed *with the Respondent* is not implemented or is reneged upon. He/she cannot be considered to have waived all rights to pursue a remedy judicially by the mere refusal or laches of the Administration to move forward.

105. It is the considered view of the Tribunal that in the absence of any timely and concrete acts of implementation of the terms of the Agreement, there was in fact no agreement that the Applicant be properly be held to.

106. The Respondent cannot, in the face of his own dilatory conduct, hold the Applicant to the terms of an agreement which he himself violated.

107. The Application is therefore held to be receivabl11(i)17(02e)3( )-34aNF1 12 Tf 0 0 0 rg 0.9981 0

[T]he legal act by which the Organization legally undertakes to

dated 22 February 2012. It was only then that he received on 27 February 2012, correspondence dated 23 February 2012 informing him that the agreement will be or was in the process of being implemented.

115. In the absence of any reasonable explanation for the inordinately long delay and breach of the Release Agreement, the Tribunal concludes that this state of affairs