



Introduction

1. The Applicant, a former staff member of the Organization, filed three applications with the United Nations Dispute Tribunal (the Tribunal) in Nairobi.

2. In his first application filed on 16 May 2015 (Case No. UNDT/NBI/2015/058), the Applicant contests four decisions, namely:

(a) the decision of the Under-Secretary-General for Field Support (USG/DFS) to close his complaint, filed on 14 April 2013 under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the then Deputy Joint Special Representative/Political (DJSR (P) of the African Union-United Nations Hybrid Operation in Darfur (UNAMID);

(b) the decision of the USG/DFS of 16 December 2014 not to provide the Applicant with a copy of the investigation report into his ST/SGB/2008/5 complaint against the DJSR (P);

(c) the decision of the Office of Human Resources Management (OHRM) to proceed with the disciplinary case against the Applicant that resulted in his separation; and

(d) the decision to treat the case of physical assault by the Applicant against another staff member Mr. A who was at the time the Head of Office of the Joint Special Representative (HoO/JSR) in UNAMID separately from his complaint under ST/SGB/2008/5.

3. In another application filed on 8 June 2015 (Case no. UNDT/NBI/2015/062), the Applicant contests the decision to abolish the P-5 post of Humanitarian Affairs Officer in UNAMID effective 1 April 2015.

4. In his third application filed on 16 July 2015 (Case no. UNDT/NBI/2015/078), the Applicant contests the decision of the Under-

Secretary-General for Management (USG/DM) to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

The proceedings

5. By Order No. 275 (NBI/2015) dated 8 September 2015, the Tribunal ordered the Applicant to file his submissions on the issue of receivability in relation to his application registered under Case No. UNDT/NBI/2015/062. On 30 September 2015, the Applicant filed the submissions.

6. On 9 October 2015, the Applicant filed a motion requesting additional documents and information from the Respondent in relation to Case Nos. UNDT/NBI/2015/058 and UNDT/NBI/2015/078.

7. On 19 October 2015, the Tribunal held a case management discussion.

8. By Order No. 334 (NBI/2015) dated 21 October 2015, the Tribunal decided to consolidate the three applications as they raised related and similar issues and relied on the same facts.

9. On 31 December 2015, the Applicant filed another motion requesting additional documents from the Respondent.

10. The Tribunal heard the consolidated application on 16 and 17 February 2016. During the hearing, testimony was provided by the Applicant and Mr. A as to the events of 24 April 2013 and the surrounding circumstances. The Tribunal ordered the parties to submit their closing statements by 18 April 2016.

11. On 29 March 2016, the Applicant filed a document entitled “leave to present evidence and cross-examine the main witness”.

12. On 1 April 2016, the Respondent filed his closing statement and a response to the Applicant’s 29 March 2016 motion.

family visit leave request. The phone conversation was not friendly and each of them claimed that the other used abusive and threatening language.³

20. Shortly after the phone call, Mr. A sent the Applicant an email copying the DJSR (P) and the JSR, noting the telephone call and stating, *inter alia*, “that the language used during [the] call... [was] unacceptable and [the Applicant’s] threats [were] unwelcome.” Mr. A explained that, in his capacity as HoO/JSR, he reviewed documents that were submitted to the JSR in order “to ensure that the JSR [did] not sign wrong and incomplete documents or those he [did] not need to.” Mr. A stated that, in this capacity, he had the Applicant’s request sent back to him for submission to the DJSR (P) as his first reporting officer.

21. Barely one hour after the email was sent, at approximately 18:30hrs, the Applicant was involved in a physical incident with Mr. A. According to the investigation report, “While Mr. A was talking to a colleague ... at the UNAMID MHQ Buildings, the Applicant ... came out of the main gate and approached them. The Applicant was angry and asked Mr. A to give him his papers (family leave request). Mr. A responded that he did not have them. The Applicant became angrier and started shouting at Mr. A to give him his papers ... Mr. A insisted saying that he did not have the family leave request”.

22. The investigation report states that the incident escalated when the Applicant “used both hands to hold Mr. A. He then grabbed Mr. A’s upper left arm with his right hand and pushed him towards block 1. The Applicant became more aggressive; using his left hand to strangle Mr. A’s neck while punching Mr. A’s face with his right hand. Mr. A did not resist and did not fight back”⁴.

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(erythematous superficial impression mark) on the right side of the neck ... and two on the left side of the neck ...” He also had “one haematoma with superficial abrasion at the middle third of the inner aspect of his left arm ...”⁵.

24. On 26 April 2013, Mr. A. officially reported to the UNAMID Special Investigations Unit (SIU) that he was

humanitarian assistance and the safety and security of humanitarian personnel. The Security Council requested UNAMID to focus and streamline its activities to achieve progress on its strategic priorities⁸.

29. By memorandum dated 17 April 2014, the Department of Field Support (DFS) referred the SIU investigation report to OHRM for disciplinary action. In the referral memorandum, DFS noted the Applicant's harassment complaint against the DJSR (P) and stated that it was of the view that the two matters were not related and that each complaint should be addressed separately.

30. Following several communications with the Applicant, in May 2014 OHRM decided to wait to proceed with the 17 April 2014 referral until the conclusion of an investigation into the Applicant's complaint against the DJSR (P). On 18 June 2014, a fact-finding panel was established to investigate the Applicant's complaint against the DJSR (P).

31. In August 2014, a team from Headquarters (UNHQ) visited UNAMID to review its substantive sections. In its report dated 8 October 2014, the UNHQ team recommended, *inter alia*, the establishment of the Protection of Civilians Section (POC Section). The UNHQ team also recommended that the POC Section be headed by a D-1 officer to maintain the high-level advisory role of this Section within the Mission, and to be at a sufficiently senior level to interact with the UN Country Team (UNCT). It further recommended the abolition of the P-5 post (the Applicant's post)⁹.

32. As from 12 September 2014, the Applicant was temporarily assigned to the P-5 position of Senior Humanitarian Officer with OCHA in Geneva.

33. On 3 November 2014, the Secretary-General's proposed budget for UNAMID for 2014-2015 was published. The Secretary-General proposed to abolish the Humanitarian and Recovery Assistance Liaison (HRAL) Unit and

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allegations against him within two weeks of receiving this memorandum. This deadline was later extended to 30 March 2015.

44. By several communications to OHRM¹⁵, the Applicant repeatedly stated that there was a “link” between his complaint against the DJSR (P) and the allegations of misconduct against him and requested that OHRM revisit its decision to proceed with the disciplinary case against him. In reply to the Applicant’s requests, OHRM noted that while the factual background of the two matters may overlap, each matter needed to be considered on its own merits and reiterated its position that the Applicant’s complaint against the DJSR (P) was a separate matter from the disciplinary process against the Applicant.

45. The Applicant did not submit any comments regarding the 18 February 2015 memorandum in which allegations of misconduct were made against him.

46. On 23 March 2015, the Applicant requested management evaluation of, *inter alia*, the decision to abolish his post (P-5 Humanitarian Affairs Officer) effective 1 April 2015.

47. On 30 March 2015, the USG/DM replied to the Applicant’s request for management evaluation of 12 January 2015. The MEU considered that the Applicant’s request was limited to contesting the decision “not to provide [him] with a copy of the panel report”. The MEU further noted that “the decision by the USG/DFS to close the [Applicant’s] case was outside the scope of [his] request and thus outside the scope of the MEU’s review”. The contested decision was upheld.

48. By letter dated 28 April 2015, the USG/DM replied to the Applicant’s request for management evaluation dated 23 March 2015. In his reply, the USG/DM was of the view that the abolition of the Applicant’s post did not constitute a reviewable administrative decision and that the Applicant’s request in that respect was therefore not receivable.

¹⁵ Email exchanges between the Applicant and OHRM and between OHRM and the Applicant’s counsel during the period from 4 to 12 March 2015.

49. On 16 May 2015, the Applicant filed an application contesting four administrative decisions as enumerated in paragraph 2 above. The application was registered as Case no. UNDT/NBI/2015/058.

50. By letter dated 26 May 2015, the Applicant was informed of the decision of the USG/DM, on behalf of the Secretary-General, to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The disciplinary measure was imposed on the Applicant for having physically assaulted Mr. A, the then HoO/JSR,

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service with compensation in lieu of notice and with termination indemnity. The application was registered as Case no. UNDT/NBI/2015/078.

57. On 6 August 2015, the Respondent filed his reply to the application registered under Case no. UNDT/NBI/2015/078.

Preliminary issues

58. Two requests to produce documents were made variously on behalf of the Applicant on 9 October 2015 and 31 December 2015. The request of 9 October 2015 was for ten documents while that of 31 December 2015 was for seven documents. The Tribunal perused the said requests and refused to make the orders as requested because the requests were irrelevant to the consolidated case, confused, vague, ambiguous and generally vexatious.

59. Production of documents is governed by art. 18 of the Tribunal's Rules of Procedure which provides as follows:

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who is ordered to produce to determine what is to be produced. The request must also not be so broad as to render their production valueless. The request must be both reasonable and logical.

62. In its perusal of the motions for production of documents filed on behalf of the Applicant on 9 October 2015, it was clear to the Tribunal that the request to produce UNAMID SIU preliminary investigation report of 28 April 2013 was complied with by the Respondent as records show that the Applicant had access to the said report and had actually filed it as part of his records before the Tribunal and had referred to it in closing submissions.

63. Also, requested for is a code cable whose date is unknown by which a decision is alleged to have been conveyed to New York. Another confused request for a memorandum between the Chief of UNAMID/CDU and the JSR about the Applicant's complaint against the DJSR (P) was made. None of the three cases making up the Applicant's consolidated application is based on these documents, therefore even if produced, they are not relevant to the consolidated case.

64. Other documents requested include memorandum of 17 April 2014 from the ASG/DFS to the ASG/OHRM; all communications between the DFS and OIOS and between Mr. A and OIOS and/or DFS relating to the Applicant's case. Also sought were all communications, minutes and a fact-finding report in respect of the panel that investigated the Applicant's complaint against the JSR and the minutes and recording of a videoconference whose date is unknown concerning a complaint against Mr. A by the Applicant. Not only are the documents sought not properly specified, confused and unwieldy, they are irrelevant to the Applicant's consolidated case.

65. The Applicant also requested that the authority by which the USG/DFS initiated the investigation into misconduct allegations against him be produced. It must be noted that if the Applicant's case is that an unauthorized official had exercised authority concerning him; it is properly a matter of law for which he could make relevant arguments and submissions to the Tribunal. It is vexatious

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against the Applicant. Mr. A was the DJSR (P)'s "major accomplice" in perpetrating the abuse of authority and harassment against the Applicant.

73. ST/SGB/2008/5 and ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) were not properly applied and their

in his separation (the third appeal claim). This matter arose two months after the Applicant had submitted his request for management evaluation in January 2015.

78. The Applicant was informed of the decision to treat the Applicant's complaint against the DJSR (P) separately from Mr. A's complaint against the Applicant (the fourth appeal claim) on 10 January 2014. No request for management evaluation of this alleged decision was submitted by the Applicant within the applicable time limit. The request for management evaluation dated 12 January 2015 was filed almost a year after this decision had been made.

79. The appeal of the third and fourth appeal claims are also not receivable because they do not constitute administrative decisions but were steps in a larger process, namely, the decision to impose a disciplinary measure, and should, therefore, be dismissed.

80. In the light of the Respondent's submissions, the only decision that was the subject of a request for management evaluation in accordance with the applicable Staff Rules is the decision not to provide the Applicant with a copy of the investigation report (the second appeal claim).

Considerations

81. It is pertinent at this juncture to examine the matter of the receivability of the four claims brought by the Applicant in case no. UNDT/NBI/2015/058.

82. Article 2.6 of the Statute UND750.0 0.739(o)-t

83. In relation to the requirement of a timely request for management evaluation, the Tribunal is mindful of the provisions of staff rule 11.2, which provides as follows:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary General in writing a request for a management evaluation of the administrative decision (emphasis added)

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urged on the Tribunal that three out of the four decisions which the Applicant purports to challenge in that application were not submitted for management evaluation as required by the provisions of articles 8.1(c) and (i) of the Tribunal's Statute.

87. On a close inspection of the evidence, the Tribunal finds nothing on the records to show that the Applicant ever sought management evaluation of the decision of the USG/DFS to close his complaint under ST/SGB/2008/5 for harassment and abuse of authority against the then DJSR (P) of UNAMID. His failure to seek a management review of that decision renders an application based

88. With regards to OHRM's decision to subject the Applicant to a disciplinary process which led to his separation following the investigated complaint against him; while there is no record of recourse to management evaluation on the part of the Applicant, the Tribunal does not agree with the Respondent that a decision to start a disciplinary process against a staff member cannot be the subject of a management evaluation.

89. It is the view of the Tribunal that in appropriate cases, such as where no investigation was conducted, the Respondent's decision to start a disciplinary process can be the subject of a management review. In this case however, the Applicant's request, if any, was brought almost a year

Considerations

95. It is not disputed that the Respondent made available to the Applicant a summary of the outcome of investigations regarding his complaint of harassment against the DJSR (P) as provided for in Section 5.18(a) of ST/SGB/2008/5.

96. The Appeals Tribunal held in Ivanov 2015-UNAT-519 that “[s]ection 5.18(a) of ST/SGB/2008/5 clearly provides that if the findings of the report concluded that no prohibited conduct took place the case is closed. The responsible official is duty bound in such a case to inform the alleged offender and the aggrieved individual of the outcome by giving them a summary of the findings and conclusions of the investigation”. Such a summary was provided to the Applicant.

97. In Ivanov2015-UNAT-519, the Appeals Tribunal also found that once the investigation is closed there must be “exceptional circumstances” to communicate the report to the cotPage

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between the Applicant and the alleged victim of assault Mr. A. The argument was regarding some leave requests submitted by the Applicant to the JSR's office for approval. Shortly afterwards, Mr. A sent an email at exactly 5:57pm to the Applicant which he also copied to the JSR and the DJSR (P).

115. In that email, Mr. A complained about the language used by the Applicant which he felt was unprofessional and threats made by him. He also pointed out that the proper procedure was for the Applicant's leave request to be sent to his first reporting officer the DJSR (P) and not directly to the JSR.

116. The evidence shows that less than 45 minutes after that email was sent, at about 6:30-6:35pm, the Applicant and Mr. A met on the walk path leading up to one of the parking lots in the UNAMID office premises. What happened between them when they met on the walk path that evening will determine the success or failure of this application.

117. Miss Karanu, a UNAMID staff member who witnessed the incident that followed gave a statement to investigators. She stated that she was talking with Mr. A on the said walk path when the Applicant approached them and angrily demanded the return of his leave papers from Mr. A. He pointed at his watch and insisted he wanted the papers "now" but Mr. A responded that he did not have them.

118. When the witness realized that the encounter was not a friendly one, she stated that she excused herself and started to leave. As she walked away, she turned to watch what was happening between the two men. She observed the Applicant pushing Mr. A, who did not resist, towards the direction of block 1 where Mr. A's office was located while continuing to demand the return of his leave application. The Applicant then held Mr. A on the neck and arm and she shouted to the pair asking what was going on while Mr. A shouted to the security guards in the building for help.

119. Her witness statement was materially corroborated by that of Mr. Khalifa, a UNAMID security guard who was

investigators in his statement that he saw the Applicant pushing Mr. A in the direction of block 1 while demanding the return of his papers. He also stated that he saw the Applicant punch Mr. A causing his eyeglasses to fall and break and that Mr. A. who did not o

124. Mr. Ezekiel made a statement to the investigators. He stated that he came to the scene only after the incident upon receiving a phone call that two staff members were fighting. When he got there, he saw the Applicant, Mr. A, the security officer Mr. Khalifa and Ms. Karanu. The Applicant complained to him that Mr. A had refused to return his leave papers while Mr. A in turn complained that the Applicant tried to strangle him.

125. Although he did not witness the incident, he saw two red marks on Mr. A's neck. He was told by Mr. Khalifa that he and Ms. Karanu witnessed the incident. He then took Mr. A to the UNAMID medical clinic where he was examined and a medical report issued.

126. Mr. A, the alleged victim of the assault, testified that on the day of the incident, while he chatted with Ms. Karanu whom he met on the walk path that evening, he saw the Applicant come out from the door of Block 1 and walk

129. He testified further that Mr. Khalifa, a security officer at the entrance of Block 1, ran towards them and took the Applicant's hands off his neck. The witness said he had blood on his face and that other security officers also came to the scene and asked him to sit down and breathe. Another security officer, Mr. Ezekiel,

confrontation took place still at the scene seven minutes later? What or whom was he waiting for?

135. In closing submissions, the Applicant's new counsel submitted that the language used in their witness statements by three eye witnesses "suspiciously coincide, in some parts word by word." He submitted further that pictures tendered of Mr. A's injuries were unclear and that evidence was not provided as to who took the pictures or when and where they were taken.

136. He also submitted that the provisions of ST/AI/371 Amend.1 and those of ST/SGB/2008/5 were not properly followed. His confused argument was that the JSR/UNAMID who was the responsible officer to undertake the investigation into the case of assault against the Applicant sent the investigation report to DFS and that that office only sent the said report to the ASG/OHRM one year later. According to counsel, this was a procedural error sufficient to exculpate his client.

137. Also in his closing submissions, the Applicant's new counsel argued that Mr. A's written statement which was tendered before the Tribunal was not a written statement and its contents did not correspond to Mr. A's testimony during the hearing on 17 February 2016. Counsel could however not explain how he arrived at those conclusions.

138. The Applicant's new counsel submitted also that the Applicant's former counsel presented the Applicant's case poorly and shoddily and did not impress on the Applicant that not answering to the allegations of misconduct sent to him by OHRM on 18 February 2015 would damage his case.

139. It is unfortunate to argue that a senior international staff member, or any staff member for that matter, would need legal advice as to his responsibility to answer to allegations of misconduct against him which were presented to him by the office of the ASG/OHRM. The outlandish submissions by the Applicant's new counsel which clearly amount to clutching at straws in this case are as unhelpful to the Applicant's case as they are to the Tribunal.

140. The Tribunal finds that it has been clearly established that in the evening of 24 April 2013 at UNAMID premises:

(a) The Applicant had argued on the phone with Mr. A over the proper channels for the submission of his leave requests.

(b) Thereafter, Mr. A sent the Applicant an email complaining about his language and threats during the said telephone conversation. He copied the JSR and DJSR (P) on that email.

(c) Less than an hour after the email was sent, the Applicant saw Mr. A. chatting to Ms. Karanu outside block 1 on the common walk path leading to the different office blocks. The Applicant approached Mr. A angrily, and shouted at him demanding that he produce his leave request papers and then proceeded to push him in the direction of block 1 which housed the JSR's offices.

(d) The Applicant also punched Mr. A while pushing him and at some point, grabbed his left arm and his neck and tried to strangle him.

(e) Mr. A did not fight back but rather shouted for help. In the process of the assault by the Applicant, Mr. A's eye glasses fell and broke and he was rescued from the Applicant's grip by a security officer, Mr. Khalifa.

(f) The eye witnesses at the scene of the incident were a staff member Ms. Karanu and a security officer Mr. Khalifa. Although another staff member Ms. Reddy gave a corroborative witness statement to investigators, the Tribunal has not taken the said statement into account.

(g) A medical examination of Mr. A that evening at the UNAMID clinic showed that there were three finger marks on the neck of Mr. A and a hematoma with superficial abrasion on the inside of his left arm.

(h) The medical officer concluded that Mr. A was the victim of a physical assault resulting in soft tissue injury.

Conclusion

141. There is clear, consistent, corroborated and convincing evidence that on the day of the incident, the Applicant accosted Mr. A on a common walk path in UNAMID premises and while shouting at him and threatening him, forcibly pushed him in the direction of Block 1. The Applicant then punched Mr. A and caused his eye glasses to fall and break while also grabbing his left arm and holding him down by the neck in an effort to strangle him. Mr. A did not fight back but instead cried out for help.

142. The Tribunal finds the Applicant's claim that Mr. A blocked him as he tried to get to his car that evening and first pushed him to be false and untrue and calculated to mislead. His denials of physical assault against Mr. A are also entirely false.

143. In the evening of 24 April 2013, the Applicant both verbally and physically assaulted Mr. A on UNAMID premises. By engaging in the said conduct, the Applicant violated staff regulation 1.2(a) which enjoins staff members to respect the principles of the United Nations Charter, fundamental human rights and the human dignity of persons.

144. The Applicant also violated the provisions of staff regulation 1.2(f) which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants. In the same vein, he violated staff rule 1.2(f) which prohibits abuse in any form at the workplace or in connection with work.

145. The Applicant's claims that he was the victim of abuse of authority by the DJSR (P) and that Mr. A had provoked him by removing the leave papers he submitted for the JSR's approval are but lame excuses for the disreputable and criminal conduct of physically and viciously assaulting another staff member within the United Nations workplace.

146. The Tribunal finds that the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity imposed on the Applicant is fair and appropriate.

Issue 3. Case No. UNDT/NBI/2015/062: Is the abolition of the P-5 post of Humanitarian Affairs Officer in UNAMID, encumbered by the Applicant, receivable? If receivable, is there merit in it?

Applicant's submissions

147. The Applicant's case on this score is as follows:

- (a) The Applicant does not contest the content of the General Assembly's resolution but the decision made by management whereby his post was identified for abolition. This managerial decision was influenced by improper motives and is unlawful.
- (b) The decision that led to the identification of the Applicant's post for abolition had direct legal consequences for the Applicant, such as the disruption of his assignment with OCHA.
- (c) The fact that the Applicant was later separated from service as a result of the imposition of a disciplinary measure has no bearing on the matter.
- (d) The abolition of the Applicant's post is unlawful. The Rules require that vacant posts be abolished before posts encumbered by staff members on continuing appointments.
- (e) The Applicant rather than his post was targeted. There was no justification for the abolition of the Applicant's post.
- (f) There was a link between the abolition of the Applicant's post and the disciplinary process that led to his separation from service.

Respondent's submissions

148. For his part, the Respondent submits as follows:

(a) The Applicant does not contest an administrative decision. The General Assembly's decision to abolish the Applicant's post does not constitute an administrative decision under staff rule 11.4(g)(i) and art. 2.1(a) of the UNDT Statute. The Applicant has not identified any administrative decision taken as a consequence of the General Assembly's decision to abolish his post. A possible future decision to terminate the Applicant's appointment does not amount to an administrative decision.

(b) The application is moot following the Applicant's separation from service effective 2 June 2015, as a result of the imposition of the disciplinary measure of separation with compensation in lieu of notice and with termination indemnity.

(c) On the merits, the Respondent denies the Applicant's allegations that the contested decision is unlawful. The Staff Regulations and Rules do not require the General Assembly to first abolish unencumbered posts before posts that are encumbered. The Applicant's claim that he was targeted through the abolition of his post and that there is a link between the abolition of his post and the disciplinary process that led to his separation from service have no merit.

Considerations

149. The abolition of post complained of by the Applicant is a decision of the General Assembly and does not constitute an administrative decision capable of being challenged before this Tribunal. In this respect, the UNAT has held in *Ovcharenko et al.* 2015-UNAT-530 that the "Secretary General has to comply with General Assembly decisions". As stipulated in art.

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Entered in the Register on this 29th day of March 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi