UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2013/018
UNDT/NY/2013/019
Judgment No.: UNDT/2015/126
Date: 31 December 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KALLON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 28 March 2013, the Applicant, former Chief Procurement Officer ("CPO") at the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed two separate applications before the Tribunal. The applications concern decisions by the Assistant Secretary-General, Office of Central Support Services ("ASG/OCSS"), affecting the Applicant's delegated authority to perform significant functions in the management of financial, human and physical resources (referred to at the United Nations as "designation").

2. The first application, registered under Case No. UNDT/NY/2013/018, contests the decision, dated 4 October 2012 and notified to the Applicant on 5 October 2012, to deny him the required designation to take up the post of CPO at the United Nations Interim Security Force for Abyei ("UNISFA") ("the UNISFA designation decision"), a mission deployed to a disputed area bordering the Republic of Sudan and the Republic of South Sudan. The second application, registered under Case No. UNDT/NY/2013/019, contests the decision, dated 28 November 2012 and notified to the Applicant on 5 December 2012, to remove his designation as CPO for MINUSTAH ("the MINUSTAH designation decision").

3. The cases were subject to an order for combined proceedings on 18 June 2014.

Facts

4. In a joint submission dated 26 June 2015, the parties provided a list of agreed facts. The agreed facts form the basis of the factual background set out below, supplemented, where necessary and relevant, by further factual findings of the Tribunal.

The Applicant's background

5. The Applicant holds a Bachelor of Science degree with Honors in Economics, a Master of Business Administration degree in International Business, and is a member of the Chartered Institute of Purchasing and Supplies, a United Kingdom-based organization serving the procurement and supply profession.

6. On 15 April 2009, Mr. WS, the then ASG/OCSS, approved a request for the Applicant to be designated under ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources) to perform procurement functions at the P-4 level while working as a Procurement Officer at the United Nations Organization Mission in the Democratic Republic of the Congo.

Haiti earthquake

7. On 12 January 2010, a magnitude 7.0 earthquake struck Haiti.

Appointment at MINUSTAH

8. On 2 July 2010, the Applicant was appointed as CPO/MINUSTAH at the P-4 level from a roster of pre-approved candidates. He acted on Special Post Allowance at the P-5 level for a one-year period during 2011.

July 2010 email exchange with Mr. DD

9. On 17 July 2010, the Applicant informed Mr. DD, the then Officer-in-Charge of the Headquarters Procurement Division, that he had reported for duty at MINUSTAH.

10. In an email response the same day, Mr. DD stated:

> With all due respect, I was misled as to the nature of your assignment. The advice communicated to me was that you'd be going there as

> temporary help and not as a CPO. Unfortunately, the opinion of [the Procurement Division] was not requested by either the mission or [the Department of Field Support]—I would have had different recommendations for you and for the CPO candidature.

The Applicant's 2010–2011 and 2011–2012 performance appraisals

11. On 24 February 2012, the Applicant's 2010–2011 electronic performance appraisal system ("e-PAS") report was completed. The Applicant was rated as having successfully met performance expectations. He received a rating of fully competent in all core values, core competencies and managerial competencies. The Applicant's first reporting officer, Mr. FR, noted that the Applicant's performance had been satisfactory despite a "very challenging environment and tasks due to the earthquake".

12. On 30 May 2012, the Applicant's 2011–2012 e-PAS report was completed. The Applicant was rated as having exceeded performance expectations. He was rated as "fully competent" in all core values, core competencies and managerial competencies, with the exceptions of Professionalism, Planning and Organization, and Leadership, for which he received a rating of "outstanding". The Applicant's first reporting officer, Mr. SM, described him as an "outstanding procurement professional". His second reporting officer, Mr. GS, Director of Mission Support ("DMS"), MINUSTAH, provided the following comment:

> A good performance in a difficult environment where procurement section was located away from its clients. This situation has been addressed and the division will be relocated to Port au Prince. Performance of the section shall therefore [be] improved in the coming year, and attention will be given to planning and quality assurance.

Selection for CPO/UNISFA

13. On 17 July 2012, Mr. GB, Chief of Mission Support ("CMS"), UNISFA, notified Mr. GS, DMS/MINUSTAH, that the Applicant had been selected for

reassignment to the post of CPO/UNISFA subject to receiving medical clearance, designation, and release from MINUSTAH.

Note of the Headquarters Committee on Contracts

14. The Headquarters Committee on Contracts ("HCC") is an oversight and advice body that reviews certain categories of proposed procurement actions.

15. On 25 July 2012, Mr. FE, the Chairman of the HCC at the time, sent a four-page note ("the HCC Note") to Mr. WS, the then ASG/OCSS, copying Mr. DD, now the Director, Headquarters Procurement Division. The HCC Note, titled "Procurement Cases from Minustah" began by stating that "[i]n a number of cases submitted recently from MINUSTAH, the [HCC] has expressed procedural or substantive concerns about the actions taken in the mission. In the Committee's view, these concerns warrant managerial review and follow up".

16. The HCC detailed five cases between 10 May 2012 and 11 July 2012 where deficiencies in procurement processes were identified. The five cases can be summarised as follows:

> a. The Mission "had invested $1.9 million in improvements to a 'Greenfield' site leased from a local landlord … The [MINUSTAH Procurement Section] was uncertain whether the UN could make any claims for reimbursement or reduction in rent. The mission had not approached the landlord to discuss the issue but hoped to do so when signing the new lease. The Committee did not believe it was appropriate for [the MINUSTAH Procurement Section] to wait until lease signing to discuss and settle the reimbursement issue with the landlord";
>
> b. The Mission sought to extend a lease for office and warehouse space in Santo Domingo from 2012 through May 2015 despite anticipating that, as a result of a retrenchment exercise, some staff would move back to Port-au-

Prince and not all of the existing space would be needed. The HCC "was of the opinion that MINUSTAH should complete the retrenchment exercise … and ascertain the requirement for office space in Santo Domingo before making any durational or special modifications in the lease". Furthermore, "[t]he Committee was concerned that no action had been taken since 2010 to obtain reimbursement [for improvements to the leased office and warehouse space in Santo Domingo], no consideration was given to offsetting any amount against the rent due and no invoice had been submitted to the landlord requesting payment [of an amount of $26,632.40 which the landlord had already agreed to reimburse]";

c. The Mission "indicated that it became aware only at a later stage of the solicitation process [for the provision of armed guard security services] of an existing government decree permitting only Haitian companies to provide security services in Haiti … In the Committee's view the mission must be informed about national laws, regulations or policies that have such a vital impact on its operations and solicitation processes";

d. The HCC "expressed concern about an apparent lack of segregation of responsibilities between requisitioning and procurement staff in MINUSTAH [in the discussion of contracts for the provision of mobile phone and data services]";

e. The Mission "amended [a contract for the provision of medical services] numerous times and extended its duration … exceed[ing] the mission's delegated authority … the numerous increases and decreases in this singular contract's [Not-to-Exceed amount] over a short period of time gives rise to concern about the ability of the mission to manage the contract and to track its expenditures". The HCC "also expressed concern about the mission's failure to comply with the limits of its delegated procurement authority" and noted that the case was *ex post facto*.

MINUSTAH consent to release the Applicant to UNISFA

17. On 8 August 2012, Mr. GS, DMS/MINUSTAH, agreed to the release of the Applicant on reassignment as CPO/UNISFA and confirmed that the Applicant had a satisfactory performance appraisal and no case of misconduct.

Forwarding of the HCC Note to the Department of Field Support and MINUSTAH

18. On 9 August 2012, Mr. WS, ASG/OCSS, forwarded the HCC Note to Ms. AH, then Under-Secretary-General for Field Support ("USG/DFS"). He stated:

> MINUSTAH's deficiency in the management of procurement procedures and operations is a matter of serious concern, as it calls into question the capability of the mission in performing procurement functions in accordance with Financial Regulations and Rules and the Procurement Manual.
>
> …
>
> Given the noted deficiency in the procurement functions of the Mission, in addition to the improvement efforts to be made on the systematic structure and arrangement, I also request for a greater care to be exercised in future assignments of those responsible staff members.

Mr. WS requested the assistance of Ms. AH in "ensuring that these serious concerns are resolved in a timely manner".

19. On 16 August 2012, Ms. AH responded to Mr. WS stating that her office took the concerns conveyed very seriously and was working to identify the best way forward.

20. On 24 August 2012, Mr. AB, Assistant Secretary-General, Department of Field Support ("ASG/DFS"), forwarded Mr. WS's note of 9 August 2012 to Mr. GS, DMS/MINUSTAH. He asked Mr. GS to do his utmost to address the weaknesses identified in the management of the procurement process in MINUSTAH and to inform him by 10 September 2012 of the actions being taken to address the concerns expressed in the HCC Note.

21. By email dated 10 September 2012 to the Applicant and eight other colleagues, with three further colleagues copied, Mr. GS requested the Applicant to coordinate a response to the HCC Note. The email further stated: "I would like all [Self Accounting Units] involved to bring some clarifications" and "[m]ore than defence I would like to see measure[s] to be taken to address those serious issues".

22. The Applicant prepared a draft response to Ms. AH on behalf of MINUSTAH and sent it to Mr. GS on 23 September 2012. The response drafted by the Applicant was not sent to Ms. AH or any other managers other than Mr. GS.

The decision to deny the Applicant designation for the post of CPO/UNISFA

23. On 4 October 2012, Mr. WS wrote to the Director of the Field Personnel Division, DFS, attaching his 9 August 2012 note to Ms. AH and noting that the Applicant was CPO/MINSUTAH. He stated that "[i]n view of the outstanding issues", he was not in a position to support the designation of the Applicant as CPO/UNIFSA.

24. On 5 October 2012, the Applicant was informed by a Human Resources Officer in the Field Personnel Division, DFS, that "in view of the outstanding concerns raised on the management of procurement procedures and operations in MINUSTAH [ASG/OCSS is] not in a position to support your designation as CPO for UNISFA".

MINUSTAH's official response to the HCC Note

25. On 8 October 2012, Mr. GS sent a facsimile to Ms. AH, copying Mr. DD, responding to the various procurement concerns outlined in the HCC Note and explaining the steps taken to address the deficiencies identified by the HCC. Although the response incorporated some of the content of the Applicant's draft of 23 September 2012, it was a significantly different document.

26. Mr. GS stated that the steps to be taken to rectify the shortcomings would include the appointment of a replacement Officer-in-Charge of the Procurement Section and reassignment of the Applicant to another mission. It appears that Mr. GS was not aware, when he sent his facsimile of 8 October 2012, that Mr. WS had declined to endorse the Applicant's designation for UNISFA (see para. 107 below).

27. On 15 October 2012, the Applicant was tasked with implementing a matrix of actions in response to the HCC Note.

28. On 18 October 2012, Mr. GS sent a facsimile to Mr. AB, copying Mr. DD, stating:

> It has now come to my attention that the ASG OCSS has declined to designate [the Applicant], MINUSTAH Chief Procurement Officer, for the function of CPO in UNISFA …
>
> This development had directly impacted the action plan I outlined in my Fax of 8 October, as my entire procurement reform plan hinges on the first step—the reassignment of the current CPO.
>
> It is my firm belief that retaining [the Applicant] at the helm of the MINUSTAH Procurement Section will impact our ability to make the changes that are required. [The Applicant]'s working relationship with the majority of his subordinates, the [Local Committee on Contracts], requisitioners and other stakeholders in the procurement process, has deteriorated to the point where I believe it would be challenging for him to function in his current position.
>
> … [The Applicant]'s non-designation for UNISFA casts doubt on [the Applicant]'s designation as CPO for MINUSTAH, which is a larger and more complex mission.
>
> In view of the above I would respectfully recommend that [the Applicant]'s designation as CPO of MINUSTAH be reviewed. …
>
> Against the background of the many other concerns surrounding his position in MINUSTAH, I further recommend that [the Applicant] be considered in the short term for a reassignment, possibly to a function that does not require his designation as CPO. As stated above his replacement is fundamental to making the improvement expected from the Mission.

The Applicant's request for information regarding denial of designation for CPO/UNISFA

29. On 25 October 2012 and 9 November 2012, the Applicant wrote to the Field Personnel Division, DFS, requesting: (i) a copy of the memorandum from the Field Personnel Division requesting his designation; (ii) a copy of the memorandum from Mr. WS dated 4 October 2012 stating that he did not support the Applicant's designation; (iii) "notation" made by Mr. WS; and (iv) clarification regarding his position as CPO/MINUSTAH.

The decision to withdraw the Applicant's designation as CPO/MINUSTAH

30. On 28 November 2012, Mr. WS wrote to Mr. AB referring to previous correspondence, including the HCC Note dated 25 July 2012 and the response of Mr. GS dated 8 October 2012, and advising that in view of the documents referred to, he had decided to withdraw the Applicant's designation as CPO/MINUSTAH.

31. On 30 November 2012, Ms. AH informed Mr. GS of the decision of Mr. WS to remove the Applicant's designation, noting that designation is required in order to receive delegation of procurement authority as CPO, and requesting that Mr. GS "take the necessary action under these circumstances".

32. On 5 December 2012, Mr. GS conveyed to the Applicant the decision to withdraw his designation.

The reassignment of the Applicant

33. On 6 December 2012, the Applicant was advised of his reassignment to the Office of the Officer-in-Charge, Administrative Services, effective the same day, where he remained through 5 March 2013.

34. Effective 6 March 2013, he was reassigned as Officer-in-Charge, Staff Counselling Welfare Unit.

35. On 10 June 2013, Mr. GS wrote to the Applicant to inform him that his fixed-term appointment, which was due to expire on 30 June 2013, would not be extended and that he would therefore be separated from the Organization. Mr. GS recalled that, following the withdrawal of the Applicant's designation to serve as CPO/MINUSTAH, effective 28 November 2012, "*instead of an immediate separation*, I decided to reassign you to the CAS Office and later to the Staff Counselling and Welfare Unit for the remaining duration of your fixed-term appointment" (emphasis added). The Applicant states that he was not separated from service on 30 June 2013 but instead received monthly contract extensions from 1 July 2013 through 15 April 2015. At the hearing on the merits, he testified that he was employed as a P-3 Administrative Officer on a temporary appointment.

Appointment of a new ASG/OCSS

36. In April 2013, Mr. SC was appointed ASG/OCSS, replacing Mr. WS.

Audit report on local procurement in MINUSTAH

37. On 28 September 2013, the Internal Audit Division of the Office of Internal Oversight Services ("OIOS") issued a report relating to its audit of local procurement in MINUSTAH covering the period 1 July 2010 to 31 December 2012. The report stated that the audit was conducted from October 2012 to March 2013. The report identified a number of deficiencies in procurement activities at MINUSTAH over the relevant period. In a section titled "Audit Results" the report stated that "[t]he MINUSTAH *governance, risk management and control processes examined were assessed as unsatisfactory*", while noting that "the Procurement Section *lacked adequate capacity*" and that "[*t]here was also poor procurement planning by requisitioners*" (emphasis added).

38. The report specifically mentioned the first issue raised in the HCC Note concerning capital improvements to leased property. The report stated: "The Procurement Section and the Engineering Section were responsible for

the administration and management of lease agreements" and "MINUSTAH had not implemented an effective system to monitor planned capital improvements and to ensure that landlords were in agreement with the construction works and the expected associated costs".

The Applicant's 2012–2013 performance appraisal and rebuttal

39. The Applicant's 2012–2013 performance appraisal was completed in September 2013. He was rated as having partially met performance expectations. It is apparent that the evaluation took into account the HCC Note. The Applicant's first reporting officer noted the perceived shortcomings highlighted by the HCC Note and the Applicant's second reporting officer noted that his designation and delegation had been removed. The Applicant rebutted the performance appraisal.

40. A rebuttal panel was convened to review the Applicant's performance assessment rating. On 24 February 2014, the panel delivered its report, in which it noted that there was no structured mid-term review during the critical period of the Applicant's tenure as CPO. The panel further stated that "structured discussions should have taken place to review the seriousness of the shortcomings and to discuss options and remedial actions". However, despite noting procedural and communication issues, the panel upheld the original rating of partially meets performance expectations. At the hearing on the merits in these cases, the Applicant testified that he had raised concerns about the report of the rebuttal panel to the Assistant Secretary-General, Office of Human Resources Management, and that he had not yet received a response. In any event, the Tribunal notes that the 2012–2013 performance appraisal was prepared well after the contested decisions were made.

Procedural history

Requests for management evaluation

41. On 3 December 2012, the Applicant filed a request for management evaluation of the UNISFA designation decision.

42. On 12 December 2012, the Applicant filed a request for management evaluation of the MINUSTAH designation decision.

Filing of applications and Respondent's reply

43. The applications in Cases No. UNDT/NY/2013/018 (concerning the UNISFA designation decision) and UNDT/NY/2013/019 (concerning the MINUSTAH designation decision) were filed on 28 March 2013.

44. The Respondent filed separate replies to the applications on 29 April 2013.

Case management

45. By Orders No. 206 and 207 (NY/2013), dated 20 August 2013, the Tribunal ordered the parties to file a joint statement containing a consolidated list of agreed facts and a list of agreed legal issues, if any. The Tribunal also ordered the parties to inform the Tribunal as to: (a) the Applicant's current status with the United Nations; (b) whether the parties were amenable to resolving the matter informally through the Mediation Division or through *inter partes* discussions; and (c) whether the two cases would benefit from being considered together.

46. On 3 September 2013, the Respondent informed the Tribunal that "the management evaluation unit remains seized of the matter" and that the Applicant's appointment would be renewed until 30 September 2013, "pending the outcome of the management evaluation process".

Inter partes *discussions and extensions of time*

47. In joint requests filed in each case, and dated 11 September 2013, the parties informed the Tribunal that they had commenced *inter partes* discussions aimed at reaching an informal resolution of the matters in these two cases and requested an extension of time to comply with Orders No. 206 and 207 (NY/2013).

48. In response to several further joint requests, the Tribunal granted seven extensions of time to comply with Orders No. 206 and 207, the last deadline being 5 June 2014.

Management evaluation and reconsideration of decisions

49. At some point during *inter partes* discussions, the Management Evaluation Unit ("MEU"), who had not, at that point, formally responded to the Applicant's requests for management evaluation dated 3 and 12 December 2012, became involved in the Applicant's cases. The process of reconsideration of the Organization's decisions is summarised in a letter to the Applicant dated 19 May 2014, signed by the Under-Secretary-General for Management ("USG/DM"), as follows (emphasis added):

> [T]he MEU took note that your involvement in the review of the procurement cases HCC highlighted is not well documented. It appeared that, upon being informed of the concerns, MINUSTAH prepared a response, and that at some point during that preparation you submitted MINUSTAH-Procurement's views, addressing the points made by the HCC in detail by explaining the context of each case. *What considerations the Administration gave to this response was unclear*.
>
> *In order to correct this*, the MEU recommended that OCSS review the matter after affording you an opportunity to present your views. The MEU also recommended that the decision not to extend your contract be suspended pending the outcome of this review. The Officer-in-Charge, Department of Management ("DM") approved this recommendation on 22 January 2014. For this purpose, on 17 January 2014, you made a submission through your counsel in

> which you presented your views, and submitted supporting documentation, on the issues raised. The MEU received confirmation from your counsel on 29 January 2014 that this submission constituted the sum total of your response in the matter. You thereafter submitted additional material on 3 March 2014. The MEU forwarded your submissions to OCSS on 30 January and 3 March 2014, respectively.
>
> On 16 April 2014, the ASG-OCSS submitted a memorandum containing the outcome of the review to the MEU, upholding its original determination. The MEU transmitted the OCSS's memorandum to you on 29 April 2014.

The Tribunal notes that the memorandum dated 16 April 2014, referred to in the letter of the USG/DM, was signed on behalf of Mr. SC (ASG/OCSS) by Mr. DD, Director of the Headquarters Procurement Division. According to an interoffice memorandum from USG/DM dated 28 March 2014, Mr. DD was Officer-in-Charge of OCSS from 13 April 2014 to 24 May 2014 during a period in which Mr. SC was away from Headquarters.

50. By joint submission dated 30 April 2014, the parties informed the Tribunal for the first time about the involvement of the MEU and the reconsideration of the decisions by the Organization's management. The parties indicated that they had agreed that the Applicant "was not accorded his formal due process right to respond in his personal capacity" to the observations of the HCC prior to withdrawal of his designation. The parties informed the Tribunal that the Applicant was given an opportunity to respond to the observations and "a further decision concerning his designation has been taken by the Administration". The parties requested a further extension of time to comply with the Tribunal's orders, stating:

> Pending a formal decision issued by the Under-Secretary-General of Management (USG/DM) reflecting the Administration's position, further discussions between the parties are continuing to review the scope of the case and determine whether they are able to reach agreement in regard to some of the matters that are currently in dispute.

The Tribunal granted a further extension of time.

51. On 19 May 2014, the USG/DM wrote to the Applicant, conveying the decision to uphold the contested decisions. The letter stated:

> …
>
> After reviewing OCSS's memorandum and your comments on the review, the MEU concluded that OCSS provided a reasoned basis for its determination, addressing the salient concerns with the procurement cases in question, while specifically addressing those concerns in light of your submissions.
>
> …
>
> The MEU considered that, while the initial decision to remove your designation as Chief, Procurement Officer may have lacked a step insofar as it was taken without affording you the opportunity to comment in your individual capacity, this was fully remedied by the aforementioned review. As the MEU found no basis to question the lawfulness or integrity of that review, it recommended upholding the outcome.
>
> …
>
> In light of the foregoing consideration of your case, the Secretary-General has decided to endorse the findings and recommendations of the MEU and to uphold the contested decisions.

52. In a joint submission dated 5 June 2014, the parties informed the Tribunal of the decision to uphold the contested decisions, listed agreed facts and legal issues, and stated that they had no objections to the two cases being considered together and that they continued to be engaged in discussion aimed at informal resolution of the cases.

Order for combined proceedings

53. As mentioned above, by Order No. 151 (NY/2014), dated 18 June 2014, Cases No. UNDT/NY/2013/018 and UNDT/NY/2013/019 were subject to an order for combined proceedings.

Case management discussion

54. A case management discussion ("CMD") was held on 23 July 2015 to discuss the availability and order of witnesses and other matters that might expedite a fair and just hearing of the cases. At the CMD, the Tribunal expressed its concern and reservations about the manner in which the *inter partes* discussions had metamorphasized into a new decision-making process in the first half of 2014, resulting in a "further decision" by the ASG/OCSS, recommendations by the Management Evaluation Unit, and a decision by the Secretary-General to uphold the contested decisions that were already before the Tribunal. This issue is considered further starting at para. 76 of this judgment.

Hearing on the merits

55. A hearing in these cases was held over five days between 27 and 31 July 2015. The Applicant gave evidence on 27, 28 and 31 July 2015.

56. On 29 July 2015, Mr. GB, former CMS of UNISFA and DMS of MINUSTAH, as well as Mr. FE, former Chairman of the HCC, gave evidence. Mr. GB testified by telephone from Kosovo and Mr. FE testified *viva voce* in court.

57. On 30 July 2015, another three witnesses testified: Mr. GS, former DMS/MINUSTAH, testified by telephone from the Democratic Republic of the Congo; whilst Mr. DD, Director of the Headquarters Procurement Division, and Ms. NN, Chief, Peacekeeping Procurement Section, Headquarters Procurement Division, both gave oral evidence in court.

58. On 31 July 2015, Ms. LK, former Administrative Officer, Office of the DMS/MINUSTAH, testified by telephone from Uganda.

Closing submissions

59. The Applicant filed his closing submission on 7 August 2015 and the Respondent filed his closing submission on 14 August 2015.

Legal and regulatory framework

60. In a joint submission dated 26 June 2015, the parties submitted an agreed summary of the basic legal framework governing these cases. This section is based on the summary provided by the parties, supplemented by further provisions considered relevant by the Tribunal.

61. Through its Financial Regulations, the General Assembly issues the broad legislative directives governing the financial management of the United Nations. Within the framework of the Financial Regulations, the Secretary-General promulgates the Financial Rules, which provide details to further define the parameters within which staff and the Administration must exercise their financial management responsibilities.

62. Pursuant to financial regulation 101.1, the Secretary-General delegated authority and responsibility for the implementation of the Financial Regulations and Rules to USG/DM. Financial rule 105.13 states that the USG/DM is responsible for the procurement functions of the United Nations and shall *designate* the officials responsible for *performing* such functions.

63. Pursuant to sec. 1 of ST/AI/2004/1 (Delegation of authority under the Financial Regulations and Rules of the United Nations) and the annex thereto, the USG/DM delegated authority and responsibility for the implementation of the Financial Regulations and Rules in relation to procurement functions to the ASG/OCSS. Section 1 of ST/AI/2004/1 further provides that the ASG/OCSS may, in turn, delegate authority and responsibility to other officials, as appropriate.

64. Section 2 of ST/AI/2004/1 provides (emphasis added):

> **Terms and conditions for the exercise of delegated authority**
>
> 2.1 Exercise of this delegated authority entails responsibility for ensuring full implementation of the relevant financial regulations and rules of the United Nations and related administrative instructions. … *Failure to abide by the terms and conditions of this delegation of authority may result in its withdrawal*.
>
> 2.2 The act of delegating authority and responsibility does not absolve the official to whom authority was initially delegated of accountability for the manner in which the authority is exercised. Accordingly, … the Assistant Secretary-General for Central Support Services may be held personally accountable, and *must likewise hold those to whom they have delegated authority accountable*, for their actions in performance of their delegated authority and responsibility.

65. The further delegation of authority to perform significant procurement functions, referred to as designation, is regulated by ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources). Acting on the basis of delegated authority from the USG/DM, the ASG/OCSS is responsible for the designation of chief procurement officers (secs. 2.1, 2.2 and 7). ST/SGB/2005/7 further provides (emphasis added):

> **Section 3**
>
> **Responsibility and accountability**
>
> 3.1 In the performance of functions related to the management of financial, human and physical resources, *staff members designated under the provisions of this bulletin are accountable to the officials who designate them*, as well as to the head of their respective department or office.
>
> 3.2 In designating staff members performing significant functions in financial, human and physical resources management, *the officials responsible for the designation must ensure that the staff members selected have the requisite qualifications and experience to carry out the functions assigned to them* and to provide consistency in the application of the Organization's regulations, rules, policies and procedures.

66. ST/SGB/2010/2 (Organization of the Department of Field Support) states that DFS, in coordination with relevant departments and offices of the Secretariat, "delegates to field missions and administers and monitors field operations in the areas of … local procurement, conduct and discipline" (sec. 2.1(b)). The Field Procurement and Liaison Team, located within the Office of the ASG/DFS, is responsible for managing and monitoring delegations of procurement authority by the Under-Secretary-General for Field Support to field mission staff (sec. 5.12(a)).

67. The Guidelines on Designation of staff members performing significant functions in the management of financial, human and physical resources ("Guidelines on Designation") were approved by the USG/DM on 15 November 2006 and are intended to clarify issues relating to the designation of staff members under ST/SGB/2005/7. The Guidelines provide (emphasis added):

> **V. Staff members previously designated for similar functions at the same level**
>
> 20. No formal request is required in respect of a staff member who is reassigned to a new position and was cleared for similar functions, at the same level, and less than two years prior to the move to the new position. The only requirement in that case is for the parent office to notify the appropriate DM office of the reassignment, attaching a copy of the latest clearance.
>
> 21. Designation requests for staff members previously designated for similar functions at the same level more than two years prior to the move to the new position must have the following attachments:
>
> a. Vacancy announcement, job description or generic job profile for the new position;
>
> b. The two latest PAS reports documenting the performance of the staff member since the previous clearance.
>
> …
>
> **VII. Notification to staff members**
>
> 25. As agreed at SMCC-XXVII, *a written explanation will be given to a staff member in the event clearance was not granted by senior management* for carrying out significant functions in the management of financial, human and physical resources.

68. The United Nations Procurement Manual ("UNPM") provides guidance on procurement policies, procedures and practices to all staff members involved in the procurement process. It is approved by the ASG/OCSS for use by management and staff (sec. 1.1.1(a) of the UNPM). Revision 6 of the UNPM, dated March 2010, was in effect at the time of the contested decisions. The UNPM states:

> **Chapter 3. Delegation of Procurement Authority**
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> …
>
> **3.2 Procurement Authority and Responsibility**
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> …
>
> 2. For Field Missions supported by DFS, the procurement authority is delegated by the ASG/OCSS to the USG/DFS, and further delegated to the DMS/CMS. Delegations of procurement authority and the financial levels of authority to make commitments are granted in writing by the DMS/CMS directly to the CPO and to Procurement Officers and Procurement Assistants on an individual basis.
>
> …
>
> 5. Prior to any commitment being made, officials entrusted with procurement authority are to ensure that:
>
> a. the procurement action strictly complies with all FRRs, SGBs, AIs, the Procurement Manual and other procurement policies;
>
> b. the appropriate and authorized officials have approved the commitment;
>
> c. the required resources are available;
>
> d. the commitment is in the interests of the UN, based on the information available at the time and as documented in the procurement case file.
>
> 6. Delegations of authority require Procurement Staff to exercise their duties and responsibilities with the utmost care, efficiency, impartiality and integrity in accordance with Chapter 4 of this Manual.
>
> …
>
> **3.4 Procurement Authority at Offices Away from Headquarters and Field Missions**
>
> …

2. Field Missions: The ASG/OCSS has issued a delegation of procurement authority to the USG/DFS for awards of $1,000,000 or less for Core Requirements and $500,000 or less for other requirements excluding Special Requirements. Delegations of procurement authority to the DMSs/CMSs are granted by the USG/DFS.

…

3.5 Modification of Individual Procurement Authority

1. Individual procurement authority may be changed at any time by the ASG/OCSS, or by any official who has been duly authorised by the ASG/OCSS to sub-delegate Procurement Authority.

Agreed legal issues

69. In joint submissions dated 5 June 2014 and 26 June 2015, the parties set out the following agreed legal issues:

a. Was the UNISFA designation decision a proper exercise of discretionary authority?

b. Was the MINUSTAH designation decision a proper exercise of discretionary authority?

c. What rights to due process does a staff member have in the conduct of a designation exercise? Were these rights observed in the Applicant's case?

d. If the Applicant's rights of due process were not observed, was the decision not to approve his designation justified on its merits?

e. If the Applicant's rights to due process were not observed, what remedy should be granted? Has the Applicant demonstrated either substantive or moral losses?

f. Has any alleged breach of due process been remedied by the reconsideration of the designation decision by the ASG/OCSS on 16 April 2014?

Consideration

Scope of review

70. The basic principles of judicial review were set out by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084:

> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
>
> …
>
> 42. … As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.

71. The first question for the Tribunal is whether the Administration lawfully and properly exercised its discretionary authority in making the contested decisions. In determining this issue the Tribunal will consider the basic principles of judicial review as set out in *Sanwidi*, and in particular, in the circumstances of these cases, whether the decisions were procedurally correct, reasonable, rational and fair, and whether all relevant matters were considered prior to making the decisions.

72. As part of the above examination, the Tribunal must consider what rights to due process a staff member has in relation to decisions affecting his or her designation and whether any such rights were observed in these cases. In his closing submission, the Respondent conceded that there was a "formal failure of due process" in these cases in that the Administration failed to request that the Applicant respond to the HCC Note in his personal capacity. Instead the Administration requested that the Applicant respond in his capacity as CPO/MINUSTAH. However, the Respondent submits that from a substantive point of view, there is no difference between these two requests.

73. In their submission on agreed legal issues, the parties submitted that if the Applicant's right to due process was not respected, it would be necessary to consider whether the contested decisions were justified on the merits. A lot of time and energy was spent by the parties in these cases addressing the issues raised in the HCC Note and whether the Applicant was or was not responsible for those deficiencies and/or a pattern of failings generally. However, in his closing submission, the Respondent to the contrary stated that, ultimately, the Tribunal need not form a final view on the details of these issues. He stated that

> the Tribunal is not called upon to determine whether or not the five failures listed [in the HCC Note and addressed individually in the Respondent's closing submission] constitute a 'pattern' of failings in the management of the procurement function and/or the seriousness or the implications of these failures. The Tribunal is called upon to assess whether the ASG/OCSS informed himself of the relevant information and on the basis of this information properly considered the risks associated with issuing [the Applicant] with a further designation for UNISFA and/or maintaining his designation at MINUSTAH.

74. As submitted by the parties, if the Tribunal finds that the Applicant's right to due process was not respected, it would be necessary to consider whether the contested decisions were justified. However, it may not be necessary to include a detailed consideration of the individual issues identified in the HCC note (for which it

seems the Applicant was held solely accountable), as the documentary evidence submitted was extensive and uncontested in the material aspects. The Tribunal will comment on the evidence on record in relation to each of these issues in order to determine whether, in addition to being procedurally defective, the contested decisions were substantively unfair or improper.

75. Finally, before examining the questions outlined above, the Tribunal must decide what weight and consideration, if any, should be given to the "further decision" taken by the Office of the ASG/OCSS, dated 16 April 2014, and the subsequent decision of the Secretary-General to uphold the contested decisions, conveyed to the Applicant by the USG/DM on 19 May 2014. The Tribunal will consider this issue presently.

Preliminary issue: management evaluation and the "further decision" of the ASG/OCSS

76. As noted above, at the CMD on 23 July 2015, the Tribunal expressed its concern at the way in which *inter partes* discussions had metamorphasized into a process resulting in a further decision. The parties noted that this process was initiated in the context of settlement discussions.

77. The Tribunal asked the parties how it should consider and treat the reconsideration or further decision, and noted that, even if the Tribunal were to find that the process was of no legal effect and consequence in terms of the Tribunal's review of the contested decisions, it would have to comment on the process. Counsel for the Respondent stated that the present proceedings before the Tribunal are "boxed as presented" and that the Respondent does not see the additional actions—the reconsideration of the decisions by the Office of the ASG/OCSS—as being before the Tribunal for consideration.

78. The purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial

review of the administrative decision is not necessary (*Pirnea* 2013-UNAT-311, para. 42; see also *Kouadio* 2015-UNAT-558, para. 17). The Staff Rules and the Statute and Rules of Procedure of the Dispute Tribunal establish a strict timeline for these actions to take place. Staff rules 11.2(a) and (c) require staff members to submit a request for management evaluation prior to filing an application to the Tribunal, and to do so within sixty days of being notified of the contested decision. Staff rule 11.2(d) states that the Secretary-General's response, reflecting the outcome of the management evaluation, "shall" be communicated within 45 days of receipt of the request if the staff member is stationed outside of New York. However, this deadline may be extended by the Secretary-General pending efforts for informal resolution by the Ombudsman.

79. The General Assembly has repeatedly emphasised the importance of the informal resolution of disputes (see, most recently, paras. 14 and 15 of resolution 69/203 (Administration of justice at the United Nations), adopted on 18 December 2014). The Staff Rules provide for the informal resolution of disputes both before and after the filing of an application to the Tribunal. Staff rules 11.1(b) and (c) provide:

> (b) Both the staff member and the Secretary-General may initiate informal resolution, including mediation, of the issues involved at any time before or after the staff member chooses to pursue the matter formally.
>
> (c) The conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal,

80. While the Tribunal encourages and supports efforts to informally resolve disputes, parties must be aware that, once an application has been filed before the Tribunal, any new decision taken by management, particularly when based on new or different information, constitutes a separate administrative decision, which should be the subject of new and distinct proceedings if the staff members wishes to contest it.

An applicant would then be in a position to consider whether to maintain or withdraw his or her initial application, and if the former, the Tribunal could consider whether the new case should be subject to an order for combined proceedings. However, the Tribunal cannot simply consider a new administrative decision, or a reconsideration of a previous decision, as part of an existing case. As noted by this Tribunal in *Adundo et al*. UNDT/2012/118, the Tribunal cannot adjudicate cases involving decisions of a changing nature (see also *Tredici et al*. UNDT/2014/114, para. 23). No new application was filed by the Applicant in these cases.

81. In the circumstances, and in light of the above discussion, and indeed the Respondent's submission that the proceedings "are boxed as presented", the Tribunal finds that the matters for consideration in this judgment are the decisions dated 4 October 2012 and 28 November 2012, as outlined in para. 2 of this judgment and in the Applicant's requests for management evaluation dated 3 and 12 December 2012. These are the decisions that have been addressed by the parties in written submissions during these proceedings and at the hearing between 27 and 31 July 2015. The Organization's attempts to cure or remedy a breach of due process by initiating, in 2014, more than a year after the contested decisions and long after the Applicant's unanswered requests for management evaluation, a new process for the Applicant to respond to the HCC Note are not properly part of the cases before the Tribunal and will not be considered.

82. In this regard, the Tribunal also notes that although the parties had identified, as one of the agreed legal issues, whether any alleged breach of due process had been remedied by the reconsideration of the designation decision in April 2014, the Respondent conceded that this second decision was not for consideration before the Tribunal. Therefore, it would be improper and without legal basis to hold that any process or alleged remedy or consequences flowing therefrom should be considered or taken into account by the Tribunal.

Observation

83. Even if the Tribunal considered that the decision by the Office of the ASG/OCSS, dated 16 April 2014, fell within the scope of the issues to be considered in this judgment, there are several reservations regarding the process followed, after proceedings were instituted, the legal basis for which is unclear. Whilst management evaluation may afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review is not necessary, it must be timeous, and at the same time the doctrine of *functus officio* should not be compromised in the reconsideration of a final decision.

84. Furthermore, from the Applicant's evidence, which was not disputed, these discussions took place within the context of informal resolution and settlement, but without the commensurate protections of confidentiality and privilege.

85. Mr. DD, when asked whether he had seen the full submissions and supporting documentation submitted by Applicant's Counsel in response to the issues raised by the HCC Note, testified that he did not recall and was not aware that proceedings had been initiated before the Tribunal.

86. The propriety of Mr. DD considering cases that his own division, the Headquarters Procurement Division, had originally reviewed and put forward to the HCC, and then signing the relevant memorandum on behalf of Mr. SC while Officer-in-Charge for six weeks, is also a matter for concern, giving rise to a potential, or at least perceived conflict of interest. The Tribunal appreciated Mr. DD's candid testimony as a witness at the hearing. By his own admission, he was "irate" when the Applicant was appointed CPO/MINUSTAH without consulting him, as evidenced by his email dated 17 July 2010. In addition to the potential conflict of interest, Mr. DD's explicit statement in his email dated 17 July 2010 that he did not support the Applicant's appointment as CPO/MINUSTAH gave rise to a reasonable perception of bias in considering issues relating to the Applicant's performance in

that role. Though the Tribunal has not made any definitive findings on these matters, it does wish to highlight them as issues of concern.

Were the contested decisions properly made?

The role and function of the HCC

87. The HCC Note was the catalyst for both of the contested decisions. The Tribunal therefore considers it necessary to examine the role and functions of the HCC.

88. The HCC is an advisory rather than a decision-making body. ST/AI/2011/8 (Review committees on contracts) states that the purpose of the HCC is to provide written advice and to act as an advisory body to authorised officials in discharging their procurement-related responsibilities under the Financial Regulations and Rules. Mr. FE, the Chairman of the HCC at the relevant time, also emphasised this distinction in his evidence before the Tribunal. When asked what his objective was in submitting the HCC Note to Mr. WS, Mr. FE responded as follows:

> What I expected to happen was that the senior management would request their counterparts in Peacekeeping to look into what is happening in this area. Beyond that, I did not know what they would find or not find. As I alluded to before, they could have looked into it and said, you know what, yes, there are some problems, but they are understaffed by 75% and, therefore, there are extenuating circumstances. I did not know what they would find. I would not have enough information and, really, it was beyond certainly the Committee's ability and responsibility. But we can only flag an issue based on what came in front of us. And what came in front of us was that there was enough issues to give rise to a concern that people that have accountability and responsibility at higher levels should look into this.

89. The Tribunal concludes that the HCC Note did not set out definitive findings in regard to MINUSTAH or the Applicant. It merely raised concerns that required follow-up by senior management.

Accountability for the exercise of delegated authority

90. Section 2.1 of ST/AI/2004/1 states that failure to abide by the terms and conditions of the delegation of authority under the Financial Regulations and Rules *may* result in its withdrawal. Sections 3.2.5 and 3.2.6 of the UNPM, set out above, establish some of these terms and conditions in relation to the procurement function. Staff members with delegated procurement authority must ensure strict compliance with all Financial Regulations and Rules, the UNPM, and other procurement policies. They must also exercise their duties and responsibilities with the utmost care, efficiency, impartiality, and integrity.

91. ST/AI/2004/1 establishes that the ASG/OCSS must hold accountable those staff members to whom he or she has delegated authority (sec 2.2). ST/SGB/2005/7 likewise establishes that staff members who have been designated to perform significant procurement functions are accountable to the officials who have designated them. The question, therefore, is how such staff members are to be held accountable, under what circumstances, and through what process?

92. The legal and regulatory framework relating to delegation of authority, designation, and procurement authority does not set out a specific procedure for holding staff member's accountable for failure to abide by the terms and conditions of delegated authority, for example by the withdrawal of a staff member's designation. This lacuna has been observed as an issue of concern by oversight and advisory bodies. In a 2000 report titled "Delegation of authority for the management of human and financial resources in the United Nations Secretariat" (JIU/REP/2000/6), the Joint Inspection Unit of the United Nations (an independent external oversight body established by the General Assembly) stated:

> 85. [A] basic element of the accountability framework will be the ability of the Organization to actually measure the performance of officials to whom authority is delegated, and the extent to which it acts on these findings. The performance appraisal system … is an important step in this regard. The strengthening of enforcement

> mechanisms, including the increased use of disciplinary action against individuals engaged in wrongful activities … will also serve to underlie any accountability system which the Secretariat may put forward.
>
> 86. Mechanisms are yet to be put in place, however, to distinguish between deliberate and accidental failure, i.e. between:
>
> - Failure due to corruption, dishonesty and dereliction of duty, which needs to be dealt with by disciplinary sanctions; and
>
> - Failure due to poor judgement, ignorance or inexperience, which should be dealt with by remedies such as training or, as the last resort, transfer to other posts.

93. On 29 January 2010, the Secretary-General issued a report entitled "Towards an accountability system in the United Nations Secretariat" (A/64/640) in which it was noted that the Department of Management is responsible for monitoring the exercise of delegated procurement authority "and for assisting staff to carry out their responsibilities properly. If deemed necessary, the level of authority can be reduced or the authority withdrawn" (para. 51).

94. One month later, on 26 February 2010, the Advisory Committee on Administrative and Budgetary Questions (an advisory committee to the General Assembly) issued a report (A/64/683) with the same title, which, commenting on the Secretary General's report, noted that the "Secretary-General does not make mention of the consequences in cases when the delegated authority is mismanaged or misused".

95. In the absence of any specific legal or regulatory guidance on the process for holding staff members with designation "accountable", including withdrawing or denying designation, the Tribunal will rely on basic principles of law and judicial review. First, however, the Tribunal will examine in greater detail the process that was followed to address the concerns raised in the HCC Note.

The "accountability" process triggered by the HCC Note

96. The Tribunal recalls that Mr. FE's intention in submitting the HCC Note to Mr. WS was that senior management would request their counterparts in Peacekeeping to look into what was happening at MINUSTAH.

97. In his note to Ms. AH, the USG/DFS, dated 9 August 2012, Mr. WS requested assistance in ensuring that the serious concerns raised in the HCC Note were "resolved in a timely manner and that my office is advised of the outcome". He also requested that greater care be exercised in future assignments of the responsible staff members. This second request suggests an element of pre-judgment, without taking into account the possibility that there may have been valid explanations for the issues raised in the HCC Note, the presence of extenuating circumstances, or other extraneous or countervailing factors.

98. Mr. AB, the ASG/DFS, then forwarded Mr. WS's note to Mr. GS, the DMS/MINUSTAH. Mr. AB asked Mr. GS to do his utmost to address the weaknesses identified in the management of the procurement process in MINUSTAH and for Mr. GS to send him a response indicating "the actions being taken to address the concerns expressed in the HCC Note". Mr. AB was effectively asking Mr. GS to take responsibility for addressing the issues raised in the HCC Note.

99. Rather than seeking accountability, the focus of each of the officials appeared to be on resolving the matters raised in the HCC Note and moving forward. There was no request for an explanation, or for an investigation to identify the causes of the problems or the responsibility of any specific staff member. There was also no indication that Mr. WS was considering withdrawing the designation of the Applicant or any other staff member.

100. When Mr. GS in turn forwarded the correspondence to the Applicant, he asked him to coordinate a response, stating that "[m]ore than defence I would like to see measure[s] to be taken to address those serious issues". Again, no issue of

accountability under ST/AI/2004/1 and ST/SGB/2005/7 was ever raised. The Applicant was not singled out as responsible for the deficiencies, or asked to provide an explanation. In fact, Mr. GS specifically asked that he *not* try to explain or defend the issues raised in the HCC Note, but rather provide solutions to address those issues.

101. The Applicant was asked to respond directly to Mr. GS, which he did. However, the Applicant's response was never forwarded to Mr. AB, Ms. AH or the decision-maker in these cases, Mr. WS. Instead, Mr. GS used the Applicant's memorandum as the basis for his own response to Ms. AH, which was copied to Mr. DD. Mr. GS's facsimile response to Ms. AH dated 8 October 2012 is written from his point of view as DMS/MINUSTAH. It begins by stating that "the majority of these cases date back prior to my arrival". It then highlights the apparent previous concerns of Mr. GS with MINUSTAH procurement functions and his strategy for rectifying those shortcomings, including the *reassignment* of the Applicant to another mission. Mr. GS then addresses the issues raised in the HCC Note, and notes some challenges facing the Mission and some explanations for the perceived shortcomings and deficiencies, none of which are attributable to the Applicant.

102. While the memorandum sent by Mr. GS on 8 October 2012 may have been the response expected from the managers concerned given the instructions that they issued, the facsimile has a different tone and focus than might be expected from a document prepared by the Applicant in response to concerns raised about his personal professional competence. The Tribunal notes that specific concerns of this nature were never expressed to the Applicant prior to the contested decisions. The Tribunal will now consider whether the UNISFA designation decision was a proper exercise of discretionary authority.

The UNISFA designation decision

103. The parties agree that, in accordance with sec. 9.2 of ST/AI/2010/3 (Staff selection system), designation is a pre-requisite for selection to positions involving significant functions in the management of financial resources. However, the Applicant submits that the UNISFA designation decision was unlawful and unjustified, that the ASG/OCSS failed to follow the Guidelines on Designation, and that the Administration failed to provide him with a written explanation or an adequate explanation of the reasons for the decision.

104. The Respondent submits that the Applicant placed the resources of the Organization at risk and, accordingly, his designation for UNISFA was not approved. The ASG/OCSS is obliged to review and assess reliable information communicated to him concerning failures by designated officials to follow the financial rules and procedures of the Organization. The Respondent submits that the ASG/OCSS could not ignore an appreciable risk of a significant problem of carelessness, misjudgment or lack of oversight or accountability in relation to the Applicant's work. When considering whether to grant designation, the ASG/OCSS must weigh the information at hand and assess the risks presented to the Organization. The precautionary principle justified the decision to deny designation. On the information before him, the ASG/OCSS acted reasonably and rationally.

105. Paragraph 21 of the Guidelines on Designation states that, where a staff member with designated authority is reassigned to a new position and they have received designation more than two years prior to the move, a new designation request must be submitted, even if the staff member has previously been designated for similar functions at the same level. The request must include the vacancy announcement or job description and the last two performance appraisals of the staff member.

106. The discretionary authority of the ASG/OCSS is not unfettered when considering such a request. Any decision must be rational, reasonable, fair and procedurally correct. It is not apparent from the record to what extent Mr. WS, the ASG/OCSS, engaged in any "weighing exercise" before making the UNISFA designation decision, as suggested by the Respondent. The Respondent has not produced any written record containing any detailed reasons for the decision, or indicating that Mr. WS came to any definitive conclusions or findings. The Applicant was not afforded the opportunity to make any submissions to Mr. WS regarding either the HCC Note or the request for designation for UNISFA.

107. Mr. WS does not appear to have communicated directly with MINUSTAH or with the Applicant prior to making the UNISFA designation decision. Indeed in his facsimile dated 8 October 2012 responding to the HCC Note, Mr. GS mistakenly informed Ms. AH that the Applicant had been reassigned to UNISFA, apparently unaware that four days earlier Mr. WS had denied the Applicant the designation required to take up the position.

108. Mr. WS also did not wait until Mr. GS had responded, on behalf of MINUSTAH, to Ms. AH before making the UNISFA designation decision. When Mr. GS did respond to Ms. AH on 8 October 2012, no further consideration was given to the request, and no definitive conclusion was reached and communicated to the Applicant, despite the fact that Mr. GS's facsimile included information regarding each of the five issues of concern as well as other background relating to the context and challenges of the Mission. Mr. WS simply relied upon his decision of four days earlier that the "outstanding concerns" justified a decision to deny designation.

109. The Tribunal is cognisant of the need to fill important posts in field missions and does not suggest that such posts can be held open indefinitely. However, at the time the UNISFA designation decision was made, it was already two and a half months after Mr. GB notified Mr. GS of the Applicant's selection, and almost two months after Mr. GS had approved the Applicant's release, including certifying his

performance. In any event, the position of CPO/MINUSTAH was not filled for a significant period of time.

110. Mr. GB gave evidence at the hearing, stating that the UNISFA designation decision put him in "a very difficult situation because [he] had no CPO for almost a year". The Tribunal concludes that there was no particular urgency that required Mr. WS to make the UNISFA designation decision without considering a response from either the Applicant or MINUSTAH to the concerns raised in the HCC Note.

111. The Respondent cited *Mbatha* UNDT/2011/096 in support of his submission that the UNISFA designation decision was justified on the basis of the precautionary principle. In *Mbatha*, a Security Sergeant at the International Criminal Tribunal for the former Yugoslavia was suspended from supervisory duties as a result of his unsatisfactory performance. The Dispute Tribunal held that the decision to suspend the staff member from supervisory duties was justified, noting that there were safety and security issues involved and stating that "the precautionary principle alone would justify a measure of the kind taken" against the staff member in that case.

112. *Mbatha* is distinguishable from the present case. The contested decision in that case was a suspension from supervisory duties due to performance issues that were brought to the attention of the staff member and then formally recorded as part of the performance management and development system. The decision to limit the supervisory functions was an interim measure pending finalisation of the rebuttal process. In the present case, the UNISFA designation decision immediately and summarily resulted in the permanent denial of a career opportunity. The Applicant was never explicitly informed that his performance was a concern or even that his individual performance was the reason for the decision.

113. The UNISFA designation decision was irrational, unreasonable, unfair, and procedurally flawed. The Applicant should have been informed that Mr. WS was considering the issues raised in the HCC Note in relation to the decision whether to approve designation, and he should have been provided with the opportunity to

comment on those issues. Contrary to the principles set out in *Sanwidi*, the Tribunal also finds that relevant material, in the form of the forthcoming response from Mr. GS, was ignored, as it was not in the hands of the decision-maker at the time of the decision. The Tribunal finds that the UNISFA designation decision was flawed and that the Applicant is entitled to be compensated. The issue of remedy is addressed at the end of this judgment.

The MINUSTAH designation decision

114. Ten days after sending his memorandum of 8 October 2012, having become aware that the Applicant's designation for UNISFA was denied by the ASG/OCSS, Mr. GS wrote to the ASG/DFS requesting that the Applicant's designation as CPO/MINUSTAH be reviewed. In his memorandum dated 18 October 2012, he stated that replacing the Applicant as CPO was fundamental to making the changes expected of the Mission. He also alleged that the Applicant's professional relationships had deteriorated to the point that it would be challenging for him to continue to function in the CPO/MINUSTAH post. The Applicant's uncontroverted testimony is that he was never informed by Mr. GS or anyone else of this concern.

115. It is recalled that less than six months earlier, on 30 May 2012, the Applicant's 2011–2012 e-PAS report was completed and he was rated as having exceeded performance expectations. His second reporting officer, Mr. GS, commented that he had produced a "good performance in a difficult environment". In *Simmons* 2012-UNAT-222, the Appeals Tribunal emphasized the importance of e-PAS reports, stating (emphasis added):

> 16. Importance of annual e-PAS reports cannot be under-estimated. These reports are important for the staff member because they *inform the staff member of how well or poorly she has performed* and how her performance has been judged by her reporting officers. *This gives the staff member an opportunity to improve her performance.* …

116. On 5 December 2012, the Applicant was informed by Mr. GS that his designation as CPO/MINUSTAH had been withdrawn effective 28 November 2012. He was effectively stripped of his designation without an opportunity to be heard or any consultation or reasoned explanation. As noted by the rebuttal panel convened to review the Applicant's 2012–2013 performance assessment, there were no structured discussions to review the seriousness of the alleged shortcomings or to discuss options and remedial actions (see para. 40 above).

117. The Tribunal has considered the Respondent's submission that designation is a separate process to performance management and development. While this is true in a sense, it is also clear that the decisions in these cases were based on an assessment that the Applicant had failed to perform his functions to the required standard. It is inescapable that the decisions were connected to the Applicant's performance.

118. The Tribunal appreciates that the delegation of authority in financial matters creates risks to the Organization in terms of its financial liabilities. However, the fact that the ASG/OCSS is accountable for the exercise of delegated authority and that he is responsible for protecting the financial interests of the Organization does not mean that action or measures may be taken without due regard to basic principles of fairness and justice. Staff members with delegated authority are accountable to the staff members that have delegated that authority. However, accountability within the Organization, which has been the subject of numerous General Assembly resolutions and reports of the Secretary-General, will not be strengthened if decisions are not transparent and well-reasoned. Accountability is meaningless unless staff members know which specific shortcomings they are being held accountable for and, crucially, why.

119. The Applicant was never informed that he had breached the Financial Regulations or Rules, the UNPM, or other procurement policies, and which of those provisions were breached. He was never informed that Mr. WS considered that he had placed the Organization's financial resources at risk, if indeed this was the

conclusion reached. He was never informed that he alone was being held personally accountable for one or more of the matters raised in the HCC Note, or for other matters, and the reasons for this decision. He was also not informed what information was taken into account and what weight, if any, was given to the explanations provided by Mr. GS in the 8 October 2012 facsimile.

120. The Administration cannot simply ignore its own performance management and development system as set out in ST/AI/2010/5. Any modification to a staff member's designation resulting from poor performance should be accompanied by appropriate discussions and consultation with the staff member as required by sec. 10 of ST/AI/2010/5, which states:

> When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

121. There is no evidence that the Applicant's performance was managed in a fair, supportive, and consultative manner as required by ST/AI/2010/5. In *Goodwin* UNDT/2011/104 this Tribunal noted that, in general, higher standards of competence and performance are expected of senior managerial employees and the same amount of counselling and sympathetic treatment usually accorded to more junior staff may not apply. However, even if the Applicant as a CPO at the P-4 level was considered a senior staff member, he is still entitled to consultation and due process. He was summarily and permanently stripped of his designation and reassigned to new functions, which he says have no relevance to his qualifications, with no consultation or opportunity to be heard. As stated in the Applicant's closing submissions, the decisions were abrupt, without warning or discussion and appear to be based on personal assessments that were not only at variance with the official record of service

and performance, but with the views of his other linemen and those who worked closely with him.

122. Where an adverse decision clearly results from a negative assessment of a staff member's performance, particularly with such drastic consequences, as a matter of fairness, the staff member should be clearly apprised of the concerns and be afforded an opportunity to respond. His or her responses should be taken into account and he or she should be informed of the conclusions reached and be allowed to make representations before the ultimate decision. This is particularly so in this case since many of the concerns had their genesis in decisions taken before the Applicant arrived at the mission, prior uncorrected systemic issues continued to prevail, where written records were incomplete or non-existent, resources and capacity strained, in a working environment devastated by the recent earthquake and where, as the evidence proved, decisions were often made on an *ad hoc* basis and validated *ex post facto*.

123. The Tribunal finds that the MINUSTAH designation decision was arbitrary, unreasonable, unfair and procedurally flawed. The Administration breached its obligation to act reasonably and in good faith, which is implied in every contract of employment (*Hamayel* 2014-UNAT-459, para. 17). For clarity, the Tribunal does not find that the delegation of authority gives rise to any specific rights to retain that authority. Rather, where an adverse decision is taken as result of a negative assessment of a staff member's performance, the staff member concerned should have an opportunity to respond to those concerns. The decision was arbitrary and unreasonable in that no reasoned conclusion was reached about the Applicant's culpability, responsibility or specific shortcomings. As noted by the Applicant in his closing submission, until the five-day hearing on the merits there had not been a systematic review of the Applicant's arguments and evidence on the specific cases that served as the basis for the contested decisions.

Disguised disciplinary measure

124. The Applicant submits that the MINUSTAH designation decision was a disguised disciplinary measure. Significant or serious lapses in performance, including dereliction of duty, failing to fulfil a proper supervisory role, recklessness or gross negligence, can, in some circumstances, give rise to a finding of misconduct. In *Goodwin* UNDT/2011/104, a staff member was placed on Special Leave with Full Pay while an investigation was conducted into a contract he had entered with a vendor. As a result of the investigation, he was informed that he had been derelict in his managerial responsibilities, failed to exercise sound and prudent oversight, and failed to ensure that the Organization's procurement rules and financial regulations were followed, resulting in an accumulated debt of USD1.3 million. The staff member was charged with misconduct and provided with an opportunity to comment on the charges. The disciplinary charges were eventually dropped and the staff member received a written reprimand, which is an administrative rather than a disciplinary measure.

125. The Tribunal finds it perplexing that in the present case, despite what the Respondent has characterized as very serious concerns addressed in the HCC Note, including a contention that the Applicant's shortcomings almost led to the loss of over half a million dollars, no formal investigation was conducted in relation to the Applicant's specific role in the five matters raised in the HCC Note, and no allegation of misconduct, recklessness or gross negligence was ever made against him. Because no disciplinary proceedings were initiated, the Applicant was not accorded the due process protections that he would have been entitled to under the Staff Rules if a charge of misconduct had been laid against him. Yet the sanction meted out to him was akin to a disciplinary measure. If the Applicant's failings in the present case were as serious as the Respondent has claimed, the process followed in *Goodwin* would have been a fairer and more appropriate means of dealing with the issues.

The "no difference" argument

126. The "no difference principle" presupposes a foregone conclusion without adherence to procedural requirements. The Respondent submits that giving the Applicant an opportunity to respond to the concerns of the Administration would have made no difference. Besides, he avers that the Applicant's interest in presenting all relevant information and explanations in his capacity as CPO/MINUSTAH is wholly consistent with his interest in responding in his personal capacity.

127. The Respondent further submits that when, in 2014, the Applicant was afforded the opportunity to respond to the HCC Note as part of discussions between the two parties, he presented the same information and arguments that he had presented in his capacity as CPO/MINUSTAH. Thus, in substance and in fact, there was no difference between the Applicant presenting a response as CPO/MINUSTAH and presenting a response on his own behalf.

128. The Tribunal does not accept this argument. The Tribunal has already ruled that the process of reconsidering the contested decisions and trying to remedy the breach of due process that occurred is not a matter that is properly before it. Therefore, whatever submissions the Applicant made during that process are irrelevant. Furthermore, the Tribunal repeats its previous observations beginning at para. 83 above.

129. There is also an important difference between the Applicant being asked to coordinate a response to the HCC Note and suggest measures to address the issues it raised, and him being given an opportunity to respond to a suggestion, as referred to by the Respondent, that he personally had placed the financial resources of the Organization at risk and/or breached the Financial Regulations and Rules and other issuances, and was at risk of losing his designation.

130. Finally, it would be wrong in principle for the Tribunal to condone a breach of the right to due process on the basis that, in the Respondent's view, it made no

difference in the end. In circumventing procedural requirements, the no difference principle would serve to subvert the very essence of the principles of natural justice, in particular the *audi alteram partem* rule. Procedural propriety and the protection of fundamental rights is a central theme pervading various issuances of the Secretary-General and the General Assembly. Adverse decisions taken as a result or as a consequence of a breach of the fundamental principle of due process cannot be regarded as fair. A breach of the right to due process is both procedurally and substantively unfair.

Conclusion on procedural matters in respect of the contested decisions

131. The contested decisions, in combination, and taking into account the effect on the Applicant's professional reputation, and his reassignment to unrelated functions, effectively ended his procurement career within the United Nations. Even if the decisions resulting in such an outcome were justified based on the substantive issues involved, and the Tribunal does not consider that they were, the Organization should have followed a fair and transparent process in making those decisions.

132. When, at the hearing on the merits, Mr. DD was asked by Counsel for the Applicant whether he knew if any other staff members had been held to account for the shortcomings identified in the HCC Note, he responded as follows (emphasis added):

> When we signalled weak internal controls to the DMS, who was Mr. [GS], it was up to Mr. [GS] to take administrative actions concerning staff under [the Applicant]. *For [the Applicant], we could not take administrative action* because we could not dismiss him, we could not reprimand him, we could not do anything about [the Applicant], *except, the only leverage that we have in New York is designation of procurement authority. So we used the only leverage that we had.* The rest was up to peacekeeping mission locally.

133. Although Mr. DD was not the decision-maker in this case, his characterisation of the contested decisions is revealing and accords with the Tribunal's interpretation

of the facts. Instead of following a proper and fair procedure to address the Applicant's alleged shortcomings, the Organization took a shortcut and withheld and withdrew his designation for the UNSIFA and MINUSTAH posts, respectively.

Issues raised in the HCC Note

134. The parties submitted, as one of the agreed legal issues, that the Tribunal consider whether the contested decisions were justified on the merits if the Applicant's rights of due process were found not to have been observed. The Applicant submits that the documentary evidence supports the argument that there was no legal justification for the contested decisions. As the documentary evidence submitted was extensive, and as a significant amount of time was spent by the parties and the witnesses addressing the five issues raised in the HCC Note as an indication of the Applicant's performance, the Tribunal considers it necessary to comment only briefly on the evidence.

135. The Applicant submits that the issues raised in the HCC Note arose primarily as a result of developments outside of his control or knowledge. While the Tribunal considers it unnecessary to make findings as to the competence and responsibility of the Applicant, it is relevant to note the context in which the Applicant was working.

136. He was appointed CPO/MINUSTAH on 2 July 2010, less than six months after the earthquake of 12 January 2010. Mr. GB, who was deployed as CMS/MINUSTAH in March 2010, and recruited the Applicant as CPO/MINUSTAH, gave evidence at the hearing. He was asked to comment on the state of procurement at MINUSTAH when the Applicant took over as CPO in 2010 and whether there were any specific concerns or problems. Mr. GB responded as follows:

> Were there issues with procurement? Absolutely. But many of these issues, I would say, started due to the earthquake. I think you are aware that the Secretary-General on the 20th January 2010 … due to the major event that took place, gave a special delegation to the head of mission that was then passed to me that we basically had special

> authority to take whatever measures had to be taken to sort out the numerous and very significant problems. So this designation … was used extensively by my predecessor … many, many activities took place, many decisions were made—acquisition of land, acquisition of property, rental of property, and various activities were done—and they were not in accordance as we would know with the normal procurement process … And there were a huge amount of activities that were ongoing ... And [the Applicant] arrived only in July, so it is about six months after the earthquake itself. … We tried to cope as much as possible with the rules and when we had to bypass due to the exigencies, we did. Now this is not necessarily related to the cases which are the object of your review … but I just wanted to specify that … some of the procurement activities were not totally in line with the way they should have been due to the exigency and complexity of the situation.

Lease of land to accommodate military contingents

137. There was a strong focus during the hearing on the first of the issues addressed in the HCC Note regarding improvements made by MINUSTAH to a "Greenfield" site leased from a local landlord. In 2006, MINUSTAH entered into an agreement to lease 100,000 square meters (m^2) of land. The lease contained four one year options. In December 2006 the Mission began work on irrecoverable improvements to the land. The work, which included construction of a perimeter wall, watch towers, roads, buildings and internal drainage, as well as the boring of deep wells, was completed in November 2007 and cost more than USD1.9 million. In 2007, the leased area was increased by 140,000 m^2 to a total of 240,000 m^2. The renewal option was exercised for four consecutive years until late 2011, when the lease expired.

138. The Respondent submits that the Applicant did not ascertain the sum expended on the irrecoverable improvements prior to entering negotiations with the landlord to renew the lease, nor whether steps had been taken to recover expenditure on these irrecoverable improvements.

139. The Applicant noted that the minutes of the HCC meeting held on 8 August 2006 (HCC/06/59), stated that the initial capital investments, amounting to USD400,000, "would be left in-situ at the end of the lease term. The investment formed part of the rent negotiations with the landlord that resulted in the monthly rental". He further noted that the same minutes stated that other infrastructure, such as pre-fabricated buildings, generators, network communications, etc. could be removed at the end of the lease term. The response of Mr. GS on 8 October 2012 to the HCC Note referred to these minutes and noted that recovery was never anticipated either in the lease agreements or in the case presentations or supplementary information submitted to the HCC.

140. The Respondent submits that it is irrelevant whether those managing the lease prior to the Applicant's appointment in July 2010 should have contracted differently and/or sought reimbursement. The Tribunal disagrees. The Applicant gave unchallenged testimony that no records of the improvements existed on the files of the MINUSTAH Procurement Section when he arrived at MINUSTAH and he relied upon the statements in the HCC minutes quoted above that investments were either not intended to be recovered or would be removed at the end of the lease term.

Lease for office space in Santo Domingo

141. The Applicant submitted in his closing submission that the retrenchment exercise that concerned the HCC was not implemented until 2015. The case was submitted to the HCC to avoid an *ex post facto* situation. The improvements made to the leased space were not originally documented by the Engineering Section in the procurement file that the Applicant inherited, nor were they properly authorized by the landlord in advance. In any event, the Applicant eventually recovered the costs.

142. The Respondent reiterated in his closing submission that the undisputed sum of USD26,632.40, which could have been collected at any time during the Applicant's tenure as CPO, should have been recouped earlier.

143. The Tribunal notes that the 8 October 2012 facsimile from Mr. GS to Ms. AH stated that, at the date of that communication, the landlord had passed a credit note for the undisputed amount of USD26,632.40 and recovery was underway. The Mission chose to move to a different building in Santo Domingo and the proposed lease extension did not go ahead. The Tribunal accepts the explanations provided by the Applicant.

Provision of armed security services

144. The Applicant submits that the Legal Office at MINUSTAH did not maintain a digest of local laws unlike standard practice. The record shows that on 14 November 2011, the Applicant emailed the MINUSTAH Legal Office attaching a Haitian government decree and asked for a legal opinion as to whether the decree had been repealed, "contrary to the [Status of Forces Agreement"]. On 16 November 2011, the Applicant was informed by the Legal Office that the decree was still in force. In his telefax to Ms. AH dated 8 October 2012, Mr. GS noted that since, its inception in 2004, the Mission had been unaware of the relevant decree.

145. The Respondent submits that the Applicant should have consulted with either the Office of Legal Affairs or the Mission's Legal Office. He submits that, given the misdirected focus of the solicitation process, there was a low response rate to the solicitation. While this may well be true, the Tribunal does not consider that accountability for this oversight should rest entirely with the Applicant, who was simply acting in accordance with best practice and his personal knowledge. He testified that he was operating based on the fundamental rule that contracts should be exposed to international competition. The Respondent has not shown that the Applicant placed the resources of the Organization at risk or breached the Financial Regulations and Rules of the Organization.

Segregation of responsibilities

146. The Applicant testified that he provided the requisitioner guidance on how to interact with the contractor and that the requisitioner went ahead and discussed commercial issues anyway. The Applicant acknowledged that the requisitioner's conduct raised an issue of segregation of responsibilities but stated that he was not present at the meeting and had provided the appropriate guidance. The requisitioner did not report to him. He did not authorise the requisitioner to discuss commercial issues. Therefore, he should not be held responsible.

147. In his closing submission the Respondent summarised this issue by stating that the principle of separation of requisitioning and procurement was not observed, "bringing into question the professionalism and integrity of the procurement process". After hearing five days of evidence, this vague statement does not convince the Tribunal that the Applicant should be held accountable for the concerns raised by the HCC in relation to this issue.

Contract for the provision of medical services

148. The HCC expressed concern over amendments by the Mission to a contract for the provision of medical services that had previously been vetted by the HCC. According to the HCC Note, the contract was amended a total of seven times. The fourth, fifth and sixth amendments resulted in increases to the Not to Exceed Amount that exceeded the Mission's delegated authority. The case was submitted *ex post facto*.

149. The Applicant stated that the delay in submitting the case to the HCC resulted from deficiencies in the technical evaluation of the contract, which were attributable to the Medical Services personnel from United Nations Headquarters in New York who visited MINUSTAH to carry out the evaluation. The Mission was not in a position to suspend the essential medical services. The Respondent submitted that the

Applicant failed to take proactive steps to ensure continuation of services while avoiding an *ex post facto* situation.

150. No convincing submissions or evidence were presented to the Tribunal as to why the Applicant's explanation, which was also advanced by Mr. GS in his facsimile of 8 October 2012, was not accurate or acceptable.

Conclusion on the issues raised in the HCC Note

151. The Tribunal has considered each of the five issues raised in the HCC Note. As stated in the scope of review section of this judgment, the Tribunal does not consider it necessary to comment in detail on each of these issues given its findings that the contested decisions were fundamentally flawed.

152. The Tribunal listened carefully to the Applicant's detailed responses to questioning from Counsel for both sides as well as the Tribunal. The Applicant's evidence was cogent and credible and he remained unshaken throughout the hearing. At no point in the hearing was the Applicant's *integrity* questioned in regard to the issues raised in the HCC Note. He supported his testimony with frequent references to the relevant Financial Regulations and Rules, the UNPM, the Guidelines on Designation and other documents pertaining to procurement authority and best practice.

153. The Tribunal notes that, following the removal of his designation, and his reassignment to other, mostly unrelated functions, the Applicant, apparently because of his knowledge and experience, was tasked with preparing a code of best practices for requisitioners and lease management, despite his alleged poor performance.

154. On balance, the Tribunal finds that the Applicant's explanations were acceptable. Having carefully considered the submissions of both parties, the testimony of the Applicant and all of the relevant witnesses, as well as the voluminous documentation on file, the Tribunal is not convinced that the contested

decisions would have been justified notwithstanding the breaches of due process and procedure.

Conclusion

155. The contested decisions were flawed and the Applicant is entitled to be compensated.

Remedy

156. In his closing submission the Applicant stated that his removal from procurement functions had tarnished his reputation and foreclosed his normal career progression. He stated that he has been subjected to severe emotional stress and has been severely traumatised by the treatment of the Organization. The Applicant seeks rescission of the contested decisions, including reinstatement of his designation and procurement authority, revocation of the letter dated 10 June 2013 stating that he would be separated from service, and placement in a suitable post commensurate with his experience. He also requests two years' net base salary in compensation for professional and moral damages.

157. In the circumstances of this case, the Tribunal considers that a hearing is necessary to decide the appropriate remedy to be ordered by the Tribunal, including compensation, if any. A hearing will therefore be convened unless the parties inform the Tribunal that they have reached agreement to settle the matter of remedy.

Judgment

158. The application succeeds.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of December 2015

Entered in the Register on this 31st day of December 2015

(Signed)

Hafida Lahiouel, Registrar, New York