



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/062

Judgment No.: UNDT/2014/051

Date: 14 May 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NARTEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Victor Rodriguez
James Ochieng Oduol
Miller Wanjala Bwire

Counsel for the Respondent:

Sarahi Lim Baró, ALS/OHRM

Introduction

1. This Application was filed on 26 November 2012. The Applicant contested primarily the decision by the United Nations Office at Nairobi (UNON) not to grant a lien on his post to enable him undertake a mission assignment to the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”). It was his case that the decision was taken as part of a series of prohibited conduct and retaliatory actions meted out against him for having testified as a witness before the Tribunal on 2 September 2009 in the case of *Kasmani* UNDT/NBI/2009/67.

2. The Respondent filed a Reply on 27 December 2012 in which he submitted:

- a. the Applicant’s claims are without merit;
- b. the contested decision was taken lawfully; and
- c. the said decision was not retaliatory in nature as it was based exclusively on a consistently applied general practice by UNON not to grant liens to staff members on any assignment to field Missions.

Facts

3. The Applicant first joined the Organization at the United Nations Protection Force (“UNPROFOR”) on 1 September 1998. He later joined the UNON as a Procurement Officer at the P-3 level in 2006 and was given a permanent appointment with retroactive effect from 30 June 2009.

4. On 2 September 2009 he testified for the Applicant in the case of *Kasmani* UNDT/NBI/2009/67.

5. In January 2010, the Applicant was temporarily re-assigned to the Finance Section from the Procurement Section where he had been working since joining UNON. This reassignment lasted about one year.

6. On 16 February 2010, the Tribunal issued Order No. 025 (NBI/2010) in response to a motion by Mr. Kasmani. The said Order was reaffirmed by the Tribunal's three-Judge panel on 26 April 2012 ordering that witnesses testifying for Mr. Kasmani, which included the present Applicant, should not be subjected to:

- a. intimidation or threats, either physical or verbal prior to or after testifying before the Tribunal;
- b. threats to the security of their employment, or development of their career with the United Nations, and
- c. retaliation of any other sort as a result of testifying before the Tribunal.

7. Additionally, the Tribunal ordered that the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violations of that Order. Parties were reminded of the seriousness of the matter so that any breach of that Order by the Parties or the Ethics Office would possibly trigger the application of the accountability provision in art. 10.8 of the Statute of the Dispute Tribunal.

8. On 9 July 2010, the Applicant was endorsed by the Central Review Body for placement on the roster for the position of P-4 Procurement Officer.

9. On 13 October 2010, the Director, Division of Administrative Services (DAS), UNON, Mr. Alexander Barabanov, received an email from Mr. Reem Frangoul, Human Resources Assistant at the United Nations Mission for the Referendum in Western Sahara ("MINURSO") requesting that UNON urgently release the Applicant for a three month Temporary Duty Assignment ("TDY") in MINURSO.

10. Mr. Barabanov responded on 27 October 2010 as follows:

My apologies for a late response. Somehow your email fell through the cracks in my in-tray. I have no objections to [the Applicant's] release for TDY. Please confirm your continued interest in this,

plus provision of replacement post or GTA funding to allow UNON to secure a temporary replacement.

11. The MINURSO offer had lapsed by then and no response was received from the mission.

12. The Applicant was informed on 5 March 2012 by Ms. Isabelle Kadjo, Human Resources Assistant at UNAMID, that he was under review for the position of Procurement Officer at the P-4 level. The formal offer was made to him by UNAMID on 30 March 2012.

13. On 30 March 2012, Mr. Tinkamanyire Mugisha, the Officer-In-Charge (OIC) Human Resources Section at UNAMID also sent a memo to the UNON Chief, Human Resources Management Services (HRMS), Mr. Suleiman Elmi, informing him that the Applicant had been selected “for reassignment on promotion to UNAMID as Procurement Officer.” The letter indicated that the offer was subject to receipt of medical clearance and Mr. Elmi’s confirmation of release of the staff member within 60 days of receipt of the request. The same memo was sent to the Applicant on the same date.

14. The Applicant then wrote to the UNON Chief, Administrative Staff Section, HRMS, Ms. Deborah Ernst, on 13 April 2012 requesting advice on the position of UNON in relation to the offer made by UNAMID and a clarification as to what return rights he would have after his Mission service.

15. Ms. Ernst responded on the same day stating that the Applicant’s move from UNON to UNAMID would be a ‘reassignment’ and not a ‘temporary assignment’ and therefore he could not maintain a lien on his post at UNON.

16. On 23 April 2012, Mr. Aggrey Kedogo, Chief Civilian Personnel Officer, (CCPO) UNAMID sent a letter to Mr. Elmi revising the offer to the Applicant. He indicated that the Applicant’s move to UNAMID would be on an “assignment with the Mission.”

17. In the same letter, Mr. Kedogo stated that the Applicant’s release from UNON was requested for an initial assignment period of one year subject to the extension of the Mission’s mandate and that the Applicant’s Mission

“assignment” would only be extended for a maximum period of two years. UNAMID also requested confirmation that upon return from his Mission assignment, the Applicant would be reabsorbed into UNON service.

18. Mr. Elmi replied to UNAMID on 29 April 2012 stating that UNON would not release the Applicant on a temporary mission assignment. Part of his letter read:

Please note that UNON was prepared to release [the Applicant] on transfer basis in response to your request of 12 April. However, it seems that while the request was being discussed, UNAMID decided to send us another request asking for his release on mission assignment. We are unable to meet your second request of April 25 and release [the Applicant] on one year mission assignment to UNAMID.

19. On 30 April 2012, Ms. Kadjo, emailed Mr. Elmi indicating that the offer would be amended and sent back to him shortly. Subsequently, UNAMID submitted a third letter dated 2 May 2012 to UNON and to the Applicant stating that the Applicant’s movement would be a transfer for an indefinite period with no obligation on the part of UNON to reabsorb the staff member after completion of his service to UNAMID.

20. Mr. Elmi responded on 7 May 2012 and communicated that UNON had accepted the third offer and that the Applicant would be released on a transfer basis.

21. On 14 May 2012, the Applicant wrote to Mr. Elmi requesting clarification of the final position by UNON on the issue of his maintaining a lien on his post in light of the different exchanges between UNON and UNAMID as regards the terms “reassignment,” “temporary assignment,” “transfer” and “mission assignment” since they all seemed to have different implications on his request for a lien.

22. Mr. Elmi responded to the Applicant’s letter on the same day stating that UNON was prepared to release him without any further delay since he was moving on a promotion. He also stated that UNON would not grant a lien on his post:

As you know, the procurement unit is under staffed and we will need to fill the vacancy as soon as possible with a regular appointment, especially since the new rules do not allow the filling of an RB post through temporary appointment.

Also, please note that as correctly pointed out by UNAMID, ‘*a transfer is a movement for an indefinite period..., with no right of the releasing office to reabsorb the staff member.*’ However, since you hold a permanent appointment, you have a right of placement for a suitable P3 position within the UN should this become necessary. It is my hope though that you will aspire for upward career progression and aim for moves from P4 to P5 and so on.

23. On 18 May 2012, Ms. Cynthia Gonzalez, Associate Human Resources Officer, UNON, wrote to Ms Kadjo informing her that the Applicant would be released on transfer to the Mission effective 1 August 2012.

24. The Applicant on 12 July 2012 submitted a request for management evaluation of the decision not to grant a lien on his post when UNAMID made him an offer for a one year mission assignment.

25. On 3 August 2012, the Applicant submitted a complaint titled “Report of Discrimination, Harassment, Abuse of Authority and Retaliation by UNON” to the United Nations Ethics Office.

26. The Management Evaluation Unit (MEU) upheld the contested decision and notified the Applicant on 28 August 2012 that the decision not to grant a lien on his post was a lawful and valid exercise of the Secretary-General’s discretionary authority.

27. On 6 September 2012, the Applicant submitted the complaint of Discrimination, Harassment, Abuse of Authority and Retaliation to UNON’s Director-General, Ms. Sahle-Work Zewde.

28. On 12 November 2012, the Ethics Office replied to the Applicant’s complaint of 3 August stating *inter alia*, that giving testimony before the UNDT did not constitute a protected activity under ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits and Investigations) and that retaliation allegations attributed to the

provision of testimony fall outside the scope of the Ethics Office's protection against retaliation mandate.

29. On 26 November 2012, the Applicant was selected to serve as Chief, Technical Service in the United Nations Integrated Peace building Office in the Central African Republic ("BINUCA") on a temporary assignment for a period of six months.

30. On the same day, he filed this Application in which, among other claims, he challenged UNON's earlier refusal to grant him a lien on his post when he was to undertake a mission assignment to UNAMID.

31. On 4 December 2012, UNON approved the Applicant's assignment to BINUCA and the placement of a lien against his post. The Applicant's assignment to BINUCA was to expire on 17 August 2013.

32. As at the date of the Application, the Applicant had been unable to transfer to UNAMID due to difficulties in obtaining a Sudanese visa.

33. On 2 April 2013, the Director-General, UNON, communicated to the Applicant her decision on his complaint of harassment submitted to her office on 6 September 2012. Based on the findings and conclusions of the Senior Legal Officer of the United Nations Environment Programme (UNEP), she concluded that no further action was required on the matter and that the matter was closed.

34. On 23 April 2013, UNAMID withdrew its offer of appointment to the Applicant "due to the long delay in approval of the Sudanese visa as well as the Mission's budget constraints."

Applicant's case

35. The Applicant's case as deduced from his pleadings and oral testimony is summarized below.

36. The retaliation, harassment and abuse of authority he suffered started in early 2008 when he refused to provide damaging information and/or testimony regarding a staff member in the Office of the Director-General.

37. The decision by UNON not to grant a lien on his post was discriminatory and/or retaliatory as it was based on the fact that he had served as a witness in 2009 in the case *Kasmani* UNDT/NBI/2009/67. This retaliation was meted out to him because Mr. Barabanov considered his testimony as an act of disloyalty and in fact had made veiled retaliatory threats against him that were acknowledged by the Tribunal in *Kasmani*.¹

38. After his testimony in the *Kasmani* case, the Applicant attended a meeting on 14 October 2009 with his First Reporting Officer (FRO), Ms. Mills-Aryee, and Mr. Barabanov. He was threatened with dismissal from service by Mr. Barabanov.² During the meeting, Mr. Barabanov said to him: “*I think it is better for you to leave the Organization,*” and concluded the meeting with the statement: “[*Applicant*] *I really think you should leave.*” He also suggested that Ms. Mills-Aryee should begin recording the Applicant’s activities for disciplinary or separation purposes suggesting that it would be difficult to punish him for insubordination since Ms. Mills-Aryee had not made any notes and was not in possession of any hard evidence to show as much.

39. In its judgment in *Kasmani*, the Tribunal had found that Mr. Barabanov was of the view that testifying on behalf of the applicant in that case was an act of disloyalty and that Mr. Barabanov’s statements directed towards him on 14 October 2009 constituted veiled threats.³ The Tribunal declared also that its Orders for the protection of Mr. Kasmani’s witnesses continue to remain live.

40. Additionally, the following other instances are also part of the series of harassment and retaliatory actions against him and should be read in conjunction with the impugned decision as they are all attempts to impede his career development:

¹ UNDT/2012/049, paragraphs 108-109.

² Ibid, paragraphs 92-95.

³ Ibid, paragraphs 108-109.

a. The statements made by Mr. Barabanov at a meeting on 12 February 2008, referring to the Applicant as a petulant child following his repeated requests to represent UNON at the annual Chief Procurement Officer (CPO) conference in New York. The Applicant's referral of the matter to the then Director-General of UNON, Ms. Anna Tibaijuka, was interpreted as an expression of disloyalty towards Mr. Barabanov.

b. The Applicant's reassignment from the Procurement Unit to the Finance Section in January 2010 even though he was not interested in the said re-assignment as it was not within his career path for advancement. This was done in a bid to 'punish' and 'banish him into exile.' This assignment which initially was to last for three months, kept on being extended and it was only after one year that he was granted permission to return to the Procurement Unit. This return to the Procurement Unit came only after he had written various letters requesting his return to his previous functions. As a result of this, he lost one year of procurement experience.

c. The inclusion into his Official Status File (OSF) in 2010 of negative correspondence from his former supervisor at the International Criminal Tribunal for Rwanda (ICTR) even before the matter could be verified or proved. Despite many requests, Mr. Elmi and HRMS refused to help the Applicant resolve the issue. Instead the correspondence was placed on his OSF.

d. Both Mr. Elmi and Ms. Vibeke Glavind, Chief, Support Services Section, UNON, had advised him to ignore the former supervisor's allegations stating that in so far as they were concerned, the matter was closed. It was therefore surprising that the matter was re-ignited in 2010 at a time when the Applicant was being considered for a permanent appointment.

e. The failure of Mr. Barabanov to act in time to release him for TDY to MINURSO in 2010 on the excuse that it had "slipped through the cracks" which caused him to miss that opportunity.

f. Directives given by Mr. Barabanov to prevent the Applicant from assuming responsibility as OIC on the departure of the then Chief Procurement Officer in May 2011; and in July 2011 when a junior P-2 Officer was appointed in his stead. On each of these occasions when the Applicant was to be appointed as OIC, the decision was overruled by Mr. Barabanov.

g. Further to this, the limitations imposed by the Chief of Procurement, Ms. Eckerstrom, as to the exercise of the Applicant's duties when acting as OIC in February 2012 left the Applicant in a role subordinate to a junior officer with much less experience.

41. The impugned decision when read along with all these other retaliatory actions taken against him commencing from when, at the instance of the Applicant, the former Director-General, UNON, overruled Mr. Barabanov's decision on attendance at the 2008 Procurement conference in New York and his testimony before the Tribunal in the *Kasmani* case in 2009 leaves no doubt of its abusive and retaliatory nature.

42. It was customary practice at UNON and in other United Nations Organizations to grant liens on posts of staff members who were proceeding to serve on mission and the decision to deny him a lien following UNAMID's revised offer of a temporary mission assignment was discriminatory and taken only for extraneous motives.

43. In various meetings which the Applicant held with Mr. Elmi regarding the approval for mission assignment with a lien on his post, he was informed that the decision as to whether or not to maintain a lien would have to be made by Mr. Barabanov. This shows that Mr. Barabanov used this as another opportunity for the retaliation and harassment campaign started against him in 2008. The refusal of a lien was meant to ensure that the Applicant would never return to UNON.

44. The Applicant submitted that even if the administrative decision to grant a lien is discretionary in nature, such discretion should not be abused in the decision making process and, in any case, no discretion is absolute.

45. The failure by UNON to give any reasons to UNAMID for the refusal to send him on “assignment” was in breach of the principle of procedural fairness.

46. The Applicant’s testimony before the Tribunal in *Kasmani* was no different from “reporting misconduct” or “having cooperated with a duly authorized audit or investigation” and therefore falls within the mandate of the Ethics Office as ordered by the Tribunal.

47. The Applicant prayed the Tribunal to order the following reliefs:

- a. Rescission of the decision refusing to grant him a lien or a right to return to his duty station UNON.
- b. That measures be taken to ensure that Mr. Barabanov refrains from actions that are retaliatory, discriminatory or threatening to his career development.
- c. To provide compensation for material and moral damages to his career and professional reputation by activities of Mr. Barabanov.
- d. To order the payment of legal costs and other expenses associated with bringing the case before the Tribunal.

Respondent’s case

48. The Respondent’s case is summarized below.

49. The withdrawal of the offer by UNAMID rendered the Application moot since the contested decision by the Applicant is “UNON’s decision not to grant [him] a lien on his post while on Mission to UNAMID.” The withdrawal therefore rendered the question of whether or not the Applicant ought to have a lien on his post an academic exercise and the Tribunal cannot grant a remedy under its Statute.

50. The contested decision was lawful and was not taken on the basis of extraneous reasons but on UNON’s general practice of not granting liens to staff members on mission assignment or transferring to field missions. Being a practice

that is consistently applied to all staff members, the Applicant cannot assert that he was discriminated against or treated differently from other staff members.

51. The Applicant did not have any legal expectancy or right to have a lien placed against his post while he proceeded on mission assignment.

52. None of the Applicant's rights had been violated by the failure to grant a lien on his post and neither did he establish a factual legal basis for any of his claims. In particular, the claims of harassment, abuse of authority and retaliation are irrelevant and without merit and should be dismissed.

53. Further, the contested decision was based on the need to maintain productivity in the Organization. Granting a lien on the Applicant's post would have worsened the difficulties that UNON was facing in attracting qualified candidates to its duty station. It would have also interrupted the work program of the Procurement Unit. As such, the contested decision was taken under the discretionary authority of the Secretary-General and based on the operational realities of UNON, specifically the Procurement Unit.

54. The Applicant was bound by the contract that he signed with UNAMID which provided that he was being transferred for an indefinite period, and with no right of the releasing office to reabsorb him, which precludes the possibility of granting a lien on his post. The Applicant was not 'temporarily reassigned' but 'transferred' and a transferred staff member does not retain any administrative link with the releasing office or department which has no obligation to reabsorb him or her at a later date.

55. The fact that UNON later approved the placement of a lien against the Applicant's post while he serves on Mission assignment to BINUCA disproves his claim that the decision not to grant a lien on his post was based on bias and abuse of authority. To the contrary, it demonstrates that UNON sought to accommodate the Applicant, while he was awaiting his Sudanese visa.

56. The findings made on the Applicant's complaints to the Director-General, UNON, disprove the claim that the lien was denied as part of a retaliatory pattern meted out against him by UNON Administration.

57. These findings further demonstrate that the Applicant's claims under ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority) are not receivable since any appeal alleging harassment or retaliation must be based on the Director-General's decision. The Applicant must first exhaust administrative remedies by requesting a management evaluation of the Director-General's decision but he has not done so and as such the Applicant's claims of retaliation and harassment are not properly before the Tribunal.

58. All the other claims are not receivable by reason of the fact that they were not submitted for Management Evaluation within the 60 day time limit. Having been filed after the statutory deadline, they are time barred. These are the claims regarding:

- a. an unsolicited extended assignment in the Finance Section in 2010,
- b. untimely response to the request for release of the Applicant to MINURSO in October 2010,
- c. decisions concerning non-appointment of the Applicant as OIC in July 2011,
- d. claims of the Applicant's authority as OIC being limited in February 2012; and
- e. the alleged placement of negative correspondence in his official status file in July 2010.

59. In view of the foregoing, the Respondent prayed the Tribunal to reject the Application.

Issues

60. Having reviewed the entire case record, the Tribunal formulates the following issues for consideration:

- a. Whether the Applicant's claims are receivable.
- b. Whether the Applicant became a victim of harassment and/or retaliation after his attendance of the annual Chief Procurement Officer's conference in 2008 and following his testimony before the Tribunal in the case of *Kasmani* UNDT/NBI/2009/67.
- c. Whether, in regard to UNAMID's revised offer to the Applicant on 23 April 2012 for a mission assignment, UNON abused its authority in refusing to release the Applicant with a lien on his post. Did the fact of the withdrawal of UNAMID's offer due to the non-grant of a Sudanese visa to the Applicant render the Application moot or an academic issue?
- d. The effect of the entry of adverse materials into the Applicant's Official Status File in the form of the negative performance review received from the International Criminal Tribunal for Rwanda.
- e. Matters of concern for the United Nations Ethics Office.
- f. The role and conduct of Mr. Barabanov in this case.

Considerations

Are the Applicant's claims receivable?

61. Counsel for the Respondent argued that the Applicant's claims regarding: (a) the comment by Mr. Barabanov to the Applicant at the 12 February 2008 meeting; (b) the comments by Mr. Barabnov to the Applicant at the 14 October 2009 meeting after his testimony; (c) his assignment to the Finance Section in 2010-2011; (d) the abortive request from MINURSO for his release; (e) his non-appointment as OIC of the Procurement Section in July 2011; (f) the limitation of

his powers when subsequently appointed as OIC; (g) the entry into his file of the negative performance review from the ICTR are all time-barred and should be rejected by the Tribunal.

62. The Respondent submitted that the claims ought not to be considered because the Applicant did not request management evaluation for each of these as they arose; and in addition the Management Evaluation Unit (“MEU”) determined that these claims were not receivable as they were submitted outside of the 60-day statutory limit under staff rule 11.2(c).

63. Further to this, Counsel for the Respondent argued that the Application is now moot as the assignment opportunity with UNAMID had been withdrawn following the delay in the issuance of a Sudanese visa to the Applicant. It was the Respondent’s case that the question as to whether or not the refusal of a lien is unlawful has therefore ceased to be an issue as there is no position to grant a lien against following the said withdrawal of offer by UNAMID.

64. For his part, the Applicant contended that all his claims are receivable as they go towards establishing a pattern of prohibited conduct on the part of the Respondent’s agents and does not each constitute a separate application in and of itself. The conduct complained of spans a period of a number of years culminating in the management decision not to grant him a lien on his post at UNON upon the offer of a mission assignment to UNAMID.

65. It is clear from the Respondent’s arguments and submissions that his objection to the receivability of this case has at its core the failure of the Applicant to request management evaluation of each of his allegations within the prescribed time limit of sixty days.

66. In the case of *Costa* UNDT/2009/051, Shaw J. noted that the Statute of the Dispute Tribunal contains an express prohibition in relation to the variation of management evaluation deadlines by the Tribunal.

67. Much as a request for management evaluation is a *sine qua non* in most cases for bringing an Application to the Tribunal, it must be understood that its

only purpose is to afford the Administration an opportunity to review itself with a view to minimizing litigation in appropriate cases.

68. But do management evaluation decisions affect the judicial process or its determination of any questions of fact or law that may arise in a case? Boolell J in the case of *Igbinedion* UNDT/2013/023 had this to say:

The submission by the Respondent that [the] finding by the MEU [on receivability] binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word ‘deadline.’

...Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation.

69. In the case of *Porter* UNDT/NBI/2013/156, the Tribunal discussed at length the receivability of certain claims that had not been submitted for management evaluation by the Applicant and found that they formed part of the same continuum. The Tribunal stated:

In certain circumstances, one may be subjected to recurring acts of unlawful conduct but may be unable to recognize the true character of the manner of treatment one has been subjected to until after it has continued for an appreciable length of time.⁴

...It cannot reasonably be argued that every single administrative action perceived to have been taken against the interests of the staff member in this case, which actions affected his employment are no longer actionable or that he can no longer seek relief as soon as 60 days of each of the adverse actions had occurred. In cases of continuous abuse all one needs to show is that there is a pattern of abuse of authority.⁵

70. The former UN Administrative Tribunal in *Andronov*, Judgment No. 1157 (2003) defined an administrative decision as a unilateral decision taken by the administration in a particular case producing direct legal consequence for the staff member concerned.

⁴ UNDT/2013/156, paragraph. 95.

⁵ *Ibid*, paragraph 102.

71. This definition has been cited with approval by both the Dispute and Appeals Tribunals.⁶ Does it reasonably follow that all actions and/or inactions on the part of a manager or statements uttered by him or her to his or her subordinate are necessarily administrative decisions? No doubt, certain actions, inactions or utterances may go to reveal the state of mind of the said manager and, when read in conjunction with subsequent administrative decision-making, will lend context to the rationale behind such decisions.

72. It cannot be reasonably argued that every action, inaction or utterance by a manager which adversely affects his supervisee or subordinate is an administrative decision capable of review by MEU. If this were to become the case, the majority of staff members would spend the greater part of their working hours making requests for management evaluation!

73. ST/SGB/2008/5 legislates against four classes of misconduct which include discrimination, harassment, sexual harassment and abuse of authority in order to ensure that all staff members are treated with dignity and respect and that the United Nations workplace is safe and conducive to all.⁷

74. In defining harassment, the Bulletin particularly noted⁸: *...Harassment normally implies a series of incidents*. Also in the definition of abuse of authority⁹, it is stipulated that it may include conduct that creates a hostile or offensive work environment: *...includes, but is not limited to, the use of intimidation, threats, blackmail or coercion*.

75. There is therefore no gainsaying that the prohibited conduct of harassment and abuse of authority against a staff member would most often be seen to have occurred over a period of time and involving *a series of incidents*. To argue that the victimized staff member must make a request to the management evaluation unit on every occasion that he is humiliated, demeaned, threatened or mistreated is as unserious as it is untenable.

⁶ For instance in *Hamad* 2012-UNAT-269.

⁷ ST/SGB/2008/5

⁸ Ibid, section 1.2

⁹ Ibid, section 1.4

76. As observed by the Tribunal in *Porter*, “the principle of access to justice upon which the entire internal justice system of the United Nations depends, demands that the seemingly legitimate claims raised in [an Application] be given a chance to be heard.”¹⁰ And this is especially so in cases of prohibited conduct.

77. As to the Respondent’s submission that this Application has been rendered moot following the inability of the Applicant to take up any kind of mission assignment at UNAMID because he did not get a Sudanese visa, the Tribunal finds that this argument misses the point. The matter of obtaining a Sudanese visa had no relevance to UNON management’s prior refusal that the Applicant undertake a mission assignment to UNAMID. The matter of the legality of the refusal continued to remain an issue capable of being challenged before this Tribunal even though the UNAMID offer was no longer live.

78. The Tribunal holds that in view of the reasons outlined above with regard to the peculiar characteristics and elements of prohibited conduct, this Application is indeed receivable.

Was the Applicant a victim of harassment and/or retaliation after his attendance of the annual Chief Procurement Officer’s conference in 2008 and following his testimony before the Tribunal in the case of Kasmani UNDT/NBI/2009/67?

79. It is the Applicant’s case that the impugned decision not to grant him a lien on his post while on mission to UNAMID ought to be read in conjunction with other related actions and decisions which constituted harassment and were consequently retaliatory.

80. In his report to the Ethics Office on “Discrimination, Harassment, Abuse of Authority and Retaliation by UNON Management” on 3 August 2012 the Applicant specifically stated:

UNON management have, acting under the express instructions or as agents of Mr. Barabanov, engaged in reprisal harassment and

¹⁰ UNDT/2013/156, paragraph 117.

retaliatory activities to thwart every move I make and to block every promotion and all aspects for advancement and career development which have come my way.

81. In his response to the Application, the Respondent made a blanket denial of any allegations of harassment, abuse of authority and retaliation. Further, Counsel for the Respondent submitted that the claims of prohibited conduct are not properly before the Tribunal as the Applicant failed to bring these claims before MEU and also failed to exhaust the administrative remedies available to him under ST/SGB/2008/5.

82. The Tribunal is of the view that it is unnecessary for a staff member to go to MEU with every single allegation that forms part of a series of actions that constitute a pattern of ill-treatment amounting to prohibited conduct. Also, even if an Applicant has not exhausted the administrative remedies provided for in ST/SGB/2008/5, this fact alone does not oust the jurisdiction of the Tribunal.

Evidence on prohibited conduct provided by the Applicant

83. In his sworn testimony, the Applicant stated that UNON Management led by Mr. Barabanov is intent upon seeing him leave the United Nations and has gone to lengths over a period of time to frustrate his career prospects within the Organization. His troubles with Mr. Barabanov started sometime in early 2008. The Applicant then traced the development of what he referred to as his woes at UNON.

84. He testified that Mr. Barabanov had approached him through an intermediary wanting him to make a false report and give testimony against another staff member who was his friend and countryman. When he refused, he was branded disloyal and tribal by the DAS.

85. The Applicant continued that shortly afterwards, he learnt that the Chief of Support Services Section (SSS) Ms. Glavind was far advanced in plans to attend the annual Chief Procurement Officers' meeting in New York while giving the impression all along that UNON would not send a representative to the said meeting due to financial constraints. A subsequent request by him and another

colleague in the Procurement Unit that at least one person from the Unit attend with Ms. Glavind was refused by Mr. Barabanov.

86. The Applicant said he followed up his request by appealing to the Chief of SSS to ask Mr. Barabanov to reconsider his decision not to send anyone from the Procurement Unit to the New York meeting. Ms. Glavind replied by email reminding him that Mr. Barabanov would be angry if the matter was raised again and would not change his earlier decision.

87. The Applicant then wrote to the then UNON Director-General, Ms. Tibajiuka, who went on to approve the attendance of one officer from the Procurement Unit as she felt it was the right thing to do since the procurement meeting in New York was geared towards operational not policy issues. Her intervention enabled the Applicant to attend the meeting in New York.

88. During a meeting held on 12 February 2008 between the Applicant, his other professional colleague in the Procurement Unit with Ms. Glavind and Mr. Barabanov to discuss UNON's representation at the up-coming meeting in New York, the latter told the Applicant and his colleague that their behaviour in appealing his decision to the Director-General UNON was like that of his three year old children while Ms. Glavind referred to it as evidence of their disloyalty.

89. The Applicant told the Tribunal that at a hearing in the case of *Kasmani* on 2 September 2009, he had testified as a witness for Mr. Kasmani. He had temporarily recruited Mr. Kasmani while he was OIC of the Procurement Unit and he believed that Management wanted Kasmani out in order to get back at him.

90. Following his testimony in the *Kasmani* case, the Applicant attended a meeting on 14 October 2009 with Mr. Barabanov and the then Chief of Procurement, Ms. Diana Mills-Aryee, who was also his FRO, to discuss staffing problems in his unit. At the said meeting, Mr. Barabanov berated the Applicant telling him that he was insubordinate for hiring Mr. Kasmani and should be reprimanded.

91. Mr. Barabanov also said that by testifying in the *Kasmani* case, the Applicant had acted against the interests of the Organization. He further said that the Applicant's work was poor, that he was sabotaging the Organization, that he did not trust him and that it was better for the Applicant to leave the Organization.

92. Mr. Barabanov then instructed Ms. Mills-Aryee to start from then on, to document everything the Applicant did in order that these could be used against him for separation purposes if the need arose.

93. The Applicant's minutes of the said meeting, made barely thirty minutes afterwards, were sent by him to both Mr. Barabanov and Ms. Mills-Aryee. They were also tendered in evidence as Applicant's annexure 11.

94. The Applicant also testified that on 10 December 2009 following his testimony in the *Kasmani* case, one Mr. Joerg Weich, then Chief, Recruitment & Planning Section UNON, in the company of Mr. Arnold Kreilhuber, Legal Officer, UNEP, questioned him about allegations that he tried to entice a lady security officer into provide damaging allegations against Messrs. Barabanov and the Chief of Security, Mr. Marshall. Later Mr. Weich told him that the matter had been dropped.

95. Following these developments, a motion was brought before the Tribunal which at the time was still *sub judice* in the *Kasmani* case, seeking an order for protection from retaliation for any witnesses who had testified in that case. The Applicant was a witness in the said *Kasmani* case. The Tribunal consequently made an order of protection from retaliation in favour of the witnesses in the *Kasmani* case on 16 February 2010.

96. The Applicant also told the Tribunal that in January 2010, he was reassigned from the Procurement Unit where he had been for four years and moved to the Finance Section. He had no interest in this job and the move was not in his career path neither did it offer him any possibility of career progression. The reassignment was initially for three months but eventually lasted more than one year.

97. The Applicant continued that in July 2010, he was contacted by Mr. Elmi, concerning an unsigned performance review received from his previous place of employment, the ICTR. It was his testimony that Mr. Elmi then told him that he would place it on his OSF until successfully rebutted contrary to his (Elmi's) former position in 2007 that the document would be ignored.

98. Still on the allegations of harassment, abuse of authority and retaliation, the Applicant told the Tribunal that the then out-going Chief of Procurement told him sometime in May 2011 that she was appointing him OIC of the unit pending the arrival of her replacement. She later informed the Applicant that her decision to appoint him OIC had been overruled by Mr. Barabanov.

99. Shortly after the arrival of Ms. Eckerstrom, the new Chief of Procurement, she was to go away on leave. She told the Applicant that she was instructed by Mr. Barabanov not to make him OIC of the unit although he was the most senior officer. A junior officer was made OIC although subsequently, he would be made OIC on other occasions with very limited powers.

100. Also in October 2010, MINURSO requested urgently the release of the Applicant on a short term assignment on promotion. Mr. Barabanov replied to the request two weeks later claiming in his response that the email "fell through the cracks." The Applicant testified that this was a deliberate effort to frustrate his career progression.

101. The Applicant received the news of a promotion offer from UNAMID on 11 April 2012. The next day, an officer from OIOS came to his office with the Chief of the Procurement Unit and seized his computer hard disk, laptop and official mobile phone and started an investigation based on fictitious allegations in order to ensure that he was not promoted. The Applicant told the Tribunal that once a staff member is officially under investigation, it would be impossible to secure a 'designation' for promotion.

102. As part of his acceptance of the UNAMID offer, the Applicant was required to take on significant management functions requiring the delegation of the United Nations Controllers' financial authority, through the process known as

designation. He was required to sign a “Designation Staff Self Clearance Form” questioning whether he was currently the subject of an investigation at the United Nations.

103. The Applicant wrote to the OIOS officer heading the investigation, Mr. Paul McDonagh, on 29 June 2012 seeking guidance on how to complete the form. Mr. McDonagh advised him to direct his query to Mr. Michael Dudley, Deputy Director of OIOS, in New York. Mr. Dudley responded to the Applicant on 2 July 2012 stating that OIOS was not in a position to provide advice.

104. The Applicant proceeded to indicate on the form that he had not been and was not currently subject to an investigation and forwarded the form to the Office of Human Resources Management.

105. UNON Management had claimed that it refused to grant the Applicant a lien on his post if he accepted the UNAMID offer because his move would be considered by UNON as a reassignment and not as a temporary assignment. In spite of UNAMID revising its offer on 23 April 2012 to a one-year mission assignment, Mr. Elmi refused to grant the request without giving any reasons. Rather, he later told the Applicant that the decision whether or not to maintain a lien on his post would need to be made by Mr. Barabanov.

106. On 3 August 2012, the Applicant made a report of discrimination, harassment, abuse of authority and retaliation by UNON to the Ethics Office. On 6 September 2012, he submitted a similar report to the UNON Director-General.

Evidence tendered in response to the Applicant’s allegations on prohibited conduct.

107. The Respondent’s case on this score as presented by Counsel was that the UNON Administration had not engaged in any form of prohibited conduct or retaliation against the Applicant.

108. Three out of the Respondent’s five witnesses gave testimony which threw some light on the issue of prohibited conduct.

109. Ms. Eckerstrom, the Chief of the Procurement Unit and the Applicant's FRO, testified on 24 September 2013 for the Respondent. She stated that there was no need for the Applicant to serve as OIC before she arrived because she was already in Nairobi on 20 May 2011 which was the last day in office of her predecessor Ms. Mills-Aryee.

110. Still on the matter of appointment of OIC in her unit, the witness told the Tribunal that Mr. Barabanov told her in June not to make the Applicant OIC when she went on annual leave in July 2011 and rather proposed that she appoint a P2 officer who was junior to the Applicant as OIC. She agreed but asked Mr. Barabanov if he minded her telling the Applicant that it was his decision and he said he did not mind and so she told the Applicant about it when he asked.

111. In response to a question by the Tribunal, the witness said she did not seek Mr. Barabanov's views on who to make the OIC of her unit while on leave but that he merely instructed her on what to do, that she did not know why he gave the instruction and she did not ask him.

112. The witness testified also that she made the Applicant OIC on about six other occasions and that the only time she had put a limitation on his functions as OIC was when he was to hold the position for only two days and another junior officer was to continue for seven days. The limitation was directed at the other junior officer who would be there for a longer period.

113. With regard to the refusal to grant the Applicant a lien on his post on the offer of his temporary assignment to UNAMID in April 2012, she said she did not agree that the Applicant be given the lien he wanted because she was concerned about losing staff in the section.

114. The witness said that a temporary appointment which was what could be offered any replacement for the Applicant if he was allowed a lien did not generally make it easy for the section to keep good staff. Someone whom they tried to recruit on a Fixed Term Appointment (FTA) while the Applicant was waiting for a Sudanese visa to leave for UNAMID later refused a temporary

appointment when he had to go to BINUCA with a lien against his post because the person was already sitting on a temporary post in New York.

115. With regard to the Applicant's temporary assignment to BINUCA with a lien on his post, the witness said she was not in the picture as to how the request for the Applicant came or how it was approved. In response to a question by the Tribunal, she said that her opinion and recommendation were not sought when the Applicant was allowed to go to BINUCA on the temporary assignment.

116. Mr. Elmi also testified. He stated that when a request first came from UNAMID for the release of the Applicant on a reassignment, he passed it on to Ms. Eckerstrom for her decision and copied Mr. Barabanov. Her response was that he could be released but without a lien. Mr. Barabanov agreed with her.

117. The witness said he did not know why UNAMID changed the offer from a reassignment which meant a permanent transfer to an assignment for a temporary period. He said also that he had advised the Applicant to accept an outright transfer to UNAMID on the P4 position since it was a promotion but he refused. He explained that for a mission assignment, it is temporary and the staff member is expected to be away for a short period and he can hold a lien on his post.

118. According to the witness, even when UNAMID came back to UNON on 23 April 2012 revising its initial offer to the Applicant to a temporary mission assignment, UNON still refused the Applicant a lien on his post. He said he mistakenly informed the Applicant that the new rules do not allow the filling of a regular post through temporary recruitment. Why would Mr. Elmi make such a mistake? And why would he advise the Applicant to accept an outright transfer out of UNON?

119. He continued that UNON agreed to the Applicant's temporary assignment to BINUCA with a lien while he was waiting for a Sudanese visa to go to UNAMD and later extended it. The witness said he was not sure why the extension was granted.

120. With regard to the allegation that he had in 2010 placed an incomplete 2006 performance appraisal (“ePAS”) sent by the Applicant’s former FRO in ICTR on the Applicant’s file, the witness said he had no choice but to do so and that he had advised the Applicant that the proper thing to do was to initiate a rebuttal process if he was not happy with the ePAS.

121. Mr. Barabanov also testified for the Respondent. He denied the allegation that the decision not to grant the Applicant a lien on his post in UNON following the offer from UNAMID was based on bad faith and retaliation.

122. As to the allegation that he was intent on seeing the Applicant leave the Organization and had led a campaign of intrigues against him to that effect, the witness said it was not true. He added that in his position as DAS, he would not engage in such action with regard to a very junior member of staff. He also denied any knowledge of or involvement with the OIOS investigations against the Applicant.

123. When examined about the meeting he held with the Applicant and the then Chief of Procurement on 14 October 2009 following the Applicant’s testimony before the Tribunal in the *Kasmani* case at which he was alleged to have asked the Applicant to leave the Organization, he said that he did not threaten him but expressed serious concern about the Applicant’s insubordination because he did not follow the instructions of his supervisor. The witness said he had asked the Applicant on that occasion to leave UNON and to seek employment elsewhere within the United Nations.

124. Still under examination by the Respondent’s Counsel, Mr. Barabanov said he recalled receiving a request from MINURSO regarding the Applicant but that it was not a very clear request. He replied to it within ten working days asking them for clarification but they did not respond and so he assumed it was not a serious request.

125. Regarding the allegation that he victimized the Applicant after he requested to be allowed to attend the Chief Procurement Officers meeting in New York in 2008; he said that he felt that the Applicant was not mature enough to

take over the responsibilities of the Chief of Procurement when the previous Chief left on a mission assignment and so reached agreement with the Procurement Division in New York to send a senior officer to UNON. He believed the new Chief who was still in New York would attend the meeting.

126. Meanwhile, he felt it was useful for the Chief of SSS in UNON to attend the said Procurement meeting and refused to grant approval for either the Applicant or his colleague in the Procurement Office to attend the same meeting. When the Applicant and his colleague asked him to reconsider his decision, he refused to do so. The Applicant then approached the Director-General of UNON who overruled him and gave approval for the Applicant to attend the meeting.

127. Mr. Barabanov was then examined about the allegation that he had instructed the Applicant's FRO, Ms. Eckerstrom, not to appoint him OIC in July 2011 when she was going on leave. He admitted that that was indeed the case and explained that he did so because:

...I was not comfortable with her being a very new Chief of Procurement in UNON leaving Mr. Nartey in charge of the Procurement Section. In that respect, my considerations were Mr. Nartey's pattern of behaviour and insubordination plus his attempts to undermine successive Chiefs of Procurement in the past did not fill me with confidence in his ability to head the Procurement section as officer in charge. So I requested Elizabeth Eckerstrom to appoint somebody else as officer in charge on that occasion

128. In commenting generally on the allegations made against him by the Applicant, the witness told the Tribunal that as he had mentioned earlier, it was not his habit, nature and track record to engage in the harassment of very junior people and that he did not have direct dealings with P-3 level staff members since there are at least two or three levels of supervisors between them.

129. During cross-examination, Mr. Barabanov was asked if the insubordination, immaturity or incompetence which he ascribed to the Applicant would be found in his performance evaluation. The witness replied that in principle these would normally be reflected in the ePASes but that he merely referred to the Applicant's ability to head the Procurement Unit and not the discharge of his functions at the P-3 level. When he was told that the Applicant's

ePASes made no mention of insubordination or immaturity, he said he was not looking at the Applicant's ePASes.

130. In answer to the question that in spite of claiming not to have any dealings with P3 level staff members, he had instructed Ms. Eckerstrom not to appoint the Applicant OIC; the witness admitted that he told Ms. Eckerstrom not to appoint the Applicant OIC. He added that in the past, the Applicant undermined his supervisors and bad-mouthed them to him. This led him to form the impression that the Applicant was immature and so he asked Ms. Eckerstrom not to leave him in charge of the section.

131. When the witness was asked if he knew that in spite of his objections to the Applicant attending the conference in New York in 2008, some of the Applicants recommendations at the said conference were adopted and became part of policies and processes to improve procurement in UNON; he replied that he was not aware of that and did not know if the Applicant represented UNON satisfactorily at the conference.

132. Still in cross-examination, Mr. Barabanov was asked whether at the time that the MINURSO request for the release of the Applicant on assignment was made, he had held the unflattering views of him and his answer was that he did.

133. The Tribunal asked Mr. Barabanov if he ever noted that the recruitment of Mr. Kasmani which he continually cited as the instance of the Applicant's insubordination, the Dispute Tribunal, the Appeals Tribunal and even the Management Evaluation Unit were all in agreement in the *Kasmani* case that the recruitment was not irregular. The witness replied that he was ignorant about the judgments of the Tribunals.

134. When the Tribunal asked him if apart from the recruitment of Mr. Kasmani which he believed amounted to insubordination, there were other instances to support his claim that the Applicant engaged in a pattern of insubordination; the witness said he could not recall any other instances of the Applicant's insubordination.

Were prohibited conduct and retaliation established in the Applicant's case?

135. ST/SGB/2008/5 is the legislation which creates the class of misconduct referred to as prohibited conduct. This class includes discrimination, harassment, including sexual harassment, and abuse of authority. Its section 1.2 defines harassment thus:

Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents.

136. In section 1.4, abuse of authority is defined as:

...the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to the use of intimidation, threats, blackmail or coercion.

137. Retaliation is provided for in section 1.4 of ST/SGB/2005/21 and is:

Any direct or indirect detrimental action recommended, threatened or taken because an individual is engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.

138. ST/SGB/2005/21 was promulgated “for the purpose of ensuring that the Organization **functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals** who report misconduct or cooperate with duly authorized audits or investigations...”

139. Is a staff member's protection from retaliation within the Organization completely limited to when he makes reports of misconduct or cooperates with auditors and investigators? Is the staff member protected from retaliation when he gives testimony before the Tribunal?

140. Article 17 of the Tribunal's Rules of Procedure provides that the parties to a case may call witnesses to testify. It goes without saying that the testimonies of witnesses are often crucial and critical to determining the justice of any case and as such witnesses are routinely offered protection by the court if they face any kinds of threats in any way.

141. It was observed in the Order of the Dispute Tribunal made on 16 February 2010 in respect of an *ex parte* application in *Kasmani*¹¹ that although the Statute and Rules of Procedure of the Dispute Tribunal are silent on the protective measures for witnesses testifying before it, art. 36 of the Rules gives the Tribunal the broad power to issue any order or give any direction that appears appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

142. The Tribunal ordered in respect of that *ex parte* application that witnesses testifying before it in the substantive application not be in any way subjected to intimidation, threats or retaliation within the Organization. In that Order, the Tribunal sent a clear message and affirmed the universal and fundamental principle that testifying before a Tribunal is indeed as protected an activity within the Organization as those provided for in ST/SGB/2005/21.

143. In determining whether the Applicant's claim that he was a victim of prohibited conduct and retaliation at UNON in a campaign led by Mr. Barabanov is established; the Tribunal will examine whether there were any actions, inactions utterances and/or *series of incidents* which point in that direction.

144. Firstly, there is the unrebutted evidence of the Applicant that on 12 February 2008 after Mr. Barabanov's refusal to allow the participation of a Procurement Officer from UNON at the Chief Procurement Officers conference in New York had been overruled by the then Director-General; the Applicant and his colleague in the Procurement Unit held a meeting with him and the Chief of SSS. At that meeting, Mr. Barabanov told the Applicant and his colleague that their behaviour in appealing his refusal was like the behaviour of his three-year old children rather than that of professional staff members. The language employed

¹¹ Order No. UNDT/NBI/2010/025.

by Mr. Barabanov was clearly belittling, demeaning and embarrassing. This was harassing conduct.

145. Evidence also adduced is that on 14 October 2009 following the Applicant's testimony in the *Kasmani* case, Mr. Barabanov held a meeting with the then Chief of Procurement, Ms. Mills-Aryee, and the Applicant to discuss staffing issues. At that meeting, Mr. Barabanov harangued and intimidated the Applicant for appearing at the Tribunal as a witness. He told the Applicant that he was sabotaging the Organization, that he could not trust him and that it was better for him to leave the Organization. He also told the Applicant that he had a very poor record in the Organization and asked Ms. Mills-Aryee to document everything he did, his poor work quality and absences to be used for purposes of separating him. The threats made at that meeting prompted Mr. Kasmani to subsequently seek protection for his witnesses, including the Applicant, from the Tribunal.

146. While Mr. Barabanov denied threatening the Applicant, he admitted that at the said meeting, he accused the Applicant of insubordination for hiring Mr. Kasmani and testifying to the correctness of his actions before the Tribunal. He said he asked him to find other employment and to leave UNON.

147. The language and style of Mr. Barabanov at that meeting even by his own admission were not only intimidating but more than sufficient to cause alarm as it is easy to see that an officer junior to him by several levels would be threatened by them especially coming from him as the Director of Administrative Services. This was no doubt harassing behaviour. His instructions in that context to Ms. Mills-Aryee to begin to document any perceived short-comings of the Applicant for purposes of separating him constituted abuse of his authority considering that Ms. Mills-Aryee was also his subordinate.

148. Again, there is evidence that Mr. Barabanov had instructed the Applicant's Chief of Unit, Ms. Eckerstrom, not to appoint him OIC when she was going away on leave in July 2011 in spite of the fact that the Applicant was the most senior officer in the Unit in the absence of the Chief. He had also told Ms. Eckerstrom that she could tell the Applicant that he gave the directive. He admitted to the

Tribunal that he made the said directive. Mr. Barabanov's directive to the new Chief of Unit who did not ask his views on the subject was harassing and also constituted abuse of authority in respect of the Applicant as it could only serve to create a hostile work environment for the Applicant in the Procurement Unit.

149. The Tribunal heard how MINURSO had sent an urgent request on 13 October 2010 for the Applicant to be released for a three-month assignment but Mr. Barabanov did not respond to the request until 27 October, two weeks later. This piece of evidence was admitted by the DAS and further confirmed by documentary evidence. He had also told the Tribunal that he held his unflattering views of the Applicant as at that date. There is no doubt in the mind of the Tribunal that ignoring MINURSO's urgent request concerning the Applicant constituted both abuse of authority and an act of retaliation in the circumstances.

150. With regard to the evidence that the Applicant who is a trained Procurement Officer was, without his consent, assigned to the UNON Finance section for three months in January 2010 and later the said assignment was extended to one year; causing him to lose valuable procurement experience, this claim is unchallenged. In the absence of any reasonable explanation for the said reassignment especially so soon after the Applicant was intimidated and harassed at the meeting on 14 October 2009 by Mr. Barabanov; the Tribunal finds that this reassignment was an act of retaliation while also constituting an abuse of authority.

151. In respect of the OIOS investigations commenced against the Applicant in April 2012, Mr. Barabanov testified that he knew nothing about it. Although Ms. Eckerstrom who was said to have escorted the OIOS officers to the Applicant's office did not offer any testimony on this score, the Tribunal does not find a relationship between the said OIOS investigations and the UNON Administration.

152. The Tribunal could not arrive at a determination concerning the matter of placing an uncompleted ePAS from ICTR on the Applicant's OSF in 2010 after UNON Management had allegedly in 2007 decided to ignore the said ePAS. The Tribunal did not have enough evidence at its disposal to make a determination on that score.

Whether in regard to UNAMID's revised offer to the Applicant on 23 April 2012 for mission assignment UNON abused its authority in refusing to release the Applicant and grant him a lien on his post? Did the fact of the withdrawal of UNAMID's offer due to the non-grant of a Sudanese visa to the Applicant render the Application moot or an academic issue?

153. It was the Applicant's case that UNON's decision not to grant him a lien on his post when he was offered a temporary mission assignment to UNAMID on 23 April 2012 was unlawful. He submitted that it was customary practice in UNON and in other United Nations organizations that a staff member taking up a mission assignment would be granted a lien for a limited period of two years and that UNON's refusal in his case was based on extraneous motives.

154. The Applicant claimed that in various meetings with Mr. Elmi, he was informed that the decision of whether or not he could be granted a lien on his post was to be made by Mr. Barabanov. He submitted that Mr. Barabanov's decision was retaliatory and abusive in nature and constituted part of the harassment campaign started against him when he attended the Procurement Conference in New York in 2008 against Mr. Barabanov's wishes and directive and carried over into 2009 when he testified in the *Kasmani* case to the displeasure of the same individual.

155. On his part, the Respondent argued that the Applicant had no right to be assigned to another activity or office with a lien placed against his post. The Secretary-General has the discretionary authority to assign staff to any of the activities or offices of the organization.

156. It was also submitted for the Respondent that the decision not to grant a lien against the Applicant's post was made in order to maintain productivity as the Procurement Unit was understaffed and that UNON had consistently applied a policy against liens on posts to all similarly-situated staff members. The refusal of a lien on the Applicant's post while on assignment to UNAMID was lawful.

157. Four out of the Respondent's witnesses gave testimony touching on the refusal by UNON Administration to grant the Applicant a lien when he received the revised offer of assignment to UNAMID.

158. The Applicant's FRO, Ms. Eckerstrom, told the Tribunal that when the Applicant received the first offer from UNAMID, the Procurement Unit had staffing difficulties and that the Applicant was the only staff on a fixed term appointment. She said that she recommended to Mr. Barabanov on 12 April 2012 that the Applicant be granted a transfer with no return rights to his post.

159. With regard to the Applicant going to BINUCA, she said that he was released to BINUCA on a temporary basis. In answer to a question in cross-examination, she said that she was not fully in the picture as to how the BINUCA assignment request came or how it was approved. In answer to another question put by the Tribunal, she said that her views and recommendation were not sought when the Applicant was to go to BINUCA.

160. Mr. Elmi for his part told the Tribunal that in cases of mission assignment, it is temporary and the staff member is away for a short period and can hold a lien on his or her post. When the request from UNAMID came, it was passed on to Ms. Eckerstrom as the Applicant's FRO for her response. She refused the grant of a lien and her position was supported by Mr. Barabanov. He said that UNON agreed to the Applicant's temporary assignment to BINUCA but that he did not know why it was extended.

161. In answer to a question put to him by the Tribunal, the witness said that there is no policy but there is a practice at UNON for not releasing a staff member if a manager thinks it will affect the section adversely. The manager has discretion to refuse grant of a lien to a staff member proceeding on a mission assignment.

162. Ms. Ernst testified that when the UNAMID request came, the Applicant sought to maintain a lien on his post and that since it was a discretionary decision, it was unlikely that he would be released on an assignment. She said that UNON had approved several inter-organizational movements on secondment basis with return rights for up to a period of five years because it is likely that the seconded

staff members would find higher positions and not return. According to the witness, UNON management however had never supported intra-organizational movement of professional staff members.

163. She continued that UNON's practice had been to encourage mobility among General Service (GS) staff members and to give GS staff the opportunity to obtain peace-keeping experience. UNON is a small office and since her arrival in 2008, no professional staff members had been released on a temporary basis and this policy has been consistently applied.

164. Regarding the approval of the Applicant's BINUCA assignment with a lien on his post, the witness said that UNON agreed to the temporary assignment to BINUCA because the Applicant was meant to be going away on transfer to UNAMID from there and going to BINUCA was a temporary arrangement. UNON agreed to extend the BINUCA assignment as there was already a temporary replacement in place and the Applicant wanted the assignment and there was no need to inconvenience the mission.

165. Mr. Barabanov in his testimony said that it is common practice at UNON to first consult with the head of the substantive unit from which a staff member is requested for assignment as to whether they agree to the release of the staff member and his own agreement as the head of division is also sought. He said he agreed with Ms. Eckerstrom's recommendation that the Applicant could be released on a reassignment and would have no right of return.

166. While answering to a question in cross-examination, the witness said that UNON does not have any documented policy on the subject of assignments. The practice that UNON had followed was that it could not afford to release staff with a lien on their post because it is a small office in terms of professional strength. The witness continued that from UNON's experience, recruiting replacement staff for a post of less than twelve months is difficult and so it follows a policy of not granting liens on posts.

167. Replying to a follow-up question, Mr. Barabanov said that there had been discussions within the UNON Senior Management Team and that it had been

agreed that such a policy be adopted. When the Tribunal asked if there were any records of such meetings and agreements on policy, he said it was usually a free discussion of not more than six people that operated as a like-minded group and that no records were made or kept. The team had agreed on how to deal with assignments to peace-keeping missions which included refusal of liens for those proceeding on mission assignments.

168. In cross-examination, the witness was asked which official at UNON made the final decision as to whether a staff can be assigned or transferred. His answer was that where it concerned any staff working under the Division of Administrative Services, the final decision on whether to release staff on transfer, secondment or short-term mission assignment, lay with him as the Director.

169. In order to determine the questions that arises with regard to the refusal to release the Applicant on mission assignment to UNAMID, the Tribunal will examine relevant evidence before it and the official and legal position of the Organization. ST/AI/404 (Mission detail), is an administrative instruction dated 19 May 1995 which provides for the procedures and guidelines governing assignments to and returns from mission detail. Paragraph 3 of that document speaks to the commitment of the Secretary-General on the subject thus:

The Secretary-General is committed to having staff integrate mission service into their personal growth. He therefore expects programme managers to encourage their staff to serve on mission through staff rotation, and through that rotation to further the careers of both the staff who remain in their department/offices by giving them the opportunity to take up new responsibilities.

170. In order to better achieve the Secretary-General's intention with regard to staff members volunteering for mission service, certain modifications were made including that for blocking of posts for staff members on mission detail.

it is most important that staff in the Professional and General service and related categories proceeding on mission detail be assured that they can return to their current post. Accordingly, for a period of up to two years, in conjunction with a staff member's mission assignment, releasing departments/offices are responsible for ensuring that the posts of detailed staff members holding permanent or long-term appointments are blocked. These posts are

to be filled only through temporary recruitment of replacement staff, if necessary, or through temporary staff redeployment (including a special post allowance, when called for).¹²

171. Further, the difficulties that would be encountered by departments/offices that release staff members for mission service in this arrangement are recognized and it is also provided that:

It is for this reason that departments cannot be expected to block posts for more than two years when permanent staff members proceed on mission detail.¹³

And:

it has been decided to set an 8 to 10 per cent ceiling as a guideline in determining the percentage of staff that a department or office is expected to release for mission service. ...Once a department/office has reached this ceiling, the department/office would not be expected to release additional staff until a corresponding number of staff has returned.¹⁴

172. Mr. Barabanov testified that UNON's Senior Management Team adopted a policy to deal with assignment of staff members to peace-keeping missions. This policy was not documented and there are no minutes in existence of any of the meetings where such a policy was adopted. The essence of the said policy adopted by UNON and the practice it followed was that it would not release professional staff members for mission assignment with a lien on their post.

173. Both Mr. Elmi and Ms. Ernst told the Tribunal that refusal to release staff members on mission assignment with a lien on their post was not a policy but a practice at UNON. Mr. Elmi had testified that a staff member would not be released on mission assignment if his manager thought it would affect the section adversely and that it was Ms. Eckerstrom's views that led to UNON refusing the Applicant a mission assignment to UNAMID with a lien. The assertion that the Applicant's FRO's opinion on release for mission assignment influenced the refusal of the UNAMID offer is clearly false when it emerged that the said Ms.

¹² ST/AI/404, paragraph 7.

¹³ Ibid, paragraph 9.

¹⁴ Ibid.

Eckerstrom was not even consulted when UNON subsequently allowed the Applicant a mission assignment to BINUCA.

174. Explanations were offered by Mr. Barabanov that UNON would release staff members to serve in other agencies on a secondment basis with a lien on their posts. It was explained that a different document governs secondments.¹⁵ It was further explained that staff members who left on secondment although they had liens on their posts were likely to be gone for up to five years or to find other jobs and not return. Mr. Barabanov actually told the Tribunal that if an exception were made in the Applicant's case, the rights of other staff members in similar situations would have been damaged.

175. What must be underscored here is that the same UNON Administration would deny those staff members who wish to take up mission assignments liens on their posts while allowing secondments. Clearly this undocumented policy or practice adopted by UNON not to release international staff members for mission assignment is contrary to the spirit and intent of the Secretary-General as expressed in ST/AI/404.

176. It is surprising that UNON Administration has shown itself to be totally unimpressed and unaffected by the provisions of the said Administrative Instruction and actually refused to implement it or be regulated by it. UNON's position is that it would force a staff member who wanted to undertake a temporary mission assignment to leave permanently on a reassignment or transfer rather than return to his post. No evidence was tendered to show that UNON Administration was ever granted any kind of a waiver to adopt a policy or practice contrary to ST/AI/404 for any reason!

177. The Respondent's Counsel in closing submissions, argued that even if ST/AI/404 were applicable in the Applicant's case, granting him a lien on his post while on mission assignment is entirely discretionary and does not vest on the Applicant any rights to a lien. This submission is at total variance with the position of UNON Administration! UNON's case is not about exercising any

¹⁵ Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances.

discretion in the circumstances of the Applicant. Rather its case is that UNON had adopted a policy and practice which clearly is in total conflict with the Organization's policy!

178. The question that naturally follows from UNON's stated position here is whether any Senior Managers in any part of the United Nations Secretariat, under any guise whatever; have any discretion or legal right to adopt policies and practices contrary to those laid down in the staff rules by the Secretary-General as Chief Executive Officer of the Organization.

179. Certainly, those who are agents cannot by themselves depart from the directives of the principal. Where they do so, they act for themselves and not for their principal. In other words, UNON Administration cannot adopt a policy or practices different from those embodied in the staff rules and in the Secretary-General's Administrative Instructions, or pick and choose which Administrative Instructions to contradict while still claiming to act on behalf of the Secretary-General.

180. Curiously and interestingly, UNON in December 2012 agreed to release the Applicant in February 2013 on a mission assignment to BINUCA for six months with a lien. The said BINUCA assignment was later extended to a year. This release with a lien was granted after the filing of this Application on 26 November 2012. Is it possible that the filing of this Application was what informed this change of heart or policy and practice on the part of UNON managers?

181. Conclusively, to the extent that UNON Administration claims to have adopted and applied undocumented and questionable practices and policies outside of the relevant staff rules and bulletins on mobility of staff and outside of the provisions of ST/AI/404 in order to refuse the Applicant a lien on his post and truncate a mission assignment to UNAMID, it acted illegally.

182. The Respondent had argued that the withdrawal of UNAMID's offer to the Applicant of a mission assignment rendered the Application challenging UNON's refusal of a lien in that regard a moot point. In the circumstances of this case, it is

the considered view of this Tribunal that this argument is untenable. UNON's stated position is that as a matter of policy and practice, it chooses not to implement the Organization's policy as provided for by ST/AI/404 or the staff rules on mobility.

183. Regardless of whether the offer from UNAMID to the Applicant was later aborted by the non-issuance of a Sudanese visa or by a *force majeure*, the fact remains that UNON administration had acted illegally and its refusal in the circumstances served to reveal a state of mind bent on exacting retaliation and forcing the Applicant out of UNON.

Matters of concern for the Ethics Office

184. The Ethics Office was established on 1 January 2006 as a new office within the United Nations Secretariat reporting directly to the Secretary-General. The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability. It is noteworthy that the Ethics Office came into existence before the establishment of the new internal justice system under which the Dispute and Appeals Tribunals were set up.

185. Section 5.1 of ST/SGB/2005/21 stipulates that individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible. Having received the complaint, the Ethics Office is required, under section 5.2 (c) to conduct a preliminary review of the complaint to determine if: (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation. The Ethics Office should complete its preliminary review within 45 days of receiving the complaint of retaliation in accordance with section 5.3.

186. Section 1.4 of ST/SGB/2005/21 which defines “retaliation” has been reproduced earlier. Its section 2.1 stipulates that:

Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards... or

(b) Cooperates in good faith with a duly authorized investigation or audit.

187. As already stated, on 2 September 2009, the Applicant had testified as a witness before the Dispute Tribunal in *Kasmani*, Case No. UNDT/NBI/2009/067. On 23 December 2009, Mr. Kasmani applied to the Tribunal for a judicial order of protection for his witnesses pursuant to article 7 of the Tribunal’s Statute and articles 19 and 36 of the Tribunal’s Rules of Procedure.

188. On 16 February 2010, the Tribunal issued Order No. UNDT/NBI/O/2010/25 in the terms discussed above and made the following Orders.

- a. Witnesses testifying before the Tribunal in the instant case not be subject to: (i) intimidation or threats, either physical or verbal, prior to or after testifying before the Tribunal; (ii) threats to the security of their employment, or development of their career with the United Nations; and (iii) retaliation of any other sort as a result of testifying before the Tribunal.
- b. That the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violation of the Order.

189. The Tribunal also directed the Registrar of the Nairobi Registry of the Dispute Tribunal to serve a copy of the Order on the Ethics Office and reminded the parties of the seriousness of the matter so that any breach of the Order by either of the parties or the Ethics Office may trigger the application of the accountability provision in article 10.8 of the Tribunal's Statute. The said Order was accordingly served on the Ethics Office.

190. On 3 August 2012, the Applicant submitted a "Report of Discrimination, harassment, Abuse of Authority and Retaliation by UNON" to the Ethics Office requesting that measures be taken to ensure that the Division of Administrative Services in UNON refrain from retaliatory, discriminatory and career-impeding actions against him. On 12 November 2012, Ms. Joan Elise Dubinsky, the Director of the Ethics Office responded to the Applicant's request. The relevant part of her response is reproduced below:

Regarding the issue of your 2 September 2009 testimony before the UNDT, the Ethics Office notes that, pursuant to Section 2 of Secretary-General's Bulletin ST/SGB/2005/21, the organization's protection against retaliation policy strictly applies to staff members who allege retaliation as a consequence of (a) having reported misconduct or (b) for having cooperated with a duly authorized audit or investigation. As testimony before the UNDT does not constitute a protected activity under ST/SGB/2005/21, retaliation allegations attributed to the provision of UNDT testimony fall outside of the scope of the Ethics Office protection against retaliation mandate.

Having administered ST/SGB/2005/21 since its entry into force in January 2006, the Ethics Office has identified procedural and substantive deficiencies with the Organization's protection against retaliation policy. In pursuit of making the policy more robust and effective, the Ethics Office will be initiating an expert review of the current programme. ST/SGB/2005/21 entered into force prior to the establishment of the UNDT. The issue of extending the policy's coverage to those who provide UNDT testimony, including identification of any required conditions to ensure conformity with whistleblower best practices, will be examined in the course of this expert review process.

191. While testifying before the Tribunal in this case, Ms. Dubinsky stated that following the relevant protection order made by the Dispute Tribunal in 2010 and reaffirmed by the Appeals Tribunal, the Ethics Office implemented the orders,

acting within the limited mandate of the office. The Office did so by ensuring that the Applicant received the appropriate advice and counsel to bring forward his concerns to the appropriate authority which is the head of office. She stated that it was the Ethics Office's understanding that the ultimate issue was whether the Applicant was subject to abuse of power which is a matter within ST/SGB/2008/5 and that the Ethics Office had not received a report from the Applicant on his concerns of discrimination, retaliation or abuse of office subsequent to making a complaint to his head of office.

192. The question of whether testifying before the Tribunal amounts to an "activity protected by the present policy" within the scope of section 1.4 of ST/SGB/2005/21 was canvassed in *Kasmani*. The Tribunal answered this question in the affirmative in that case. The *Kasmani* judgment was appealed to the United Nations Appeals Tribunal with the Secretary-General praying the Appeals Tribunal to vacate the UNDT's order relating to the Ethics Office. In rejecting that ground of the Secretary-General's appeal, UNAT held that the Ethics Office "would only act upon the basis of a report".

193. In the present case, despite the Tribunal's Order of 16 February 2010 requiring the Ethics Office to be seized of the matter and to monitor the situation for further action should there arise allegations of violation of the Order, and despite the submission of a report of retaliation to it by the Applicant; the Ethics Office refused to take action as ordered but rather informed the Applicant that testimony before the UNDT does not constitute a protected activity under ST/SGB/2005/21. The question that arises is whether the Ethics Office acted in disobedience of the Tribunal's Order in view of the jurisprudence of the UNDT and UNAT.

194. In *Applicant* UNDT/2012/114, the Tribunal held that,

In the context of the United Nations, the inherent jurisdiction of the Tribunal confers it with power to deal with contemptuous conduct and is necessary to safeguard its judicial functions. This power need not be defined in the Tribunal's Statute or in its Rules of Procedure. Willful disobedience of the Tribunal's orders is contempt and is a direct attack upon the jurisdiction of the Tribunal and its power to undertake the responsibilities with which it has

been entrusted in its Statute by the General Assembly. When faced with willful disobedience of its orders, the Tribunal must vindicate the integrity of its jurisdiction by exercising its necessarily inherent power.

... It is a well-established principle of law and equity that the court does not make an order in vain.

195. In the said case of *Applicant* UNDT/2012/114, citing *Abboud* UNDT/2010/030, the Tribunal further held that,

As has been noted, the Rules of Procedure of the Tribunal do not deal with the issue of contempt. Since it affects the rights of the accused staff member, the procedures must be careful to ensure procedural fairness and a transparent process. The sanctions that could be imposed, of course, can only affect the staff member's contract one way or another but should be spelled out. The Rules of Procedure are established by plenary agreement of the judges of the Tribunal and are subject to the approval of the General Assembly.

....

the Tribunal has discretion in determining whether to proceed by way of contempt or with regard to the provisions of Art. 10.8 of the Statute of the Dispute Tribunal.

196. In the present case, having considered Ms. Dubinsky's testimony and her 12 November 2012 response to the Applicant, the Tribunal finds that the Ethics Office willfully disobeyed the Tribunal's Order. Unfortunately, the Ethics Office has preferred to confine itself to the narrow mandate to deal with retaliation only when it arises from a staff member having reported misconduct or cooperating with duly authorized audits or investigations. It has failed to recognize that the judgments, rulings and orders of the Tribunal constitute case law and therefore form part of the jurisprudence of the internal justice system. It has also failed to recognize that the one of the core principles of the rule of law is breached when it refuses to implement the orders of the Tribunal.

197. The failure by the Ethics Office to act on the basis of the report of retaliation filed by the Applicant in accordance with the provisions of

ST/SGB/2005/21 also entitles the Applicant to compensation for failure to accord him due process. The Tribunal finds the said disobedience to be so serious a matter as to warrant the attention of the Secretary-General and the case is accordingly referred to the Secretary-General under article 10.8 of the Statute of the Tribunal for the purpose of considering what action should be taken in respect of the conduct of the Director of the Ethics Office in disregarding the Tribunal's Order.

Conduct of Mr. Barabanov

198. The claims of prohibited conduct and retaliation made by the Applicant in this Application are largely based on the attitude, actions and conduct of UNON's Director of Administrative Services, Mr. Barabanov, towards the Applicant in the workplace and how he had used and influenced UNON management to act against the said Applicant over a period of about four years, 2008-2012.

199. Staff regulation 1.2 spells out the core values that every staff member of the United Nations Organization is expected to possess and exhibit as follows:

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work or status.

200. The fore-going core values are the principles on which the work of the Organization is based and must accordingly guide the actions and behaviour of its staff members. Additionally, staff members must possess certain core competencies.¹⁶ Those who are managers are required to among other

¹⁶ "United Nations Competencies for the Future," Booklet Code 99-93325-November-18M, Specialist Services Division, OHRM.

competencies, possess the attributes of leadership, empowering others, building trust and making good judgment.¹⁷

201. It is against this background that the Tribunal will briefly examine the un rebutted evidence of certain actions of Mr. Barabanov and other conduct which were either raised in this Application or which emerged in the course of the proceedings in this case.

202. At a meeting held between Mr. Barabanov, Ms. Glavind, the Applicant and his colleague on 12 February 2008 after the then UNON Director-General had overruled the DAS' decision not to allow a Procurement officer to attend the New York Chiefs of Procurement meeting; the Applicant and his colleague were told by the DAS that they had behaved like three year-old children by approaching the Director-General. This comment has already been found to be unprofessional, belittling and demeaning.

203. In spite of telling the Tribunal on more than two occasions in the course of his testimony that it was not his 'habit, nature or track record to engage in the harassment of very junior people', Mr. Barabanov had, during another meeting between him, the Applicant and his then supervisor, Ms. Mills-Aryee, on 14 October 2009 expressed anger that the Applicant had testified before the Tribunal in the *Kasmani* case and warned him to leave UNON and find employment elsewhere. Such conduct from a senior manager must be thoroughly condemned for being unfortunately motivated by delusions of personal ownership of the workplace rather than the good of the Organization.

204. Even during the proceedings in this case, Mr. Barabanov continued to refer to the recruitment of Mr. Kasmani in 2009 by the Applicant as an act of 'insubordination'. When the Tribunal called his attention to the fact that the recruitment of Mr. Kasmani was held by the first instance Tribunal as being properly done and not altered on appeal, he claimed ignorance of the judicial decisions. This was most unprofessional on the part of the DAS who clearly

¹⁷ Ibid.

preferred to cling to his own personal judgment than subscribe to any lessons to be learnt from the pronouncements of properly constituted courts.

205. The directive to a newly-recruited Ms. Eckerstrom in June 2011 not to appoint the Applicant as OIC of the Procurement unit when she was on leave, even when he was the most senior officer in the unit, was not only unduly meddlesome but also exhibited discrimination on the part of the DAS and lack of respect for the views of others. Far from being altruistic, he in fact used the occasion to impose his own biased judgment of the Applicant on the new Chief of Procurement who actually testified that she did not even ask Mr. Barabanov why he gave the directive before complying with it.

206. The DAS claimed that UNON administration led by him had adopted a non-documented policy to not approve any assignment to peace-keeping missions with lien on posts for staff members. This claimed policy of UNON was said to be implemented for years in spite of the Organization's clear policies embodied in administrative instructions requiring mobility of staff for career progression and prescribing mission assignment to gain experience and give service. The core competency of accountability demands that a staff member operates in compliance with the Organization's regulations and rules. Mr. Barabanov cannot make different policies for UNON which conflict with United Nations organizational policies.

207. While replying to a question in cross-examination, Mr. Barabanov said that the Applicant's shortcomings were not necessarily reflected in his ePAS. In concluding his testimony, he said of the Applicant:

I must admit in the workplace there will always be room for subjective assessment by a manager of staff in that office. And my assessment of Mr. Nartey's behaviour, character in those few instances where I had to deal with the outcome of his professional work were not favourable. His character in terms of how he dealt with his colleagues and with his immediate supervisors did not instill confidence in me that he is mature enough and capable of managerial responsibilities in the procurement section. There were instances where, in the absence of his supervisors or because of dealing directly with the procurement cases and dealing directly with me or my deputy who was acting on delegated authority, there

were instances of cases being dealt with in less than a professional manner. There were errors, there were inaccuracies. Your Honour, I admit this is my subjective view which I believe every manager is entitled to.

208. These accusations made by the DAS with regards to the Applicant's character, supposedly deduced from how the Applicant dealt with his direct supervisors and colleagues, were never part of the Respondent's case and were never fully explained or canvassed. The Applicant's direct supervisor, Ms. Eckerstrom, in her testimony told the Tribunal that on six subsequent occasions, after initially complying with Mr Barabanov's instruction not to appoint the Applicant OIC, she did appoint him. No evidence was tendered by the Respondent to show that the Applicant was unprofessional in his work or made errors and inaccuracies as the DAS alleged. Mr. Barabanov however admitted that these were his subjective views of the Applicant.

209. The Tribunal was nevertheless concerned by Mr. Barabanov's assertions that in the workplace, there will always be room for subjective assessment of staff by a manager. One of the competencies expected of a manager within the Organization is the capacity for objectivity. Managing performance includes the fair appraisal of a staff member's performance. This duty cannot be carried out by a manager using his own subjective assessment.

210. Because managers in the Organization make judgments and take decisions that impact on the workplace and on staff members, they can only carry out this duty by gathering all relevant information before making a decision.¹⁸ They are expected to check assumptions against the facts¹⁹ and therefore must not make subjective judgments in the workplace or in the course of their official duties.

211. A manager must show leadership. This means that he or she must serve as a role model in the workplace.²⁰ He or she has a duty to empower those under him or her including valuing and appreciating their inputs and expertise.²¹ He or she

¹⁸ Ibid, page 49.

¹⁹ Ibid.

²⁰ Ibid, page 41.

²¹ Ibid, page 43.

must build trust in the workplace by, among other things, providing an environment in which others can talk and act without fear of repercussion.²²

212. Unfortunately, the evidence shows that in February 2008, when the Applicant had appealed to the Chief of SSS, Ms. Glavind, to ask Mr. Barabanov to reconsider his decision not to send anyone from the Procurement unit to the New York meeting; she had warned the Applicant about incurring the anger of the DAS as follows:

[Mr. Barabanov] hates to repeat his decision – be prepared for
a) his anger, or b) him ignoring your e-mail.

213. Also, when Ms. Eckerstrom was instructed by the DAS not to make the Applicant, who was the most senior officer in her unit OIC whilst she was on leave, she carried out the instruction without asking him why. Clearly, this was not Mr. Barabanov's call to make considering that he was several levels senior to the Applicant and was not a reporting officer for him. It is difficult in the circumstances to conclude that the DAS provided a work environment in which those under him could talk or act without fear of repercussion.

214. Staff regulations 1.2(a) and (b) already reproduced above enjoin all staff members to uphold the highest standards of integrity. In other words, the Organization demands that its staff and especially managers act with fairness and impartiality and not bestride the workplace like giants in whose presence other staff members would cower. The DAS had testified that he had the final say with regard to such issues as the approval of mission assignment with lien for staff members. No manager should be allowed the indulgence of subjective assessments, appraisals and other consideration of staff members.

215. In view of the totality of evidence placed before it, the Tribunal could only arrive at the inescapable conclusion that at the times material to this Application, Mr. Barabanov had created an unhealthy work environment riddled with fear and intimidation of staff members. This state of affairs must be condemned.

²² Ibid, page 47.

Findings

216. The Tribunal's findings are summarized below:

- a. This Application is receivable.
- b. The Applicant was a victim of harassment and retaliation by the DAS/UNON, Mr. Barabanov, after his attendance of the annual Chief Procurement Officer's conference in 2008 and following his testimony before the Tribunal in the case of Kasmani UNDT/NBI/2012/49.
- c. UNON management abused its authority in refusing to release the Applicant on mission assignment to UNAMID and in denying him the grant of a lien on his post.
- d. Testifying before the Tribunal amounts to an "activity protected by the present policy" within the scope of section 1.4 of ST/SGB/2005/21.
- e. The Ethics Office acted in disobedience of the Tribunal's Order by informing the Applicant that testimony before the UNDT does not constitute a protected activity under ST/SGB/2005/21 and in refusing to take all necessary action to protect him.
- f. The failure by the Ethics Office to act on the basis of the report of retaliation filed by the Applicant in accordance with the provisions of ST/SGB/2005/21 entitles the Applicant to compensation for failure to accord him due process.
- g. Aat the times material to this Application, Mr. Barabanov had created a work environment riddled with fear and intimidation of staff members.

Judgment

217. The Applicant is entitled to compensation for the procedural irregularities occasioned him by the failure of the Administration to follow its own guidelines and its rules and procedures, namely:

- a. UNON management abused its authority in refusing to release the Applicant on mission assignment to UNAMID and in denying him the grant of a lien on his post.
- b. The failure by the Ethics Office in refusing to act on the basis of the report of retaliation filed by the Applicant and its failure to take all necessary action to protect the Applicant from retaliation.

The Tribunal accordingly awards the Applicant six months' net base salary as compensation for these procedural irregularities.

218. The Applicant is also entitled to moral damages. The Tribunal recognizes the stress caused to the Applicant over a period of years by the circumstances of this case and, specifically the conduct of the DAS/UNON and awards USD10,000 as moral damages.

219. The case is referred to the Secretary-General under art. 10.8 of the Statute of the Tribunal for the purpose of considering what action should be taken in respect of the conduct of Ms. Dubinsky for disobeying the Tribunal's orders and Mr. Barabanov for his abuse of authority and acts of intimidation and retaliation against the Applicant.

220. All other pleas are rejected.

Signed

Judge Nkemdilim Izuako

Dated this 14th day of May 2014

Entered in the Register on this 14th day of May 2014

Signed

Abena Kwakye-Berko, Registrar, Nairobi