



UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/NBI/2015/058
UNDT/NBI/2015/062
UNDT/NBI/2015/078
Judgment No.: UNDT/2018/045
Date: 29 March 2018
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MICALETTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Victor Rodriguez

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Jonathan Croft, ALS/OHRM

Introduction

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

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

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

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

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

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

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

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

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

The proceedings

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

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

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

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

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

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

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

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

13. On 12 April 2016, the Applicant filed a motion for extension of time to file his closing statement.

14. By Order No. 194 (NBI/2016) dated 14 April 2016, the Applicant's 29 March 2016 motion was refused and his 12 April 2016 motion was granted.

15. On 9 May 2016, the Applicant filed his closing statement.

Background and Facts

16. The Applicant joined the Organization on 28 April 1995 and continued to serve with the Organization until separated on 2 June 2015, following the imposition of the disciplinary measure of separation with compensation in lieu of notice and with termination indemnity on him. At the time of his separation, the Applicant had a continuing appointment and was temporarily serving with OCHA at the P-5 level in Geneva.

17. On 14 April 2013, the Applicant, then a Humanitarian Affairs Officer with UNAMID on a Special Post Allowance at the D-1 level¹, filed a complaint of workplace harassment and abuse of authority under ST/SGB/2008/5² against the then UNAMID DJSR (P). Among the Applicant's complaints was an allegation that the DJSR (P) did not process his leave requests in a timely manner, including a pending request for family visit leave dated 31 March 2013.

18. On 24 April 2013, the Applicant submitted his request for family visit leave dated 31 March 2013 directly to the Office of the JSR for approval. Mr. A, who was then serving as HoO/JSR, reviewed the request and instructed an administrative assistant to send the request to the DJSR (P) who was the Applicant's first reporting officer at the time.

19. On learning, later that day, about Mr. A's instructions from the said administrative assistant, the Applicant called Mr. A by phone to inquire about his

¹ From 13 August 2010, the Applicant received a Special Post Allowance following his selection for the temporary D-1 position of Officer-in-Charge, Humanitarian Liaison Officer (later, Chief Humanitarian Affairs Officer) in UNAMID.

² Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.

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

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

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

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

23. Shortly after the incident, Mr. A sought medical attention at the UNAMID Clinic for injuries he had sustained. Following a medical examination and treatment of Mr. A, a medical report was prepared by the Medical Officer at UNAMID, Dr. Soe Win. The report stated that Mr. A had “one finger mark

³ Report of the Darfur States Special Investigation Unit (SIU) in relation to the “Allegation of Physical Assault on Mr. [A] by [the Applicant]”, page 23, para. 7.4

⁴ Report of the Darfur States Special Investigation Unit (SIU) in relation to the “Allegation of Physical Assault on Mr. [A] by [the Applicant]”, page 23, paras. 7.6-7.7.

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

24. On 26 April 2013, Mr. A. officially reported to the UNAMID Special Investigations Unit (SIU) that he was physically assaulted by the Applicant on 24 April 2013.⁶ The UNAMID SIU thereafter opened a preliminary investigation into the incident and interviewed the Applicant, Mr. A and five other witnesses. The UNAMID SIU issued its preliminary investigation report on 28 April 2013.

25. On 23 May 2013, the Applicant filed a counter-complaint against Mr. A alleging, *inter alia*, that on 24 April 2013, Mr. A had physically assaulted him. He also claimed that Mr. A’s removal of the family visit leave request from documents that were submitted to the JSR was a continuation of the alleged harassment detailed in his 14 April 2013 complaint of harassment against the DJSR (P).

26. UNAMID SIU produced its investigation report on 3 March 2014⁷. The investigating team concluded that the “allegation of physical assault levied against the Applicant was substantiated by all available witnesses and evidences.”

27. On 3 April 2014, the Applicant’s former counsel contacted OHRM requesting, *inter alia*, that the complaint against the Applicant by Mr. A and the complaint by the Applicant against the DJSR (P) be reviewed as a single case as there was a “nexus” between them. The said former counsel also submitted comments regarding the circumstances surrounding the incident of 24 April 2013.

28. Meanwhile, UNAMID had undertaken a comprehensive review of its operations with a view to streamlining its activities. In this context, on 3 April 2014, the Security Council endorsed the revised strategic priorities for UNAMID, which included the protection of civilians, the facilitation of the delivery of

⁵ Report of the Darfur States Special Investigation Unit (SIU) in relation to the “Allegation of Physical Assault on Mr. [A] by [the Applicant]”, Annex 12, page 78.

⁶ Report of the Darfur States Special Investigation Unit (SIU) in relation to the “Allegation of Physical Assault on Mr. [A] by [the Applicant]”, Annex 2, page 41.

⁷ The investigation report was wrongly dated 3 March 2013.

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

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

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

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

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

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

⁸ Security Council resolution 2148 (2014) adopted by the Security Council at its 7152nd meeting, on 3 April 2014, paras. 4 and 5.

⁹ UNAMID Streamlining Mission Report dated 8 October 2014, para. 20

establish the new Protection of Civilians (POC) Section¹⁰. The proposed budget included *inter alia* the abolishment of 12 posts in the HRAL Unit, including the P-5 post encumbered by the Applicant effective 1 April 2015.

34. On 10 November 2014, the fact-finding panel completed its report in relation to the Applicant's complaint against the DJSR (P). The panel concluded that no prohibited conduct had taken place.

35. By letter dated 25 November 2014, the USG/DFS informed the Applicant of the panel's findings and conclusions with respect to the allegations raised in the his complaint against the DJSR (P). She advised him that, upon review of the panel report, she concurred with the panel's assessment that no prohibited conduct occurred and that she considered the Applicant's complaint closed.

36. By email dated 9 December 2014 to the USG/DFS, the Applicant requested a copy of the investigation report in relation to his complaint against the DJSR (P).

37. By letter dated 16 December 2014, the Chief, Conduct and Discipline Unit, DFS informed the Applicant that he was not entitled to receive a copy of the report. He noted that the Applicant had been informed of the outcome of the complaint and given a summary of the findings and conclusions of the investigation as required by ST/SGB/2008/5.

38. In its report dated 16 December 2014, the ACABQ approved the Secretary-General's proposal to abolish 791 posts including, *inter alia*, the Applicant's post, in UNAMID¹¹. This was followed on 29 December 2014 by the report of the Fifth Committee which contained a draft resolution endorsing the conclusions and recommendations of the ACABQ¹².

¹⁰ Report of the Secretary-General on the revised budget for UNAMID for the period from 1 July 2014 to 30 June 2015 (A/69/549), para. 58-61.

¹¹ ACABQ report dated 16 December 2014 on the revised budget for UNAMID for the period from 1 July 2014 to 30 June 2015 (A/69/671), para. 33, Annex II, page 29.

¹² Report of the Fifth Committee on the financing of UNAMID dated 29 December 2014 (A/69/687), Section III, para. 1.

39. Also on 29 December 2014, the General Assembly adopted resolution 69/261 on the financing of UNAMID. In that resolution, the General Assembly endorsed the conclusions and recommendations of the ACABQ and requested the Secretary-General to ensure their full implementation.

40. On 12 January 2015¹³, the Applicant filed a request for management evaluation. In his request, the Applicant indicated that “the decision had been taken on 24 November 2014 and that he had become aware of it when he received the letter communicating the decision on 16 December 2014”.

41. By letter dated 30 January 2015, the Chief of the Management Evaluation Unit (MEU) acknowledged receipt of the Applicant’s request for management evaluation. In his letter, the Chief, MEU identified the contested decision as the “decision of 16 December 2014 not to provide [the Applicant] with a copy of the report of the fact-finding panel into [his] complaint against [his] colleague.”

42. By email dated 17 February 2015, the UNAMID Chief Human Resources Officer informed the Applicant of the abolition of his post (P-5 Humanitarian Affairs Officer) effective 1 April 2015. The Applicant was also informed that his temporary assignment with OCHA would be extended from 1 April 2015 to 30 June 2015 and that, during this time, he would be temporarily placed against another P-5 post, strictly for administrative purposes. It was noted that if his assignment was not extended beyond 30 June 2015 or he was not reassigned to another position, approval would be sought from the Secretary-General to terminate his continuing appointment.

43. By memorandum dated 18 February 2015¹⁴, the Applicant was provided with formal allegations of misconduct. Specifically, it was alleged that, during a workplace dispute, the Applicant physically assaulted Mr. A, the then HoO/JSR, UNAMID. The Applicant was invited to provide his comments in response to the

¹³ The management evaluation request was dated 8 January 2015 but was received by the Management Evaluation Unit (MEU) on 12 January 2015.

¹⁴ The Applicant received this memorandum by email dated 24 February 2015.

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

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

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

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

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

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

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

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

50. By letter dated 26 May 2015, the Applicant was informed of the decision of the USG/DM, on behalf of the Secretary-General, to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The disciplinary measure was imposed on the Applicant for having physically assaulted Mr. A, the then HoO/JSR, UNAMID. The decision letter was received by the Applicant on 2 June 2015 and was effective as of that date.

51. On the same day, the Applicant filed an application with the Tribunal requesting it to suspend the decision of the USG/DM to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. By Order No. 191 (NBI/2015) dated 10 June 2015, the Dispute Tribunal refused the Applicant's application for suspension of action.

52. On 2 June 2015, the Applicant was separated from the Organization.

53. On 8 June 2015, the Applicant filed an application contesting the decision to abolish his post (Humanitarian Affairs Officer at the P-5 level) in UNAMID effective 1 April 2015. The application was registered as Case no. UNDT/NBI/2015/062.

54. On 26 June 2015, the Respondent filed his reply to the application registered as Case no. UNDT/NBI/2015/058.

55. On 9 July 2015, the Respondent filed his reply to the application registered as Case no. UNDT/NBI/2015/062.

56. On 16 July 2015, the Applicant filed an application contesting the decision of the USG/DM to impose on him the disciplinary measure of separation from

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

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

Preliminary issues

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

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

2. The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

3. A party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence.

60. Under art. 18.2, the documents whose production a party seeks must be necessary for a fair and expeditious disposal of the case. This means that like other evidence that are admissible by the Tribunal, the documents whose production are sought must be reasonable and calculated to lead to the discovery of relevant and admissible evidence. In other words, all requests for production of documents must be relevant to the issues in the case.

61. It is not expected that the request for production of documents would include documents that are difficult or impossible to obtain. Also, a request for production of documents must not be vague as to make it difficult for the party

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

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

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

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

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

and an abuse of the process that instead of making out a case for unlawfulness, a frivolous request is made to produce documents that may not exist.

66. With regard to the Applicant's second request dated 31 December 2015 also for production of documents, he asked for seven documents. He sought the production of interviews of some staff members by UNAMID/CDU regarding the Applicant's family leave application and interviews with UNAMID Medical Officers. He also requested the interviews of four security officers and a witness to his alleged assault of Mr. A by the UNAMID Security Advisor.

67. The Applicant requested emails between him and other staff members on his application for family leave and the abolition of posts in his Division. He wanted all correspondence between UNAMID and DFS personnel in relation to his complaint against the DJSR and Mr. A. The Applicant additionally requested digital copies of pictures which were annexed to the UNAMID SIU investigation report of his alleged assault of Mr. A.

68. As in the requests of 19 October 2015, the Tribunal finds these requests generally vague, unintelligible, confused and irrelevant. Consequently, no order was made for production of the said documents.

Issues

69. Based on the parties' pleadings, material evidence and submissions before it, the Tribunal will interrogate the following issues towards determining this consolidated application:

1. Are the Applicant's claims in Case no. UNDT/NBI/2015/058 receivable? and if receivable, is there any merit in them?
2. Was the decision to impose the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity on the Applicant proper? On that score, the following matters arise for consideration:

- i. Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence;
 - ii. Whether the established facts amount to misconduct;
 - iii. Whether the disciplinary measure is proportionate to the offence;
 - iv. Whether the Applicant's procedural rights were respected.
3. Was the decision to abolish the P-5 post of Humanitarian Affairs Officer in UNAMID effective 1 April 2015, receivable? and if receivable, was it proper?

Issue 1. Case no. UNDT/NBI/2015/058: Are the Applicant's claims in this case receivable? and if receivable, is there any merit in them?

Applicant's submissions

70. The Applicant's complaint of harassment against the DJSR (P) should have been considered together with the allegations of physical assault in relation to the incident of 24 April 2013.

71. The team that investigated the Applicant's complaint for harassment against the DJSR (P) did not carry out a proper investigation. First, the team failed to interview two crucial witnesses, namely the JSR/UNAMID and the Chief of Staff. Second, the investigation team was headed by a staff member at the P-5 level even though the case involved a very high ranking official. Third, there was a delay of more than a year in investigating the Applicant's complaint. Fourth, the team did not have access to all relevant documents, namely, to a "code cable" in which it was noted that the complaint and counter-complaints were to be treated as one matter.

72. The delay in processing the Applicant's family leave request was part of the continuous harassment and abuse of authority exercised by the DJSR (P)

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

73. ST/SGB/2008/5 and ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) were not properly applied and their breach renders the outcome of the procedure unlawful. Under these provisions, the UNAMID Head of Mission instead of the USG/DFS should have dealt with the Applicant's complaint of harassment.

74. In contravention of section 5.3 and 5.14 of ST/SGB/2008/5, there was a huge delay in the review of the Applicant's complaint against the DJSR (P). The complaint was filed on 14 April 2013 but the fact-finding panel was only established on 18 June 2014 (13 months later). Furthermore, the USG/DFS only decided on the Applicant's complaint on 25 November 2014 (18 months later).

Respondent's submissions

75. The Applicant stated in his request for management evaluation filed on 12 January 2015 that the decision that he was contesting was contained in a letter dated 16 December 2014. In that letter, DFS management conveyed the decision of the USG/DFS not to provide the Applicant with a copy of the investigation report. Therefore, in the MEU letter dated 30 January 2015 to the Applicant acknowledging receipt of his request for management evaluation, and in the following management evaluation letter dated 30 March 2015, the Applicant was informed that the scope of his request for management evaluation was limited to the decision not to provide him with a copy of the investigation report (the second appeal claim).

76. The Applicant had not contested the decision of the USG/DFS to close his complaint with no further action within the applicable time limit (the first appeal claim).

77. The Applicant had not filed a request for management evaluation of the decision by OHRM to proceed with the disciplinary case against him that resulted

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

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

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

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

Considerations

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

82. Article 2.6 of the Statute of the UNDT provides that in the event of a dispute as to whether the Tribunal has competence under the said statute, the Tribunal shall decide on the matter. In *Christensen* 2013-UNAT-335, the United Nations Appeals Tribunal ("UNAT") confirmed that legal position when it held that "the UNDT is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute" when determining the receivability of an application.

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

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

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is *sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.* This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General. (emphasis added)

84. Furthermore, art. 8.1(c) of the Tribunal's Statute provides that an application shall be receivable if "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

85. The consistent jurisprudence of the Appeals Tribunal is that there must be a timely request for management evaluation prior to submitting an application to the Tribunal. (see, e.g., *Rosana* 2012-UNAT-273; *Dzuverovic* 2013-UNAT-338), and more recently reiterated in *Kouadio* 2015-UNAT-558, where the Appeals Tribunal recalled that it is "settled law that requesting management evaluation is a mandatory first step in the appeals process".

86. It is also settled law that the time limit of 60 days for requesting management evaluation begins to run from the date of notification of the decision being challenged. The Tribunal cannot waive the deadlines for the filing of requests for management evaluation or make any exception to it (*Costa* 2010-UNAT-036; *Sethia* 2010-UNAT-079, *Samardzic* 2010-UNAT-072; *Trajanovska* 2010-UNAT-074, *Ajdini et al.* 2011-UNAT-108; *Barned* 2011-UNAT-169; *Muratore* 2012-UNAT-191; *Christensen* 2013-UNAT-335). The Respondent has

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

87. On a close inspection of the evidence, the Tribunal finds nothing on the records to show that the Applicant ever sought management evaluation of the decision of the USG/DFS to close his complaint under ST/SGB/2008/5 for harassment and abuse of authority against the then DJSR (P) of UNAMID. His failure to seek a management review of that decision renders an application based upon it incompetent and cannot be entertained by the Tribunal.

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

89. It is the view of the Tribunal that in appropriate cases, such as where no investigation was conducted, the Respondent's decision to start a disciplinary process can be the subject of a management review. In this case however, the Applicant's request, if any, was brought almost a year after the decision was made and was therefore brought out of time rendering that claim not receivable.

90. Records also show that the Applicant's challenge of the Respondent's decision to treat the complaint of physical assault brought against him separately from his own earlier complaint against the DJSR (P) for harassment and abuse of authority was not submitted for management evaluation. This means that the said challenge is not competent for consideration by this Tribunal.

91. The only decision under challenge in case no. UNDT/NBI/2015/058 that has scaled the hurdle of a timely request for management evaluation and therefore is competent for the Tribunal's consideration is the Respondent's decision to not

provide the Applicant with a copy of the investigation report in the complaint of physical assault against him.

Was the decision to not provide the Applicant with a copy of the investigation report proper regarding his allegations against the DJSR (P)?

Applicant's submissions

92. The Applicant should have been provided with a copy of the investigation report. The “summary report” that was provided to him did not contain “any useful information that could be used for an appeal”. The summary did not mention the content of a “code cable” drafted by the Chief of Staff and signed by the UNAMID Head of Mission whereby his three cases were transmitted to Headquarters for review noting that there was a “clear link” between the harassment case and the two counter complaints of physical assault.

Respondent's submissions

93. Section 5.18 of the ST/SGB/2008/5 provides that an aggrieved individual is entitled to a summary of the outcome of the investigation. The Applicant was duly provided with such summary. The Respondent notes that in the Applicant’s request to be provided with a copy of the report, he stated that he wished to “review the report with counsel and would appreciate it if [(USG/DFS) could send [him] a copy of that report”.

94. No other reason was given regarding his need to receive a copy of the report. Following the approach in *Adorna* UNDT/2010/205, the Applicant had raised no issues indicating that there were any exceptional circumstances that compel the disclosure of the investigation report to him and accordingly, urged that this aspect of the application be dismissed.

Considerations

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

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

97. In *Ivanov* 2015-UNAT-519, the Appeals Tribunal also found that once the investigation is closed there must be “exceptional circumstances” to communicate the report to the complainant. In the present case, the Applicant has not presented any cogent argument to show that there were exceptional circumstances that might otherwise have entitled him to the investigation report. In the present circumstances, the Applicant is not entitled to receive a copy of the investigation report. Therefore, there is no merit in the Applicant’s case.

Issue 2. Case No. UNDT/NBI/2015/078: Was the allegation of physical assault on another staff member established against the Applicant? Was the decision to impose the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity on the Applicant proper?

Applicant’s submissions

98. The facts of the case have not been established. The Applicant denied the allegation that he assaulted Mr. A in the evening of 24 April 2013 and it was not proven that he did.

99. There were “innumerable” and “serious inconsistencies” in the witness testimonies of Mr. A, Ms. Reddy, Ms. Karanu and Mr. Khalifa. It was not established where Ms. Karanu was at the time of the incident and what she saw. Also, the testimony of Mr. Khalifa that he intervened in the incident is false. Ms. Reddy was not at the scene and did not witness the incident. After the Applicant’s counsel pointed out the discrepancies in the witness statements, they merely confirmed their testimonies by email but they were never interviewed again so the contradictions remain.

100. The Administration failed to investigate the Applicant’s complaint of harassment and physical assault against Mr. A. Following the incident of 24 April 2013, UNAMID SIU only conducted a preliminary investigation into the incident but a proper investigation by OIOS, as recommended by the Head of Mission, was never undertaken. OHRM only relied upon the SIU investigation report of 28 April 2013, to impose the disciplinary measure.

101. Flawed documents were used as evidence. Most of the documentation attached to the investigation report as evidence are either “uncorroborated (JSR/Organization Chart” or “obsolete 2009 Administrative Instruction on reporting lines” or of “contested probative value pictures”.

102. The Administration failed to investigate and consider the Applicant’s harassment complaint against the DJSR (P) together with the allegations of assault against him which led to his separation.

Respondent’s submissions

103. The facts on which the disciplinary measure was based are established; those facts amount to misconduct; the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii) was not disproportionate; and the Applicant’s procedural fairness rights were respected throughout the process.

104. It was established by clear and convincing evidence that the Applicant assaulted Mr. A on 24 April 2013. The version of events provided by Mr. A is consistent with the account provided by the witnesses to the incident. While the witnesses' accounts differ to some degree as to the extent of the assault, all of them claimed to have witnessed at least some part of the assault and each witness described the Applicant as the aggressor. None of the witnesses, aside from the Applicant, provides any mention of Mr. A. engaging in any physical attack.

105. The Applicant gave contradictory statements in relation to the incident. In his statement of 26 April 2013, he stated that he did not touch Mr. A. Later, in a communication provided to OHRM prior to the referral of the matter to OHRM, the Applicant conceded that he engaged in some pushing with Mr. A. During the hearing, the Applicant admitted again to having pushed Mr. A after confronting him about his leave request.

106. The Applicant claimed that his physical assault of Mr. A was the result of provocation due to Mr. A's purported unwillingness to process the leave request and the alleged harassment pertaining to the DJSR (P). Neither of these factors, even if true, justify or excuse the use of physical aggression against another staff member.

107. The Applicant's physical assault of Mr. A. amounts to misconduct and violation of staff regulations 1.2(a) and (f) and staff rule 1.2(f).

108. The imposition of the contested disciplinary measure was not arbitrary. It is in line with the past practice of the Secretary-General in disciplinary matters with respect to physical assaults. Both mitigating and aggravating circumstances were considered in determining the appropriate sanction.

109. The Applicant's procedural rights were respected through the investigation and disciplinary process. The Applicant was interviewed by the SIU investigators. The issues raised by the Applicant in his comments of 3 April 2014 were properly addressed. All the documents, including the clarifications of the witnesses, were considered in the allegations of misconduct against the Applicant. In the

allegations of misconduct memorandum, the Applicant was informed of the allegations against him, his right to provide OHRM with comments of the allegations and his right to seek assistance of counsel.

110. Although the assault incident was referred for disciplinary action prior to completion of the complaint of harassment, OHRM did not, in fact, initiate the disciplinary process until after the Applicant was informed that the outcome of the investigation into his complaint was that his allegations had not been substantiated.

Considerations

111. The principal issue to be resolved here is whether the allegation that the Applicant physically assaulted another staff member (Mr. A) on UNAMID office premises was sufficiently established or proven. The UNAT has consistently laid down the required standard of proof in cases before the Tribunal to be that of “clear and convincing evidence”. In *Molari* 2011-UNAT-164, the UNAT held that “when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable”.

112. The Applicant had stridently argued that there were serious inconsistencies in the statements given by three eye witnesses to the alleged physical assault. He also submitted that the investigation report is not credible because the investigation was carried out by UNAMID SIU rather than by the OIOS.

113. He argued further that flawed documents such as an obsolete organizational chart and Administrative Instructions on reporting lines were relied upon. He added that his own claims of harassment against the DJSR should have been investigated together with his alleged assault of the staff member.

114. A close review of the evidence before the Tribunal shows that in the evening of 24 April 2013, an unpleasant argument took place on the telephone

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

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

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

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

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

119. Her witness statement was materially corroborated by that of Mr. Khalifa, a UNAMID security guard who was on duty at the time of the incident. He told

investigators in his statement that he saw the Applicant pushing Mr. A in the direction of block 1 while demanding the return of his papers. He also stated that he saw the Applicant punch Mr. A causing his eyeglasses to fall and break and that Mr. A. who did not offer any resistance was shouting for help. He then ran towards them and met the Applicant strangling Mr. A while pushing him downwards and demanding his papers but he succeeded in separating them.

120. On his part, the Applicant testified that he met Mr. A when he left his office that evening. He told the Tribunal under oath at the hearing that Mr. A blocked his path and walked up close to him as he was walking towards the car park. The Applicant said he then told Mr. A to return his leave papers and that he would have to answer the next day regarding the said leave papers to Mr. Younis, the then Deputy Joint Special Representative/Operations & Management (DJSR/O&M).

121. According to the Applicant's account, Mr. A then became wild, pushed him (the Applicant), blocked his way and came even closer to him swearing in Arabic, English and French. It was while doing so that Mr. A stepped on his own prescription glasses which had fallen to the ground and broke them.

122. The Applicant testified further that because Mr. A continued to block his path to prevent him from getting to the car park, he had to gently push him out of the way so as to reach his car and that he did not use any force. He said that at that point, Mr. A started screaming to Ms. Karanu who had gone far and was close to the exit to come back. Mr. A then ran back to his office in block 1 and emerged about seven minutes later with the security guard, Mr. Khalifa.

123. The Applicant continued that at the same time he saw another security officer Mr. Ezekiel and invited him to come and record what had happened. He was then very close to his car. Mr. Ezekiel came and stood with him, Mr. A and Ms. Karanu. Their names were recorded by Mr. Ezekiel but no report was made and then he (Applicant) entered his car and left.

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

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

126. Mr. A, the alleged victim of the assault, testified that on the day of the incident, while he chatted with Ms. Karanu whom he met on the walk path that evening, he saw the Applicant come out from the door of Block 1 and walk towards them. The witness continued that as the Applicant got closer, he started pointing and shouting at him (Mr. A) demanding that he give him his papers. He said that he told him that he did not have his papers and that what he needed to do to move his leave request forward.

127. The witness said the Applicant was very agitated and stood close to him as he continued to demand for his papers. Ms. Karanu then started to move away from the scene and the Applicant then held him and began to push him towards Block 1. The Applicant, he said, while continuing to push him, was telling him to stop meddling with his papers and that he would take him to the office of the DJSR/ O&M. The witness said he agreed that they go to the said office.

128. The witness continued that when they got near the asphalt area near the entrance of Block 1, the Applicant hit him first in the back, then in the neck and on the head as he tried to protect himself. The Applicant continued the assault by grabbing the witness' face and his eyeglasses fell and broke but that the Applicant held him by the neck while also pressing on it. It was at that point that he shouted for help.

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

130. There is documentary evidence that Mr. A visited the medical clinic at about 7pm on the day of the incident. He was examined by the medical officer Dr. Soe Win who was on duty. In her medical report, she stated that Mr. A was upset, had red eyes from crying and was breathing normally.

131. It was also stated in the said medical report that there was a 2.5cm x 3.0cm finger mark on the right side of his neck, and two other finger marks on the left side with sizes of 2.0cm x 2.5cm and 2.3cm x 2.5cm. There was also one hematoma with superficial abrasion at the middle third of the inner left arm whose size was 3.0cm x 3.0cm. The view of the medical officer was that Mr. A had been assaulted and sustained soft tissue injury.

132. In conducting a thorough review of the facts of the alleged assault that led to the institution of disciplinary action against the Applicant, the Tribunal has carefully summarized, weighed and considered the evidence before it. The facts as stated to investigators and testified to before the Tribunal by those who witnessed the confrontation between the Applicant and Mr. A in the evening of 24 April 2013 at UNAMID premises are largely unchallenged.

133. The Applicant's account that an agitated Mr. A blocked his path, pushed him and broke his own eye glasses and then ran to his office only to emerge seven minutes later with Mr. Khalifa is not only incredible but a mere afterthought concocted to save himself from the consequences of his own misconduct.

134. If indeed Mr. A went away for seven minutes, as testified to by the Applicant, to bring Mr. Khalifa to the scene after the confrontation, why was the Applicant who testified that he was on his way to his parked car when the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

Applicant's submissions

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

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

Respondent's submissions

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

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

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

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

Considerations

149. The abolition of post complained of by the Applicant is a decision of the General Assembly and does not constitute an administrative decision capable of being challenged before this Tribunal. In this respect, the UNAT has held in *Ovcharenko et al.* 2015-UNAT-530 that the "Secretary General has to comply with General Assembly decisions". As stipulated in art. 2.1 of the UNDT Statute, this Tribunal is competent to entertain only an application which challenges an

administrative decision or to enforce the implementation of an agreement reached through formal mediation.

150. The Applicant claims that the decision to abolish the post he encumbered is unlawful. Contrary to his claims, neither the Staff Regulations nor Rules or indeed any other relevant legislation requires that unencumbered posts be first abolished before the posts that are encumbered.

151. Another of the Applicant's claim that there is a connection between the abolition of his post and the disciplinary process that led to his separation from service is completely unsubstantiated. He has not provided oral or documentary evidence in support of this claim.

152. The Tribunal agrees with the Respondent's submission that this aspect of the Applicant's case challenging the abolition of his post is indeed moot and in these circumstances, constitute a mere academic exercise.

153. The Tribunal must observe that many of the claims and submissions made by the Applicant in each of his three cases which were consolidated by the Tribunal are not founded on or supported by credible and relevant evidence. His tendencies to send the Tribunal on a wild goose chase with outlandish arguments did not help his case.

DECISION

154. There is no merit in any of the Applicant's three cases. This consolidated case accordingly fails.

(Signed)

Judge Nkemdilim Izuako

Dated this 29th day of March 2018

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi