



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

HALIDOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sètondji Roland Adjovi

Counsel for Respondent:

Matthias Schuster, ALD/OHR, UN Secretariat

Susan Maddox, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Security Officer at the FS-5 level with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”), contests the decision to separate him from service with compensation in lieu of notice and termination indemnity for an alleged physical assault that occurred on 1 May 2016. The decision was notified to the Applicant on 23 December 2016, and the Applicant was separated on 3 February 2017.

2. For the reasons below, the Tribunal finds that the established facts legally amount to misconduct, but the impugned disciplinary measure was disproportionate to the Applicant’s misconduct.

Procedural background

3. On 23 March 2017, the application was filed with the Nairobi Registry of the Dispute Tribunal, and the case was assigned to Judge Izuako under case number UNDT/NBI/2017/023.

4. Pursuant to the parties’ agreement, the Tribunal ordered that the case be decided without hearing further oral evidence, and the parties filed closing submissions on 30 May 2018.

5. On 10 July 2019, Judge Izuako’s term with the Dispute Tribunal ended, and on 19 July 2019, to balance the Tribunal’s case load and ensure judicial efficiency, the case was transferred to the New York Registry with immediate effect.

6. On 27 August 2019, the case was reassigned to the undersigned Judge.

7. On 12 September 2019, by Order No. 129 (NY/2019), the Tribunal decided to hold a hearing to hear Mr. MY and Mr. JY, two local security guards who were present during the incident, but not interviewed during the investigation.

8. On 29-30 October 2019, the Tribunal held a two-day hearing during which the Tribunal heard testimonies of the following five witnesses: Mr. MY, Mr. JY, the above-mentioned witnesses, and Mr. G, the victim of the alleged physical assault, Ms. VL, the then Chief of the Special Investigation Unit (“SIU”) in MINUSCA, and the Applicant.

9. Subsequently, the parties submitted closing statements in accordance with Order No. 152 (NY/2019).

Facts

10. The Applicant started working for the Organization in 2000, and from September 2014 and until his separation, he worked as a Security Officer in charge of the local security in Bouar, MINUSCA.

11. On 1 May 2016, the Applicant slapped Mr. G, a local security guard, in the face. The Applicant reported this incident to the head of the Bouar office the following day.

12. On 3 May 2016, several local security guards sent a letter to the head of the Bouar office with various complaints, including that the Applicant had assaulted Mr. G on 1 May 2016. In the letter, the security guards also alleged that the Applicant targeted a security guard with a baton and doused another security guard with cold water. Thereafter, an investigation was conducted into the Applicant’s alleged acts, who subsequently was imposed the disciplinary action of separation from service with compensation in lieu of notice and termination indemnity.

Investigation and disciplinary process

13. On 5 May 2016, the SIU received a request to investigate an alleged assault by the Applicant and other allegations against him and launched an investigation. On 8 May 2016, the Applicant provided a detailed written statement using the SIU Incident Report Form, and on 9 and 10 May 2016, the SIU investigator interviewed the Applicant, a Security Assistant, three local security guards, Mr. G, the alleged victim, Mr. GS, Mr. GB, and a supervisor in a local security company. The SIU also reviewed a letter of complaint by local security guards, a sick leave/medical certificate for Mr. G, and Mr. G's complaint to the national prosecutor.

14. On 12 May 2016, the SIU investigation report concluded that the Applicant slapped Mr. G in the face on 1 May 2016 and that other allegations against the Applicant, raised by Mr. GS and Mr. GB, were not corroborated. The Tribunal notes that while the Applicant stated in his written statement submitted to the SIU that Mr. JY and Mr. MY were present when the incident occurred, the SIU did not interview them.

15. On 13 June 2016, the acting Assistant Secretary-General for Field Support, based on the recommendation from MINUSCA, referred the Applicant's case to the Office of Human Resources Management ("OHRM") for action. Based on the SIU's investigation report, it was recommended that an appropriate disciplinary action be taken against the Applicant.

16. By memorandum dated 19 July 2016 and delivered on 6 August 2016 ("the charge letter"), the Applicant was requested to respond to formal allegations of misconduct.

17. On 27 August 2016, the Applicant submitted his comments on the allegations of misconduct. In his comments, he stated that when the incident occurred, Mr. G and he were both standing, that a table was between them, and that he gave Mr. G a "little" slap. The Applicant also claimed that Mr. G's sick leave/medical certificate

was not genuine or accurate as Mr. G was seen carrying sand a few days after the incident and said that Mr. G exaggerated the injury for financial gains. The Applicant also submitted a copy of the withdrawal of Mr. G's complaint to the national prosecutor.

18. By letter dated 15 December 2016 and delivered on 23 December 2016 ("the sanction letter"), the Applicant was informed that the Under-Secretary-General for Management ("USG/DM") had concluded that the allegations against the Applicant had been established. In particular, it was noted that Mr. G's contention that the Applicant slapped him in the face with force thereby causing him to fall to the ground was corroborated by the statements of Mr. GS and Mr. GB. It was further noted that medical documentation supports the finding that Mr. G presented with earache and was diagnosed with a perforated eardrum. Regarding the Applicant's claim that the medical certificate provided by Mr. G was not accurate and Mr. G had exaggerated the extent of his injuries, it was concluded that such claim was neither supported nor relevant, noting that the Applicant admitted that he had slapped Mr. G and only disputed the alleged force and impact of the strike. Therefore, the USG/DM concluded that the allegations against the Applicant are established and that his actions constitute misconduct and thus decided to impose the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

The 1 May 2016 incident between the Applicant and Mr. G

19. Since the Applicant primarily contests the disciplinary measure imposed on him on the grounds that the decision, based on the testimony of individuals who were not present during the incident, was made on factual errors and erroneous assessment of the available evidence with regard to the level of force used by him and the extent of injury suffered by Mr. G, a central issue to the present case is what exactly happened between the Applicant and Mr. G on 1 May 2016. The following facts were

adduced from the record on file and the oral evidence provided at the hearing held on 29 and 30 October 2019.

20. According to the Applicant's statement submitted to the SIU, on 1 May 2016, in the morning, the Applicant passed by the MINUSCA building known as "Villa MINUSCA" on his way to watch a football match as part of the May Day celebrations. The Applicant noticed that a driver of a "moto-taxi" had stopped in front of the pedestrian entrance to the Villa MINUSCA where a security post was located. The Applicant found the presence of the moto taxi driver suspicious since visitors were not allowed on a public holiday and decided to check what was happening. At the entrance of the Villa MINUSCA, the Applicant saw that the moto-taxi driver was giving a phone to a security guard.

21. The Applicant parked his vehicle in front of the Villa MINUSCA and asked Mr. MY and Mr. JY, two local security guards on duty, why the moto-taxi driver was there but did not receive any answer. The Applicant went inside the security post where Mr. G, another local security guard, was stationed. The Applicant asked if they were charging mobile phones again, referring to their practice of charging phones for local residents for fees. Mr. G showed one mobile phone, and the Applicant found two additional mobile phones behind the door. The Applicant asked Mr. G if there were any other phones. When the Applicant ordered Mr. G to open the drawer, Mr. G was reluctant and only took out one or two phones. The Applicant persisted and Mr. G then took out another phone. All of the phones had numbers written on little pieces of cardboard that were apparently used as references to return the phones to their owners. The Applicant then slapped Mr. G on the left cheek and asked why he was lying when he had the phones next to him the whole time.

22. The Applicant insists that he gave a "little" slap or a tap on Mr. G's left cheek and he did not intend to harm Mr. G. The Applicant said that they were both standing and there was a desk between them. The Applicant said that Mr. G touched his cheek a little but did not see any physical reaction nor any trace of injury on Mr. G's face.

23. Mr. G gave a different account of the events than the Applicant. During the SIU interview, Mr. G said that he was sitting down when the Applicant slapped him violently and he fell to the ground. As admitted by Mr. G during the hearing, his brother was present during the SIU interview and answered questions on his behalf. Also, while Mr. G does not speak French, the SIU interview was carried out in French without interpretation. During the hearing, Mr. G said that he was standing when he was slapped causing him to fall to the ground. Mr. G said that he could not recognize anything when he fell down and he felt strong pain coming from inside the ear. Mr. G said that Mr. MY and Mr. JY witnessed the incident.

24. Mr. MY, who was not interviewed by the SIU, said at the hearing that when the Applicant slapped Mr. G, both were standing; they were very close to each other and there was no table between them. He said that Mr. G did not fall down but looked shocked. Mr. MY said that he and Mr. G had a friendly relationship and talked about the incident before the hearing.

25. Mr. JY, who also was not interviewed by the SIU, said at the hearing that when the incident occurred, the Applicant and Mr. G were inside the building while he was at the door entrance. Mr. JY said that Mr. MY was not inside the building and did not witness the incident. According to Mr. JY, Mr. G did not fall to the ground but he seemed to have lost conscience briefly since he did not seem to understand Mr. JY when he spoke to him. Mr. JY said that he has not talked to Mr. G since the incident.

26. Thereafter, according to the Applicant's statement submitted to the SIU, since he noticed that Mr. G was touching his cheek, he asked Mr. G if he was hurt, in which case he would take him to the hospital. At the hearing, the Applicant said that since Mr. G complained of pain, he drove a vehicle with the intent to go to the hospital with Mr. G. Mr. JY said at the hearing that he accompanied Mr. G and the Applicant in the car, but was dropped before joining the hospital because he had to go back to his supervisor. Witnesses provided different accounts about Mr. G's

condition when they set off to the hospital. Mr. MY said that Mr. G was not able to walk properly, whereas the Applicant said that Mr. G went to the vehicle without any support. Mr. G, Mr. JY, and Mr. MY all said that Mr. JY helped Mr. G to get into the car.

27. While Mr. G and the Applicant were heading to the hospital, according to the Applicant, Mr. G told him that he could go back to work and return to the hospital the following day if needed. The Applicant gave Mr. G CFA10,000 with which Mr. G bought some balm and painkillers. Then the Applicant dropped Mr. G off at the Villa MINUSCA and went to see a football match. Mr. JY also returned to the Villa MINUSCA and reported the incident to his supervisor at a local security company.

28. Mr. G told the SIU investigator that he went back to the hospital later the same day because he was not feeling well. Around 4:00 p.m., the force commander told the Applicant that Mr. G was at the hospital, and the Applicant therefore went to the hospital, where he met Mr. G's brother and paid him another CFA15,000 to cover the first-aid services. Mr. G's brother told the Applicant that Mr. G was scheduled to have an X-ray exam on the following day, and the Applicant promised to Mr. G's brother to send additional money to cover those expenses.

29. The following day, on 2 May 2016, Mr. JY visited Mr. G at the hospital. The Applicant, through Mr. G's supervisor, gave CFA100,000 to Mr. G's brother, who later confirmed that he had received the money. The Applicant was told that an appointment with an X-ray specialist at another hospital was made on 3 May 2016. Later, the Applicant was told that Mr. G was discharged after receiving a prescription for some medication since his condition was not serious. At the hearing, Mr. G said that in the end, an X-ray exam was not done.

30. According to the sick leave/medical certificate dated 7 May 2016 issued by a physician at the Bouar Prefectural Hospital, Mr. G suffered an earache in the left ear and perforated eardrum and he was placed on “temporary incapacity” for 60 days. The SIU asked Mr. G if he had any objections to seeing another doctor for a second medical opinion, but Mr. G declined.

Consideration

Preliminary matter

31. Before reviewing the merits of the case, the Tribunal will first consider whether some additional evidence submitted by the Applicant as part of his closing statement is admissible. Article 18.1 of the Dispute Tribunal’s Rules of Procedure provides that the Tribunal shall determine the admissibility of any evidence.

32. In this case, by Order No. 152 (NY/2019), the Tribunal pronounced that after a two-day hearing, the proceedings were to be closed and ordered the parties to file their closing statements. As part of his closing statement, the Applicant submitted new written evidence without prior leave from the Tribunal, namely, the photo of a security post in the Villa MINUSCA, receipts for the money paid by the Applicant to Mr. G, and a written statement by a person who assisted a mediation process between the Applicant and Mr. G at the time. The Tribunal finds it inappropriate to admit new evidence at this stage when this evidence could have been submitted to the Tribunal before the closing of the proceedings and no exceptional circumstances justifies the late submission. Accordingly, the Tribunal rejects all new evidence submitted as part of the Applicant’s closing statement. The Tribunal also notes that this new evidence has no probative value because it does not affect the outcome of the case.

Standard of review in disciplinary cases

33. The general standard of judicial review in disciplinary cases requires the Dispute Tribunal to ascertain: (a) whether the facts on which the disciplinary measure

was based have been established; (b) whether the established facts legally amount to misconduct; and (c) whether the disciplinary measure applied was proportionate to the offence (see, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537). When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see, for instance, *Molari* 2011-UNAT-164, para. 30, and *Ibrahim* 2017-UNAT-776, para. 44).

Whether the staff member's due process rights have been respected

34. The Applicant alleges that the following procedural irregularities occurred during the investigation and disciplinary process: (a) the facts were assessed according to security guards' testimonies who were not present when the incident occurred and, (b) the actual eyewitnesses were not interviewed during the investigation. The Tribunal will address these issues first.

35. Staff rule 10.3(a) sets forth a staff member's due process rights in the disciplinary process:

No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

Such due process rights are also reiterated in the para. 6 of ST/AI/371/Amend.1 (revised disciplinary measures and procedures), which is applicable to the present case.

36. In this case, while the charge letter did not mention or rely on the statements of Mr. GS and Mr. GB obtained during the SIU investigation, the sanction letter concluded that Mr. G's contention that the Applicant slapped him in the face with force thereby causing him to fall to the ground was corroborated by the statements of Mr. GS and Mr. GB. As stated above, the evidence shows that neither Mr. GS nor Mr. GB witnessed the incident.

37. It is true that the Applicant was given the opportunity to comment on the allegations against him set forth in the charge letter. However, the difference between the charge letter and the sanction letter actually deprived him of an opportunity to comment, during the disciplinary process, on this important mistake committed by the Administration in relying on the statements of individuals who did not actually witness the incident.

38. This procedural error was compounded by the fact that the Administration did not interview Mr. MY or Mr. JY, both present when the incident occurred, during the investigation or the disciplinary processes, even though the Applicant mentioned these names during the SIU interview.

39. Therefore, the Tribunal finds that there were serious procedural irregularities during the disciplinary process.

40. However, the Tribunal notes that the Appeals Tribunal stated the following regarding the procedural irregularities during a disciplinary process in *Sall* 2018-UNAT-889, paras. 33, 39:

... under our consistent jurisprudence, only substantial procedural irregularities will render a disciplinary measure unlawful. Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault.

... Irrespective of any irregularities, the [Dispute Tribunal] should have conducted a further review of the disciplinary measure ... Save exceptional cases involving major violations of due process rights, it is not sufficient for [the Dispute Tribunal] to find procedural errors in a disciplinary process but, where necessary, it has to conduct a *de novo* review of the facts and a judicial review of the remaining aspects of the case.

The Appeals Tribunal cited *Muindi* 2017-UNAT-782 as an example of an exceptional case involving major violations of due process rights that rendered a disciplinary measure unlawful. In this case, the Administration relied on a charge that was never formally notified to the staff member to impose a disciplinary measure.

41. In the present case, while the Applicant was not fully informed of all the evidence upon which the Administration would rely to impose the disciplinary sanction, he was nevertheless informed of the allegations against him and, therefore, as the Appeals Tribunal instructed in *Sall*, the Tribunal is able to proceed to a “*de novo* review of the facts and a judicial review of the remaining aspects of the case” as below.

Whether the facts on which the disciplinary measure was based have been established

42. In this case, the sanction letter concluded that the Applicant slapped Mr. G in the face “with force thereby causing him to fall to the ground”. The Applicant has consistently admitted that he slapped Mr. G in the face, although he describes his slap as a “little” slap and disputes the level of force and the injury that Mr. G claims to have suffered.

43. With regard to the level of force used by the Applicant, the Tribunal notes that while during the SIU interview, Mr. G said that he was sitting down when he was “violently” slapped, which caused him to fall to the ground, he testified at the hearing that he was standing when he was slapped and then he fell to the ground. Mr. MY and Mr. JY testified at the hearing that Mr. G did not fall to the ground. The Applicant also testified that Mr. G did not fall to the ground when he gave Mr. G a “little” slap.

44. The Tribunal notes the following issues with respect to the evidence provided by Mr. G: (a) it was Mr. G's brother who answered questions on behalf of Mr. G during the SIU interview, a fact not reflected in the SIU interview record; (b) while Mr. G does not speak French, the SIU interview was carried out in French without interpretation; (c) there are numerous inconsistencies between Mr. G's statement to the SIU and his testimony before the Tribunal. In light of this, the Tribunal does not find Mr. G's testimony credible.

45. The Tribunal instead concludes that the evidence clearly and convincingly shows that when the Applicant slapped Mr. G in the face, he did not fall to the ground. The sanction letter's conclusion that the Applicant used such force that caused Mr. G to fall to the ground is therefore not supported by clear and convincing evidence.

46. The sanction letter further concluded that medical documentation supports the finding that Mr. G suffered an earache and was diagnosed with a perforated eardrum. In response to the charge letter, the Applicant questioned the accuracy of the sick leave/medical certificate submitted by Mr. G, stating that Mr. G was seen carrying sand a few days after the incident. However, the Tribunal notes that no further inquiry was made to verify the sick leave/medical certificate during the investigation and/or disciplinary process. The Tribunal also notes that Mr. G refused to undergo an independent medical examination as otherwise recommended by the SIU investigator. Further, during the hearing, Mr. G testified that whereas the X-ray exam for the ear had been scheduled, it was never undertaken. The Tribunal also notes that at the hearing, Mr. MY testified that Mr. G was not able to walk properly after the slap, but that this testimony is not corroborated by other evidence. Mr. JY and the Applicant claimed that Mr. MY did not witness the slapping incident itself, whereas Mr. MY testified that he witnessed the incident. Based on this evidence, the Tribunal concludes that Mr. MY's testimony is not fully credible and is not in itself sufficient to establish by clear and convincing evidence that Mr. G suffered an earache and a perforated eardrum from the incident. While it is undisputed that the Applicant

bought some medicine for Mr. G and paid for his visit and stay at the hospital, which may suggest that some injury occurred, this does not by itself establish the extent of this injury by clear and convincing evidence.

47. Nevertheless, through the Applicant's admission and testimonies of other witnesses at the hearing, it is established by clear and convincing evidence that the Applicant slapped Mr. G in the face on 1 May 2016. However, the Tribunal finds that the sanction letter's conclusion that the Applicant slapped Mr. G in the face "with force thereby causing him to fall to the ground" and that it caused an earache and a perforated eardrum is not established by clear and convincing evidence.

Whether the established facts legally amount to misconduct

48. The sanction letter states that the established facts legally amount to misconduct as the Applicant's actions violated staff regulations 1.2(a) and (f) and staff rule 1.2(f) (emphasis in original), which provide that:

Regulation 1.2

Basic rights and obligations of staff

(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;

...

(f) ... [Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations ...;

Rule 1.2

Basic rights and obligations of staff

...

(f) Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

49. Under the jurisprudence of the Appeals Tribunal, it is undisputed that physical assault amounts to misconduct (see, for instance, *Toukolon* 2014-UNAT-407; *Ouriques* 2017-UNAT-745; *Majut* 2018-UNAT-862; *Sall* 2018-UNAT-889).

50. Since it was established by clear and convincing evidence that the Applicant slapped Mr. G in the face, the Tribunal finds that his actions constitute abuse at the workplace, which is prohibited by staff rule 1.2(f), and therefore, the established facts amount to misconduct.

Whether the disciplinary measure applied was proportionate to the offence

51. The principle of proportionality in a disciplinary matter is set forth in the staff rule 10.3(b), which provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

52. The Administration has discretion to impose the disciplinary measure that it considers adequate to the circumstances of a case and to the actions and behavior of the staff member involved, and the Tribunal should not interfere with administrative discretion unless “the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity” (*Portillo Moya* 2015-UNAT-523, paras. 19-21). But as the Appeals Tribunal also stated, “due deference does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and

procedurally fair”. The Appeals Tribunal has further explained that this means that the Dispute Tribunal should “objectively assess the basis, purpose and effects of any relevant administrative decision” (*Samandarov* 2018-UNAT-859, para. 24).

53. The Tribunal will accordingly determine whether in light of all the circumstances, the sanction of separation from service with compensation in lieu of notice and with termination indemnity was proportionate to the established misconduct.

54. In the present case, as stated in the sanction letter, the Administration imposed the separation from service with compensation in lieu of notice and with termination based on the nature and gravity of the conduct, the past practice of the Organization in matters of comparable conduct as well as mitigating factors.

55. With regard to the mitigating factors, the Tribunal finds that the facts considered by the Administration as mitigating circumstances are supported by the evidence. In particular, the Administration considered that the Applicant had over 16 years of service with the Organization, he reported the incident himself, he admitted his wrongdoing, he apologized for the incident and he took measures to remedy his wrongdoing by assisting the victim in obtaining medicine and paying for his medical treatment. The Administration also considered that the Applicant was dealing with a difficult situation where security guards were misusing the Organization’s property.

56. The Tribunal notes that the past practice of the Organization in cases involving physical assault since 2011 shows that the disciplinary measure of separation from service to dismissal has been imposed. However, as stated above, the sanction in the present case was based on an incorrect determination of the nature and gravity of the Applicant’s acts. Therefore, the Administration was not in a position to compare the Applicant’s acts to past practice.

57. In this regard, the Tribunal agrees with Judge Halfeld in his dissenting opinion in *Ouriques* 2017-UNAT-745, “While the application of a ‘parity of

sanctions' is in general appreciated, this cannot lead to a fixed and inflexible minimum sanction to certain types of misconduct ... As the [Dispute Tribunal] observed, such a practice "would be inconsistent with the duty to issue proportionate sanctions because it would mean that the general nature and characterization of the misconduct would almost exclusively dictate the penalty" (para. 15 of the dissenting opinion).

58. The Tribunal agrees with the Respondent that there is no place for physical violence or corporal punishment in the workplace. However, this does not mean that the Administration can only impose a minimum sanction of separation in all cases of physical assault. In the present case, given the serious mistakes and irregularities in the investigation and the disciplinary process, the Tribunal is of the view that the imposition of separation from service with compensation in lieu of notice and with termination indemnity was excessive and disproportionate to the misconduct and a lesser sanction would have been more appropriate under the particular circumstances in this case.

Remedies

59. Having concluded that the impugned disciplinary measure was disproportionate to the established misconduct, it is appropriate to rescind the decision to impose it. When the Tribunal finds a disciplinary sanction to be unlawful, it has the power to modify it by setting a different one (see, for example, *Abu Hamda* 2010-UNAT-022; *Samandarov* 2018-UNAT-859). Considering that the Applicant undoubtedly committed misconduct by slapping Mr. G in the face, the Tribunal decides to impose on the Applicant demotion with deferment, for three years, of eligibility for consideration for promotion under staff rule 10.2(vii), instead of separation from service with compensation in lieu of notice and with termination indemnity.

60. However, since this case concerns the termination of the Applicant's appointment, the Tribunal is bound, pursuant to art. 10.5(a) of its Statute, to set an amount that the Respondent may elect to pay as an alternative to rescission or specific performance. Considering that the Applicant was on a continuing appointment at the time of separation, the Tribunal sets the alternative compensation at 24 months of the Applicant's net-base salary at the rate that he would have been paid had he been demoted at the time of his separation, plus the applicable Organization's contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation.

Conclusion

61. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity is rescinded and replaced by that of demotion with deferment, for three years, of eligibility for consideration for promotion;
- c. Should the Respondent elect to pay in lieu compensation, the Applicant shall be paid, as an alternative, a sum equivalent to 24 months of the Applicant's net-base salary at the rate that he would have been paid had he been demoted at the time of his separation, plus the applicable Organization's contribution to his pension fund and to his medical insurance, minus the termination indemnity that he received upon his separation;

d. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 9th day of December 2019

Entered in the Register on this 9th day of December 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York