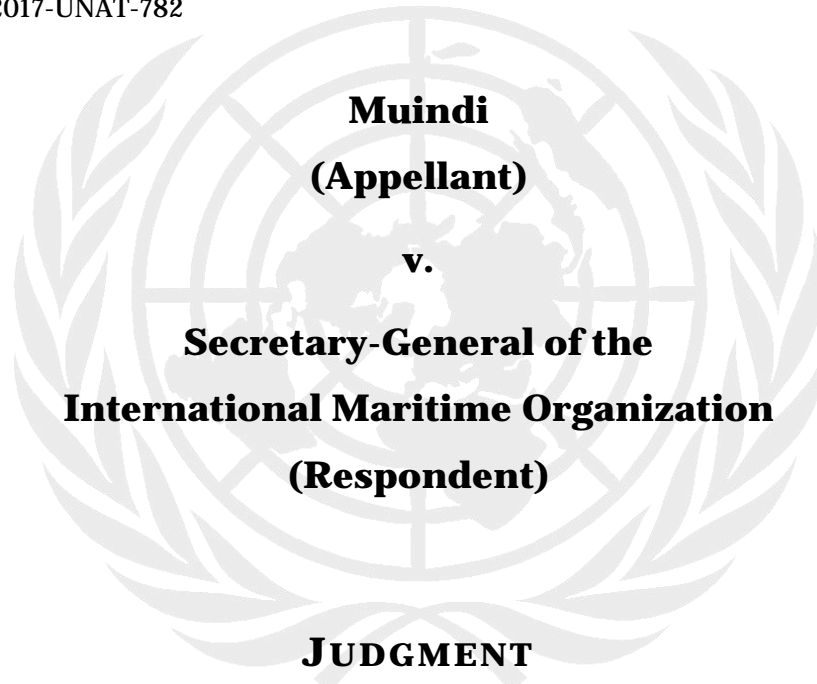




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-782



Before:	Judge Sabine Knierim, Presiding Judge Rosalyn Chapman Judge Dimitrios Raikos
Case No.:	2017-1063
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Appellant:	Antje Kunst
Counsel for Respondent:	Dorota Lost-Sieminska

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. John Paul Muindi against the decision of the Secretary-General of the International Maritime Organization (IMO) dated 4 April 2016 to summarily dismiss him from service for serious misconduct. Mr. Muindi filed his appeal on 8 February 2017 and the Secretary-General of the IMO answered on 12 April 2017.

Facts and Procedure

2. Mr. Muindi was appointed to the post of Regional Coordinator in IMO's Regional Presence Office for Technical Co-operation in the Eastern and Southern Sub-region of Africa (RPO) in Nairobi, Kenya, on 1 March 1999, as a locally recruited National Officer. He worked in this position until his summary dismissal on 4 April 2016, following a fact-finding investigation into fraudulent activities allegedly committed by him, which was conducted by the Internal Oversight Services (IOS), IMO's Internal Oversight and Ethics Office, from 1 to 5 February 2016.

3. In 2011, IOS carried out an audit of RPO. It recommended *inter alia* that personal phone calls should be identified on a regular basis and clearly marked on the schedule or list showing the details of the calls, and to indicate the total cost to be refunded for personal calls on the same bill. However, a follow-up audit carried out by IOS, in February 2015, revealed that Mr. Muindi had not complied with the audit recommendation and that his personal phone calls from 2011 to 2014 had amounted to 644,408 Kenyan Schillings (KES).¹

4. By memorandum dated 28 January 2016, the IMO Secretary-General placed Mr. Muindi on suspension from duty with full pay with immediate effect, pending the outcome of "a fact-finding investigation into allegations that [Mr. Muindi] committed fraud by giving instructions for the electronic signature of a colleague to be appended in an official IMO communication that materially misrepresent[ed his] contractual status with the Organization".² The fact-finding investigation report of 23 February 2016 confirmed the allegations and

¹ As of 6 February 2015, the exchange rate of US Dollar (USD) v. KES stood at 1:91.45. KES 644,408 was equal to USD 7,046.56. Mr. Muindi started reimbursing his personal phone calls in 10 monthly installments (KES 64,440 per installment) beginning in June 2015. As of 5 February 2016, Mr. Muindi had paid eight monthly installments and owed IMO KES 128,880.

² For details of this case, see paragraph 6 below.

recommended that the IMO Secretary-General take disciplinary measures against Mr. Muindi for fraud.

5. The IMO Secretary-General then referred that case (hereinafter the accreditation letter case), together with the earlier case of telephone charges to a Joint Disciplinary Committee (JDC) for consideration and advice. On 21 March 2016, the JDC submitted its report to the IMO Secretary-General. The JDC made the following considerations and findings with regard to the telephone charges case:

... Mr. Muindi extensively used his work mobile phone for personal calls during the period from 2011 to 2014, which accounted for 75% of total number of phone calls and 71% of the total cost. The calls were made while in Kenya and roaming to and from the Republic of Korea, China, Malaysia, Turkey, Thailand, Australia, USA, Japan and the UK. Mr. Muindi failed to mark those personal calls clearly and to refund the Organization the correct amount of money. Mr. Muindi did not comply with the recommendations of IOS and he started refunding the money that he owed the Organization only after a follow-up audit by IOS and clear instructions from the TC Director. From June 2015 to January 2016, Mr. Muindi paid the monthly instalments of KES 64,440 (8 monthly instalments), leaving a balance of two monthly instalments total[ing] KES 128,880 as of 5 February 2016.

... According to Article 1, Regulation 1.1 of the Staff Regulations and Staff Rules (SRSRs), Members of the Secretariat, by accepting appointment, pledge themselves to discharge their functions and to regulate their conduct with the interests of the Organization only in view.

... According to Rule 101.2(g) of the SRSRs, misuse of funds, abuse of trust or mismanagement will be considered acts of serious misconduct.

... The JDC was of the opinion that Mr. Muindi's conduct was not in conformity with Article [1], Regulation 1.1 of the SRSRs, he did not use the resources of the Organization in a responsible manner as required by the Standards of Conduct for the International Civil Service (paragraph 4), and, according to Rule 101.2(g) of the SRSRs, his abuse of trust and mismanagement constituted acts of serious misconduct.

6. The JDC made the following considerations and findings with regard to the accreditation letter case:

... According to the investigation report dated 24 February 2016, "the IMO official communication (letter of accreditation), on which the electronic signature of Mr. Micheni was appended, requesting the processing of accreditation from the Foreign Ministry of Kenya, is for Mr. Muindi with the first step being the request for the processing and issuance of a Diplomatic Identity Card" ...

... Mr. Muindi verbally instructed Mr. Moseti to append the signature of Mr. Micheni to a letter of accreditation for Mr. Muindi, without the authorization or instructions from Mr. Micheni. Mr. Muindi intentionally and materially misrepresented his contractual status with the Organization.

... The JDC examined the letter of appointment sent to Mr. Muindi and dated 19 February 1999 ... which stated clearly that the assignment of Mr. Muindi belongs to the category and grade of “National Officer-Level D” and has the recruitment status of “Local”.

... The JDC unanimously agreed with the conclusion of the fact-finding report that Mr. Muindi was aware of his assignment category, grade and recruitment status as stated in the letter of appointment and he abused his official position as the Regional Coordinator of the IMO Regional Presence Office.

... Mr. Muindi instructed Mr. Moseti to append the electronic signature of Mr. Micheni on a letter of accreditation for Mr. Muindi without authorization or instructions from Mr. Micheni. Such a letter misrepresented the contractual status of Mr. Muindi as an “internationally recruited staff member” and a “Professional Staff”.

... According to Rule 101.2(h) of the SRSRs, “staff members shall not intentionally misrepresent their functions, official title or the nature of their duties to Member States or to any entities or persons external to the Organization”.

... The JDC noted that Mr. Muindi denied any fraud on his part or deliberate misrepresentation. Mr. Muindi added that he did not manipulate, falsify or alter any document for his personal gain and that the accreditation would be a positive achievement for the Organization.

... The JDC was of the opinion that the act of Mr. Muindi in this case was to intentionally misrepresent his contractual status with the Organization. Such an act is in breach of Rule 101.2(h) of the SRSRs.

7. The JDC concluded by consensus that Mr. Muindi had committed serious misconduct:

Considering that:

... fraud, abuse of trust or the use of official position for personal gain or advantage of any kind whatsoever constitute serious misconduct (Article X, Regulation 10.3 of the SRSRs); and

... IMO has a zero-tolerance policy vis-a-vis fraud in all its manifestations and does not tolerate, under any circumstances, the diversion of the resources allocated to IMO from serving their ultimate purpose as determined by the Governing Bodies of the Organization (Appendix F, paragraph 1.1, of the SRSRs);

the JDC recommends that disciplinary measures should be taken against Mr. J-P. Muindi in accordance with Appendix F, paragraphs 6.1 and 6.2, of the SRSRs and that the adequate disciplinary measure should be summary dismissal. Furthermore, any unpaid monies that Mr. Muindi owes the Organization shall be recovered in full from his salaries or terminal emoluments.

8. By letter dated 4 April 2016, the IMO Secretary-General informed Mr. Muindi that, in accordance with Staff Regulation 10.2 and Staff Rule 110.4(viii) and on the recommendation of the JDC, he was summarily dismissed for serious misconduct. The reasons given for his summary dismissal were firstly, his giving instructions to append the electronic signature of a colleague to an official IMO communication without authorization or instruction by that colleague; and secondly, his misrepresenting his contractual status with IMO in that communication.

9. By letter dated 9 June 2016, Mr. Muindi appealed the IMO Secretary-General's decision to summarily dismiss him for serious misconduct to the Staff Appeals Board (SAB). The SAB received the IMO Administrative Division (AD)'s reply to Mr. Muindi's appeal on 8 August 2016 and Mr. Muindi's comments on the AD's reply on 5 September 2016.

10. On 8 December 2016, the SAB issued its report. The SAB, while noting that it was aware through the comments by the AD that Mr. Muindi had previously been reprimanded for fraudulent activities, stated that it would limit its considerations to the administrative decision of the IMO Secretary-General to summarily dismiss Mr. Muindi because of the fraudulent activities regarding the accreditation letter, since this was the administrative decision he was appealing against. The Board agreed that the other fraudulent activities mentioned in the JDC report and in the AD's reply to Mr. Muindi's appeal, relating to non-payment for private phone calls and the unauthorized use of an official vehicle, "although of a very serious nature, did not form part of this appeal since they were not cited in the dismissal letter and therefore decided to set them aside".

11. The SAB "considered the following views on the disputed facts for the purpose of reaching a decision regarding the present case":

... [T]he fraudulent activities in question, undertaken by the Appellant to eventually gain diplomatic accreditation, were listed in the Secretary-General's letter of dismissal as: firstly, giving instructions to append the electronic signature of a colleague to an official IMO communication without authorization or instruction by

that colleague; and, secondly, misrepresenting his contractual status with the Organization in that communication, i.e. knowingly stating that he was internationally recruited, when it was clear from the documents provided to him and from his previous exchanges with IMO Headquarters, that he had been recruited locally as a National Officer;

... [T]he communication in question is a draft letter addressed to the [United Nations Development Programme (UNDP)] Office Nairobi which was neither sent to nor received in the UNDP Office Nairobi, as confirmed by the Lead Investigator in the IOS investigation of the case ... ;

... [W]hile AD in its comments dated 5 August 2016 states that the summary dismissal was based on two cases, i.e. the use of the Appellant's official phone for personal use and the fraudulent accreditation letter, the Secretary-General's letter of dismissal refers solely to the fraudulent accreditation letter as the only reason for the dismissal;

... [I]n accordance with the advice provided by the Director, LED ..., attempted fraud requires that a person does an act that is more than merely preparatory to the commission of an offence;

... [T]he definition of fraud as set out in Appendix F to the Staff Rules and Regulations (Policy and procedures on the prevention and detection of fraud and serious misconduct) requires "a resulting loss or damage to the Organization";

... [T]he Board was not in a position to establish, ... whether the fraud not having been completed was due to the process being interrupted or due to the Appellant having changed his mind. The facts are that the Appellant prepared a draft letter misrepresenting his employment status with the Organization and having an unauthorized electronic signature attached to it on 25 January 2016 and that the Appellant was suspended on 28 February 2016, by which time the letter had not been sent. In any case, his actions did not result in tangible loss or damage to the Organization;

... [F]raudulent activities carried out by the Appellant cited in the written reply of AD to the Statement of Appeal (e.g. use of official car for private purposes, for which he had been officially reprimanded in the past, and use of official phone for private purposes, as evidenced in the JDC report) are not being considered by this Board since they were not included in the reasons for the dismissal; and

... [T]he Board was of the view that the fraudulent activities described [in the preceding paragraph] taken together with the case under consideration would probably have provided more than sufficient reasons for a dismissal.

12. The SAB noted that while the documentation made available to the Board showed that Mr. Muindi had been engaged in three cases of fraudulent activities, namely, “the unauthorized use of the official car; the use of the official phone for private purposes and non-payment of the charges; and the subject of the case before the Board, i.e. the preparation of an accreditation letter to the UNDP Office Nairobi using the electronic signature of a colleague without authorization and misrepresenting his contractual status with the Organization”. However, the SAB concluded that “the appeal was made against the administrative decision of summary dismissal and that decision was taken on the grounds of the preparation of [an accreditation] letter”.

13. The SAB stated that it was a fact that the letter had never been sent to the UNDP Office in Nairobi. Since the draft letter was never sent, there was, in the SAB’s view, no tangible loss or damage to IMO. While it found that the facts of the case amounted to serious misconduct, the SAB was also of the view that “summary dismissal as a disciplinary measure [was] too severe in the circumstances and not proportionate to the offence committed”. However, “[i]n view of the history of the Appellant with regard to other fraudulent activities, the Board [was] not of the view that reinstatement to his former post should be an option”.

14. By letter dated 5 January 2017, the IMO Secretary-General informed Mr. Muindi that after consideration of both the JDC report and the SAB report, and in line with the SAB’s recommendation not to reinstate Mr. Muindi, he confirmed the decision of summary dismissal as described in his letter of 4 April 2016. He noted that:

While [he] considered the SAB’s opinion that the action of summary dismissal may have been excessive for the act of preparing a false accreditation letter improperly using the electronic signature of another employee and misrepresentation of the contractual status with the Organization, [he] also considered the totality of the circumstances, including the report of the JDC. That report concerned multiple incidents of serious misconduct: the excessive use of the official phone for private purposes during office hours for which full reimbursement was not received; and the preparation of the aforementioned letter.

The IMO Secretary-General concluded that the disciplinary measure of summary dismissal was proportionate “[i]n consideration of these repeated cases of serious misconduct and the loss of trust and confidence resulting from Mr. Muindi’s conduct”.

15. On 8 February 2017, Mr. Muindi filed his appeal against the decision of the IMO Secretary-General to confirm the summary dismissal of Mr. Muindi for serious misconduct. The IMO Secretary-General filed his answer on 12 April 2017. On 10 May 2017, Mr. Muindi filed a motion seeking leave to submit additional pleadings. The IMO Secretary-General filed his comments on the motion on 19 May 2017, opposing the motion.

Submissions

Mr. Muindi's Appeal

16. The disciplinary measure of summary dismissal is unlawful for the following reasons.

17. There was no attempted fraud or any other misconduct regarding the preparation of the accreditation letter. The SAB found that it was unable to determine whether there was attempted fraud as it did not know why Mr. Muindi had not sent the letter.

18. As to the issue of appending Mr. Micheni's signature, the SAB ignored Mr. Muindi's submissions that the instruction to append the electronic signature was done with Mr. Micheni's consent. Furthermore, the SAB failed to consider that Mr. Micheni appended Mr. Muindi's electronic signature without his authorization on the former's accreditation letter to UNDP, which goes to prove that it was Mr. Micheni's idea to append an electronic signature.

19. The finding in paragraph 73 of the IOS investigation report that Mr. Micheni had no intention at all to sign the accreditation letter is ill-conceived. The letter remained unsigned until 25 January 2016. During that time Mr. Micheni was on leave and he stated to Mr. Muindi that he would sign the letter. Furthermore, the finding in paragraph 75 of the IOS investigation report that it must have been Mr. Muindi's idea to append the electronic signature on the accreditation letter during the discussion on 25 January 2016, because it would only benefit him and not Mr. Micheni, is also ill-conceived.

20. Mr. Mundi did not misrepresent his contractual status. After having been informed by the UNDP Protocol Officer on 25 January 2016 that he could not submit the accreditation letter because of his contractual status, he had no intention to, and did not, send the letter. Mr. Muindi indeed told the UNDP Protocol Officer that he was a national officer and hence did not attempt fraud.

21. The SAB erred in finding that the documentation made available to it showed that Mr. Muindi had been engaged in three cases of fraudulent activities, (a) the unauthorised use of his official car; (b) the use of the official mobile phone for private purposes and non-payment of the charges; and the (c) accreditation letter issue. The first two allegations were not determined as fraudulent by any fact-finding report. Also the SAB correctly acknowledged that the two matters did not form part of the reasons for his summary dismissal. The telephone charges matter was raised by the IMO after the summary dismissal. It formed part of the JDC report, but the IMO Secretary-General's summary dismissal was not based on it.

22. Mr. Muindi alleges serious procedural irregularities. The SAB failed to make any determination on the irregularity of the "disciplinary process" before the JDC. No formal charge of misconduct was made against him. The JDC did not hear him, his defense or his accusers/witnesses. It was only after the decision had already been taken to summarily dismiss him that Mr. Muindi was informed that his case had been considered by the JDC. Moreover, the witnesses' testimony should have been "tested" by the JDC in the presence of Mr. Muindi thus allowing him to cross-examine them. Given that the witnesses were "untested", the IMO Secretary-General could not rely on their testimonies.

23. The SAB should have ordered the IMO to disclose to Mr. Muindi all the appendices, i.e. the witness statements and other documentation withheld on which the charges were based. Had he had the statements available he could have scrutinised and contested what witnesses had stated to the investigators to establish his innocence. Mr. Muindi cannot mount a defense establishing that the witness statements are not reliable and not truthful unless those are provided to him. Serious allegations have been made against Mr. Muindi and the most severe disciplinary sanction (i.e. summary dismissal) has been imposed.

24. The sanction was disproportionate. The SAB correctly concluded that the summary dismissal as a disciplinary measure was too severe in the circumstances and not proportionate to the conduct. Summary dismissal is a disproportionate sanction to Mr. Muindi's conduct taking into account his long-standing good career with the IMO, the fact that he did not, and had no intention to personally benefit from his conduct; his wish to be accredited like Mr. Micheni arose in the context of a series of harassment acts; he stopped preparing supporting documentation and did not submit the letter to UNDP Protocol Officer when he knew that national staff could not obtain accreditation; and

there was no attempt to mislead UNDP vis-à-vis his contractual status. In any event, Mr. Muindi's conduct cannot be considered as misconduct.

25. Mr. Muindi requests that the Appeals Tribunal order “[r]escission of the refusal to disclose exhibits, appendi[c]es or annexes attached to the [IOS] investigation report”; “[r]escission of the decision of [s]ummary dismissal”; “reinstatement to his post of IMO Regional Coordinator for eastern and southern Africa or another post equivalent in status and compensation amounting to the salary, emoluments and entitlements lost from separation from service to the date of his reinstatement”; “[c]ompensation for the violations of his rights to due process and fairness and for the harm suffered with regard to his long standing good career and reputation, and the psychological stress suffered as a result of the harassment”; and “[l]egal costs”.

The IMO Secretary-General's Answer

26. The facts upon which the IMO Secretary-General's decision to summarily dismiss Mr. Muindi were based have been established; the established facts legally amount to serious misconduct under IMO's Staff Regulations and Rules; and the disciplinary measure applied is proportionate to the offense.

27. The IOS investigation and the JDC both concluded that Mr. Muindi had attempted to commit fraud by knowingly misrepresenting his status claiming to be an internationally recruited officer and by giving instructions for the electronic signature of Mr. Micheni to be appended to the accreditation letter without Mr. Micheni's approval, seeking accreditation with the Kenyan government in order to gain diplomatic privileges and immunities to which Mr. Muindi was not entitled.

28. The key component of the definition of fraud is to knowingly make a false representation with the intention that it be acted or relied upon. In the accreditation letter, Mr. Muindi knowingly made a false representation as to his status with IMO, i.e. that he was internationally recruited, and appended Mr. Micheni's electronic signature to give the impression that his office had authorized this initiative. He did so with the intention that the letter be acted or relied upon in order to gain accreditation, i.e. to obtain undue financial benefits and entitlements. These facts were established by IOS with clear and convincing evidence and were accepted as such by

the SAB. The fact that Mr. Muindi did not transmit the letter is irrelevant. Attempted fraud is still serious misconduct under IMO's Staff Regulations and Rules and equally punishable.

29. The reliance of the IMO Secretary-General on the facts that were established by clear and convincing evidence is in line with the standard of proof required by the Appeals Tribunal for cases of termination. Mr. Muindi has failed to provide a credible explanation or contrary evidence sufficient to rebut the outcome of the investigations. The established facts, therefore, legally qualify as attempted fraud consistent with the definition contained in paragraph 2 of appendix F of IMO's Staff Regulations and Rules, and the conclusion of the SAB that Mr. Muindi's acts constituted serious misconduct was appropriate.

30. Turning to the case concerning the excessive usage of the phone during office hours for private purposes and the non-payment of the related charges, Mr. Muindi does not contest the facts established by another investigation that he disregarded an audit recommendation to identify all personal phone calls, so that costs could be repaid to IMO. Instead, a follow-up audit also noted excessive usage of the phone by Mr. Muindi during office hours for private purposes and the non-payment of the related charges. The fact that Mr. Muindi paid the charges at a later stage is irrelevant. Payment of charges does not preclude the imposition of discipline for the rules violation. The established facts legally qualify as misuse of funds.

31. Claiming that the disciplinary measure was not proportionate to the offence, Mr. Muindi fails to recognize the IMO Secretary-General's broad discretion in disciplinary matters. The IMO Secretary-General may take various disciplinary measures, taking into account any advice that may be provided by the JDC. At all stages of the disciplinary process, both JDC and SAB concluded that the facts amount to serious misconduct. JDC recommended summary dismissal. While the SAB may have concluded that summary dismissal was not proportionate to the offence committed, at the same time it concluded that in view of Mr. Muindi's history with regard to other fraudulent activities, the SAB was not of the view that reinstatement to his former post should be an option.

32. Mr. Muindi's claim that the disciplinary process was flawed is not correct. In both cases, the disciplinary process was conducted in line with IMO's Staff Regulations and Rules "without any significant procedural irregularities". Mr. Muindi was notified of the allegations against him before the investigation was initiated. As soon as the investigation team arrived in Nairobi, he was notified that he was suspended from duty with pay during the investigation and pending

the disciplinary proceedings. Mr. Muindi was given a written statement of the reasons for the suspension and its probable duration. The investigators conducted a comprehensive interview with Mr. Muindi during which he was given the opportunity to respond to the allegations. The fact that the investigators did not reveal the source of the allegation, in compliance with IMO's whistle-blower policy, did not affect his due process rights, as he was given all relevant information and facts, forming the basis for the allegation.

33. In line with IMO's Staff Regulation 10.1 and Staff Rule 110.3(b), the IMO Secretary-General established a JDC to advise him on the appropriate disciplinary measures, if any. He at this point decided to include another case against Mr. Muindi in the disciplinary proceedings, which had been discovered through an audit of the regional office. Mr. Muindi had been informed of both the initial audit recommendations and the outcome of the follow-up audit, and he was given the opportunity to explain his non-compliance with the audit recommendations, but he could not provide any justifications for his conduct.

34. Under IMO's Staff Regulations and Rules, the IMO Secretary-General was not required to notify Mr. Muindi again that the JDC would be established. Mr. Muindi had been made fully aware of the allegations against him and the related investigations, during which he was given the opportunity to respond in both cases. The IMO Secretary-General initiated the disciplinary process against Mr. Muindi, subject to the outcome of the investigation. The mandate of the JDC is not to provide an adversarial hearing on the facts of the case; it is merely to provide the IMO Secretary-General with a recommendation as to appropriate disciplinary measures, if any. The JDC is not a fact-finding body and IMO's Staff Regulations and Rules do not envisage any additional procedural requirements, like oral hearings or a cross-examination.

35. Mr. Muindi's claim that the SAB should have ordered disclosure of the appendices to the IOS report is inconsistent with IMO's whistle-blower policy, and contrary to the overriding United Nations system-wide policy protecting whistle-blowers to strengthen accountability. IMO's whistle-blower policy obliges the Organization to keep confidential the identity of the whistle-blower throughout the process. This concept of strict confidentiality means that the name of the whistle-blower cannot be disclosed without his or her permission. The current case struck the correct balance between Mr. Muindi's rights to due process and the whistle-blower's right to confidentiality. In this case, the individual who reported the alleged misconduct specifically requested to be protected under the whistle-blower policy, for fear of retaliation.

36. Notwithstanding the above, in reality, everything has been disclosed to Mr. Muindi. The investigation report contains all names and events and presents them in sufficient detail that Mr. Muindi was well aware of all statements made during the investigation and of the identity of persons who made them. The documents not disclosed contain no information that would have bettered Mr. Mundi's plight or exculpated him in any way. Should the Appeals Tribunal request review of the documents not disclosed to him during the investigation, IMO will provide them for review *in camera*.

37. The IMO Secretary-General requests that the Appeals Tribunal affirm the conclusion of the SAB that the actions undertaken by Mr. Muindi constitute serious misconduct; apply the principle of deference with regard to the discretionary decision of the IMO Secretary-General to summarily dismiss Mr. Muindi; decide that Mr. Muindi has not established any grounds of appeal under the Appeals Tribunal Statute and the Agreement between IMO and the United Nations pursuant to which the Appeals Tribunal has jurisdiction; decline Mr. Muindi's request for reinstatement to his post or any alternative post within IMO; decline to award any type of compensation claimed by Mr. Muindi; and decline to award legal costs.

Considerations

Agreement between the United Nations and IMO

38. Effective 1 July 2009, the United Nations and IMO entered into a written agreement providing the Appeals Tribunal with "competen[ce] to hear and pass judgement on an application filed by staff members of [IMO]" in accordance with Article 2(10) of the Statute of the Appeals Tribunal (Statute).

39. The conditions governing appeals to the Appeals Tribunal by IMO staff members are specified in the Statute and the Agreement between the United Nations and IMO signed on 21 January 2010 by the Secretary-General of IMO and on 8 February 2010 by the Secretary-General of the United Nations (Agreement).

40. Article 2(10) of the Statute provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established

by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. ... Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

41. Article 2(4) of the Agreement provides:

An application shall not be receivable by the Appeals Tribunal unless:

- (a) the staff member concerned has previously submitted the dispute to the neutral first instance process provided for in the IMO Staff Regulations and Staff Rules;
- (b) the latter has communicated its opinion to the Secretary-General of the Organization; and
- (c) the Secretary-General of the Organization has, in accordance with the IMO Staff Regulations and Staff Rules, communicated his/her decision to the complainant, except where the Secretary-General of the Organization and the staff member have agreed to submit the application directly to the Appeals Tribunal.

42. The SAB is established as the “neutral first instance process” by Article XI of the IMO Staff Regulations. Specifically, IMO’s Staff Regulation 11.1 requires the IMO Secretary-General to establish an “administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment”. The SAB is thus established by these Staff Regulations as a guarantor of the neutrality of a first-instance procedure in the framework of which it has to submit its opinion and recommendations to the IMO Secretary-General so that he can take his decision on the complaint made by a staff member or former staff member disputing an administrative decision.³

³ Cf. *Ortiz v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2012-TANU-231, para. 32.

43. The relationship between IMO and the Appeals Tribunal is comparable to that between the International Civil Aviation Organization (ICAO) and the Appeals Tribunal, which has been explained by this Tribunal in *Ortiz*:⁴

... As a result of the foregoing, an appeal has been referred to the Appeals Tribunal, not directly against the original administrative decision, but against the final decision taken by the Secretary-General [of ICAO] upon completion of the first-instance procedure. It is the Tribunal's business to deliberate upon [the Advisory Joint Appeals Board (AJAB)'s] conclusions and recommendations and the reasons for which, as it turned out, the Secretary-General [of ICAO] departed from them. There should normally be no need for any other evidence than that submitted to AJAB.

... Nevertheless, it should be borne in mind that, even in a case like this, in which AJAB carried out its task carefully and impartially, the appeal is directed against an administrative decision, taken by an executive authority, and not against a judgment delivered by a professional, independent court of first instance deciding on the issue itself.

... Therefore, the Appeals Tribunal's Statute is only applicable to such an appeal insofar as, and on condition that, its provisions are compatible with the judgment of an appeal directed against a decision taken by an executive authority.

Preliminary issues

44. Mr. Muindi requests an oral hearing. Under Article 18(1) of our Rules of Procedure, this Tribunal may hold oral hearings if doing so would assist the expeditious and fair disposal of the case. In Mr. Muindi's case, the relevant factual and legal issues are straightforward and have been fully ventilated on the papers. For those reasons, the request for an oral hearing is denied.

45. Mr. Muindi also filed a motion seeking leave to file additional pleadings to comment on the documents the IMO Secretary-General had attached to his answer to Mr. Muindi's appeal. We do not see any exceptional circumstances which would warrant the granting of leave to Mr. Muindi to comment on these documents. For this reason, we reject his motion.

⁴ *Ibid.*, paras. 33-35; see also *Mosupukwa v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2016-UNAT-625 and *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376.

Receivability of Mr. Muindi's appeal

46. We find that Mr. Muindi's appeal is receivable. He filed, within the prescribed time limits, not only his appeal against the IMO Secretary-General's 4 April 2016 decision to summarily dismiss him to the SAB, but also his appeal against the IMO Secretary-General's final decision of 5 January 2017 to uphold the summary dismissal to this Tribunal.

Merits of the case

47. The task of this Tribunal is to decide whether or not the 5 January 2017 summary dismissal by the IMO Secretary-General is lawful. If it is lawful, Mr. Muindi's appeal cannot succeed; if it is unlawful, Mr. Muindi's appeal must be granted.

48. We find that the decision of 5 January 2017 to summarily dismiss Mr. Muindi is unlawful, because Mr. Muindi's due process rights under IMO's Staff Regulations and Staff Rules were substantially violated.

49. The relevant provisions read as follows:

Rule 101.2

STAFF MEMBER OBLIGATIONS AND ACTS OF MISCONDUCT

(a) Staff members shall comply with his or her obligations under the Convention on the International Maritime Organization, the Staff Regulations and Staff Rules, the Financial Regulations and Rules and the terms and conditions of his or her appointment. In applying this rule, account shall be taken of all administrative memoranda, directives and policy guidelines and of the Standards of Conduct for the International Civil Service, promulgated by the International Civil Service Commission, as applicable from time to time.

(b) Disciplinary measures and procedures set out in Article X of the staff regulations and staff rules 110.1 to 110.4 may be instituted against a staff member who commits an act of misconduct or fails to comply with his or her obligations under this rule.

...

(f) Failure by a staff member to comply with the IMO Policy and Procedures on the Prevention and Detection of Fraud, which is attached in appendix F, will be considered to be an act of serious misconduct under this rule.

(g) Misuse of funds, abuse of trust or mismanagement will be considered acts of serious misconduct under this rule.

(h) Staff members shall not intentionally misrepresent their functions, official title or the nature of their duties to Member States or to any entities or persons external to the Organization.

Rule 110.1

CO-OPERATION IN THE INVESTIGATION OF MISCONDUCT

(a) An allegation that a staff member has failed to comply with an obligation or has committed an act of misconduct under rule 101.2 will be promptly referred to the Director, Administrative Division for examination or investigation under rule 110.3.

Rule 110.3

DUE PROCESS

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations, provided that:

- (i) subject to (ii) and (iii), an allegation of failure to comply with an obligation or of an alleged act of misconduct under rule 101.2 will be examined, and, when necessary, investigated, in accordance with the procedures set out in appendix H;
- (ii) ...
- (iii) an allegation of misconduct under rule 101.2(f) and (g) concerning fraud and serious misconduct will be investigated when an initial review by the Head of Human Resources Services (or by the Director of the Administration Division in any case involving the Head of Human Resources Services) determines that the facts as alleged would, if true, constitute an act of misconduct. The procedures for investigation will conform to those set out in appendix F. Where an investigation is conducted, a Joint Disciplinary Committee shall not be convened until the outcome of the investigation is available.

(b) Subject to rule 110.2 (a), no staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:

- (i) if referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General; or

- (ii) in respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.

(c) In cases of summary dismissal imposed without prior submission of the case to a Joint Disciplinary Committee in accordance with subparagraphs (b)(i) and (ii), the staff member or former staff member concerned may, within two months of having received written notification of the measure, request that the measure be reviewed by such a Committee. A request shall not have the effect of suspending the measure. After the advice of the Committee has been received, the Secretary-General shall decide as soon as possible what action to take in respect thereof. An appeal in respect of such a decision may not be submitted to the Joint Appeals Board.

APPENDIX F

Policy and Procedures on the Prevention and Detection of Fraud and Serious Misconduct

GUIDELINES FOR THE INVESTIGATION OF SERIOUS MISCONDUCT

2.5 IOS is not responsible for deciding whether to initiate disciplinary action under article X of the Staff Regulations or to institute corrective administrative action as a result of its reports and recommendations. That is the responsibility of the Secretary-General or his authorized officials. It follows that an IOS finding that a staff member appears to have engaged in misconduct and a resultant IOS recommendation that disciplinary action be taken are not charges of misconduct. The Secretary-General initiates the disciplinary process by bringing a formal written charge of misconduct against the staff member and providing to the staff member the material on which the charge of misconduct is based. The disciplinary process is governed by the rules set out in articles X and XI of the Staff Regulations and associated provisions of the Staff Regulations and Staff Rules.

50. The IMO Secretary-General, in his 5 January 2017 decision, stated that there were “multiple incidents of serious misconduct: the excessive use of the official phone for private purposes during office hours for which full reimbursement was not received; and the preparation of the [accreditation] letter”. The IMO Secretary-General went on to state that in “consideration of these repeated cases of serious misconduct ... [t]he disciplinary measure of summary dismissal is proportionate to the events and stands”.

51. With regard to the use of the telephone charges case (Case I), there were no disciplinary proceedings in accord with the above mentioned provisions. In this matter, the IMO Secretary-General never brought a formal written charge of misconduct against Mr. Muindi as expressly required in Rule 110.3(a)(iii) and Appendix F, Section 2.5 of the aforementioned

Guidelines. Such a formal charge was only brought against Mr. Muindi with regard to the preparation of the accreditation letter (Case II) by the IMO Secretary-General in his 28 January 2016 memorandum. The IMO Secretary-General is of the view that Mr. Muindi was sufficiently informed about the allegations regarding the telephone charges matter by the IOS' follow-up audit report of February 2015. That is not so. In *Rangel*, we stated:⁵

... In the instant case, we find that Ms. Rangel was not notified in writing of the charges against her.

... The Conciliation Committee in its Report of 28 November 2014 noted that Ms. Rangel had been asked to send comments or observations she might wish to make with respect to the two investigation reports. It thus concluded that in this manner Ms. Rangel "was notified in writing of the charges against her" in compliance with Article 3(a) quoted above. The Appeals Tribunal disagrees.

... The "charges" are the legal conclusions that the Administration has reached on the basis of an investigation and that assert that somebody has committed misconduct. Panels One and Two were tasked with conducting a "fact-finding investigation" and not making legal conclusions or "charges" as to the possible resultant misconduct. In the present case, sending the reports of the two investigation panels to Ms. Rangel was not the same as charging her with misconduct. In other words, Ms. Rangel was not apprised of the charges when she was asked to respond to the two investigation reports.

... We must disregard the findings of Panel One and Panel Two.

... Article 3 of Annex VI of the ICJ Staff Regulations is entitled "Due process in the disciplinary process". A breach of due process occurred and constituted a serious infringement of the rights of Ms. Rangel when she was not informed of the concrete or specific charges against her that could result in her termination.

... Absent such charges, Ms. Rangel was not put on notice of the possible "misconduct" which she was considered to have committed.

... For the reasons set out above, it follows that her termination is legally unsustainable.

52. We find that, as in *Rangel*, Mr. Muindi was not put on notice that his use of the official cellphone for personal or private calls could be regarded as serious misconduct and would lead to disciplinary proceedings. Firstly, in IOS' February 2015 report, there was no finding that

⁵ *Rangel v. Registrar of the International Court of Justice*, Judgment No. 2015-UNAT-535, paras. 70-76. Article 3(a) of Annex VI of the Staff Regulations for the Registry of the International Court of Justice (ICJ) reads: "... no disciplinary measure or non-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 charges against him or her, and has been given the opportunity to respond to those charges".

Mr. Muindi had engaged in any misconduct nor was any recommendation made that disciplinary charges be taken against him. In paragraph 43 of the report, IOS merely “recommends that the Director [of Technical Co-operation Division (TCD)] in consultation with Director, Administrative [Division] reviews and considers the facts established and analysis made, as well as the explanations provided by the Regional Coordinator for further action when appropriate”. The evidence before this Tribunal shows that IMO and Mr. Muindi concluded a reimbursement agreement and that Mr. Muindi delivered payments accordingly. Secondly, paragraph 2.5 of the Guidelines unambiguously states that an IOS finding that a staff member appears to have engaged in misconduct and a resultant IOS recommendation that disciplinary action be taken are not charges of misconduct. A formal written charge of misconduct must always be brought against the staff member by the IMO Secretary-General. For the same reason, the 8 August 2016 Administrative Division’s reply to Mr. Muindi’s appeal to the SAB cannot be regarded as a charge of misconduct under IMO’s Staff Regulations and Guidelines.

53. With regard to the alleged misconduct by using the official cellphone for private calls, a formal written charge by the IMO Secretary-General was never brought against Mr. Muindi. Even after having received the 21 March 2016 recommendation by the JDC to summarily dismiss Mr. Muindi based on Cases I and II, the IMO Secretary-General issued the 4 April 2016 summary dismissal decision relying solely and entirely on the alleged misconduct with regard to the accreditation letter. Consequently, Case I never became part of the disciplinary proceedings against Mr. Muindi; and it was not examined by the SAB. It thus cannot be a basis for the IMO Secretary-General’s 5 January 2017 decision to maintain his earlier decision to summarily dismiss Mr. Muindi.

54. As to Case II, in his 5 January 2017 letter, the IMO Secretary-General stated that he had “considered the SAB’s opinion that the action of summary dismissal may have been excessive for the act of preparing a false accreditation letter improperly using the electronic signature of another employee and misrepresentation of the contractual status with the Organization”. However, he also considered the “totality of the circumstances, including the report of the JDC ... concern[ing] multiple incidents of serious misconduct: the excessive use of the official phone for private purposes during office hours for which full reimbursement was not received; and the preparation of the aforementioned letter”. We find that, in acting this way, the IMO Secretary-General justified his final decision of summary dismissal not on the sole basis of Case II, but on the basis of Case I and case II combined.

Relief

55. We reject Mr. Muindi's request to rescind the IMO's refusal to disclose exhibits, appendices or annexes attached to the IOS 23 February 2016 investigation report. Apart from the question as to whether IMO's whistle-blower policy would allow such a disclosure, this Tribunal finds that the requested documents are not necessary for the disposal of the present case.

56. As we find the 5 January 2017 decision of summary dismissal to be unlawful, we order rescission of that decision. As an alternative, the IMO Secretary-General may elect to pay as in-lieu compensation to Mr. Muindi the amount of one year's net base salary at the rate in effect for March 2016.

57. Mr. Muindi's request for compensation is rejected. He has presented no evidence to substantiate his claim of harm.⁶

58. Mr. Muindi's claim for legal costs must also fail. Article 9(2) of the Statute provides: "Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party". We find that Mr. Muindi has failed to establish that the IMO Secretary-General has manifestly abused the appeals process in any way. The fact that Mr. Muindi's appeal is successful is not sufficient in this regard. There is, therefore, no justification for an award of costs against the IMO Secretary-General.

⁶ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

Judgment

59. Mr. Muindi's appeal is partly granted. The 5 January 2017 decision of summary dismissal is rescinded; as an alternative, the IMO Secretary-General may choose to pay to Mr. Muindi one year's net base salary at the rate in effect for March 2016 as compensation in lieu of rescission. Mr. Muindi's other requests on appeal are dismissed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Raikos

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar