



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

Judgment No. 2018-UNAT-822

**Elobaid
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

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| Before: | Judge Martha Halfeld, Presiding Judge John Murphy Judge Deborah Thomas-Felix |
| Case No.: | 2017-1111 |
| Date: | 22 March 2018 |
| Registrar: | Weicheng Lin |

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| Counsel for Mr. Elobaid: | Robbie Leighton, OSLA |
| Counsel for Secretary-General: | Amy Wood |

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 13 July 2017, in the case of *Elobaid v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 8 September 2017, and Mr. Elobaid Ahmed Elobaid filed his answer on 10 November 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant serves as Head of the Human Rights Training and Documentation Centre at the Office of the High Commissioner for Human Rights (OHCHR) Regional Centre for South-West Asia and the Arab Region [in Doha, Qatar].

...

... On 11 February 2014, the Investigations Division of the Office of Internal Oversight Services (OIOS) received a report of possible misconduct implicating a staff member of the United Nations Office on Drugs and Crime (UNODC) (...). The complaint alleged that during a break at a conference in Doha, Qatar, from 10 to 12 December 2013, [which Mr. Elobaid attended as representative of OHCHR], the Applicant publicly accused Mr. A., a UNODC representative, of being corrupt and of conspiring with a Qatari hotel to inflate invoices for UNODC events in return for the hotel refunding the price difference to Mr. A's private bank [a]ccount.

... In case no. 0066-14, OIOS investigated the claims of possible misconduct implicating Mr. A. On 10 April 2014, the Applicant was required to participate in an interview with Ms. Kabita Nirola and Mr. Gianfranco Vittone, OIOS Investigators. [A rubric, read to Mr. Elobaid at the beginning of the interview, *inter alia* stated as follows: "If an investigation report is prepared, any implicated United Nations staff member will be provided with the opportunity to review the factual details and provide clarification or correction of any errors before finalization of the report". When asked how he had concluded that Mr. A had misused project funds, Mr. Elobaid responded: "[I] did not conclude that he mis[used] the project money – I was rather expressing an impression. It was just an impression and hearsay how the whole project was improperly implemented". When confronted with a statement he was alleged to have made to the effect that Mr. A was the "most corrupted person [he had] ever seen in the [United Nations]" he stated that he "[did] not recall having said this". The investigators asked how he had informed participants during the aforementioned

¹ Impugned Judgment, paras. 1, 4-13 and 2-3.

conversation that Mr. A benefited financially from the hotel while organizing the program, he responded, *inter alia*, as follows: “I would not make any assertion in my official capacity. I would voice out a lot of frustration in relation to how Mr. [A] had been organizing the human rights trafficking project. There was a suspicion that something was not right. I do not have hard documents or evidence. But this was a gut feeling—something was not right.” Ultimately,] OIOS found no evidence that Mr. A was involved in misconduct [and the investigation into possible misconduct by Mr. A was closed].

... OIOS thereafter commenced a new investigation, case no. 0100-15, whereby the Applicant was now the subject. In this connection on 8 May 2015, the Applicant was required to participate in a further interview with OIOS Investigators, Mr. Vittone, and Ms. Elisa Reuter. [Before his interview, Mr. Elobaid was provided with a copy of the record of his 10 April 2014 interview with OIOS and he confirmed having received and read it. He stated that he did not recall the incident or having made any specific comment, in particular in view of the time that had elapsed since the conference, and did not remember the names of the persons being present during the subject coffee break. In the context of this investigation, OIOS also conducted interviews with four potential witnesses of fact.]

... Based on the evidence gathered during the investigation, OIOS[, in its report issued on 29 July 2015,] made the following findings:

- a. During a coffee break, the Applicant approached a group of participants and queried them about Mr. A. He also voiced allegations of corruption against Mr. A.
- b. While the Applicant claimed no recollection of having raised such allegations against Mr. A., OIOS noted that the Applicant did not actually deny having raised these allegations.
- c. The Applicant confirmed that, during the material time, he had been frustrated with Mr. A. and the way in which he had been handling a project.
- d. The Applicant raised allegations of corruption against Mr. A while having no good faith belief in their veracity or otherwise having willful disregard for their truth or veracity and the reputational harm likely to be caused to Mr. A as a result of raising such allegations.

... On 28 September 2015, Mr. Kyle Ward, Chief Programme Support and Management Services [(PSMS)], OHCHR, issued to the Applicant a communication titled ‘Intention to issue written reprimand’ (...). [The communication informed Mr. Elobaid that OHCHR had received a report from OIOS concerning allegations of possible misconduct by him and asked him to provide comments. The memorandum summarized the findings and conclusions of the OIOS report, *inter alia*, as follows:

[W]e have received an Investigation Report (...) from [OIOS] concerning allegations of misconduct which were made against you.

(...) Specifically, it was alleged that during a break at a conference being held in Doha, Qatar from 10 to 12 December 2013, you publicly accused Mr. [A] (...) of engaging in corrupt activities.

(...) The Report found that at the conference in Doha, during a coffee break, you approached a group of participants and queried them about Mr. [A]. You also reportedly voiced allegations of corruption against Mr. [A].]

... On [12 and] 27 October 2015, the Applicant provided his [comments on] the 'Intention to issue written reprimand' (...). [In his e-mail dated 12 October 2015, Mr. Elobaid stated that the decision "seem[ed] to rely entirely on hearsay evidence, namely that [he] did not deny saying something that [he] could not remember" and he asked for "access to the entire evidence on the basis of which the decision is made". In his 'Response to the Intention to Issue Written Reprimand' dated 27 October 2015, Mr. Elobaid further elaborated his arguments on hearsay evidence and stated that he had been informed by Mr. Ward that he had no right to full disclosure of the evidence, mainly the OIOS report, as it was no disciplinary case but a managerial matter, which Mr. Elobaid argued violated his due process rights.]

... On 6 November 2015, Mr. Ward issued another communication titled 'Intention to issue written reprimand' (...)[, justifying, *inter alia*, the decision not to provide Mr. Elobaid with a copy of the OIOS Investigation Report].

... On 10 November 2015, the Applicant received a memorandum dated 9 November 2015 whereby Mr. Ward issued the written reprimand which was placed in the Applicant's Official Status File (...). [The reprimand stated that "[o]n behalf of the High Commissioner, this is to confirm that you were informed on 28 September 2014 that we have received [the OIOS report]" and it summarized the findings of the report.] The reason for the reprimand was articulated as follows:

(...) OIOS [(...)] determined that you raised allegations of corruption against Mr. [A] while having no good faith belief in their veracity, or otherwise displayed willful disregard for the truth of these allegations and the consequent reputational harm likely to be caused to Mr. [A] as a result of raising these allegations.

(...) The Report states that the established facts constitute reasonable grounds to conclude that you may have failed to observe the standards of conduct expected of an international civil servant...

[The reprimand concluded by stating as follows: "We have reviewed your comments [on the allegations set out in the OIOS report] and taking into account the totality of the facts and circumstances in the present case, have decided to issue the [reprimand]." Mr. Elobaid was further informed of his right pursuant to

Administrative Instruction ST/AI/292 (Filing of adverse material in personnel records) to provide “any written statement or explanations [he] might wish to give in response to the reprimand, which will also be placed in [his] Official Status File”.]

... On 7 January 2016, the Applicant requested management evaluation of the decisions to reprimand him and not to provide him with a copy of the OIOS Investigation Report (...).

... On 12 February 2016[,] the Applicant received a response from the Management Evaluation Unit upholding the decision (...).

...

... On 12 May 2016, he filed an application [with the Dispute Tribunal] to contest the decision to issue him a written reprimand and to withhold an investigation report. He [requested] a disclosure of the report and rescission of this decision.

... The Respondent filed a reply to the application on 16 June 2016. The Respondent [requested] the [Dispute] Tribunal to uphold the decision.

3. The UNDT rendered its Judgment on 13 July 2017. First, the UNDT found that the decision to issue the reprimand was *ultra vires* as it had not been taken by the competent organ. It considered that under paragraph 5 and Annex II of Administrative Instruction ST/AI/234/Rev.1 (Administration of the staff regulations and staff rules) as amended, the “head of office”—in this case the High Commissioner for Human Rights—had delegated authority to issue Mr. Elobaid with a written reprimand. However, in light of unsuccessful attempts by the UNDT “to clarify the matter with the [Secretary-General’s] counsel”, the UNDT found that it was “left with no option but to take the reprimand on its face as originating [in actuality] from Mr. Ward [, the Chief, PSMS, OHCHR,]”² who lacked the necessary delegated authority.

4. Second, the UNDT concluded that “[c]onsidering that a reprimand is issued upon a finding of misconduct and that it entails lasting negative consequences, (...) due process guarantees applicable to disciplinary measures are not *prima facie* irrelevant in determining the ones to be applied in relation to a reprimand”.³ The UNDT found that Mr. Elobaid’s due process rights had been violated as he “had not been properly given the ‘opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand’ whereupon his right to respond embodied by staff rule 10.2(c) was not observed [which] (...) may have had an impact on the decision”.⁴ A “meaningful”⁵ right to “rebuttal”⁶ entailed a “right to access to an

² *Ibid.*, para. 48.

³ *Ibid.*, para. 64.

⁴ *Ibid.*, para. 75.

investigative report to the extent needed to mount a defence”⁷ and the Administration failed to provide a rationale for its refusal to provide Mr. Elobaid with a full copy of the OIOS Investigation Report prior to the issuance of the written reprimand.

5. Third, the UNDT considered that the facts relevant for the decision had not been established to the requisite standard of proof, which was “preponderance of the evidence” due to the reprimand’s “final character and lasting negative consequences”.⁸ It found that the “ultimate finding of misconduct”⁹ fell within the competence of the administrative organ applying a disciplinary or administrative measure and not the investigative bodies. The failure of the Chief, PSMS, OHCHR to make a proper assessment of the OIOS Investigative Report and a definitive finding of misconduct demonstrated a “complete abdication of [this] role”¹⁰. The OIOS evaluation that Mr. Elobaid “may have failed to observe standards of conduct” was not a sufficient establishment of misconduct. Moreover, the UNDT considered that OIOS drew several incorrect inferences and failed to provide explanations for central assumptions such as Mr. Elobaid’s alleged lack of good faith.

6. Based on the foregoing, the UNDT ordered rescission of the decision to issue a reprimand and ordered the reprimand be expunged from Mr. Elobaid’s Official Status File.

Submissions

The Secretary-General’s Appeal

7. The Secretary-General argues that the decision to issue the written reprimand was appropriate given the facts of the case and was lawful in all respects. Mr. Elobaid’s actions constituted a clear breach of the highest standards of integrity expected of an international civil servant under Article 101(3) of the Charter of the United Nations and Staff Regulation 1.2(b). His due process rights were fully respected as he was given ample opportunity to respond to the facts and circumstances of the case as required under the applicable legal framework, namely Staff Rule 10.2(c) and ST/AI/292. Specifically, before Mr. Elobaid was interviewed by the OIOS investigators on 8 May 2015, he was provided with a copy of his 10 April 2014 interview, during

⁵ *Ibid.*, para. 69.

⁶ *Ibid.*

⁷ *Ibid.*, para. 72.

⁸ *Ibid.*, para. 80.

⁹ *Ibid.*, para. 82.

¹⁰ *Ibid.*, para. 84.

which he had been asked specific questions about the content and circumstances of the comments he was alleged to have made with respect to Mr. A. During the interview, he was asked to provide written comments on the allegations and to suggest additional witnesses, which he failed to do. Moreover, the OIOS investigators followed the required procedures applicable at the time of the investigation, in particular the OIOS “Manual of Investigation Practices and Policies”, by giving Mr. Elobaid ample opportunity both during the interview and following the memorandum dated 28 September 2015 (Intention to issue written reprimand) to respond to the allegations.

8. Further, the Secretary-General asserts that the UNDT exceeded its competence and erred in law in concluding that Mr. Elobaid’s due process rights had not been respected. The UNDT misconstrued the established legal framework and jurisprudence on the nature and scope of judicial review in cases, such as the present case, concerning the imposition of purely administrative, i.e. non-disciplinary measures. Pursuant to Staff Rule 10.2(b), a written reprimand does not constitute a disciplinary measure and, contrary to the UNDT finding, the standard of judicial review applicable in disciplinary cases articulated in *Applicant*¹¹ does not apply in this case.

9. In particular, the Secretary-General argues that the UNDT exceeded its competence and erred in law in finding that Mr. Elobaid had not been provided with a full copy of the OIOS Investigation Report and thus not been properly given the opportunity to comment on the facts and circumstances prior to the issuance of the written reprimand. In fact, he claims, Mr. Elobaid’s due process rights were fully respected as he was duly informed, as required by Staff Rule 10.2(c), of the nature of the underlying allegations and was provided with the opportunity to comment thereon. Specifically, the OIOS investigators directly quoted back to him statements that he was alleged to have made against Mr. A and informed him of the context in which he was said to have made them and provided him with the witnesses’ functional titles so that he was made aware of sufficient details to avail himself of the right to rebut the allegations as mandated by Staff Rule 10.2(c). Once the decision had been taken to issue the written reprimand, the requirements set forth in ST/AI/292 were followed. In addition, upholding the UNDT’s finding that Mr. Elobaid’s “right” to have access to the OIOS Investigation Report was violated although staff members do not have a right to be provided with a copy of an investigative report outside of disciplinary proceedings would effectively constitute an amendment of the

¹¹ *Ibid.*, para. 36, referring to *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, para. 36.

provisions established by the Administration which does not fall within the Dispute Tribunal's or the Appeals Tribunal's authority as stated by established jurisprudence.

10. Moreover, the Secretary-General contends that the UNDT exceeded its competence and erred in law in holding that the facts of the case had not been established to the requisite standard of proof. In this regard, the UNDT again misconstrued the character of the administrative reprimand and erred in requesting a finding of misconduct. The decision to issue the written reprimand was not arbitrary, but based on reliable factual findings supported by the evidence in the case. The UNDT, however, erred in law and exceeded its competence by engaging in what amounted to a *de novo* review of the OIOS investigation.

11. Finally, the Secretary-General submits that the UNDT erred in fact resulting in a manifestly unreasonable decision in finding that the decision to issue the written reprimand was *ultra vires* because it had not been taken by the competent organ. As accepted by the UNDT in the impugned Judgment, Annex II of ST/AI/234/Rev.1 as amended provides that written reprimands may be issued by the "head of office" at offices away from Headquarters and the High Commissioner for Human Rights may be considered as such and thus had the delegated authority to issue Mr. Elobaid with a reprimand. The UNDT erred in fact, however, when it considered that the Chief, PSMS, OHCHR, was in fact the "decision-maker". Contrary to the UNDT's finding, it was the High Commissioner who took the decision which was merely communicated by the Chief, PSMS, OHCHR "on behalf of the High Commissioner" in the memorandum dated 9 November 2015 containing the written reprimand. In order for the reprimand to have been "issued" by the High Commissioner within the meaning of ST/AI/234/Rev.1 as amended, his signature was not required. Even assuming that the memorandum should have been personally signed by the High Commissioner, the UNDT exceeded its competence by ordering rescission of the decision to issue the reprimand as not every procedural irregularity leads to the unlawfulness of the respective decision and the UNDT should have sent the matter back for correction of the procedure pursuant to Article 10(4) of the UNDT Statute.

12. Based on the foregoing, the Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment in its entirety.

Mr. Elobaid's Answer

13. Mr. Elobaid contends that the UNDT was “entirely reasonable” in concluding that the decision to issue a written reprimand had not been taken by the competent organ and was thus *ultra vires* and could be rescinded. The Chief, PSMS, OHCHR, indicated in his memorandum dated 28 September 2015 that he personally intended to issue the reprimand (albeit in consultation with the High Commissioner) and the reprimand itself was neither drafted nor signed by the High Commissioner and did not indicate on its face that the decision had been taken by him which could have easily been done. In addition, neither the management evaluation nor the Secretary-General’s reply to the application before the UNDT identified the High Commissioner as the decision-maker but rather indicated that it was the Chief, PSMS, OHCHR, who exercised his discretion in issuing the reprimand.

14. Mr. Elobaid further argues that the UNDT was correct in finding that his due process rights had not been respected. It was appropriate for the UNDT to apply the standard of review as articulated in *Applicant*¹² for disciplinary cases due to the “negative nature of the [r]eprimand and the manner in which [the] decision to issue a reprimand [had been] taken”.

15. He claims that in violation of the fundamental principle *audi alteram partem* and of its obligation to exercise discretion in a rational and proportionate manner, the Administration arbitrarily chose to limit Mr. Elobaid’s possibility to effectively respond to allegations by withholding from him “any knowledge of the evidence upon which the reprimand was based”. In order to justify his position, the Secretary-General conflates the “right to respond to evidence, to rebut the actual case (...) with an opportunity to respond to an allegation”. For instance, the Administration had failed to inform Mr. Elobaid when exactly the incident was alleged to have taken place or who was meant to have witnessed it as he was, contrary to the Secretary-General’s pleadings, not provided with the functional titles of the witnesses except for one whom he was nonetheless unable to identify. If a staff member only knows what he or she is accused of, but not the reasons why the Administration concluded that the underlying events took place, then the only rebuttal available is to deny the allegations, which he did.

16. Further, he asserts that the Administration also failed to explain why Mr. Elobaid had not been provided with the opportunity to review and comment on the OIOS Investigation Report in accordance with standard practice for OIOS, as reflected in the rubric read to him when he was

¹² *Ibid.*

interviewed as a witness on 10 April 2014. The absence of any justification for the refusal to provide Mr. Elobaid with the evidence against him on the sole basis of the Administration's choice of an administrative rather than a disciplinary measure renders this action arbitrary.

17. Moreover, Mr. Elobaid claims that the UNDT correctly held that the facts of the case had not been properly established. The UNDT's conclusion that the facts upon which a reprimand is based must be proved to a certain level is not dependent on whether those facts amount to a finding of misconduct or otherwise. The burden of proof referenced in the reprimand itself is "reasonable grounds" which is the applicable burden to initiate an investigation and thus cannot be the same for taking a decision with such significant negative consequences as issuing a reprimand. The UNDT correctly found that the decision-maker had failed to assess the evidence and to form a conclusion in the memorandum containing the reprimand as to what had in fact occurred and nonetheless issued the reprimand. Mr. Elobaid further disputes the Secretary-General's contention that the UNDT substituted its own judgment for that of the Administration arguing that the UNDT instead "remained firmly rooted in the contents of the reprimand reviewing the decision making process".

18. In view of the foregoing, in particular of the fact that "absent the [Appeals] Tribunal's intervention [Mr. Elobaid] will continue to be impacted by negative consequences flowing from the decision to reprimand him", he requests that the appeal be dismissed and the impugned Judgment be upheld.

Considerations

19. The issue on appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision to issue Mr. Elobaid with a written reprimand was unlawful.

20. The questions to be answered in this appeal are the following:

- i. Did the UNDT err in law in finding that the investigation had not been carried out in accordance with Mr. Elobaid's due process rights?
- ii. Did the UNDT err in fact, resulting in a manifestly unreasonable decision when it found that the decision to issue a written reprimand had not been taken by the competent organ?

- iii. Did the UNDT exceed its competence and/or err in law in holding that the facts of the case had not been established to the requisite standard of proof?

The Appeals Tribunal will address these questions in turn.

(i) Respect of due process rights

21. Here, we will examine whether the UNDT erred in finding that Mr. Elobaid's due process rights were violated.

22. In disciplinary cases, only when the preliminary investigation stage is completed and a disciplinary process has begun is the staff member entitled not only to receive written notification of the formal allegation, but also to be given the opportunity to assess the evidence produced against him or her.

23. As Staff Rule 10.3(a) states:¹³

The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. 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 had been given the opportunity to respond to those formal allegations. (...)

24. The present case, however, concerns a reprimand, which is not a disciplinary measure but is an administrative measure. The issue is whether Mr. Elobaid was entitled to have full access to the evidence produced during the investigation phase before the issuance of the reprimand.

25. The consequences of a disciplinary measure are not equivalent to those of an administrative measure. Although the reprimand could have an adverse impact on the concerned staff member's career, since it is placed in his or her Official Status File, it is not comparable, by its nature, to the effects of any disciplinary measure. Only such significant negative effects justify the applicability of the adversarial principle in full in disciplinary cases after the completion of the investigation phase and before the disciplinary measure is taken.

¹³ Emphasis added.

26. In administrative procedures, however, as the measure e.g., reprimand, is not as consequential as a disciplinary action, the scope of the adversarial principle—while it must also respond to the needs of transparency, proportionality and fairness—is limited to informing the staff member concerned of the Administration’s intention and allowing him or her the opportunity to comment on the respective action. Also, once the reprimand is taken, in accordance with ST/AI/292, a written statement or explanation from the staff member can be placed in his Official Status File.

27. Therefore, the staff member’s rights in both procedures—disciplinary and administrative—are not the same. An administrative measure is less formal and is usually done with alacrity and is thus more flexible in order to better respond to the Organization’s needs of efficiency. It is a real exercise of discretion. Under the standard applicable to such administrative cases, the anonymity of the four witnesses interviewed by OIOS did not have the effect of jeopardizing Mr. Elobaid’s due process rights, in particular since the content of their evidence would not have been affected by their identification.

28. As we have stated in *Michaud*:¹⁴

... (...) Mr. Michaud was entitled to a procedurally fair decision. (...)

... Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him. In this case, the Administration avoided further disciplinary proceedings but acted in a limited way on the undisputed evidence of the e-mails, which it knew had been canvassed with Mr. Michaud. The e-mails speak for themselves.

29. In *Ivanov*,¹⁵ we have specifically held as follows:

... The matter is a closed matter and Mr. Ivanov has not presented any cogent argument to show that there are exceptional circumstances which might otherwise have entitled him to the investigation report. In those circumstances, Mr. Ivanov is not entitled to receive a detailed copy of the investigation report.

¹⁴ *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, paras. 55-56.

¹⁵ *Ivanov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-519, para. 18.

30. In light of the foregoing, the UNDT erred in law when it found that there was a breach of Mr. Elobaid's due process rights, as Mr. Elobaid was correctly apprised of the allegations against him, which could lead to an administrative action, and was afforded the opportunity to make representations before the measure was taken. We highlight the well-crafted and thought-provoking arguments of the UNDT, although we disagree in substance with it.

(ii) Competent delegated authority?

31. Regarding the competence, there is no dispute that it was the High Commissioner for Human Rights (head of the office), under Staff Rule 10.1(c) and paragraph 5 and Annex II of ST/AI/234/Rev.1, who had the necessary authority to issue the reprimand in the present case.

32. The relevant question is whether the memorandum dated 9 November 2015, signed by Mr. Ward, fulfills the mandatory condition of having been issued by the competent authority. The answer to that question does not demand much reasoning: Even though Mr. Ward signed the memorandum, the decision was taken "on behalf of the High Commissioner", whose signature was not necessary. This would be a formal constraint not required by the applicable provisions.

33. Therefore, when the UNDT inferred that Mr. Ward was the decision-maker, it made an error of fact. While it is normal for the High Commissioner, before taking the decision, to consult the Chief, PSMS, OHCHR, as the immediate superior of Mr. Elobaid (which justifies the word "we" in the document), the memorandum simply communicated the decision, on behalf of a higher authority who was the real decision-maker. The presumption made by the UNDT of the actual origin of the reprimand could not supersede the plain reading of the memorandum.

34. The UNDT therefore erred in fact, resulting in a manifestly unreasonable decision, when it took "the reprimand on its face as originating from Mr. Ward",¹⁶ who lacked the necessary delegated authority.

¹⁶ Impugned Judgment, para. 48.

(iii) Facts established to the requisite standard of proof?

35. Finally, the UNDT erred in a matter of law, when it held that the facts of the case were not established to the requisite standard of proof. Although we agree that the applicable standard of proof in this case is that of “preponderance of evidence”, as it deals with simple administrative action and not a disciplinary measure, we hold that the reprimand was issued on the basis of a definitive administrative finding of misconduct – and not just that of a possible failure to comply with the required standards of conduct.

36. Moreover, the evidence produced before the UNDT demonstrates that the reprimand was based on “reasonable grounds”, which is, in the present case, sufficient to establish the facts to the applicable standard of proof. In this regard, our view of the terms of the reprimand differs from that of the UNDT. While “(t)he aim of OIOS investigations is to establish facts and make recommendations in light of its findings”, the delegated manager “in the circumstances of the case, has the responsibility to consider what action, if any, is to be taken after receipt of the report”.¹⁷ However, when the Administration refers to a report to justify a decision and transcribes or summarizes part of it, it is actually endorsing it. The facts are accurately described in the reprimand and were sufficiently substantiated by the content of Mr. Elobaid’s first interview held on 10 April 2014 during the investigation implicating Mr. A.

37. Indeed, during that interview, although Mr. Elobaid said that he did not remember a conversation with United Nations colleagues during a coffee break at the conference held in Doha in December 2013, he shortly thereafter said he would not be surprised “if [he had] brought up [the] issue [involving Mr. A]” and, responding to the subsequent questions, described in detail the content of the conversation and admitted that he was expressing an “impression” of Mr. A, even if he “did not conclude that [Mr. A] mis[]used the project money”. According to the OIOS record, he also said:

I would voice out a lot of frustration in relation to how Mr. A. had been organizing the human trafficking project. There was a suspicion that something was not right. I do not have hard documents and evidence. But this was a gut feeling – something was not right.

(...) I was referring to the fact that we had the impression that UNODC office in UAE was directly approaching hotels without going through the procurement channel of

¹⁷ OIOS “Investigations Manual” dated January 2015, page 5.

UNDP. And Hotels managers were asking why we were not following the same procedure of [UNODC] UAE.

...

(...) UNDP should be the one to deal with hotels for arranging programmes, such as booking rooms and other facilities. Since UNODC was doing it by themselves, I would not be surprised if they were gaining in some way.

38. We do not agree with Mr. Elobaid's assertion that the only rebuttal available during his investigation was to deny the allegations against him, first because he knew what he was accused of and the reasons therefor, having received a copy of his own 10 April 2014 interview; and second because, if the facts, as contained in the transcription of his first interview, were not accurate, then he should have provided some other explanation as to what really occurred, particularly bearing in mind his duty to cooperate with the administrative investigation pursuant to Staff Rule 1.2(c). He did not do that, despite having had this opportunity in his second interview during the investigation into allegations against him.

39. The fact that the investigation into possible misconduct of Mr. A was closed and that there is no indication in the records against that decision suggests that there was no evidence of his involvement in misconduct. Mr. Elobaid himself had stated during his interview that he had no evidence whatsoever to prove Mr. A's alleged misconduct.

40. The fact that Mr. Elobaid cast aspersions on Mr. A out of personal frustration based solely on hearsay and without any evidence during a coffee break at a conference, regardless of the fact that only one person heard them clearly (others could have heard; therefore the declaration was not private), demonstrated his poor judgment and therefore justified a measure of admonition from the Administration, particularly in view of the probability of causing serious damage to the other person's reputation.

41. In view of the foregoing, we consider that the issuance of the reprimand was a proper exercise of the discretion vested in the Administration.

Judgment

42. The appeal is upheld and Judgment No. UNDT/2017/054 is hereby vacated.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Thomas-Felix

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar