UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/34
Judgment No.: UNDT/2010/121
Date: 12 July 2010
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

OSTENSSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Bettina Gerber, UNOG

Introduction

1. By application, registered on 12 June 2009 by the Geneva Joint Appeals Board (JAB) and transferred to this Tribunal on 1 July 2009, the applicant contests the decision not to drop the charges of misconduct that have been presented against him, the decision by the Office of Human Resources Management (OHRM) not to pursue complaints that he had filed against two of his colleagues, and the decision to place a note with defamatory content in his Official Status File (OSF).

Facts

2. The applicant entered the service of the United Nations on 21 June 1981 under a two-year fixed-term appointment (FTA), at the P-3 level as an Economic Affairs Officer in the Commodities Division of the United Nations Conference on Trade and Development (UNCTAD), in Geneva, on secondment from the Government of the Kingdom of Sweden. His appointment was subsequently extended until 8 July 1983, date of his separation.

3. On 31 October 1985, the applicant was reappointed to his previous post, at the same level, again on secondment from the Government of the Kingdom of Sweden, under a two-year fixed-term contract, which was subsequently extended for three months until 31 December 1987.

4. On 1 January 1988, the applicant was granted a probationary appointment which was converted to a permanent one on 1 October 1988. The applicant was promoted to the P-4 level on 1 February 1992 (Economic Affairs Officer, Commodities Division, Minerals and Metals Branch, UNCTAD) and to the P-5 level on 1 October 2000 (Chief of Section).

5. The applicant was designated Officer-in-Charge (O-i-C) of the Commodities Branch, Division on International Trade in Goods and Services, and Commodities (DITC), UNCTAD, on 1 November 2006 and was granted a special post allowance (SPA) to the D-1 level from 1 February 2007 to 31 July 2007.

6. In the morning of 20 December 2006, an incident occurred between the applicant and one of his colleagues of DITC (hereinafter colleague A). The same day, the applicant wrote an email to the Director, Division for Trade in Goods and Services, and Commodities, to report the incident. Colleague A, together with another colleague (hereinafter colleague B) who had arrived at the scene at a moment disputed by the applicant and colleague A, subsequently called the Security and Safety Service and reported the incident. The applicant, who had not been asked by the staff of the Security and Safety Service to make a statement, became aware of this only later. On 21 December 2006, the applicant wrote a note for the file with respect to the incident.

7. The Security and Safety Service issued an incident report dated 22 December 2006, on the basis of the statements made by colleagues A and B. In the report it was stressed that in view of his position, the applicant had not been asked for a statement and that the Security and Safety Service was awaiting the authorization from the Director, Division for Trade in Goods and Services, and Commodities.

8. On 17 January 2007, the applicant sent an email to colleague A, asking him about some projects for which he was responsible and informing him that he had not yet taken any action beyond reporting the incident of 20 December 2006 to the Director, Division for Trade in Goods and Services, and Commodities.

9. Two days later, on 19 January 2007, colleague A submitted a formal complaint against the applicant for physical and verbal assault to the Chief, Human Resources Management Section (HRMS), UNCTAD.

10. On 18 April 2007, the Chief, HRMS, UNCTAD, set up an initial fact-finding panel pursuant to ST/AI/371 to establish the facts with respect to the complaint of 19 January 2007.

11. When the Director, Division for Trade in Goods and Services, and Commodities came back to the office, she informed the applicant that colleague A had submitted a complaint against him and that there was a witness (colleague B) who confirmed colleague A's version of the incident.

12. On 1 May 2007, the applicant submitted to the Director, Division of Management (DOM), UNCTAD, a formal complaint against colleague A "for assault on 20 December 2006" and false accusation.

13. The Chief, HRMS, UNCTAD, informed the applicant by memorandum dated 8 May 2007 with respect to his complaint of 1 May 2007 that HRMS would "proceed in accordance with established United Nations procedures/guidelines for cases of such sensitive nature".

14. On 24 May 2007, the Chief, HRMS, UNCTAD, informed the Investigation Panel that since it was already undertaking a fact-finding investigation with respect to the complaint filed against the applicant, it would also be entrusted with the investigation into the complaint filed by the applicant against colleague A.

15. On 14 June 2007, the Acting Deputy Secretary-General of UNCTAD wrote to the Secretary-General of UNCTAD with respect to the case against the applicant, noting that colleague A had unduly invoked the Senegalese and Swiss Ambassador and did not cooperate with the authorities dealing with the complaint. She also underlined that colleague A already had had similar incidents and that in 2004, he had brought a complaint against his supervisor for discrimination and racism, which proved to be unfounded.

16. The Investigation Panel submitted its report to the Director, DOM, UNCTAD, on 9 November 2007. It had interviewed the applicant and colleague A, as well as eight other colleagues. Colleague B refused to be interviewed and stated that she had already made a statement to the Security Officer on 20 December 2006.

17. In its report, the Investigation Panel concluded that with respect to the incident of 20 December 2006, the version of colleague A appeared more credible than that of the applicant. It also noted that the "infractions of the staff rules and the code of conduct that may have been committed" "should be ascertained through a proper investigation by competent authorities such as [the Office of Internal Oversight Services (OIOS)]" and that the Panel "[was] not in a position to suggest any specific course of action relating to either complaint".

18. The Director, DOM, UNCTAD, referred the case to the Assistant Secretary-General, OHRM, New York, on 28 November 2007, together with the report of the Investigation Panel. He stressed that the panel's report showed that an incident occurred on 20 December 2006, which it seemed involved physical altercation between the applicant and colleague A and that in view of the serious nature of the allegations, "this case would seem to warrant some form of disciplinary action, once all the salient facts [were] fully ascertained".

19. By letter dated 3 April 2008, the O-i-C, Division for Organizational Development (DOD), OHRM, informed the applicant that on the basis of the findings of the Investigation Panel, he was "charged with shouting at and physically assaulting [colleague A] on the morning of 20 December 2006, a staff member who [was] under [his] supervision which amounts to an abuse of authority and work-place harassment" and that his conduct, if established, would constitute a violation of staff regulation 1.2, staff rule 101.2 d) and paragraph 1 of ST/SGB/253. The O-i-C, DOD, OHRM, requested the applicant to submit his comments on the charges within two weeks upon receipt of the charge letter.

20. The applicant submitted his preliminary comments on the charges to the Director, DOD, OHRM, on 16 May 2008, pointing out several procedural and judgmental errors that were committed in the process leading up to the charges, e.g. important documents missing from the file, the fact that he had not been interviewed by the Security and Safety Service on the day of the incident, the contradictions in the two versions of the incident of colleague A and colleague B. Contrary to what was stated by the respondent, the applicant stressed that colleague B did not witness the incident since she arrived on the scene too late. He noted that she refused to be interviewed by the Panel and hence was never confronted with the contradictions between her version and the version of colleague A. He further pointed out that the Panel did not find any evidence and based its conclusions on a credibility analysis of him and colleague A and on an assessment of their characters. The applicant also put forward that the Senegalese Ambassador came to see the Secretary-General of UNCTAD in favour of colleague A, a national from Senegal, thus unduly interfering in the process.

21. On 14 July 2008, the applicant lodged with the Secretary-General, UNCTAD a second complaint against colleague A with whom the incident of 20 December 2006 occurred "for assault and defamation" and "for defamation" against colleague B who had "allegedly" witnessed the incident. He explained this new complaint at that stage by the fact that he had been allowed to see the written statements on the incident of 20 December 2006 of these two colleagues only on 5 May 2008 and that the two versions were contradictory.

22. The applicant sent his additional comments on the charges against him to the Director, DOD, OHRM, on 18 July 2008, reiterating several procedural and substantive errors made during the investigation. The applicant reiterated that it was him who had been pushed by his colleague on 20 December 2006, that all charges against him should be dropped and that charges should be brought against his two colleagues. He noted that the investigation led by the Security and Safety Service was flawed since he had not been given the opportunity to state his version of the facts. With respect to the investigation by the Investigation Panel, the applicant noted that it was amateurish, perfunctory and flawed. He stressed *inter alia* that the Panel's terms of reference had never been communicated to him; that though colleague B had refused to come to an interview, the Panel had nevertheless taken into account her previous statement. He further noted that the Investigation Panel had not taken into account the undue interference of the Senegalese Ambassador in the process and the fact that colleague A had already made false accusations in the past. He expressed his belief that the credibility analysis of him and of colleague A was flawed and that anybody in UNCTAD would confirm that he is a very honest person, whereas colleague A was known to lie, which the Panel had been told by at least one of the persons it had interviewed. In this respect, he stressed that contrary to what had been stated by the Investigation Panel, two staff member could testify about very violent verbal aggressions on the part of colleague A. It also disregarded the contradictions in the versions provided by colleagues A and B. The applicant believed that OHRM handling of the case raised many questions, *inter alia*, why it did not follow UNCTAD recommendation to investigate the case further and why it decided to charge the applicant, despite the fact that UNCTAD avoided naming a guilty party.

23. The O-i-C, HRMS, UNCTAD, informed the applicant by memorandum dated 23 July 2008 that with respect to his complaint dated 14 July 2008, UNCTAD Administration would "proceed in accordance with established United Nations procedures" and that this complaint related to the ongoing case.

24. Effective 28 July 2008, the applicant was transferred from the Commodities Branch to the Trade, Environment, Climate Change and Sustainable Development Branch, as Special Adviser.

25. Colleague B retired from the Organization on 31 July 2008.

26. The Administrative Law Unit (ALU), OHRM, informed the applicant by emails dated 28 November and 3 December 2008 respectively that his comments to the charge letter dated 3 April 2008 were still under review and that he would be informed once OHRM had determined what action to take. The applicant was also informed that his complaint of 14 July 2008 against his two colleagues would be reviewed in addition to the other pending matters.

27. The applicant sent a letter to the Secretary-General on 26 February 2009, requesting administrative review of the decisions not to take any action with respect to his complaint of 14 July 2008 against his colleagues and to deny him justice by not dropping the charges against him. He repeated his requests that all charges against him should be dropped and that the two colleagues should be charged respectively with false testimony, defamation and interference with the investigation.

28. The Human Resources Management Section (HRMS), United Nations Office at Geneva (UNOG), informed the applicant on 6 March 2009 that the Acting Chief, ALU, OHRM, had placed a note in his OSF. The note stated that the applicant "resigned from service with the Organization effective 31 March 2009. At the time of his separation, a disciplinary matter was pending which had not been resolved due to his separation. In the event that [the applicant] should seek further employment within the United Nations Common System, this matter should be further reviewed by the Office of Human Resources Management […]".

29. The applicant sent an email to the Acting Chief, ALU, OHRM, on 17 March 2009 requesting several clarifications with respect to the decision to put the above-mentioned note in his OSF and to suspend the case against him. He

noted that he had requested an administrative review of OHRM actions in the case against him and asked whether she intended to affirm in the review that the disciplinary matter had not been resolved due to his separation.

30. On 30 March 2009, the applicant sent another letter to the Secretary-General requesting review of the decision to place the above-referenced note in his OSF, which he considered to be an abuse of authority. He requested that the Acting Chief, ALU, OHRM, be charged with abuse of authority.

31. The applicant resigned from the Organization effective 31 March 2009.

32. The Acting Chief, ALU, OHRM, responded to the applicant's request for review dated 26 February 2009 by letter dated 4 May 2009, informing him that her Office had reviewed "the implicit decision not to take any action with respect to [his] complaint … and to deny [him] justice by not dropping charges against [him]" and had concluded that the foregoing did not constitute administrative decisions within the meaning of former staff regulation 11.1 and staff rule 111.2. She further noted that "it was not legally possible for anyone to compel the Administration to take disciplinary action against another party". The Acting Chief, ALU, OHRM, informed the applicant that his second request for review, raising issues related to decisions taken by OHRM on his disciplinary case, was being reviewed by the Office of the Under-Secretary-General for Management.

33. Colleague A passed away on 5 May 2009.

34. By letter dated 4 June 2009 from the O-i-C, Human Resources Policy Service, OHRM, the applicant was informed that after review, it had been found that the decision to place the above-referenced note on his OSF was "proper and in accordance with the Administration's practice in similar situations". She noted that no final decision had been taken on the disciplinary case against the applicant at the time of his separation from service and that the Organization does not have jurisdiction over individuals who do not work for it. Hence, it was appropriate to put the state of the case on record so that the matter could be reviewed, should the applicant seek to be reemployed by the United Nations.

35. On 29 May 2009, the Presiding Officer of the Geneva Joint Appeals Board (JAB) granted the applicant an extension until 12 June 2009 to submit his complete statement of appeal, which the applicant did on 12 June 2009. The case

was transferred to this Tribunal on 1 July 2009. The respondent submitted his reply on 14 September 2009 and the applicant submitted his comments thereto on 24 October 2009. A directions hearing on this and two other applications submitted by the applicant was held on 4 May 2010.

36. By memorandum dated 22 June 2010, the Chief, Administrative Law Section, OHRM, informed the Judge in charge of the examination of the present application that after review of the file, OHRM had decided that "in order to resolve the dispute, the charges of misconduct against the [a]pplicant [would] be formally dropped, and that the [a]pplicant [would] be informed in writing of this decision no later than seven working days from the date of this memorandum". Moreover, the memorandum indicated that OHRM "ha[d] further decided that the note of 6 March 2009 [would] be removed from the [a]pplicant's official status file no later than seven working days from the date of this memorandum" and that therefore, the respondent considered the application to be moot.

37. On 23 June 2010, a full hearing was held on the present case and on a second application the applicant has pending at the Tribunal.

Parties' contentions

38. The applicant's principal contentions are:

a. UNCTAD and OHRM damaged his reputation and professional standing and destroyed his opportunities for career development, as such causing him considerable psychological distress. His due process rights were denied through several instances. The fact that he had not been interviewed by the Security and Safety Service, which conducted a first fact-finding investigation the day of the incident, prevented him from rebutting his colleagues' and from presenting his own version of the event. This procedural error set the tone for the rest of the process. The terms of reference of the Investigation Panel were not shared with him and the day he was interviewed and informed about the Panel's mandate, the latter had not yet been expanded to the applicant's complaint. The applicant could never really present his case, which was not only to reverse

colleague A's case, but included a request that colleague A's conduct, already in the past, be reviewed, which never happened. The applicant has "dozens of hostile, insulting and slanderous emails" from colleague A but the Panel never asked for them, though the applicant had offered to provide them to the Panel. The Panel refused to hear witnesses as per the applicant's request and did not investigate accusations made by colleague A according to which the applicant had harassed other staff members. If the Panel had done so, it would have found that these allegations were absolutely baseless. This would have provided the Panel with further evidence with respect to the credibility of the parties involved in the incident of 20 December 2006;

b. The fact that the Panel did not set up a list of the persons it interviewed and did not prepare minutes of its interviews and meetings made it impossible for anybody to assess the basis of the conclusions drawn by the Panel. This is a violation of the procedural standards applicable to investigations as outlined in the Uniform Guidelines for Investigations, proposed by OIOS and the World Bank and adopted at the Fourth Conference of International Investigators of United Nations Organizations and Multilateral Financial Institutions, in April 2003. The Panel failed to make a proper reconstruction of the incident, which would have demonstrated the contradictions between the versions presented by colleague A and colleague B;

c. Crucial elements such as the interference of the Senegalese Ambassador were not addressed. Since the respondent argues that this did not have an impact on the course of action, the applicant requests to be provided with any correspondence and notes related to the meeting of the Ambassador with the Secretary-General of UNCTAD. The Panel based its conclusions on speculations and failed to investigate the credibility of the parties involved. UNCTAD Administration spread rumours about the incident, thus breaching its duty of confidentiality;

d. The case was sent to OHRM without the facts having been ascertained and without any indication as to who was the person who had actually been the aggressor in the case at hand. OHRM ignored UNCTAD recommendation to call for a proper investigation by competent investigators hence charged the applicant "on the basis of an incompetently executed investigation", ignoring contradictions;

e. OHRM did not investigate the applicant's complaints against his two colleagues. It put a note on his file creating the impression that the reason why the case had not been resolved was his leaving the UN while in reality, it was OHRM refusal to take action. The applicant was not informed about his right to comment on the note, in contradiction with article 3 of ST/AI/292;

f. In view of the jurisprudence of the former United Nations Administrative Tribunal (UNAT) on disciplinary cases, UNCTAD and OHRM actions were tainted by gross irregularities and the Administration violated the standards established by UNAT on disciplinary cases, i.e. the facts of the case were not established, no proper investigation was carried out and the pursuit of the case was biased in that it was done to please African delegations;

g. UNCTAD and OHRM actions were exacerbated by the extreme delays in taking action: the incident took place on 20 December 2006 and "even if [he] were guilty of the offense for which [colleague A] accused [him], it would be unacceptable to let such a long period of time pass before taking judicial action"; in view of his innocence, "the delay in rendering justice is all the more unacceptable"; in view of the long time which had elapsed, OHRM cannot reasonably claim that its consideration of the case was interrupted by the applicant's resignation before it was completed; the applicant raises the question when and by whom OHRM was informed about his resignation and requests to be

provided with a memorandum from the then Chief, HRMS/UNOG to ALU/OHRM on that issue;

h. The Secretary-General has an obligation to investigate all complaints that are not obviously frivolous and to inform the complainant of the results of the investigation. It is not understandable how ALU/OHRM could sit for eight months on a case which, according to the respondent, met all the necessary requirements for disciplinary action, without submitting the case to the Joint Disciplinary Committee (JDC). The applicant believes that the charges were never referred to a disciplinary committee because OHRM was aware that "they would not stand up to scrutiny". "UNCTAD and ALU willfully charged the wrong person and since then, the respondent has tried to cover up its mistakes";

i. A review of written material would show "that improper motives influenced the investigation and determined its direction"; hence, he requests the disclosure to him or to the Tribunal of a series of correspondence related to the case against him and to his complaints;

39. The applicant requests:

a. A series of explanations from OHRM with respect to the treatment of the various complaints and related investigations and wants to know what procedures OHRM claims it has been unable to complete due to his leaving the UN;

b. That the charges against him be dropped and that the note placed in his OSF be removed; he requests a written apology from the Assistant-Secretary-General for Human Resources and the Secretary-General of UNCTAD, copied to all staff of UNCTAD and placed on his OSF, for having denied him justice and falsely accused him of misconduct. He also asks that colleague B be banned from any future employment with the United Nations.

40. With respect to damages, the applicant requests:

a. "One year's net base salary for damage to [his] reputation and professional standing caused by the failure to accord [him] due process in the case against [him]";

b. "One year's net base salary for psychological suffering and anguish, eventually leading to [his] choosing to leave the United Nations, caused by the denial of due process, as well as by excessive and unexplained delays";

c. "US$ 100,000 that should have accrued to [him] in damages from [colleague A] for assault, false accusation and defamation, had the procedure been carried out properly, and which [he] now claims from the United Nations, since it is due only to the failure of the United Nations to pursue the case that [he] was not able to claim these damages from [colleague A]";

d. "US$ 25,000 that should have accrued to [him] in damages [from colleague B] for defamation and slander, had the procedure been carried out properly, and which [he] now claims from the United Nations, since it is due only to the failure of the United Nations to pursue the case that [he] cannot claim these damages from [that colleague]."

41. The respondent's principal contentions are:

a. The burden to proof that an administrative decision was tainted by improper motives and was not taken in accordance with the applicable procedure falls on the applicant who, in the present case, failed to provide evidence in that regard;

b. It was not the mandate of the Security and Safety Service to conduct a proper investigation but to ensure that the situation would not escalate; the applicant was given ample opportunity to present his version of the events to the Panel set up for the purpose of investigating the incident; the Investigation Panel could legitimately take into account the statement made by colleagues A and B to the Security and Safety Service the day of the incident;

c. The Investigation Panel had been properly established and its terms of reference, though extended over time, were clear and had been conveyed to the applicant when he was interviewed by the Panel;

d. Even if it would be good administrative practice, an Investigation Panel is not obliged to prepare minutes of the interviews conducted in the framework of ST/AI/371; the Panel had no power to force a witness to testify;

e. The applicant's allegation that the Panel "failed to carry out a proper reconstruction of the incident" must be rejected;

f. All due process rights of the applicant were respected and the conclusions reached by the Investigation Panel were not vitiated or prejudiced; the interference of the Senegalese Ambassador did not have any impact on how the case was dealt with;

g. The referral of the case to OHRM was done in accordance with paragraph 3 of ST/AI/371 since the Director, DOM, UNCTAD, concluded that the investigation report "appeared to indicate" that misconduct had occurred; it was not the role of the Director, DOM, UNCTAD, to ascertain the facts, as alleged by the applicant, since this role fell upon the Investigation Panel;

h. With respect to the recommendation by the Investigation Panel to consider the conduct of a proper investigation "by competent authorities, such as OIOS", it is noted that this course of action was not taken into consideration since the case did not fall within the mandate of the OIOS;

i. It was not the task of OHRM to undertake an investigation of the complaint against the applicant since, according to paragraph 5 of ST/AI/371, the Assistant-Secretary-General for Human Resources "shall decide whether the matter should be pursued" on the basis of the presented evidence, in which case the staff member will be sent a charge letter and informed of his right to respond; in the present case, the ASG's decision to pursue the case was a correct exercise of her discretionary power;

j. In view of the applicant's resignation effective 31 March 2009, OHRM decided not to refer the case to a JDC, although the facts indicated that the applicant had engaged in misconduct; the rationale of this decision was that the applicable rules "do not provide for the Organization to exercise disciplinary jurisdiction over former staff members", hence if a staff member separates from the Organization during a disciplinary proceeding and there is no compelling interest in pursuing the case, it is common practice to place a note on the staff member's OSF, such as the one issued with respect to the applicant; since OHRM was not convinced that no misconduct occurred, it decided to review the matter in case the applicant would be reemployed, hence the charges were not dropped; as such, the Administration's interest to preserve the order within the Organization and its reputation, which is the purpose of disciplinary proceedings, could be upheld. When the note was transmitted to the applicant, he was not informed that he could comment thereon; however, OHRM later provided him the opportunity to submit his comments;

k. The Administration has broad discretionary power to decide whether a formal investigation should be carried out or not; in the present case, this discretionary power was correctly exercised when the Administration decided not to pursue the complaints the applicant had filed against his two colleagues; the same is true with respect to the Administration's decision not to take disciplinary action against another staff member;

l. The complaint submitted by the applicant on 14 July 2008 related to the incident of 20 December 2006, hence OHRM decided to suspend the review of that complaint as "it was directly related to the disciplinary case that was pending against [the applicant] at the time of separation"; the same applies to the applicant's complaint of 1 May 2007;

m. The complaint against colleague A will no longer be reviewed since he passed away; the review of his complaint against colleague B would resume if the applicant rejoined the Organization;

n. In view of the fact that it was decided, on 22 June 2010, that the charges against the applicant would be dropped and that the note would be removed from his OSF, the application has become moot;

42. The respondent requests that the application be rejected in its entirety.

Considerations

43. In view of the peculiar circumstances of the case, which result from the fact that the alleged incident dates back to 2006, that colleague A passed away and that colleague B and the applicant are no longer in the service of the United Nations, the actual facts of what happened at the time can no longer be established. Therefore, and for the purposes of the present proceedings, the Tribunal will have to limit its considerations to the question whether the applicant's terms of appointment, including his right to a fair procedure, were violated by the respondent's handling of the case.

44. Though the Tribunal welcomes the decision of 22 June 2010 to drop the charges against the applicant and to remove the note for file from the applicant's OSF, the respondent's conclusion that the application has become moot cannot stand. As the former UNAT held in its judgment No. 915, *Guggenheim* (1999), claims by a staff member, especially involving denial of due process, are not necessarily extinguished by the subsequent change of status of the staff member, such as a staff member's resignation. According to the former UNAT, a change in a staff member's status cannot "absolve the Organization from making decisions in accordance with proper procedures, which have been established to ensure fairness and impartiality". The same rationale may apply in situations in which the Administration withdraws an administrative decision which, at the time it was taken, violated the staff member's due process rights. In such case, if the respondent fails to follow proper procedures, and even if the decision is

subsequently withdrawn, the applicant may be entitled to compensation, for the violation of his due process rights at the time the decision in question was taken. Therefore, the question of compensation must be dealt with separately from the fact that the contested decision was withdrawn.

45. The United Nations Appeals Tribunal held that in cases involving disciplinary proceedings, it falls upon the Tribunal to examine if there were substantive or procedural irregularities (2010-UNAT-028, *Maslamani*). The decision not to drop the charges against the applicant and to put a note on his OSF constituted a violation of the applicant's right to a proper procedure under Chapter X of the former Staff Rules and ST/AI/371, then in effect. As the former UNAT held in judgement No. 744, *Eren et al*. (1995) "[t]he provisions of staff rule 110, governing disciplinary proceedings, are designed to ensure that due process protection is afforded to staff members who are accused by the Administration of having engaged in misconduct. The aim is to provide them with an opportunity to present arguments and evidence refuting the charges of misconduct, or to be taken into account in mitigation. In this way, the staff member has an opportunity to tell his or her side of the story, and to offer alternative inferences that may be drawn from the evidence. All of this is then taken into account in determining what happened, who, if anyone, should be held responsible, and what, if any, action should be taken by the Respondent." In the present case, the decision not to drop the charges and to put a note on the applicant's OSF stood at the end of a rather lengthy process during which the applicant's due process rights were, in several instances, not fully respected.

46. First, the decision taken by OHRM under Section 6 (a) of ST/AI/371 in force at the time to issue a charge letter against the applicant was questionable, to say the least, since it was taken on the basis of an investigation, reflected in a three-page report, which itself called explicitly for a further, more in-depth, investigation. It is remarkable that the investigation report was not accompanied by an investigation file, since the Investigation Panel did not prepare minutes of its interviews and did not even set up a list of the interviewees. The lack of an investigation file makes it almost impossible to ascertain the veracity of what is stated in the investigation report.

47. Second, it is the Tribunal's belief that on the basis of the investigation report and the applicant's comments on the charge letter, it would have been indicated, under Section 9 of ST/AI/371 in force at the time, to close the case, for lack of convincing evidence that it was indeed the applicant who had assaulted colleague A on 20 December 2006.

48. In any case, it was at least the Administration's duty to pursue in due time one of the options available under Section 9 of ST/AI/371 and not to leave the applicant in a limbo for a considerable period of time, without giving him the opportunity to rebut the charges brought against him in front of a JDC. Already in view of the long time which elapsed between the applicant's comments to the charge letter and his separation from service (July 2008 to March 2009), the respondent's argument that OHRM decided not to submit the case to a JDC since the Organization cannot exercise disciplinary jurisdiction over former staff members cannot stand. The Administration's failure to pursue one of the options under Section 9 of ST/AI/371, to put the case on hold and to keep the applicant, who had been charged with misconduct, in a limbo and to issue the Note for File, was, under the prevailing circumstances at the time, not justified and violated the applicant's rights to a proper procedure under Chapter X of the former Staff Rules and ST/AI/371, then in effect.

49. With respect to the applicant's claim that his complaints against colleagues A and B were not properly addressed, the Tribunal noted that his initial complaint, dated 1 May 2007, against colleague A had been added to the terms of reference/mandate of the Investigation Panel, initially established to ascertain the facts on the complaint made against the applicant by colleague A on 19 January 2007. Though the result of the investigation report did not allow concluding what had actually happened on 20 December 2006, the decision alone not to pursue any further that particular complaint made by the applicant and not to initiate disciplinary proceedings against colleague A did not constitute an abuse of the respondent's discretionary power. As the former UNAT stated, "[t]he instigation of disciplinary charges against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the

final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party." (Judgement No. 1086, *Fayache* (2002)). On the basis of the available evidence, the respondent properly exercised its discretionary power with respect to the applicant's complaint dated 1 May 2007.

50. The same holds true with regard to the applicant's complaints of 14 July 2008. The former UNAT held that "even if it had been in the [a]pplicant's interests to take action on this issue, the decision to conduct such an investigation is the privilege of the Organization itself" (judgement No. 1271 (2005); cf. also judgements No. 1319 (2007) and 1385 (2008)). In the present case, at the moment of the applicant's complaints of 14 July 2008, the Administration did not and could not know what had actually happened on 20 December 2006. Therefore, it was reasonable to conclude that any further investigation into that new complaint, which was based on the incident of 20 December 2006 and related to allegations of defamation made in that context, would not make sense unless the facts of the incident of 20 December 2006 were established. In view of all the circumstances of the present case, the Organization's decision not to conduct another, separate investigation into the applicant's complaints of 14 July 2008 and not to provide further details to the applicant thereon was understandable, was within the discretionary power of the Secretary-General and did not violate the applicant's rights.

51. Since the quantification of immaterial damages is an "inexact science", the Dispute Tribunal in its judgment UNDT/2009/028, *Crichlow*, has established some guiding principles for calculation of compensatory damages; these include that damages may only be awarded to compensate for negative effects of a proven breach and that an award should be proportionate to the established damage suffered by the applicant.

52. The application of the universal principle of proportionality on the determination of financial award for a proven breach requires due consideration of all elements of the case at hand. Essential elements of this consideration are e.g. the number of breaches and their intensity, as well as the impact the established breaches have on their victim.

53. On the applicant's account, first and foremost, there is the breach of Section 9 of ST/AI/371 as indicated above. For the applicant, this breach implied a long period of time being accused of misconduct. Secondly, as the Tribunal held in judgment UNDT/2009/025, *James*, "it is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process". By leaving the applicant in a limbo for about nine months (July 2008 to March 2009), without justification, the Administration caused unnecessary stress to the applicant who was uncertain about his professional future. Finally, more than one additional year had to pass by before the Administration found it suitable to drop the charges and to remove the note from the file. In total, a period of about two years of unnecessary insecurity has to be taken into account when assessing the compensation to be awarded to the applicant.

54. On the other side, the Administration did nothing wrong by instigating the normal process after becoming aware of the event of 20 December 2006. The allegations were serious and it was unclear what really had happened. At that time it was rational to set up an initial fact-finding panel. What followed seems to be much more an expression of negligence and incapacity to go deeper into the detail than a clear case of bad faith.

55. Taking into account all relevant aspects, the Tribunal finds it appropriate that the applicant be paid a lump sum of USD24,000.00, which compares approximately to three months of his net base salary at the P-5, step XIII level. In view of other decisions of the Tribunal in which violations of the applicants' due process rights, stemming from procedural irregularities, were compensated only by two months of the applicants' net base salaries (see UNDT/2009/089, *Wu;* UNDT/2010/009, *Allen)*, the increase in the case at hand to three months' net base salary is justified in view of the considerable delay in the handling of the case (see 2010/UNAT/021, *Asaad*).

Conclusion

56. In view of the foregoing, the Tribunal DECIDES:

a. That the applicant be awarded a lump sum of USD24,000.00 in compensation for the violation of his rights, to be paid within 60 days from the date of the issuance of this judgment, with interest thereafter at eight percent per annum until payment;

b. All other pleas are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 12th day of July 2010

Entered in the Register on this 12th day of July 2010

(*Signed*)

Víctor Rodríguez, Registrar, Geneva