



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/053

Judgment No.: UNDT/2011/067

Date: 8 April 2011

Original: English

**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

BORHOM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Miles Hastie, OSLA  
Katya Melliush, OSLA

**Counsel for Respondent:**

Elizabeth Brown, UNHCR

## **Introduction**

1. The Applicant joined the Regional Office of the Office of the United Nations High Commissioner for Refugees in Cairo (“UNHCR/RO”) in July 1981 as a cleaner on a short-term appointment at the GL-1 level. His appointment was consecutively extended on a short-term basis until January 1988 when he was granted a fixed-term appointment. This appointment was converted into an indefinite appointment in January 1998. On 26 November 2007, the Applicant was summarily dismissed from the UNHCR/RO for misconduct.

## **Facts**

2. On 26 December 2006, Ms. Hayam El Guindy, who was at the time an Assistant Administrative Officer at the UNHCR/RO and the Applicant’s supervisor, was approached by the head of the security guards (of the company with which the UNHCR/RO has a service contract), who reported to her that he had witnessed the Applicant asking for money from the cleaners of a private cleaning company contracted by the UNHCR/RO. Ms. Hayam El Guindy reported this to her supervisor, Ms. Stephanie Renville, the then Senior Administrative Program Officer at the UNHCR/RO.

3. In January 2007, Ms. Rania El Guindy, the then Senior Protection Clerk at the UNHCR Cairo Office was called for a meeting with her former supervisor, Mr. Saad Al Attar, who was the then Regional Representative, Ms. Renville, and Ms. Hayam El Guindy. At the meeting, it was brought to Ms. Rania El Guindy’s attention that the Applicant was allegedly involved in various acts of misconduct based on oral reports made to Ms. Hayam El Guindy. Ms. Rania El Guindy was asked to look into the issue by interviewing those involved, that is, victims or witnesses of the alleged misconduct and to write an initial fact-finding report after her investigation. She interviewed five people.

4. Ms. Rania El Guindy did not interview any of the alleged victims because, according to her, she was informed by Ms. Hayam El Guindy that they had refused to meet with her as they were too scared and did not want to make any statements that would be on the record.

5. Ms. Rania El Guindy's initial fact-finding investigation report was reviewed by the Regional Representative and the Deputy Regional Representative and a revised copy was then sent to the UNHCR Inspector General's Office ("IGO") in Geneva. The report was dated 18 February 2007. The report concluded that the Applicant had taken UNHCR property, extorted payments from UNHCR contractors and harassed contractors working in the UNHCR/RO.

6. By a letter dated 27 March 2007, Ms. Merida Morales-O'Donnell, Director, Division of Human Resources Management ("Director/DHRM"), informed the Applicant that an initial report of possible misconduct required his suspension from duty during a preliminary investigation. The Applicant was thus suspended from duty with pay from 11 April 2007 to 10 May 2007. The Applicant was interviewed by the IGO on 11 April 2007 by telephone from Geneva.

7. By a letter dated 9 May 2007, the Director/DHRM informed the Applicant of his suspension from duty with pay for another month, until 10 June 2007. On 15 May 2007, the IGO issued its Preliminary Investigation Report. The draft investigation report was not shared with the Applicant for comment before finalization because, according to the Respondent's submissions, he does not read English or French.

#### **Charges and the Applicant's comments on the charges**

8. A letter dated 5 June 2007 from the Director/DHRM transmitted the Preliminary Investigation Report to the Applicant and informed him that the allegations, if proven, would constitute misconduct as defined in the then applicable staff rule 110.1 of the Staff Regulations and Rules of the United Nations. The letter informed the Applicant, inter alia, of his right to respond to the allegations in the report in writing and to produce countervailing evidence, if any, within two weeks of receipt of the letter. It further informed him of the possibility of availing himself of the assistance of counsel. His suspension from duty with pay was extended for another month until 9 July 2007. The Applicant's response to the allegations was received by the IGO by e-mail on 24 August 2007 and by letter on 5 September 2007.

### **Administrative decision and JDC review**

9. In a memorandum to the UNHCR dated 17 October 2007, the Director/DHRM recommended that the Applicant be summarily dismissed for serious misconduct. She stated that the facts as established by the investigations led to the conclusion that the Applicant had repeatedly assaulted, both verbally and physically, individual cleaners at the UNHCR/RO; extorted and attempted to extort monies from contractors of the UNHCR/RO; and that he had taken toner cartridges from the UNHCR/RO without authorization and sold these items for private gain.

10. The memorandum further stated that by his conduct, the Applicant had violated staff regulations 1.2 (a), (b); (e), (o), (q), staff rule 101.2(2) and principles 2, 3, 8, and 9 of the UNHCR Code of Conduct.

11. Also by a letter dated 19 November 2007, the said Director/DHRM notified the Applicant of UNHCR's decision to summarily dismiss him for serious misconduct based on the recommendations contained in the memorandum of 17 October 2007. The letter informed the Applicant of his right to a review of the decision under the then applicable staff rule 110.4(c).

12. The Applicant submitted a request for administrative review of his summary dismissal to the Joint Disciplinary Committee (JDC) by a letter dated 23 December 2007. A JDC Panel was constituted on 24 March 2009. A JDC hearing was held on 19 May 2009 in New York. The Applicant was present via telephone conference from Cairo. He was represented by Mr. Bart Willemsen who was present in New York. UNHCR was represented by Ms. Elizabeth Brown and Ms. Mehreen Afzal via telephone conference from Geneva.

13. On 9 June 2009, the JDC Panel met in executive session and unanimously adopted its report. The JDC Panel's observations, conclusions and recommendations were:

- a. The Panel did not find sufficient evidence to support the charges of assault and theft of UNHCR property.

- b. The Administration had presented sufficient evidence to support the charge that the Applicant extorted money from the cleaners and attempted to extort a commission from Mr. Zaid, which amounted to serious misconduct warranting the Applicant's summary dismissal.
- c. The Panel noted with concern that in cases such as the present, where potential witnesses to a case are not staff members but contractors or their respective employees, the Organization has no means to compel these witnesses to cooperate in the investigations and to appear as witnesses in cases. In the Panel's view, the current case clearly illustrates the necessity for the Organization to consider adopting a policy to this effect.
- d. The present case further illustrated the necessity of a policy that puts in place appropriate procedures for the reporting of suspected misconduct and the conducting of searches by security guards under clearly specified circumstances.
- e. The Panel recommended by a majority: that the decision to summarily dismiss the Applicant be upheld; that UNHCR put in place a policy and appropriate procedures for reporting suspected misconduct and for conducting searches in a timely and appropriate manner; and that UNHCR introduce a policy that obliges all contractors and their subsidiaries, agents, intermediaries, and principals to cooperate with the Organization before, during, and after the execution of the contract, including providing all required documents, company records, access to employees, officers, and staff, and financial information.
14. In a dissenting opinion, a member of the JDC panel arrived at the following conclusions/recommendations:
- a. UNHCR's decision to summarily dismiss the Applicant should not be upheld as the evidence supporting the charges was insufficient.
- b. There were violations of due process and the sanction was disproportionate to the established facts.

c. Under the circumstances, with due regard to the fact that UNHCR had reasonable discretion in determining what disciplinary measure to be imposed on a staff for misconduct and the fact that it is not the function of the JDC to substitute its views for those of the UNHCR, this Member recommended that the Applicant should be reinstated but with appropriate disciplinary action imposed to the extent that the evidence supports the misconduct that is:

- i. Reduction in one level grade;
- ii. Letter of censure;
- iii. No supervisory functions;
- iv. A mandatory training on core UN principles of tolerance for cultural diversity, professionalism and integrity along with training in “effective communication and teamwork”.

d. UNHCR should seriously consider putting in place a policy and appropriate procedures for reporting suspected misconduct and authorizing the conduct of appropriate timely and lawful searches on UNHCR’s premises of persons under suspicion.

e. UNHCR should consider introducing a policy that obligates all vendors/contractors and their subsidiaries, agents, intermediaries and principals to cooperate with the Organization during any investigative processes undertaken by it either before, during or after execution of a contract, including providing all required documents, company records, access to employees, officers and staff, as well as financial information.

f. UNHCR should consider referring cases where facts are in dispute for the review of the JDC (or appropriate body) under the relevant Staff Rules for recommendation of appropriate disciplinary action rather than taking such drastic action as summary dismissal.

- g. UNHCR should review its investigation and disciplinary procedures, in collaboration with the UN Secretariat, to ensure that they are brought in line with the former UN Administrative Tribunal's judgment in *Sokoloff*<sup>1</sup> in observing the full range of due process rights of staff members.
15. On 7 July 2009, the Officer-in-Charge of the Division of Human Resources Management in UNHCR informed the Secretary of the New York JDC that the advance electronic copy of the JDC report was received only on 30 June 2009, at 16:40 Geneva time. Given the deadline of 30 June 2009 for the High Commissioner to make a decision under the old internal justice system, this did not leave UNHCR sufficient time to consider the JDC report and for the High Commissioner to make his decision by the required deadline. In accordance with the transitional measures related to the introduction of the new system of administration of justice, the case would be transferred directly by the JDC Secretariat, as a pending case, to the UN Dispute Tribunal.
16. By Order dated 24 July 2009, this case was transferred from the UNDT Registry in New York to the UNDT Registry in Nairobi. Following a status conference on 26 November 2009, the Applicant was granted leave to file his Application which he did on 11 January 2010. The Respondent's Reply was filed on 29 January 2010. The Tribunal held a Hearing in Cairo from 6-9 December 2010. Interpreters who secured the interpretation from English into Arabic and Arabic into English were present. During the hearing, the Tribunal, received testimony from the following witnesses:
- a. The Applicant was present.
  - b. Mr. Tarek Iskander - Driver for the Director of UNHCR/RO also physically present.
  - c. Mr. Saad Al Attar - Regional Representative for UNHCR/RO at the material time testified via telephone from Geneva.

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<sup>1</sup> UN Administrative Tribunal Judgment No.1246, (2005).

- d. Mr. Essam Mamdouh Aly – Employee of a company in Cairo which supplied stationery to the UNHCR/RO.
  - e. Mr. Mohammed Adbu Abdelrahman – A driver with the UNHCR/RO between 1975-October 2006.
  - f. Mr. Mohammed Mahfouz - An independent electrician and contractor who maintained the UNHCR/RO's electrical equipment at the material time.
  - g. Mr. Sabry Said Ahmed - A security guard with the UNHCR/RO.
  - h. Ms. Stephanie Rinvile - Senior Regional Administrative and Program Officer of the UNHCR/RO at the material time who testified via telephone.
  - i. Mr. Yehyeh Ragab – Cleaning supervisor at the UNHCR/RO. He was employed by two companies which provided cleaning services to the UNHCR/RO at the material time.
  - j. Ms. Rania El Guindy – The then Senior Protection Clerk at the UNHCR/RO who undertook the initial fact-finding investigation of the allegations made against the Applicant.
  - k. Ms. Hayam El Guindy – The then Assistant Administrative Officer at UNHCR/RO at the material time. Ms. El Guindy testified via telephone.
17. Counsels for the Respondent and the Applicant filed their closing submissions on 9 and 14 December 2010 respectively.

### **Applicant's Case**

18. The summary dismissal of the Applicant was based on allegations of misconduct. It is the Applicant's case that those allegations cannot be sustained and that the Respondent's evidence attempts to demonize him as these tried but failed to establish that few UNHCR staff members in Cairo seem to have escaped his wrath. He has an elementary school education; he was a local staff member and had no role in



management. He was in service for 27 years within which five different supervisors gave him good reviews.

19. There is a lot of hearsay evidence against him. Those who worked with him did not know him to be bad and notorious. He was a strict supervisor and he had a good relationship with the cleaners. He had never stolen; he was not notoriously dishonest, never asked for kickbacks, never extorted and had no opportunity to extort. This proceeding was precipitated by false reports made by those against him. The Applicant was told that he would be rewarded if he did not appeal the findings of the JDC.

20. It was submitted on the Applicant's behalf that the Dispute Tribunal should be vigilant in admitting hearsay evidence. In this respect, the Applicant refers to the judgments in *Masri*<sup>2</sup> and *Kasmani*<sup>3</sup> and requests the Tribunal not to admit untested evidence. The correct statement of law regarding the burden of proof in disciplinary proceedings is contained in *Masri* and *Cohen*<sup>4</sup>. In quasi-criminal processes such as a disciplinary proceeding, the burden of proof cannot simply be the civil burden. It cannot be the position that the slightest preference for some evidence can tip the scales in favour of depriving a person of their livelihood. The more serious the allegation, the more convincing the evidence must be. There must be admissible, credible and compelling evidence in summary dismissal cases.

21. During the proceedings, Counsel for the Respondent conceded that the charge of theft against the Applicant was not established. The Applicant submitted that this charge should never have been pursued.

22. With respect to the charge of extortion and attempted extortion of suppliers, the Applicant submitted that:

- a. No evidence was presented during the hearing and the allegations have still been left floating.

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<sup>2</sup> UNDT/2010/056.

<sup>3</sup> UNDT/2009/036.

<sup>4</sup> UNDT/2010/118.

- b. Both Ms. Hayam El-Guindy and Ms. Rania El-Guindy had no recollection of efforts made to contact UNHCR/RO's suppliers to hear directly from them.
  - c. There was direct evidence before the Tribunal from a UNHCR/RO supplier, Mr. Aly, that he was never extorted by the Applicant and that the Applicant had no control over him and that he was not afraid of the Applicant.
23. With respect to the charge of extortion and attempted extortion of repair contractors, the Applicant submitted that:
- a. No direct evidence of any extortion/attempted extortion from any repair people was presented to the initial fact-finding investigator or even to the Tribunal. There was also no direct evidence from victims or witnesses of money changing hands and no demands were heard.
  - b. The only piece of evidence tendered was a vague comment by Mr. Sabry Ahmed that the Applicant had said, outside of the earshot of the air conditioning repairman, that the latter had better repair his air conditioner.
  - c. The Applicant provided photographic evidence to show that he did not have an air conditioning unit in his house.
  - d. While Mr. Sabry Ahmed reported that the Applicant had extorted money from the electrician, neither Ms. Hayam El Guindy nor Ms. Rania El Guindy could recall efforts made to contact the plumber/electrician. The Applicant brought the electrician to the Tribunal where the said electrician denied doing business with the Applicant or being the object of extortion. The Applicant submits that these allegations were unfounded but were left to cast a pall over him.

24. With respect to the charge of extortion and attempted extortion of cleaners the Applicant submitted that:

a. There was no direct evidence of any such demands. The only direct evidence by Mr. Ragab, another cleaning supervisor, was that Mr. Gamel Abdel Kader, had asked him (Mr. Ragab) for money and that the Applicant later asked Mr. Kader whether he had done so.

b. No direct evidence was obtained from the alleged victims. There was no evidence of any efforts made to contact the alleged victims. The initial fact-finding investigator, Ms. Rania El-Guindy said that she was told by Ms. Hayam El-Guindy that they could not be reached and no efforts were made to reach them.

c. The Applicant gave direct evidence before the Tribunal that he did not extort.

d. It was in evidence that the cleaners' salaries were too little to make a difference and would cost the Applicant, a 27-year employee with the UNHCR/RO, too much to jeopardize his career.

e. The Applicant's co-worker for a decade, Mr. Iskander gave evidence that the misconduct alleged did not happen. Mr. Abdelrahman, the Applicant's fellow employee for all 27 years, gave direct evidence before the Tribunal that the allegations were untrue and direct evidence was tendered that there was no aura of fear around the Applicant.

f. The Respondent presented innuendo, not the compelling evidence required to ground disciplinary sanction. The Administration brought charges that it should never have against the Applicant.

25. With respect to the charge of abuse of cleaners, the Applicant submitted:

a. That it is true that he was loud. A few witnesses gave evidence of a heated dispute with one cleaner which involved some pushing and exchange of religious

insults, first by the cleaner and then the Applicant. Mr. Sabry Ahmed gave untrue evidence of insults about cleaners' mothers. These incidents were never reported and Ms. Hayam El-Guindy who was his supervisor and to whom the reports that gave rise to this case were made had no knowledge of them.

b. Mr. Sabry Ahmed's allegations of loud, regular insults to the Islamic religion are not credible given the fact that there is evidence that the majority of the UNHCR/RO staff were Arabic-speaking Muslims. It is unfathomable that the Applicant, a Christian and G-1 level cleaner would loudly insult the religion of most of the staff and his superiors. The possible conclusions to be drawn are that the Applicant did not always treat some co-workers with deserved respect.

c. The nature of the conduct which were characterised as abuse is common and normal in workplaces in Egypt and both Ms. Hayam El Guindy and Ms. Rania El Guindy gave evidence to that effect. Ms. Hayam El Guindy observed that such behaviour is often informed by education, culture, social standing and that given the Applicant's background; it is likely that impropriety of such behaviour is difficult for him to understand.

d. The Applicant was never formally disciplined for such behaviour and was never given remedial training. He, however, received 27 years of positive reviews of his work and conduct only to be summarily dismissed. Even his direct supervisor, Ms. Hayam El Guindy who officially reported the allegations against the Applicant to the UNHCR/RO considered his summary dismissal harsh.

e. It was argued for the Applicant that should the Tribunal find that misconduct occurred through the treatment of cleaners, the real question to be determined is the proportionality of the sanction imposed on him.

26. Most of the other evidence presented by the Respondent suffers from serious defects. In this respect, the Applicant submitted:

- a. Other than insults to cleaners which she said were “not that bad”, Ms. Hayam El Guindy provided hearsay evidence, some of which, by her own admission, were sometimes double hearsay.
- b. Ms. Rinville presented no direct evidence. Most of her evidence was double/triple-hearsay about things told to Ms. Hayam El Guindy.
- c. Other than a pushing incident with a cleaner, which she could not remember well, Ms Rania El Guindy’s evidence was all about things told to her as an initial fact-finding investigator.
- d. Mr. Sabry Ahmed’s only direct evidence was about the Applicant’s treatment of the cleaners.
- e. Mr. Al-Attar gave no direct evidence on any relevant matter.
- f. Mr. Ragab gave no direct evidence of misconduct by the Applicant.

27. In a case of disciplinary proceedings, the Applicant submitted that hearsay evidence should only be admitted where it is proven truly necessary and reliable. This is not the case in the present matter. The Tribunal was not informed of what efforts were made to contact the cleaners who were alleged to be the victims of his misconduct. It is not known what Mr. Zaid’s personal situation is or whether the initial reports were taken under oath or under what circumstances. In this respect the Applicant submitted that in *Liyanarachchige*<sup>5</sup>, the Appeals Tribunal held that there must be compliance with the requirements of adversarial proceedings and the rights of the defence or in other words, the right to challenge witnesses directly.

28. Further, the Applicant submitted that in *Azzouni*<sup>6</sup>, the Appeals Tribunal held that the central evidence given in the case before the Dispute Tribunal was not given under oath and therefore the appeal had to be allowed. In the present case, the Applicant submits that the Respondent wishes to rely upon written statements, either sent to the

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<sup>5</sup> 2010-UNAT-087.

<sup>6</sup> 2010-UNAT-081.

Tribunal, or obtained in the fact-finding interviews. The oath of the witnesses have not been recorded and their veracity cannot be tested. The Applicant submits that the message from the Appeals Tribunal in *Azzouni* is very clear, that is, if disciplinary charges are sustained upon either unsworn testimony or hearsay evidence, they will be reversed on appeal.

29. It was also submitted on behalf of the Applicant that the investigative and disciplinary processes were fundamentally unfair. In this respect the Applicant underscored:

- a. There was no presumption of innocence.
- b. There was evidence that management had spoken to the Applicant about his treatment of co-workers. He, however, was never formally disciplined. His behavior was not raised as a management concern.
- c. Management began privately assembling evidence against him. There was evidence tendered of difficult times in UNHCR management in 2006 by Ms. Hayam El Guindy and Ms. Stephanie Renville. There were some serious suggestions that the UNHCR had concerns about how allegations of prolonged misconduct would reflect on the office. There was a telling reference, in the context of investigating the complaint to “zero tolerance” policy by Ms. Stephanie Renville.
- d. A meeting was convened in January 2007 during which Ms. Rania El Guindy was mandated to undertake a formal initial fact-finding investigation. She had no formal responsibility for investigations. It was to be a brief investigation.
- e. The Applicant was not interviewed. The investigator was told by upper management that it was not necessary to interview him. It was not simply an investigation of the allegations reported to Ms. Hayam El Guindy in December 2006 but according to Ms. Rania El Guindy, the investigation “evolved”.
- f. The Respondent states that there were “four separate reports” of attempted extortion. The initial fact-finding investigator told each of the people interviewed that

the Applicant was under investigation and what the investigation was about. These people were then invited to provide their comments. There was no investigation into the second-hand accounts of those interviewed. The Tribunal has never been provided with the revised investigation report.

g. In the follow-up interview by Geneva of the Applicant over the telephone, he was not offered a lawyer. He was not told he was being investigated and excitedly ran to the telephone for his first call in 27 years from Geneva.

h. The final conclusions of the investigation are replete with reasoning errors.

30. In light of the foregoing, the Applicant requested the Tribunal to order:

- a. Reinstatement, effective 26 November 2007 and payment of accrued salary and interest.
- b. Moral damages in the sum of \$100,000.
- c. All adverse material to be removed from the Applicant's personnel files.
- d. IGO Geneva to be held accountable for its failure to make a good faith effort to investigate the allegations against the Applicant, pursuant to Article 10 (8) of the Statute of the Tribunal.

31. The Applicant testified that since his summary dismissal, his life is now impossible and that his children are out of school, he has been stigmatized, he has sold all his possessions, he lives of borrowing from people and that his daughter cannot get married because he has no money. The Applicant also requested the Tribunal to be allowed to make additional submissions on the quantification of a monetary remedy if deemed appropriate.

### **Respondent's Case**

32. The thrust of the Respondent's case is that the summary dismissal was justified and proportionate to the offence.

33. It is the Respondent's case that the charges against the Applicant were well founded, supported by evidence and that there was no breach of the Applicant's due process rights.

34. On the standard of proof, the Respondent submitted that he is not required to prove his case beyond reasonable doubt. The former UN Administrative Tribunal had expressed the burden of proof in terms of adequate evidence or on the preponderance of the evidence in *Araim*<sup>7</sup> and *Jhuthi*<sup>8</sup> respectively. In *Cohen* the Dispute Tribunal held that for summary dismissal cases a higher standard of proof should apply although the standard of proof in summary dismissal cases remains somewhat below the beyond reasonable doubt standard required in criminal cases.

35. On the charge of harassment of the cleaners, Mr. Sabry Ahmed testified that he directly observed the Applicant calling the cleaners in an insulting way, insulting their religion and their parents as well as pushing a cleaner in the chest. Ms. Hayam El Guindy also testified that the Applicant regularly insulted the cleaners and that she had witnessed an incident whereby the Applicant had pushed a cleaner. She also testified that when she raised the matter with the Applicant, as she had on a number of occasions, he did not accept that his behaviour was wrong and that he viewed this as the only way the cleaners would work. Mr. Bakr provided evidence to the investigation (although he was not available for the hearing) that he had witnessed the Applicant pushing and insulting the cleaners.

36. Ms. Rania El Guindy testified to the Tribunal that she had witnessed a particular incident when the Applicant yelled at a cleaner and slapped him on the back of his neck. The cleaner did not react and Ms. Rania El Guindy was shocked. Ms. Rania El Guindy also referred to this incident when she conducted her interview with Mr. Sabry Ahmed. The Respondent submits that the preponderance of evidence supports the conclusion that Mr. Borhom did harass the cleaners at UNHCR/RO.

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<sup>7</sup> UN Administrative Tribunal Judgment No. 1022 (2001).

<sup>8</sup> UN Administrative Tribunal Judgment No. 897 (1998).



37. On the charge of extortion and attempted extortion, the Respondent submitted that Mr. Zaid had provided direct evidence at the investigation stage that the Applicant had attempted to extract a payment from him and that fearing he may try and interfere with his contract with the UNHCR/RO, he reported the matter to Ms. Hayam El Guindy. Ms. Hayam El Guindy corroborated Mr. Zaid's written statement that he had reported the matter to her.

38. Hearsay evidence was provided to the investigation by Ms. Hayam El Guindy and two security guards Mr. Bakr and Mr. Sabry Ahmed, that a practice existed whereby the Applicant would take a cut from the cleaners salary and that this happened when they received a bonus for work that fell outside their normal terms of reference and for which, therefore, they were paid directly by UNHCR and not through the contracting company. The hearsay evidence provided by Ms. Hayam El Guindy derived from conversations she had with the head of the afternoon shift, Mr. Ragab, one of the cleaners who was responsible for cleaning the car, Mr. Aly and the former Head of Security, Captain Ashraf.

39. It is the Respondent's case that hearsay evidence is admissible and that it is up to the Tribunal to determine its probative value, if any, and that in the present case, the preponderance of the hearsay evidence is striking. Ms. Hayam El Guindy received four separate reports relating to extortion or attempted extortion. In addition, Mr. Sabry Ahmed provided evidence that the head of the morning shift had told him and the other guards that he gave money to the Applicant and that this happened when the cleaners received a bonus of some kind. Mr. Bakr, in his witness statement, stated that he was aware of this practice and gave direct evidence of this to the former JDC. The head of the afternoon shift, Mr. Ragab testified that he himself was asked to give money to the head of the morning shift who was acting with the Applicant and that he was aware that the cleaners from the morning shift were forced to give money to Mr. Kader, the supervisor of the morning shift, on behalf of the Applicant.

40. In response to the Applicant's contention that Mr. Bakr was motivated by vengeance against him as he did not put the office seal on a paper which Mr. Bakr

required by way of an alibi, the Respondent submits that it is not clear why Mr. Bakr would have requested such a paper from the Applicant. Even if the Applicant's version of events is accepted and a motive for bias established, it does not account for the preponderance of other evidence regarding the Applicant's activity. Mr. Iskander corroborated the Applicant's version of events but the Respondent submits that the relationship between the Applicant and Mr. Iskander is closer than either party is willing to admit.

41. The Respondent submits that there is circumstantial evidence tendered to show that the Applicant together with Mr. Iskander advised Ms. Hayam El Guindy about which suppliers to use and that the cleaners were paid directly by UNHCR both by cheque to the morning and afternoon shift supervisors and from petty cash for special jobs, such as cleaning the office cars and moving the office furniture and that at the end of 2006/2007, the office move created many such jobs. The Respondent submitted that the preponderance of evidence, including first hand hearsay evidence, supports the conclusion that the Applicant did extort and attempt to extort money from UNHCR/RO contractors and that this alone constitutes serious misconduct justifying disciplinary measures.

42. With regard to the stealing and resale of toner cartridges, the Respondent concedes that there is insufficient evidence to maintain this charge.

43. It was the Respondent's submission that the Applicant's due process rights were respected and that he was given full opportunity to reply to the charges against him. The investigation was carried out in accordance with the provisions of the then applicable ST/AI/371 of 2 August 1991 (Revised Disciplinary Measures and Procedures) and UNHCR Inter-Office Memorandum, Field Office Memorandum 54 of 2005 (IOM/FOM/54/2005). The UNHCR IGO was not obliged to inform the Applicant of the complaint against him until after formal disciplinary charges were instituted. The Respondent submits that it was within the discretion of the IGO whether further witnesses needed to be interviewed or re-interviewed.

44. The Respondent submitted that the facts support the conclusion that the Applicant committed serious misconduct in taking money from UNHCR/RO contractors and harassing UNHCR/RO cleaners. The disciplinary measure of summary dismissal was within the discretion of the High Commissioner and was proportionate.

### **Considerations**

#### ***Initial fact-finding investigation, the “preliminary investigation” and due process requirements***

45. The applicable laws in conducting preliminary investigations for UNHCR at all times material to this case were ST/AI/371 and IOM/FOM/54/2005. The Applicant claimed that procedural irregularities tainted the investigation and disciplinary proceedings. The Tribunal observes that the preliminary fact-finding was undertaken by someone who was a witness before her to the Applicant’s alleged misconduct. In this respect, the said initial fact-finder Ms. Rania El-Guindy testified as follows before the Tribunal:

I think that as far as the harassment and physical abuse of cleaners was concerned, I was certain and sure it was a clear cut case as I was a witness to this and Hayam too. If I wanted I could have asked more staff about it to get more facts. Since I had witnessed this myself, I felt that I had enough evidence especially as Hayam said the same and some security guards too.

46. Clearly, an investigator who at the outset of carrying out her assignment to investigate the allegations against any person is convinced of that person’s guilt for any reason, is not competent to undertake such an assignment. It is an elementary principle of law and a rule of natural justice that one cannot be a judge in his/her own cause. By the same token, it stands to reason that an investigator, just like the judge, must be neutral, without bias and must approach the case he/she is mandated to investigate from the stand of a presumption of the innocence of the subject of the investigation.

47. It was shocking to the Tribunal that this investigator who turned witness, not just as to how the fact-finding exercise was conducted, but even more as to the bad character

of the Applicant and her own certainty and conviction of his guilt in physically abusing cleaners in the office even before she was tasked to investigate the allegations, was allowed to take the witness stand. In testifying to having witnessed on one occasion, the Applicant slap a cleaner on the neck as she stepped out of an elevator, she is unable to explain the context in which the slap was given and received without any reaction on the part of the cleaner. She, however, went on to tell the Tribunal that the habit of slapping and pushing each other around was a common habit among males in work places in Egypt.

48. The same investigator testified that she did not approach or interview some of the alleged victims of the Applicant's excesses because their supervisor told her they did not want to speak to her even though she saw them every day at work. The question arises as to the real reason why she did not seek to collect direct evidence but preferred double and triple hearsay evidence of others who had stories to tell. She had also failed to make any efforts at contacting witnesses who could provide direct, first-hand accounts of the Applicant's alleged extortion of contractors and other workmen. In the circumstances, the Tribunal can only arrive at the inescapable conclusion that the initial fact-finding exercise in this case is totally unreliable, fundamentally flawed and a complete sham.

49. As if these shortcomings of the initial fact-finding process were not enough, the report produced by the fact-finder was further revised by UNHCR/RO's senior managers before being sent off to Geneva. The Tribunal finds it somewhat odd that the drafter of the initial fact-finding report was not even aware of what the final draft of the report sent to the IGO looked like. This additionally raises serious doubts as to the independence of the initial fact-finding process.

50. As to the quality and relevance of the Preliminary Investigation Report dated 15 May 2007 and which was drafted by the IGO Investigation Unit in Geneva, the Tribunal makes the following observations:

51. Paragraph 5.12.2 of IOM/FOM/54/2005 requires that investigations must respect the individual rights and obligations of all staff as set out in the UN Staff Regulations and Rules and be conducted with strict regard for fairness, impartiality, the presumption of

innocence and due process. As stated in *Sanwidi*<sup>9</sup>, the sheer importance of the investigation process leading up to the disciplinary action against a staff member cannot be over-emphasized.

52. The IGO/Investigation Unit failed to interview any of the individual cleaners who were allegedly harassed and extorted by the Applicant. The reasons provided for the failure to interview the said cleaners were:

Unfortunately, the individual cleaners were not available for interview. They are day labourers of a UNHCR contractor, and there is no means to compel their cooperation. Moreover, given their position as unskilled labourers in a market with high unemployment, the risk of affecting their job and even personal security is considered significant. Together with the language difference and other logistical matters, these constraints made collecting statements from the alleged victims of Mr. Borhom's extortion impossible.

53. These reasons are disingenuous at best. The language difference is certainly not an issue in the present case since Arabic is one of the United Nation's six official languages. The Tribunal's view is further reinforced by the fact that ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), which was applicable at all material times, was specifically promulgated to protect persons such as the Applicant's alleged victims. Section 8 of ST/SGB/2005/21 provides that "[a]ny retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the United Nations because such person has reported misconduct by United Nations staff members will be considered misconduct that, if established, will lead to disciplinary or other appropriate action".

54. The requirement that investigations must be conducted with strict regard for fairness, impartiality and the presumption of innocence requires the collection and recording of clear and complete information establishing the facts, whether incriminating or exculpatory. The Preliminary Investigation Report is characterized by a lack of direct

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<sup>9</sup> UNDT/2010/036.

evidence from the alleged victims and a heavy reliance on second hand evidence made by third party witnesses.

55. Not only did the IGO/Investigation Unit fail to establish facts that could legally amount to misconduct or serious misconduct, the Unit carried out no investigations at all except to attempt to fleshen up the initial fact-finding report which had been revised by others and to make arm-chair analysis and deductions which they presented as an investigation report. It is not surprising to this Tribunal that after cooking up a report, its authors could not testify at the hearing in this case to defend it.

56. It has been stated time and again that the United Nations must be an exemplary employer which respects the rights of its employees. It is a standard-setting Organization for the world at large and cannot harbour those who would find short cuts where they ought to apply diligence especially where an employee's career and livelihood are in issue.

57. Even as the IGO investigators failed to establish the facts, they did not give the Applicant the benefit of the doubt. The following examples from the Preliminary Investigation Report are illustrative:

a. At paragraph 31, the IGO/Investigation Unit concluded that the items over which the Applicant had authority and was believed to be stealing were consumable products not subject to normal asset management procedures and that there was no effective way of distinguishing between normal consumption and loss that might be due to theft.

b. It is clear that on this score no evidence was tendered to show that the UNHCR/RO in Cairo had lost any property. It is inexcusable and suspect to conclude that because products are consumables, it cannot be determined or known that they have been stolen. If such is truly the case then there are managerial shortcomings to be addressed rather than unsubstantiated allegations that produce scapegoats. How then could the IGO/Investigation Unit conclude

that the Applicant was guilty of stealing if there was no means available to ascertain whether any theft actually took place?

c. At paragraph 33, the IGO/Investigation Unit concluded that the Applicant's duties accorded him the "absolute opportunity to exploit contractor employees" while his responsibility for the office stores gave him "unhindered access to UNHCR stationary supplies without inventory or other controls". The Tribunal observes that UNHCR/RO's managerial failures to enact oversight mechanisms to prevent the possible exploitation of contractor employees and to provide inventory controls are blamed on the Applicant and this is totally unacceptable.

d. At paragraph 34 the IGO/Investigation Unit concluded, on the allegations of extortion, that the Applicant either "intended to commit fraud and is attempting to conceal his actions or, alternatively, the contractor fabricated the events." The Tribunal finds that the IGO/Investigation Unit essentially established nothing, that is, either there was fraud or there was no fraud!

e. At paragraph 35, the IGO/Investigation Unit concluded that the alleged victims did not want to risk their positions by cooperating with an investigation "particularly in light of Mr. Borhom's aggressive behaviour". The Preliminary Investigation Report does not state how the IGO/Investigation Unit established that the Applicant engaged in aggressive behaviour and in fact have resorted to making value judgments.

58. The Tribunal finds as a fact that no actual investigation took place. The witness statements annexed to the Preliminary Investigation Report reveal that the IGO/Investigation Unit relied upon the statements collected by Ms. Rania El-Guindy during her initial fact-finding investigation. The IGO/Investigation Unit merely interviewed the Applicant over the telephone and arrived at their own conclusions based on Ms. Rania El-Guindy's Report (incorporating the revisions from UNHCR/RO's senior management) which was transmitted to them on 18 February 2007. In the present case, the Tribunal considers this failure to conduct a proper investigation but to instead rely on

the initial fact-finding investigation to be a violation of the Applicant's due process rights. The provisions of ST/AI/371 have not been complied with. The summary dismissal of the Applicant based on this fictitious report is patently illegal.

***Charge of theft and taking toner cartridges from the office without authorization and selling these items for private gain***

59. The IGO's Preliminary Investigation Report concluded that the Applicant's theft of UNHCR/RO property was established by "two credible witnesses" and that it was corroborated by circumstantial evidence such as the Applicant's access to UNHCR/RO property and his departure from the office carrying bags with which he did not enter. The Report also found that the relevant circumstantial evidence primarily related to proof of opportunity and that his responsibility for the office stores gave him unhindered access to UNHCR/RO stationary supplies without inventory or other controls.

60. In the IGO's Preliminary Investigation Report, Mr. Bakr, a security guard, had stated to investigators that he had witnessed the Applicant taking boxes of soap from the UNHCR/RO garage on several occasions, apparently for purposes other than replenishing soap in the lavatories and that he also witnessed the Applicant selling toner cartridges taken from UNHCR/RO to an unknown third party.

61. Also in the IGO's Preliminary Investigation Report, Mr. Zaid, a former security guard, had stated to investigators that he had witnessed the Applicant take things from the UNHCR/RO garage such as photocopier spare parts and office supplies and sell them to a man named "Mohammed" who worked in the neighborhood as a security guard. The above-named witnesses mentioned in the IGO's Preliminary Investigation Report did not testify before the Tribunal.

62. Mr. Sabry Ahmed testified that every day the Applicant left with an envelope on him. The security guards had no authority to search any UNHCR/RO employee. They recorded everything that was brought into the office.

63. Mr. Iskander testified that he had never seen the Applicant take anything away from the office and that sometimes the Applicant shopped from the supermarket during



work hours and placed the shopping bag upstairs before going home with it. Mr. Abdlerahman testified that he never saw the Applicant take things from the office. The Applicant testified that he neither stole nor sold any ink cartridges since as empty cartridges, they were trash. The Applicant also stated that he did not steal any liquid soap and that he had no use for soap. He brought the big bags that he took to the office from his house because his wife could not go out and that the bags did not contain any stolen soap.

64. During the hearing, Counsel for the Respondent conceded that there was insufficient evidence to maintain this charge. The Tribunal accordingly strikes off the charge of stealing of UNHCR property and will focus its attention on the remaining two charges.

***Charge of harassment of cleaners***

65. The IGO's Preliminary Investigation Report concluded that the "direct testimonial evidence of credible witnesses corroborated by other witness testimony attesting to Mr. Borhom's generally aggressive attitude towards contractor employees established that he assaulted individual cleaners on at least three occasions."

66. During the hearing, Mr. Sabry Ahmed testified that he had witnessed the Applicant shout insults at the cleaners such as "you are the son of a dirty woman...you are the religion of a dog." According to Mr. Sabry Ahmed, on one occasion the Applicant had asked a cleaner to go and clean the kitchen where the Applicant used to make coffee and tea for employees. A refugee told Mr. Sabry Ahmed and other security guards that the cleaner had asked if they now took orders from Christians. The cleaner the Applicant called was at the time working in the refugees' toilet.

67. On an unspecified date, Mr. Sabry Ahmed witnessed the Applicant pushing a cleaner twice on the chest. Later, a refugee told him and other security guards that the cleaner had insulted the Applicant saying "will the Christians have the upper word now?" Mr. Ahmed testified that the majority of people in the UNHCR Office were Muslim and

that he was unhappy at what the Applicant said about Muslim religion and told him it was wrong.

68. The Applicant's direct supervisor at the time Ms. Hayam El Guindy testified that the Applicant had, on an unspecified date, hit or pushed a cleaner. She did not consider it a serious matter that the Applicant called the cleaners names. She never heard insults pertaining to religion or parents. She said that as the Applicant's supervisor, she would have taken it further if she did. She said she spoke to the Applicant about how he treated the cleaners because he was not polite to them. The Applicant told her that they should be treated that way in order that they do their jobs well. She thought it was inappropriate at the UNHCR but added that it is common workplace behaviour in Egypt to treat another man like that if the one mistreated was of a "lower standard". It also depended on how a person was raised. Ms. Hayam El Guindy never followed up with actions after the oral discussions she had with the Applicant. The first form of disciplinary action taken against the Applicant was his summary dismissal.

69. Ms. Rania El Guindy informed the Tribunal that she had witnessed an incident when on one occasion, in the refugee waiting room area, she had just stepped out of the elevator when she saw the Applicant yelling at one of the cleaners and eventually slapping the cleaner on the back of his neck. She stated that this was not normal behavior in the UNHCR/RO but that she knew such behavior took place sometimes in other offices in Cairo. She did not inquire as to the context of what she saw. Instead, she concluded that it was a "clear-cut case" of harassment and that no further inquiries to establish the context were required.

70. The Tribunal did not receive any direct evidence from the cleaners who were alleged to have been harassed, insulted or assaulted by the Applicant. In addition, the Preliminary Investigation Report does not contain any records of conversation with the cleaners who were alleged to have been harassed by the Applicant.

71. Mr. Iskander testified that the Applicant had a good relationship with the cleaners. They ate with him and called him "Uncle Yousri". He never saw the Applicant hit any of the cleaners. The Applicant even gave the cleaners cigarettes. Mr. Iskander stated that he

had never heard the Applicant insult anyone's religion and that the Applicant tended to shout at times but he did not insult the cleaners. The Applicant had nothing to do with the cleaners except to insist that they do the cleaning thoroughly. The Applicant sometimes joked with the cleaners and with the suppliers. Mr. Abdlerahman testified that he had seen the Applicant working with the cleaners in the office. He had never seen the Applicant shout at the cleaners. He sometimes saw the Applicant supervising the cleaners and no one was afraid of him as he was only a cleaner.

72. Mr. Ragab testified that it was a Mr. Gamel, Director in the El Hosn Company, who was threatening the cleaners and that it was he who used improper words relating to religion or one's parents. He further stated that the Applicant used to push the workers when he joked, quarreled or argued with them. The Tribunal observes that Mr. Ragab had not been interviewed either during the preliminary fact-finding investigation or during the IGO/Investigation Unit's so-called Preliminary Investigation.

73. In his testimony, the Applicant stated that his role at UNHCR included seeing to it that the cleaners cleaned properly and that he sometimes shouted at them to show them that he was serious. He stated that he never pushed the cleaners to make them hurry up. When they didn't clean well, he would tell them to do the job again and that he would even do the cleaning himself when they didn't do well. When he shouted at them, he did not say anything insulting about their religion but dealt with them fairly. According to the Applicant, Ms Rania El Guindy once met him on the escalator with a cleaner. She never told him that he had treated the cleaner badly.

74. As regards the allegations made by the Respondent that the Applicant had harassed cleaners working in the office, the Tribunal notes that at the material time, ST/SGB/2005/20 (Prevention of workplace harassment, sexual harassment and abuse of authority), which came into operation on 25 February 2005, was applicable in the present case. Paragraph 3.1 of ST/SGB/2005/20 made it compulsory for staff at all levels to complete a system-wide, self-administered learning programme titled "Prevention of workplace harassment, sexual harassment and abuse of authority" which had been developed jointly and in collaboration with the United Nations Development Group, the

United Nations Development Programme, the United Nations Population Fund, UNHCR, the United Nations Children's Fund, the United Nations Office for Project Services and the World Food Programme.

75. Paragraph 3.1 of ST/SGB/2005/20 requires that upon successful completion of the programme, a certificate of completion would be issued which should be retained by each staff member and a copy placed in his/her official status file. A copy should also be provided to the staff member's supervisor. Paragraph 3.2 of ST/SGB/2005/20 requires Heads of departments and offices to be responsible for ensuring the completion of the learning programme by themselves, their staff and others for whom they are responsible.

76. There was no evidence presented to the Tribunal to show that the Respondent had implemented this programme at the UNHCR/RO and that the Applicant had received the said mandatory learning programme. Paragraph 2.4 of ST/SGB/2005/20 provides that the learning programme would be issued initially in English, French and Spanish in November 2005. From December 2005, it would be made available in Arabic, Chinese and Russian.

77. The Tribunal observes that the Applicant's supervisor, Ms. Hayam El Guindy on one occasion witnessed the Applicant hit or push a cleaner. She did not consider it a serious matter that the Applicant called the cleaners names and did not reprimand him or take any further action. She never heard insults pertaining to religion or parents and as the Applicant's supervisor she would have taken the matter further if she did. The Tribunal also notes that none of the cleaners had ever reported that they had been mistreated by the Applicant.

78. At the material time, there was no administrative issuance which defined "workplace harassment". Workplace harassment consists of offensive treatment through vindictive, cruel, malicious or humiliating attempts to undermine an individual employee or groups of employees. In the present case, the Tribunal adopts the following test in determining whether the Applicant's conduct amounted to workplace harassment<sup>10</sup>:

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<sup>10</sup> Norman Selwyn, *Selwyn's Law of Employment* (Oxford University Press, 2008), p. 170.

- a. Was the harassment intentional?
- b. Did the Applicant know or ought to have known that he was harassing the cleaners and would a reasonable person in possession of such information at the time of the alleged conduct regard it as harassment?
- c. Were the alleged victims alarmed or distressed?
- d. Was there a course of conduct which involved harassment on at least two occasions?
- e. Was the same person the victim on each occasion?

79. Having looked at the evidence presented in this case, the Tribunal finds that: the trading of insults between the Applicant and the cleaners was mutual; the nature of the alleged “physical abuse”, as testified by several witnesses, was common and normal in workplaces in Egypt; and the alleged victim(s)’ work was not affected in any way.

80. The Tribunal notes that ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which although not in effect at the material times, provides guidance as to how the Respondent should have dealt with the allegations of harassment.

81. Paragraph 5.3 of ST/SGB/2008/5 now requires managers and supervisors to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings. Paragraph 5.5 of ST/SGB/2008/5 states that,

In many cases, the situation can be resolved informally. An informal approach offers the opportunity to resolve a complaint or grievance in a non-threatening and non-contentious manner. Aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her behaviour is offensive. However, disparity in power or status or other considerations may make direct confrontation difficult, and aggrieved individuals are not required to confront the offender.

82. In respect to the foregoing, the Tribunal heard evidence that the Applicant's behaviour was considered normal in Egyptian workplace culture. In addition the fact that there was no evidence tendered by the Respondent to show that the Applicant had received the mandatory training on what the Organization considered workplace harassment, the lack of direct testimonial evidence from the alleged victims, the lack of specific dates of the alleged harassment and having applied the above-mentioned test to the facts in the present case, the Tribunal concludes that the charge of harassment or abuse of cleaners cannot be sustained.

*Charges of extortion and attempted extortion*

83. The IGO's Preliminary Investigation Report concluded that the report of "possible extortion was supported by direct witness evidence in one instance but that this evidence related only to solicitation of a kickback with no actual payment occurring. The Report also concluded that "the other evidence of extortion [was] primarily hearsay and of limited value for establishing the truth of the matter." The Report goes on to state that only the individual employees of companies contracted by the UNHCR/RO were in a position to "potentially" provide a first-hand account but there was no means to compel their testimony. Finally, the Report states that "in the absence of testimony from the claimed victims of this extortion, the second hand accounts are considered as having some corroborative value when taken together with direct testimonial evidence."

84. The "direct testimonial evidence" referred to in the IGO's Preliminary Investigation Report was that of Mr. Zaid. Mr. Zaid is a former UNHCR security guard who later became an air conditioning repairman ultimately contracted by UNHCR for repair services. Mr. Zaid alleged that the Applicant requested payment from him for work carried out for UNHCR and that he also asked him to provide free repair services for his personal air conditioners at his home. Mr. Zaid did not testify before the Tribunal.

85. Mr. Sabry Ahmed testified that on one occasion when Mr. Zaid had gone to the UNHCR/RO office to receive a cheque he overheard the Applicant saying that Mr. Zaid had not repaired the air conditioning in his home and that he would send him out of the office. The most direct evidence is that of Mr. Ragab. Mr. Ragab testified that the

Applicant asked him for money. On further cross examination, Mr. Ragab stated that it was not the Applicant who asked him for money but that it was a person named Gamel who asked him for money in the name of the Applicant. Mr. Ragab also testified that the Applicant prepared the cheques for car washing and for moving desks and other work outside of cleaning for which the cleaners were paid hourly and that the Applicant took the money by force. However, Mr. Ragab stated that he had never witnessed the Applicant take money from anyone. All of Mr. Ragab's statements amounted to hearsay and in some instances double hearsay. It is also untrue that the Applicant prepared cheques to pay cleaners.

86. Mr. Iskander testified that he had never seen the Applicant demand money from suppliers or demanding money from anyone else in the office. Mr. Aly testified that the Applicant had never asked him for money and that he had never been afraid of him. Mr. Mahfouz testified that the Applicant had never asked him for money.

87. In her testimony, Ms. Hayam El Guindy stated that she remembered reporting that she was told the Applicant took money from an electrician. She did not see this happen herself. She never saw any money change hands between the Applicant and anyone or heard him demand money from anyone. The initial fact-finder Ms. Rania El Guindy testified that she interviewed a bookstore owner, Mr. Emile Nashet Salama, but that she did not interview the messenger of the bookstore who had alleged that the Applicant had asked for a commission from the bookstore's supplies to the RO.

88. The Tribunal has failed to understand how the Respondent arrived at the conclusion that "the second hand accounts had some corroborative value when taken together with direct testimonial evidence." The Tribunal does not consider the evidence provided by Mr. Zaid in support of the charge as credible and capable of being acted upon as the Applicant had provided evidence that he did not have an air conditioning unit in his home and this piece of evidence remained unrebutted. The testimonies relied upon by the Respondent mostly contain unsubstantiated hearsay, double hearsay such as in the case of the bookstore owner and rumours that, in the circumstances of this case, lack probative value. The evidence adduced by the Respondent in this case does not

sufficiently support the charges of extortion and attempted extortion and does not therefore establish the commission of these by the Applicant.

*Admissibility of hearsay evidence and standard of proof*

89. The Respondent referred to Judgment Number 2771 of the Administrative Tribunal of the International Labour Organization where it was held, inter alia, that “hearsay evidence is not necessarily inadmissible, the question is always one of its probative value.” It is for the Tribunal to determine the admissibility of hearsay evidence and its probative value in any given case. With respect to double hearsay, however, the Tribunal is not in the habit of admitting such evidence and will in fact discount it.

90. The Tribunal has previously held (in *Masri*) that establishing criminal liability in investigations and judicial proceedings even in the context of a civil matter, such as in the present case, must necessarily require that a standard higher than the ordinary one of a balance of probabilities must be attained. In disciplinary cases where the charges against a staff-member are quasi-criminal in nature, the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred. In the present case, the Respondent has fallen short of this standard.

*Relationship between Mr. Iskander and the Applicant*

91. The Respondent went to great lengths to show that there was some form of familial relationship between Mr. Iskander and the Applicant. It is necessary to point out that such a relationship, even if true, does not make a witnesses’ testimony necessarily unreliable or inadmissible. It is up to the Tribunal to determine whether the witness is credible or not.

*Proportionality of Sanction*

92. In *Masri*, the Appeals Tribunal held that,



In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take.

93. In the present case, it is the finding of the Tribunal that the summary dismissal was far more excessive than was necessary for obtaining the desired result. The Applicant, a loyal and dedicated employee with the Organization for over 26 years should have received the mandatory training on the expected workplace culture for an international civil servant which the Respondent failed to provide. The decision to summarily dismiss the Applicant went beyond what was required to achieve the objective of creating a culturally diverse and harmonious workplace free of harassment and abuse of authority as spelt out in ST/SGB/2005/20.

### **Findings/Conclusions**

94. The summary of the Tribunal's findings and conclusions are as follows:
- a. The initial fact-finding investigation was fundamentally flawed, unreliable and a sham.
  - b. The failure to conduct a proper investigation but to resort to arm-chair analysis and conclusions based on the unreliable initial fact-finding investigation was not only useless but constituted a violation of the provisions of ST/AI/371 and the Applicant's due process rights.
  - c. The Preliminary Investigation Report is characterized by a lack of direct evidence from the alleged victims and a heavy reliance on second hand evidence made by third party witnesses. The Tribunal finds that the IGO/Investigation Unit failed to establish facts that could legally amount to misconduct or serious misconduct.

- d. Counsel for the Respondent conceded that there was insufficient evidence to maintain the charge of theft and taking toner cartridges from the Office without authorization and selling these items for private gain.
- e. UNHCR failed to provide the Applicant with the mandatory learning programme on prevention of workplace harassment and the Respondent cannot sustain the charge of harassment of cleaners.
- f. The evidence adduced by the Respondent does not sufficiently support the charges of extortion and attempted extortion.
- g. The Respondent has failed to discharge his burden of proving that misconduct has taken place.
- h. The decision to summarily dismiss the Applicant went beyond what was required to achieve the objective of creating a culturally diverse and harmonious workplace free of harassment and abuse of authority as spelt out in ST/SGB/2005/20.

### **Remedy**

95. The sanction of summary dismissal was based on unsubstantiated charges. Accordingly, the Tribunal:

- a. Rescinds the Applicant's summary dismissal and considers that until the date of this judgment the Applicant remains lawfully in the service of the UNHCR.
- b. Orders the Respondent to reinstate the Applicant in service of the UNHCR with retroactive effect.
- c. Since the Applicant's dismissal is a termination within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to the

rescission of the Applicant's dismissal. The Tribunal considers an appropriate compensation to be the amount of two years' net base salary of the Applicant.

d. Irrespective of whether the Respondent elects to reinstate the Applicant or to pay him the above amount as an alternative, the Applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma of being imposed the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at six months of the Applicant's net base salary.

e. The Tribunal awards the Applicant six months' net base salary for the violation of his due process rights.

f. The Applicant also requested that his personnel file be cleared of any adverse material relating to this matter. The Tribunal orders that all material relating to the Applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 8<sup>th</sup> day of April 2011

Entered in the Register on this 8<sup>th</sup> day of April 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi