UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/116
Judgment No.: UNDT/2011/124
Date: 30 June 2011
Original: English

**Before:** Judge Marilyn J. Kaman

**Registry:** New York

**Registrar:** Santiago Villalpando

JOHNSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
Leonard Sclafani

**Counsel for Respondent:**
Marcus Joyce, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

**Introduction**

1. The Applicant was one of eight staff members from the Department of Management ("DM"), Procurement Division ("PD"), who were placed on Special Leave With Full Pay ("SLWFP") on 16 January 2006 following issuance of a December 2005 draft audit report into procurement activities and pending a follow-up investigation by a specially-constituted Procurement Task Force ("PTF") of the Office of Internal Oversight Services ("OIOS").

2. The Applicant has two cases before the UNDT: UNDT/NY/2010/056/UNAT/1569 (Case 1) and UNDT/NY/2009/116 (Case 2). This Judgment shall only address Case 2, since Case 1 has been decided in a separate Judgment.

3. In Case 1, the Applicant appealed against the Secretary-General's decision to place the Applicant on SLWFP pursuant to former staff rule 105.2(a) (i) effective 16 January 2006. In *Johnson* UNDT/2011/123 dated 30 June 2011, the Tribunal made the following overall findings, namely that:

> a. The Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006;
>
> b. The Applicant's due process rights were not observed when the Secretary-General exercised his discretionary authority to place the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006; and
>
> c. The Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant subsequent to his being put on SLWFP.

4. The events in Case 2 follow in time but are related to the events in Case 1. In Case 2, the Applicant appeals against a 2 June 2009 decision of the Secretary-General regarding a written reprimand against the Applicant. The reprimand in lieu of a disciplinary measure was first issued on 16 January 2007 for the Applicant's alleged lapses in managerial performance, and these alleged lapses in managerial performance were based on the 13 September 2006 OIOS/PTF report ("the 2006 Report") as to the Applicant (for a full recitation of the events surrounding the 2006 Report, see Judgment UNDT/2011/123).

5. Three days after issuing the first Reprimand, the Secretary-General requested that the reprimand be withdrawn pending further review. The reprimand was withdrawn and disciplinary misconduct charges were subsequently filed against the Applicant.

6. On 29 July 2009, the Secretary-General reinstated the 16 January 2007 reprimand upon dismissal of the disciplinary misconduct charges against the Applicant.

7. For ease of reference, the reprimand that was issued on 16 January 2007 shall be referred to as the "Initial Reprimand" and the 29 July 2009 reinstatement of the reprimand shall be referred to as the "Reinstated Reprimand".

8. The issues to be addressed by the Tribunal in this Judgment are defined as follows, based on the delineation made in Order No. 22 (NY/2011) of 26 January 2011:

a. Whether the Applicant was accorded the proper due process guarantees when the Initial Reprimand was issued;

b. Whether the Respondent properly observed the Applicant's due process rights when issuing the Reinstated Reprimand.

9. Based on the request of the parties in their jointly-signed 27 September 2010 statement, the Tribunal decided to handle the present case on the papers. In the same statement, the parties agreed to consolidate the handling of Case 1 and Case 2, which the Tribunal notes is an efficiency measure under art. 19 of the Rules of Procedure of the Dispute Tribunal to eliminate the production of the same evidence in both cases. However, Case 1 and Case 2 each remain independent from one another and are adjudicated on their own distinctive terms, also in relation to the compensation limit stipulated in art. 10.5(b) of the Statute of the Dispute Tribunal.

**Facts**

*Case 1*

10. This summary of facts includes only selected portions of the facts that formed the basis for Case 1. For a complete statement of those facts, reference is made to *Johnson* UNDT/2011/123.

11. The Applicant joined the Organization in July 1994 as a Logistics Officer in the United Nations Operation in Somalia. Three years later he assumed the post of Contracts Management Officer within the United Nations Angola Verification Mission. In April 1999, the Applicant was appointed Officer-in-Charge of the Transport Section, Department of Peacekeeping Operations ("DPKO"), at United Nations Headquarters. In April 2004, while still assigned to DPKO, the Applicant was deployed to Khartoum, Sudan, as Chief Administrative Officer ("CAO") of the United Nations Advance Mission in the Sudan ("UNAMIS"). The Applicant also later served as CAO with the United Nations Mission in the Sudan ("UNMIS"). At the time of his application to the Joint Appeals Board ("JAB"), the Applicant was serving as Chief, Logistics Operation Section ("LOGOPS"), Logistics Support Division ("LSD"), Office of Mission Support. His fixed-term appointment was to expire on 30 June 2007.

12. On 15 November 2006, the Applicant was returned to duty after his SLWFP, although he was advised that he would not be permitted to resume his duties as CAO, UNMIS, or to return to his post at Headquarters as Chief, LSD/LOGOPS. The Respondent's representatives also informed the Applicant that he could not return to duty within LSD, but no explanation has been given for this restriction.

2005 and early 2006 developments and the 2005 Draft and Final Reports

13. For reasons that are not relevant here, the OIOS Internal Audit Division ("IAD") issued two reports in 2003 and 2004 that formed the basis for subsequent OIOS audit reports in 2005.

14. On 22 June 2005, the General Assembly adopted resolution 59/296 (Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: cross-cutting issues), which, under section IV, paragraph 4, requested OIOS to conduct a comprehensive management audit of the Department of Peacekeeping Operations ("DPKO").

15. On 30 November 2005, the private consultancy firm, Deloitte and Touche, issued a report on "Assessment of Internal Controls in the United Nations Secretariat Procurement Operations" in response to a 4 October 2005 request from the Secretariat to conduct "a six-week, forward-looking diagnostic assessment of internal procurement controls".

16. On 20 December 2005, OIOS/IAD prepared draft internal Audit Report AP2005/600/20 titled "Comprehensive Management Audit of the Department of Peacekeeping Operations—Procurement" ("the 2005 Draft Report").

17. The 2005 Draft Report associated the Applicant by name with several procurement cases where OIOS claimed that so-called "fraud indicators" existed—the alleged unnecessary acquisition of a heavy helicopter in 2000, the alleged attempt in 2004 to inflate the volumetric fuel estimate for the short-term fuel contract for

UNMIS, and the alleged acquisition of aviation support services at Cairo, Egypt, in 2005 outside the regular procurement processes.

18. Conflicting evidence exists on to what extent the Applicant either was given a copy of, or was briefed on, the 2005 Draft Report:

a. According to the Respondent's 4 December 2007 referral to the Joint Disciplinary Committee ("JDC"), it is stated that the Applicant "was briefed on the contents of [the 2005 Draft Report] and was asked to provide an individual written reply. [The Applicant] complied with this request, researching one particular aspect of the report's findings and providing his submission to DPKO on 13 January 2006, which was incorporated in DPKO's comment concerning the draft audit report …";

b. In his 28 June 2007 written interrogatories to the JAB, the Respondent stated that:

> On 8 January 2006, the [Applicant] was recalled to Headquarters to assist in the preparation of DPKO's response to the conclusions contained in the draft OIOS report [assumedly, referring to the 2005 Draft Report] and was thereby made aware of the contents of the report. Hence the [Applicant] was informed of the nature and seriousness of the preliminary findings concerning unsatisfactory conduct in connection with certain procurement exercises, and of the facts that had been established to date. The [Applicant] provided his full cooperation to DPKO in connection with the preparation of its response to the draft report.

c. In the Applicant's response to Order No. 121 (NY/2011) of 21 April 2011, para. 4(b), the Applicant, however, states that he only received a copy of the 2005 Draft Report on or about 16 August 2006, as part of the JAB appeal, although in para. 6(b) of the same submission, the Applicant notes that, on 9 January 2006, he was given "photocopies extract[s]" of the 2005 Draft Report that "contained only the paragraphs in which their respective names were mentioned".

19. The Tribunal interprets these answers to mean that, at most, the Applicant was briefed on selected portions of the 2005 Draft Report, but did not have the opportunity to read, review or comment on the 2005 Draft Report before he was placed on SLWFP or before the OIOS/PTF began its investigation.

20. On 20 January 2006, OIOS/IAD submitted Audit Report AP2005/600/20 to the Department of Management ("DM") and DPKO as a final report ("the 2005 Final Report").

Creation of the OIOS/PTF and its terms of reference

21. On 12 January 2006, the then-USG/OIOS, Ms. Inga-Britt Ahlenius, approved the terms of reference for the OIOS/PTF to investigate allegations of wrong-doing in United Nations procurement activities. In its 2006 Report, the OIOS/PTF itself acknowledged that the creation of the OIOS/PTF was "the result of perceived problems in procurement identified by the Independent Inquiry Committee into the Oil for Food Programme (IIC), and the arrest and conviction of a United Nations Officer".

The decision to place the Applicant on SLWFP

22. A memorandum dated 16 January 2006 from Mr. Mark Malloch Brown, then-Chef de Cabinet for the Secretary-General, informed the Applicant of the following (emphasis added):

> In view of the ongoing audit *and investigation into the Organization's procurement activities*, the Secretary-General has decided that it is in the best interest of the Organization to place you on *special leave with full pay pursuant to staff rule 105.2(a)(i)*, effective immediately.
>
> While on special leave, you will not be discharging any of your normal functions but will be expected to cooperate fully with all audit and investigation processes. The situation will be assessed following an appropriate determination of the facts, and you will be returned to duty if no further action is required at that time.
>
> I wish to emphasize that your placement on special leave with full pay is purely administrative measure, which is not disciplinary in nature

> and is taken to assist the Organization in conducting a full assessment of the situation.

23. On 19 January 2006, an internal press release from the United Nations Department of Public Information was issued, and contained the exact names, departments and positions of the eight staff members placed on SLWFP.

24. On 30 January 2006, by an email broadcast to the staff members at the United Nations Headquarters, the Secretary-General stated (emphasis added):

> As you know, we are in the midst of a rigorous effort to strengthen management, oversight and accountability throughout the Secretariat, which I regard as essential to the future functioning and credibility of our Organization. As part of that process, we are reviewing our procurement policies, procedures and activities. Indeed, procurement has grown rapidly, from $400 million a few years ago to more than $2 billion today. We are also painfully aware that problems in this area have come to light in the past year. If the United Nations is to faithfully serve the world's people, we must remove any hint of suspicion and put in place a professional and trustworthy procurement system.
>
> Last June, the General Assembly requested a comprehensive management audit of the Department of Peacekeeping Operations. From September to December, the Office of Internal Oversight Services performed the procurement portion of that review. Its report documents various instances of non-compliance with procurement rules, and indicates that more serious wrongdoing may have occurred as well. Senior management is now looking into the issues raised by the report. *OIOS is also investigating a number of cases of possible fraud, abuse and waste that were identified both in this audit and in other complaints.*
>
> In a separate but coordinated step undertaken at the request of the Department of Management and DPKO, Deloitte Consulting is currently reviewing our procurement systems, examining our internal and management controls, and conducting a full forensic audit of the Procurement Service. Together with OIOS's work, this will allow us to strengthen our management and procurement functions and bring UN activities in line with best practices in these areas.
>
> In response to the findings of the OIOS report, eight staff members in positions related to procurement then or now have been placed on special leave with full pay. There is understandable unease among many colleagues about this step. Let me stress that this was an

> administrative undertaking, and reflects a range of different shortcomings and apparent behaviours. It was not a disciplinary action, nor was it meant to prejudge anyone's conduct. Rather, this step was necessary to protect the Organization's interests and to allow us to better establish facts. We are still at the early stages of this process. Before we draw any conclusions, we must get to the bottom of what has happened, quickly and thoroughly, with full respect for the due process rights of staff members.

The OIOS/PTF investigation

25. In April 2006 the OIOS/PTF commenced operations to investigate allegations of wrongdoing in the United Nations procurement activities under specific terms of reference approved by Ms. Ahlenius on 12 January 2006.

The 2006 Report and the Applicant's return to duty

26. On 13 September 2006, the OIOS/PTF presented its final report regarding the allegations against the Applicant ("the 2006 Report").

27. The OIOS/PTF concluded that the Applicant had not engaged in any fraudulent activity, but demonstrated a lack of managerial oversight and proper controls:

> …
>
> 206. It is evident that certain transgressions were presented to [the Applicant] after they had materialized, and that [the Applicant] was forced to react to a situation in which rules and/or policies were already ignored. Nevertheless, as the Mission's CAO it was incumbent upon [the Applicant] to establish controls to avoid future reoccurrences, create an environment mindful of the need to adhere to the Organization's financial and procurement rules, and operate within existing rules himself—setting an appropriate example. In sum, there must be a cumulative effect when findings intimate similar conduct, namely a lack of managerial oversight and the lack of proper controls to secure adherence to these rules.
>
> …

28. On 15 November 2006, the Applicant was returned to duty after his SLWFP, although he was advised that he would not be permitted to resume his duties as CAO,

UNMIS, or to return to his post at Headquarters as Chief, LSD/LOGOPS. The Respondent's representatives also informed the Applicant that he could not return to duty within LSD, but no explanation has been given for this restriction.

29. On 4 December 2006, the Applicant provided his written response to the 2006 Report.

30. On 14 December 2006, the Assistant Secretary-General for Peacekeeping Operations, DPKO, sent a memorandum addressed to all staff of the Office of Mission Support, DPKO, informing them, in relevant part, as follows (emphasis added):

> I am extremely pleased to announce that effective 17 January 2006, [the Applicant] returned to duty at DPKO headquarters. He has joined the Administrative Support Division in the role of ... Chief of Operations in PMSS [Personnel Management and Support Service].
>
> As you may know, in January 2006, as part of the ongoing audit and investigation in the Organization's procurement activities, the Secretary-General decided to place [the Applicant] and seven other UN officials on special leave. Following receipt of the investigative report prepared by the Procurement Task Force established by OIOS, the Secretary-General has decided that disciplinary action is not appropriate. *[The Applicant] was specifically cleared of any instance of fraud or criminal wrong-doing*.

*Case 2*

31. The following facts are based on the material submitted by the parties to the Tribunal in Case 1 and Case 2, as well as the factual outline included in the JDC Report No. 232 of 23 February 2009.

The Initial Reprimand and its later withdrawal

32. In November 2006, the Respondent took a decision that the Applicant should be issued a written reprimand in connection with the incidents investigated in the

OIOS/PTF 2006 Report (see the Respondent's 4 December 2007 memorandum referring the case to the JDC for advice, para. 20).

33. On 14 November 2006, the decision to issue the Applicant a reprimand was "approved" by the then-Deputy Secretary-General. This fact is evidenced by an unsigned and undated document forwarded by the Respondent to the JDC Secretariat on 19 January 2009, which was titled, "Comments on Questions Raised by the JDC" (the document is reproduced in the JDC Report No. 232, para. 19) and read, *inter alia*, as follows:

> (a&b) In a joint note, DPKO and OHRM [the Office of Human Resources Management] on 13 November 2006 recommended that administrative rather than disciplinary action be taken against [the Applicant]. This was approved by the then Deputy Secretary-General on 14 November 2006. It is understood that no steps towards an administrative action were initiated till early January 2007 .... Subsequently, the then Deputy Secretary-General requested that a further comparative analysis be undertaken concerning the case of [the Applicant].
>
> ...

34. As stated above, on 4 December 2006, the Applicant provided a written response to the 2006 Report. The Applicant's response addressed the OIOS/PTF conclusions that the Applicant had demonstrated a "lack of managerial oversight and the lack of proper controls" (see the 2006 Report, para. 206) regarding four projects: (a) Universal Weather & Aviation ("UWA"); (b) Kadugli Airport Refurbishment ("Kadugli Runway Lights"); (c) Short-term Fuel Contract ("Skylink"); and (d) Eurest Support Services ("ESS"); while the Report freed him from responsibility for the use of a heavy helicopter MI-26 ("Heavy Helicopter").

35. The above facts demonstrate that the decision to issue a reprimand to the Applicant was taken and approved at the highest levels *before* the Applicant's 4 December 2006 comments to the 2006 Report had been received.

36. Being prior in time to the issuance of the Initial Reprimand described hereinafter, the Applicant's 4 December 2006 response to the 2006 Report were not

intended to be, and cannot be interpreted as, a response to the contents of the Initial Reprimand.

37. On 16 January 2007, the Assistant Secretary-General ("ASG"), DPKO, issued the Initial Reprimand. The Initial Reprimand stated that the Applicant's "managerial oversight ... was inadequate in certain areas and that the chain of command under [the Applicant's] supervision did not administer its fiduciary responsibilities in a way that ensure that the standards required by the Organization were maintained". The Initial Reprimand further read that:

> …
>
> You are accordingly reprimanded for your failure to fulfil your functions and responsibilities to the standard required by the Staff Regulations and Staff Rules, and to exercise the necessary level of oversight over your subordinate senior managers in order to ensure a high standard of administration and full compliance with the rules of the Organization You will not be returned to your assignment in UNMIS, but will, rather, be placed in another position commensurate with your qualifications and the Organization's needs, and your performance will be monitored.
>
> In addition, you will be required to undergo training designed to strengthen your overall management skills to address weaknesses in oversight and control mechanisms...
>
> …

38. On 19 January 2007, the ASG/DPKO requested that the Initial Reprimand be withdrawn pending further review, and the Initial Reprimand was withdrawn the same day.

The decision to charge the Applicant with misconduct

39. On 30 March 2007, the Applicant was charged with misconduct under staff regulation 1.3(a) ("the Misconduct Charge").

40. The Misconduct Charge was filed against the Applicant, despite (a) the Respondent's statement in the 16 January 2007 Initial Reprimand that "the Organization considers that the issues raised by the [OIOS/PTF] report did not rise to

the level of misconduct, but should be dealt with administratively", and (b) the statement in the Respondent's 14 December 2006 memorandum to DPKO staff that the Applicant "was specifically cleared of any instance of fraud or criminal wrong-doing".

41. On 2 July 2007, the Applicant filed a response to the Misconduct Charge.

42. On 4 December 2007, the ASG for Human Resources Management ("ASG/OHRM") referred the matter to the JDC for advice on whether misconduct had occurred.

43. A JDC panel was constituted on 16 October 2008. The panel examined the separate projects of: (a) UWA; (b) Kadugli Runway Lights; (c) Skylink; (d) ESS; and (e) Heavy Helicopter.

44. On 19 January 2009, the Respondent forwarded to the JDC secretariat the unsigned and undated document cited above in para. 33.

45. On 23 February 2009, the JDC panel issued Report No. 232. The panel concluded that the decision to issue the Initial Reprimand "created a legally protected expectation that his case was closed and the charges against [the Applicant] were dropped" (see para. 28 of Report No. 232). The panel invoked principles of estoppel to state that the "Administration should be estopped from starting anew" in the act of filing misconduct charges against the Applicant (see para. 28 of Report No. 232). The report further stated the following (emphasis added):

> 29. The Panel further observed that any attempt to reopen the case after it had been duly closed, would seriously offend fundamental due process requirements, and would constitute a misuse of procedure. The Administration was bound as a matter of law to follow its own rules, in accordance with the principle of *patere legem*, which requires the Administration to act in good faith towards its staff by making decisions that are in accord with the rules of the Organization...
>
> …

> 32. Having conducted a careful review of the procedure followed in this case, and having weighed all relevant factors, the Panel came to the conclusion that for the reasons outlined above, the former Secretary-General's decision to close [the Applicant's] case and impose administrative actions was a proper exercise of his discretionary authority in disciplinary matters. *Any reversal of that decision must be based on compelling grounds, such as the existence of an error of fact or of law, or the uncovering of new facts of decisive importance that were not known to the Secretary-General when he made the original decision.* In the absence of such grounds, the Panel arrived at the inescapable conclusion that the Secretary-General could not reverse a discretionary decision taken and implemented by his predecessor. *To reopen [the Applicant's] case and review it on the merits would therefore amount to a serious violation of his rights to due process, and his right to be secure that after a final decision was taken by the former Secretary-General, his case was closed in accordance with Paragraph 9 of ST/AI/371*.
>
> 33. The Panel concluded that the reversal of the previous decision and the subsequent referral of the case to the JDC might have been based on valid policy concerns, *but they were not invoked in accordance with the staff rules and with basic principles of due process.* Therefore, this case was not properly before the JDC, based as it was, on an arbitrary reversal of a valid discretionary decision that had been taken by the former Secretary-General.
>
> 34. In light of the foregoing conclusions, the Panel unanimously recommended that the charges against [the Applicant] be dropped, and the decision previously taken by the former Secretary-General and conveyed to the staff member on 16 January 2007 be maintained.
>
> …

46. The JDC panel determined, on procedural grounds, that the Misconduct Charge should be dropped because the previous Secretary-General had properly closed the case in November 2006, when he directed the issuance of the Initial Reprimand. The JDC observed that, in re-opening the case, the Respondent had compromised the integrity of the internal justice system. The panel made no findings of fact or conclusions of law pertaining to the Misconduct Charge leveled against the Applicant. The panel unanimously recommended that the Misconduct Charge against the Applicant be dropped, and that the decision previously taken by the previous Secretary-General and conveyed to the staff member on 16 January 2007 (issuance of the Initial Reprimand) be maintained.

47. In recommending that the Initial Reprimand be reinstated, the JDC panel did not return to examine whether the Initial Reprimand had been properly issued in the first instance.

The decision to dismiss the Misconduct Charge and to issue the Reinstated Reprimand

48. On 2 June 2009, the Respondent decided to accept the JDC panel's recommendations to drop the Misconduct Charge and to reinstate the written reprimand that had been withdrawn on 19 January 2007.

49. On 29 July 2009, Ms. Susana Malcorra, Under-Secretary-General for Field Support, informed the Applicant that a reprimand would be placed in his Official Status File as recommended by the JDC.

50. On 8 September 2009, the Applicant filed an appeal with the Dispute Tribunal.

**Relevant legal provisions**

51. ST/AI/292 (Filing of adverse material in personnel records) states in relevant parts as follows:

> 1. In his first address to the Headquarters staff, the Secretary-General stated that "anything that is adverse to the staff member should not go on a confidential file unless it has been shown to the person concerned." The purpose of this instruction is to establish interim guidelines in implementation of that decision, pending completion of a comprehensive review, in consultation with the staff, of the system of personnel records.
>
> 2. *Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.* It shall be handled and filed in accordance with the procedures set out below, depending upon its source.
>
> 3. Adverse material may originate from sources outside the Organization or from other staff members in their personal capacity commenting on a staff

> member's behaviour or activities. ... Both the adverse material and the staff member's comments will be kept in the non-privileged portion of the confidential file to which the staff member will have access.

52. Former staff rule 110.3 (Disciplinary measures) stated, *inter alia*, as follows

> …
>
> (b) The following measures shall not be considered to be disciplinary measures, within the meaning of this rule:
>
> (i) Reprimand, written or oral, by a supervisory official;
>
> …

53. ST/AI/371 of 2 August 1991 (Revised Disciplinary Measures and Procedures) states as follows in relevant parts:

> …
>
> 2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation. Misconduct is defined in staff rule 110.1 as 'failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant.' Conduct for which disciplinary measures may be imposed includes, but is not limited to:
>
> (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
>
> (b) Unlawful acts (e.g., theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;
>
> (c) Misrepresentation or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;
>
> …
>
> (e) Misuse of United Nations equipment or files, including electronic files;

> (f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;
>
> (g) Acts or behaviour that would discredit the United Nations.
>
> ...

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether suspension is warranted. Suspension under staff rule 110.2 (a) is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant suspension without pay, in both cases without prejudice to the staff member's rights.

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

> (a) Inform the staff member in writing of the allegations and his or her right to respond;
>
> (b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;
>
> (c) Notify the staff member of his or her right to the advice of another staff member or retired staff member to assist in his or her responses; and offer information on how to obtain such assistance.

If the Secretary-General authorizes suspension, the staff member shall be informed of the reason for the suspension and its probable duration and shall surrender his or her grounds pass. A staff member on suspension may not enter United Nations premises without first requesting permission and shall be afforded the opportunity to enter, under escort, if necessary to prepare his or her defence or for any other valid reason.

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member’s written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

8. The entire dossier is then submitted to the Assistant Secretary-General, Office of Human Resources Management. It shall consist of the documentation listed under subparagraphs 6 (a), (b) and (c) above, the staff member’s reply and the evidence, if any, that he or she has produced. In cases arising away from New York, the responsible official shall promptly forward

the dossier to the Assistant Secretary-General, Office of Human Resources Management.

9. On the basis of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, shall proceed as follows:

> (a) Decide that the case should be closed, and the staff member should be immediately notified that the charges have been dropped and that no further action will be taken. This is without prejudice, where appropriate, to the measures indicated in staff rule 110.3 (b) (i) and (ii); or
>
> (b) Should the facts appear to indicate that misconduct has occurred, refer the matter to a joint disciplinary committee for advice; or
>
> (c) Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

…

**Applicant's submissions**

54. The Applicant makes the following primary contentions:

a. The Initial Reprimand was issued based on erroneous conclusions that were not supported by the facts or prevailing practices of the Organization;

b. The Reinstated Reprimand was done without any consideration as to whether the Initial Reprimand was proper and whether it was supported by the facts; without such an analysis, the Reinstated Reprimand violated the Applicant's due process rights;

c. The Reinstated Reprimand was done without a fair hearing of the Applicant's defense against the accusations that had been raised against him;

d. The Respondent's actions against the Applicant as to both the Initial Reprimand and the Reinstated Reprimand were motivated by prejudicial factors stemming from the Respondent's need to engage in a public relations

scheme to placate the United Nations Member States regarding procurement irregularities;

e. In each of the four instances cited by the Respondent as the basis for the Initial Reprimand and the Reinstated Reprimand (Kadugli Runway Lights, UWA, Skylink and ESS,), the facts and evidence presented by the Applicant demonstrate that the Respondent's reasoning was erroneous, thereby making the Initial Reprimand and the Reinstated Reprimand an improper exercise of discretion;

f. The Respondent did not take the Applicant's comments about the 2006 Report into account when the Respondent sought to establish the facts of the case and thereby denied the Applicant due process;

g. The facts show that the Respondent decided to reprimand the Applicant before he was given the opportunity to read and comment on the 2006 Report as to him;

h. The decision to issue the Reinstated Reprimand deprived the Applicant of his right to have case his adjudicated pursuant to former staff rule 110.3(a);

i. The JDC panel refused to consider the merits of the Initial Reprimand and was not in a position to determine: (a) whether a disciplinary or non-disciplinary measure was warranted; (b) if a reprimand was warranted; (c) whether the Reinstated Reprimand was the same as the Initial Reprimand; and (d) whether the Reinstated Reprimand was appropriate; and

j. The Applicant was summarily removed from his job as CAO/UNMIS; he was humiliated publicly, he had his right to confidentiality violated; he was not permitted to work for ten months; he was denied legitimate due process rights as an accused; he had his name included in a factually-incorrect OIOS/PTF investigation report that was released to the United Nations

Member States, one of which posted the investigation report on its internet website; he was sanctioned without a fair hearing and prohibited him from working in his area of greatest expertise; he was denied a legitimately-won promotion for some nineteen months by being reprimanded for contrived performance faults; he did not receive compensation for being involuntarily placed on special leave without justification; he was required to defend himself against unfounded disciplinary misconduct charges that were without merit; and he was the subject of the Reinstated Reprimand that left him without a remedy.

**Respondent's submissions**

55. The Respondent makes the following primary contentions:

a. The imposition of the Initial Reprimand is an administrative action pursuant to former staff rule 110.3(b) and, as with all administrative decisions, the Respondent enjoys broad discretion in deciding whether or not a reprimand should be imposed; unless manifestly unreasonable, the decision to impose a reprimand must stand;

b. Each of the four instances forming the basis for the Initial Reprimand are supported by sufficient evidence and demonstrate that the imposition of the Initial Reprimand was a valid exercise of the Respondent's discretionary authority;

c. The Applicant was given the right to comment on the findings of the 2006 Report as to him;

d. The fact that disciplinary charges had been dismissed as not receivable by the JDC did not affect the basis for the original reprimand, which was not considered substantively by the JDC; consequently, the basis for the Initial Reprimand remained untouched by judicial intervention and it was entirely legitimate for the Respondent to reinstate the reprimand in its original form;

e. A "new duty" did not exist for the Respondent to seek comments from the Applicant prior to the Reinstated Reprimand, as the Applicant had already submitted comments prior to the Initial Reprimand; and

f. The basis for the issuance of a reprimand was not within the jurisdiction of the JDC, as a reprimand is a non-disciplinary measure and the JDC was not in a position to consider the merits of a reprimand; thus, the Applicant's due process rights were not violated with the Reinstated Reprimand.

**Consideration**

*Were the requirements of ST/AI/292 properly observed when the Initial Reprimand was issued?*

56. The first analysis is whether the requirements of ST/AI/292 were properly observed when the Initial Reprimand was issued, namely whether the Applicant was shown a copy of the Initial Reprimand and "given an opportunity to make comments thereon" (ST/AI/292, sec. 2).

57. The Initial Reprimand against the Applicant was issued for his "failure to fulfil [his] functions and responsibilities to the standard required by the Staff Regulations and Staff Rules, and to exercise the necessary level of oversight over subordinate senior managers in order to ensure a high standard of administration and full compliance with the rules of the Organization" (see para. 37 above). The Applicant was further admonished that he would not be returned to his assignment in UNMIS, but would be placed in another position commensurate with his qualifications and the Organization's needs, that his performance would be monitored, and that he would be required to undergo training designed to strengthen his overall management skills to address weaknesses in oversight and control mechanisms.

58. Under ST/AI/292, sec. 2, "adverse material" is defined to be any "correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member". Both the Initial Reprimand and the Reinstated Reprimand qualify as adverse material for purposes of this administrative instruction, and the provisions of ST/AI/292 therefore apply.

59. While a reprimand is not considered a disciplinary measure under former staff rule 110.3 and therefore does not carry the same procedural safeguards that apply to disciplinary procedures under ST/AI/371 and ST/AI/371/Amend.1 (hereinafter referred to as ST/AI/371), certain protections nevertheless apply under ST/AI/292 (see also *Applicant* UNDT/2010/069 and the former United Nations Administrative Tribunal Judgment No. 1176, *Parra* (2004)).

60. ST/AI/292, sec. 2, specifies that adverse material may not be included in the staff member's personnel file unless it has been shown to the staff member concerned and the staff member is thereby "given an opportunity to make comments thereon".

61. The ST/AI/292 requirement was further amplified by the former Administrative Tribunal in *Parra* (see para. IV) and was linked with the internationally-recognised and fundamental due process principle of *audi alteram partem*, or the right to be heard (see also *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, para. 33):

> IV. A reprimand is not considered a disciplinary measure within the meaning of staff rule 110.3, as explicitly stated therein. The implication of this rule is that the procedural safeguards contained in the Staff Regulations and Rules in the form of the disciplinary process, which serve to benefit both the Administration and the employees, do not apply to a reprimand.
>
> However, this does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or

> natural justice, which implies, inter alia, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (*audi alteram partem*).
> …

62. A fundamental purpose of ST/AI/292 would be to allow the manager to review and consider the staff member's comments before issuing a reprimand. On this basis, the manager can either: (a) change her/his decision about whether to issue the reprimand; (b) modify its content; or (c) maintain it as it is. It makes no logical sense, and cannot be the intention of ST/AI/292, to have a manager issue a reprimand first, and for the comments of a staff member to be received only subsequently.

63. The established facts in this case demonstrate that the provisions of ST/AI/292 and the doctrine of *audi alteram partem* were not observed, and that the Initial Reprimand was improperly issued:

a. The decision to issue the Initial Reprimand *was taken* by the Respondent *and approved* then-Deputy Secretary-General in November 2006, without the existence of these decisions being known to the Applicant;

b. When the Applicant in December 2006 filed his comments to the 2006 Report, those comments did not constitute a response to the Initial Reprimand (whose existence was unknown and which had not yet been issued);,

c. The Applicant's comments to the 2006 Report were meaningless, since the decision to issue the Initial Reprimand had already been taken and approved as of November 2006;

d. The Initial Reprimand was issued on 16 January 2007 and was withdrawn only three days later, on 19 January 2007, before the Applicant had an opportunity to file any comments to it.

64. The Respondent also attempts to argue that, when the Applicant assisted DM in January 2006 to prepare comments on the 2005 Draft Report (para. 18 above),

those comments could form the substance of the Applicant's response to the Initial Reprimand. This contention cannot be correct, for the following reasons:

a. When the Applicant assisted DM in preparing comments to the 2005 Draft Report, he was only briefed on selected portions of this report; and

b. The Initial Reprimand and the 2005 Draft Report were each part of two different exercises undertaken by the Organization and a response to one exercise cannot be automatically and properly transposed into the other exercise. The Initial Reprimand was an administrative measure under former staff rule 110.3(b) and was governed by the procedures of ST/AI/292, while placing the Applicant on SLWFP was adopted under former staff rule 105.2(a)(i) as a consequence of the subsequent 2006 Report (determined by this Tribunal in *Johnson* UNDT/2011/123 to be improper and in fact constituting a *de facto* disciplinary measure requiring application of ST/AI/371).

65. The Tribunal finds that the Applicant was not accorded proper due process guarantees under ST/AI/292 and the internationally-recognised and fundamental legal principle of *audi alteram parem*, since he was not afforded an opportunity to see and to comment on the Initial Reprimand before it was issued.

*Did the Respondent properly observe the Applicant's due process rights when issuing the Reinstated Reprimand?*

66. As a factual matter, the Initial Reprimand was "placed back" in the Applicant's Official Status File following a 29 July 2009 communication from the USG for Field Support, Ms. Malcorra (see para. 49 above). The Tribunal has not seen any documentation for the Reinstated Reprimand that would suggest it is in any way different in content from the Initial Reprimand. Apparently, the Respondent simply took the Initial Reprimand and "placed it back" into the Applicant's Official Status File.

67. Several difficulties exist with the Reinstated Reprimand, that compel the conclusion that it was improperly issued:

> a. As with the Initial Reprimand, the Applicant was not permitted to see and to comment on the Reinstated Reprimand in accordance with ST/AI/292. The Reinstated Reprimand did not turn back the clock, as though nothing had happened after issuance of the Initial Reprimand. The Reinstated Reprimand carried a different date of implementation (2 June 2009), required observance of its own procedural requirements, and had its own legal consequences flowing from it; and
>
> b. The rules and regulations of the Organization, specifically ST/AT/371, did not allow for the issuance of a reprimand after a misconduct charge has been dismissed; under the specific provisions of ST/AI/371, para. 9, if the facts of a case did not appear to indicate that misconduct had occurred, the Secretary-General was required to close the case immediately, notify the staff member that the charges have been "dropped", and take "no further action".

68. Additionally, the Respondent's action in issuing the Reinstated Reprimand runs counter to the fundamental legal principle of the obligation of good faith and fair dealing.

69. In the Applicant's case, it appears that the Initial Reprimand and the Reinstated Reprimand are identical documents. The 2 June 2009 decision of the Secretary-General to accept the JDC's recommendation to reinstate the 19 January 2007 reprimand indicates that the two reprimands are identical:

> …
>
> … The Secretary-General agrees that the former Secretary-General's decision to close your case and impose administrative actions was a proper exercise of his discretionary authority. The Secretary-General notes that the decision to issue you with a reprimand was made prior to your being charged under ST/AI/371 and, therefore, consideration of paragraph 9 of ST/AI/371 is not applicable in this case. Nevertheless, the Secretary-General agrees with the general finding of

> the JDC that disciplinary proceedings should not have been commenced against you and agrees with the JDC's recommendation that the charges against you should be dropped and that the reprimand conveyed to you on 16 January 2007 be maintained. Therefore, the Secretary-General has decided *to drop the charges against you and to re-instate the reprimand issued to you on 16 January 2007*.
>
> …

70. The decision to issue the Initial Reprimand was made (in November 2006), when one Secretary-General was about to leave office, and another Secretary-General was to assume office in January 2007. It was the new Secretary-General who made the decision to withdraw the Initial Reprimand, pending review of the case. In this regard, the JDC panel concluded, in Report No. 232, that the decision for the Reinstated Reprimand was improper for the following reasons (see para. 28 of the Report):

> The circumstances of this case indicated that the former Secretary-General had exercised and exhausted his discretion [in deciding to issue the first administrative reprimand only] in this case. He had reviewed the whole dossier, considered [the Applicant's] answers to the allegations, and made an informed decision not to pursue disciplinary measures. It was the Panel's considered view that the Secretary-General was bound by the discretionary decision previously taken by his predecessor. *Furthermore, the Panel observed that* [the ASG/DPKO's] *memorandum to [the Applicant] created a legally protected expectation that his case was closed and the charges against him were dropped. Therefore, the Administration should be estopped from starting anew, given that [the Applicant] had already been informed of the Secretary-General's decision in this case, and all administrative actions resulting from this decision had been fully implemented.*

71. The Tribunal concurs with the JDC panel's conclusions that, when the Initial Reprimand was issued, the Applicant had a legally-protected expectation that his case was closed and that all matters flowing from the 2006 Report would be dropped. The Organization should be "estopped from starting anew, given that [the Applicant] had already been informed of the Secretary-General's decision in this case, and all administrative actions resulting from this decision had been fully implemented" (see para. 28 of the Report).

72. It would be anomalous, indeed, for legal decisions to be in jeopardy simply because of a change at the highest level of the administration. No one within the United Nations system—neither managers nor staff members alike—is benefited by a decision taken one day but where the next day, and every day thereafter, the staff member is concerned whether he or she will be subject to a different decision adversely affecting his career and reputation.

73. The Tribunal concludes that the Respondent did not properly observe the Applicant's due process rights when issuing the Reinstated Reprimand, since the Respondent failed to comply with the relevant provisions of ST/AI/292 and ST/AI/371, as well as the fundamental principle of good faith and fair dealing.

**Compensation**

74. Under the judgment of the United Nations Appeals Tribunal in *Antaki* 2010-UNAT-096, the Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation under Article 10.5 of its Statute for violation of the legal rights of a staff member, as provided under the Staff Regulations, Staff Rules, and administrative issuances.

75. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (*Wu* 2010-UNAT-042).

76. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059, *Ianelli* 2010-UNAT-093).

77. The Appeals Tribunal has specifically determined that under art. 10.5(a) of the Statute of the Dispute Tribunal, an award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damage designed to punish the Organization, which is prohibited under art. 10.7 of the Statute of the Dispute Tribunal (*Wu*).

78. Compensation may be awarded for egregious conduct surrounding an investigation. "It is apparent from the reasons given ... that this case is particularly egregious, commencing with the findings of the obviously biased investigation ... from the outset" (*Mmata* 2010-UNAT-092).

79. The Tribunal finds that the Applicant is entitled to compensation in this case based on the cumulative factors and legal determinations in this case:

a. The Applicant was not accorded proper due process guarantees under ST/AI/292 and the internationally-recognised and fundamental legal principle of *audi alteram parem*, since he was not afforded an opportunity to see and to comment on the Initial Reprimand; and

b. The Respondent did not properly observe the Applicant's due process rights when issuing the Reinstated Reprimand, since the Respondent failed to comply with the relevant provisions of ST/AI/292 and ST/AI/371, as well as the fundamental principle of good faith and fair dealing.

80. The Tribunal will award the Applicant the sum of four months' net base salary in effect as of January 2006. This compensation is made both under the head of pecuniary or economic loss, as well as under the head of moral injury (see *Johnson* UNDT/2011/123.

**Conclusion**

81. The Tribunal finds that the Applicant was not accorded proper due process guarantees under ST/AI/292 and the internationally-recognised legal principle of *audi alteram partem*, since he was not afforded an opportunity to see and comment on the Initial Reprimand before it was issued.

82. The Tribunal finds that the Respondent did not properly observe the Applicant's due process rights when issuing the Reinstated Reprimand, since the

Respondent failed to comply with the relevant provisions of ST/AI/292 and ST/AI/371, as well as the fundamental principle of good faith and fair dealing.

83. The Tribunal awards the Applicant, under art. 10.5 of the Statute of the Dispute Tribunal, the sum of four months' net base salary in effect in January 2006.

84. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 83 above is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 30th day of June 2011

Entered in the Register on this 30th day of June 2011

(*Signed*)

Santiago Villalpando, Registrar, New York