UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/022 /UNAT/1662
Judgment No.: UNDT/2011/162
Date: 16 September 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MUSHEMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bartolomeo Migone, WFP
Simone Parchment, WFP

Introduction

1. The Applicant, a former staff member of the World Food Programme ("WFP"), filed an application with the former United Nations Administrative Tribunal ("the former UN Administrative Tribunal") contesting the decision of WFP to separate him from service for reasons of misconduct, in accordance with former staff rule 110.3.

Facts

2. The Applicant entered the service of WFP on 1 February 2001 as a Logistics Assistant on a Special Service Agreement. Effective 1 November 2004, he was granted a fixed-term appointment to serve as a Logistics Assistant at the GS5/IV level in Dodoma, Tanzania. On 1 July 2007, he was promoted to the GS6/V level as a Senior Logistics Assistant in Dodoma. He remained in this position until his separation from service on 1 October 2008. As the Senior Logistics Assistant, the Applicant was responsible for supervising the two warehouses in Dodoma i.e. the main WFP warehouse and the Strategic Grain Reserve ("SGR") warehouse that WFP was renting from a Government counterpart.

3. On the morning of 18 September 2007, RM, one of the Storekeepers at the SGR warehouse in Dodoma was the only person on duty at the warehouse. This was due to the fact that the other SGR Storekeeper, CM, and the Tally Clerk, GM, were both on leave. While verifying the stock of vegetable oil in the warehouse, RM noticed an anomaly in the arrangement of the cartons of vegetable oil in one of the stacks (No. 22), which was located close to one of the warehouse doors. She called the Applicant, who was her immediate supervisor, at approximately 11:50 am to inform him of the irregularity.

4. The Applicant went to the SGR warehouse at approximately 13:00 hours and tried to count the stacks but according to him, each side seemed to have different

dimensions (i.e. twenty cartons at the front and fifteen at the back). He called GS, another Senior Logistics Assistant and reported the matter to him. GS advised him to re-stack the cartons to get an accurate figure but since the warehouse loaders were engaged in other duties, the Applicant and GS decided that the re-stacking and re-counting of the cartons should be done the following morning. The Applicant then drove RM and another WFP staff member to their homes sometime between 17:30 and 18:00 hours. After dropping of the other staff member, the Applicant visited with RM at her house.

5. At approximately 20:00 hours, a former WFP casual cleaner visited RM's house and informed the Applicant and RM that he had seen WFP vegetable oil being offloaded at a shop in the Makole area of Dodoma. The Applicant called GS and reported the matter to him and they agreed to meet at the police station. On the way to the police station, the Applicant met a police patrol and he proceeded with them to the shop instead. He called GS and told him to meet him and RM at the shop.

6. The police, the Applicant, RM and GS then went to the store, where they found vegetable oil in WFP jerry cans. The Applicant, RM and GS subsequently went to the police station. The Applicant and GS provided the police with formal statements. GS reported the matter to Ms. Neema Sitta, the Head of the Sub-Office ("HOSO"), at approximately 1:00 am on 19 September 2007.

7. Some time between 8:00 and 9:00 am on 19 September 2007, the HOSO visited the SGR warehouse and was shown the anomaly in the stack. A re-stacking exercise was carried out for about one week and it was discovered that 396 cartons of vegetable oil were missing.

8. A preliminary investigation carried out by the Field Security Assistant revealed that in actuality, 704 cartons (equivalent to 13.033 metric tonnes of oil, valued at approximately USD 15,000 were missing) were missing. The investigation also revealed that the loss was not from a single stack but from a cross section of stacks in the warehouse with the outer rolls and top layers of the stacks being

undisturbed. The Field Security Assistant concluded that the Applicant, RM, CM and GS were fully aware of the losses but chose to conceal it.

9. As a result of the preliminary investigation, the WFP Country Director for the Tanzania Country Office informed the Chief of WFP's Oversight Services Division – Inspections and Investigations ("OSDI") on 10 October 2007 of the potential theft in the WFP warehouse in Dodoma and that the Applicant, RM, CM and GS were indicated as potential suspects. The Country Director requested that a formal investigation be undertaken.

10. As a result of an agreement between the Tanzania Country Office and OSDI, Mr. Melville Smith, a Forensic Accounting Consultant, was hired to conduct the investigation in accordance with an investigation plan prepared by OSDI. The Forensic Accounting Consultant interviewed the Applicant on 25 and 30 October 2007. He submitted his final investigation report on 1 November 2007. After a review of the investigation report, OSDI conducted further interviews with the Applicant, RM, CM and GS and issued another report on 27 February 2008[1]. This report concluded, *inter alia*, that the Applicant had been grossly negligent in the performance of his duties and responsibilities as a Senior Logistics Assistant and recommended that appropriate administrative and disciplinary action be taken against him.

11. By a memorandum dated 15 April 2008 from the Director, Operations and Management Department of the Human Resources Division ("OMH"), the Applicant was charged with misconduct for gross negligence in the performance of his duties and responsibilities.

12. The Applicant provided his response to the allegations of misconduct by a memorandum dated 19 May 2008.

[1] See "OSDI e-mail Report (OSDI/101/07 – WFP Tanzania – I 45/07: Investigation of Theft of Vegetable Oil".

13. The matter was subsequently referred to an *ad hoc* Disciplinary Committee ("the Disciplinary Committee"), which was established at the Tanzania Country Office. The Disciplinary Committee found sufficient evidence of the Applicant's negligence in not detecting the loss in time and for failing to take immediate action to ascertain the loss once suspected. The Disciplinary Committee also found that he was negligent in not informing the HOSO who was his direct supervisor and in contacting and making statements to the police without informing the HOSO and obtaining authorization. The Disciplinary Committee ultimately concluded that there was gross negligence in the Applicant's performance of his duties and responsibilities and as a result, recommended that he be separated from service.

14. By a memorandum dated 25 August 2008, the Director, OMH, informed the Applicant that as a result of the findings, conclusions and recommendation of the Disciplinary Committee, the disciplinary measure of "separation from service" for reasons of misconduct, pursuant to staff rule 110.3(vii) was being imposed on him.

15. By memorandum dated 27 August 2008, the Country Director informed the Applicant that his fixed-term appointment with WFP would be terminated effective 1 October 2008.

16. The Applicant submitted the current application to the former UN Administrative Tribunal on 29 December 2008. The Respondent filed his reply on 20 July 2009 and the Applicant submitted his observations on the Respondent's answer to the UN Administrative Tribunal on 15 September 2009.

17. In accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice), the former UN Administrative Tribunal transferred its pending cases to the United Nations Dispute Tribunal ("the Tribunal") on 1 January 2010. The Applicant's case was transferred to the Tribunal in Nairobi.

18. The parties were given the opportunity to submit supplementary documents in addition to the documents that had already been filed with the former UN Administrative Tribunal. The Applicant did not submit any further documentation. The Respondent submitted supplementary documents and, with leave of the Tribunal, also submitted comments on the Applicant's observations on the Respondent's reply.

19. The Tribunal held an oral hearing in the matter on 10 and 11 November 2010. During the hearing, the Tribunal received testimony from the Applicant, the Forensic Accounting Consultant, Mr. Vittorio Speranza, one of the OSDI investigators who investigated the matter, the HOSO and three people (both former and current WFP staff members) who had worked with the Applicant.

Applicant's submissions

20. The Applicant submits the following:

a. That he was unaware of the loss and theft of the vegetable oil until RM informed him on 18 September 2007 that one stack showed signs of having been tampered with and the casual cleaner informed him that WFP vegetable oil was being offloaded at a shop in Makole;

b. That he performed his duties perfectly and followed all the required procedures in reporting the incident to the logistics focal person who coordinated logistics communication and that in this respect, the Respondent failed to establish how he was grossly negligent;

c. That informing the police of the theft of the vegetable oil was not a negligent act but rather the act of a responsible staff member who was trying to recover WFP property and prevent the destruction of evidence and that he provided a statement to the police in the interests of WFP and in compliance with Tanzanian law;

d. That the Disciplinary Committee denied him the right to be heard and to cross examine the witnesses and evidence presented against him;

e. That the Respondent relied on, without investigating, the statement and allegations made by other staff members against him when these allegations had no probative value;

f. That the facts on which the disciplinary measures were based did not legally amount to gross misconduct. There were numerous irregularities in the facts and the investigation was not properly conducted. He was judged before he was given the opportunity to defend himself;

g. The disciplinary measure imposed on him was illegal, unjust and disproportionate to the offence, if any; and

h. That in the 7 years and 6 months he worked for WFP, his performance was "successful" and he never received a verbal or written warning for negligence or misconduct.

Respondent's submissions

21. The Respondent submits the following:

a. The Applicant was grossly negligent because the risk of theft of WFP commodities from the SGR warehouse and the method of theft were reasonably foreseeable and as such, the Applicant recklessly failed to act as a reasonable person would with respect to the risk;

b. The Applicant's gross negligence was aggravated by his failure to take prompt action to ascertain the loss, and by his failure to report the loss to his supervisor, the HOSO, or to ensure that she was informed;

c. The facts on which the disciplinary measures were based were established and legally amounted to misconduct. There were no substantive irregularities in the establishment of the facts;

d. The disciplinary proceedings against the Applicant were conducted in accordance with the applicable procedures and the due process rights of the Applicant were respected during the investigation and disciplinary proceedings;

e. Former staff regulation 10.2 provided that the Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. The sanction imposed was legal and proportionate to the offense. The imposition of the sanction did not constitute an arbitrary exercise of discretion; and

f. There was no improper motive, abuse of purpose or arbitrariness in the exercise of the Respondent's discretionary powers.

Issues

22. It has been established by the jurisprudence of the United Nations Appeals Tribunal ("the Appeals Tribunal") that the role of the Tribunal in reviewing disciplinary cases is to examine the following[2]:

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;

c. Whether the disciplinary measure applied is proportionate to the offence; and

d. Whether there was a substantive or procedural irregularity.

[2] *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; and *Maslamani* 2010-UNAT-028.

23. In considering these issues, the Tribunal will scrutinize the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available and draw its own conclusions[3]. The Tribunal is not bound by the findings of the *ad hoc* Disciplinary Committee or of the Director, OMH.

Considerations

Whether the facts on which the disciplinary measure was based have been established

24. The Applicant is alleged to have been grossly negligent in the performance of his duties and responsibilities for the following:

a. Not reporting the missing oil identified during the inventory count on the morning of 18 September 2007 in a timely manner to the HOSO. The missing oil was reported to the HOSO only in the morning (01:00) of 19 September 2007;

b. Not reporting to the HOSO another incident on the same day (18 September 2007) that WFP oil was being sold in a shop in Dodoma in a timely manner. The incident was reported to the Applicant at 20:00 hours on 18 September 2007 and he reported it to the HOSO at 01:00 am on 19 September 2007 after he had reported the incident to the police and made official statements;

c. Reporting the incident to the Police and formalizing statements to the Police without having informed the HOSO and without obtaining her authorization; and

d. Not identifying even one of the 714 empty/semi-empty oil cartons in the warehouse during their regular physical inventory. This is supported by the statements of: (i) the HOSO, who said that it was not possible not to notice

[3] *Diakite* UNDT/2010/024.

704 empty/semi-empty oil cartons in the stacks; (ii) GM, who stated that the Applicant was aware of the empty/semi-empty oil cartons but decided, during a meeting with RM, GS, and himself, that the matter would not be reported to the HOSO and that the inventory on the stack cards should be left to reflect the inventory date; and (iii) HD, who declared that he had identified empty cartons during loading and reported it to a Tally Clerk.

Failing to report the missing oil identified during the inventory count on the morning of 18 September 2007 in a timely manner to the HOSO

25. The Tribunal does not doubt that the Applicant made a report on 18 September 2007 to GS regarding the anomalies in the SGR warehouse. What is in contention though is whether the Applicant properly reported the incident to GS or whether he was required to report directly to the HOSO.

26. The Respondent asserts that the Applicant should have reported the situation pertaining in the SGR warehouse on 18 September 2007 directly to the HOSO but failed to do so. In support of his contention that the Applicant was required to report to the HOSO and not to GS, the Respondent submitted an organizational chart for the Dodoma office showing a direct reporting line between the Applicant and the HOSO. While the chart is dated April 2008, the Tribunal will infer from the Applicant's testimony during the hearing that a similar chart existed on 18 September 2007.

27. Additionally, the Respondent invited the HOSO to give testimony at the oral hearing. She testified that she reported to the Dodoma office on 1 September 2007 and that both GS and the Applicant reported to her directly. She stated that she was unaware of any arrangement that had been made prior to her arrival in Dodoma regarding the Applicant reporting to GS.

28. In a response dated 19 May 2008, GS, who had also been charged with misconduct, stated that the Applicant was supposed to report the incident directly to the HOSO and that he was merely "supposed to cooperate with [his] colleagues

because we are to support the achievement of the Organization." It is noteworthy however that prior to his being charged with misconduct, GS seems to have accepted that it was his duty to report to the HOSO. In a 20 December 2007 interview with OSDI investigators, he was questioned on the issue of reporting to the HOSO and he did not, at that time, state that it was the Applicant's responsibility to report to the HOSO. Actually, when he was asked to explain why he had reported the matter so late to her, GS explained that (i) he was informed of the matter late in the afternoon; and (ii) it was unclear at the time of the Applicant's phone call whether it was just a matter of improper stacking or whether oil was really missing. There is nothing in the record of interview to show that GS protested against the Applicant reporting to him instead of directly to the HOSO. There is also nothing in the record to show that GS advised the Applicant to report the matter directly to the HOSO. The Tribunal finds it strange that GS would accept the report from the Applicant on 18 September 2007 without question if this had not been the accepted practice in the past and if he had no part to play apart from "cooperating" with his colleagues. In the Tribunal's view, GS took the report from the Applicant with a view to acting on it.

29. The Applicant submits that he reported the matter in a timely manner because he informed GS, who was the Logistics focal point for Dodoma, of the anomaly at the SGR warehouse on 18 September 2007. In a 12 December 2007 interview with OSDI investigators, the Applicant acknowledged that under the then existing organizational chart, he was supposed to report to the HOSO. He explained however that there had been changes at the Dodoma Sub-Office and that it was the practice for senior staff to report to the HOSO, and for Logistics Operations to report to GS. In his 19 May 2008 response to the "Allegations of Misconduct", he explained that he reported the matter to GS because GS had been appointed in 2004 by the then Head of Logistics to be the Logistics focal point and spokesperson for the Dodoma Logistics Unit and it was his responsibility to coordinate all logistics activities. He also asserted that in July 2007, the then Officer-in-Charge for Dodoma had made the Applicant responsible for daily activities carried out at the warehouse and GS was made responsible for coordinating

all logistics activities with HOSO, the Country Office, other field offices and implementing partners.

30. During the hearing, the Applicant further clarified that although he held the same title as GS, he had been reporting to GS since 2004 based on the directives of the then Head of Logistics. He testified that GS was made the Logistics focal point in 2004 because, unlike the other WFP offices, the Dodoma office did not have a Logistics Officer to serve as the focal point. Thus, to prevent situations where both of the Senior Logistics Assistants (i.e. the Applicant and GS) would end up reporting the same incidents, GS was appointed as the focal point for the Dodoma office. As a result of this appointment, GS was provided with an official mobile phone for coordinating information and making reports. The Applicant testified that he continued to report all logistics operations issues to GS until the 18 September 2007 incident when the communication set up was changed and he was required to report directly to the HOSO. He also testified that it was at this point that he started providing her with a report every morning and sometimes in the evening. The Tribunal notes the HOSO's evidence that she had a discussion with the Applicant after the incident regarding how the reporting line should look.

31. Two of the Applicant's witnesses, OAM, a former WFP Storekeeper, and GK, a former Tally Clerk, gave evidence that GS was the Logistics focal point and that all operations issues at the warehouse were reported by the Applicant to GS who in turn reported the matter to the relevant persons/offices. OAM also gave evidence that from the time he joined the Dodoma Sub-Office in 2005, the Logistics Unit in the Country Office (located in Dar-es-Salaam) would always communicate instructions for the warehouses through GS who would then pass it on to the Applicant. GK, who had been working as a Tally Clerk since 2004, gave evidence that GS was responsible for communicating with other offices and passing the information on to the Applicant.

32. When asked if it was not his responsibility to ensure that GS reported the matter to the HOSO, the Applicant explained that once he reported the matter to GS, he believed he had discharged his responsibility. He explained that since it was GS' responsibility to report, he believed that GS had done so and it was not until he followed up with GS after they left the police station that he discovered that the matter had not been reported to the HOSO after all. It was at this time that GS called the HOSO to report the anomaly in the warehouse and the incident at the store in Makole.

33. The Applicant's Management and Appraisal Performance report ("MAP") for the period 01-01-04 to 31-12-04 corroborates his contention that the organizational chart notwithstanding, the then Head of Logistics had made GS his supervisor in 2004. The Applicant subsequently objected to GS executing his MAP because they were at the same level. Thus in 2005 and 2006, his MAP was executed by the then Head of Logistics and in 2007, by the HOSO.

34. The Tribunal has taken note of the Applicant's acknowledgement of the formal reporting line set out in the organizational chart and of the testimony of the HOSO. However, based on: (i) the consistency of the Applicant's assertion of an informal reporting line from the time the issue was first raised by OSDI in December 2007; (ii) the reasons provided by the Applicant for the creation of the informal reporting line; (iii) his 2004 MAP; (iv) the answers provided by GS to the OSDI investigators in December 2007; and (v) the testimonies of OAM and GK the Tribunal is convinced that there was an accepted, albeit informal, practice in the Dodoma Sub-Office whereby the Applicant reported to GS on issues arising out of the logistics operations and GS in turn was responsible for reporting to the HOSO. Thus, based on this accepted practice, the Applicant acted appropriately and in a timely manner by reporting the anomaly identified by RM on 18 September 2007 to GS instead of the HOSO.

35. The Respondent asserts in his closing submission that the Applicant should also be found grossly negligent on the basis that he did not ensure that the HOSO had been informed. The Tribunal does not accept this line of reasoning in light of the fact that the Applicant was not charged with this and the disciplinary measure that was imposed on him was not on this basis. While it may have been prudent for the Applicant to follow up with GS, the Tribunal is of the considered view that this was not one of his responsibilities. It was the responsibility of GS to ensure that the HOSO was informed in a timely manner. The Tribunal concludes therefore that the facts supporting this allegation of misconduct have not been established.

Failing to report the sale of WFP oil in a Dodoma shop to the HOSO in a timely manner

36. Upon being notified of the sale of WFP oil in a Dodoma shop at approximately 20:00 hours on 18 September, the Applicant called GS and informed him of this new development. They then proceeded to report the matter to the police with a view to recovering the oil from the shop. Some time after midnight on 19 September 2007, the Applicant and GS left the police station. At this point, the Applicant followed up with GS and discovered that GS had not reported the matter to the HOSO after all. At approximately 01:00 hours, GS used the official phone to call the HOSO to report the anomaly discovered in the warehouse and the sale of WFP oil in the Makole shop.

37. When GS was asked by the OSDI investigators why he did not immediately inform the HOSO of the sale of WFP oil in a Dodoma shop, he did not say that this was the Applicant's responsibility. Rather, he explained that there was a lot of panic and that everybody was in a rush to get to the shop and to the police as soon as possible before the perpetrators could get away. He explained further that he "planned to talk to the HOSO after they were finished talking to the police".

38. The Tribunal notes its conclusion in paragraph 34 above that the available evidence indicates that the accepted practice in the Dodoma Sub-Office was for the

Applicant to report to GS and GS was, in turn, responsible for reporting to the HOSO on issues arising out of logistics operations. Thus, the Applicant made a timely report to GS upon receipt of the information from the former casual cleaner. It was then for GS to take the report further by calling the HOSO promptly. The Tribunal considers that due to the seriousness of the matter, it would have been prudent for the Applicant to follow up with GS but as been previously noted, this was not his responsibility. The Tribunal will reiterate that in its view, it was the responsibility of GS to ensure that the HOSO was informed in a timely manner. The Tribunal concludes therefore that the facts supporting this allegation of misconduct have not been established.

Reporting the incident to the Police and formalizing statements to the Police without having informed the HOSO and without obtaining her authorization

39. The OSDI investigators advised GS, but not the Applicant, that he had no authority to talk to the police. They told him that decisions regarding cooperating with the police had to be taken by the HOSO because of "immunity reasons". They concluded that talking to the police without consulting with the HOSO first constituted "a breach of procedure". Neither the "immunity reasons" nor the "procedure" that was breached were expanded on by the OSDI investigators in their report.

40. The Tribunal recognizes that the matter of United Nations staff members making reports to the police and formalizing statements is a very crucial issue that goes to the core of the privileges and immunities that have been granted to the Organization for the "fulfillment of its purposes"[4] and as such, every precaution must be taken, by staff and the Organization, to ensure that these principles are not compromised. The Tribunal is of the considered view that incidents, such as occurred in the present case, will continue to occur unless there is: (i) a formal/written procedure that sets out the steps to be taken by staff members vis-à-vis the law enforcement authorities of the host country when there is criminal behaviour; and (ii)

[4] Article 105, Charter of the United Nations.

training to ensure that staff members are aware of and understand their role in this context.

41. In the present case, the Respondent did not place any evidence before the Tribunal relating to the procedures a staff member should utilize when he or she is faced with criminal behavior that needs to be addressed post haste so as to safeguard the interests of the Organization. Thus, there was no yardstick by which the Tribunal could measure whether or not the Applicant failed to follow WFP's procedures in this respect. Neither did the Respondent place any evidence before the Tribunal to show that the Applicant had received training that would equip him to deal appropriately with such an important matter in the absence of any specific and/or written procedures.

42. It does not appear to the Tribunal that the Applicant, GS and the HOSO were even aware that they were not allowed to engage the police without authorization. When the incident was reported to the HOSO during the early morning hours of 19 September 2007 she did not see anything wrong with their actions. Her evidence was that when she learned that the Applicant and GS had already reported the matter to the police, she thanked them for what they had done and told them that they would speak further in the morning. There is nothing in her evidence to indicate that she admonished them for cooperating with the police without her authorization. Ironically, when she called the Head of Logistics for guidance the next day, she was advised to report to the police and follow up with them.

43. The Applicant informed the OSDI investigators in December 2007 that when the casual cleaner came to them with the information, "everybody was surprised/shocked and there was a lot of confusion as it was considered an urgent matter". He stated further that "[e]verybody was concentrated on getting to the police station as soon as possible before the evidence was destroyed". The Applicant explained in his response to the Allegations of Misconduct that reporting to the police "was a mandatory requirement to seek for immediate assistance to recover the oil and

prevent destruction of the evidence." GS explained in his response to the Allegations of Misconduct that "[r]eporting to the police was necessary owing to the fact that any incident of a criminal [*sic*] after noticing it to assist the police to combat crimes".

44. In light of the foregoing, the Tribunal is of the considered view that the Applicant did not act unreasonably by reporting criminal behavior to the police and cooperating with their investigation by providing a statement. Thus, the facts supporting this allegation of misconduct have not been established.

Not identifying even one of the 714[5] semi-empty/empty oil cartons in the warehouse during their regular physical inventory based on the statements of the HOSO, GM and HD

45. With respect to the time period within which the loss/theft occurred, the evidence is quite varied. The Respondent contends that the loss was sustained over a period of time i.e. between July and September 2007. In this respect, the Respondent relies on the statement of GM, a Tally Clerk, who asserted that sometime between 27 and 29 July 2007, one of the loaders discovered gaps in the cartons at the SGR warehouse while a truck was being loaded. The unnamed loader informed GM, who in turn informed the storekeepers, RM and CM. The Applicant was subsequently called to the warehouse and shown the problem. There was then a discussion as to whether the loss should be reported to the Sub-Office but no action was taken at this stage. According to GM, there was a meeting the next day that was attended by the Applicant, GS, RM, CM and himself. It was agreed at this meeting that the loss would not be reported so as to protect their jobs and that instead, an alternative means of replacing the lost oil would be devised. According to GM, stack cards were changed and cartons were transferred from other stacks to cover the losses, which continued to increase over time.

[5] The figure of 714 appears to be a mistake as the preliminary investigation identified a total loss of 704 cartons (i.e. 497 missing cartons + 207 empty cartons). The Tribunal will therefore use the figure of 704 as identified in the preliminary investigation report.

46. The Tribunal finds it quite interesting that out of the blue, the Respondent asserts in his closing submission that, based on the statement of GM, the Applicant **was aware** that oil was missing from the SGR warehouse at least as early as July 2007. Although the allegation of knowing about and intentionally covering up the losses is, in this Tribunal's view, a very serious issue, the Respondent did not pursue this within the context of disciplinary proceedings and apparently proceeded on the basis that the Applicant failed to notice or identify these empty/semi-empty and missing cartons. In this respect, the Tribunal notes:

a. The members of the Disciplinary Committee "detected a clear negligence as [the loss] should have been identified earlier";

b. The Respondent's argument in his Answer dated 17 July 2009 that the facts on which the disciplinary measure was based were established in that "[t]he Applicant also failed to notice that the middle layers of the stacks of cartons were empty […]".

c. The Respondent notes in his comments on the Applicant's observations, dated 23 September 2010, that the Applicant "in reckless disregard of [his] responsibilities […] failed to detect that any portion of that oil was missing". He also notes that "[t]he Applicant in this case failed to identify any portion of the more than 13 metric tons of oil that was stolen from the Respondent, and once the loss was identified, the Applicant failed to take the proper measures to report it".

47. It is unclear to the Tribunal how an individual can be accused of knowledge of a situation and yet be charged with failing to notice that same situation. The Applicant either knew or he did not know. The Respondent cannot have it both ways. In light of the fact that during the disciplinary process the Respondent chose to ignore the portion of GM's statement alleging that the Applicant had knowledge of the missing oil and instead proceeded on the premise that the Applicant did not notice or

detect the loss in dereliction of his duties, the Tribunal has no reason to proceed on a different basis.

48. The Respondent also relies on a Note for the Record that was prepared by the Forensic Accounting Consultant after he interviewed one HD, a loader at the SGR warehouse. According to the Note for the Record, HD stated that he found empty boxes in July 2007 while a School Feeding Program delivery was being loaded. He informed a Tally Clerk, who instructed him to take full boxes of oil from another stack for the delivery. HD did not provide the name of the Tally Clerk involved in this incident.

49. The Applicant asserted that the loss/theft probably occurred during the weekend of 15 and 16 September when there were no activities at the SGR warehouse. He denied ever being told about empty/semi-empty cartons by anyone and asserted that the statements of GM and HD were "false" and "baseless" on the grounds that there was no such report or meeting. RM and GS also denied any knowledge of semi-empty/empty cartons prior to 18 September and asserted that the alleged meeting reported by GM was a "fabrication" and/or "creation" as they had not participated in any such meeting. Similarly, CM denied any knowledge of semi-empty/empty cartons prior to 18 September and denied having attended the meeting alleged by GS.

50. GK initially gave evidence that the 704 cartons of oil were moved overnight. He later acknowledged that it was possible for the theft to have occurred over a long period of time. He gave evidence at the hearing that he never came across or was informed by any of the loaders, including HD, or GM of semi-empty/empty cartons at the SGR warehouse. OAM told the Forensic Accounting Consultant that it would take a very long time to take the oil containers out of the carton, replace the cartons back in the middle of the stack and load the oil containers in a truck. He also stated that it would take 10 loaders about 3 to 4 hours to load about 13 metric tonnes of oil onto a truck. He gave evidence that he participated in the monthly physical inventory

for July and August but did not notice any empty/semi-empty cartons at the time and never received a report from GM to this effect. JK, a loader who gave evidence on behalf of the Applicant, testified that he did not come across any empty/semi-empty cartons at the SGR warehouse between July and September 2007 and did not receive any reports from the other loaders to this effect.

51. The question that still remains is when the vegetable oil went missing from the SGR warehouse. The Tribunal is of the considered view that the losses were most probably sustained over a period of time. This is borne out by the large amount of vegetable oil that went missing, i.e. 13.033 metric tonnes, and the fact that the remaining cartons were re-arranged so meticulously that it was difficult to discern that anything had been removed without a re-stacking of the oil being done. In this respect, the Tribunal notes the acknowledgment of GK that it was possible for the theft to have occurred over a long period of time. Also noted is the statement of OAM that it would take a very long time to take the oil containers out of the cartons, replace the cartons back in the middle of the stack and load the oil containers in a truck. The amount of time needed to remove cartons from the stacks, open each carton to take out one or two containers, re-arrange the cartons in the stacks and load 13 metric tonnes of stolen vegetable oil on a truck indicates that this could not have been done overnight or during the weekend of 15 and 16 September, as asserted by the Applicant.

52. Nonetheless, the Tribunal is not convinced that the loss/theft started to occur during the July/August timeframe asserted by the Respondent. It is noted that monthly physical stock counts were carried out for the months of July and August and no losses were identified then. The available evidence shows that the physical stock counts for July and August were conducted by all logistics/warehouse personnel and entailed the participants counting the stacks and filling out the relevant counting forms. No evidence was placed before the Tribunal to indicate that the July and August physical stock counts did not occur or were not properly conducted. In light of the foregoing, the Tribunal is of the considered view that the losses were

probably sustained some time between 1 and 18 September since a physical stock count had not as yet taken place.

53. The next issue to be addressed is whether the Applicant failed to identify that there were semi-empty/empty cartons of vegetable oil in the SGR warehouse during the period of 1 to 18 September 2007. The Applicant stated repeatedly in various documents and at the hearing that he had never noticed empty/semi-empty cartons in the past and only became aware of the empty/semi-empty cartons after the 18 September 2007 incident. Based on the Applicant's own admissions, the Tribunal concludes that he failed to identify that there were semi-empty/empty cartons of vegetable oil in the SGR warehouse. Consequently, the facts supporting this allegation of misconduct have been established.

54. In light of the foregoing, the Tribunal concludes that the facts on which the disciplinary measure was based have not been established in relation to the Applicant: (i) not reporting the missing oil identified during the inventory count on the morning of 18 September 2007 in a timely manner to the HOSO; (ii) not reporting to the HOSO that WFP oil was being sold in a shop in Dodoma in a timely manner; and (iii) reporting the incident to the Police and formalizing statements to the Police without having informed the HOSO and without obtaining her authorization. The Tribunal concludes, however, that the facts on which the disciplinary measure was based have been established in relation to the Applicant not identifying even one of the 704 semi-empty/empty oil cartons in the warehouse during their regular physical inventory.

Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations

55. In light of the conclusion at paragraphs 53 and 54 above, the Tribunal's consideration of the allegation that the Applicant was grossly negligent in the performance of his duties and responsibilities will be limited solely to his not

identifying the 704 semi-empty/empty oil cartons in the warehouse during the regular physical inventory.

56. The Tribunal wishes to note that in accordance with an agreement dated 18 March 1999 between the United Nations Development Programme ("UNDP") and WFP, national staff or other employees engaged by WFP in Country Offices are subject to the United Nations Staff Regulations and Rules and related UNDP policies/procedures as well as practices.

57. Pursuant to UNDP/ADM/97/17[6] dated 12 March 1997 (Accountability, Disciplinary Measures and Procedures), gross negligence involves an extreme and reckless failure to act as a reasonable person would with respect to a reasonably foreseeable risk, regardless of whether intent was involved or not in the commission of the act or that the staff member benefitted from it.

58. The Tribunal will first examine whether the Applicant failed to perform his duties as required by his terms of reference ("TOR") and the relevant WFP manuals. The Applicant's TOR called for him to perform duties and responsibilities which included, *inter alia*:

a. Monitoring the receipt, dispatch and storage of the commodities for the Country Programme activities (i.e. school feeding, Food for Work, HIV AIDS and Nutrition);

b. Supervision of warehouse staff (stores clerk, tally clerks, loaders, etc.,) to ensure an effective discharge of duties commensurate with WFP warehouse procedures, maintaining warehouse cleanliness, proper stacking and stores record keeping and documentation; and

[6] This circular provides guidelines and directives on the application of Staff Regulation X and chapter 10 of the Staff Rules relating to accountability, disciplinary measures and outlines the basic requirements of due process to be afforded a staff member who is the subject of an allegation of unsatisfactory conduct.

c. Supervision of warehouses and warehouse premises.

59. According to the WFP Transport Manual[7], a manager, such as the Applicant, is required to "inspect the top of the stack to see that no holes or gaps have been created there and then must proceed to effect the count in the presence of at least two of his staff". The Transport Manual stipulates that an important aspect of accounting for commodities is the physical count of the commodities in the warehouse and that this must be done regularly (i.e. monthly). Additionally, a full physical stock inventory exercise where all food stocks are counted and verified is required at the end of each year.

60. Pursuant to the WFP Food Storage Manual[8], an inspection of the store and its contents must be done regularly (i.e. not less than once per week), and should include a complete walk around the store (i.e. inside and outside) and all stocks, looking carefully for signs of theft, security problems and any other problems.

61. The WFP Warehouse Management Handbook[9] provides that the store and food stocks are to be inspected at least once a week for physical damage, staining caused by water and evidence of theft. With respect to cereal grains, pulses, dried fruit and flour and blended foods, staff are to: (i) inspect all round the sides of a stack; (ii) push a bag up slightly to look between bags that are at corners; and (iii) at the top of the stack, lift some bags and look underneath to look for insect manifestations and/or spoilage. With respect to oil, warehouse personnel are advised to look for leaking containers during the inspection process.

62. The OSDI investigator gave evidence that the Applicant should have checked daily to ensure that the storekeeper was doing her job appropriately. Additionally, he stated that pursuant to the "Manual", the Applicant was required to walk on top of the layers and check/ensure that there was nothing missing from the middle of the stack.

[7] Due to the size of the Manual, the Respondent provided the Tribunal with only section 3.11.7.
[8] Due to the size of the Manual, the Respondent provided the Tribunal with only Chapters 1, 7 and 13.
[9] Due to the size of the Manual, the Respondent provided the Tribunal with only Chapters 2 and 9.

He asserted that this included removing the top and middle layers of cartons from the stack and checking the contents of the cartons during the monthly physical count.

63. According to the HOSO, the Applicant was responsible for spot checking on either a weekly or monthly basis, which entailed his doing re-stacking on a limited basis to count the contents of the cartons. She also explained that the storekeeper was responsible for checking the stacks every morning to ensure that the stacks were in the same condition as the night before.

64. The Applicant submits that he performed all of the functions required of him. According to the Applicant, he did the following: (i) monitored the storekeepers to ensure that commodities were being properly stored and stacked in the warehouse; (ii) conducted spots checks, which entailed his walking on top of the stacks at regular intervals to ensure that the cartons were properly arranged as required by the Transport Manual; (iii) conducted monthly physical inventories, which entailed staff members counting the stacks and filling out the counting form; and (iv) routinely checked the ledgers and stack cards to ensure they were updated. He stated that monthly physical inventories had been carried out at the end of July and August 2007 by all warehouse/logistics staff. OAM gave evidence that the Applicant conducted spot checks almost on a daily basis before signing the stack cards and ledger books and that whenever there was any movement of commodities, he would be at the warehouse to monitor it.

65. The Applicant stated that they were not moving the commodities around but were just checking the stacks to ensure that they were properly stacked and that the layers were properly arranged. He explained that they could not re-stack because there was not enough space in the SGR warehouse to accommodate this. The HOSO and GK gave evidence that there was very little empty space in the warehouse and that it was almost full. The HOSO explained that this was due to the fact that they were receiving food for the refugee operation.

66. Although the Respondent alleged that the Applicant was not performing his duties, there is no evidence to substantiate this allegation. The OSDI investigator was unable to tell the Tribunal whether or not the Applicant had been performing the monthly stock counts and he did not know if the Applicant had been conducting spot checks. Apart from stating that the monthly stock counts should have been conducted in accordance with the "manual", he was unable to describe how it was or was not being carried out at the Dodoma Sub-Office. He explained that the investigators had come to the conclusion that the Applicant was negligent in the performance of his duties based on the statements of GM and HD and the fact that he had not noticed 704 semi-empty/empty oil cartons in the warehouse.

67. The Tribunal did not find the HOSO's evidence on this issue to be very helpful since she had only been in her position for 17 days when the anomalies were identified by RM. Consequently, she could not provide any details as to the conduct of the July and August stock counts. She stated that when the anomaly was identified on 18 September 2007, she had no knowledge of how the monthly stock count was done because she had not participated in any before. She also gave evidence that as a program officer, she really did not know the technical side of warehouse management. While she was given an orientation by the warehouse personnel when she arrived in Dodoma, she acknowledged that she gained most of her knowledge of warehouse management (i.e. counting the layers and stacking) after the incident. Instead of providing the Tribunal with tangible facts as to the Applicant's negligence, the HOSO was only able to offer conjecture. According to her, if the Applicant had been performing his duties, he would have noticed the anomalies. It is unclear to the Tribunal how a person who had no knowledge of warehouse management and was therefore undergoing orientation could determine that the Applicant was not performing his duties after only 17 days on the job.

68. In light of the foregoing, the Tribunal finds that the Respondent did not establish that the Applicant failed to perform his duties as required by his TOR and the relevant WFP manuals. The available evidence indicates that the Applicant

performed the duties that were required of him by his TOR and the relevant WPF manuals. The Tribunal does not accept the Respondent's assertion that the Applicant should have moved and opened the cartons in the warehouse to check the contents during the monthly physical count (i.e. re-stacked) because this was not detailed in any of the documents submitted by the Respondent. Additionally, the available evidence indicates that re-stacking is a requirement where an anomaly is identified or the manager perceives something to be wrong. It is noted that such an anomaly was not identified until 18 September 2007 and once it was identified, a weeklong re-stacking exercise was undertaken.

69. The Tribunal will now examine whether a reasonable person in the Applicant's position would have been able to identify the semi-empty/empty cartons in the performance of his daily duties.

70. The OSDI investigator gave evidence that the stacks should not be more than 6 or 7 layers so that warehouse personnel can walk on top of the cartons freely. However, the Applicant gave evidence that the stacks in the SGR warehouse were more than 10 layers and that there were 22 stacks. There was also evidence that the SGR warehouse stacks were huge in that a single layer could contain up to 800 cartons. The HOSO gave evidence that the top layer was comprised of about 100 to 200 cartons and that during the re-stacking exercise that was conducted after 18 September to ascertain the extent of the loss, the first and second layers were found to be intact. It was not until they reached the third layer that they began to find the semi-empty/empty cartons. There was evidence that due to the way the semi-empty cartons were replaced in the middle of the stacks, someone could walk on top and not notice that there was a problem underneath. Additionally, since these cartons were not from the same stack but from about 8 different stacks this prevented the stacks from collapsing. There was also evidence that since the semi-empty cartons were in the middle of the stack, they could not be seen from the outside. Thus, in the Tribunal's view the semi-empty/empty cartons could only be identified by re-stacking, which was not called for during the normal performance of the Applicant's duties.

71. However, the HOSO was of the view that if someone had really taken the time to check the stock thoroughly he/she would have noticed the missing cartons. The Tribunal finds this to be an unfair assessment. Noting that there were 22 stacks and each stack had more than 10 layers and each layer contained up to 800 cartons, the Tribunal is of the considered view that the missing cartons would not have been readily noticed using the inspection method outlined in the Food Storage Manual and Warehouse Management Handbook i.e. walking around the store and all stocks and looking carefully for signs of theft, security problems and any other problems. The missing cartons would probably have been noticed during the monthly physical count, which entailed a count of the cartons in the stacks. As noted earlier, monthly physical stock counts for July and August did not reveal any losses and since it was only the middle of the month, the physical stock count for September had not been conducted.

72. Consequently, the Tribunal finds that a reasonable person in the Applicant's position would not have been able to identify the semi-empty/empty cartons in the performance of his routine daily duties.

73. Lastly, the Tribunal will examine the Respondent's contention that the Applicant was grossly negligent because the risk of theft of WFP commodities from the SGR warehouse and the method of theft were reasonably foreseeable and as such, the Applicant recklessly failed to act as a reasonable person would with respect to the risk.

74. As noted earlier, WFP has two warehouses in Dodoma – the main WFP warehouse and the SGR warehouse that WFP was renting from a Government counterpart. The available evidence shows that prior to the rental of the SGR warehouse, WFP stored its commodities in the main WFP warehouse, which consisted of Rubb Halls (i.e. tarpaulin tents). In 2002, 2005 and 2006, there were thefts of commodities, mostly vegetable oil and peas, from the Rubb Halls in about the same way as in the SGR incident of 18 September (i.e. from the third layer in the

middle of the stacks). WFP changed padlocks, enforced security measures and engaged the assistance of the police in an effort to curtail the thefts but without success. Finally, in May 2007, WFP decided to move the vegetable oil from the Rubb Halls to the SGR warehouse, where it was thought it would be safe. The thefts continued at the Rubb Halls so Management implemented daily stack counting in both warehouses. In the Rubb Halls, the storekeepers were required to carry out the daily stack counting with the security guards, who were responsible for the commodities after working hours.

75. The OSDI investigation report notes that the SGR warehouse was guarded by security guards who were hired by the Government counterpart and that due to the poor security control they did not record the inward and outward movements of trucks from the SGR warehouse as part of their duties. Since the security guards at the SGR warehouse were not hired by WFP, they did not participate in the daily stack counting with the storekeepers at this location.

76. According to the Applicant, GM called him some time in July 2007 to report information he had received from an SGR loader about four people, including a key fabricator and a guard, planning to steal vegetable oil and cement from the WFP Rubb Halls. According to the Applicant, he passed this information on to the then OIC, Dodoma, who in turn took the police to the main WFP warehouse but the alleged perpetrators were nowhere to be found. When GM was asked to bring the loader for questioning, he failed to do so.

77. The Respondent submits that in light of the circumstances outlined in paragraphs 74 to 76 above, the risk of theft of WFP commodities from the SGR warehouse and the method of theft were reasonably foreseeable to the Applicant and as such, he should have applied a high standard of diligence with respect to the risk. The Respondent submits that in the high risk environment of the Dodoma Sub-Office, the Applicant should have conducted more frequent spot checks, which should have

included moving and examining a random sample of cartons. The Respondent also asserts that since commodities had been removed from the middle layers of the stacks in the Rubb Halls, the Applicant should have looked in the middle of the stacks during his spot checks.

78. The Tribunal finds no merit in the Respondent's contention that the Applicant was grossly negligent because he failed to appreciate that the risk was reasonably foreseeable and to adequately address it. First, there was no evidence placed before the Tribunal to show that there had been any thefts or loss of WFP vegetable oil from the SGR warehouse prior to 18 September 2007. Secondly, the Tribunal wishes to note that WFP deemed the SGR warehouse to be safer than the Rubb Hall tents, hence the transfer of commodities. In this respect, the Forensic Accounting Consultant's observation regarding the SGR warehouse is relevant. He wrote that:

> "[…] The warehouse itself is impressive and well designed. There are six doors on the one side, one at each end and none on the back wall. The doors are low enough to prevent lorry or trailer access and have solid steel posts outside the door frames to prevent damage to the doors. The eves had wire mesh and one door had a lock on the outside, to grant access, whilst the other five doors on the side and those at either end were locked from the inside."

79. With respect to security at the SGR warehouse, the Forensic Accounting Consultant wrote:

> "[…] Entry to the SGR compound was unchecked, either the vehicle or its occupants, by any security measures [...] On leaving the SGR compound there was no exit security check at the gate."

80. With respect to security at the WFP Rubb Halls, the Forensic Accounting Consultant wrote:

> "On driving into the other stores compound the vehicle was checked and the occupants asked to sign in by Ultimate Security. Wherever the investigator traveled around the Wiik and Rubb Halls there was a security guard following

> […] On leaving the compound the vehicle was again checked by the security staff."

81. If the risk was as reasonably foreseeable as asserted by the Respondent, why didn't WFP put in place the same security arrangements at the SGR warehouse that existed at the Rubb Halls? In the Tribunal's view, this was because WFP considered the SGR warehouse, which was comprised of a hard-wall structure, to be safer than the Rubb Halls, which were tarpaulin tents. If the Organization itself fails to appreciate a so-called reasonably foreseeable risk, is it fair to condemn a staff member when he fails to appreciate the same risk? The answer is a resounding no.

82. Secondly, as was noted earlier, the SGR warehouse contained 22 stacks. Each stack was comprised of more than 10 layers. The top layer was comprised of about 100 to 200 cartons. As with the SGR incident, the Rubb Hall vegetable oil was taken from the third layer in the middle of the stacks. This means that the Applicant would have had to re-stack (i.e. remove and individually check) hundreds of cartons of oil on a daily or weekly basis. Further, OAM gave evidence regarding the challenges that WFP faced in relation to the retention of loaders. He told the Tribunal that even though the loaders had service agreements with WFP, they would abandon their WFP duties to go work for other companies because they were paid higher salaries and on a daily basis as opposed to WFP's lower weekly payments. JK also gave evidence in respect of the few numbers of loaders that were available to carry out work at the WFP warehouses.

83. Was the Applicant really expected to re-stack hundreds of cartons of oil on a daily or weekly basis because there had been previous thefts at the Rubb Halls? That, in the Tribunal's view, is an unreasonable demand to make of anyone, especially in light of the evidence that was provided on the lack of adequate numbers of loaders to assist with said re-stacking of commodities. The Tribunal finds that based on the conditions prevailing in the SGR warehouse, which made WFP deem it to be safe, the Applicant adequately performed his duties by: (i) conducting daily spots checks,

which entailed his walking on top of the stacks to ensure that the cartons were properly arranged as required by the Transport Manual; and (ii) conducting monthly physical inventories.

84. The Tribunal concludes therefore that the established facts do not legally amount to misconduct within the meaning of staff rule 110.3.

Whether the disciplinary measure applied is proportionate to the offence

85. Based on the circumstances of this case, the Tribunal finds that the penalty of separation from service was disproportionate and unwarranted.

Whether there was a substantive or procedural irregularity

86. In *Johnson* UNDT/2011/123, Kaman J. noted that there are two distinct investigatory procedures set out in ST/AI/371 (Revised disciplinary measures and procedures) in that section 2 deals with preliminary investigations while section 6 deals with formal investigations. The Tribunal opined that:

> "For an investigation to be regarded as merely preliminary in nature, some "reason to believe" must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must not have reached the stage where the reports of misconduct are "well founded" and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the [Assistant Secretary-General, Office of Human Resources Management]. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member […].
>
> It is a fundamental principle of due process that where an individual has become the target of an investigation, then that person should be accorded certain basic due process rights […]."

87. In *Applicant* UNDT/2011/054, Shaw J. concluded that:

> "To give full effect to the requirements of staff rule 110(4) which embodies the elements of fair process in disciplinary investigations, the preliminary investigation undertaken pursuant to [ST/AI/371] and any related IOM/FOMs should be treated as strictly preliminary. The disciplinary part of the process, including the interview of the alleged offender should only occur once all the preliminary evidence has been made available to the staff member and the specific allegations against him or her have been finalized. If there is to be an interview it should properly be the last step in the investigation as envisaged by paragraph 6(a-c) of ST/AI/371."

88. Similarly, two distinct investigative procedures are provided for in UNDP/ADM/97/17. The first one, under paragraph 2.1.a, relates to an investigation where no specific allegation of misconduct is reported or individual staff members are identified. At this initial stage, there is nothing substantially adverse against the staff member. The exercise is more a gathering or collecting of evidence. That evidentiary procedure requires witnesses to be interviewed and documents or specific objects to be secured or seized. The standing practice, as it emerges from a long line of cases that have been decided or have come before the Tribunal, indicates that invariably, the "suspected" staff member is questioned. The Tribunal pauses here and asks the question that is very pertinent to the process, namely, whether during the course of the interrogation of the staff member at this preliminary stage, he/she is informed of his/her rights if there is any incriminating matter that has been raised against or by him/her. Normal due process rights would require such a warning. This is never done. Nor is the staff member informed of his/her right to legal or other representation at such an interrogation.

89. The second suggested investigative procedure, under paragraph 2.1.b, deals with the case where a staff member is investigated for unsatisfactory conduct. Whereas the investigation under paragraph 2.1.a is administrative in nature, the one provided for under paragraph 2.1.b is disciplinary and is "initiated" by a formal letter of allegation and "staff participating in or otherwise involved shall be accorded necessary due process protections". Pursuant to paragraph 2.1.b, when a staff member

has engaged in unsatisfactory conduct, an investigation is ordered by the head of office. But before such an investigation is embarked on, there must be "reason to believe" that a staff member has engaged in "unsatisfactory conduct".

90. The expression "reason to believe" is neither defined nor explained. An investigation in a case of suspected unsatisfactory conduct requires the existence of some cogent evidence of the unsatisfactory conduct. No such investigation can be initiated on a mere hunch or rumor. Nor should such an investigation be used for a fishing expedition to find evidence against a staff member. Those responsible for initiating such an investigation must therefore bear in mind that the threshold of reasonable belief must be satisfied.

91. One may refer by analogy to what obtains in criminal law. An arrest cannot take place if the law enforcement authorities do not satisfy the test of reasonable suspicion or probable cause. If this test is not met the arrest may be unjustified and arbitrary. Likewise, an investigation that is initiated under the rules, regulations and administrative issuances of the United Nations without a justifiable and reasonable belief that an act of misconduct may have taken place may appear to be arbitrary.

92. It is invariably on the basis of the evidence gathered during the paragraph 2.1.b investigation that the head of office will recommend further action. This is provided for by paragraph 2.5, which is entitled "Initial Findings of Misconduct". This section provides that:

> "Where the investigation, as under paragraphs 2.1.b and 2.1.c above, appears to indicate that the report of misconduct is well founded, the head of office or the official responsible for the investigation shall make a recommendation for disciplinary action to the respective official at UNDP/UNFPA or UNOPS in charge of personnel, giving a full account of the facts that are known and attaching relevant documents."

93. It is at this stage that the staff member is communicated the report of misconduct and invited to send his/her response under paragraph 3.1. Two situations emerge from this procedure. If the head of office is satisfied with the response of the

staff member and there is no ground for disciplinary action, the matter ends here (paragraph 3.2). But if the head of office concludes that a *prima facie* case has been made out, the matter may be referred to a disciplinary committee (paragraph 3.3). If a disciplinary committee is established then the full panoply of due process safeguards, as detailed in paragraph 3.7, comes into play.

94. Now since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted. Flaws may exist in an investigation because relevant witnesses have not been interviewed or because the "suspected" staff member has been denied the right to call witnesses on his behalf or because the investigators have declined to call witnesses named by the staff member, or because the staff member was not legally represented at this initial stage, he/she may have answered seemingly innocent questions that turned out to be incriminating. Since the preliminary investigation is the harbinger of a disciplinary proceeding it is vital that it be conducted in a rational, lawful and judicious manner. It should not be the gateway to a foregone decision to the establishing of a disciplinary committee or a finding of guilt.

95. The due process requirements that come into play in an alleged case of misconduct of a staff member under paragraph 2.2 are the following:

a. The rights and interests of the Organization must be respected;

b. The rights and interests of the potential victims must be respected;

c. The rights and interests of any staff member subject to or implicated by an allegation of misconduct must be respected. The rights of the affected staff member are as follows: (i) he/she must be notified in writing of all the allegations and of his/her right to respond; (ii) he/she must be provided with copies of all documentary evidence of the alleged misconduct; and (iii) he/she

must be advised of his/her right to the advice of another staff member or retired staff member as counsel to assist in preparing his or her responses.

d. Allegations, investigative activities and all documents relating to the action must be handled in a confidential manner.

96. In the present case, the Applicant alleges that he was not afforded due process because there were procedural irregularities in relation to the investigation process, the allegations of misconduct and the conduct of the ad hoc Disciplinary Committee. The mere assertion of the Respondent that due process rights were respected is not enough to convince the Tribunal that this was indeed the case. Thus, the Tribunal must review each of the areas complained of by the Applicant, using the criteria set out in paragraphs 84 to 93 as the litmus test.

The investigations

97. Were the due process rights of the Applicant respected? Pursuant to paragraph 2.1.a, a preliminary investigation was carried out by the Field Security Assistant soon after the 18 September 2007 incident in Dodoma was reported. His report established that WFP had sustained a loss of 13.033 metric tonnes of oil. His report also concluded that the theft was not a one time incident but an accumulation of concealed losses that occurred "with [the] full knowledge" of the Applicant et al "who decided not to report […]". This preliminary investigation, in effect, clearly identified the Applicant as a possible wrongdoer and, in the Tribunal's view, made him the logical target of a subsequent investigation. According to the Field Security Assistant, his conclusion was based on information from GM, HD, a letter from one RG, also a storekeeper, and a text message from an unidentified individual to the HOSO. The Tribunal never saw the letter from RG or the text message. During the OSDI investigation, RG denied writing or sending this letter.

98. As a result of the preliminary investigation, the Country Director requested that OSDI conduct a formal investigation. In view of the fact that the Applicant had

been clearly identified as a possible wrongdoer in the preliminary report, the Tribunal concludes that he should have been accorded the due process rights detailed in paragraph 2.2 of UNDP/ADM/97/17 upon the commencement of the OSDI investigation. Thus, he should not have been interviewed by OSDI until all the preliminary evidence had been made available to him and the specific allegations against him had been finalized. This would have ensured that his "rights and interests" were not only respected, but also protected.

99. It is noted that the Applicant was advised that at the commencement of the interviews, the investigators advised him that he was being interviewed concerning "allegations of food theft in the WFP Dodoma warehouse" and that the investigation could result in administrative or disciplinary action against him. It is also noted that halfway through the Applicant's record of interview, the OSDI investigators advised him vaguely that "there were numerous witnesses who indicated that empty cartons of oil had been noted on various occasions in the past". As noted by Shaw J. in Judgment No. UNDT/2011/054, a statement before the interview that the investigation is into possible misconduct is not sufficient. This is especially relevant since paragraph 2.2 dictates that staff member be notified in writing of all the allegations.

100. The available evidence indicates that the Applicant was not accorded the requisite due process rights until he was given the Allegations of Misconduct of 15 April 2008. Consequently, the Tribunal concludes that the Applicant's right to due process was violated.

101. On the issue of the conduct of the investigation, Meeran J. made the following observation in *Mmata* UNDT/2010/053:

> "It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude

that misconduct has occurred."

102. Was there a "thorough" investigation in the present matter? The Applicant submits that the investigations were inadequate as the investigators failed to interview other Tally Clerks and loaders working at the warehouse.

103. The Respondent avers that the investigation included interviews of individuals who had or were likely to have direct knowledge of the matter, i.e. the Applicant, the other Senior Logistics Assistant, the HOSO, the Storekeepers, a Tally Clerk and a Loader who had stated they knew of the missing oil prior to 18 September 2007. The Respondent submits that the Applicant failed to identify any other individuals he wished to be interviewed and that the Forensic Accounting Consultant would have welcomed such suggestions to facilitate his investigation. The Respondent maintains however that even if the statements of other Tally Clerks and loaders could be considered to have marginal relevance, it would not have affected the ultimate findings in this case because the lack of knowledge of some individuals does not refute the knowledge of others. The Respondent asserts that the evidence adduced by the Applicant failed to refute the findings in the investigation report.

104. As a preliminary matter, the Tribunal wishes to note that the Applicant failing to identify other individuals to be interviewed does not absolve the investigators from conducting a comprehensive investigation.

105. Based on the Investigative Plan, the Forensic Accounting Consultant was supposed to interview the staff member who had been in charge of the Sub-Office until the arrival of the HOSO in September (i.e. the OIC Dodoma). He was also supposed to meet with the Head of Logistics in the Country Office to familiarize himself with the processes. He notes in his report however that neither the OIC Dodoma nor the Head of Logistics were available. No reason is given for their unavailability and no explanation is given as to why these staff members were not contacted at a later date by the investigators to provide statements. If the OIC

Dodoma had been interviewed, he could have easily affirmed or disaffirmed the reporting line for the Applicant prior to the HOSO taking office in September 2007.

106. Additionally, while there were three other Tally Clerks, apart from GM, working at the SGR warehouse, neither the Forensic Accounting Consultant nor the OSDI investigators sought to question any of them about empty/semi-empty boxes prior to 18 September or about the management of the SGR warehouse. There was also evidence that there were three other SGR Storekeepers, apart from RM, and at least 9 other loaders on HD's team but none of these people were interviewed by the investigators. These people may have had very useful information on the management of the SGR warehouse and on the missing/empty cartons. When asked why he did not cross check HD's information with some of the other loaders, the Forensic Accounting Consultant explained that logistically, it would not have made sense for him to interview all the others as they had not complained and he did not want to waste time interviewing people who did not have anything additional to add. He noted however, that if they had come forward to give him information or if the Applicant had suggested they be interviewed, he would have welcomed them.

107. The circumstances of this case also required that the investigators visit the premises and check it meticulously, inside and out. The Forensic Accounting Consultant explained that the day he went to the SGR warehouse, he was able to check the outside of the warehouse but was unable to get inside because the Applicant had decided to fumigate the premises. It is unclear to the Tribunal whether or not he had informed the Applicant he would visit that day and the Applicant intentionally had the warehouse fumigated but the question still remains as to why he didn't go back for another visit. If he had taken the time to go back and examine the contents of the warehouse, he might have been able to provide an overview in his report on the number of stacks, how the cartons were stacked and the volume of cartons within the stacks. Since the Forensic Accounting Consultant was retained to carry out the investigation on behalf of OSDI, the OSDI investigators relied on his report and did not go to Dodoma to examine the premises for themselves. This, in the

Tribunal's view, turned out to not be the best approach because the OSDI investigator who testified at the hearing was under the impression that the stacks at the SGR warehouse contained no more than 6 or 7 layers when they in actuality contained more than 10 layers.

108. It is also quite interesting that the OSDI investigators also did not deem it necessary to interview any of the other people listed at paragraph 106 upon their receipt of the Forensic Accounting Consultant's report. Was the Applicant's culpability a predetermined conclusion in light of the findings of the preliminary investigation? This would explain the hasty investigation conducted by the Forensic Accounting Consultant from 22 to 30 October 2007 and the acceptance of the statements of GM and HD by OSDI without interviewing them further as the Applicant, RM, GS and CM were subsequently interviewed. Paragraph 4.1 of UNDP/ADM/97/17 stipulates that investigations under paragraph 2.1.b or 2.1.c "shall include statements from witnesses, signed or certified by them, […]". It is noteworthy that the statement of HD, which was one of the foundations upon which the Applicant was charged with misconduct, was recorded in an unsigned Note for the Record.

109. In light of the foregoing, the Tribunal concludes that a "thorough" investigation was not conducted in the present matter and in the absence of such an investigation, it is not reasonable or just to conclude that misconduct has occurred.

The Allegations of Misconduct

110. The Applicant claims that the Respondent failed to provide him with a copy of the investigation report when the Allegations of Misconduct, dated 15 April 2008, were given to him.

111. The first paragraph of the Allegations of Misconduct, dated 15 April 2008, reads as follows:

> "Please find attached the following investigation report: *"OSDI E-mail Report (OSDI/101/07) – WFP Tanzania – I 45/07: Investigation of Theft of Vegetable Oil"* dated 27 February 2008 (Annex 1) concerning allegations of theft of vegetable oil at the WFP Dodoma Warehouse."

112. In paragraph 24, the Applicant is requested to provide his views and comments "on the Investigation Report in question as well as to the charges outlined in the present memorandum […]".

113. The Tribunal notes that the Applicant signed for the memorandum on 6 May 2008 but did not complain to WFP that he had not received the investigation report that was supposed to be attached. He then proceeded, without any complaint, to draft and submit a response to the Allegations of Misconduct. At the hearing, the Applicant claimed that he did not tell WFP that he had not received the investigation report because he thought the Allegations of Misconduct was itself the investigation report because it contained all the findings of the investigation. The Tribunal does not find this explanation to be plausible in light of the very clear language used in paragraphs 1 and 24. The investigation report was obviously a separate document i.e. annex 1, which had a different date, 27 February 2008, from the Allegations of Misconduct. Since the Applicant signed personally for the Allegations of Misconduct and did not register any complaints with WFP until September 2009, the Tribunal considers that he received the investigation report together with the Allegations of Misconduct.

114. Further, the Applicant claims that the decision to separate him from service was a foregone conclusion because paragraph 25 of the Allegations of Misconduct clearly stated, "[p]lease be informed that the charges against you are serious enough to warrant your **"separation from service"** for misconduct which is hereby proposed to the Committee as the recommended measure considered as justified and appropriate". The Applicant submits that this sentence was prejudicial to him because the Disciplinary Committee was induced by WFP's stance on the issue to recommend his separation from service.

115. The Respondent explained that the Applicant was informed of the possible disciplinary measure in the Allegations of Misconduct so as to alert him of the gravity of the charges against him and to allow him to respond appropriately. The Respondent submits that this was neither a condemnation nor a predetermination of his case but a measure put in place to protect the Applicant's rights. Lastly, the Respondent submits that the Disciplinary Committee had the authority to make its own recommendation independent of WFP management and it did so.

116. The Tribunal acknowledges that the language used in paragraph 25 of the Allegations of Misconduct is inappropriate. However, since the Applicant did not adduce any tangible evidence as to how the Disciplinary Committee was induced by paragraph 25 to recommend his separation from service, the Tribunal does not consider that his right to due process was violated. In this respect, the Tribunal endorses the following observation made in *Mmata*:

> "[…] the language used, in significant parts of the charge letter, is inappropriate in that it states as a fact that the Applicant's actions constituted serious misconduct rather than to use language that will clearly indicate that whilst it would appear that such misconduct may have occurred the Applicant was being given a fair opportunity to defend himself. The Respondents would be well advised to reconsider the terms of such charge letters so as to avoid the impression of a pre-judgment having been made, unless of course that that is precisely the meaning that is intended, which would be a matter of surprise."

117. Lastly, the Applicant claims that his due process rights were violated because he was given only 10 working days within which to provide a response to the allegations of misconduct.

118. The Respondent submits that the Applicant was provided with a sufficient opportunity to respond to the allegations i.e. the ten working days normally afforded to respond to charges. The Respondent also submits that the Applicant has not claimed any specific prejudice in his ability to respond to the charges within that time period. The Respondent notes that the Applicant did, in fact, provide a comprehensive response.

119. Pursuant to section 3.1 of UNDP/ADM/97/17, a "reasonable period of time" should be afforded to the staff member being subjected to disciplinary proceedings. What should be a "reasonable period of time" in this context cannot be measured by a specific yardstick. But it is perfectly permissible for the Tribunal, without imposing a strict time limit, to decide on a case by case basis, what would amount to a reasonable time. Such an exercise should consider the nature of the charges, their complexity, volume of documents, if they are annexed to the charges and whether the staff member needs additional materials to enable him/her to prepare the response.

120. Of course, in the latter scenario a staff member should act promptly and request further particulars and documentation, if that is deemed necessary and should accompany this with a request for an extension of time. Any responsible management should view such a request judiciously. The attitude of both the staff member and that of management will be and should be factors that the Tribunal should consider if at all there is an appeal in a disciplinary matter that raises, amongst other issues, the reasonableness of the time imparted to a staff member to respond to a charge.

121. The Applicant was given ten days within which to file a response to the charges. Given the nature of the charges, the Tribunal believes that this was a reasonable amount of time. The Applicant did not ask for an extension of time to file his response. Nor did he ask for further materials to enable him to do so. But matters do not and should not end there. Very often, the Administration and the Tribunal are dealing with lay people, albeit the fact that they are staff members of the Organization. These lay people may not be aware of all the subtleties of the procedure in disciplinary matters. Further consideration should also be given to the fact that many staff members are working in the field and operating under difficult conditions including poor or lack of communications facilities.

122. Due process means also that when the Administration files charges against a staff member it should inform the staff member that if he/she needs more time to file a response, he/she should make a reasoned request to this end. The Tribunal notes

that this was not done in the present case. The Administration should also inform the staff member that he/she may make a request for further materials, if needed, to enable him/her to file an adequate response to the charges.

The ad hoc Disciplinary Committee

123. The Applicant claims that the Disciplinary Committee failed to follow proper procedure in that the evidence it used to reach its conclusions were not clearly communicated to him and he was not given the opportunity to cross-examine witnesses.

124. The Respondent submits that the Applicant was presented with the evidence and was given a full opportunity to "present arguments and evidence to respond to the charges of misconduct" and "to tell … [his] side of the story". In this respect, the Respondent submits that: (i) during the investigation, the Applicant was informed of the allegations that empty/semi-empty cartons of oil had been noticed in the past; (ii) he was given the opportunity to respond to the allegations during the investigation and subsequently in his response to the allegations of misconduct; (iii) the applicable procedures do not require a hearing or the in-person cross examination of witnesses; (iv) as investigations and disciplinary proceedings are not criminal trials, a staff member's due process right to challenge and respond to the allegations against him does not require a hearing at which the staff member may confront his accuser.

125. Paragraph 3.7 of UNDP/ADM/97/17 provides as follows:

> "The proceedings of the Disciplinary Committee and its rules of procedure shall be consistent with due process, the fundamental requirements of which are that the staff member concerned has the right to know the allegations against him or her; the right to see or hear the evidence against him or her; the right to rebut the allegations and the right to present countervailing evidence and any mitigating factors. If the Committee decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses. If the Chairperson decides that the Committee or one of its members should take testimony by deposition, telephone, or other means of communication, such testimony shall

> be shared with the parties concerned for comment or rebuttal. At all times, the quorum of a Disciplinary Committee constituted to hear a case shall not be less than 3 members, plus the secretary."[10]

126. The Report of the Disciplinary Committee, dated 11 June 2008, indicates that the members of the Committee reached its conclusions on the basis of the Investigation Report ("OSDI E-mail Report (OSDI/101/07) – WFP Tanzania – I 45/07: Investigation of Theft of Vegetable Oil" dated 27 February 2008), the Allegations of Misconduct, dated 15 April 2008 and the Applicant's response to the Allegations of Misconduct. In light of the conclusion at paragraph 111 that the Applicant received a copy of the OSDI investigation report, the Tribunal does not find merit with the Applicant's contention that the evidence the Disciplinary Committee used to reach its conclusions were not clearly communicated to him.

127. The Tribunal has taken note of the Respondent's submission that the applicable procedures do not require a hearing or the in-person cross examination of witnesses and that as investigations and disciplinary proceedings are not criminal trials, a staff member's due process right to challenge and respond to the allegations against him does not require a hearing at which the staff member may confront his accuser. To accept this submission would amount to a denial of the fundamental rights of employees and to give a freehand to employers to act as they please towards employees. This submission ignores the clear words of the preamble to General Assembly resolution 63/253, which reads in relevant part:

> "*Reaffirming* the decision in paragraph 4 of its resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike […]".

128. No system of justice worthy of that appellation can condone a procedure where the employer adopts a one-way traffic policy that enables that employer to

[10] This same information is reproduced in WFP/DAR/08/0487 (Terms of Reference: WFP Tanzania Disciplinary Committee) dated 9 June 2008.

decide in an arbitrary manner how evidence should be gathered during an investigation or disciplinary proceeding and not be held accountable. The Tribunal simply rejects this submission as totally baseless.

129. Ironically, even though the Disciplinary Committee felt that the documents provided were sufficient and "oral testimony from the three staff [the Applicant, RM and GS] or other parties was not required, they proceeded to take witness testimony from one of the Disciplinary Committee members i.e. the Head of Logistics! He gave evidence to the other Disciplinary Committee members that if the stacking had been done as per procedures and regulations the loss would have been evident. He also told them that, "although not specified in the OSDI Report, the commodities are/were stacked at human height/eye level. Accordingly, it would still have been possible to see the top of the stack without necessarily walking on top of the stack". Seeing that the evidence given by the Head of Logistics to the Disciplinary Committee went to the core of the alleged misconduct, the Applicant should have been given the opportunity to at least cross examine this witness. Once the Disciplinary Committee decided to hear oral testimony from the Head of Logistics, a hearing should have been organized so that the parties and counsel could have been present as provided for under paragraph 3.7 of UNDP/ADM/97/17.

130. In *Borhom* UNDT/2011/067, Izuako J. observed that the preliminary fact-finding was undertaken by someone who was a witness to the Applicant's alleged misconduct. The Tribunal made the following observation:

> "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."

131. The Tribunal wishes to reiterate the pronouncement in *Borhom* with respect to the Head of Logistics stepping out of his role as a fact-finder to become a witness in the matter. Additionally, the Tribunal considers that the conflicting role that the Head of Logistics played tainted the disciplinary process in that the Applicant was deprived of the opportunity to rebut the very crucial testimony he provided and to present countervailing evidence.

Conclusion

132. The facts do not show that the due process rights of the Applicant were respected at the initial stage of the investigation nor is it clear that the investigation was a thorough one. What is worse, notwithstanding the clear wording of paragraph 3.7 on Disciplinary Committee proceedings, the rights of the Applicant were not completely respected.

133. Based on the circumstances of this case, the Tribunal finds that there were procedural irregularities in this matter that forms a separate basis for awarding compensation to the Applicant.

Remedies

134. The Applicant requests that the imposed disciplinary measure be set aside and that he be reinstated and paid damages for the loss of income and inconveniences caused by the unlawful separation from service.

135. The Respondent requests the Tribunal to find that the decision to separate the Applicant from service for misconduct was a valid exercise of discretion and as such, to dismiss all of the Applicant’s pleas and the application in its entirety.

Judgment

136. Pursuant to Article 10 of its Statute the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10(5)(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

137. The Respondent unfairly dismissed the Applicant. The charge of gross negligence is not well-founded.

138. Consequently, the Tribunal orders rescission of the administrative decision and orders the Respondent to reinstate the Applicant and to make good all his lost earnings from the date of his separation from service to the date of his reinstatement.

139. In the event that reinstatement is not possible, the Respondent is further ordered to compensate the Applicant for loss of earnings from the date of his separation from service to the date of this Judgment.

140. The Respondent is further ordered to pay the Applicant the sum of six months net base salary in effect at the time of his separation from service for the procedural irregularities during the investigation and disciplinary process.

141. The Applicant will be entitled to the payment of interest, at the US Prime Rate applicable at the date of this judgment, on these awards of compensation from the date this judgment is executable, namely 45 days after the date of the judgment, until payment is made. If the judgment is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

(*Signed*)

Judge Vinod Boolell

Dated this 16 day of September 2011

Entered in the Register on this 16 day of September 2011

(*Signed*)

Jean-Pelé Fomété, Registrar, Nairobi