



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/027/
UNAT/1684
Judgment No.: UNDT/2011/205
Date: 30 November 2011
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MARSHALL

v

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, Mr. Ian Marshall, was appointed as a Communications Assistant on 18 January 2001 at the FS-3 level under an Appointment of Limited Duration (ALD) to serve in the United Nations Mission in Ethiopia and Eritrea (UNMEE) based in Asmara. The Applicant's ALD was renewed on a regular basis for a period of over three years. On 1 April 2004, he was re-appointed under a fixed-term appointment at the FS-4 step 2 level.

2. The Applicant had been serving as supervisor of the Telephone Billing Unit, Communication Centre and Telephone Switchboard, for which he had been competitively selected and formally recommended for a Special Post Allowance to the higher level, FS-5 until he took up a temporary assignment in Addis Ababa, Ethiopia on 1 August 2005. The UN Security Council terminated the mandate of UNMEE effective 31 July 2008 and the Applicant's fixed-term contract expired on 31 December 2008.

Background

3. Sometime in 2001, the Applicant began a consensual co-habitative relationship with one Ms. Pecanin ("the Complainant"), a Telephone Billing Assistant at UNMEE at the FS-2 level. Following the Applicant's promotion in 2003, the Complainant came under his supervision. On 9 March 2005, a son was born to the couple.

4. In the period between March and June 2005, disagreements had arisen between the couple over issues of name, parental rights, care, nationality and upbringing of their son. The relationship ended by mutual consent in June 2005 and the Applicant and the Complainant ceased co-habitation.

5. Sometime after and about June and July 2005, the Complainant spoke to the Chief Administration Officer (CAO) in UNMEE, Mr. Petrounev, claiming that the Applicant was not supporting her and their son. The CAO informally interviewed the Applicant, told him that the Complainant was requesting a re-assignment to another mission and advised that they try to settle their differences. Their relationship appeared to stabilize for a while after that until the Applicant brought up the issue of the Complainant having unilaterally changed their child's name and of removing his name as the father in the birth registration records.

6. The Complainant then approached their common friend and head of unit, the Acting Chief Communications and Information Technology Section (ACCITS), Mr. Johannes van den Berg who thereafter had an informal chat with the Applicant. As weeks passed and the Complainant continued to refuse that the Applicant be reinstated as the legal father of their child on the birth certificate, the Applicant confided in the ACCITS that he intended to take legal action to resolve the issue. The ACCITS told him that it was only fair that the Complainant be informed about the action he intended to take to which he agreed.

7. In late July 2005, a peers' group meeting made up of certain staff members at UNMEE, some of whom were friends of either of the Applicant and the Complainant, was convened by the ACCITS in the UNMEE headquarters building in Asmara. The Gender Focal Point (GFP) Ms. Whakatope attended the meeting and intimated privately before the start of the meeting to the Applicant that the Complainant had made allegations against him that were serious enough to merit an investigation.

8. At the said meeting, the Complainant further expanded her allegations and included accounts alleging an on-going verbal and physical abuse by the Applicant in their home against her during their co-habitation and after. The Applicant denied the allegations and explained that the Complainant had other motives for making the allegations.

9. It was suggested at the said peers' group meeting after hearing the accounts of the two that the Applicant be temporarily assigned to Addis Ababa for one month as a "cooling off period" to which the Applicant agreed. The Applicant was accordingly temporarily assigned to Addis Ababa. On 29 July 2005, the Officer in Charge (OIC) of Communications in UNMEE addressed a Memorandum to the Chief of Personnel Section of UNMEE informing her of the temporary assignment of the Applicant to Addis Ababa for a period of one month commencing on 1 August 2005.

10. The Applicant took up his temporary assignment in Addis Ababa and on 15 August 2005 the Complainant, assisted by the UNMEE/GFP, outlined allegations, in a memorandum entitled "Seeking Protection," that she had been the object of verbal and physical assaults by the Applicant over a period of time. She stated that such assaults occurred for the most part after the Applicant had consumed excessive amounts of alcohol. She additionally expressed her fear for her and her child's safety.

11. On 8 September 2005, the Special Representative of the Secretary-General of UNMEE (“SRSG/UNMEE”) Mr. Legwaila, established an *ad hoc* panel to undertake a preliminary investigation into the possible misconduct by the Applicant based on the allegations made by the Complainant in her memorandum dated 15 August 2005.

12. The Applicant responded to the Notice of Preliminary Investigation by memorandum on 14 September 2005 claiming, *inter alia*, that the reason for the unfounded allegations levelled against him by the Complainant was due to a domestic situation that existed between them.

13. He further stated that the situation was brought about by a point of contention over the possible validity and legality of the name of their son on the child’s birth registration document and the right of the Applicant to be recognized as the child’s father on that registration. On 30 September 2005, the *ad hoc* panel that investigated the alleged misconduct of the Applicant submitted its report to the SRSG concluding that the allegations “might be well-founded.”

14. The Office of the Legal Adviser (“OLA/UNMEE”), on 10 October 2005, relying on the *ad hoc* panel’s investigation report, stated in a memorandum to the SRSG that there was no doubt that the Applicant had in the past shouted and used offensive and threatening language toward the Complainant. Whereas no one had witnessed physical abuse or the physical evidence of it, interviews of the Applicant and the Complainant indicated that there was substance to the allegations of physical abuse. The OLA/UNMEE then recommended that the *ad hoc* panel report be forwarded for further action.

15. On the same date, the CAO commented in his memorandum to the SRSG/UNMEE that the panel’s findings indicated that the alleged abuse may indeed have taken place. He expressed the view that, although the panel noted that there was no physical evidence of assault, it established that the complaint was highly credible. He continued that the panel also established that the Applicant’s consumption of alcohol was above average and made suggestions as to what actions the SRSG of UNMEE should take in the circumstances.

16. On 17 October 2005, the CAO transmitted the *ad hoc* panel’s report as well as a series of other documents. These included the recommendations of UNMEE’s administration as contained in his earlier memorandum entitled “Investigation into possible misconduct”, a memorandum of the OLA/UNMEE concurring that the allegations appeared to be well-

founded and that, pursuant to ST/AI/371, the matter should be referred to the Office of Human Resource Management (OHRM) for further action through Personnel Management and Support Service (PMSS). He further requested PMSS to review the documentation and advise on the disposition of the case and the measures to be taken.

17. On 19 October 2005, the UNMEE Chief Security Officer reported a complaint made against the Complainant by the Applicant and requested an investigation into the public dissemination of adverse personal information and criminal allegations made about the Applicant by other staff members believed to have been instigated by the Complainant. The said report, however, was ignored and there was no follow-up.

18. Having spent more than eleven weeks in Addis Ababa, the Applicant, on 19 October 2005, addressed a memorandum to the CAO noting that his temporary assignment to Addis Ababa at the FS-4 level had been prolonged and asking to be allowed to resume his former functions in Asmara.

19. On 25 October 2005, the ACCITS decided in an internal memorandum, sent through Mr. Win Htut, the Chief of the Integrated Support Services (CISS), to the CAO, that the Applicant's continued temporary assignment to Addis Ababa would be further extended as a result of an official complaint by the Complainant against him and that the said complaint was still under investigation.

20. He stated that until an outcome of the investigation had been reached, the Applicant would retain the FS-4 post whilst another staff member would undertake the duties in Asmara as Communications Supervisor at the FS-5 level, a post the Applicant had encumbered with an SPA. Mr. Htut endorsed the said memorandum on which he added that the Applicant's extension of assignment was indefinite and unconditional.

21. On 6 December 2005, the Eritrean Government wrote to UNMEE with the demand that its personnel with nationalities from the United States of America, Canada and Europe, including the Russian Federation leave the country within 10 days.¹ UNMEE officials thereafter began to leave Eritrea by the end of 2005 for Addis Ababa pending the closure of UNMEE.

¹ "Report of the Secretary-General on Ethiopia and Eritrea" 3 January 2006, S/2006/1 on page 3, para. 8.

22. A meeting which was convened and chaired by Mr. Critchley, the Chief of Administrative Services (CAS), was held in Addis Ababa on 14 February 2006. The meeting, which was based on the allegations against the Applicant by the Complainant, was attended by the Chief Civilian Personnel Officer (CCPO), the Senior Administrative Officer (SAO), the Staff Representative and the Applicant.

23. During the meeting, the CAS insisted that the Applicant had an alcohol problem and ought to undergo treatment for it which was available in Addis Ababa. The Applicant was adamant that he did not have such a problem and did not need any treatment. The CAS, in answer to a question by the Staff Representative, stated that the Administration could place the issue of alcohol abuse on the Applicant's official status file.

24. The Assistant Secretary-General (ASG) for Peace Keeping Operations, in a confidential memorandum dated 29 March 2006 to the ASG/OHRM, referred to the Complainant's allegations against the Applicant and reviewed the report of the *ad hoc* panel. She recommended disciplinary action against the Applicant whom she noted had refused treatment for alcohol abuse.

25. On 8 August 2006, the Director for Organizational Development in OHRM, wrote to the Applicant informing him that based on the conclusions made by the *ad hoc* panel and the report of the OLA/UNMEE, he was being charged with verbally harassing the Complainant, physically assaulting the said Complainant and thereby acting in a manner unbecoming of his status as a civil servant. The memorandum further stated that these charges, if established, would constitute a violation of former staff regulation 1.2 on the conduct of staff members and former staff rule 101.2 on workplace harassment.

26. The Applicant submitted his response to the charges on 30 October 2006. On 19 December 2006, the ASG/OHRM wrote to the Applicant informing him that following a careful review of the investigation file and his response, the case was being closed in accordance with paragraph 9 (a) of ST/AI/371.

27. The ASG/OHRM further stated that the charges were being dropped and that no disciplinary action would be taken against him. In the last paragraph of her letter, however, she further noted that the Complainant was a supervisee of the Applicant and "cautioned" that

he should be mindful to avoid the appearance of a conflict of interest between his professional duties and personal interests.

28. On 3 January 2007, the Applicant wrote to the Officer in Charge (OIC) of the Administration in UNMEE, regarding the ASG/OHRM memorandum dated 19 December 2006 stating that it failed to “address some of the consequences of having been presented with unfounded allegations that [had] impugned [his] character, including spurious charges of substance abuse.”

29. The Applicant further stated that the reprimand insinuated that he had in fact abused his authority with the Complainant as her direct supervisor and that the long process resulting in the closure of the case had negatively impacted on his career prospects. The Applicant requested therefore that action be taken to rectify the negative effects on his career and to have all disparaging and potentially damaging records removed from his file.

30. On 8 January 2007, the Applicant addressed the ASG/OHRM by memorandum requesting a copy of the final report which formed the basis of her decision and demanding that the comments and caution be withdrawn. The ASG/OHRM responded to the Applicant on 17 January 2006 stating that the written analysis and recommendations prepared in the context of the review of his case constituted legal advice and was privileged and that as such he was not entitled to receive copies of them.

31. She added that since the allegations against him were being dropped, no reference to them would appear on his record of service including the “caution”. She further stated that the decision to caution him was a managerial action, which was justified by the established facts of the case and was appropriate and proportionate in the circumstances.

32. On 22 January 2007, the Applicant wrote to the Secretary-General informing him, *inter alia*, of the closure of the case as well as requesting that there be full accountability for the “harm that [had] been done to [him], [his] family and [his] professional reputation as well as rectify the consequent damage.”

33. In April 2007, the Applicant requested and was granted Special Leave Without Pay (SLWP) to return to his home country for medical and family reasons. While there, he sought

legal advice on international child custody issues to obtain custody of his son who was by that time living with the Complainant's relatives in Kosovo.

34. On 19 December 2007, the Applicant submitted a letter together with an official communication from the Public Registration Office of the Municipality of Asmara, dated 1 November 2007, indicating that the Complainant had "deliberately deceived the Municipality of Asmara, Census and Civil Status Office, into issuing another birth certificate" by submitting a new registration document removing the Applicant as the father of their child. On 30 January 2008, the Respondent provided comments to the additional material submitted by the Applicant.

Joint Appeals Board (JAB) review

35. The Joint Appeals Board (JAB) met in executive session on 27 June 2008 to consider the Applicant's case. The Panel completed its deliberations and adopted its report at that meeting. The JAB submitted its report to the Secretary-General on 13 August 2008 in which it found the following:

- a. It was proper for the Organization to launch such an investigation.
- b. The relationship between the Applicant and the Complainant could not have but impacted on their work environment.
- c. It was within the discretion of the Administration to issue the caution which was appropriate in the situation.
- d. The request by the Applicant that the Complainant be held accountable for her actions was beyond the scope of the panel's competence.
- e. The Panel made no recommendation in favour of the Applicant.

36. On 6 October 2008, the Deputy Secretary-General transmitted a copy of the JAB Report to the Applicant stating that upon examination of the Applicant's case and the Report, the Secretary-General accepted the findings and conclusions of the JAB and decided to take no further action in this matter.

37. Following the unfavourable outcome of the JAB process, the Applicant filed an appeal against the decision with the former UN Administrative Tribunal on 30 March 2009, to which the Respondent replied on 9 October 2009. The Applicant then filed his Observations on the Respondent's Answer on 30 December 2009.

38. On 1 January 2010, this case was transferred to the Nairobi Registry of the Tribunal in accordance with section 4 of ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice).

Applicant's case

39. The Applicant's case is summarized below.

40. The charges of misconduct contained in the memorandum of 8 August 2006, which were ultimately withdrawn, stemmed from a mistaken notion that allegations by one staff member against another involving private conduct are the proper subject of inquiry and administrative action by the Administration. Chapter V, paragraph 38 of ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) provides that "the private life of international civil servants is their own concern and organizations should not intrude upon it."

41. In initiating disciplinary charges against him, the Respondent improperly characterized a private, personal dispute as an employment matter and unfairly took sides. The allegations against him by his former domestic partner were never the subject of any civil or criminal complaint, let alone conviction. The investigation report even stated that none of the allegations of verbal or physical assault was ever witnessed by anyone and that there was no evidence of any assault of any kind.

42. The Applicant had always explained why he felt that the Complainant's motives might be suspect, but this was never taken into account. The decision to allow the Complainant to use the resources of the Organization, knowing that her complaint dealt purely with private matters external to the Organization, constituted an abuse of authority.

43. The fact that the case involved two staff members, even in a direct reporting line, did not, in and of itself, warrant the assumption that was made that this was a case of workplace harassment or abuse. As a good employer obligated to respect the requirement of best

practices, the Respondent had an obligation to maintain some neutrality and to refrain from taking sides in a private disagreement.

44. Abuse of authority is at the heart of this Application. The Applicant was not treated fairly from the outset. Instead, all the actions of the Respondent point to a presumption of guilt based entirely on unproven third party statements.

45. The Respondent first attempted to coerce the Applicant into making admissions by offering to treat the matter as a substance abuse problem. The Applicant rejected this dishonest suggestion. The Respondent then proceeded to treat it as a case of workplace harassment and abuse, only to abandon this attempt at a later stage realizing it could not be sustained. The Respondent's actions in this case constituted a violation of the Applicant's due process rights.

46. The Respondent resorted to a disguised disciplinary measure in the form of a caution to him to avoid the appearance of conflicts of interest between personal and professional interests. This was an entirely new conclusion that appeared completely gratuitous and labelled him as a potential liability.

47. Although not defined as a disciplinary measure under staff rule 110.3, a reprimand or caution nevertheless carries with it all the same negative connotations of guilt and embarrassment as a disciplinary sanction. It forms part of the staff member's record of service and could be construed to imply that he engaged in wrongful conduct.

48. The Applicant was issued a *de facto* reprimand, prevented from resuming his career and systematically harassed until he was finally separated from service at the end of 2008.

49. The issuance of the *de facto* reprimand was not the end of the case for him. Although the Complainant was no longer in the UNMEE/Mission, the Applicant was not reinstated to his higher level post in Asmara but forced to remain in Addis at a lower level and try to restart his career in spite of malicious rumours that followed him there.

50. Extraneous considerations informed the actions of UNMEE management against the Applicant as he became the object of the Respondent's unarticulated "zero tolerance" policy towards sexual harassment and abuse. This was used with the help of an overzealous Gender

Adviser, to elaborate a claim of spousal abuse that was a combination of exaggeration and fabrication.

51. The JAB Panel dismissed the Applicant's concerns and the decisive evidence that corroborated his original explanation that the Complainant was motivated by a desire to remove him from birth registration records as the father of their child. It also made no mention of the subsequent effects on his career and the failure by the Administration to reinstate him.

52. The JAB stated that "the relationship...could not but have impacted on their work environment" without citing any evidence of this or even suggesting that the Applicant's role as supervisor was the cause of the problem.

53. The investigation report amounted to little more than summaries of the opinions of the respected friends and associates of the Applicant and the Complainant. This does not constitute a sufficient factual foundation for bringing formal charges of serious misconduct.

54. The Respondent's actions have had a devastating impact on the Applicant's personal and professional life, ultimately resulting in the loss of his UN career and more tragically, of his parental rights to his son. He consequently requests damages in this instance.

55. In view of the foregoing, the Applicant requests the payment of compensation, rescission of the impugned decision and the award of costs due to the exceptional nature of the circumstances surrounding the case.

Respondent's case

56. The Respondent's case is summarized below.

57. The principal issue in this case is whether the Organization abused its discretion in handling the charges of misconduct against the Applicant and whether, in that context, the Applicant was denied his right to due process.

58. The Applicant was given numerous opportunities to respond to the allegations against him, consistent with his right to due process, leading to the dismissal of the charges and the closure of the case against him.

59. The Organization's decision to investigate the allegations brought against the Applicant was entirely justified in accordance with applicable rules and regulations. A claim to the contrary is unsupported by the relevant facts, pertinent jurisprudence and applicable law.

60. The records of the case confirmed that the intervention of the Administration became necessary. The Applicant was relocated to a different duty station on a temporary basis so as to ensure the ability of both the Applicant and the Complainant to continue their service with UNMEE.

61. Whilst the Applicant argued that the Administration had a particular *animus* or bias against him, the record shows no evidence of such. The Applicant has failed to substantiate any violation of his due process rights by the Respondent during and after the disciplinary proceedings against him

62. The record showed that the investigation was carried out fairly and in good faith and that the conclusions of the *ad hoc* panel were based on evidence gathered as a result of thorough investigation including witness interviews of relevant staff members. The Applicant was duly informed, in writing, of the allegations against him as well as his right to respond. He was also given a copy of the documentary evidence of the alleged misconduct and informed of his right to seek the assistance of counsel.

63. The decision to caution the Applicant was not a disciplinary measure and was, in any event, appropriate in the circumstances. The cautionary language contained in the letter of the ASG/OHRM dated 19 December 2006, did not constitute a disciplinary measure or the administrative measure of a reprimand, but a managerial decision entirely within the scope of the discretion afforded to UN officials with a supervisory role.

64. There is no need to order the Respondent to withdraw "the letter of reprimand" and to issue a letter exonerating the Applicant of any wrongdoing since there was no "letter of reprimand" and the Applicant has not been found culpable of any wrongdoing.

65. The Applicant attempted to establish an unsubstantiated connection between the disciplinary proceedings that were concluded positively for him in late 2006, and the fact that he was not promoted and not reassigned to another Mission with the Organization in late 2008, two years after the conclusion of such proceedings.

66. The Applicant had not bothered to provide any evidence to prove that the fact that he was not promoted during the period of his transfer to Addis Ababa or that he was not assigned to a Mission other than UNMEE at the end of 2008 was ill-motivated.

67. There is no basis for compensation since the Applicant had not established the existence of a *causal nexus* between the alleged damage he suffered and any of the actions of the Respondent. He had therefore failed to substantiate his case and to prove that any of the decisions in this regard by the Respondent were abusive.

68. The Tribunal is urged to reject each of the Applicant's pleas and to reject the Application in its entirety, in which case a question of compensating the Applicant's costs does not arise. If, however, the Tribunal finds that the Applicant's pleas do not fail completely, the Respondent submits that there are no exceptional circumstances to justify awarding costs to the Applicant.

Legal issues for determination

69. The following questions were formulated by the Tribunal for consideration of the issues in this case:

- a. Were the charges brought against the Applicant based on conduct prohibited by the relevant staff rules?
- b. Were the required investigation standards in the UN met in the conduct of the investigations in this case?
- c. Were the findings made by the *ad hoc* panel and the charges subsequently brought against the Applicant relevant to the legitimate business of the Organization?
- d. Does the Organization have any jurisdictional competence with regard to the private conduct of a staff member?
- e. Was the Applicant a victim of abuse of position and authority in this case?
- f. Did considerations other than the allegations made against the Applicant inform the instituting of disciplinary action against him?

- g. Did bias against the Applicant and the efforts of UNMEE management to protect the private interests of the Complainant result in personal harm to the Applicant and the Organization?
- h. Did the cautionary note amount to disciplinary sanction by stealth?
- i. Was the Applicant entitled to continue to earn his SPA after his one month temporary assignment to Addis Ababa?
- j. Was the inability of the Applicant to secure a posting to another Mission on the closure of UNMEE a result of the Administration's wrongful interference in his private life?

Considerations

Were the charges brought against the Applicant based on conduct prohibited by the relevant staff rules?

70. The Applicant submitted that the allegations of misconduct contained in the memorandum of 8 August 2006, which were ultimately withdrawn, stemmed from the mistaken premise that allegations by one staff member against another involving private conduct are the proper subject of inquiry and administrative action by the Administration and that in allowing the initiation of disciplinary charges against the Applicant, the Respondent improperly characterised a private, personal dispute as an employment matter and unfairly took sides. The Applicant consequently requests the Tribunal to find that the conclusions and decision of the Respondent were vitiated by mistakes of fact and of law.

71. The Respondent disagreed and submitted that it was entirely justifiable for the Organization to investigate the allegations made against the Applicant and that a claim to the contrary is unsupported by the relevant facts, pertinent jurisprudence and applicable law. The facts of the case confirm that the intervention became necessary as it was the obligation of the Administration to initiate a preliminary investigation pursuant to the applicable rules.

72. Following the written report of the *ad hoc* panel, which had investigated a complaint made against the Applicant, he was charged with the following:

- a. Verbally harassing the Complainant, a staff member of the United Nations;

- b. Physically assaulting the Complainant, a staff member of the United Nations;
and
- c. Acting in a manner unbecoming of the status of a civil servant.

73. The memorandum outlining the charges stated that if established, the Applicant would have violated former staff rule 101.2(d). The said former staff rule provides:

Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse **at the workplace or in connection with work**, is prohibited. (Emphasis mine)

74. The foregoing provision of the former Staff Rules, on the basis of which the charges were brought against the Applicant, prohibits discrimination, harassment, physical or verbal abuse at the workplace or in connection with work or when such affected the work environment. The wordings are clear, simple and unequivocal. The prohibition of the conduct in question clearly spells out that it must occur in the workplace or in connection with work in order to constitute a violation of former staff rule 101.2(d).

75. In her written complaint dated 15 August 2005, the Complainant told the story of a four-year adult, consensual and romantic relationship in which she co-habited with the Applicant resulting in the birth of a son in March 2005 in Asmara, Eritrea. In the said complaint, she said she was seeking protection from physical and verbal abuse sometimes meted out to her in her home by the Applicant.

76. The complaint in issue was wholly and entirely one of alleged domestic disagreements and violence. It did not allege that the conduct complained of had occurred in the workplace or was in connection with work. Neither evidence elicited nor findings arrived at by the *ad hoc* investigating panel pointed to or suggested that what was alleged to have happened, amounted to or constituted workplace harassment. United Nations Rules on prohibited conduct are principally crafted to protect staff members from abusive conduct from fellow staff members in order to ensure a safe and conducive workplace.

77. ST/SGB/2002/13 (Status, basic rights and duties of United Nations staff members) sets out in its paragraph 38 that personal conduct is not the business of the Organization in the following words:

The private life of international civil servants is their own concern and organizations should not intrude upon it. There can be situations, however, in which the behaviour of an international civil servant can reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization.

78. Outside of their domestic partnership, the only other thing that the Complainant and the Applicant had in common was the fact that they were both staff members of UNMEE. Evidently, this was the singular reason why a domestic dispute found its way into the official sphere where UN resources were unduly deployed to both investigations and what appears to have been an unnecessary disciplinary process. The Tribunal will later further examine whether the United Nations administrative system is equipped in any way to cater to matters of this nature.

Were the required investigation standards in the UN met in the conduct of the investigation in this case?

79. The Applicant submitted that the investigation that was initially undertaken was fundamentally flawed and was not even-handed. The Applicant also questioned the unverified statements and hearsay evidence gathered and relied upon by the investigation *ad hoc* panel in reaching its conclusions. The investigation report, according to the Applicant, amounted to little more than summaries of the opinions of the respected friends and associates of the two parties. It did not constitute a sufficient factual foundation for bringing formal charges of serious misconduct.

80. The Respondent submitted that contrary to the Applicant's arguments, the record shows that the investigations were carried out fairly and in good faith and that the conclusions of the *ad hoc* panel were based on the evidence gathered including witness interviews of relevant staff members.

81. ST/AI/371 (Revised Disciplinary Measures and Procedures) is an administrative instruction which provides guidelines for the application of chapter X of the Staff Rules. The said chapter X deals with disciplinary measures and procedures. Section II of ST/AI/371 points to situations that may require investigations thus:

Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or

responsible officer shall undertake an administrative preliminary fact-finding investigation.

82. Allegations that may be investigated are grouped into two categories. All Category 1 allegations are investigated by the Office of Internal Oversight Services (OIOS). Other allegations such as harassment, with which the Applicant in this case was charged, fall within Category 2 and may be investigated by the Special Investigations Unit (SIU) or an *ad hoc* panel in peace-keeping and special political missions when the person being investigated is a civilian. The investigation which is conducted and the investigation report produced are fundamental to the disciplinary process.

83. While investigations functions may be carried out by different offices and departments in the Organization, OIOS has the overall responsibility for all the internal investigations in the Organization. The OIOS Manual of Investigative Practices and Policies of 2005 was at the time, the practical guide for all UN staff members, bodies or panels who have or are given the responsibility at any time of conducting internal preliminary and fact-finding investigations into alleged staff misconduct. This means that a panel or officer charged with investigating staff misconduct is expected to perform this task within the standards set by the OIOS guidelines.

84. Some of the standards to be met by investigators are well set out in paragraph 55 of the said Manual. An investigator must be fair, have an open mind, be dispassionate and competent. Any investigative findings should be based on substantiated facts and related analysis, not suppositions and assumptions. Any recommendations also made should be based on the investigative findings and not amplified by suppositions, convictions and/or personal opinions and /or presumptions.

85. Before the disciplinary process leading up to the events on which this Application is based, a three-member *ad hoc* panel was raised by the SRSG of UNMEE on 8 September 2005 to undertake a preliminary investigation into possible misconduct by the Applicant with regard to the written complaint of the Complainant.

86. In its report dated 30 September 2005, the panel stated that its purpose and mandate was “to establish the veracity of the allegations outlined” in the complaint letter and to “establish whether any substantiation existed for consideration of further investigation of possible misconduct.”

87. As already pointed out, in the complaint letter which was titled “Seeking Protection”, the Complainant traced the unfortunate development of an adult, consensual, romantic partnership that produced a son between her and the Applicant into one of jealous rages, alcohol, paranoia and domestic violence. Her letter addressed the issues of dreams and hopes she had had for herself and the Applicant.

88. It told the story of how she had previously been married and had lost her husband in a car accident before she met the Applicant. It told of her family background which it was claimed was peaceful and stable as against that of the Applicant whose parents were said to be divorced and none of whose four brothers married.

89. For the most part, the letter, whose contents constituted the subject-matter of the investigation, made mention of undated instances of verbal and physical violence against the Complainant by the Applicant over the years allegedly induced by a drinking habit and fits of jealousy. It also mentioned an incident during which the Complainant claimed to have inflicted a stab wound on her own leg in an effort to prove to the Applicant that she loved him. The same letter addressed the mistreatment of her mother by the Applicant and arguments over a name for their child, whose paternity, according to her, the Applicant sometimes doubted.

90. The Tribunal has examined the many personal and intimate family details raised in the letter with a view to underscoring the fact that the *ad hoc* panel needed to be clear and precise about the matters it had set out to investigate. This it failed to do and as a result rendered the entire investigation process flawed even before it had begun.

91. In fact there was nothing in the letter that delineated any cause or facts for investigation that related to the workplace or which was alleged to have occurred in connection with work. Armed with a complaint letter which read more like a magazine feature article on gender-based violence in the home rather than abuse in the workplace as defined by the relevant staff rules, and in the circumstances having failed to delineate the focus of its assignment, the panel’s report was grossly lacking in a critical aspect of its work objective.

92. Of the five-page report produced by the *ad hoc* panel, about three and a half of those pages were devoted to summarising the stories and impressions of the ten witnesses that the panel spoke to. These witnesses included the Applicant, the Complainant and eight other staff

members of UNMEE. The Tribunal notes that of the ten witnesses in this preliminary investigation, seven were part of the initial peer group meeting which had decided, based on their own fact-finding, that the Applicant be reassigned for a cooling-off period to Addis Ababa even before the Complainant's letter of 15 August 2005.

93. Furthermore, seven of the witnesses interviewed recounted either rumours or personal convictions and basically unsubstantiated evidence and yet were found to be objective or plausible by the panel. The Applicant and the one witness who didn't seem to condemn the Applicant's behaviour as the others did were described as prejudiced, and "protective of the Applicant" and that the Applicant's "story did not conclude well."²

94. The evidence before the Tribunal demonstrates that there was a clear lack of impartiality, fairness and objectivity in the manner in which the investigation was conducted. The *ad hoc* investigation panel merely ended up granting credence to gossip and some senior management officers' pre-conceived conclusions about the Applicant. It then presented to the Administration a document that was substantially flawed by way of a report. The panel stated that it had made four investigative findings.

Were the findings made by the ad hoc panel and the charges subsequently brought against the Applicant relevant to the legitimate business of the Organization?

95. The Applicant submitted that the Administration failed to appreciate that none of the alleged incidents happened on UN premises or involved official duties. He additionally submitted that none of the alleged actions interfered with or impeded work at UNMEE and none were the proper subject of disciplinary action as they all stemmed from a private relationship between two individuals concerning a family dispute over the custody of their child.

96. The Respondent, on the basis of ST/AI/371, submitted that the allegations brought against the Applicant fell squarely within the province of the Staff Rules whether these took place "on or off United Nations premises, and whether or not the staff member was officially on duty at the time."

97. The four investigative findings of the panel were as follows:

² *Ad hoc* Investigation Report, 30 September 2005 pages 2-5.

- a. The Applicant and the Complainant lived together for more than four years. The Complainant got pregnant and bore a child during their co-habitation. All the interviewed individuals including the Applicant reasonably believed that the child belonged to both of them.
- b. The Applicant, the Complainant and the majority of the interviewed individuals stated that the Applicant's drinking habits were above average and that under alcoholic influence he could be aggressive.
- c. The Applicant, the Complainant and interviewed persons confirmed that the couple had frequent quarrels and that they had always hidden their problems to everybody including their friends.
- d. Three of the staff members interviewed found the Complainant's story plausible while the Gender Focal Point, based on her professional experience as a social worker and counsellor of sexual exploitation and abuse (SEA) victims, strongly believed that the Complainant had been physically and emotionally abused.

98. It is most disappointing that UN resources were spent to make findings as to the paternity of a child of staff members or any person for that matter. In these circumstances, it is just as shocking that resources of the Organization were spent to find: that the Applicant could be aggressive when under alcoholic influence in his home that he and his domestic partner quarrelled frequently and that they hid the fact from their friends.

99. The fourth stated finding informs of the opinions of three of the ten persons interviewed regarding the plausibility of the story of the Complainant and the belief of the GFP that the Complainant had been verbally and physically abused.

100. As previously observed, investigative findings should be based on substantiated facts and related analysis, not suppositions or assumptions. Even if the investigation were to be legitimate, this standard and other investigative standards, such as fairness and the requirement of having an open mind, were never met.

101. It is also unsettling that even the so-called findings bore no relationship to the charges which were later brought against the Applicant; charges which were based on harassment in the work environment.

102. It is clear that the investigating panel's so-called findings were largely irrelevant in so far as it is not the business of the Organization to concern itself with the private domestic affairs of individual staff members especially where such findings had no bearing on the work environment.

Does the Organization have any jurisdictional competence with regard to the private conduct of a staff member?

103. Former staff rule 101.2(c) provides that staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

104. A staff member must be law-abiding. The privileges and immunities of the Organization which generally extend to the staff member do not afford him or her, the excuse to avoid the performance of his or her private obligations. Under this rule, the Organization, apart from treating such non-performance as a disciplinary matter, can act to ensure that the staff member respects the orders of local courts relating to their private obligations.

105. For instance, where a staff member fails to comply with court orders for child support, alimony payments or the repayment of a debt or for the due payment of bills or services, deductions may be made from his or her salaries or other emoluments in accordance with the laid down procedures under the relevant Secretary-General's bulletin or other such issuances.³

106. Much as the Organization may require staff members to honour their private obligations, it must be careful not to encroach on the private domain of staff. In the case of *Applicant*⁴, this Tribunal found that while the Organization is entitled to look into complaints brought to it, it cannot constitute itself into a guardian of people's personal morals. Even when it examines complaints officially made to it, it must first do so with a view to determining whether the said complaint is one that it can lawfully and properly entertain.

107. In this case, the Complainant had at first informally approached the ACCITS who was a common friend and supervisor to both her and the Applicant with an oral complaint

³ For example: ST/AI/2000/12 (Private Legal Obligations of Staff Members) at Section 4 entitled "Procedures applicable in cases of non-compliance with family support court orders".

⁴ UNDT/2011/106.

concerning her deteriorating relationship with the Applicant. The ACCITS then spoke about the matter informally with the Applicant and gave his personal advice. When the Applicant told him some weeks later that he intended to brief a local lawyer to pursue the matter of his parental rights legally, the ACCITS then proceeded to arrange a peer's group meeting.

108. At the said meeting, the Complainant informally told her story making several allegations against the Applicant who denied abusing her and sought to explain his position. It was at that meeting that it was decided that the Applicant be temporarily assigned to Addis Ababa for one month to ease tension between them to which the Applicant agreed.

109. When the Applicant assumed the temporary assignment to Addis Ababa on 1 August 2005, the Complainant brought a formal, written complaint against the Applicant. As already observed earlier in this judgment, the said written complaint to UNMEE dated 15 August 2005 was wholly about having suffered domestic violence in her home at the hands of the Applicant during and after their co-habitation. Her memorandum was titled "Seeking Protection" and alleged that the Applicant usually abused her after drinking excessively.

110. The SRSG/UNMEE then established an *ad hoc* panel to investigate the possible misconduct of the Applicant pursuant to the complaint. The Tribunal had earlier called attention to the fact that the *ad hoc* panel was totally confused about what it was investigating and that after conducting some interviews produced an irrelevant and unhelpful report.

111. The convening of an informal peers' group to which the Applicant and the Complainant were willing to state their private and domestic problems with a view to resolving them ought to have been the limit of the Organization's involvement. The agreement on all sides arrived at during the said meeting that the Applicant should undertake a brief and temporary assignment away from Asmara for tempers to cool and to achieve a temporary separation of him and the Complainant in the circumstances was responsible and commendable on the part of the Organization.

112. However, allegations of domestic violence and conflicts over child custody, maintenance or paternity are properly matters for a criminal court and family court to entertain. In the case of *Capote*⁵, the former UN Administrative Tribunal rightly dismissed charges that involved an allegation arising from a dispute between two staff members on the

⁵ Former UN Administrative Tribunal Judgment No. 1004 (2001).

grounds that the Organization had no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the parties to sort out their rights and responsibilities.

113. The officials of the Administration had neither power nor the capacity to wade into such matters. It was clearly beyond their scope and the Administration had unfortunately acted *ultra vires* by its undue involvement. It had also breached the Applicant's human right to a fair adjudication of a domestic dispute by a properly constituted court when it arrogated to itself powers it did not have in that regard. It did not lie with the Respondent or his agents, whatever their personal convictions, to investigate domestic disputes that had no bearing on the workplace and to convert the same to misconduct.

Was the Applicant a victim of abuse of position and authority in this case?

114. The Applicant had submitted that the Administration's case rested on expedient political considerations rather than facts and law. He also submitted further that he was the object of the Respondent's zero tolerance policy towards sexual harassment and abuse who was aided on that path by an overzealous Gender Adviser. It was also his case that the decision to allow the Complainant to use the resources of the Organization knowing that her complaint dealt purely with private matters external to the Organization constituted an abuse of authority.

115. The Respondent submitted that the decision to investigate the complaint against the Applicant by his domestic partner was justified in accordance with the applicable rules and regulations and that the Respondent was not biased against him.

116. Neither former staff rule 101.2(c) nor do any other rules, regulations or issuances confer the power of criminal courts or family courts on any officials or entities of the Organization. In fact where a staff member is suspected of having engaged in criminal activity, the Organization may be minded to hand him or her over to the local authorities for criminal prosecution. Section 20 of the Convention on the Privileges and Immunities of the United Nations⁶ states that:

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-

⁶ Adopted by the General Assembly of the United Nations on 13 February 1946.

General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

117. It is therefore a matter of great embarrassment that in a foremost organization such as the United Nations, a head of Mission would set up an incompetent investigation panel as happened in this case with no proper terms of reference situated within the proper mandate of the Mission or permitted by the Organization's rules or other issuances. The *ad hoc* panel in turn could not properly articulate what it was out to achieve. It trespassed into the domestic space of the Applicant and then only went on to produce an equally embarrassing report.

118. Thereafter, on 10 October 2005, the UNMEE/Mission's CAO, who in his interview with the *ad hoc* panel had expressed unfavourable views about the Applicant, sent the so-called investigative report to the SRSG. In his accompanying memorandum, he correctly noted that the Mission was not competent to deal with the complaint as it related to the personal conduct of the Applicant.⁷ He also observed that the allegation pertaining to alcohol abuse lay outside the work arena.⁸

119. The CAO then wrongfully declared that he was convinced it affected the ability of the parties to work. On account of his baseless and irrelevant personal convictions which were not borne out by any facts in the case or by the complaint that was investigated, he advised that the SRSG/UNMEE take certain actions against the Applicant and decided on his own to ensure an indefinite reassignment of the Applicant to Addis Ababa.

120. On the same date, 10 October 2005, the OLA/UNMEE sent an inter-office memorandum to the SRSG informing him that the report of the *ad hoc* panel had established misconduct on the part of the Applicant and recommended that it be forwarded to the ASG/OHRM for possible disciplinary action under ST/AI/371.

121. It was obvious that the OLA/UNMEE based its incompetent advice on what a few of those interviewed had said to the *ad hoc* panel and not on the necessary legal evaluation and analysis that that office should have done. The OLA/UNMEE office did not as much as

⁷ 10 October 2005 "Investigation into possible misconduct". The CAO stated that "I submit that the following issues bear consideration in this particular case: (a) First, the question of jurisdictional competency, since this case appears to have arisen from a domestic dispute."

⁸ *Ibid.* The CAO further states that "...a deeper study would indicate that the primary purpose of ST/AI/372 [Employee assistance in cases of alcohol/substance abuse] is to address the effects of substance abuse in the work domain...the manifestation of the problem lies primarily outside the arena of work."

consider whether the Mission had the capacity to investigate the private conduct in issue and whether the Organization could initiate disciplinary action over the private domestic problems of staff members in rendering its advice that the report of misconduct was well founded.

122. Even more worrisome and shocking is the role played in the handling of the complaint that led to this case by the Gender Focal Point. She was a member of the peers' group meeting that had earlier informally intervened requesting that the Applicant be temporarily assigned to Addis Ababa. When interviewed by the *ad hoc* panel, she stated that as the Gender Focal Point, she had an obligation to protect anybody she considered to be a victim.

123. The GFP further told the panel that the Complainant's behaviour presented all the symptoms of an abused woman and that she therefore believed the Complainant had been both physically and emotionally abused by the Applicant. She continued that she based her assessment on the knowledge she had gained from previously working as a social worker and counsellor of sexually and psychologically abused women in New Zealand.

124. The work of a Gender Focal Point within the UN is to provide support to senior managers in carrying out their responsibilities as these relate to the implementation of the policy of gender mainstreaming in their substantive work programs. The GFP is expected to provide the said support through advocacy, advice and monitoring and reporting on progress made. It is also the job of the GFP to disseminate information and develop competencies on gender mainstreaming through trainings and seminars.

125. The Gender Focal Point position "is not linked to the promotion of gender equality within the department, that is, to promotion of gender balance, work/life issues, harassment, including sexual harassment and a gender sensitive work environment. These issues are taken care of by the Department Focal Points for Women."⁹ It is important to note that the Focal Points for Women have very different roles from Gender Focal Points, who are basically Gender Advisers for the promotion of gender mainstreaming.

126. The Agreed Conclusions 1997/2 of the United Nations Economic and Social Council on 18 September 1997 defines gender mainstreaming as:

⁹ "Job description for a Gender Focal Point within the United Nations Secretariat" Office of the Special Adviser on Gender Issues and Advancement of Women" (OSAGI).

the process of assessing the implications for women and men of any planned action...It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring, and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.

127. Security Council Resolution 1325¹⁰ requests the Secretary-General "where appropriate, to include in his reporting to the Security Council progress on gender mainstreaming throughout peacekeeping missions."¹¹ The Department of Peacekeeping Operations (DPKO) has strengthened institutional mechanisms for gender mainstreaming in support for the implementation of the said Resolution. Some positive interventions include, *inter alia*, "the establishment of gender units in all multidimensional peacekeeping operations, the development of a wide range of policy and operational tools and resources to facilitate gender mainstreaming."¹²

128. The GFP, whatever experience she may have had as to the psychology of abused women, had no official role of "protecting anybody she would consider a victim," as she claimed before the *ad hoc* panel. Her job was to work on gender mainstreaming. Since domestic violence is a purely criminal matter and not one that the Organization can investigate, much less adjudicate, the GFP was not appointed to protect or speak for any alleged or perceived victims of domestic abuse of any kind.

129. Because the *ad hoc* panel was confused about its own assignment, it unnecessarily made the GFP's purported assessment of the behaviour of the Complainant part of its report. The GFP had curiously listed the behaviour of the Complainant as "feeling of shame, hiding the problems from everybody and eventually followed by non-stop talking." The panel's conclusion that the GFP's "well-informed testimony [was] very informative" is evidence of the extent of its own confusion.

130. Clearly, what the *ad hoc* panel was investigating did not include any behaviours of the Complainant as it had identified its task as being "to establish the veracity of the allegations outlined." The alleged abusive behaviour of the Applicant was certainly what the panel stated it was concerned with.

¹⁰ Adopted by the Security Council at its 4213th meeting, on 31 October 2000.

¹¹ *Ibid.* Para 17.

¹² Gender and UN Peacekeeping Operations. Published by DPKO.

131. It is a matter too for serious concern that the GFP had co-signed the written complaint dated 15 August 2005 detailing the stories and allegations of the Complainant which was sent to the Chief of Personnel section of UNMEE. Such written complaints are required to be confidential. What was the interest and official role of this Gender Adviser in the private dispute between the Applicant and the Complainant that made her sign the written complaint?

132. In the Applicant's response dated 14 September 2005 to a notice of preliminary investigation against him and addressed to the CAO, he mentioned that before the informal peers' group meeting, the GFP had asked him to stay away from the Complainant who she said had made allegations against him that were serious enough to merit an investigation. Whatever friendly support the GFP gave the Complainant who alleged domestic abuse against her person on a private level, should never have been confused with her official roles.

133. This Tribunal finds that the GFP had been allowed by senior managers at UNMEE to ride roughshod over the Applicant on account of his problems with the Complainant and to assume roles and authorities that were not legitimately hers. The fact was that having been invited to be part of the peer's group which had made informal efforts at a resolution of the dispute; she then gave to herself undue liberties in the handling of the said domestic dispute. Her overbearing influence in the events leading up to the institution of disciplinary proceedings against the Applicant attests to a profound lack of leadership at UNMEE at the material time.

134. It must be recalled that it was the husband of this GFP who told the *ad hoc* panel that the Applicant had called his house and spoken to him while drunk telling him that he was guilty of all the allegations made against him. This story by the said husband of the GFP was also relied upon by the *ad hoc* panel in finding that the Applicant drank excessively. It did no credit to that panel that it would find that the drunken state of anyone could be established through a telephone conversation.

135. It is necessary to recommend that all officials of the Organization, especially those in senior management positions make serious efforts to familiarise themselves with the proper scope of their decision-making powers. They must continually refer to the relevant staff rules, bulletins and other administrative issuances and seek proper legal advice before making decisions that affect the status, contracts and indeed domestic life of staff members who work under them. Enough distance needs be maintained between official and domestic matters.

136. It is especially important that managers appreciate that they can help with efforts at informal resolution of private and domestic matters between staff members. Where however such informal efforts fail or prove inadequate, they should advise that these are sent to the proper forum such as counselling or even the relevant national courts as the case may be.

137. The purported investigations by the *ad hoc* panel and the findings said to have been made actually amounted to, as a whole, an invasion of privacy against the Applicant constituting an abuse of power and authority by those members of senior management who authorised it and acted upon its report.

138. The Convention on the Privileges and Immunities of the United Nations at its section 20 provides that where the need arises, the immunity of a staff member may be waived by the Secretary-General. In this way, domestic allegations, as in this case, which fall outside the competence of the Organization can be properly investigated and prosecuted. Since staff members have a duty to observe and obey the laws of the countries in which they serve, the Organization would be competent to demand compliance.

Did considerations other than the allegations made against the Applicant inform the institution of disciplinary action against him?

139. The Applicant previously submitted that the Administration's case rested on expedient political considerations, not upon legal or factual ones, with the help of an overzealous Gender Adviser, to elaborate a claim of spousal abuse that was a combination of exaggeration and fabrication. He submitted also that all the actions taken by the Respondent pointed to a presumption of guilt based on unproven third party statements.

140. The Respondent for his part argued that contrary to the Applicant's allegations in this case, the relevant rules, policies and procedures were scrupulously followed both in: (i) conducting the investigation and the disciplinary proceedings against him; and (ii) dismissing the charges while cautioning him against similar situations arising in the future.

141. Evidence before the Tribunal indicated that after the submission of the report by the *ad hoc* investigation panel, the memoranda from the CAO and the OLA/UNMEE, a meeting was chaired by the CAS, on 14 February 2006. The meeting, as earlier stated in this judgment, was held in Addis Ababa, and attended by the Applicant, the CCPO, the SAO and

the UNMEE Staff Representative. At the said meeting, the Applicant was asked if he had an alcohol problem to which he replied that he did not.

142. In his oral testimony, the CAS told the Tribunal that the purpose of the 14 February 2006 meeting was to inform the Applicant that “New York” wanted him to take corrective actions to change his behaviour and to discuss the options available to him in Addis Ababa if he was agreeable.

143. The CAS further testified that in holding the meeting, he was merely acting on instructions from OHRM in New York based on the investigative findings that the Applicant drank excessively and that his drinking affected his performance. According to the witness, OHRM had decided that if the Applicant refused alcohol treatment, the matter would be moved up a notch to become a disciplinary matter. The witness continued that this meant that the manner in which the investigation report would be put to use could be determined by the Applicant himself. If the Applicant refused to agree to an alcohol problem and to undertake treatment for it, he automatically would be subjected to a disciplinary process.

144. When it was pointed out to the witness in cross-examination that the investigation report made no mention of drink affecting the Applicant’s performance, the CAS replied that he could not remember what was in the report but that he also got the information about the Applicant’s drink problem from other staff members in the Mission. In answer to a question by the Tribunal, the witness said that he had not made any direct observations about the Applicant’s performance before or after the investigation report.

145. The Staff Representative, who was in attendance at the meeting of 14 February 2006, wrote to the CAO of UNMEE the day after expressing concern at the manner in which it was conducted. Part of his letter read:

During the meeting [the Applicant] was asked if he had an Alcohol problem to which he replied that he had not. At that stage [the CAS] intervened saying that he [the Applicant] had a Drink problem and that on a few occasions a Vehicle had to be sent from HQ to collect him for work from his place of residence. I drew the attention of [the CAS], my initial concern with reference to reflecting the written complaints on [the Applicant’s] performance and behavioural changes in either his Official Status files or in his recent performance reports. [The CAS] replied that it may not be on his file however we (the Administration) could place it on his file. This statement by a senior staff member is of major concern to me, as the FSU representative, and surely to all UNMEE staff members.

The SM needs support and encouragement from both Administration and FSU in this situation and honestly, I was flabbergasted and amazed by such an insensitive statement coming from the chairman of the meeting. During the meeting [the CAS] did not offer any support or encouragement to the SM. For that reason, I feel that [the CAS] is not an ideal senior SM to chair such a meeting.

146. In reply to questions in cross-examination, the CAS said he was probably shown the memorandum of the Staff Representative reproduced above and that he did not agree with the inferences in it but could not recall sending a reply to it.

147. On 10 October 2005, the then CAO of UNMEE, who was the immediate supervisor of the Applicant and the second supervisor of the Complainant, had sent a memorandum to the SRSG of UNMEE in which he discussed the investigation report and the subject of alcohol abuse regarding the Applicant. Part of the said memorandum read :

...the case appears to have a strong element of alcohol abuse/substance abuse, which at first blush would endear it to the provisions of ST/AI/372 (Employee Assistance in cases of alcohol/substance abuse). However a deeper study would indicate that the primary purpose of ST/AI/372 is to address the effects of substance abuse in the work domain, although paragraph 13 indicates that the problem may be brought to light by concerned family members. In the present case, while the manifestations of the problem lie primarily outside the arena of work, I am convinced that it has affected the ability of both parties to perform their assigned work tasks in the expected manner.

148. The former CAO then continued in his memorandum to make several suggestions as to what actions could be taken against the Applicant and also proposed a meeting between the Complainant and the SRSG to reassure her that all possible measures were being taken to ensure her protection.

149. It is unfortunate that all these recommendations were being made at a time that the Applicant had not been adjudged guilty of misconduct through an official disciplinary process. Also, the CAO was well aware that the complaint allegations were squarely situated outside the arena of work. In the said memorandum, he drew a conclusion that was not based on any facts but on his personal conviction that the ability of both the Applicant and the Complainant to perform their official duties had been affected.

150. The Tribunal observes with some regret the efforts on the part of some senior officials in UNMEE Administration, through veiled threats, to arm-twist the Applicant into admitting to an alcohol problem. There is no doubt that some senior officers at UNMEE through a

combination of their own personal moral standards and convictions, selective grapevine stories, and misplaced gender concerns constructed an entirely new case of alcohol and substance abuse against the Applicant in Addis Ababa.

151. This new issue of alcohol abuse was outside the complaint allegations and the factual findings of the confused *ad hoc* panel. It must be recalled that at the 14 February 2006 meeting chaired by the then CAS, he had expressed the view that the Applicant had an alcohol abuse problem because, according to him, a vehicle had been sent on some occasions to pick the Applicant up from his house to work.

152. From the foregoing, not only had the Respondent's agents unlawfully expanded the allegations of the Complainant with their own views on the Applicant's alcohol abuse, their threat to bring disciplinary proceedings against the Applicant was made good as he persisted in his denial of alcoholism. There is therefore no doubt that matters outside of the Complainant's allegations had been considered and actually influenced the institution of disciplinary proceedings against the Applicant.

Did bias against the Applicant and the efforts of UNMEE management to protect the private interests of the Complainant result in personal harm to the Applicant and the Organization?

153. From the inception of Ms. Pecanin's oral complaint and through her written version and the attendant official investigation, the Applicant had made efforts at different stages to explain his own side of the story. It is evident from the records that his explanations were never inquired into and were totally ignored.

154. Instead, the panel was only interested in the allegations of abuse contained in the written complaint and the opinions of the senior staff members they had interviewed. The same panel in its report described the Applicant as "***the accused.***" [Emphasis mine] This wrong description of the Applicant by the panel, together with its apparent unwillingness to consider the Applicant's explanations attests to the biased state of mind of the panel.

155. The *ad hoc* panel based its conclusions on the views of two senior UNMEE officers – namely the then CAO, the Chief of CITS and also that of the Complainant's friend and former housemate—all of which were mainly speculative as these persons all "believed" that

the complaint was “plausible.” The panel also sought support from and was largely influenced by the GFP’s psychological analysis of the behaviour of the Complainant. The GFP’s analysis was relied upon to include theoretical and psychological analysis and speculations in the report.

156. It is mention-worthy that while admitting unwarranted psychological assessments of the Complainant’s behaviour as it was led to do by the GFP, the *ad hoc* panel did not seek explanations for the Complainant engaging in self-harm by stabbing herself as she disclosed in her complaint. The bias of the *ad hoc* panel, stemming from a desire to make conclusions that tallied with the views and desires of UNMEE managers, is clear evidence of a lack of independence of the panel.

157. In an inter-office memorandum sent on 29 March 2006, Ms. Jane Holl Lute, the then ASG for the Department of Peacekeeping Operations (DPKO), requested the ASG/OHRM to take disciplinary action against the Applicant and suspend him with pay. She made reference to the refusal of the Applicant to admit to an alcohol abuse problem. Her stated reason for the request was to protect the Complainant and the child.

158. The Tribunal was told that in March 2006, the Complainant was reassigned to the United Nations Stabilization Mission in Haiti (MINUSTAH). Before the reassignment, the Complainant had been briefly assigned to Addis Ababa where she worked in the same building as the Applicant. Why was it necessary to base the recommendation that the Applicant should be suspended on the basis of protection of the Complainant and the child?

159. Clearly this biased attitude was being adopted against the Applicant because he had refused to be pressured into agreeing that he abused alcohol and not necessarily because he could harm his baby and the Complainant who had been reassigned out of Addis Ababa at the time.

160. While replying to the charges of misconduct against him, the Applicant had explained to the ASG of OHRM that the problem he had with the Complainant arose from an existing dispute over his rights as the father of their child. He had made the same explanations in his response to the notice of preliminary investigations dated 14 September 2005 which was sent to him on 8 September 2005. He had also made the same explanation to the *ad hoc* panel

when he was interviewed but none of them took any notice of his own account or investigated it.

161. It is in evidence that sometime in November 2005, an email was circulated throughout UNMEE with the Complainant's account of her allegations against the Applicant. The Chief Security Officer at UNMEE, to whom the Applicant reported the matter, found that some staff members were responsible for circulating adverse material which was either obtained from or provided by the Complainant. A request for an investigation into the matter was ignored by UNMEE management.

162. The records are clear that when it was suggested in July 2005 at the peer's group meeting that the Applicant be temporarily assigned to Addis Ababa for one month to allow tempers to cool, the Applicant was agreeable. An official temporary assignment for one month was accordingly made. Once in Addis Ababa, the Applicant was never allowed to return to his position in Asmara.

163. After more than two and a half months of his temporary assignment, the Applicant wrote to his supervisor, the ACCITS, requesting that he be advised as to when he would be returning to encumber his previous post in Asmara. His request to return to Asmara was refused. The ACCITS wrote instead to the CAO through the CISS retroactively and unilaterally extending the temporary assignment of the Applicant because, according to him, an official complaint had been brought by the Complainant.

164. The CISS for his part endorsed the memorandum stating his decision that the temporary assignment of the Applicant was indefinite and unconditional. He further appointed another staff member to assume the Applicant's official duties in Asmara as "Supervisor of the Billing Unit replacing [the Applicant]."¹³

165. The implications of the actions of the ACCITS and the CISS who were senior officers at UNMEE were that they had unilaterally reversed an agreement that was taken informally with the Applicant to undertake a temporary assignment to Addis Ababa for one month. Even more damning was the fact that they had prematurely and improperly applied the provisions of section 4 of ST/AI/371 dealing with disciplinary measures and procedures.

¹³ 25 October 2005 "[the Applicant's] Temporary Assignment to Addis Ababa" Inter-Office Memorandum.

166. The said section 4 of ST/AI/371 provided for the suspension of a staff member who was under investigation and whose conduct appeared to pose a danger to others or the investigation process. Such suspension of a staff member could only be imposed by the ASG of OHRM. These actions on the part of the said senior officials amounted to bias, abuse of authority and a breach of the Applicant's due process rights.

Documents from local authorities in Asmara

167. When the instant case was brought before the JAB, the Administration submitted that the documents obtained by the Applicant from the local authorities in Asmara which confirmed the Complainant's false declarations to obtain a new birth certificate for their child and exclude the Applicant as a parent, had not been made available to it previously. The same document, it was submitted, was also not available to the *ad hoc* panel for consideration when making its investigative findings.

168. This submission cannot be a true reflection of the facts considering that the Applicant had consistently maintained and explained that the real cause of the conflict was the illegal change of his son's identity by the Complainant. In putting the Applicant through an official investigation and subsequently charging him with misconduct, the Respondent had no real evidence to back up its case but relied upon rumours, speculation and conjecture.

169. Due to the fact that senior UNMEE officials had taken a biased view of the case based on their own personal moral judgment against the Applicant, they were only interested in giving assistance to the Complainant for whatever reasons and in the process compromised the integrity of the Organization. The United Nations Organization demands of its staff members that they comply with their legal obligations and obey the laws of the countries and localities in which they serve. Did these senior UNMEE officials demand this standard of the Complainant?

170. While the Applicant was being reassigned, investigated and charged with abusing the Complainant, senior UNMEE officials indirectly facilitated the Complainant's false pretences to the Eritrean local authorities to alter the birth records of the child borne of the Applicant and herself and thereby gain exclusive and sole custody of the said child by removing the name of the Applicant as the father.

171. Part of an official correspondence dated 1 November 2007 from the Maakel Region of the Municipality of Asmara, Eritrea addressed 'To Whom It May Concern', reads:

After thorough investigation it has transpired that Ms. Azra Pecanin has deliberately deceived the municipality of Asmara, Census and Civil Status office into issuing another birth certificate by means of submitting another registration document with the details of his father purposely removed. Now we inform that the birth certificate issued by Public Reg. No. 14709 to Ms. Azra Pecanin is (sic) false document, and shouldn't have any legal effect. And that the birth certificate by Public Reg. No. 14709 issued to Mr. Marshall is the true and rightful birth certificate for any and all legal purposes. The child's name was changed from Callum Marshall, which is seen on the hospital records, to Kalum Pecanin. His nationality changed from British to Yugoslav. [Emphasis mine]

172. The foregoing information constitutes a huge embarrassment for the Organization especially in the light of former staff rule 101.2(c). Unfortunately, its senior officials ranging from the then SRSG of UNMEE, the CAO, the GFP, OLA/UNMEE and others indulged in their own whims in this case or merely failed to critically evaluate the dispute at the expense of the good name of the United Nations.

173. All these officials, who had in different ways incompetently assumed the jurisdiction of a family court, failed to recognise that the best interests of a child are paramount in family law cases and that only a properly-constituted family court can decide such best interests. By their unlawful meddling, they betrayed both the Organization and the Applicant and invariably achieved a situation in which it appears that a child is lost to his father.

Did the cautionary note amount to a disciplinary sanction by stealth?

174. Following the response of the Applicant to the charges against him, the ASG/OHRM wrote to him on 19 December 2006. In the said memorandum, she stated that after a careful review of the entire case, she had decided to close the case in accordance with paragraph 9(a) of ST/AI/371. She stated further that the charges had been dropped and that no disciplinary action would be taken against him.

175. She concluded, in the said memorandum, by cautioning the Applicant to be mindful to avoid the appearance of a conflict of interest between professional and personal interests which would create social and administrative difficulties at work. The Applicant responded by requesting that the said caution on conflict of interest be withdrawn.

176. In the said memorandum of the ASG/OHRM which addressed other issues including the request for the withdrawal of the caution, she supported her decision to impose the caution stating that it:

... simply serves to remind you of your obligation as a staff member of the United Nations to avoid situations which may appear to give rise to a conflict of interest between your personal and professional interests, and which may be perceived to compromise your impartiality. The decision to caution you was a managerial action, which was justified by the established facts of the case, and was appropriate and proportionate in all of the circumstances.

177. It was submitted for the Respondent that the cautionary note only served to remind the Applicant of his obligations as a staff member and that since it would not appear in his official status file, it demonstrated a positive intention to protect the Applicant from being involved in similar situations in the future.

178. The Applicant had submitted that the cautionary note had all the hallmarks of a reprimand regardless of the nomenclature. He referred to *Olenja*¹⁴ where the former Tribunal held that even though under the former staff rule 110.3(b) a reprimand is not considered a disciplinary measure, the same principles that govern a disciplinary measure would apply. Also cited by the Applicant was *Coggon*¹⁵ where a reprimand was set aside and compensation awarded for violation of the staff member's right.

179. The current ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) which came into effect on 11 February 2008 at its paragraph 5.18(b) sets out in bold relief, the purport and object of managerial action. It states thus in part:

If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary.

180. In any considerations as to whether the cautionary note was warranted or had any basis at all, the *ad hoc* panel report must indicate that there was at least a factual basis for the allegations against the Applicant. But fundamental to such a finding is the requirement that

¹⁴ Former United Nations Administrative Tribunal Judgment No. 1167.

¹⁵ Former United Nations Administrative Tribunal decision in Judgment No. 1404.

the said *ad hoc* panel must have the proper authority and competence to conduct any investigation into the allegations of domestic abuse by the Complainant. The simple and correct position is that the said *ad hoc* panel had no such authority or competence.

181. The agents of the Respondent who squandered official time and resources chasing after a family dispute which they had no authority to deal with officially cannot hide behind the veneer of managerial action, allowed by the rules, to have the last word in the face of their manifold abuse of the Applicant's rights. Having failed to compel him to undertake treatment for alleged alcohol abuse, the imprimatur of UNMEE senior managers is writ large in the ASG/OHRM's resort to managerial action.

182. Finding that the nature of the interventions of management in a domestic dispute that should at the very worst have attracted the actions and sanctions of the domestic courts in Eritrea were unwarranted, the least that the UN Administration should have done in this case was to eat humble pie by dropping all charges against the Applicant unconditionally. Even if a cautionary note is not classified as disciplinary action under the rules, it is not administered to staff members as a matter of course. It goes with a proper factual finding of some level of wrong-doing by the staff member to whom it is directed.

183. In any case, the ASG/OHRM cannot caution the Applicant over the matter of conflict of interest as this was neither part of the unfortunate investigation findings nor reflected in the still-born charges against him. This Tribunal holds that there being no basis for the said cautionary note, what it sought to achieve was disciplinary sanction by stealth.

Special Post Allowance

184. Evidence before the Tribunal is that although the Applicant was on the FS-4 level, he was at the time of his temporary assignment to Addis Ababa encumbering a post for which he was receiving a Special Post Allowance (SPA) at the FS-5 level. He lost the said SPA owing to his temporary assignment away from Asmara, the Mission's headquarters at the time.

185. The Applicant submitted that he was entitled to earn the SPA from August 2005 when he was assigned away from Asmara until December 2008 when his employment ended.

186. It was the Respondent's contention that the Applicant was never selected for an FS-5 level post and that when he was transferred to Addis Ababa he continued to hold the same contractual status, which was an FS-4 level, that he had held in Asmara.

187. ST/AI/2003/3 (Special post allowance for field mission staff)¹⁶ is an administrative instruction which provides for SPA for field mission staff. Under section 2.1, an SPA is authorized in exceptional cases when a staff member is called upon to assume the full duties and responsibilities of a post at a level that is clearly recognizable as higher than his or her own level for a temporary period exceeding three months.

188. Under section 7.1, an SPA may be granted for a specific period which may not initially exceed one year. Also section 8.1(a) provides that the SPA shall be discontinued from the date on which a staff member ceases to perform the full functions of the higher-level post at the mission where the SPA was approved.

189. Going by these cited provisions, the Applicant could not receive the SPA for the work of a higher level post which he was not entitled to in Addis Ababa when he agreed to the one month temporary assignment. However, since the UNMEE management departed improperly from the terms of the said temporary assignment and retroactively and unilaterally placed the Applicant on an illegal and unwarranted extension of the temporary assignment which, in the circumstances of this case, amounted to a suspension or redeployment as stipulated in ST/AI/371, he was entitled to the SPA from 1 September 2005 for the full duration of the SPA that he had been granted. In other words, he was entitled to receive the SPA for its full duration less the one month of the agreed temporary assignment in Addis Ababa.

New positions applied to by the Applicant

190. The Applicant told the Tribunal that he had applied to eleven positions within the Organization between June 2005 and May 2010 of which none had been successful. He submitted that the manner in which he had been treated by the Respondent on account of the allegations and action taken against him had adversely affected his rights to a full and fair consideration of his applications.

¹⁶Which came into force on 21 March 2003.

191. The Respondent contended that the eleven positions to which the Applicant had applied were irrelevant to this case. He argued that the failure of the Applicant to seek administrative review or management evaluation of the decisions not to employ him made the issue irreceivable by the Tribunal.

192. The Tribunal has examined the evidence before it in this regard and determines that a direct connection had not been established between the allegations against the Applicant, the purported managerial action taken against him and failure to fully and fairly consider him for any of the eleven posts to which he had applied.

Findings

193. The summary of the Tribunal's findings are as follows:

a. Outside of their domestic partnership, the only other thing that the Complainant and the Applicant had in common was the fact that they were both staff members of UNMEE. This was the singular reason why a domestic dispute found its way into the official sphere where UN resources were unduly deployed to both investigations and what appears to have been an unnecessary disciplinary process.

b. There was a clear lack of impartiality, fairness and objectivity in the manner in which the investigation was conducted. The *ad hoc* investigation panel merely ended up granting credence to gossip and some senior management officers' pre-conceived conclusions about the Applicant. It then presented to the Administration a document that was substantially flawed by way of a report.

c. It is most disappointing that UN resources were spent to make findings as to the paternity of a child of staff members or any person for that matter in the circumstances. It is just as shocking that resources of the Organization were spent to find that the Applicant could be aggressive when under alcoholic influence in his home, that he and his domestic partner quarrelled frequently and that they hid the fact from their friends.

d. The investigating panel's so-called findings were largely irrelevant in so far as it is not the business of the Organization to concern itself with the private domestic affairs of individual staff members especially where such findings had no bearing on

the workplace. The so-called findings bore no relationship to the charges which were later brought against the Applicant; charges which were based on harassment in the workplace.

e. The purported investigations by the *ad hoc* panel and the findings said to have been made actually amounted to, as a whole, an invasion of privacy against the Applicant constituting an abuse of power and authority by those members of senior management who authorised it and acted upon its report.

f. Much as the Organization may require staff members to honour their private legal obligations, it must be careful not to encroach on the private domain of staff. The convening of an informal peers' group to which the Applicant and the Complainant were willing to state their private and domestic problems with a view to resolving them ought to have been the limit of the Organization's involvement.

g. Allegations of domestic violence and conflicts over child custody, maintenance or paternity are properly matters for a criminal court and family court to entertain. The Organization had no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the Applicant and the Complainant to sort out their rights and responsibilities.

h. The officials of the Administration had neither power nor the capacity to wade into such matters. It was clearly beyond their scope and the Administration had acted *ultra vires* by its undue involvement. It had also breached the Applicant's human right to a fair adjudication of a domestic dispute by a properly constituted court when it arrogated to itself powers it did not have in that regard. It did not lie with the Respondent or his agents, whatever their personal convictions, to investigate domestic disputes that had no bearing on the workplace and to convert the same to misconduct.

i. The Respondent's agents unlawfully expanded the allegations of the Complainant with their own views on the Applicant's alcohol abuse. Their threat to bring disciplinary proceedings against him was made good as he persisted in his denial of alcoholism. There is therefore no doubt that matters outside of the

Complainant's allegations had been considered and actually influenced the institution of disciplinary proceedings against the Applicant.

j. The *ad hoc* panel wrongfully admitted and dwelled on theoretical, moralistic and psychological analysis and speculation in its report.

k. The unilateral extension of the Applicant's one month temporary assignment to Addis Ababa showed bias, amounted to abuse of authority and a breach of the Applicant's due process rights.

l. The senior officials ranging from the then SRSG/UNMEE, the CAO, the GFP, the OLA/UNMEE and others indulged their own whims in this case or merely failed to critically evaluate the dispute at the expense of the good name of the UN. They also failed to recognise that the best interests of a child are paramount in family law cases and that only a properly-constituted family court can decide such best interests. By their meddling, they betrayed both the Organization and the Applicant and invariably achieved a situation in which it appears that a child is lost to his father.

m. Even if a cautionary note is not classified as disciplinary action under the rules, it is not administered to a staff member as a matter of course. There being no basis for the said cautionary note, what it sought to achieve was disciplinary sanction by stealth. The ASG/OHRM cannot caution the Applicant over the matter of conflict of interest as this was neither part of the unfortunate investigation findings nor reflected in the still-born charges against him.

n. The Applicant could not receive the SPA for the work of a higher level post which he did not have in Addis Ababa when he agreed to a one month temporary assignment. He was however entitled to the SPA for the full duration for which it had been granted, less the one month when he was in Addis Ababa.

o. The Applicant had not established a direct connection between the allegations against him, the purported managerial action taken against him and failure to fully and fairly consider him for any of the eleven posts to which he had applied between 2005 and 2010.

Conclusion

194. The Applicant had requested the Tribunal to order the following:

- a. Award of compensation at the rate of 3 year's net base salary in lieu of specific performance and an additional compensation of 5 year's net base salary in view of the special circumstances of this case.
- b. Reinstatement in service with effect from 2009;
- b. Rescission of the letter of caution;
- c. Issuance of a proper exoneration of all allegations made against him by the Complainant;
- d. Removal of any adverse material from his personnel file;
- e. SPA difference in pay between FS-4 and FS-5 from August 2005 to December 2008; and
- f. Compensation for actual, consequential and moral damages.

195. The purpose of compensation is to, as much as possible, place the Applicant in the position he would have been in had the Organization complied with its contractual obligations.

196. Article 10.5(a) of the Statute of the Tribunal states that as part of its judgment, the Tribunal may order rescission of the contested decision "provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission." The Tribunal may, as per art.10.5(b), order compensation not exceeding two years' net base salary. It may, however, in exceptional cases order the payment of a higher compensation providing reasons for it.

197. As per ST/AI/2003/3, a Special Post Allowance (SPA) shall be granted for a specific period which may not initially exceed one year. An SPA *may* be extended for another year by the Department of Peacekeeping Operations. An SPA is for a determinate period and since

the Applicant was on the SPA before his temporary assignment to Addis Ababa, he would be entitled to receive the SPA until the end of the period for which it was granted.

198. The evidence before the Tribunal clearly demonstrates the lack of due process, bias and blatant abuse of authority from the onset of the disciplinary process against the Applicant to the withdrawal of the charges and misplaced managerial action. Because it had ignored the explanations of the Applicant with regard to the complaint, the Administration appeared to have indirectly facilitated the Complainant's false pretences to the Eritrean local authorities to alter the birth records of the child borne of the Applicant and herself. In this way, she gained exclusive and sole custody of the said child by removing the name of the Applicant as a parent. This state of affairs provided the Complainant with the opportunity to remove the child to Kosovo.

199. The Tribunal is of the view that if the case had been appropriately directed to the relevant authorities, namely a family court, the Applicant would not have had to endure a substandard investigation and baseless disciplinary process. These processes, the Tribunal finds, caused damage to the Applicant's professional reputation, most especially, when adverse material was publicly disseminated regarding personal information and criminal allegations about him. The Applicant was also subjected to arm-twisting by the Administration in the expectation that he would admit to an alcohol abuse problem.

200. The Applicant submitted that as a result of the Organization's mishandling of his case, he had been subjected to extreme stress, requiring professional counselling. He had also had to endure moral damage and lost contact with his baby son. Consequently he had to pursue an expensive international legal custody battle.

201. The Tribunal additionally finds that apart from harm to his professional and social reputation, the Applicant also suffered moral damage, extreme stress and has had to engage in an international legal custody battle for his son.

202. Based on the fact that the Applicant's contract came to an end, not because of a termination of contract, but rather due to expiration on 31 December 2008 as well as the fact that UNMEE closed its operations in that year, reinstatement is not a proper order to make.

203. In light of the finding stated above, the Tribunal makes the following ORDERS:

- a. The cautionary note of 19 December 2006, which was termed managerial action, is hereby RESCINDED and NULLIFIED. As this decision does not concern appointment, promotion or termination no amount of alternative compensation is required to be set.
- b. All references to the said cautionary note shall be removed from the Applicant's UN personnel record.
- c. The Applicant shall be paid the difference between the salary he received, while in Addis Ababa and the SPA earlier granted him. The said SPA shall be calculated from 1 September 2005 when his continued assignment to Addis Ababa became illegal up to the end of the period for which the SPA was initially granted.
- d. Compensation shall be paid, pursuant to art.10.5(b), in the amount of 24 months' net base salary for the substantial and grave mishandling by the Administration in this matter to the detriment of the Applicant.
- e. An award of nine months' net base salary is made in favour of the Applicant for the totality of the stress and moral damages suffered.
- f. The Applicant is entitled to the payment of interest on this award of compensation from the date this judgment is executable, namely 45 days after the date of the judgment. Interest on the judgment sum is payable from then at the US Prime Rate until payment is made. If the Respondent fails to pay this sum within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until payment is effected.
- g. Rejects all other pleas.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of November 2011

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

(Signed)

Jean-Pele Fomété Registrar, Nairobi