Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

POWELL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Katya Melluish, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO"), filed an application with the former United Nations Administrative Tribunal ("the former UN Administrative Tribunal") contesting the decision of the Secretary-General to impose on him the disciplinary measure of demotion for two years with no possibility of promotion during that period. As a result of the transitional measures related to the introduction of the then new system of administration of justice (ST/SGB/2009/11), the case was transferred from the former United Nations Administrative Tribunal to the United Nations Dispute Tribunal ("the Tribunal") on 1 January 2010.

Facts

2. The Applicant entered into service with the then United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC") on 25 January 2002 as a Movement Control Assistant at the FS-5 level on an appointment of limited duration ("ALD") under the 300 series of the United Nations Staff Rules. Due to the disciplinary measure imposed by the Respondent, the Applicant was demoted to the FS-4 level on 5 September 2007.

3. In January 2004, the Applicant was appointed the Officer-in-Charge ("OIC") in the Movement Control Section ("MovCon") in Kisangani. On 22 November 2004, the Special Representative of the Secretary-General ("SRSG"), MONUC, convened a Headquarters Board of Inquiry ("BOI") to investigate and report on serious allegations of misconduct by the Applicant in Kisangani during March 2004. The BOI, which deliberated between 20 November and 23 December 2004, was given four incidents of alleged misconduct to investigate and report on but during the course of the inquiry, it inquired into ten other alleged incidents of misconduct.

4. The BOI found that the Applicant was "guilty of misconduct" in multiple instances under former staff rule 110.1 and that he failed to comply with staff regulation 1.2(f), which tasks staff members of the United Nations to "conduct themselves at all times in a manner befitting their

status as international civil servants" and to "not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations". The Board concluded that the Applicant be held accountable for serious misconduct in incidents relating to fourteen incidents of alleged misconduct, including an allegation of sexual exploitation of a casual worker.

5. With respect to the allegation of sexual exploitation of a casual worker, the BOI also concluded that there was enough "probable cause" to warrant further inquiry by the External Relations Office. The BOI then recommended, *inter alia*, that the then Personnel Management Support Section ("PMSS") within the Department of Peacekeeping Operations ("DPKO") be notified of the Applicant's misconduct and unsuitability for further duty with the Organization and its Agencies.

6. By a memorandum dated 9 February 2005, the Director of Administration ("DOA"), MONUC, transmitted the BOI report to the Chief of PMSS "to allow for disciplinary proceedings to be initiated in accordance with the findings of the BOI. Additionally, the DOA referred the allegation of sexual exploitation and abuse ("SEA") against the Applicant, to a MONUC SEA Investigation Team ("the SEA Investigation Team"). The SEA Investigation Team, which conducted its investigation in February 2005, interviewed four witnesses, reviewed the BOI's record of interview for the Applicant and examined excerpts from the BOI report. The SEA Investigation Team concluded in its Report[1] that the Applicant had a sexual relationship with a daily casual worker known as "Mary" and that despite her lack of professional experience he hired her for a position in MONUC's MovCon section. The SRSG/MONUC transmitted the Report of the SEA Investigation Team to the Under-Secretary-General ("USG")/DPKO on 26 February 2005 for appropriate action and possible "disciplinary measures".

7. On 9 March 2005, the Assistant Secretary-General ("ASG") for Peacekeeping Operations transmitted both the BOI Report and the report of the MONUC SEA Investigation Team to the ASG for Human Resources Management, recommending that "OHRM" (Office of Human Resources Management) initiate and expedite disciplinary proceedings against the Applicant".

[1] DPKO/089/KIS/2004.

The ASG further recommended that the Applicant be immediately suspended without pay "in order to protect the reputation of MONUC and, by extension, that of the Organization."

8. On 28 March 2005, the Director, Division for Organizational Development (DOD), OHRM, sent a memorandum to the Applicant transmitting to him the BOI Report, as well as the report of the MONUC SEA Investigation Team. The DOD/OHRM charged the Applicant with four instances of alleged misconduct, with the fourth charge being that of "engaging in an ongoing sexual relationship with a local daily worker, and employing her in a position in MovCon under [his] direct supervision".[2] The DOD/OHRM also informed the Applicant that the alleged misconduct, if established, would constitute a violation of staff regulation 1.2(a), (b), (e), (g) and (q), former staff rule 101.2(i) and ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). Lastly, in a separate communication also dated 28 March 2005, the DOD notified the Applicant that he was being suspended from duty with full pay for "a period of three months or until the completion of disciplinary proceedings, whichever is earlier."

9. The Applicant responded to the allegations of misconduct in a memorandum dated 22 April 2005.

10. By a memorandum dated 20 January 2006, the ASG/OHRM referred the Applicant's case to the Joint Disciplinary Committee ("JDC") in order to "advise the Secretary-General as to what disciplinary measures, if any, should be taken against [the Applicant] in connection with the allegations of misconduct" described in her memorandum.

11. A JDC panel was constituted on 10 August 2006, and held hearings through February 2007. On 11 June 2007, the JDC unanimously concluded that three of the charges did not rise to the level of misconduct and recommended that the charges be dropped. With respect to the fourth charge, the JDC unanimously concluded that the relationship between the Applicant and the

[2] The Applicant was also charged with the following: (i) using his position and falsifying a Movement of Personnel (MOP) form so that his wife could travel with him on a MONUC cargo aircraft; (ii) using his position in MovCon to obtain transport for himself for personal reasons on a non-revenue maintenance flight to Nairobi, despite the prohibition on such travel; and (iii) using his position and official MONUC letterhead to request an entry visa for his wife, thereby creating the impression that the request was an official, rather than a personal one.

daily casual worker did not amount to SEA within the definition of ST/SGB/2003/13 and recommended that the SEA component of this charge be dropped. However, a **majority of the JDC** ("the JDC Majority") found that the preponderance of the evidence suggested that the staff member had engaged in a sexual relationship with the daily casual worker and that as a result, he favoured her by actively seeking her transfer to MovCon. Consequently, the JDC Majority recommended that the staff member receive the disciplinary measure of a loss of two steps in grade for favouritism.

12. In a dissenting opinion, the **minority of the JDC** ("the JDC Minority") recommended that all charges against the Applicant be dropped and no sanction imposed. The JDC Minority opined that the Administration had not shown by a preponderance of "what was mostly contradictory evidence" that a sexual relationship existed between the Applicant and the daily casual worker. Accordingly, the JDC Minority remained "unconvinced that it was more likely than not that he showed favouritism".

13. By a letter dated 20 August 2007, the ASG/OHRM transmitted the JDC Report to the Applicant and informed him that the Secretary-General had accepted the unanimous findings of the JDC with respect to three of the charges. With respect to the fourth charge, the Applicant was informed that the Secretary-General had accepted the unanimous finding of the JDC that the relationship between the Applicant and the daily casual worker did not amount to SEA within the definition of ST/SGB/2003/13 and that the sexual exploitation and abuse component of this charge be dropped.

14. The Applicant was also informed that the Secretary-General had decided to accept the findings of the JDC Majority that he had engaged in a sexual relationship with the daily casual worker and had favoured her by actively seeking her transfer to MovCon. Noting, however, that the conduct of the Applicant constituted misconduct within the meaning of former staff rule 110.1, the Secretary-General declined to accept the recommendation of the JDC Majority to impose the disciplinary measure of a loss of two steps in grade for favouritism. The Applicant was informed that the Secretary-General had decided, due to the severity of his misconduct, to

demote him by one level with no possibility of promotion for two years. The Applicant was demoted to the FS-4 level on 5 September 2007.

15. The Applicant subsequently submitted the current application to the former UN Administrative Tribunal on 4 March 2008. The case was subsequently transferred from the former United Nations Administrative Tribunal to this Tribunal on 1 January 2010.

16. The Tribunal held an oral hearing in the matter from 14-16 September 2010.

Issues for determination:

17. The issues the Tribunal will examine in the present matter are as follows:

a. Whether the facts on which the disciplinary measure was based have been established;
b. Whether the established facts legally amount to misconduct under the United Nations Regulations and Rules;
c. Whether the disciplinary measure imposed is proportionate to the offence; and
d. Whether there was a substantive or procedural irregularity.

Standard of proof

18. In *Molari* 2011-UNAT-164 the Appeals Tribunal decided that the standard of proof in disciplinary cases is not beyond a reasonable doubt. The Appeals Tribunal held however that when termination is a possible outcome in a disciplinary case, misconduct must be established by clear and convincing evidence.

19. In the present matter, the Respondent submits that the standard of proof required is that of a "reasonable inference". The Applicant submits that the JDC Majority erred because its findings were made on the basis of probability rather than on the basis of any substantial evidence.

20. The Applicant was charged with four allegations of misconduct, with the fourth relating to an alleged sexual relationship between him and a local daily worker ("Mary") and her employment in a position in MovCon under his direct supervision. In light of the nature of this charge, the Allegations of Misconduct of 28 March 2005 clearly stated that if the conduct was established, it would be contrary to the provisions of ST/SGB/2003/13. Section 3.2(a) of this SGB states that:

> "Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal."

21. In view of the fact that summary dismissal/termination may have been the possible outcome at the end of the disciplinary process, the Tribunal considers that the misconduct in this matter must be established by clear and convincing evidence. As was noted in *Molari*, "clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable."

Issue 1:

Whether the facts upon which the disciplinary measure was based were established; and whether the established facts legally amount to misconduct under the United Nations Regulations and Rules.

Applicant's submissions:

22. The Applicant submits that the finding of misconduct against him was not justified because there was no evidence in support of the charge of a violation of ST/SGB/2003/13. In this respect, he denies that he was having a relationship with the daily casual worker and that he favoured her by seeking her transfer to MovCon over which he held supervisory authority. Additionally, he submits that her transfer was a routine administrative transfer.

Respondent's submissions:

23. The Respondent submits that it is within the discretionary power of the Secretary-General to determine what behaviour constitutes misconduct, as well as the disciplinary measures to be imposed. Additionally, based on the evidence adduced by the JDC, the Respondent reasonably determined that the evidence supported the charge that the Applicant had committed misconduct by actively seeking the transfer of a daily casual worker with whom he was having an intimate relationship to MovCon. Lastly, the Respondent submits that staff regulation 1.2(g) clearly prohibited the Applicant from using his official position to favour the daily casual worker, admittedly his friend, and such conduct was prohibited irrespective of the specific nature (i.e. sexual or otherwise) of the Applicant's non-professional relationship with the daily casual worker.

Considerations

24. The Applicant was charged with the following:

a. Using his position and falsifying a Movement of Personnel (MOP) form so that his wife could travel with him on a MONUC cargo aircraft ("charge 1");

b. Using his position in MovCon to obtain transport for himself for personal reasons on a non-revenue maintenance flight to Nairobi, despite the fact that travelling on such flights was prohibited and was not covered by insurance ("charge 2");

c. Using his position and official MONUC letterhead to request an entry visa for his wife, thereby creating the impression that the request was an official, rather than a personal one ("charge 3"); and

d. Engaging in an ongoing sexual relationship with a local daily worker ("Mary") and employing her in a position in MovCon under his direct supervision ("charge 4").

25. The JDC unanimously concluded that charges 1 to 3 did not rise to misconduct and recommended that the charges be dropped. With regard to charge 4, the JDC unanimously concluded that the relationship between the Applicant and Mary did not fit within the definition

in ST/SGB/2003/13 of an abusive or exploitative relationship and therefore recommended that the SEA component of this charge be dropped. However, the JDC Majority found that the preponderance of the evidence suggested that the staff member had engaged in a sexual relationship with Mary and that as a result, he had favoured her by actively seeking her transfer to MovCon.

26. The Secretary-General accepted the findings and conclusions of the JDC Majority but decided to impose the disciplinary measure of demotion with no possibility of promotion for two years instead of the disciplinary measure recommended by the JDC Majority.

27. The Tribunal notes the Respondent's assertion in his pleadings dated 29 September 2008 that irrespective of the specific nature of the Applicant's relationship with Mary (i.e. sexual or otherwise), he had violated staff regulation 1.2(g) by improperly favouring her by seeking her transfer to MovCon.

28. Staff regulation 1.2(g) provides that:

> "Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour […]."

29. In view of the fact that the Secretary-General imposed a disciplinary measure on the Applicant on the basis that he "**did** engage in a sexual relationship with the daily worker and that [he] **did** favour [her] by actively seeking her transfer to MovCon" (*emphasis added*), the Tribunal finds specious the Respondent's assertion in his answer of 29 September 2008. Due to the very precise wording in the decision of the Secretary-General, this Tribunal cannot find that the conduct of the Applicant constituted misconduct within the meaning of former staff rule 110.1, unless the Respondent establishes that Mary was transferred to MovCon as a result of the alleged sexual relationship between her and the Applicant.

Was there a sexual relationship between the Applicant and Mary?

30. The SEA Investigation Team reviewed the BOI report and interviewed Mary and three MONUC staff members (Moidrag Kraljevic, a MONUC Aviation Safety Advisor, GH, a

MONUC Microwave Satellite Supervisor, and JB, a MONUC Warehouse Manager) who had shared a house with the Applicant in Kisangani. The SEA Investigation Team found that there was sufficient evidence to substantiate that between April and December 2004, the Applicant had had a sexual relationship with Mary, who was working under his supervision in MovCon. A review of the available evidence revealed the following:

31. Moidrag Kraljevic joined MONUC in May 2004. He spent one month in Kinshasa and was then posted to Kisangani. In September 2004, he moved into the house where the Applicant and GH were living. His room was "just across" the Applicant's room. According to Moidrag Kraljevic, between September 2004 and the end of the year, Mary used to come to their house very often. She visited the Applicant's room about 4-5 times a month and would spend the night in his room. He claimed that due to the thin walls in the house, when he was in his room he could hear the Applicant and Mary having sex in the Applicant's room. Moidrag Kraljevic claimed that he would see her in the morning after she had spent the night with the Applicant and that Mary kept some of her clothes in the Applicant's room. Moidrag Kraljevic stated that the Applicant never spoke to him about his relationship with Mary. Moidrag Kraljevic restated this evidence at the JDC hearing in February 2007.

32. GH arrived in Kisangani in April 2004 and immediately started sharing a house with the Applicant and one JB. GH stated that Mary used to buy food items for them on a weekly basis. He stated that between May and December 2004, he saw Mary go to the Applicant's room about 10 times. The Tribunal notes that his evidence regarding the number of times Mary went to the Applicant's room contained an asterisk whereby he appended, at the end of his statement, an initialled phrase "and she would spend the night in [the Applicant's] room". According to GH, the relationship between the Applicant and Mary seemed very friendly (e.g. he saw them hugging each other in public at the Kisangani Airport). GH stated that the Applicant did not talk to him about his relationship with Mary.

33. When asked by the JDC at a hearing in February 2007 to explain the initialled phrase, GH denied having stated that he had seen Mary go to the Applicant's room about 10 times and that she would spend the night there. He explained that the information contained in his

statement to the SEA Investigation Team was an incorrect interpretation and that the line at the bottom of the statement was added when the interviewer asked him towards the end of the interview whether he "thought" she was spending nights in the Applicant's room following his mentioning her coming to the house with food items. He explained that the addition and the initial were an error as he had reviewed the statement very quickly without thoroughly checking it for accuracy.

34. According to a summary of telephone interview included in the BOI report, FG, a Station Manager working for Pacific Architects and Engineers (PAE), told the BOI that he "[took] it that [Mary] was living with [the Applicant]. According to him, Mary was given the job at the airport because she was the Applicant's girlfriend. In his view, Mary "was the girlfriend first, not the other way around (became girlfriend after hiring)". He told the BOI that he saw Mary with the Applicant at the Riverside Inn a couple of times. He had contact with them only at work and did not associate with them socially.

35. According to a summary of telephone interview that was included in the BOI report, RR, a MONUC MovCon staff member, claimed that the Applicant had a Congolese girlfriend who was living with him and was the only female local staff in MovCon Kisangani. According to this summary, the Applicant got into trouble because he tried to get another local staff member fired so that his girlfriend could get a UN job.

36. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held that:

> There is a distinction between the admissibility of evidence and the weight to be attached to such evidence. The Dispute Tribunal has a broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. This Tribunal is also mindful that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before the UNDT. The fact that the Secretary-General indicated that he would not require Messinger's witnesses to be cross-examined on their statements did not mean that all of the evidence contained in the witness statements would be taken to be relevant to the matters in dispute or accorded full weight when assessed in light of the other evidence. At the hearing, Messinger chose to call only one of the witnesses who provided written statements. The weight to be attached to admitted evidence is within the discretion of the UNDT Judge and Messinger has failed to convince us of any

> error in the procedure adopted with respect to the admission of the witness statements or in deciding upon the weight to be attached to the witness statements.

37. In the present case, the Tribunal was presented with BOI summaries of telephone interviews with FG and RR, which were not signed by these individuals. FG did not provide evidence before either the JDC or the Tribunal. In light of the foregoing, the Tribunal was not in a position to properly evaluate his credibility, especially in view of his statement where he said *"I take it she was living with him"*. This was pure conjecture and has absolutely no probative value. The Tribunal rejects that evidence based on sheer assumption.

38. It is noteworthy, however, that RR, who gave evidence before the JDC and the Tribunal, denied having an official interview with the BOI. He explained that he had had a personal conversation with the Chairperson of the BOI, an individual he knew from East Timor, regarding what he liked and did not like about the operation at Kisangani. He stated that he was unaware of what was attributed to him in the BOI summary of telephone interview. He denied telling the BOI or anyone else that the Applicant had a Congolese girlfriend who was living with him. He also denied telling anyone that the Applicant tried to get another local staff member fired so his girlfriend could get a UN job. Additionally, in a signed interoffice memorandum dated 15 May 2009, RR stated that he had never seen the Applicant conduct himself in an inappropriate manner as a UN staff member, and certainly not with Mary or any other female staff member. The Tribunal found RR's evidence at the hearing to be credible. Consequently, the Tribunal has decided to give absolutely no credence to the summary of telephone interview attributed to RR by the BOI.

39. Further, it is noted that GH, who gave evidence before the JDC but not before the Tribunal, provided contradictory statements on material aspects of this matter. The JDC Majority did not find the explanation he offered at the hearing to be plausible. However, the JDC Minority disagreed with the Majority's considerations regarding GH's initial statement and "retraction" and found his explanation to be entirely plausible. In light of the fact that the JDC, who heard his evidence, did not come to an agreement on the issue of his credibility and the Tribunal was unable to question him on the inconsistencies contained in these statements, his evidence is also being accorded nominal weight.

40. The JDC Majority, after hearing Moidrag Kraljevic's evidence, was of the view that his testimony "strongly [indicated] a sexual relationship" between the Applicant and Mary. To further bolster this view, the JDC Majority relied on GH's statement to the SEA Investigation Team since they did not find his subsequent testimony to be credible. At the end of paragraph 43 of the JDC report, which sets out the JDC Majority's rationale for not accepting the veracity of GH's statement, the JDC Majority found that "the testimony showed by a preponderance of the evidence that a sexual relationship existed". The findings and conclusion of the JDC Majority on this issue, which subsequently led to the imposition of a disciplinary measure on the Applicant, appears to be based on evidence from Moidrag Kraljevic and GH.

41. In light of the Tribunal's decision to accord nominal weight to GH's statements, is Moidrag Kraljevic's evidence alone adequate to sustain a finding of misconduct against the Applicant? Does his evidence provide "clear and convincing proof" that a sexual relationship existed between the Applicant and Mary as concluded by the JDC Majority?

42. Moidrag Kraljevic's assertions are that between September and December 2004: (i) Mary visited the Applicant's room about 4-5 times a month and would spend the night in his room; (ii) as a result of the thin walls in the house, he could **hear** (emphasis added) the Applicant and Mary having sex in the Applicant's room; (iii) he would see her in the morning after she had spent the night with the Applicant; and (iv) Mary kept some of her clothes in the Applicant's room. There is no dispute about Mary food shopping for the Applicant and his housemates and delivering the groceries to the house between June and December 2004.

43. There is, however, a material dispute as to whether or not Mary spent nights in the Applicant's room and engaged in sexual relations with him. Mary, who was also interviewed by the SEA Investigation Team and gave evidence before the JDC but not before the Tribunal, confirmed that she purchased food items for the Applicant once or twice a week and that she used to take the items to his house. She however consistently denied ever spending a night in the Applicant's room and denied ever having sexual relations with him. An issue that was raised at the hearing before the Tribunal was the veracity of Mary's denial. JF, the SEA Investigation Team member who took Mary's statement, provided evidence before the Tribunal that, in her

view, Mary may not have been telling the truth for fear of losing her job as a daily casual worker. The Tribunal notes however that JF did not specifically ask Mary whether she was lying to protect her job. JF appears to have assumed that this was the reason because she had interviewed other female daily casual workers, subsequent to the investigation in this case, in relation to allegations of SEA against other United Nations Personnel, who had denied the alleged sexual relationships for fear of losing their jobs. In the Tribunal's view, when dealing with such a serious allegation, an assumption is not a good enough basis from which to draw a conclusion. In the absence of evidence to the contrary, the Tribunal has no reason to rule that Mary denied the existence of a relationship with the Applicant due to the fear of losing her job.

44. The Applicant denied having a sexual or improper relationship with Mary. He explained that sometime in June 2004 the Staff Welfare Club was burned down during a period of extreme upheaval and disturbance in Eastern Congo. Subsequently, a decision was made to form a new Staff Welfare Committee and to build a new staff welfare facility in Kisangani. The Applicant became one of the founding members of the new Staff Welfare Committee and a new staff welfare facility ("the Riverside Inn") was built at the end of July/early August 2004. The new facility had a restaurant facility that necessitated the purchase of food items from the local market. The Applicant gave evidence that due to Mary's demonstrated integrity and performance at the airport, he made her responsible for purchasing the food items needed at the Riverside Inn. This occurred sometime at the end of July/early August 2004.

45. Further, the Applicant explained that around the same time period (i.e. end of July/early August), Mary started purchasing food items for him too since she was already shopping for the Riverside Inn and it was cheaper for her to purchase food items on the local market. Consequently, she started going to his house approximately two or three times a week to deliver the food items. He explained that she would deliver the food items to his house around lunch time during the week or on Saturday afternoons. He explained that this was the extent of his relationship with Mary and that she was never in the house at the time that Moidrag Kraljevic claimed she was there.

46. JB, who was interviewed by the SEA Investigation Team and gave evidence before the JDC but not the Tribunal, stated that he stayed in the house with GH and the Applicant from June 2004 until late August 2004. His room was adjacent to the Applicant's and GH's room was further away from theirs. He stated that Mary used to shop for them approximately once or twice a week, that she was often with the Applicant and that he considered the Applicant and Mary to be good friends. He did not see Mary spending any nights in the Applicant's room and he did not hear noises coming from the Applicant's room.

47. In an email dated 16 April 2009, one RS, who was working for PAE in Kisangani at the time in question, stated that the alleged relationship between the Applicant and Mary "couldn't happen" and he knew that it "didn't happen". According to him, he told the BOI this when he was interviewed but his statements were omitted from the BOI report. RS gave evidence to the JDC and also appeared before the Tribunal. He stated that he worked with the Applicant on aviation and movement control issues and that FG was his direct supervisor. He explained that the PAE supervisor in charge of passenger services did not get along with Mary because it was her job to ensure that PAE followed the United Nations rules and standards and people were trying to do things that were not in line with UN standards. According to RS, this PAE supervisor was favoured by FG and as such, any problem he had with Mary would be reported to FG and taken as the truth without question. When asked about the relationship between the Applicant and Mary, RS explained that since he played pool frequently with the Applicant, he would have known if Mary had been the Applicant's girlfriend. He denied the veracity of the allegation and explained that FG saying that Mary was the Applicant's girlfriend could only have come from hearsay because FG never socialized with any United Nations or PAE personnel in Kisangani but always went home after work. The Tribunal found RS to be a very credible witness.

48. The Tribunal cannot ignore the weight of the evidence strongly showing that the Applicant and Mary were not involved in a sexual relationship and/or that Mary did not spend any nights in the Applicant's room. One of the key individuals in this matter, Mary, the woman who was supposedly sleeping over at the Applicant's residence at night has consistently denied the allegations in different forums. In the absence of evidence establishing that Mary's denial

stemmed from a fear of losing her job, the Tribunal has no reason to doubt the veracity of her statements. Similarly, the Tribunal cannot ignore JB's statement that he did not see Mary spending any nights in the Applicant's room. The Tribunal has not come across a single reason within the pages of the JDC report to doubt the veracity of his statement either.

49. The testimony of the Applicant, who gave evidence in person before the Tribunal has been noted. The Tribunal found his explanations with respect to the reason and timing of Mary's visits to his residence i.e. during lunchtime on weekdays and afternoons on Saturdays to deliver food items, to be reasonable. JB told the SEA Investigation Team that Mary had cooked once for them during his stay in the house. In this respect, the Tribunal notes Moidrag Kraljevic's statement that after the Applicant left the house in December 2004, Mary continued to come over to the house a couple of times to cook for the staff member who took over the Applicant's room, one HS. It is also noteworthy that Moidrag Kraljevic told HS that he "did not like outsiders coming to the house and asked if he could avoid bringing any outsiders in the house". Did Moidrag Kraljevic's dislike of "outsiders" prompt him to come up with this rather intriguing sexual relationship between the Applicant and Mary so as to get rid of her? The answer to this question will never remain an unsolved mystery because Moidrag Kraljevic did not give evidence before the Tribunal.

50. Lastly, the Tribunal takes note of the evidence provided by: (i) RR who stated that he had never seen the Applicant conduct himself in an inappropriate manner as a UN staff member, and certainly not with Mary or any other female staff member; and (ii) RS who stated categorically that the alleged relationship between the Applicant and Mary "couldn't happen" and he knew that it "didn't happen".

51. In light of the foregoing, the Tribunal concludes that the Respondent did not establish by clear and convincing evidence that the truth of the allegations asserted by Moidrag Kraljevic were highly probable. While the Applicant and Mary were apparently good friends, the available evidence does not indicate to a high degree of probability that they were in a sexual relationship or spending nights together in the Applicant's room. The Tribunal finds that Mary visited the

Applicant's residence two or three times a week because she was delivering groceries to him and the people who shared the residence with him.

52. The above notwithstanding, the Tribunal will complete its examination of Moidrag Kraljevic's assertions. Did he hear noises coming from the Applicant's room? JB stated that he did not hear noises coming from the Applicant's room during his tenure at the house. It is noteworthy that the same wall that was characterized as "thin" by Moidrag Kraljevic was described by the Applicant as a thick, 8-inch double block concrete wall. Since neither the BOI nor the SEA Investigation Team deemed it necessary to visit the residence, the actual density of the wall, which is crucial evidence in this case, remains another mystery. Consequently, the Tribunal is unable to come to a conclusion as to whether or not noises could be heard through the wall that was between the rooms of the Applicant and Moidrag Kraljevic. This Tribunal has yet to devise a method by which to figure out how an unwanted and nosy eavesdropper who allegedly hears noises coming from a room to which he has no access at the material time, could conclude that the persons allegedly making noises in that room were having sex. If that were to be the case then all staff members who invite female friends to their place should be extremely wary as they may run the risk of being sanctioned following investigations by overzealous investigators who may be all out and quick to sanction such noises. The Tribunal would be cautious and add that if such a method does exist no evidence of this was forthcoming.

53. Did Moidrag Kraljevic see Mary in the morning after she had spent the night with the Applicant? In view of the Tribunal's conclusion that Mary did not spend any nights in the Applicant's room, this assertion, in the Tribunal's view, is without merit.

54. Lastly, did Mary keep some of her clothes in the Applicant's room? There is no indication from Moidrag Kraljevic's statement how he was able to come to the conclusion that the clothing in the Applicant's room belonged to Mary. The Applicant explained, however, that he had female clothing in his bedroom because his wife, who had stayed with him in Kisangani between September 2002 and April/May 2003, had left behind her clothes. In the absence of any evidence to the contrary the Tribunal finds this to be a credible explanation and concludes therefore that the clothing in the Applicant's room did not belong to Mary. Further the Tribunal

is at a loss as to how Moidrag Kraljevic figured out that the clothing belonged to Mary. Was Moidrag Kraljevic cognizant of every item of clothing owned by Mary to the point that he could identify them even when she was not wearing them? The record does not provide an answer to this question. Or was he a peeping Tom in addition to being an eavesdropper? The least the Tribunal can say is that the fertile imagination of Moidrag Kraljevic knew no bounds and the investigators allowed themselves to be led blindfolded in the fantasy world of Moidrag Kraljevic.

Did the Applicant actively seek the transfer of Mary to MovCon because he favored her as his girlfriend?

55. With respect to this issue, the JDC Minority very eloquently concluded as follows:

> "As to the question of favouritism, it follows from this that, in the absence of a sexual relationship, I remain unconvinced that it was more likely than not that he showed favouritism. However, in my view the merits of the allegation should not have been brought ab initio, insofar as favoritism never figured in the initial charges. References to [the daily casual worker] in the charge letter were made in the context of SEA, a charge that does not in and of itself subsume the notion of favouritism. It was therefore not a receivable charge by the JDC, nor, in my mind, did the JDC invite the staff member to respond on the issue before the Panel pursued this avenue."

56. Due to the symbiotic relationship between the sexual relationship and the favoritism allegations, the Tribunal concludes that in the absence of a sexual relationship between the Applicant and Mary, the favoritism element of the charge must necessarily fail. This conclusion notwithstanding, the Tribunal will still review the available evidence to ascertain whether there was clear and convincing evidence that the Applicant actively sought Mary's transfer to MovCon because she was his girlfriend. This means that the timeline and the Applicant's actions in relation to her transfer are crucial.

57. When was Mary transferred from the Engineering Section to MovCon? According to the Applicant, Mary was transferred to MovCon approximately two to three weeks after he took up his functions as OIC, MovCon on 18 or 19 January 2004. According to Mary, she started working for MovCon in March 2004 under the supervision of RR. While RR did not provide the specific month in which Mary started working under his supervision, he indicated in his letter of

15 May 2009 to the "United Nations Appeals Tribunal"[3] that she had started work about 3 months prior to his departure from Kisangani in April 2004. The BOI noted at page 28 of its report that Mary was transferred from Engineering to MovCon by the Applicant "shortly after he became OIC in Kisangani". Based on the foregoing, the Tribunal will infer that Mary was transferred to MovCon sometime between January and March 2004. The SEA Investigation Team found however that the alleged sexual relationship between the Applicant and Mary existed between April and December 2004. Consequently, the Tribunal can only conclude that Mary was transferred prior to the commencement of the alleged sexual relationship with the Applicant and as such, the alleged transfer did not occur because she was his "girlfriend".

58. Did the Applicant "actively" seek Mary's transfer to MovCon? The Applicant gave evidence that at the end of 2003, a number of national staff ALD positions became available in several sections in MONUC, including MovCon. Since MONUC had been employing a number of casual workers, it was decided that they would be recruited in these ALD posts because they had been performing the functions of these posts for lengthy periods. MovCon had ten ALD posts that needed to be filled. According to the Applicant, when he became OIC in January 2004, he thought it expedient to recruit a Congolese female for MovCon as there was only one female, from Kenya, working in the section.

59. The MONUC Engineering Section had three casual workers, including Mary, and only two ALD posts. This meant that one of the casual workers had to be terminated. According to the Applicant, since both Mary and her sister were casual workers with the Engineering Section, only one of them could stay on an ALD contract. Consequently Mary, who was aware of the ALD positions in MovCon, approached the Applicant for a job. According to the Applicant, he advised her to consult with the Chief of the Engineering Section, one AV, first. Subsequently, AV approached him and suggested that Mary be transferred to MovCon. Mary was then transferred to MovCon but not as an ALD. She remained a daily casual worker due to problems with her qualifications and experience. The Applicant denied approaching AV regarding Mary's transfer.

[3] This should have been the "United Nations Administrative Tribunal" since the United Nations Appeals Tribunal was not established until 1 July 2009.

60. AV did not provide evidence before the JDC. However, subsequent to its hearing, the JDC sought additional information on this issue from AV via email. In an email submitted to the JDC on 5 March 2007, AV stated that sometime in January 2004, the Applicant visited her in her office and inquired if Mary could be moved from Engineering to MovCon. She advised him to speak with Mary's direct supervisor but considering that Mary was a daily casual worker "she was free to go".

61. The JDC Majority decided to accept the statement of AV over the Applicant and concluded that he had favored Mary by actively seeking her transfer to MovCon. Once again, the Tribunal is faced with a witness who provided a written statement but did not appear before either the JDC or the Tribunal so that her credibility could be tested. This fact notwithstanding, the Tribunal also notes that the Applicant was not certain to a very high degree that AV had in fact approached him first. He gave evidence that this was his recollection but he could not, due to the passage of time, tell whether this was accurate or not.

62. Considering that the Applicant admitted that his recollection of this matter may or may not be accurate and the fact that the Tribunal did not have the opportunity to test AV's credibility, the Tribunal finds that the testimony on this issue is inconclusive.

Conclusion on Issue 1

63. In view of the foregoing, the Tribunal concludes that the facts upon which the disciplinary measure was based were not established and that the facts which have been established do not legally amount to misconduct under the Regulations and Rules of the United Nations.

Issue 2:

Whether the disciplinary measure applied is proportionate to the offence

64. The Applicant submits that the Respondent exceeded his discretionary authority in his determination that none of the disciplinary measures set out in former staff rule 310.1(e) were

appropriate or commensurate, and by invoking former staff rule 110.3(a)(vi), i.e. demotion, he failed to properly exercise his discretion under former staff regulation 10.2. He submits further that the disciplinary measure imposed on him by the Respondent is not provided for under the former 300 series of the Staff Rules, which was applicable to him at the time of the Respondent's decision. The Respondent's liberal interpretation is in breach of his fundamental right to fairness and basic justice.

65. The Respondent submits that it was within his discretion to not accept the JDC Majority's recommended sanction but deciding instead to demote the Applicant by one level for a period of two years without the possibility of promotion during that time. The Respondent contends that he is not bound by recommendations of the JDC and may impose a disciplinary measure that he considers appropriate to the nature of the misconduct.

66. Additionally, the Respondent submits that neither former staff rule 310.1(e) nor former staff rule 110.3(a) provide that disciplinary measures must take a form specified therein. Thus, the enumeration of possible forms of disciplinary measures is not intended to limit the discretion of the Respondent under former staff regulation 10.2.

67. Having taken careful note of the submissions of the Parties on the issue of proportionality, the Tribunal is of the considered opinion that a lengthy discourse would be nothing but academic and decidedly unnecessary in view of its earlier conclusion. Since the established facts in this case did not legally amount to misconduct, the Tribunal concludes that the disciplinary measure imposed on the Applicant was unlawful *ab initio* and therefore, a violation of his rights.

Issue 3:

Whether there were procedural irregularities

68. In *Mushema* UNDT/2011/162, the Tribunal held that since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not

been thoroughly conducted, then the whole disciplinary process is tainted. The Tribunal noted that since the preliminary investigation is "the harbinger of a disciplinary proceeding it is vital that it be conducted in a rational, lawful and judicious manner" and that it should not "be the gateway to a foregone decision to the establishing of a disciplinary committee or a finding of guilt".

69. In *Liyanarachchige*, UNDT/2010/041, paragraph 47, citing Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (N. P. Engel, Arlington: 1993) the Tribunal acknowledged that "the right to a fair trial on a criminal charge is considered to start running not 'only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned' This would equally be applicable to investigation that may lead to disciplinary proceedings…"

The Board of Inquiry

Preliminary matters

70. The Respondent submits that since none of the factual findings of the BOI formed a basis for the finding of misconduct against the Applicant, the Tribunal need not make any finding in regard to the conduct of the BOI. This submission is erroneous for two reasons. Firstly, the Tribunal notes that in *Sanwidi* 2010-UNAT-084, the Appeals Tribunal held that the role of the Dispute Tribunal is to conduct judicial review and that "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision". Thus, in reviewing the present matter, the Tribunal will scrutinize such evidence it deems relevant to determine whether or not the administrative decision under challenge is "reasonable and fair, legally and procedurally correct, and proportionate".

71. Secondly, in the Tribunal's humble opinion, without the purported BOI investigation and report, the Applicant would not have filed the current application for the reason that disciplinary proceedings would not have been initiated against him in the first place. While none of the factual findings of the BOI may have formed the basis for the finding of misconduct against the Applicant, the fact cannot be ignored that it was the same BOI's so-called investigation that

eventually gave rise to the basis for the finding of misconduct against the Applicant. Thus, it would be unfair for the Tribunal to accept the Respondent's submission and pretend that the finding of misconduct against the Applicant had no nexus whatsoever to the BOI but rather sprang out of thin air. Consequently, the Tribunal will review the conduct of the BOI and make findings, as it deems necessary.

Applicable legal framework

72. At the time of the incidents in question, Section IV, Chapter 16 of the draft Field Administration Manual was the DPKO policy document governing BOIs.

Was it appropriate for the BOI to conduct the preliminary investigation into the alleged incidents of misconduct in the present case?

73. Pursuant to paragraph 3.3 of Section IV of the Field Administration Manual, a BOI shall obtain the final Military Police/Chief Civilian Security Officer (MP/CCSO) report on an incident and any additional information required to complete its investigation. The BOI is then to establish the facts of the case from the evidence presented in the MP/CCSO reports and other documents.

74. The conclusion that the Tribunal draws from paragraph 3.3 is that a BOI is not meant to serve as an investigative tool and BOI members are not meant to turn themselves into investigators. The Tribunal's interpretation of paragraph 3.3 is that the initial investigation is supposed to be carried out solely by two entities i.e. the Military Police or the Chief Civilian Security Officer. The function of the BOI is to then review the reports of the MP/CCSO with a view to establishing the facts.

75. In the present case, the allegations against the Applicant were not investigated by the MPs or the CCSO. No evidence was placed before the Tribunal to indicate that the members of the BOI were either military police or security officers and yet they were, very regrettably, allowed to usurp the function of these two investigative bodies and allowed to carry out a purported investigation into all kinds of allegations against the Applicant. Even more regrettable

is the fact that the BOI was allowed to take statements from witnesses afresh when the Field Administration Manual clearly indicated that any additional statements from witnesses were to be obtained by the Board "only when the statements attached to the report are insufficient to enable it to address all relevant issues".

76. In view of the foregoing, the Tribunal concludes that it was not appropriate for the BOI to conduct the preliminary investigation into the alleged incidents of misconduct in the present case. This is a task that should have been left for trained investigators i.e. military police or security officers, as prescribed by the Field Administration Manual.

Did the BOI exceed its original mandate?

77. The Applicant submits that none of the original four allegations of misconduct originally set before the BOI constituted any of the final charges against him and that the BOI exceeded its original mandate by investigating 10 additional allegations without even advising him of his right to counsel or representation.

78. The Respondent submits that neither former staff rules 110.4 or 310.1 nor ST/AI/371 prohibited a preliminary investigation into allegations of misconduct from venturing further than the initial allegations leading to such preliminary investigation. The Respondent also submits that irrespective of the wide-ranging nature of the BOI investigation, the Applicant was charged with four specific instances of misconduct and in accordance with staff rules 110.4(b) and 310.1(c) and part III of ST/AI/371, the charges of misconduct, together with the Applicant's responses, were referred to the JDC.

79. It is the understanding of the Tribunal that the terms of reference ("TOR") of a BOI constitute the framework within which the BOI is to operate in that it defines the facts and issues the BOI is to address. In other words, the purpose of the TOR is to set out the precise scope of the BOI's inquiry.

80. The SRSG of MONUC convened a BOI on 22 November 2004 "to investigate and report on serious allegations of misconduct by a MONUC staff member [the Applicant] during March

2004, Kisangani, Democratic Republic of Congo". The Respondent was unable to provide a copy of the BOI's written terms of reference ("TOR") but EB, one of the BOI members, gave evidence that the TOR was for the BOI to look into allegations of four specific instances of misconduct and to determine whether, based on the facts, any United Nations regulations or rules had been violated. These four instances of misconduct related to: (i) the Applicant being involved in an altercation with another staff member at his residence; (ii) a daily casual worker under his supervision driving a forklift without authorization; (iii) problems with the Uruguayan deployment on 24 March 2004; and (iv) a daily casual worker under the Applicant's supervision being involved in a traffic accident that caused damage to a UN vehicle.

81. Despite this specific TOR, the BOI decided to go on a romp of its own by rummaging into ten other unrelated allegations of misconduct "concerning both the character of the staff member and his professional performance that involved abuse of power and integrity issues". If the BOI was meant to carry out such a sweeping investigation, then what was the purpose of the TOR? The answer here is quite simple. The BOI was provided with a TOR so as to prevent exactly what happened - a deviation from the initial focus of the investigation. Fairness and logic should have dictated to the BOI that it was not within their remit to probe into the conduct of the Applicant in the manner that they did and to make improper recommendations as to his dismissal or termination. Additionally, it is a shame that the SRSG, who convened the BOI and provided the TOR, subsequently endorsed the BOI's *ultra vires* actions by accepting its report without questioning the wide-ranging scope of its inquiry. The Tribunal duly concludes that the BOI exceeded its original mandate.

82. The Tribunal wishes to remind the Respondent again that an investigation should not be used as a fishing expedition to find off the cuff evidence against a staff member nor should it be initiated on the basis of idle chitchat. An investigation into a case of alleged misconduct requires the existence of some cogent evidence of the unsatisfactory conduct. Those responsible for initiating investigations must bear in mind that the threshold of reasonable belief must be satisfied.

Were the Applicant's due process rights respected by the BOI?

83. The Applicant asserts that his due process rights were violated because the BOI failed to advise him of the rights he had to legal representation.

84. The Respondent submits that the Applicant's right to due process was fully respected throughout the disciplinary proceedings, consistent with staff regulation 10.1, former staff rule 310.1 and with ST/AI/371 (Revised disciplinary measures and procedures).

85. A preliminary investigation relates to an investigation where either no specific allegation of misconduct has been reported or an individual staff member has been identified. At this initial stage the exercise is more a gathering or collecting of evidence and as such, most of the due process rights that subsequently attach to a formal investigation will not necessarily vest in the staff member. The right to legal assistance, however, may arise before the formal charges are presented, namely "if and when an investigation, preliminary or not, starts to focus adversely on a specific person for a charge of unsatisfactory behavior".[4]

86. Analogous to the situation in *Applicant* UNDT/2011/054, the investigation conducted by the BOI in this case was "preliminary" only in name and as such, certain due process rights should have vested in the Applicant at an early stage.

87. In the present matter, even though the Applicant was questioned on 7 December 2004 and he was subjected to very close examination by the BOI, he was not informed of his rights vis-à-vis any incriminating matter that had been raised against or by him. Further, by the 21 December 2004 interview, the BOI investigation had started to focus adversely on the Applicant and he should, as a result, have been informed of his right to legal or other representation.[5] Unfortunately, these two interviews were his only opportunity to provide explanations on an array of allegations. The BOI subsequently concluded that the Applicant "use[d] falsehoods and exaggerations so frequently that nothing he said could be taken at face value and the vast majority of his explanations of his behavior were demonstrably false". This conclusion makes it quite clear that the content and manner of the Applicant's responses at these interviews were

[4] *Ibrahim* UNDT/2011/115.
[5] *Ibrahim* UNDT/2011/115.

very influential in the subsequent assessment of the allegations and as such, the onus was on the Organization to respect and protect the Applicant's rights and interests.

88. Due to the nature of the investigation that was conducted by the BOI, which gravely blurred the lines between a preliminary and formal investigation, the Tribunal concludes that the Applicant should have been advised of his rights and that the failure of the BOI to do so was a violation of those rights.

89. The Applicant submits further that his due process rights were violated because he was not informed by the BOI why he was being investigated and what the alleged incidents of misconduct were.

90. It is the opinion of the Tribunal that basic principles of fairness and due process should have applied to all aspects of this BOI proceeding in light of its invasive and prosecutorial nature. Consequently, the Applicant should have been informed at the very beginning of the subject matter of the inquiry and the reasons why he had been called for an interview. He should have been informed of any evidence or allegations made against him and he should have been given a reasonable opportunity to respond. This, necessarily, should have included the opportunity to present countervailing evidence and to suggest the names of relevant witnesses to be interviewed by the BOI.

91. An examination of the 7 December 2004 interview record for the Applicant reveals that he was informed generally that the BOI was investigating "alleged misconduct" on his part. He was then asked by the BOI what he could tell them about "that". The Tribunal held previously in *Applicant*[6] that a statement before the interview that the investigation is into possible misconduct is not sufficient. Likewise, the BOI delivering a general statement that the investigation is into alleged misconduct is insufficient to satisfy the due process requirement set out in *Applicant*.

[6] UNDT/2011/054.

92. The Tribunal is satisfied however that the 21 December 2004 interview record for the Applicant appears to have satisfied due process in that the Applicant was apprised of the allegations that were made against him in regard to his relationship with Mary and he was given the opportunity to respond. The Applicant explained however that while the answers in the interview record were correct, they did not accurately record the answers he had actually provided.

93. Additionally, the Applicant submits that his rights were violated because the BOI failed to provide him with transcripts of his interviews for review, especially since the abridged version relied on by the Respondent contained serious inaccuracies and deficiencies that were nevertheless used as damaging evidence against him. He further submits that witnesses who were interviewed by the BOI were not given the opportunity to review summaries or transcripts of the testimony attributed to them.

94. The Respondent submits that there is no requirement that the Applicant be provided with transcripts of the evidence uncovered during such an investigation.

95. In the Tribunal's view, it is a basic tenet in investigations for a record to be made of the witness's evidence in the form of a statement. The Tribunal also considers that it is only fair for the witness to be allowed to review the transcript following the interview and allowed to make amendments if he or she wishes to do so. Once the witness is satisfied with the statement, he/she should then be asked to sign and date the statement.

96. Apart from the Applicant's evidence on this issue, MD, who was also a staff member of MONUC during the relevant period, gave evidence that the BOI did not provide him with a transcript or record of his interview for verification and signature. According to MD, while some of the statements attributed to him by the BOI were accurate, several of them could best be described as a falsification of testimony. According to RS, he had been interviewed by the BOI for approximately 20 to 30 minutes and yet a record of his interview was not included in the BOI report. EB's explanation of this anomaly was that while he was unable to recall whether or not RS was interviewed, the information provided by RS may not have been included if it had not been relevant. The Tribunal finds this to be an odd way to conduct an investigation. Once a

witness is interviewed, shouldn't his or her evidence at least be reported on and then given the weight the fact-finding body deems to be appropriate? Additionally, RR stated that he was not informed that the substance of a personal telephone conversation between him and the BOI Chairperson was meant to become part of the BOI record. According to him, certain statements attributed to him by the BOI in his interview summary were either untrue or inaccurate.

97. Noting the evidence of the Applicant, MD, RS and RR on the records of their interviews, the Tribunal is of the considered view that the confusion with the interview records could have been averted if the BOI had merely provided the Applicant and all the witnesses they interviewed with copies of their interview summaries for verification and signature. Noting, however, that the BOI members were not qualified investigators, it is not too surprising that they were not conversant with this fundamental precept. Even if there was no requirement to provide transcripts, as submitted by the Respondent, shouldn't a sense of fair play have dictated that the Applicant and the witnesses are allowed to review and sign the summaries of the statements being attributed to them for the simple sake of transparency and accuracy? Noting that disciplinary proceedings are quasi-criminal in nature, the Respondent is reminded that once an investigation is initiated, adherence to due process is not only obligatory but also intrinsic.

98. The Tribunal is of the view that due to the serious nature of the allegations in this case, the failure of the BOI to provide the Applicant and the witnesses with either a transcript or a summary of their interviews for vetting prior to finalization of the BOI report was a violation of the Applicant's rights.

Were the recommendations of the BOI appropriate?

99. Paragraph 5.1 of Chapter 16 of the draft Field Administration Manual provides that "the recommendations should deal with any action that in the opinion of the Board should be taken by United Nations authorities, for example, action to avoid the recurrence of an incident, such as specific additional safety precautions; or legislative or administrative action such as amending regulations or rules or instructions".

100. The BOI provided several recommendations at the end of their report. Two of their recommendations were highly inappropriate in that they exceeded the fact-finding mandate of the BOI. The BOI demonstrated a fundamental misunderstanding of its role vis-à-vis the disciplinary process set out in ST/AI/371 by recommending that "PMSS be notified that, because of Mr. Powell's misconduct and lack of integrity during his MONUC service, he is unsuitable for further duty with the Organization and its Agencies". Additionally, the BOI recommended that "Mr. Powell should not be allowed to hold a supervisory position because of his repeated violations of UN rules and regulations and administrative instructions, his lack of integrity, his propensity to misuse his position and UN assets when left without direct scrutiny of a superior officer and his lack of ability to supervise staff". This was a performance related issue that should have been addressed in the context of the Applicant's performance evaluation and not by the BOI.

The SEA investigation

101. The Applicant submits that the failure of the SEA Investigation Team to interview him as the accused or any of the domestic staff employed at his house was a violation of his rights. Further, he asserts that at no time during this investigation was he advised of: (i) why he was being investigated; (ii) what the alleged incidents of misconduct were; or (iii) what rights he had to any form of legal representation.

102. The Respondent submits that the Applicant's right to due process was fully respected throughout the disciplinary proceedings, consistent with staff regulation 10.1, former staff rule 310.1 and with ST/AI/371 (Revised disciplinary measures and procedures).

Was the SEA investigation a preliminary investigation?

103. As noted earlier, a preliminary investigation relates to an investigation where either no specific allegation of misconduct has been reported or an individual staff member has been identified. Additionally, in *Johnson* UNDT/2011/123, the Tribunal held that:

> "For an investigation to be regarded as merely preliminary in nature, some "reason to believe" must exist that a staff member has engaged in unsatisfactory

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

104. A BOI, which had itself exceeded its original mandate, conceived an allegation of SEA against the Applicant and came up with the following conclusions:

> "[…] The Board did find evidence that may point in the direction of corroborating the accusation; however, the Board did not have the time nor necessary tools to be able to prove the charges to its satisfaction";
>
> "[…] that [the Applicant] should be held accountable for serious misconduct in the incidents of: […] Sexual Exploitation of Casual Worker – enough probable cause to warrant further inquiry".

105. It is quite interesting that on one hand, the BOI had judged the Applicant and deemed him liable for "serious misconduct" and yet on the other hand, it felt the allegation needed further inquiry. Against this backdrop, a SEA investigation team was established to look further into the allegation of SEA against the Applicant.

106. The prejudicial conclusions contained in the BOI report, in effect, clearly identified the Applicant as a possible wrongdoer and, in the Tribunal's view, made him the logical target of a subsequent adverse investigation. Although the SEA Investigation was characterized as a "preliminary investigation"[7], it was, in fact, a "formal investigation" and as such, the Applicant should have been: (i) notified in writing of all the allegations and of his right to respond; (ii) provided with copies of all documentary evidence of the alleged misconduct; (iii) informed of his right to legal representation; and (iv) interviewed by the SEA Investigation Team once all the

[7] See the memorandum dated 26 February 2005 from the SRSG/MONUC to the USG/DPKO.

preliminary evidence that had been gathered by the BOI had been made available to him and the specific allegation against him had been finalized.

Was the Applicant accorded the due process rights required for a formal investigation?

107. Regrettably, the record indicates that the Applicant was not accorded any of the due process rights particularized in paragraph 108 above prior to and/or during the conduct of the SEA Investigation. The available evidence shows that the Applicant was redeployed to Kinshasa prior to the arrival of the SEA Investigation Team in Kisangani. The Applicant gave evidence that he initially heard of the SEA investigation informally through a friend and formally when he received the "Allegations of misconduct" dated 28 March 2005, which included the SEA investigation report of 26 February 2005 as an attachment. The Applicant was not notified in writing by the SEA Investigation Team of the allegation against him. He was not provided with copies of the documentary evidence of the alleged misconduct nor was he informed of his right to legal representation. Lastly, even though the SEA Investigation Team interviewed Mary, Moidrag Kraljevic, GH and JB, it decided to rely on the Applicant's interviews with the BOI instead of conducting an interview of its own with him. JF, a member of the SEA Investigation Team, could not recall why the Applicant was not interviewed. This is truly regrettable because such an interview is a fundamental aspect of conducting a proper and thorough investigation.

108. Subsequently, after a so-called "investigation" that lasted a mere 2 or 3 days and involved a review of the BOI report and interviews with four people, the SEA Investigation Team found sufficient evidence to substantiate the allegation of SEA against the Applicant. Clearly, the SEA Investigation Team should have carried out its own independent investigation into the allegations instead of relying so heavily on the BOI report, which remarkably was not redacted but included findings and conclusions on allegations unrelated to the one they were tasked to investigate. In the Tribunal's considered opinion, the Administration providing the SEA Investigation Team with the full BOI report was highly prejudicial to the Applicant and should not have occurred. This in effect, was a circuitous way to ensure the Applicant's culpability and regrettably, also

points to a failure on the part of the SEA Investigation Team to fulfill, with the requisite impartiality, the task that it was established to do.

109. In light of the foregoing, the Tribunal wishes to remind the Respondent that:

> "[…] the requirement to afford "due process" to a staff member in this context has now become a reasonable expectation forming part of his contractual conditions. Yet another approach is also available that looks to the requirement of rational decision- making that the decision-maker takes all reasonable steps to obtain the relevant facts. When allegations are made against a staff member, it is a necessary element of due administration that any resulting decision must be based upon an adequate inquiry. This necessarily involves seeking information from the staff member both as to the allegations and, ultimately, the findings or recommendations affecting him or her. Not to do so is unreasonably to fail to take a necessary step to ensure that any decision will be appropriately informed."[8]

The *ad hoc* Disciplinary Committee

110. The Applicant submits that the following were a violation of his rights: (i) the introduction of new testimony post facto after submission of closing statements to the JDC by both sets of counsel, and his not being given satisfactory time or opportunity to respond or cross-examine in person as provided for under former staff rule 110.4; and (ii) the use or introduction of evidence and statements from parties who could not be cross-examined as provided for under former staff rule 110.4.

111. The JDC report indicates that the panel carried out a thorough review and discourse on the disciplinary charges that were levelled against the Applicant and the evidence that was presented. Noteworthy is the fact that there were majority and minority decisions written by the JDC members evincing their views on the issues. Nonetheless, the heavy reliance of the JDC Majority on statements from parties who could not be cross-examined by the Applicant was erroneous. In light of the gravity of the allegation against the Applicant and the fact that disciplinary proceedings are quasi-criminal in nature, the availability of the individuals for cross

[8] *D'Hooge* UNDT/2010/044.

examination should have been a paramount consideration. Further, their absence made it impossible for the JDC to judge their credibility. Thus, the JDC Majority's reliance on these statements adversely affected the Applicant and violated his rights.

112. The Applicant also submits that the time taken for the JDC to be convened, a period of almost two years, was excessive and extremely stressful. In *Bridgeman* UNDT/2011/118, the Tribunal dealt with the issue of a JAB report that had been delayed for almost two years. Drawing an inference from the factual background of the case, the Tribunal deduced that the explanation for the delay was that the JAB was awaiting the conclusion of a JDC report. The Tribunal subsequently concluded that "in the absence of a satisfactory explanation" the delay was "unconscionable".

113. Is there a satisfactory explanation in this case in relation to the delay in the conduct of the JDC? The allegations of misconduct against the Applicant were referred to the JDC Secretariat by the ASG/OHRM on 20 January 2006 but the JDC panel did not meet until 12 September 2006. No explanation is given for this almost eight month delay. Due to the absence of a satisfactory explanation, this Tribunal also finds that this almost eight month delay was unconscionable and undue.

114. The JDC met in executive session for planning purposes on 12 September 2006 and held hearings on 13 and 14 February 2007. The reason given by the JDC for this four month delay was that the initial intention in September was for the case to be reviewed, along with several others from MONUC, by an *ad hoc* JDC panel in the Democratic Republic of Congo (DRC), which was originally envisioned for November 2006. However, despite several intimations that the *ad hoc* JDC panel would be constituted this did not occur until March 2007. Thus, the decision was taken, in view of the Applicant's continued suspension, to proceed with the review by the original JDC panel established at United Nations Headquarters. The Tribunal is satisfied with the reason proffered by the JDC for the four month delay as it believes it was reasonable for the JDC at UNHQ to hold off any work on the case pending a potential transfer to an *ad hoc* JDC in DRC.

115. Additionally, after the hearings, the JDC seemed to have worked assiduously to finalize its report on 11 June 2007. Taking into consideration the nature and number of allegations against the Applicant, the volume of the documents and the complexity of some of the issues that had to be deliberated on, the Tribunal is satisfied that the delay, from 14 February 2007 to 11 June 2007, was not undue.

Placement on suspension

Was the proper procedure followed in placing the Applicant on suspension?

116. Pursuant to ST/AI/371, a staff member could be suspended following a preliminary investigation into conduct that is "of such a nature and of such gravity" to warrant suspension.

117. Based on the available evidence, the Tribunal is satisfied that the procedure set out in ST/AI/371 was followed i.e. he was placed on suspension after a preliminary investigation had been conducted. The Tribunal is not convinced however that the suspension was, in fact, necessary. Sec. 4 of ST/AI/371, goes on to provide that suspension may be contemplated where the conduct in question might: (i) pose a danger to other staff members or to the Organization; or (ii) if there is a risk of evidence being destroyed or concealed; and (iii) if redeployment is not possible. The crucial words in sec. 4 of ST/AI/371 are "**and** if redeployment is not feasible" (*emphasis added*). Thus, in the Tribunal's considered view, suspension may not be used to remove the risk or potential risk that the staff member poses, where redeployment of the staff member is possible.

118. The record reveals that redeployment in this case was possible because the Applicant had already been redeployed from Kisangani to Kinshasa for administrative reasons from the time the BOI issued its report in December 2004 until he was placed on suspension on 28 March 2005. No evidence was placed before the Tribunal to show that the Applicant posed a risk, subsequent to his redeployment from Kisangani to Kinshasa, to other staff members or to the Organization. Neither was evidence placed before the Tribunal to show that there was a risk of evidence being destroyed or concealed, especially in light of the fact that the Applicant had been removed from Kisangani and no longer had access to any of the records in his office.

Was the length of time that the Applicant was suspended from duty pending the outcome of the disciplinary proceedings unduly delayed?

119. The Applicant submits that his removal from MONUC with immediate effect and his placement on suspension with pay for almost 3 years was a violation of his rights due to the fact that this denied him access to archival material and data that were vital to the preparation of his defence.

120. The Respondent submits that former staff rule 310.1(b) provides that a staff member may be suspended from duty, with or without pay, during the pendency of disciplinary proceedings. The Respondent further submits that although former staff rule 310.1 makes no provision as to the period of such suspension, staff rule 110.2(a) provides that any such suspension shall normally not exceed three months. While accepting the applicability of the standard set out in staff rule 110.2(a) in this case, the Respondent asserts that even though the Applicant was suspended for a lengthy period (from 28 March 2005 when he was notified of the charges until 20 August 2007 when the Applicant was informed of the decision) such suspension was the result of the time taken by the JDC to complete its complex inquiries and to provide its final recommendation.

121. OHRM notified the Applicant of the charges of misconduct by a memorandum dated 28 March 2005. In a separate communication also dated 28 March 2005, OHRM also notified the Applicant that due to the nature of the allegations against him and "in the interest of the Organization", he was being suspended from duty with full pay for "a period of three months or until the completion of disciplinary proceedings, whichever is earlier". On the basis of this communication, the Applicant was promptly suspended from duty effective 28 March 2005. The Respondent did not communicate further with the Applicant regarding his suspension after the initial three months. Even though the disciplinary proceedings culminated with the Secretary-General's decision, dated 20 August 2007, the Applicant was not allowed to resume work with MONUC until 9 February 2008, approximately 6 months later. All in all, the Applicant's

suspension, which was supposed to be for a period of three months or until the completion of disciplinary proceedings, "whichever is earlier" ended up being almost three years in duration.

122. Although the Respondent is trying to lay all the blame for the delay at the JDC's door, this is a disingenuous and rather unfortunate characterisation of events. As was noted earlier, the JDC had conduct of the matter from 20 January 2006 to 11 June 2007. The Tribunal found that only 8 months out of this almost 17 month period could be characterized as an undue delay. The Respondent however is calculatedly ignoring the fact that the Applicant was on suspension prior to and after the allegations had been referred to and dealt with by the JDC. No explanation is provided for the delay between the Applicant's placement on suspension on 28 March 2005 and the referral to the JDC on 20 January 2006. Neither is an explanation provided for the delay from 11 June 2007, when the JDC finalized its report, to 9 February 2008, when the Applicant was finally allowed to return to work with MONUC.

123. In the absence of a satisfactory explanation from the Respondent, the Tribunal can only conclude that there were undue and unconscionable delays from 28 March 2005 to 12 September 2006, and again from 11 June 2007 to 9 February 2008.

Should the Respondent be held liable for the undue delay caused by the JDC?

124. In *Bridgeman* UNDT/2011/018, the Tribunal noted that the Respondent, in accordance with former staff rule 111.1, established the JAB and set out the general provisions regarding its composition and procedures. Consequently, the Tribunal concluded that the Respondent must assume liability for the failure of the machinery that he had established to deal with grievances.

125. This Tribunal endorses this finding in light of the fact that the JDC was similarly established by the Respondent in accordance with former staff rule 110.5. Consequently, the Respondent must assume liability for the almost eight month delay attributable to the JDC.

Conclusion on Issue 3

126. The Tribunal finds that there were several material procedural irregularities in this matter that form a separate basis for awarding compensation to the Applicant.

Remedies

127. The Applicant requests the following remedies:

a. Rescission of the decision of the Secretary-General, dated 20 August 2007, to demote him by one grade with no possibility of promotion for two years;

b. Payment of his salary at the FS5 level from 20 August 2007 to the date of the judgment;

c. Compensation for abuse of process/breach of due process rights/breach of contract in the sum of 2 years' net base salary;

d. Compensation for loss of a chance in the sum of $75,000 – for conversion to a 100 series contact, which would have occurred in February 2005, and for the loss of a chance to obtain an FS6 position, which in all likelihood would have occurred between January 2005 and the date of the judgment;

e. $75,000 in compensation for moral injury, including harm to reputation, arising both out of the excessive administrative leave on which the Applicant was unduly placed, but also as a result of the extremely harmful nature of the allegations against him, which had a serious detrimental effect on his marriage and his personal integrity.

Judgment

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

129. The administrative decision that the Applicant's conduct constituted misconduct was unsubstantiated and therefore ordered rescinded. Accordingly, the decision to impose a disciplinary sanction on the Applicant was unlawful. This decision is also rescinded. All references to them should be removed from the Applicant's official status file.

130. The Respondent is to restore the Applicant to the FS5 level that he was at prior to 20 August 2007. As a result of the wrongful demotion, the Respondent is also ordered to pay the Applicant the difference between the salary and entitlements of an FS4 and an FS5 from 20 August 2007 to the date of this judgment.

131. Additionally, for the material breaches of the Applicant's due process rights, the Respondent is ordered to compensate the Applicant in the amount of one year's net base salary at the FS5 level, taking into consideration the step he would have been at now absent the unlawful disciplinary measure.

132. Although the Applicant was paid during the period of suspension, the need for the suspension was questionable and the length of it was excessive. Apart from isolating him from professional life, the suspension also stymied his career progression. The Respondent is therefore ordered to pay $15,000 in compensation for moral injury.

133. The Applicant did not place any evidence before the Tribunal evincing his claim that he would have been converted to a 100 series contract in February 2005. Further, his claim that he would have obtained an FS6 between January 2005 and the date of this judgment is merely speculative. Consequently, this claim is dismissed.

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

(Signed)

Judge Vinod Boolell

Dated this 28th day of March 2012

Entered in the Register on this 28th day of March 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi