UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NBI/2009/074
	Judgment No.:	UNDT/2012/101
	Date:	29 June 2012
	Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LEAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGEMENT

Counsel for applicant:
Seth Levine, OSLA

Counsel for respondent:
Robert Nadelson, UNDP

INTRODUCTION

1. The Applicant is challenging the decision by the Administrator of the United Nations Development Programme (UNDP) to separate him from service with payment *in lieu* of notice without termination indemnity. The Applicant was notified of the impugned decision on 27 August 2009.

2. The Applicant contends that the investigation into his conduct was so unfair and procedurally flawed, as to render its conclusions unsafe. The Applicant submits that what should have been properly characterized as essentially performance-related issues (with the exception of the pornography) became the subject of disciplinary proceedings. As a result, the sanction imposed was grossly disproportionate to the alleged misconduct.

FACTS

3. The Applicant joined the office of the United Nations Security Coordinator (UNSECOORD) as a Field Security Officer in June 2000. He was Security Officer in Cuito, Angola during the war, following which he served in Benguela for some months. He was then promoted to Deputy Security Adviser and deployed to Luanda.

4. On 16 November 2003 he was assigned to the United Nations Department of Safety and Security (UNDSS) Security Office in Maputo, Mozambique as Field Security Advisor. Here, the Applicant reported to Mr Ndolamb Ngokwe, and Ms Masaka who, as Deputy Resident Representative oversaw operations for UNDP in Mozambique.

5. As Field Security Adviser, the Applicant was charged with all security related matters, to supervise all security installations of the United Nations, and to liaise with national authorities on issues relating to the security and safety of staff and assets of the United Nations.

6. In November 2007, Mr Tomaz Vas, a national of Mozambique who was not affiliated to the UN, wrote to the UNDP Mozambique Resident Representative and UN Resident Coordinator (RR/RC) alleging, inter alia, that the Applicant had hired him to work in the UNDSS Field Security Office for a period of two months without a contract and with a promise of permanent employment. On 11 December 2007, the Deputy Resident Representative for Operations (DRRO) reported this allegation. The DRRO also indicated that she had met with the Applicant who confirmed knowing Mr Vas, and allowing him to work with the staff of the office.

7. In February 2008 the Applicant was assigned to Juba, South Sudan.

8. In the same month, during the period 20-29 February 2008, the Office of Audit and Investigations (OAI) conducted a field investigation in Mozambique. The Applicant was not made aware of the investigation.

9. On 9 May 2008, the Applicant received an email from the OAI advising him that he was the subject of an investigation. This email had apparently been sent to him in February 2008 but was never received by him. The email served to notify the Applicant that he was being investigated for having 'abused [his] authority and misappropriated certain property belonging to UNDSS and UNDP.'[1]

10. By May 2008, the investigation was almost complete. It had in fact been initiated in 2007 and conducted through early February 2008. The Applicant heard rumours from former colleagues in Maputo and elsewhere that he was being investigated, but did not receive formal notification himself until May 2008.

11. On 5 June 2008, the Applicant was informed by email that he was to attend UNDP offices in Johannesburg, South Africa for interview by the Investigators. He was not made aware of his right to bring an observer to the interview.[2]

[1] Applicant's Annex 2.
[2] Applicant's Annex 3.

12. The Applicant travelled from Juba to Johannesburg for the interview with the Investigators which took place on 19 June 2008. At the time of the interview, the Applicant had still not received any specific information as to what the allegations against him were.

13. In September 2008, the OAI produced an Investigation Report which dealt with a large number of specific allegations, many of which seem to have arisen in the course of an initial investigation into alleged impropriety in permitting an individual named Mr Vas to work unpaid for UNDSS in June and July 2007.[3]

14. On 16 December 2008, the Applicant received a letter enclosing the Investigation Report and its annexes which required him to provide a response within 10 working days. The Applicant requested an extension of time because of his home leave over Christmas and was granted until 9 January 2009 to provide a reply, which he did.[4]

15. On 24 April 2009 the Applicant received a Charge Letter from UNDP. He was given ten (10) days to respond to these charges, which response he submitted on 8 May 2009.[5]

16. On 28 September 2009, the Applicant received a letter from Ms Helen Clark, Administrator of UNDP, dated 27 August 2009, which concluded that the Applicant abused his authority and failed to uphold the standards required of him as a staff member. The letter advised the Applicant that the disciplinary measure to be imposed upon him was separation with payment in lieu of notice pursuant to staff rule 10.2(a)(viii).[6]

[3] Applicant's Annex 5.
[4] Applicant's Annex 7.
[5] Applicant's Annex 9.
[6] Applicant's Annex 1.

AGREED FACTS

17. On 21 November 2011, the Respondent filed a Joint Submission on Witnesses and facts as agreed between the Parties and signed by Counsel for both sides. These facts are listed as follows[7]:

General Facts

i. On 28 February 2008, the UNDP Office of Audit and Investigations (OAI) sent the Applicant a Notice of Formal Investigation. A further Notice was sent on 6 May 2008. On 9 May 2008, a third email from OAI with the Notice was sent to the Applicant advising him that he was the subject of an investigation, which the Applicant acknowledges receiving.

ii. On 19 June 2008, Mr Frank Dutton and Mr Alfred Zebi of OAI interviewed the Applicant in Johannesburg, South Africa.

iii. On 2 December 2008, the Legal Support Office/ Bureau of Management (the LSO/BOM) sent the Investigation Report and Supporting Materials to Applicant for his comments on the findings and conclusions, which he received on 16 December 2008. The Applicant provided his response on 10 January 2009.

iv. On 28 April 2009, the Applicant received a Charge Letter dated 24 April 2009, setting out the legal charges. He replied on 8 May 2009.

v. On 28 August 2009, LSO/BOM sent the Applicant a letter from Ms Helen Clark, UNDP Administrator, dated 27 August 2009, informing him that she had concluded that he had engaged in misconduct and that she had decided to impose upon him the sanction of separation from service with payment *in lieu* of notice but without termination indemnities. The Applicant did not receive this letter until 28 September 2009.

[7] This list of agreed facts mirrors that filed by the Parties on 24 January 2011.

Matters relating to the investigation interview

vi. On 5 June 2008, The Applicant was instructed to attend an interview in relation to the pending investigation. The OAI Notice to the Applicant informed the Applicant that he was the subject of an investigation, of his right to be interviewed in person and encouraged the Applicant to identify witnesses and documentation in support of his explanation. The Notice to the Applicant further indicated that "[s]ince the role of the Investigator is that of fact-finder with no legal or disciplinary authority, a subject of an investigation does not have the right to legal assistance at this early stage when interacting with investigator(s)." The Notice did not indicate that the Applicant could bring an observer to the interview. The Applicant did not request to have the presence of an observer at the interview.

Matters related to the alleged recruitment of Mr Tomaz Vas

vii. The Applicant instructed Security staff members under his supervision to allow Mr Vas to accompany them in completing their functions and traveling on their rounds.

Matters related to the instruction to lock workers in a warehouse

viii. The Applicant instructed staff members under his supervision to lock workers engaged in cleaning and/or washing vehicles in a warehouse. The warehouse contained no entry or fire exit other than the door that was to be locked. The warehouse also did not contain a bathroom or sanitary facilities.

Matters related to the receipt, storage and distribution of pornography

ix. The Applicant does not deny that he received, stored and distributed pornographic materials on his work computer and using his UNDP email account.

THE CHARGES

18. The charges against the Applicant were framed as follows:

(i) Failing to uphold recruitment procedures and abusing his authority by permitting Mr Vas to work in the UNDSS Field Security Office without a contract;

(ii) Abusing his authority by instructing that workers be locked in a warehouse with no exit or fire escape and where petroleum products were kept;

(iii) Misusing UNDP property by receiving, storing and distributing pornographic material through his UNDP computer and email account.

THE EVIDENCE

The alleged Employment and Installation of Mr Vas in the UNDSS Field Security Office in Maputo

19. Mr Vas had approached the Applicant for a job. He was living in South Africa at the time, but had his family in Mozambique. As there were no posts available at the time, the Applicant kept a copy of Mr Vas' CV.

20. Mr Vas was persistent in pursuing his quest for a job and kept calling the Applicant. For his part, the Applicant was of the opinion that Mr Vas would be an asset to the team as he showed genuine interest and spoke several of the locally relevant languages.

21. The Applicant envisaged Mr Vas being part of a special unit created in Mozambique called the Emergency Response Unit (ERU), whose function it was to oversee private security arrangements (firms and guards) that impacted on UNDP properties or installations. The ERU was also used to attend any accident scene or any scene that would involve the national police and staff members of the UN

(national and international). The Emergency Response Unit was not a UNDP unit *per se*; the cost for the running of the Unit was shared by all the UN Agencies that used its services.

22. When a vacancy arose, the Applicant contacted Mr Vas and told him to come to Mozambique and submit his application/CV for the job.

23. Once in Mozambique, Mr Vas pestered the Applicant to allow him to learn the ropes of the job as he really wanted to work and be in Mozambique with his family. The Applicant testified to blindly allowing Mr Vas to remain in the UNDSS offices and to observe how the staff worked there and in other duties outside the office. Mr Vas was never sent to do any security rounds but only accompanied other officers from the ERU.

24. Mr Vas submitted his application for the vacant post and after a few days asked to return to South Africa to settle some personal matters, which he did. He later returned and stayed for another two weeks, before the Applicant was deployed to Lebanon.

25. The Applicant testified that he informed Mr Vas that he would have to wait until his return from Lebanon before continuing to "learn" on the job by shadowing the ERU as he had previously done.

26. The Applicant told the Court that he had never promised Mr Vas a job, and that he had made it clear to him that recruitment was a process in which he would be competing with several other candidates. The Applicant further testified that once the post was advertised he told Mr Vas to formally apply by providing the recruiting office in Maputo with all the required documents. Mr Vas was in South Africa at the time the post was advertised.

27. The Applicant testified that in addition to making the process very clear to Mr Vas, he also sent an email to Ms Masaka on 15 June 2007 urging that the process be speeded up. The Applicant had also informed Ms Masaka that he knew of a candidate

who he thought would be good for the job. Ms Masaka responded simply saying that there are procedures for recruitment and that the Applicant should contact Human Resources, which the Applicant did and following which the vacancy was advertised.

28. The Applicant testified that as far as he knew, Mr Vas was living in Mozambique with his wife and was surviving on income from a business he ran bringing in shoes from South Africa and selling them in Mozambique.

29. When asked about Mr Vas' financial situation, the Applicant testified to having lent him money twice. The first time, it was USD550 to renew his driver's license and the second request was for USD1000. The Applicant told the court that he lent Mr Vas these monies solely on the basis of faith, believing that the money would be returned to him as soon as Mr Vas was able to find paid employment.

30. The Applicant told the Court that he did not give anyone the impression that the advertised post was for Mr Vas. The only thing he did do was to call a meeting with the staff of his Unit, in the presence of Mr Vas, to inform them that Mr Vas was there "to learn."

31. The Applicant denied using Mr Vas on his visits to homes of staff members for the purposes of Minimum Operational Residential Security Standards (MORSS_ compliance. He testified that all MORSS inspections were conducted and reported on by himself.

32. The Applicant accepted that his actions in respect of Mr Vas showed a lack of judgement. The Applicant conceded that he is more "of an operational person" and was not well-versed in the rules.

The Locking of Workers in the Warehouse

33. The Applicant did not dispute that he authorized the locking of the warehouse whilst casual labourers were working in there. The Applicant was in the office at the

time his subordinate told him that the workers wished to be locked in while they worked to avoid pilfering of the properties in the warehouse, and he agreed.

34. Ms Masaka had asked the Applicant to arrange for certain vehicles to be cleaned and polished in readiness for an auction.

35. The labourers for the job were recruited by someone in ERU, and a private security firm, Alfa Seguranca, was contracted to guard the warehouse.

36. The Applicant visited the warehouse with Ms Masaka, as they discussed the arrangement for getting the cars ready for auction. The Applicant visited the warehouse several times after that visit with Ms Masaka but could not remember when exactly his last visit was.

37. The Applicant described the warehouse as follows:

> The warehouse […] an old structure, but it's all metal. It's metal beams no. It's metal poles and then covered with a corrugated iron sheet, and the walls are about maybe 3 metres high. Then there is a space that has some sort of a mesh, I mean, a net, but it's very thick holes, about 4 centimetres by 4 centimetres, all around the warehouse. And then there is the roof. It has beams and then again corrugated iron sheets covering the roof. And the doors are two metal doors as well, the gates.

38. The Applicant testified that the exit was secured because of concerns for valuables in the warehouse. Neither Ms Masaka nor the Applicant could spare any (UNDSS) staff for the purposes of guarding the premises and the labourers themselves expressed concerns of being harassed over the items in the warehouse by the officers of the security company on patrol there. It was the labourers themselves who suggested that they be locked in to "prevent the guards from coming in."

39. The labourers had expressed these concerns to Mr Pachecho who was with the ERU. Mr Pachecho consulted with the Applicant who gave him the go ahead to lock

the labourers in as requested by them. The Applicant also gave Mr Pachecho money to buy the workers water and food, which he did. At all times while inside the warehouse, the Applicant testified, the workers had contact with Mr Pachecho. He testified also that Mr Pachecho himself made several hourly visits to the warehouse to check on how work was progressing. The workers also had a mobile phone with which they could contact Mr Pachecho if the need arose.

40. In relation to the observation in the investigation report that there was fuel in each of the vehicles, the Applicant testified that there was a little fuel (diesel) in some of the vehicles, not all. Some of the vehicles had no fuel at all, and some were wrecks which were going to be dismantled and sold for spare parts if there were no takers at the auction. None of the vehicles had functioning batteries, nor did the generators have any fuel in them.

41. The Applicant told the Court that in doing as he did, he did not think he was jeopardizing the safety and security of the labourers in the warehouse. The only time Mr Pachecho was contacted was when the labourers informed him that the work was done.

42. The Applicant told the Court that while he accepts that he could have "judged better", he honestly did not believe that his actions risked the safety and security of the workers.

Storage and Distribution of Pornographic Materials on and Using UNDP Computers

43. The Applicant testified that this was a matter he was embarrassed about and not proud of. He admits to having exchanged pornographic emails with a couple of male colleagues. It was not meant to harass anyone.

The Investigation

44. Soon after his arrival in Juba in February 2008, the Applicant found himself being "bombarded" with questions by his colleagues, asking what was going on with him and telling him that they had heard that he was being investigated. Confused, the Applicant began contacting friends of his in Maputo, who also told him that questions were being asked about him.

45. The Applicant testified that as he was not aware of any of this himself, he did not give it much importance.

46. Sometime in May 2008, heavy fighting broke out at the border town of Abyei between the Sudan and (what is now) South Sudan. The Applicant was the first person to be deployed there. He testified that communication facilities were very limited but for the use of a satellite phone. The Applicant stayed in Abyei for about fifteen (15) days. The Applicant's plan at the end of his stay in Abyei was to return to Juba for two (2) days and then go on leave.

47. However, the Applicant returned to Juba to find two (2) emails from Mr Nadelson, the second of which required an immediate reply from the Applicant.

48. The Applicant then received an email informing him that he needed to be in Johannesburg on a particular date (during the period he was meant to be on leave). Very quickly thereafter, indeed the very next day, he found that the travel itinerary had been planned, booked and paid for. The travel itinerary was to take him through Addis Ababa to Johannesburg.

49. The Applicant attended what was a long interview with Mr Dutton and another gentleman.

50. In all of this, the Applicant was aware of only one thing: that he was being accused of misconduct. The nature of the allegations against him and his right to have an independent observer were not made clear to him.

51. The Applicant testified that it was only "much later on" that he "received a pile of documents" containing "a number of things."

APPLICANT'S CASE

52. The Applicant contends that the Impugned Decision is unlawful as it was based on a flawed investigation in which the rights of the Applicant were violated in a number of ways. The Applicant also contends that the sanction imposed on him was disproportionate to the conduct alleged.

Lack of Due Process

53. The Respondent failed to inform the Applicant of the allegations and investigation against him in a timely manner pursuant to Section 1.1 of the UNDP Legal Framework. The investigation was initiated in January or February 2008. But the Applicant was only informed of it in May.

54. In breach of its own Legal Framework, confidentiality of the investigation was not maintained. The Applicant came to hear of the investigation from a number of different sources prior to OAI contacting him. This, the Applicant submits, must call into question the integrity of the process.

55. The tactics of the Investigators must be also be queried. In March 2008, they invaded the premises of Sandra Mabunda without permission, apparently to look for evidence against the Applicant. Ms. Mabunda was so distressed that she complained to the local police.

56. The Respondent relied on the OAI Investigation report in making the Impugned Decision. Although the Respondent clearly disregarded large elements of the Investigation report, the Applicant submits that the report must be analysed as a whole in assessing its validity. Examples of bias and incompetence on the part of the Investigators include:

i. failure to observe the obviously forged signature on the statement of the deceased Alfredo Massango or to consider the likelihood of this letter being a forgery, given that in his last weeks Mr. Massango, who was dying from a terminal ailment was not likely to have made such a coherent statement, nor would he have had any reason to do so;[8]

ii. failure to attribute the initials 'FM' to Fernando Maveze, another security guard, when questioning the contents of the alleged statement of Alfredo Massango;

iii. using the Complainant, Mr. Vas, as interpreter when taking the evidence of a security guard at Bilene where the investigators had gone to;

iv. failure to give any consideration to an anonymous letter sent to the Applicant's family (which demonstrates ill-will towards him) whilst the obviously forged letter of Mr. Massango was given significant weight during the investigation;

v. concluding on the flimsiest of evidence that the Applicant was responsible for the theft of a UNDP door;

vi. conducting a fishing expedition rather than properly investigating matters initially brought to their attention for enquiry.

57. As so many of the allegations investigated by the OAI were based on rumours and inconsistent statements by a number of unreliable sources (whose unreliability the Investigators allude to in their report), the failure of the Investigators to consider why the Applicant was being made a target of allegations raises the question of bias.

58. The Applicant submitted that the Investigators did not consider him innocent until proven guilty, as stated in their letter of 26 February 2008.[9] He contended that

[8] *See* Annex 6, pp. 6-7.
[9] Annex 2.

the investigation was, from the outset, a fishing expedition and that the Investigators were intent on seeing that the allegations against the Applicant were upheld.

59. Although the OAI Investigation Guidelines permitted the Applicant to have an observer present at interview with the Investigators, he was not informed of this right; nor was he made aware of the substance of the charges against him prior to the interview.[10]

60. The letter advising him of the investigation merely cited abuse of authority and misappropriation of UNDP property, thus depriving the Applicant of the opportunity to prepare for the interview, or to seek legal advice.

61. The Applicant submitted that although the practice within the UN in conducting investigative interviews has not been to permit legal assistance or representation, it is nonetheless a breach of the Applicant's right to due process not to allow this.

62. The right to legal representation stems from the right to a fair hearing and the right to contest, correct and submit evidence in support of one's case. Furthermore, it must be noted that this right is not only engaged in an adversarial setting, but also arises where proceedings, most commonly extra-judicial or investigatory in nature, may lead to a loss of an individual's livelihood or other serious adverse effect.[11]

63. The Applicant submitted that he had the right to invoke due process with all its attendant guarantees, including the rights to be assisted by counsel, to remain silent and to avoid self-incrimination. He should have been able to exercise these rights as soon as he was identified as "a possible wrongdoer."

64. On the application of these rights before bodies other than regular courts, the Applicant cited *The Stock Exchange of Hong Kong Limited v New World Development Company Limited.*[12] This case provided a summary of common law from international jurisdictions on the right to legal representation and administrative

[10] Applicant's Annex 11.
[11] *See* Peter Leyland & Gordon Anthony, Administrative Law (6th ed, 2009) 16.1.4.
[12] FACV No. 22 of 2005 the Court of Final Appeal of the Hong Kong Special Administrative Region.

law. In its unanimous decision the court affirmed the right to legal representation before bodies not classified as courts, notably medical and legal regulatory bodies. The Court held, *inter alia*:

> i) the right to confidential legal advice is a right which is protected even where such advice does not bear on any existing or contemplated court proceedings';
>
> ii) legal representation is not restricted to court proceedings;
>
> iii) the principles of fairness should be flexible and be adopted in consideration of the specific circumstances of each case;
>
> iv) where parties to an investigation or dispute are not on equal footing legal representation should be considered; and
>
> v) where there exists a possibility of serious sanctions the issue of fairness is of even greater significance.

65. In *Joplin v Chief Constable of the City of Vancouver* police disciplinary regulations excluding legal representation were held to be *ultra vires*.[13]

66. In *Hendrickson v Independent Chairperson of the Disciplinary Court of Kent Institution* the court determined that although inquisitorial hearings are not an adversarial process they must still be conducted in a fair manner. [14]

67. These authorities go to show, the Applicant contended, that in order for an individual to receive a fair hearing, albeit inquisitorial, they must be afforded the right to be represented, advised or assisted by a person who is legally qualified.

68. The jurisprudence of the former United Nations Administrative Tribunal is unequivocal when it comes to the right to due process pending an investigation. In Judgment No. 1246 pronounced on 22 July 2005, the Tribunal, *inter alia*, held that:

[13] (1982) 2 CCC (3d) 396.
[14] [1990] F.C.J. No. 19, 32 F.T.R. 296.

> "[i]n conclusion, the Tribunal is of the opinion that the assurances of due process and fairness, as outlined by the General Assembly and further developed in the rules of UNDP, mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees. Moreover, the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*."

69. The Applicant argued that it is unacceptable for the United Nations Organisation to allow anything less; that as the world's primary and prominent advocate of human rights, staff members who are formal suspects of misconduct cannot properly be summoned to be interrogated, refused legal assistance and be denied the right to remain silent under threat of independent disciplinary proceedings.

70. The Applicant also stated that the relevance of due process during OIA investigations is expressly confirmed in the OIA Investigation Guidelines, as it explicitly refers to due process as a guiding principle during investigations. The Applicant argued that the Respondent cannot cherry-pick from the catalogue of due process rights; once recognised, it must apply *in toto*. It would defy logic to first recognise the importance of due process in relation to official investigations but subsequently refuse the application of the most fundamental of those rights, i.e. the right to counsel and the right to remain silent.

71. The applicant submitted that the absence of due process in the investigation of his alleged misconduct must render the conclusions of the Investigators and the Respondent unacceptable.

Flawed Conclusions in the Specific Charges

i) Recruitment of Mr Vas

72. The entire investigation into the Applicant's conduct derived from a complaint made to UNDP by Mr Vas, who was not an employee of UNDSS/UNDP. The statement he gave to investigators on 24 February[15] had not been open to challenge – neither by the investigators themselves, nor by the Applicant, who never had a chance to cross-examine Mr Vas about his allegations. On the face of it, his statement contained significant errors – such as the assertion that he was 'working' for UNDSS until sometime in October 2007 – which is clearly false. By the Respondent's own admission, Mr Vas could only have been present at the premises from around 10 June to 26 July 2007, a period of at most 7 weeks.

73. The Applicant submits that Mr Vas had a significant interest in complaining about the Applicant, since he wanted a job with UNDSS but did not obtain one.

74. Although the investigators took statements from a number of people on this subject, none of them actually stated that Mr Vas 'performed security functions' as indicated in the letter containing the Impugned Decision.[16] Indeed, all the evidence went to support the Applicant's consistent contention that he permitted an eager potential employee to learn the ropes by work-shadowing with other security officers.

75. In his Charge Letter, the Respondent placed undue emphasis on the use of the word 'probation' which was manifestly unfair on the Applicant, to whom English is not mother tongue.

76. Moreover, the conclusion that the Applicant authorized Mr Vas to 'work' in the UNDSS Field Security Office after having been specifically reminded of the need to follow recruitment procedures does not stand up to scrutiny. The only evidence of a 'specific reminder to follow recruitment procedures' as found by the Investigators was an email dated 15 June from the Applicant's supervisor which advised him: "We have procedures for recruitment." There was no admonishment in that email, as has been imputed by both the Investigators and the Respondent. Further, and more

[15] Applicant's Annex 6, Exhibit 1.
[16] Applicant's Annex 1.

significantly, the Applicant has been accused of failing to initiate any formal recruitment process, in spite of his having stated to the Respondent in his Response to Charges that he had followed the matter up, as evidenced by a series of emails on the subject which important evidence has been completely ignored.[17]

77. The Applicant submits that it is clear from the Applicant's email of 15 June that he was openly advising his supervisor that there was a gentleman training with UNDSS who was not an employee of any sort, yet the supervisor's response says nothing to imply impropriety.[18] There was no 'legitimate instruction' from the Applicant's supervisor which he had not followed.

78. The Respondent in his Charge Letter went so far as to state:

> While I agree that Ms. Masaka's email did not provide you with specific information on recruitment procedures, she did stress that in filling the vacant security clerk position, the Organisation's recruitment practices had to be followed and complied with.

79. The Applicant argued that this is "an extraordinary extrapolation from the one line email by Ms. Masaka, which placed no stress on anything."

ii) Abuse of authority - locking workers in a warehouse

80. The Investigation found that the Applicant was negligent in instructing that workers be locked into a warehouse where petroleum products were kept with no escape route.

81. Nothing in the OAI Investigation report actually indicated that petrol was seen on the premises by the investigators. The description of the warehouse provided in paragraph 270 of the Investigation report is purportedly based on Exhibit 49, a Statement of Mr Dutton. In fact, that Statement says nothing about the warehouse or

[17] Applicant's Annexes 9 and 10.
[18] Applicant's Annex 6, Exhibit 31.

its contents whatsoever.[19] As a result it is utterly unclear how the Investigators came to the conclusion so adamantly stated:

> There was fuel in each vehicle and other machines such as generators and chain saws. It is likely that there were also jerry cans containing fuel.

82. The Applicant had consistently maintained that this was not the case – the vehicles had been out of use for many years and the few that did contain fuel only contained a couple of litres of diesel, which is not flammable in such circumstances.

83. Whilst it may have been unwise to lock workers into a warehouse while they were cleaning vehicles, the Applicant's job was to perform risk assessments and he did so. As he persistently maintained, there was no petrol inside the warehouse, and it was regularly patrolled. Moreover, the workers were able to contact the Alfa guards outside in case of emergency, and the Alfa guards had continuous communication facilities with UN security off the premises.

84. The Applicant ensured that the casual workers inside the warehouse were provided with good quality food and drink and they were never kept inside the warehouse for more than 2 hours at a time.

85. Furthermore, no harm actually came to the workers, suggesting that the Applicant's risk assessment was incorrect. The Applicant decided to lock the doors to prevent theft which was a very real possibility in the circumstances.

86. The Respondent described this conduct as gross negligence and abuse of authority. It is hard to see how the latter could be the case unless the implication is that the Applicant coerced the workers into the warehouse and locked them there as some kind of punishment or torture. The Applicant submits that this action does not amount to misconduct but rather a performance failure since it was part of the Applicant's job to ensure security and to do risk assessments in precisely this sort of situation.

[19] Applicant's Annex 49, Annex 6.

iii) Storing and distributing pornography on his computer

87. The Applicant did not deny receiving, storing, and passing on pornographic material on his work computer.

88. The Respondent, the Applicant argued, had taken an "unfairly po-faced attitude to the Applicant's interest in pornography, which came from a variety of sources including other staff members of the UN and UNDP who do not appear to have been sanctioned for the same."

89. The Applicant denied knowing that it was against the rules of the Organisation to share this material *via* a work computer and apologised for doing so. The sanction of separation from service was, the Applicant submitted, grossly disproportionate to this offence.

Proportionality of the sanction

90. Notwithstanding the broad discretion of the Administration in deciding on a disciplinary measure, the Applicant contended that the disciplinary measure imposed upon him – separation without notice – was grossly disproportionate to the nature and gravity of his alleged misconduct.

91. It was tantamount to a breach of Article 10.3 (b) of the Staff Rules which requires the Administration to ensure that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

92. Even taken at its highest, the nature and gravity of the conduct complained of does not warrant separation. There is no evidence of *mala fides* on the part of the Applicant – and by the Respondent's own admission, no actual harm was done to anyone, nor any loss suffered by the Organization as a result of the Applicant's conduct.

93. The Applicant cited the Secretary-General's submission before the UNDT that in disciplinary cases it had been his practice that

> there is a level of moral turpitude or wrong-doing that must be satisfied before a matter can be considered to constitute misconduct[20]

94. In the light of this assertion by the Respondent, the Applicant submitted that it can only be said that the circumstances of the present case do not constitute misconduct, let alone serious misconduct justifying separation.

95. The Applicant additionally submitted that the evidence did not and does not support a finding of moral turpitude or the *mala fide* intent required. The Applicant had admitted to making a number of unwise decisions, which ultimately caused no particular harm.

96. Besides considering the nature and gravity of the misconduct, account should have been taken of all the circumstances of the case including the Applicant's long and impeccable service record.

97. Taken alone, the investigation into charges of misconduct and the disciplinary process in this case were flawed, and the sanction of separation in breach of Article 10(3) of the Staff Rules which requires proportionality of disciplinary measures.

RESPONDENT'S CASE

98. With respect to the Applicant's first argument concerning timely notice, the Respondent submitted that it is evident, including from the Applicant's submissions that the Respondent sought to provide Notice of Investigation on 28 February 2008.[21]

[20] *Abboud v Secretary General*, Secretary-General's Motion for Preliminary Determination, UNDT/NY/2009/055, 19 August 2009, para.5.
[21] Attachment 3, see also Application Annex 2.

99. While it is unclear why the Applicant did not receive the 28 February 2008 Notice until 9 May 2008, the record of communications is clear evidence of the Respondent's good faith efforts to provide the Notice to the Applicant.

100. With regard to breach of confidentiality, the Applicant had not provided evidence of this breach by the Respondent beyond his own inferences, and the Respondent cannot reply on the matter of what the Applicant has "heard".

101. As regards the examples of bias or incompetence in the conduct of the investigation, the examples cited by the Applicant concern matters that did not form the basis of the charges against the Applicant and were not part of the disciplinary proceedings. The Respondent observed that the examples cited by the Applicant almost exclusively concern the investigators' purported failure to give the weight or credence to a certain explanation or interpretation of events that the Applicant contends they should have been given. It was submitted that matters of interpretation are easily susceptible to differences of opinion, and the investigators' disagreement with the Applicant's interpretation did not make them biased or incompetent. In any event, again, that these matters were not part of the charges and are of limited, if any, relevance to the proceedings.

102. The Respondent disagreed with the Applicant's basic premise that "due process rights are rigid, predefined and absolute, to be accepted *in toto* or not at all." Due process rights do not exist in a vacuum. They are a means of preserving fairness and accuracy in the process, not preventing the process from occurring. The Respondent submitted that in considering due process rights, it was necessary to first consider what process was due to the Applicant.

103. The Respondent noted that the disciplinary proceedings concerning the Applicant, as well as the investigation, are administrative processes governed by internal UN requirements and procedures, notably the UN Staff Regulations and Rules.

104. The Respondent argued that he exercised no police powers over the Applicant, and had no authority to impose restrictions on the Applicant's individual liberty or civil rights. The distinction between criminal and administrative proceedings such as these, the Respondent submitted, was that the Applicant's due process rights must be understood in terms of the relationship of the Applicant as a staff member to his employer. These rights are largely defined by, and must be consistent with, the Staff Regulations and Rules, as well as the policies and procedures promulgated in accordance thereto, which provisions exist specifically to remove staff members and the Organisation from being subject to any national jurisdiction. What applies in criminal proceedings of national jurisdictions is not analogous to the investigative stage of proceedings within the internal justice system of the UN. The Respondent also observed that some of the authorities cited by the Applicant themselves recognize the changing nature of due process rights at different stages of a case.

105. As for the right to remain silent, the Respondent cited staff regulations 1.1 (b) and 1.2(e), pursuant to which the Applicant undertook to regulate his conduct to accord with the interests of the Organisation. Such interests clearly include cooperation in investigation of allegations of misconduct. Indeed, staff regulation 1.2 (r) provides explicitly that a staff member must respond fully to requests for information from officials authorised to investigate possible misuse of funds, waste or abuse.

106. There is, therefore, no right to remain silent. Indeed, the Respondent observed that some of the national jurisdictions cited by the Applicant did not themselves recognize a right to remain silent in all circumstances; a notable exception being within the context of self-regulating organizations.

107. On the right to counsel, the Respondent argued that the Applicant is sought to equate not being informed of the right to counsel with a denial of that right. Investigators never denied the Applicant the right to seek legal counsel. The Applicant was only advised in the Notice of Investigation that he did not have the right to the presence of legal counsel when interacting with investigators during any

interviews. It remained open to the Applicant to seek the advice of the Panel of Counsel (as it then was), the Ombudsman, or even inquire from OAI. As an experienced professional staff member with managerial responsibilities, it is reasonable to expect that he knew how to do this.

The Charges

Recruitment of Mr Vas

108. The Respondent contended that the circumstances surrounding the investigation into this allegation did not alter the facts of the matter, which facts the Applicant had admitted to in his comments on the investigation report and in his response to the charge letter and which remained uncontested in his current Application.

109. It is a fact that the Applicant in his capacity as Field Security Adviser instructed staff under his supervision to allow Mr Vas to accompany them on their rounds. It is a fact that the Applicant exercised this authority without any prior recruitment process, procedural requirements or notice to the senior management of the Country Office. It is further a fact that the Applicant's exercise of authority in this regard was neither isolated nor incidental in that Mr Vas accompanied the security staff over a period of some seven weeks, and the situation was the result of the Applicant's own initiative.

110. The only matter in dispute is the interpretation of Mr Vas' functions or status. The Applicant had termed the nature of Mr Vas's status in his email to the DRRO on 15 June 2007, that is, after Mr Vas started work and prior to the start of any investigation, as "...work on a probation basis..." (applicant annex 6, exhibit 30) The Applicant had since disputed this characterisation and termed Mr Vas' functions as `work-shadowing'.

111. It is not readily apparent what the difference between probationary work and work shadowing is. The Applicant said in his email of 15 June 2007 that Mr Vas was working on a probationary basis and that he would like to employ him "formally."

One of the Applicant's subordinates, Mr Pacheco, also recalled that the Applicant, in assigning Mr Pacheco to train Mr Vas, indicated that Mr Vas was on probation.[22] Other staff members under the Applicant's supervision told investigators that the Applicant had introduced Mr Vas to them variously as "a security clerk", "a future security clerk" or as a "member of their staff.[23]

112. However the Applicant later chose to re-characterize Mr Vas' status. Mr Vas had put in a claim for compensation for his time and effort. The Respondent submits that Mr Vas' claim cannot in good faith be ignored and that the matter was under review by the Respondent.

113. The Respondent submitted that it was unclear from the Applicant's own submissions how he, as the supervising manager, would have prevented the recruitment for the vacant post from being unfairly prejudiced in favour of Mr Vas. The Respondent submitted that the Applicant failed to discharge his duties in respect of the recruitment process. This constitutes a clear failure to uphold the standards required of the Applicant as a professional staff member and manager.

114. The Respondent contended that the Applicant's conduct was aggravated by several factors. Firstly, the events occurred in the context of the Applicant's responsibility for overall security in Mozambique. The fact that the Applicant exercised his authority to enable an unknown individual to work in security magnifies the extent of the Applicant's failure to uphold the highest standards. Not only was there the potential risk that Mr Vas might have posed, he was himself at risk. The Respondent would have been liable for any harm suffered by Mr Vas as a consequence of his security "training." Given the experience of the Applicant within the system, he must be expected to have known better.

115. As for the Applicant's contention that he used the word "probation" wrongly as English is not his mother tongue, the Respondent argued that the language

[22] Applicant annex 6, exhibit 36.
[23] Applicant annex 6, exhibits, 16, 3, and 15.

employed in the Applicant's response to the charge letter and his undergraduate education in the United States clearly suggest otherwise.

116. On the issue of the Applicant's disregard for recruitment procedures, the Respondent pointed out that the DRRO's response to the Applicant clearly did not prompt the Applicant to cancel his instructions to his subordinates concerning Mr Vas or even to check whether his understanding of Mr Vas' status complied with procedures.

117. The evidence adduced by the Applicant indicating follow- up in September and October 2007 (Application Annex 10) concerned recruitment for the vacant position, and well after Mr Vas stopped working. The Respondent did not accept the proposition that the Applicant, as an experienced staff member and manager with special security oversight responsibilities, needed more detailed instructions on the procedure for the employment of staff within the Organisation.

Locking workers in a warehouse

118. The Applicant instructed one of his subordinates to lock the ten workers in a warehouse containing vehicles and equipment from a de-mining project. The warehouse contained no entry or fire exit other than the one that was locked, no bathroom or sanitary facilities, and no access to drinking water. Some of the vehicles in the warehouse contained fuel; there was also other equipment and rubbish present. The Applicant indicated that the workers were specifically asked to turn out their pockets to ensure none had cigarettes, presumably out of concern for fire.

119. Paragraph 23 of the UNDP Legal Framework provides that

> Misconduct may include, but is not limited to, the following categories whether willful, reckless or grossly negligent:
>
> a. Acts or omissions in conflict with general obligations of staff members set forth in Article 1 of the Staff Regulations [...]

k. misuse of office, abuse of authority.

120. The Respondent submitted that the risk of fire or explosion in an enclosed space with vehicles containing fuel is reasonably foreseeable; although technically diesel is "considered combustible while petrol is flammable."

121. The Respondent submitted that a reasonable person would not lock his or her employees into such a warehouse not only because of this reasonably foreseeable risk of fire or explosion, but also because locking individuals into a warehouse exponentially increases the likelihood that those individuals will be injured or killed in such a fire or explosion.

122. The Applicant's act of instructing his subordinates to lock the workers in a warehouse can only be considered an extreme or exaggerated failure to act as a reasonable person would. The Applicant was clearly being reckless; he recognised the risk of fire and confiscated the workers' cigarettes and disregarded that risk when weighed against the possibility of theft.

123. As the UNDP Administrator stated in her letter of 27 August 2009, the Applicant was expected as a supervisor and specifically as a Field Security Adviser, to provide a model of compliance with safety and security standards.

124. The Respondent argues that the Applicant's continued defence of his actions in this respect is troubling. Firstly, the Applicant maintained that his instruction was necessary to prevent theft. It was not clear why a compound patrolled by security guards where workers were being searched involved such a high risk. The Applicant's claim that the absence of incident validated his purported risk assessment did not hold merit. The Respondent understood that the Applicant was not present during the time the workers were locked in and did not accept the proposition that the absence of direct consequences of an act was proof that the act was not committed recklessly or in a grossly negligent manner. One need not be involved in an accident to be cited for reckless driving. Citing the former UN Administrative Tribunal in *Dilleyta* (Judgment

No. 1103 (2003), the Respondent maintained that the relevant standard in misconduct is the nature of the conduct, not the consequences.

Receipt, storage and distribution of pornography

125. Staff regulation 1.2 (q) requires staff members to use property and assets for official purposes. As the Applicant accepted, the UNDP Policy on use of Information Communication and Technology (ICT) Resources prohibits the use of ICT resources for receipt, storage and transmission of sexually explicit messages and images. The Applicant had an obligation as a staff member to regulate his conduct with the interests of the Organisation only in view.

126. As a threshold matter, it must be pointed out that the Respondent was not interested in the Applicant's enjoyment of pornography on his own equipment and during his own time. The Respondent was however concerned with his use of UNDP equipment and resources for this purpose. What the Applicant terms "po-faced" was in fact an eminently reasonable concern to protect the image and interests of the Organisation. The Respondent certainly had an obligation to ensure that the privileges and immunities enjoyed by the Organisation did not become a means of evading national laws concerning transmission or receipt of sexually explicit material, and the Applicant as a staff member had undertaken a similar obligation.

127. The Respondent found it surprising that the Applicant could possibly not know that the use of official equipment for this purpose was prohibited.

Proportionality of Sanction

128. The Respondent observed that the Applicant had admitted to what he termed "a number of unwise decisions".

129. The `decisions' for which the Applicant was sanctioned consist of three largely unrelated actions. The Applicant had not made one isolated mistake, but rather demonstrated a consistent pattern of behaviour incompatible with the highest standards of efficiency, competence and integrity he was required to uphold as an international civil servant.

130. As a point of law, under staff rule 10.2 (a), the failure of a staff member to observe the standards of conduct expected of an international civil servant may amount to misconduct and lead to the imposition of disciplinary measures. The Applicant's behaviour in ignoring procedural requirements and using his authority to endanger human life represented such misconduct.

131. Once misconduct is established, the Respondent has broad discretion in deciding on the appropriate and proportionate disciplinary measure.

132. The Respondent submitted that the Applicant's conduct in any one of the charges could have resulted in the imposition of disciplinary sanctions, and cumulatively they merit a more severe sanction. As relevant precedents, the Respondent notes, for example, that judgments at both the former UN Administrative Tribunal and the International Labour Organization Administrative Tribunal have upheld the imposition of disciplinary sanctions for the use and distribution of pornography alone, including the most severe sanction when accompanied by aggravating factors.[24] In the present case, as the Administrator indicated to the Applicant in communicating her decision, she did consider mitigating factors, such as the absence of physical damage, in deciding on the appropriate sanction, and for this reason the most severe sanction was not imposed.

133. The Respondent submitted that the Applicant's acts of gross negligence or recklessness, such as locking workers into a warehouse for an entire working day, constituted misconduct of such magnitude that the Administrator could reasonably

[24] *See* Judgement No. 1299, Sawhney (2006), *see also* ILOAT Judgement No. 2555 (2006).

decide that she could not entrust the Applicant with responsibilities in the Organisation.

134. The Administrator's discretion on deciding the appropriate disciplinary measure is broad. This point had been consistently recognised by the former UN Administrative Tribunal, as long as the sanction was, inter alia, proportionate, and untainted by bias, prejudice or extraneous factors.[25] Having established the existence of misconduct, the Administrator's decision was a valid exercise of her discretion. It was proportionate to both the gravity and cumulative evidence of the Applicant's recklessness, and it was based on substantive facts to which the Applicant had admitted.

ISSUES AND DELIBERATIONS

135. As most of the facts in this case have been substantially agreed upon between the Parties, the Tribunal is called to determine:

a) If the Applicant's conduct constituted misconduct;

b) If the sanction imposed on the Applicant was proportionate; and

c) If the Applicant was afforded due process during the course of events leading up to his separation from service.

Did the Applicant's conduct constitute misconduct?

Definition

136. Misconduct is defined in the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (the Legal Framework). Among its purposes, the document serves to remind all members of UNDP staff of their duty to abide by the highest standards of conduct and defines misconduct in addition to

[25] *See* Judgment No. 210 Reid (1976) paragraph III, Judgment No. 994 supra (2001) paragraph II.

setting out what could constitute misconduct. The document also serves to define mechanisms which exist within the Organisation for reporting allegations of wrongdoing. It also explains the investigative and disciplinary procedures.

137. Section 3 of the Legal Framework defines misconduct, pursuant to staff rule 101.1, as:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant." Such a failure could be deliberate (intentional act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).

138. Article 3 goes on to list the various acts which could constitute misconduct in the following terms:

> Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:
>
> a) Acts or omissions in conflict with the general obligations of staff members set forth in Article I of the Staff Regulations and Rules and administrative issuances; failure to comply with the standards of conduct expected from international civil servants;
>
> b) Unlawful acts (e.g. theft, fraud, possession or sale of illegal substances, smuggling) wherever it occurs, and whether or not the staff member was officially on duty at the time;
>
> c) Assault, harassment, including sexual harassment", or threats to other staff members or third parties;
>
> d) Sexual exploitation and sexual abuse as defined in the Secretary-General's Bulletin "Special measures from protection from sexual exploitation and sexual abuse", ST/SGB/2003/13;
>
> e) Misrepresentation, forgery, or false certification, such as, but not limited to, in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit;
>
> f) Misuse or mishandling of official property, assets, equipment or files, including electronic files or data;

g) Action or omission to avoid or deviate from Financial Regulations, Rules and Procedures, including inappropriate use of committing or verifying authority;

h) Mishandling of contract obligations and relations with third parties leading lo loss of property or assets, or generating liabilities for the Organization;

i) Failure to disclose an interest or relationship with a third party who might benefit from a decision in which the staff member takes part; favouritism in the award of a contract to a third party;

j) Breach of fiduciary obligations *vis-a-vis* the Organization;

k) Misuse of office, abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

l) Exaction or acceptance of funds from a colleague or a third party in return for a favour or benefit;

m) Failure to disclose promptly the receipt of gifts, remuneration or other benefits received from an external source by the staff member in connection with his or her official duties;

n) Retaliatory action against a whistleblower or an investigation participant or other action in violation of the UNDP policy on the protection against retaliation;

o) Making false accusations and dissemination of false rumours;

p) Direct or indirect use of, or attempt to use, official authority or influence of the staff member's position or office for the purpose of obstructing an individual from reporting allegations of wrongdoing, or cooperating with an audit or an investigation;

q) Abetting, concealing or conspiring in any of the above actions, including any act or omission bringing the Organization into disrepute.

139. Article 3 goes on to add that

> Unsatisfactory work performance, when it does not come to the level of gross negligence or recklessness, does not constitute misconduct and thus does not fall within the scope of the present document. Performance-related issues are to be addressed through the Results and

> Competency Assessment (RCA) in accordance with the appropriate procedure.

The Charges

Storage and distribution of pornographic materials on UNDP official computer

140. The Tribunal notes that the Applicant concedes, in his closing submission, that the distribution and storage of pornographic material using UNDP equipment constitutes misconduct. For the purposes of the Tribunal's deliberations, therefore, the characterisation of this charge is considered settled.

141. The Tribunal is therefore left to examine the other acts of the Applicant which were part of the charges against him.

Locking of workers in the warehouse

142. While the Applicant concedes that the workers assigned to clean the vehicles before the auction were locked in the warehouse under his watch, the record contains varying accounts as to how this actually came to be.

143. The Applicant's own unrebutted testimony, which the Tribunal accepts as credible, is that the workers themselves asked to be locked in. The Applicant concedes he unwisely allowed this locking in.

144. The Respondent's evidence and submissions did not actually address *why* the workers were locked in while they cleaned the vehicles or how the events actually transpired. The Respondent argued that the Applicant's conduct showed such a wanton disregard of UN "principles and policies," and could in many jurisdictions be tantamount to "false imprisonment." The Respondent further added that the conditions in which the workers were made to carry out their task were so unsafe and unsanitary as to pose a threat to their life and safety.

145. The Respondent suggested that the actions of the Applicant were so reckless, and an "abdication of duty", as to merit the charge of misconduct.

146. Mr Curtis, the senior investigator whom the Respondent called as a witness, did not however provide a credible account of the state and contents of the warehouse. When questioned as to the fire-risk, the witness told the court that he could not recall if there were fire extinguishers in the warehouse. Neither the guards nor the workers present on the relevant day appear to have complained or questioned to corroborate the Respondent's theory. It appears to the Tribunal that the investigator was not looking into this particular conduct from the perspective of the fire-risk which the Applicant is alleged to have placed the workers in.

147. The Tribunal also finds the testimony of Mr Sanders, the UNDP Security Advisor for Europe and the Commonwealth of Independent States, as an 'expert' on the nature of fire-risk, to be of little use. Not only did the witness have no knowledge of the time of the year that the incident took place, his evidence on the possibility of fuel spontaneously combusting under the strength of the Mozambican sun, is at best hypothetical.

148. While Mr Sanders earnestly maintained that the locking of doors to a warehouse with workers in it could never be acceptable, the Tribunal finds that accepting this line of reasoning would depend not only on *why* the workers were locked in but also the prevailing conditions of that locking in.

149. This of course brings the Court squarely back to the Applicant's testimony in respect of the workers' request or suggestion that they be locked in, which I accept presents the most plausibly account of the event as it transpired.

150. The Tribunal accepts the Applicant's account of the incident, which is that the workers suggested that they be locked in to complete the task they were assigned without risk of theft of the items, that they were provided food and drink and that the Applicant assessed the risk under the circumstances and found it to be safe.

151. The suggestion that the locking of the workers could amount to false imprisonment in many jurisdictions is faulty and irrelevant as the elements of the offence appear to be totally absent in this case. For the locking of the workers to

amount to false imprisonment, it must be shown that the Applicant had the intention to confine them. It must also be shown that the workers were confined against their will and that they were conscious of it or harmed by it.

152. The Tribunal finds the Applicant's conduct in this regard to constitute poor judgment without the slightest hint of malice or intent to harm. It was neither abuse of position nor abuse of authority and therefore did not attain the level of misconduct.

The 'hiring' of Mr Vas

153. The Respondent's principal witness in respect of this charge is Mr Vas, the Complainant himself, who was not called to testify.

154. The Respondent's case rests on the Complainant's statement, which the Respondent seems to have accepted as true at face-value.

155. The Tribunal does not accept the Respondent's theory that Mr Vas was promised a job with UNDSS by the Applicant, nor does the Tribunal accept that the money the Applicant loaned Mr Vas was in consideration for the 'work' he was doing with UNDSS. In examining the circumstances under which Mr Vas was allowed by the Applicant to stay on in UNDSS, the Tribunal finds the suggestion that the Applicant sought to circumvent the recruitment process for the purposes of hiring Mr Vas does not stand up to scrutiny.

156. The Tribunal does however find that the conduct of the Applicant showed such poor judgment as to call into question some degree of negligence or recklessness on his part. The Tribunal finds it difficult to imagine a set of circumstances under which a person who has no contractual relationship of any type may be legitimately asked or allowed to "shadow" the work of security officers. Even where the Organisation admits interns and volunteers to learn or work with or without pay within its offices, it provides for the processes for admitting these non-staff personnel. It does not lie within the competence of any manager or other staff member to do so on their own authority as they have none.

157. The Applicant's conduct on this score, the Tribunal finds, goes beyond the scope of unsatisfactory work performance. The Applicant, as a P4 Security Advisor and head of the security unit, should more than just have known better. His casual conduct in this regard, even with the best of intentions, displays a degree of recklessness which is both troubling and sanction-worthy.

158. The Tribunal also finds the Respondent's submission that he is seriously considering Mr Vas' claim for compensation for "work done" to be extraordinary. The evidence before the Tribunal is that Mr Vas was allowed to 'shadow' other employees to learn the ropes of the job. It is not in evidence that he performed any assigned duties. The Tribunal struggles to understand why the Respondent would even engage in the matter when the Complainant was clearly not *employed* by him and had no legal standing with him at any time material to this application. The Complainant clearly knew that he was not employed by the Organisation even though he was hoping at the time that the Applicant could facilitate his recruitment.

159. It is no more the place of the Respondent to consider the Complainant's claim for compensation for being illegally within the Organisation's offices and business than it was for the Applicant to allow "shadowing", "probation" or whatever to learn the ropes!

Were the requirements of due process met?

160. Section 1 of Chapter III of the UNDP Legal Framework requires that "investigation subjects shall be informed in writing of the allegations at the earliest possible time […] In no case shall the staff member be informed later than during his or her interview as the subject of the investigation."

161. The evidence bears out the Applicant's contention that the Applicant only received notice of being the subject of an investigation in May 2008, when the investigation had, in fact, commenced *circa* January or February that year. The notice issued to the Applicant in May 2008 said little more than that he was being

investigated for abuse of authority and misappropriation of "certain property belonging to UNDSS and UNDP."

162. While the Respondent insists that the Applicant was informed in a timely manner, he does not dispute that *actual* notice was only received by the Applicant in May 2008. The Applicant bears no fault for the fact that the Notice was not received by the Applicant when it was first sent.

163. In addition to it being late, the Tribunal finds the contents of the Notice of Formal Investigation dated 26 February 2008 scarcely adequate, and certainly does not accord with the letter and spirit of the provisions in Chapter III of the Legal Framework which require the subject to be informed of the *allegations*.

164. The Respondent's bland statement informing the Applicant that he was being investigated for abuse of authority and misappropriation of "certain property belonging to UNDSS and UNDP," tells him little about the allegations and allows no scope for preparation for the interview.

165. The Tribunal must here point out the contradiction in Section 1 of Chapter III. While exhorting the Respondent to ensure that information of the allegation be provided "at the earliest possible time," it goes on to state that this shall be no later "than during his or her interview." The two situations are incompatible and allow for random and indeed arbitrary application and interpretation of the concept of timeous notice. It also places the subject of an investigation in the precarious position of being ambushed with allegations at the interview itself.

166. The conduct of a subject to an investigation during the interview is in no small measure directly correlated to how prepared he or she is for the interview itself. Factors such as shock, surprise and fear will all invariably play into the demeanour, tone and tenor of the subject of the interview.

167. A careful review of the facts in this case, as narrated above, brings me to the unreserved conclusion that the investigation was hasty and afforded the Applicant little opportunity to prepare for what he was to face in Johannesburg.

168. In listing all the due process requirements which, the Respondent argues, were met, paragraph 24 of the Respondent's closing submissions is notably silent as to the information given to the Applicant in the Notice of Investigation pursuant to Section 1 of Chapter III. This can only be because the Applicant was given *no* information as to the allegations against him.

169. The Tribunal also finds that the Respondent should have acted within the terms and spirit of its own OIA Guidelines and notified the Applicant that he could request the presence of a third party to observe the interview.

Was the sanction proportionate to the offences?

170. With regard to the receiving, storing and distribution of pornographic material on a UNDP official computer which is admitted by the Applicant, it would be enough to deny the staff member an in-grade increment, reprimand him or deny him a month's salary.

171. In *Massah*, on the charge of "computer related misconduct" for the storage and distribution of pornographic material, six (6) other staff member who were found to have engaged in the same misconduct with the Applicant lost steps within their grade, were demoted, denied their within-grade increments for two (2) to three (3) years. The Court held that the sanction of summary dismissal against Applicant to have been disproportionate under the circumstances. [26]

172. The Tribunal is of the view that there was not sufficient evidence to adequately show that the circumstances in which the casual labourers who were cleaning vehicles were locked in amounted to a misconduct. It was at the very worst, very poor judgment on the part of the Applicant. This is because the risk of harm to the

[26] *See* UNDT/2011/218 *Massah v Secretary General* of 29 December 2011.

workers, although shown to be minimized by the workers own request, Mr Pacheco remaining close by and providing them with food and water, was higher when weighed against the risk of theft of the items in the warehouse which was the reason for considering the locking in. The Tribunal is persuaded that the Applicant showed an undue lack of managerial competence in allowing the locking in of the workers even where it was at the request of the workers themselves. A reprimand and removal as head of the security unit would have been adequate sanction.

173. Regarding the matter of allowing Mr Vas to remain in the UNDSS premises and to observe how the unit worked or to train for a possible filling of a vacancy within the ERU with no legal capacity to do so, the Applicant had acted so unprofessionally and irresponsibly as to taint the image of the Organisation. This act was so reckless as to amount to misconduct.

174. The Tribunal has found that some of the Applicant's due process rights were not observed in the process of the investigation leading up to the disciplinary proceedings against him. Much as it is not the function of the Tribunal to substitute its judgment with that of the decision maker, it cannot avoid its duty of determining whether the sanction imposed on the Applicant for a proven misconduct is excessive.

175. For this purpose, it is the view and judgment of this Tribunal that a manager or staff member who has exhibited the degree of recklessness and abuse of position as shown by the Applicant in "recruiting" Mr Vas merits the sanction of separation from service.

176. In the instant case, the Applicant was terminated with compensation *in lieu* of notice but without termination indemnity. The lack of due process shown on the part of the Respondent while investigating the Applicant must necessarily count to mitigate his separation. To this extent, the sanction imposed on the Applicant is not proportionate in the circumstances. The Applicant ought to be terminated with termination indemnity.

CONCLUSION AND FINDINGS

177. Having deliberated on the evidence, the Tribunal's findings are listed as follows:

Due process

178. It is my judgment that the investigation was hasty and afforded the Applicant little opportunity to prepare for what he was to face in Johannesburg during interviews by Investigators.

179. The Tribunal finds that Respondent should have acted within the terms and spirit of its own OIA Guidelines and notified the Applicant that he could request the presence of a third party to observe the interview.

180. The Tribunal also finds the provisions of Section 1 in Chapter III of the Legal Framework contradictory. The principle of notice of allegations to a subject cannot at once be applicable "at the earliest possible time" *and* no later "than during his or her interview."

181. The so-called notice afforded to the Applicant in this case, as subject of an investigation, fell woefully short of the spirit of the Legal Framework.

Misuse of UNDP Assets

182. As the Applicant has conceded, in his closing submission, that the distribution and storage of pornographic material using UNDP equipment constitutes misconduct, the characterisation of this charge is considered settled.

Locking of workers

183. The Tribunal finds that Applicant's conduct in this regard constituted poor judgment without the slightest hint of malice, bad faith or intent to harm. It was neither abuse of authority nor misconduct.

'Hiring' of Mr Vas

184. The Applicant's conduct on this score, the Tribunal finds, went beyond the scope of unsatisfactory work performance. The Applicant, as a P4 Security Advisor, should more than just have known better. The Applicant was unduly casual, irresponsible and reckless.

185. The Tribunal finds the Respondent's submission that Mr Vas' claim for compensation is being seriously considered is deeply troubling. The Tribunal struggles to understand why the Respondent would even engage in the matter when the complainant was clearly not *employed* by him at any time. Under no circumstances can Mr Vas be legitimately compensated.

186. It is no more the place of the Respondent to consider the complainant's claim than it was for the Applicant to allow 'shadowing' to learn the ropes!

REMEDIES

187. The Applicant's request for a) reinstatement, b) compensation and the c) removal of the adverse material against the Applicant from his personnel file is refused.

188. The violation of the Applicant's due process rights coupled with the Tribunal's finding that the sanction imposed was disproportionate to the offence, merits, in my judgment an adjustment of to the sanction.

189. The Respondent is hereby ORDERED to adjust the sanction to separation from service *with* termination indemnity.

190. The Respondent is to pay the Applicant interest on the termination indemnity at the US Prime Rate from the date of the Applicant's separation from service.

(Signed)

Judge Izuako
Dated this 29th day of June 2012

Entered in the Register on this 29th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi