



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/36

Judgment No.: UNDT/2013/032

Date: 26 February 2013

Original: English

Before: Judge Vinod Boolell, Presiding
Judge Nkemdilim Izuako
Judge Goolam Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TADONKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robert Amsterdam, Amsterdam & Peroff LLP
Geoff Gelbart, Amsterdam & Peroff LLP
Katy Epstein, Amsterdam & Peroff LLP
Katya Melliush, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat,
Steven Dietrich, ALS/OHRM, UN Secretariat
Adele Grant, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant was appointed as the Head of Office (“HoO”) for the Zimbabwe Office of the Office for the Coordination of Humanitarian Affairs (“OCHA”) on 24 March 2008. The Assistant Secretary-General (“ASG”) of OCHA, Ms. Catherine Bragg, informed him by an email dated 27 January 2009 that: (i) OCHA would not renew his contract after its expiry on 23 March 2009; and (ii) he was going to be moved to the OCHA Regional Office in Johannesburg to take up the position of Senior Humanitarian Affairs Officer until the expiry of his contract.

2. The Applicant filed a request to the Secretary-General on 27 January 2009 seeking to suspend the implementation of the two administrative decisions. OCHA subsequently extended his appointment through to 23 April 2009.

3. On 20 April 2009, the Applicant filed another request for suspension of action challenging the decision not to renew his appointment. Subsequently, his contract was extended to 29 May 2009. On 27 May 2009, he filed an appeal with the New York Joint Appeals Board (“JAB”) challenging the decision by OCHA not to renew his appointment.

4. In view of the transition to the new system of internal justice this case was transferred to the United Nations Dispute Tribunal (“UNDT” or “the Tribunal”) in New York on 1 July 2009 in accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice). On 15 July 2009, the Applicant’s case was transferred to the Tribunal in Nairobi and was assigned case number UNDT/NBI/2009/036.

Procedural History

5. On 10 December 2009, the Applicant filed an amended application on the merits. The Registrar transmitted the application to the Respondent for reply within 30 calendar days.

6. On 4 January 2010, pursuant to article 10.9 of the UNDT Rules of Procedure, the President of the UNDT requested the President of the United Nations Appeals Tribunal (the Appeals Tribunal) to refer the case to a panel of three UNDT judges.

7. On 19 January 2010, the Respondent filed his response to the Applicant's amended application.

8. On 20 January 2010, a Panel of three UNDT judges was constituted.

9. On 21 January 2010, a Case Management Discussion (CMD) was held under art. 19 of the Rules of Procedure of the Tribunal by the Presiding Judge with the objective of identifying the issues and to assess the readiness of the case for a hearing. The Respondent indicated his intention to call four witnesses as part of his case but did not name them.

10. On 5 February 2010, the Applicant submitted voluminous additional documents, including numerous written testimonies of persons allegedly familiar with the Applicant's character and professionalism for the consideration of the Tribunal.

11. On 9 February 2010, the Applicant filed a motion to strike out the Respondent's list of witnesses on the ground that the Respondent had failed to provide the names of his witnesses within the timeframe requested by the Tribunal. The Applicant moved the Tribunal to prohibit the Respondent from calling witnesses to testify for the Respondent at the hearing and to order the presence of Ms. Catherine Bragg, Assistant Secretary-General of OCHA (ASG

Bragg), Mr. John Holmes, Under-Secretary-General of OCHA and the Emergency Relief Coordinator (USG Holmes), and the United Nations Resident Coordinator and Humanitarian Coordinator (“RC/HC”), Mr. Agostinho Zacarias, at the hearing in Nairobi.

12. On 10 February 2010, the Respondent submitted a list of potential witnesses, excluding USG Holmes and ASG Bragg.

13. By order UNDT/NBI/O/2010/015, dated 10 February 2010, the Tribunal directed the Respondent to file a final list of witnesses and required the physical presence of ASG Bragg, USG Holmes and RC/HC Zacarias at the hearing, pursuant to article 9.2 of the UNDT Statute and article 16.5 of the Tribunal's Rules of Procedure.

14. Pursuant to article 18.2 of its Rules of Procedure the Tribunal issued another order on 11 February 2010 to direct the Respondent to produce a copy of the report of the Panel on Discrimination and Other Grievances (PDOG).

15. On 16 February 2010, the Applicant filed an application to amend his list of witnesses.

16. On 19 February 2010, the Respondent requested an amendment to Order UNDT/NBI/O/2010/015 to direct that the testimony of two witnesses based in New York be provided by video conferencing.

17. On 20 February 2010, the Applicant moved the Tribunal to dismiss the Respondent's motion, arguing that the physical presence of these witnesses was essential.

18. In a motion dated 21 February 2010, the Respondent moved the Tribunal to order the Applicant to produce, prior to the hearing scheduled for 23 February 2010 the original audio file, which the Applicant claimed to be the recording of his phone conversation with ASG Bragg on 25 January 2009.

19. A hearing was held from 23 to 26 February 2010 in Nairobi by the panel of three judges. The Applicant was represented by counsel from the Office of Staff Legal Assistance ("OSLA") and two private lawyers from Amsterdam & Peroff LLP. The Respondent was represented by a team of counsel from the Administrative Law Section, Office of Human Resources Management in the UN Secretariat ("ALS/OHRM").

20. Counsel for the Applicant called two witnesses, Ms. Kerry Kay, Head of the NGO "Helping Hands", which is located in Harare, Zimbabwe, and the Applicant. Both witnesses were cross-examined by the Respondent.

21. At the close of proceedings on 26 February 2010, the Tribunal directed the parties to provide an amended list of witnesses. It further advised the parties that they would receive further directions from the Tribunal, including a re-scheduling of the hearing.

22. On 12 March 2010 the Respondent submitted six written statements and indicated that he would call four witnesses to give evidence *viva voce* at the hearing.

23. On 15 March 2010, the Tribunal reiterated its order to the Respondent, requiring the physical presence of USG Holmes, ASG Bragg, and RC/HC Zacarias. On the same day, the Respondent filed a witness statement by RC/HC Zacarias. In response to the Tribunal's order requiring the presence of USG Holmes, ASG Bragg and RC/HC Zacarias, the Respondent reiterated that these witnesses could not travel to Nairobi for professional reasons to give evidence in person at the hearing. The Respondent further indicated his intention to call witnesses Rudolf Muller (based in OCHA New York and the Deputy Director of the Coordination and Response Division ("CRD")), by video-conference from Geneva, Switzerland, Ms. Maria de Lurdes Tomás (an Administrative and Finance Officer for OCHA Zimbabwe) by audio-conference from Harare,

Zimbabwe, and Roeland Monash (Deputy Representative of UNICEF) via video-conference from Tbilisi, Georgia.

24. On 16 March 2010, the Respondent moved the Tribunal to direct the Applicant to submit the written statements of his witnesses as agreed on 26 February 2010.

25. On 18 March 2010, the Tribunal decided that the hearings would resume from 21 to 28 April 2010 and gave further directions to the parties.

26. On 22 March 2010, the Applicant filed a motion to strike out the Respondent's written witness statements and for an order requiring RC/HC Zacarias' *viva voce* testimony.

27. On 23 March 2010, the Tribunal reiterated its order requiring the physical presence of witnesses ASG Bragg and RC/HC Zacarias at the hearing scheduled to resume from 21 to 28 April 2010 in Nairobi. As for witness USG Holmes, the Tribunal decided that he could be heard via video-conference.

28. On 29 March 2010, the Applicant filed a motion entitled "Urgent Motion for an Order Excluding Non-Probative Material and Evidence from Proceedings", seeking to exclude the witness statements filed by the Respondent on 15 March 2010, which were, in the view of the Applicant, aimed at defaming him.

29. On 31 March 2010, the Respondent filed his response to the above motion, submitting that the Applicant's motion was misconceived and should be rejected. On 1 April 2010 by Order No. UNDT/NBI/O/2010/55 the Tribunal ruled that the Applicant's motion related to evidentiary issues and would be best dealt with at the hearing.

Facts

30. The Applicant entered the services of the Organization in 1999 with the United Nations Office for Project Services (UNOPS). He later joined OCHA as a Senior Regional Advisor for the Southern Africa Humanitarian Information Management Network in Johannesburg. In December 2007, the Applicant applied for the position of HoO of OCHA in Harare, Zimbabwe, under a 200-series contract. He went through a competitive process that lasted six months, and was selected. He assumed duties on 24 March 2008.

31. The Applicant underwent an orientation and induction in New York where he was given a briefing by Mr. Steve O'Malley of the CRD and other OCHA staff. According to the Applicant, he was not briefed by USG Holmes but had a ten-minute meeting with him

32. The Applicant's fixed-term appointment was extended through 23 April 2009 and thereafter, his appointment was variously extended as follows: from 24 April to 29 May 2009; from 30 May to 15 July 2009 but was further extended through 2 August 2009 after the Applicant filed a Suspension of Action dated 10 July 2009; and from 3 August 2009 to 3 September 2009. Following the Respondent's decision not to renew the contract beyond 3 September 2009 the Applicant filed another application for a suspension of action, which was granted on 1 September 2009.

33. According to the Applicant, the several decisions of the Respondent not to renew his fixed-term appointment started in January 2009. ASG Bragg informed him by email dated 27 January 2009 that his contract would not be renewed based on his performance. The email stated, *inter alia*, "...after discussion with senior management, OCHA does not intend to renew your contract after its expiry on 23 March, 2009." The Applicant was, by the same email, asked to move to the OCHA Regional Office in Johannesburg. Upon receipt of the email, the Applicant filed a request to the Secretary-General on 27 January 2009 to review the

administrative decision not to renew his fixed-term appointment after its expiry on 23 March 2009. The Applicant also filed a request for suspension of action on 27 January 2009 seeking to suspend the implementation of the two administrative decisions.

34. According to the records provided by the Applicant, the JAB considered the request for suspension of action and recommended that the request be rejected on the ground, that the Applicant had not made a *prima facie* showing that the implementation of the decision not to renew his 200-series contract would result in irreparable harm, provided that certain conditions be met before the expiry of his appointment on 23 March 2009. On 30 January 2009, the Secretary-General informed the Applicant that he had accepted the JAB's findings.

35. On 12 March 2009, the Applicant was again advised that his appointment would expire on 23 March 2009.

36. On 16 March 2009, the Applicant requested another suspension of action against the non-extension of his contract, but OCHA subsequently extended the Applicant's appointment for a month through to 23 April 2009. In the light of that extension the JAB did not take any action on this second request for suspension of action.

37. On the same date, the Applicant filed a rebuttal against his 2008-2009 performance appraisal ("e-PAS"). On 17 March 2009, the Administration provided the Applicant with a list of names of OCHA staff members and requested him to select three persons to serve as members of the Rebuttal Panel. On 18 March 2009, the Applicant raised his concerns over the involvement of OCHA staff members in the rebuttal. He requested that persons from other United Nations agencies sit on the panel to avoid the risk of potential conflicts of interest.

38. On 20 April 2009, OCHA decided to proceed with the Applicant's separation effective 23 April 2009. On the same day, the Applicant filed a request

for suspension of action with the JAB challenging the decision not to renew his appointment. A hearing was held on 22 April 2009 after which the Panel unanimously decided to recommend the suspension of the contested action. It further recommended that OCHA "make zealous efforts" to provide the Applicant with a list of potential Rebuttal Panel members who were not OCHA staff members and that the rebuttal process be conducted and finalised expeditiously.

39. On 23 April 2009, the Secretary-General accepted the JAB's recommendation. Subsequently, the Applicant's contract was extended from 24 April to 29 May 2009.

40. On 27 May 2009, the Applicant submitted a Statement of Appeal to the JAB challenging the decision by OCHA not to renew his appointment. On 30 May 2009, the Applicant's contract was extended for two months and four days, until 2 August 2009.

41. On 1 June 2009, a Rebuttal Panel was convened to review the Applicant's e-PAS for the 2008-2009 performance cycle.

42. On 16 June 2009, OCHA advised the Applicant that his contract would not be renewed beyond 15 July 2009 and on 10 July 2009, the Applicant requested management evaluation of this decision with the Management Evaluation Unit (MEU). He also filed a motion for suspension of action with the Dispute Tribunal of OCHA's decision, dated 15 June 2009, not to renew his contract beyond 15 July 2009. Subsequently, OCHA decided to extend the Applicant's contract from 14 July 2009 to 2 August 2009, as a result of which the Applicant decided to withdraw his request for suspension of action.

43. The Applicant's appointment was once more extended from 3 August 2009 to 3 September 2009. That extension was granted to enable the Applicant to utilize his sick leave.

44. On 18 August 2009, the Applicant filed an application for suspension of action before the Tribunal of the decision not to renew his contract beyond 3 September 2009. He also sought a number of other reliefs. The suspension of action was granted by judgment UNDT/2009/016.

45. In a motion dated 2 September 2009, the Applicant requested the Tribunal to provide an interpretation of judgment UNDT/2009/016. The Respondent did the same on 2 October 2009. The Applicant filed comments to the Respondent's request for interpretation. Thereafter, the Respondent filed a reply to the Applicant's motion for clarification.

46. On 21 October 2009, the Applicant filed an application for suspension of action of the decision by OCHA not to extend his contract beyond 3 November 2009. The Applicant's contract was then extended to 3 February 2010, rendering the application for suspension of action moot.

47. On 30 October 2009, the Tribunal issued an interpretation judgment (UNDT/2009/058).

Preliminary matters

Applicant's Motion for Interim Measures

48. On 2 March 2010, the Applicant requested the Tribunal to grant him two months net base salary as an interim measure during the proceedings, pursuant to Article 14 of the Rules of Procedure. The Respondent requested that the Tribunal dismiss the Applicant's motion for interim relief, stating that the Applicant had been duly compensated for the period of January 2009 through February 2010 and that payment of the outstanding balance concerning the Applicant's rental subsidy in Harare would be made promptly. On 3 March 2010, the Respondent filed a corrigendum to his response, revising the amount of the total payments made to the Applicant.

49. By Order 052 (NBI/2010) dated 31 March 2010, the Tribunal granted the Applicant's motion for interim measures and directed the Respondent to pay him the sum of two months' net base salary, within seven days of the Applicant signing an undertaking to repay any sums which may be due to the Respondent upon judgment being given by the Tribunal.

50. On 7 October 2010, the Respondent submitted a Motion for Reconsideration of Order No. 052 (NBI/2010). The Respondent alleged that new facts had emerged since the Tribunal granted interim relief of two months' net base salary to the Applicant on 31 March 2010, which demonstrated "a level of impropriety of the greatest ilk" on the part of the Applicant. The Respondent sought to show that the Applicant misled the Tribunal in seeking interim relief. According to the Respondent, the Applicant was allegedly appointed as a Director in UNOPS at the P-5 level on 16 February 2010; was paid salary advances by UNOPS in February and March 2010 to the tune of USD \$17,500; sought to enroll his new-born son on his Van Breda health insurance through OCHA in March 2010, as well as continuing to accept half-salary payments, DSA payments and other entitlements from OCHA up until 31 March 2010. The Respondent submitted that the Applicant was obliged to notify the Tribunal of his employment with UNOPS yet failed to do so, that the Applicant deceived UNOPS, and that Order 052 (NBI/2010) ought to be reversed.

51. On 13 October 2010, the Applicant submitted his response to the Respondent's Motion for Reconsideration. The Applicant sought to clarify the dates of his employment with UNOPS, stating that he did not take up his post until 15 April 2010; he explained that this was due to his waiting on medical and visa clearance to travel to Abidjan which were not finalised until 12 April 2010. The Applicant submitted that no salary advances could possibly have been made to him by UNOPS before 13 April 2010, as this was the first day he was recognised on the UNOPS payroll. Further, the Applicant provided evidence to show that he was explicitly advised on two occasions by UNOPS not to resign from his OCHA post until his appointment with UNOPS was completely

formalized. The Applicant submitted that the Respondent's motion was "a thinly veiled attempt to malign" him, "so as to prejudice the outcome of the trial."¹

52. On 21 October 2010, the Respondent filed additional documentation relevant to the Motion for Reconsideration and on 25 October 2010, he filed a reply to the Applicant's response. The Respondent submitted evidence to show that the Applicant's appointment with UNOPS was effective 16 February 2010 and again insisted that the Applicant deceived UNOPS so as to continue receiving payments from OCHA after he took up UNOPS employment. The Respondent again requested that this Tribunal reconsider its Order granting interim relief.

53. On 26 October 2010, the Respondent filed a Motion to Re-open the hearing and recall the Applicant for further cross-examination. The Respondent submitted that the new facts discovered were central to the Applicant's case, and that the Applicant's failure to disclose them deprived the Tribunal of the opportunity to assess the credibility of his submissions with reference to the aforementioned new facts. The Respondent also sought the opportunity to cross-examine the Applicant in light of the new facts, specifically with regard to his failure to disclose them, his "misrepresentations to the Tribunal in regard to his financial status", as well as his fitness for work and career prospects, and his "misrepresentation to the Tribunal that he suffered loss as a consequence of alleged harassment".

54. On 1 November 2010, the Applicant filed his response to the Respondent's Motion to Re-open the hearing and recall the Applicant for further cross-examination, in which he very strongly submitted that there were no "new facts" of which the Respondent – i.e. the Organization itself – was not aware, and that it is not counsel's duty to seek to re-litigate once proceedings have closed. The Applicant went so far as to seek confirmation from UNOPS about his early salary payments, writing to BES-UNOPS on 11 October 2010 to ask why he was paid a full month's salary in April 2010, when in fact he arrived halfway through that

¹ Applicant's Response to Respondent's Motion for Reconsideration of Order No. 52.

month. The Applicant provided a letter from the Regional Director of UNOPS as evidence confirming that he did not start work with UNOPS until 15 April 2010.

55. The Respondent sought to show that the six-month delay in this request illustrates the deceit of the Applicant. However, this Tribunal had already accepted that earlier in 2010 the Applicant was in dire financial straits, and did not consider this delay on the part of the Applicant to be an unreasonable one while he concentrated on resolving his financial difficulties. The Applicant stated in his email of 11 October 2010 “If I was paid in error, I am ready for the recovery”. This statement, if anything, demonstrates honesty rather than deceit.

56. The Tribunal is of the considered view that these repeated allegations made by the Respondent against the Applicant are unnecessary, gratuitous and intended to undermine the credibility of the Applicant before the Tribunal. Not only are the additional submissions made by the Respondent totally unrelated to the Applicant’s original application and the issues to be decided by the Tribunal, they are primarily focussed on tarnishing the Applicant’s reputation before this Tribunal by portraying him as deceitful, dishonest and manipulative and setting out to “double-dip” across the OCHA and UNOPS payrolls. Evidence seeking to portray a party’s negative character alone is not admissible. The first motion submitted by the Respondent is merely incidental and does not correlate with the central issue in this case. In the opinion of the Tribunal, the second motion has no justification whatsoever and its very filing was unworthy of the Respondent and caused distress to the Applicant.

57. The interim measures granted the Applicant in Order 052 (NBI/2010) were not reversed, and the Respondent’s motion to recall the Applicant was denied. The Tribunal rejected that motion on the ground that Respondent had ample opportunity to test all of these issues during the testimony of the Applicant and other witnesses. The Tribunal finds that these two motions constitute an abuse of process of the court.

Respondent's motion to recall a witness

58. After RC/HC Zacarias had completed his testimony, Counsel for the Respondent made a motion to have him recalled for further examination on the grounds that, as the Tribunal understood it, RC/HC Zacarias was dismayed, disturbed, surprised and allegedly taken aback by the line of cross-examination he was subjected to. The Tribunal rejected this motion on the grounds that no reason was presented to explain whether there was any new element that may have taken RC/HC Zacarias or Counsel for the Respondent by surprise. It is an elementary principle of evidence that when a witness completes his or her testimony, it is on very rare occasions that the witness may be recalled. This may happen when there is a need for further clarification, or when any new evidentiary element, which could not reasonably be foreseen has been discovered after his testimony.

Applicant's case

59. The Applicant submits that the decision not to renew his contract as HoO OCHA Zimbabwe was taken in violation of his due process rights, as he was not given a valid reason and he was not given a proper e-PAS. He was not offered a mid-year review of his performance and a chance to improve any identified shortcomings. He was served with an unfair e-PAS that had been hastily and unilaterally prepared by OCHA and which grossly violated any relevant provisions of ST/AI/2002/3. The Applicant also submits that the onus of proving the non-performance is on management to show that he was properly evaluated, in accordance with the Performance Appraisal System as set out in ST/AI/2002/3. In this regard, the Respondent has not produced evidence of an e-PAS completed at the appropriate time and in the appropriate manner.

60. The Applicant contends that the non-renewal of his contract was motivated by bias and ill will. In support of this contention the Applicant has sought to establish that: (i) the attitude of his direct supervisor, RC/HC Zacarias, was the main factor that led to the termination of his contract; (ii) the campaign

orchestrated against him by his deputy, Mr. Farah Muktar, played a significant part in his removal; (iii) the top management of OCHA in New York as represented by USG Holmes, and ASG Bragg condoned the attitude of RC/HC Zacarias who was making life difficult for him; (iv) the Muller Mission that was sent to Zimbabwe to investigate the working of OCHA was in fact an investigation on his performance that triggered his removal; and (v) the procedure contained in the e-PAS rules was not followed.

61. The Applicant further avers that OCHA acted wrongfully against him and caused severe prejudice to his career, in addition to physical injury to him. The termination resulted in a series of contractual, administrative and financial abuses as well as other “cruel” measures of retaliation.

62. He also asserts that the Respondent tried to force him to withdraw his case from the MEU and the UNDT in exchange for a one-year extension.

Respondent’s case

63. The Respondent submits that this matter is about the decision not to renew the Applicant’s fixed-term appointment beyond its expiry date and argues that it was not biased nor founded on extraneous factors as alleged by the Applicant. The Respondent avers that the Organization complied with the applicable rules and regulations and that the Applicant did not suffer any actual detriment. He further submits that the decision not to renew his appointment was justified in view of the Applicant’s non-performance.

64. The Respondent states that the Administration did not recommend the termination of the Applicant’s appointment, but informed him that his contract would not be renewed beyond 23 March 2009 and that this is in accord with the well-established jurisprudence that 200 series posts are inherently temporary and that staff members have no expectation of renewal.

65. The Applicant occupied a central role in the co-ordination of the delivery of aid but he failed to perform at an adequate level for the functions of his post. Further, he had been given opportunities to take corrective action and improve, which he failed to do. It is also the Respondent's argument that the Applicant's inadequate performance adversely impacted on the delivery of humanitarian aid in Zimbabwe at a critical time. In good faith, the Organization made efforts to find an alternative placement for the Applicant, but it was not possible to do so.

66. With regard to the e-PAS, the Respondent refers to Administrative Instruction ST/AI/2002/3 which provides that a draft work plan for discussion with the first reporting officer must be prepared by the staff member and it is the responsibility of the first reporting officer to ensure that this occurs. In the present case, it was the responsibility of both the staff member and management to ensure that the performance appraisal procedure was complied with and, in fact, the evidence has shown that the Applicant was abundantly aware of his duties and responsibilities. He received the work plan for the office and worked on and modified this work plan. Accordingly, the Applicant could have prepared and submitted his individual work plan at any time. Furthermore, the Applicant knew what the duties were from the terms of the Vacancy Announcement and he was in receipt of the proposals of the executive coaching mission, which detailed the break-up of duties between the HC and the HoO.

67. The Respondent acknowledges that there was some confusion in regard to the Applicant's reporting lines. The RC/HC thought that he was the Applicant's first reporting officer – which in fact was the case. However, the Applicant considered that he only reported to the RC/HC for limited duties, and not in regard to his management role in the office. The Respondent submits that the Applicant could have cleared this issue by drafting his individual plan and sending it to either Mr. David Kaatrud (Director of the Coordination and Response Division (CRD)) or RC/HC Zacarias or both. That would have started the performance appraisal process in accordance with paragraph 6.2 (a) of ST/AI/2002/3.

68. The Respondent submits that compliance could not have made any substantial difference to the outcome. The evidence demonstrates categorically that the Applicant proved to be intransigent when confronted with issues of his own performance. He would not have taken any corrective action or improved, regardless of the form in which feedback was communicated to him.

69. As far as the attempt of the Administration to convince the Applicant to withdraw his case the Respondent avers that this contention is without merit as the Respondent had made attempts to resolve the case informally. However, the Respondent could not accept the conditions demanded by the Applicant for an informal resolution.

The social and political climate in Zimbabwe at the material time

70. The events leading to the termination of the contract of the Applicant revolved mainly around the social and political climate in Zimbabwe, which gave much cause for concern. When the Applicant assumed duties as HoO of OCHA Zimbabwe the social and political climate was very volatile and insecure, and the humanitarian office in the country was having a difficult time.

71. OCHA had had a very difficult relationship with the Government for some time. The existence of the OCHA office at different points in the previous two or three years had been hanging by a thread, because the Government of Zimbabwe did not always look with favour upon its activities and OCHA drawing attention to humanitarian issues and humanitarian needs. OCHA faced a tricky balancing act. The position of Humanitarian Coordinator was even trickier in some respects. There was a difficult challenge because of food security issues and many humanitarian issues, which the government was not particularly prepared to accept or to help OCHA to deal with.²

² Transcript of hearing of 6 July 2010 (hereinafter referred to as “6/7”), p. 67.

Stakeholders and individuals involved in Zimbabwe at the material time

72. Given the nature of the case and the duties that the Applicant was performing in Zimbabwe at the relevant time, and the stance of the Respondent, the Tribunal deems it necessary to first set out a list of all the persons involved and of all the stakeholders that were in the field in Zimbabwe at the material time for a proper understanding of the issues.

International organizations involved in humanitarian work in Zimbabwe at the time

73. A number of non-governmental organisations (NGOs) were present in Zimbabwe and they fell under the umbrella of what is referred to in the evidence as NANGO. Among them were: CARE, Médecins Sans Frontières (MSF), the Office of U.S. Foreign Disaster Assistance (OFDA) which was an organ of the United States Agency for International Development (USAID) dealing with disaster management, the World Health Organisation (WHO), and the Inter-Agency Standing Committee (IACS), a body of all humanitarian agencies coming together.³ Also mentioned were the United Nations Country Team (UNCT) made up of United Nations agencies such as UNICEF and the World Food Programme (WFP). There was also the national NGO “Helping Hands.”

OCHA

74. When the Applicant assumed duty in Harare as HoO, the Under-Secretary-General (USG) for Humanitarian Affairs and the Emergency Relief Coordinator (ERC) was Mr. John Holmes. His deputy was Ms. Catherine Bragg, the Assistant Secretary-General for Humanitarian Affairs. Ms. Bragg was also in charge of the Zimbabwe desk. Mr. Zacarias was both the Humanitarian Coordinator and the Resident Coordinator (RC/HC) in Zimbabwe.⁴ Mr. David Kaatrud was the

³ Transcript of hearing of 25 February 2010 (hereinafter referred to as “25/2”), p. 50

⁴ Mr. Zacarias is referred to as HC, HC/RC or Zac in the evidence.

Director of the CRD based in New York. Mr. Rudolph Muller⁵ was the Deputy Director of the CRD. Mr. Chris Hyslop was a Desk Officer in OCHA New York. Ms. Rania Dagash of OCHA New York was assigned to the Zimbabwe desk. Mr. Farah Muktar was the Deputy Head of Office of OCHA Zimbabwe and therefore second in command to the Applicant.

75. The CRD, the operations heart of OCHA is based in New York. It is the base of the coordination/supervision of the country offices. There are also regional offices around the world, particularly in Africa. The CRD is responsible for drawing up the work plans, of supervising budgeting arrangements and for policy decisions that are taken on humanitarian issues in any particular country. In short, the CRD is a key player in advising the USG on issues relating to humanitarian operations overseas.⁶

The Humanitarian Coordinator (HC) in Zimbabwe

76. The UN Humanitarian Coordinator, Mr. Zacarias, was responsible for the good conduct of all the humanitarian operations in Zimbabwe. He also had the responsibility for liaising with the government and persuading it to facilitate humanitarian operations. He was also responsible for speaking out about humanitarian issues and defending humanitarian principles. He chaired and coordinated the activities of the humanitarian Country Team, which is a strategic body designed to take decisions about humanitarian issues and the conduct of humanitarian affairs in that country. This team brought together the United Nations agencies, the NGOs and the Red Cross/Red Crescent Movement.

77. The HC was also the Resident Representative of the United Nations Development Programme (UNDP) and UN Resident Coordinator.⁷ In this capacity, his primary responsibility was to the United Nations Development Group and to the Administrator of UNDP. He was responsible for the

⁵ Mr. Rudolph Muller is often referred to in the evidence as Rudi Muller.

⁶ 6/7 p.65

⁷ 6/7 pp.63/64

coordination of development policy towards a particular country. He was also responsible for many other aspects of policy, including gender and human rights. He was usually the designated official responsible for security policy and security decisions in Zimbabwe.⁸

78. The role of a resident coordinator, especially when he is also a humanitarian coordinator is to maintain a working relationship with the government to which he is accredited. At the same time, because of wider issues of concern in the United Nations system about the particular government at that particular time, the HC was obliged to reflect those concerns as well, both privately and publicly. So it was a very difficult balancing act. There were those in the system who regarded Mr. Zacarias as performing that balancing act with great skill in the circumstances by maintaining access and having influence with government whilst not compromising principles. Yet there were others who regarded him as being too close to the government.

The Head of the OCHA Office in Zimbabwe

79. As HoO of OCHA Zimbabwe, the Applicant was entrusted with the following responsibilities: to manage and lead the OCHA Office in Zimbabwe; to support humanitarian programming/coordination in Zimbabwe; to support humanitarian policy and leadership and other related matters.

80. USG Holmes explained in his testimony that the role of the head of the OCHA office in any particular country is to work directly for the humanitarian coordinator and to liaise with not only him but also with the other main United Nations agencies in the country and the NGOs. He or she ought to have a relationship with the government and maintain the necessary balance between having a productive and cooperative relationship with it, while at the same time drawing attention to issues and on occasions saying things, which the government may not find particularly palatable. This is the situation that faces any head of

⁸ 6/7 p.92

office in any country where OCHA operates, but of course it can be more or less difficult depending on the attitude of the particular government concerned.⁹

81. USG Holmes also stated that in the difficult environment, which Zimbabwe presented, the HoO OCHA needed to have good analytical skills, good experience in humanitarian affairs, and good management skills. He had to have good interpersonal skills to deal with and cooperate with not only the humanitarian coordinator but also with the many other actors in the humanitarian community including the government and the press. He needed also to have coordination skills in order to be able to survive and prosper in that environment. He needed to have the ability to understand, advocate for and defend humanitarian principles to fulfil the needs of the people OCHA is trying to help in any particular state.

Issues for consideration

82. The issues to be addressed in this judgment include:

- a. Whether the complaints leveled against the Applicant by the HC and others unreasonably and unlawfully influenced OCHA management's decision not to renew his contract;
- b. Whether the non-renewal of the Applicant's contract was motivated by extraneous factors or improper motive;
- c. The performance of the Applicant;
- d. Whether a proper performance appraisal was conducted in respect of the Applicant;
- e. The true aim and effect of the Muller Mission to Zimbabwe and its impact on the non-renewal of the Applicant's contract;
- f. Whether OCHA observed the requirements of due process and fairness in the method it employed to separate the Applicant from service as Head of Office of OCHA Zimbabwe;

⁹ 6/7 p.60

- g. Whether the Applicant suffered any moral damage as a result of the way he had been treated and, if so, to assess the degree of such damage;
- h. Whether the manner in which these proceedings were conducted on behalf of the Respondent amounted to an abuse of process or which an order for costs would be appropriate under art. 10.6 of the Tribunal's Statute.

Whether the complaints leveled against the Applicant by the HC and others influenced OCHA management's decision not to renew his contract

Complaints from the staff against the Applicant

83. Mr. Muller had a meeting with the staff while on the Zimbabwe mission. According to him, the national staff was more careful than the international staff. There was a strong reaction from the administrative staff who said that they had a difficult working relationship with the Applicant in view of his management style and inadequate instructions. At meetings the Applicant would always reject the views of others. On the national staff side, the assistant of the Applicant came down very hard on him. The overall reaction of the national staff was mixed. Both RC/HC Zacarias and Mr. Muktar told Mr. Muller that they had a feeling that the Applicant was coaching them.¹⁰

84. Ms. Maria de Lurdes Tomás who said that she had been with OCHA since 2003 and worked under the Applicant as an Administrative and Finance Officer in the Zimbabwe office testified on the behaviour of the Applicant. She had also been in the Zimbabwe office when Ms. A.A.O was the head of OCHA. She stated that the working environment had deteriorated a couple of months after the Applicant's arrival.

¹⁰ 5/7, notes of presiding judge.

85. According to Ms. Tomás, the Applicant would call the staff into his office and lecture them without according them opportunity to speak.¹¹ The question of whether the Applicant used a tape recorder to record the conversations of staff members was disallowed in the absence of any evidence of such tape recordings.¹² She stated that the Applicant would also threaten the staff that he could easily fire them¹³ and that he could destroy whoever he wanted.¹⁴ He would often summon staff to meetings that were not work-related.¹⁵ That feeling of suspicion did not exist at the time Ms. A.A.O was the head of OCHA.¹⁶ She said that the staff was isolated and suspicious during Mr. Tadonki's tenure.¹⁷

86. Ms. Tomás said that there was nothing positive about the presence of the Applicant¹⁸ and that he never provided proper and sufficient guidance. According to the witness, Ms Muwani, the Applicant's assistant told her that she had been asked to spy on the staff.¹⁹ He also asked Ms. Loretta Bismark to do the same thing²⁰ and on one occasion, he came into her office and asked her repeatedly whether somebody had filed a complaint of sexual harassment against him. The witness said she felt harassed by this²¹ and that it was an abuse of power.²²

87. When Mr. Rudi Muller and Mr. Chris Hyslop came to Zimbabwe, the witness said that she and other colleagues met them to express their concerns about the work environment that had deteriorated under the leadership of the Applicant and to ask them to help find a solution.²³

¹¹ Transcript of hearing of 8 July 2010 (hereinafter referred to as "8/7"), p.5.

¹² 8/7 pp.6/7

¹³ 8/7 p.8

¹⁴ 8/7 p.11

¹⁵ 8/7 p.12

¹⁶ 8/7 p.31

¹⁷ 8/7 p.33

¹⁸ 8/7 p.31

¹⁹ 8/7 pp. 17/18

²⁰ 8/7 p.19

²¹ 8/7 p.20

²² 8/7 p.21

²³ 8/7 pp. 22/23

88. The Applicant rejected the suggestion that there were criticisms by his staff of his management role. He explained that he did a 360-degree exercise in his office for three months. Everybody in his office was given the latitude to examine what he was doing in the office.²⁴ He was confronted with a document drawn up by Mr. Kaatrud following the Muller mission to Zimbabwe where it was recorded as follows: “On 19 November the mission called the HoO to get his reflections on the debriefing. The HoO stated that in his opinion the mission was too short a period to establish an accurate account of the OCHA Zimbabwe office. He noted that he had used an authoritative style of management and was tough but not abusive”.²⁵

89. The Applicant denied having said this and added that he never obtained a copy of the Muller report.²⁶ He denied that he humiliated his staff²⁷ or that he would always lecture to them and almost never allowed them to talk during staff meetings.²⁸ He denied having installed a tape recorder in the office of his secretary and told her that he was recording her conversations.²⁹ He denied having asked his staff to sign a petition to ask for his continued stay in Zimbabwe.³⁰

90. On the last issue, he explained that when he received an email from ASG Bragg informing him he had been dismissed, he invited his staff for lunch and asked them to provide him with a letter of recommendation so that he could find another job as he had been terminated. His staff told him that they had nothing against him as mentioned by Mr. Muller. The only concern that they had was that RC/HC Zacarias would come after them because it would look like they were against him. “And you don't know how bad he can be because he is the one who signed our contract. We don't want to take that risk”.³¹

²⁴ Transcript of hearing of 26 February 2010 (hereinafter referred to as “26/2”), p.51

²⁵ 26/2 p.52 and Respondent’s Bundle Vol. 1 (hereinafter referred to as “R1”), p.75.

²⁶ 26/2 p.52

²⁷ 26/2 p.53

²⁸ 26/2 p.54

²⁹ 26/2 p.56

³⁰ 26/2 p.56

³¹ 26/2 p.57

Other testimonies about the Applicant's conduct

91. Mr. Marcellin Hepie, head of UNHCR in Zimbabwe in 2008, stated during his testimony that it was a fact that the Applicant was putting pressure on his staff and this was so because he was a workaholic. The deputy head of office however, told Mr. Hepie that he was disappointed with the Applicant.³²

92. The Applicant, according to Ms. Kerry Kay, a witness called by the Applicant, was not abusive towards people. Whenever she attended his meetings or went to meet him in his office, she observed the way he interacted with his staff and the way his staff talked about him at the reception desk and concluded that the staff “really enjoyed him” as he was “open, polite and kind”.³³ Commenting on an observation made in a document,³⁴ where it is stated that the Applicant lacked certain listening skills and that he needed to further develop his management, team working and communication skills, Ms. Kay disagreed and added that his communication skills were excellent.

Allegation of sexual harassment

93. The Applicant denied that he interrogated Ms. Tomás to find out whether a complaint of sexual harassment had been made against him by his assistant. He had raised the matter at a staff meeting having heard such a rumour and learnt that it was Ms. Tomás who was behind the rumour. But he did have a conversation with her and she told him that she was worried about the long hours the secretary was working. That allegation was never the subject of any investigation as provided for by the Staff Rules.³⁵

94. Mr. Amsterdam, Counsel for the Applicant, intervened to move that all the evidence relating to the said allegation be struck off the record.³⁶ He submitted

³² 5/7, notes of presiding judge

³³ Transcript of hearing of 24 February 2010 (hereinafter “24/2”), pp. 20/21

³⁴ Applicant’s Bundle Vol. 2 (hereinafter “A2”), 513 Para 31.

³⁵ 26/2 pp.59/60

³⁶ 26/2 p.69

that the issues in this case were not related to the allegation and it was the first time in the course of the proceedings that this matter was being raised.³⁷ He continued that what was worse was that a totally unfounded allegation of sexual harassment was being used by Counsel for the Respondent to attempt to discredit the Applicant.

95. Rules exist within the Organisation on how to deal with such a serious allegation. An investigation would have allowed the Applicant to present his version of events, and for the facts as presented by both parties to be properly and independently verified. Although no investigation was carried out into these allegations and there was absolutely no foundation or justification for such a line of questioning, this allegation is used unashamedly by Counsel for the Respondent. This is yet another indication of the length the Respondent was prepared to go to downgrade and denigrate the Applicant. In the view of the Tribunal, this is another example of abuse of process by the Respondent.

Criticisms of the Applicant by NGOs

96. RC/HC Zacarias testified that the heads of agencies had a forum for coordination of all international NGOs operating in Zimbabwe under an umbrella organisation of the national NGOs, known as NANGO. There were more than 1,000 national NGOs and 56 international NGOs in Zimbabwe. The international NGOs and the umbrella organisation, NANGO, called themselves the Heads of Agencies.³⁸

97. In July 2008 a letter³⁹ purporting to emanate from the Heads of Agencies' Chair was sent to RC/HC Zacarias, complaining about the Applicant. Ms. Rania Dagash sent a copy of the letter to the Applicant and asked him to reply to ASG Bragg on this. Ms. Dagash refused to tell the Applicant who had sent the letter.⁴⁰

³⁷ 26/2 p.70

³⁸ Transcript of hearing of 7 July 2010 (hereinafter "7/7"), p.39.

³⁹ Applicant's Bundle Vol. 1 (hereinafter "A1"), p. 274

⁴⁰ 24/2 p 51

The Applicant, who claims to have a wide knowledge of computers, said that when he analysed the letter from a computer, he found out that the author was one Stephen Vaughan, head of CARE,⁴¹ an NGO in Zimbabwe.⁴² When the Applicant confronted him with the letter, he denied writing it and said the letter came from a group.⁴³ A second person, one Ms. Joanna Hiel from Médecins du Monde (MDM) had co-authored the letter.⁴⁴ The Applicant responded by inserting his comments in capital letters after each paragraph.⁴⁵

98. In reply to a question, the Applicant answered that the two had authored the letter to serve the purpose of RC/HC Zacarias. Both these persons who headed international NGOs needed the support of Mr Zacarias to obtain accreditation to work in Zimbabwe. In the case of CARE, the government had accused the NGO, under the leadership of Stephen Vaughan, of forcing rural people to vote for MDC, the opposition party⁴⁶ and it was the first NGO that the government of Zimbabwe asked to close.⁴⁷ As for MDM, they were having problems getting visas to bring in more people and were operating with only two persons.⁴⁸

99. On 23 September 2008,⁴⁹ Mr. Zacarias wrote to USG Holmes as follows:

Unfortunately, the current OCHA office in country is strife with tensions that have become visible through a number of incidents involving OCHA staff and the Head of Office, the head of OCHA office and the members of the UN Country Team, which are affecting relationships with partners in the NGO community and donors, while eroding quickly trust and confidence in OCHA and jeopardizing relations with government. In this context I must share with you in the strictest confidence that a key international NGO representative informed me that they had intended to lodge a letter of protest against the head of OCHA, but subsequently opted

⁴¹ 24/2 p.55

⁴² 24/2 p. 54

⁴³ 24/2 p 56

⁴⁴ 24/2 p 59

⁴⁵ A1 p. 274

⁴⁶ 24/2 p.64

⁴⁷ 24/2 p 65

⁴⁸ 24/2 p.66

⁴⁹ A1 p.252

to simply bypass OCHA in terms of their operations. This is an undesirable operation at a time when we are all trying to come together as one.

With this concern in mind, I feel compelled to request that you dispatch your director of the coordination and response division to review the current OCHA office and help address current internal tensions before they reach the public domain and tarnish OCHA's image.⁵⁰

100. It was the Applicant's testimony that RC/HC Zacarias never mentioned to him the letter or the dispatch of someone from the CRD to Zimbabwe.⁵¹

101. USG Holmes stated that it was not the practice of OCHA to encourage the humanitarian coordinator and other agencies to report to OCHA or to comment on the internal workings of an OCHA office. He always emphasised to the humanitarian coordinators that they should not micromanage the OCHA office. However, if people did send OCHA information on the internal workings of the OCHA office, it could not simply be ignored.⁵²

Criticisms from USAID

102. In a document titled "Notes on a meeting held on 30 July 2008 at 08:15 hours in OCHA office" it is stated that USAID was informed that NGOs were complaining that OCHA was not supporting them enough or keeping them fully informed on the discussions between the government and the United Nations. The Applicant said that NGOs had not conveyed these concerns to OCHA Zimbabwe, that there were formal and informal channels for communication in the field, and that it would have been easy for NGOs to use those channels to inform OCHA. The Applicant added that he was willing to listen to the NGOs as this was part of his role as head of OCHA.⁵³

⁵⁰ Transcript of hearing of 23 February 2010 (hereinafter "23/2"), p.11

⁵¹ 24/2 p. 71

⁵² 6/7 p.117

⁵³ R1 p.15/16/17

103. The document also contained "Recommendations from USAID" on the need for OCHA to look for ways to improve communication with NGOs and donors by meeting with the donor community more frequently. It went on to say that the United States of America "can be very supportive" if OCHA keeps the dialogue with them open.

104. OFDA is one of OCHA's major donors within USAID. In the light of USAID's recommendations, it was suggested to the Applicant that the head of OFDA, Mr. Ky Luu, was not convinced that the Applicant was performing.⁵⁴ The Applicant rejected this suggestion and stated that the date of the meeting should be put in its proper context as it took place on 30 July 2008, at a time when they were all confined in Harare as a ban was in force. Mr. Luu arrived during this period when nobody could move and he seemed not to be aware of it.⁵⁵

105. Secondly, the complaints made by Mr. Luu were about humanitarian leadership. He was asking why the United Nations could not defy the government, and according to the Applicant the concerns were more about the humanitarian coordinator rather than him. He tried to explain to Mr. Luu that he was not the right person for these issues. Pushing the government was the job of the HC and not OCHA.⁵⁶

106. And lastly, Mr. Luu was also making recommendations. He wanted a strong OCHA that had a strong relationship with the government, and that was exactly what the HC did not want. The HC did not want the OCHA office to be in contact with the government or to be that strong.⁵⁷

Complaints about the overall attitude of the Applicant

107. USG Holmes explained that the behaviour of the Applicant related to work performance because many of the partners he was operating with, the major

⁵⁴ 26/2 p. 8

⁵⁵ 26/2 p. 9

⁵⁶ 26/2 p. 9

⁵⁷ 26/2 p. 9

United Nations agencies, the major NGOs and some donors had serious problems relating with him. They found his attitude patronising and lecturing and he was not providing the right kind of relationships, which OCHA needed.⁵⁸

108. In a note to USG Holmes on 27 October 2008⁵⁹ regarding a meeting she had with the Applicant, ASG Bragg expressed some concerns about the overall attitude of the Applicant towards the HC and the fact that he was reluctant to listen to the views of others. USG Holmes discussed the contents of that mail with ASG Bragg and agreed with the conclusion she had reached about the Applicant, namely that they were having a very serious problem with him. The Applicant was not listening to the points that were being made about him and he did not seem inclined to take any corrective action. USG Holmes added that there was a significant problem with the personal attitude of the Applicant in his dealings with the rest of the humanitarian community and that it was extremely worrying.⁶⁰

109. According to USG Holmes, the Applicant had become aware of the issues in relation to him and was in a position to take corrective action but was unwilling to do so.⁶¹ This was after the complaint from the NGOs, after the difficulties he had with other members of the United Nations Country Team and with the Humanitarian Coordinator about his behaviour. He was in denial about these problems and was inclined to attribute them exclusively to some kind of conspiracy against him, led by the Humanitarian Coordinator and perhaps by his deputy as well.⁶²

110. USG Holmes testified that steps were taken to assist the Applicant in relation to the behavioural component, which affected his performance. He stated: "I gave instructions that there should be a time when I was communicating with Zac about the problems that he was part of. I made it clear to my colleagues in the Coordination Response Division that we should be taking up these issues with

⁵⁸ 6/7 p.118

⁵⁹ R1 p.58

⁶⁰ 6/7 p.75

⁶¹ 6/7 p.80

⁶² 6/7 p.76

Georges himself to make sure that he recognised that there were problems there and did something about it.”⁶³ The Tribunal finds, however, that there was no clear indication as to how and when OCHA actually took any steps to address the issue.

111. ASG Bragg had written to him: “The overwhelming impression from the conversation was that [the Applicant] perceived himself to be the only one who could see the situation in Zimbabwe clearly.”⁶⁴ She added that “I do believe that from that meeting it was quite apparent to me that [the Applicant] did not understand that there is a pattern of relationship difficulties and that because of the work that we do is so much dependent on relationship, our job is coordination. We are not like other humanitarians. We do not actively deliver food. We don't do concrete things. All of what we do is dependent on relationship. And when we have a head of OCHA office in a course of a 90 minute meeting seems to me to have little grasp of a pattern of relationship difficulties, that causes me some concern”.⁶⁵

112. In another mail sent to Mr. Gaby Douek of CRD dated 27 October 2008, ASG Bragg wrote in relation to the Applicant: “The view of some donors and NGOs was in fact that he was seen as too close with the government. The ASG heard speculation that he [the Applicant] might have encouraged the government to thwart a mission by the ASG to Zimbabwe in order not to have his performance examined up close”.⁶⁶

113. She did not ask the Applicant why he stopped her from going to Zimbabwe but wrote also: “I mentioned that I had heard that he might be too close to the government and as part of that might not have been supportive to my mission. To which, in my recollection - and this is now a recollection 18 months after or whatever number of months after our conversation - my recollection was

⁶³ 6/7 p.111

⁶⁴ Transcript of hearing of 10 July 2010 (hereinafter “10/7”), p.9

⁶⁵ 10/7 p.10

⁶⁶ 10/7 p.29 & R1/58

that he vehemently denied that he was too close to the government, and he said that if he had been close to the government, he would have received his accreditation by then. And I think that was the extent of our exchange on that matter”.⁶⁷

114. ASG Bragg testified that she received other unfavourable reports about the Applicant. She referred to a discussion with the government of Canada where she was told that the OCHA office in Zimbabwe was one of the weakest globally but they were not saying the Applicant was a poor manager.⁶⁸

115. She told the Tribunal that she heard from the CRD desk that managed the OCHA office that they were not getting sufficient information on the situation in Zimbabwe and that the reporting had been very inadequate.⁶⁹

116. According to her, people she talked to in USAID told her that Mr. Luu (head of OFDA) had gone to Zimbabwe and was very unhappy with the OCHA office and with the OCHA head of office. She did not have any documentation on this.⁷⁰ There was also some complaint from ECHO, which is the humanitarian office of the European Commission.⁷¹

117. It is strange that in the light of the several complaints from different quarters, which ASG Bragg said she received, she did nothing to verify them. In accusing the Applicant of using the Zimbabwe Government to stop her from visiting the Country, she made no effort to verify the Applicant’s influence with the Government but instead dwelt on suspicion and hearsay. Her said discussions with the Canadian Government about the Applicant’s performance were not recorded and she did not verify the adverse information about the Applicant from CRD. There is no doubt that this said criticisms against the Applicant affected her

⁶⁷ 10/7 p.29

⁶⁸ 10/7 p.5

⁶⁹ 10/7 p.5

⁷⁰ 10/7 p.8

⁷¹ 10/7 p.8

opinion of him. And somehow went on to take the place of a proper appraisal process.

118. In an email to RC/HC Zacarias dated 14 May 2008, Mr. Festo Kavishe, Head of UNICEF at the time levelled a number of criticisms against the Applicant that included: lack of preparedness to deal with the humanitarian situation in Zimbabwe; providing wrong assessments; the unwillingness of the Applicant to listen to concerns raised by many members of the United Nations Country Team; the negative image of the Country Team that the Applicant had given to donors and NGOs; his lack of managerial and people skills that prevented him from playing a constructive role in spite of his excellent technical skills and inability or refusal to listen.

119. The Applicant for his part stated that RC/HC Zacarias and Mr. Kavishe were good friends, although the former denied that he had directed Mr. Kavishe to forward the letter⁷² to him because he was sensitive about the fact that he had had a problem with the last two heads of office.⁷³ Mr. Zacarias rejected the suggestion that he sent a strong letter to USG Holmes criticising the Applicant, together with the letter of Mr. Kavishe because his aim was to undermine the Applicant before the latter could undermine him since he felt he was on the way out after having two other heads of OCHA office leave.⁷⁴

120. In a letter to ASG Bragg on 16 November 2008 the Applicant had stated that in hiring short-term consultants, he was interrupted by UNDP and that this jeopardised the CAP.⁷⁵ RC/HC Zacarias explained that he was not aware of UNDP interrupting the CAP because the CAP exercise was done by OCHA and agencies that were involved in it. He explained that he was briefed that the Applicant had not followed the procedure on the recruitment of consultants.⁷⁶

⁷² R1 p.10

⁷³ 7/7 pp.74/75

⁷⁴ 7/7 pp.75/76

⁷⁵ A1 p.304 Para 3

⁷⁶ 7/7 p.84

121. RC/HC Zacarias rejected the suggestion that Mr. Gwynne Vaughan, Mr. Kavishe and some others were his pawns; that he knew that he could not get rid of the Applicant himself because he had already gotten rid of two others and therefore was procuring third parties to destroy the Applicant instead of helping him. He added that if there had been conditions for dialogue with the Applicant he would have brought these issues directly to him. He had never suggested that the Applicant should be removed.⁷⁷

122. In a mail dated 23 September 2008⁷⁸ to USG Holmes, RC/HC Zacarias informed the USG that NGO representatives had signified their intention of lodging a protest against the Applicant. In relation to that mail, USG Holmes explained that his office needed to know if a Humanitarian Coordinator or the head of the OCHA office was effectively interacting with members of the humanitarian community in Zimbabwe since the job of the OCHA office is coordination which by definition involves maintaining good relationships with all those with whom the office was trying to coordinate.⁷⁹

123. He testified that initially when he heard about the issues between the humanitarian coordinator and the OCHA head of office, he believed in his mind that the Humanitarian Coordinator was causing problems again. But as the year went on, and as the message became sharper from outside and elsewhere in the system, it became clear that there was a problem with the management of the OCHA office, which was impinging on OCHA's operations in Zimbabwe.⁸⁰

124. On 16 April 2008 RC/HC Zacarias had sent an email⁸¹ to David Kaatrud to complain about the way that the Applicant was proceeding with his mandate. In brief, he was complaining that the Applicant had presented a contingency plan without prior discussions with colleagues at the Country Team. He also complained about the Applicant involving donors at a special meeting of the

⁷⁷ 7/7 p.86

⁷⁸ R1 p.33

⁷⁹ 6/7 p.72

⁸⁰ 6/7 p.72

⁸¹ R1 p.1

IACS and that he had thus created an expectation that donors would be invited to all meetings. The Government of Zimbabwe would believe that the humanitarian mission in Zimbabwe was donor-controlled which might result in the destruction of all that had been built with the Zimbabwe government. RC/HC Zacarias sought the guidance of David Kaatrud on how to address the situation although he claimed that he had spoken with the Applicant and had reached an understanding with him.

125. The Applicant told the Tribunal that there was no discussion between him and RC/HC Zacarias on these issues and that the email was sent without his knowledge.⁸² He said that it was impossible for him alone to write a contingency plan and that he coordinated with the agencies to do it. The allegation that he did not discuss it with United Nations colleagues was wrong, and indicated the kind of perception that RC/HC Zacarias had of his job. It was not the job of the head of OCHA to write a contingency plan but to bring people together to prepare the plan with the help of his team. All that the contingency plan contained came from the agencies and not from OCHA.⁸³

Response and measures taken by Applicant to address humanitarian concerns in Zimbabwe

126. The Tribunal heard evidence that the Regional representatives of WFP, UNICEF and OCHA visited Zimbabwe from 19 to 21 May 2008 with the aim of exploring and identifying ways of supporting the evolving operational and programme requirements of the United Nations Country Team and its partners.⁸⁴ Some of the recommendations approved by that mission included the initiation of the Humanitarian Weekly Technical Coordination Meetings chaired by OCHA, the weekly donor meetings with the RC/HC and the formation of the United Nations Crisis Management Team. These were positive steps in the right direction

⁸² 25/2 p. 45/46

⁸³ 25/2 p. 45

⁸⁴ A1 p.150

towards ensuring more coordinated and inclusive response planning.⁸⁵ When he arrived in Zimbabwe the Applicant established Humanitarian Weekly Technical Coordination Meetings that did not exist before.⁸⁶

127. That mission also recommended:

“Given the deteriorating situation, there is an urgent need to ensure that OCHA is in a position to meet the demands of addressing the current crisis, in particular in ensuring that: 1) there is a robust and appropriate UN response to the current crisis; 2) coordination and information management function effectively, and in the context of humanitarian reform, to systematically identify needs, gaps and required capacities; 3) assistance is provided in a principal manner.

This requires: formal acceptance and open endorsement of the role of OCHA in the UNCT in keeping with its mandate and global practice. This includes giving OCHA greater latitude and perhaps greater capacity, in carrying out its operational role; and clarification of its status to the government. It is the mission's view that only through the above actions will OCHA be enabled to meet its responsibilities in the country”⁸⁷

128. According to the Applicant, the mission showed how seriously the United Nations Regional Director of Southern and Eastern Africa took the case of Zimbabwe. That mission visited Zimbabwe as a result of the early warning where the Applicant had mentioned the deteriorating situation in Zimbabwe. The mission wanted to see if the early warning that he had given to OCHA was validated. It was clear that the Mission found that OCHA Zimbabwe was not ready, and they made a number of suggestions which included:

“[T]he issue of NGO membership in the HC-chaired IASC decision-making fora should be immediately resolved, with an agreement for a manageable number of NGOs to be core members.

Steps should be taken to ensure that all thematic areas needed to address the response are fully functioning, whether it be as cluster or pre-existing groups. ‘Fully functioning’ means meeting the following core commitments: 1) the establishment of appropriate coordination with all humanitarian partners (including national and international NGOs, the International Red Cross/Red Crescent

⁸⁵ A1 p.153, para. 17

⁸⁶ Transcript of hearing of 23 February 2010 (hereinafter “23/2”), p.47

⁸⁷ 23/2 p.46/47 and A1 p.153, Para 18

Movement, IOM and other international organizations); 2) joint needs assessment and/or consolidation of vulnerability data; 3) the development of common analysis; 4) objective setting, prioritization of needs, identification of gaps in coverage; and 5) common and strategic planning to address gaps.

The UNCT should urgently seek to identify thematic areas that are not working and rectify the problem, in particular by considering which clusters could benefit from an injection of technical expertise and/or capacity in order to become functional. The mission was particularly concerned that health group may benefit from some external support.

Given the current crisis, the HC-convened IASC decision-making fora should meet much more frequently than once a month. The mission suggests at least weekly. If the HC cannot chair this meeting, the task should be delegated to the OCHA Head of Office or an agency head.

The donor meeting should be representative of the entire donor community so as to avoid misperception about its purpose and intent”.⁸⁸

129. The Applicant thereafter prepared a Humanitarian Response Plan⁸⁹ as a follow up to the recommendations of the May mission so that his office could come up with a guide for one common analysis of the situation in Zimbabwe as a basis for the Consolidated Appeal Process (CAP), which is the way humanitarian agencies come together to analyse the humanitarian situation in a given context and also come up with response plans and projects.⁹⁰

130. The Applicant explained that the cluster approach is very important in today's humanitarian field. One of the major problems in Zimbabwe was the inability to implement the cluster approach i.e. the bringing together of all of the different organisations around specific sector issues rather than having separate meetings with them. One of the instructions the Applicant was given when he was in New York for his induction was to make sure that the cluster approach was implemented because this makes these agencies accountable. As an example, he stated that when cholera broke out in Zimbabwe, the civil society, the donors, and

⁸⁸ A1 p.153 & 154 Para 19 -21

⁸⁹ A1 p.183

⁹⁰ 23/2, p. 70/71

the United Nations were entitled to ask the coordinator of the health cluster what was being done. The Applicant said he assisted the World Health Organisation (WHO) to implement their cluster.⁹¹

131. The CAP for 2007/2008 was worth around USD360 million of projects. The CAP that the Applicant coordinated in 2009 was estimated at around USD690 million.⁹² On the cluster approach and the role of OCHA, Mr. Hepie, the head of UNHCR in Zimbabwe, wrote: “Given the magnitude of the crisis and its nature, the predictability of the cluster approach has not always followed the global cluster arrangement. Nevertheless, as an advisory and coordination body, OCHA has managed to inject some synergy in the various clusters and working Groups to achieve desired results, under a difficult operational environment. Critical technical groups’ meetings were called by OCHA, on weekly basis for the on-going crisis.”

132. According to the Applicant, NGO activity was a very serious issue when he arrived in Zimbabwe. The NGOs were completely cut off from the Humanitarian Coordinator. This was a major issue, as donors and NGOs go hand in hand.⁹³ The donors and the NGOs were not happy with the way RC/HC Zacarias was handling humanitarian leadership and coordination.⁹⁴ So the Applicant tried diplomatically to convince RC/HC Zacarias that the approach should change as he had received instruction from New York that there was need to establish a real coordination in the field there.⁹⁵

133. In the view of the Applicant there was a need to have a strong OCHA office in Zimbabwe to stand up to the government. Unfortunately OCHA was not recognized by the government and had no mandate on political issues, a domain reserved for the HC. Everything had been done to lift the ban on NGOs, but to no avail. NGOs, the United Nations and donors had tried to engage with the

⁹¹ 23/2 p.49

⁹² 23/2 p.72

⁹³ 23/2 p51

⁹⁴ 23/2 p35

⁹⁵ 23/2 p35/36

government but without any success. During political violence, the United Nations had helped victims. OCHA had tried its utmost to support the NGOs within the rules of the United Nations. The United Nations had been instrumental in getting an MOU signed between the MDC and ZANU PF (the main political parties in the country) on the need to put an end to violence and to help victims including internally displaced persons. In the wake of the 29 March elections OCHA had stepped up traditional humanitarian coordination in Zimbabwe.⁹⁶

134. The participation of NGOs, IASC and working groups was secured. A Weekly Humanitarian Technical Coordination Meeting was established by OCHA with the endorsement of the RC/HC that brought together donors and NGOs but not the government. OCHA raised the alarm that since the results of 29 March elections were uncertain this might lead to dramatic consequences. OCHA was also worried about the closure of the humanitarian space and the spread of political violence. The Applicant raised the issue of how OCHA Zimbabwe could be supported in facilitating the restoration of a humanitarian space in Zimbabwe that would be fully open and impartial, with less political interference and that really focused on the most vulnerable people in the country.⁹⁷

135. Ms. Kay testified that through her work she had a lot to do with the NGOs, the IOM, ICRC and other organisations. According to her, the Applicant was considered to be very open and efficient by the NGO community. By reputation RC/HC Zacarias was not well liked by the NGOs. He would spend most of his social time with a Mr. Nicholas Goche, an old ZANU-PF politburo member and former head of the Central Intelligence Organisation from 2000 to 2004. Although she did not personally see that, it was common knowledge.⁹⁸ The NGOs never spoke of the Applicant in a disparaging way.⁹⁹ She was of the view that the Applicant had satisfied the needs of the NGOs that she interacted with but that RC/HC Zacarias did not, because of his tendency not to listen to what was

⁹⁶ R1 p.15

⁹⁷ R1 p.16

⁹⁸ 24/2 p. 33

⁹⁹ 24/2 p20

happening or going to happen.¹⁰⁰ From the few times that she had met Mr. Zacarias she found him to be arrogant and he did not appreciate hearing the truth of what was going on.¹⁰¹

136. According to the witness, RC/HC Zacarias seemed to not take cognisance of the fact that there was likely to be widespread and unprecedented violence. The Applicant would always be warning agencies and politicians about the situation. She added that had the Applicant's and her warnings been taken seriously, the atrocities that took place could have been prevented. Ms. Kay said she did a lot with the Applicant in trying to find funding and ways to assist internally displaced peoples (IDPs) who were the victims of violence. She had approached the United Nations High Commission for Refugees (UNHCR) offices in Harare to seek assistance for the IDPs.¹⁰²

137. She testified also that the issue of IDPs in Zimbabwe was very important, and that the government of Zimbabwe had always been in denial of the humanitarian situation in the country and that was why it did not want an OCHA office. For the first time in December 2008 the government recognised that there was a humanitarian situation. There was a press statement issued by the Ministry of Foreign Affairs on that issue and they even used the report¹⁰³ prepared by the Applicant for that purpose.

138. In a report entitled "End of Year Cycle Review 2008 on OCHA Zimbabwe",¹⁰⁴ an evaluation was done on the work of the office on the humanitarian situation in Zimbabwe. According to the Applicant that report presented OCHA Zimbabwe as a successful office.¹⁰⁵ One of the issues raised in the report was that¹⁰⁶ in addition to regular monthly humanitarian reports, OCHA issued weekly situation reports during the elections, daily cholera updates in

¹⁰⁰ 24/2 p. 28

¹⁰¹ 24/2 p. 33

¹⁰² 24/2 p.16

¹⁰³ A1 p.183

¹⁰⁴ A2 p.519

¹⁰⁵ 25/2 p.17

¹⁰⁶ A2 p.520

collaboration with WHO and that weekly cholera situation reports were prepared and disseminated throughout the cholera emergency. The Applicant explained that all of this was done during his tenure as HoO OCHA Zimbabwe.¹⁰⁷ The report also mentioned that a “significant level of advocacy has been made on ensuring that access to the needy population by humanitarians is opened and unhindered”.¹⁰⁸ This was to the Applicant’s credit and contrary to the adverse comments that had been made against him by senior management.

139. The Applicant also referred to how his OCHA office intervened to find shelter for victims of violence in Ruwa. He indicated that for the OCHA office to be more effective in its role for regaining humanitarian access there was a need to put the humanitarian situation on the agenda through an active role of the United Nations Secretary-General along with the permanent representatives of African countries on Zimbabwe.¹⁰⁹ On 26 June 2008 about 387 Zimbabwean women and children had invaded the car park of the South African embassy and asked for asylum.

140. On the same day, there was a group of about one hundred people in front of the US embassy, but they were not allowed in and RC/HC Zacarias went there but later left. The Applicant’s team was following the events and went there too. The police were ready to round up those people. The Applicant remained with some of his staff as he tried to find a solution and the priority was the protection of the people there. The presence of the Applicant with his team in that car park was a deterrent, as the government of Zimbabwe could not round up the people in front of OCHA staff. The Applicant and his team reached an agreement with the police for shelter to be provided to these people. This was known as the Ruwa incident.¹¹⁰ This was another positive contribution made by the Applicant and for which he deserved credit.

¹⁰⁷ 25/2 p. 18

¹⁰⁸ 25/2 p. 18

¹⁰⁹ R1 p.15 & 16

¹¹⁰ A1 p.212

141. According to the Applicant, the United Nations could not use the term Internally Displaced People (IDPs) as is the international practice. They were called “mobile and vulnerable population” in order to “protect” RC/HC Zacarias because he had the job of dealing with the government, and the government did not want to hear certain things. It did not want to hear that there were forcibly displaced Zimbabweans and such language mentioned in a report would embarrass RC/HC Zacarias. The Applicant said that there were about two million IDPs in the region of Murabantsvina, a fact referred to in the report of Mrs. Anna Tibaijuka, the Special Envoy of the then Secretary-General, Mr. Kofi Annan, and considered as coming from OCHA. Mr. Zacarias told the Applicant that this caused him a lot of trouble. The use of “mobile and vulnerable population” would make it easier for Mr. Zacarias.

Findings of the Tribunal with respect to the complaints levelled against the Applicant

142. The Tribunal has considered the number of complaints levelled at the Applicant as well as the actions he took while he was in Zimbabwe. It should be noted that the Applicant went to Zimbabwe at a very difficult time. The OCHA office was not running smoothly and given the particular nature of the assignment of the Applicant and other stakeholders present in Zimbabwe, there were bound to be criticisms or dissatisfaction from some quarters. The Tribunal finds, however, that these criticisms were not investigated and were therefore unsubstantiated. The criticisms of a few or the dissatisfaction of the equally few cannot be the yardstick to assess the performance of the Applicant particularly in the sensitive and, at the time, volatile situation in Zimbabwe.

143. The Tribunal finds it very disturbing, as well as irrational and totally irresponsible, that the OCHA management could have lent credence to an unsigned letter from the Heads of Agency Chair,¹¹¹ which, as Counsel for the Applicant submitted, lambasted the Applicant. What is even more shocking is that

¹¹¹ A1 pp.309-311

ASG Bragg admitted in cross examination that she had not even considered the authenticity or authorship of the letter yet felt that she had to give it credence and take it seriously.¹¹²

Was the non-renewal of the Applicant's contract motivated by extraneous factors or improper motive?

144. It is settled law that in a case like the present one, which is civil in nature, the burden of proving what is averred in the pleadings lies on the party making the assertions. The standard of proof required is “a preponderance of the evidence” or on “a balance of probabilities”. “That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: “we think it more probable than not,” the burden is discharged but, if the probabilities are equal, it is not.”¹¹³

145. In a case where improper motives or extraneous motives are invoked it is very rare that direct evidence is available to prove such assertions. The task of a court of law is to scrutinise and peruse all the evidence presented by the parties both in support and in rebuttal of the assertions. A party making an assertion of extraneous factors or improper motive must establish a *prima facie* case that this is so. This would require a court of law, in the absence of direct or confirmatory evidence of such assertions to draw reasonable inferences from the evidence. Once the party making the assertion has established a *prima facie* case the burden shifts to the opposing party to establish on a balance of probabilities that the actions taken were not prompted by extraneous or improper motives.

146. The Applicant alleges that the decision not to renew his contract was tainted by extraneous factors or improper motive, some of which have already been cited at paragraph 61 above included: (i) the hostility of RC/HC Zacarias, towards him; (ii) the actions of his deputy Mr. Farah Muktar who bore him a grudge and who was stirring up the OCHA staff against him; (iii) an investigation

¹¹² 10/7 p.33

¹¹³ Miller v Minister of Pensions [1947] 2 All ER 372, per Denning J.

into his performance as Head of OCHA under the guise of a mission led by Mr. Muller to look into the working of Zimbabwe OCHA; (iv) the negative attitude of the OCHA management towards him; (v) the deliberate and systematic ignorance by OCHA New York of the hostility of RC/HC Zacarias who was hell-bent on getting him out of Zimbabwe; and (vi) the improper way in which his performance was evaluated.

147. The Applicant therefore submits that the cumulative effect of these factors show that he was a victim of a conspiracy between RC/HC Zacarias, and Mr. Muktar with the complicity of OCHA leadership.

The nature of the relationship between the Humanitarian Coordinator and the Applicant

148. Before the Applicant took up his assignment in Zimbabwe, he went to New York for briefings and met briefly with USG Holmes. They had a discussion about the challenges in Zimbabwe. That discussion also covered the relationship that he was likely to have with RC/HC Zacarias.

149. In support of his case, the Applicant explained that at the time he went to Zimbabwe in 2008 political violence had escalated dramatically. There was a humanitarian drama unfolding and people were dying. Part of the population had been abandoned and subjected to repression.¹¹⁴ The issue between him and the HC was to what extent these humanitarian concerns should be exposed and addressed and the risk that there was of infuriating the Mugabe government. Matters started to sour when the Applicant started doing his job. RC/HC Zacarias preferred that the Applicant remain quiet. If he remained quiet, OCHA at headquarters would say he was not doing his job. Therefore while silence would bring him trouble from OCHA, noise would infuriate the RC/HC. When the Applicant started organizing a forum made up of the NGOs, the United Nations and the donors to discuss the situation in Zimbabwe with the approval of RC/HC

¹¹⁴ 23/2, p.42

Zacarias and to achieve a common understanding of the humanitarian situation, the RC/HC became angry.¹¹⁵

150. The Applicant had prepared an Assessment Form on Zimbabwe dated 7 April 2008¹¹⁶ in which he stated that humanitarian preparedness in Zimbabwe needed to be increased due to an acute deterioration of the economy and livelihoods. Access to food and basic services such as healthcare and vital HIV/AIDS support were critically affected by the protracted electoral process. He referred to electoral violence, acts of retaliation, and acute food shortages.¹¹⁷ The Applicant distributed the document to a number of people according to established procedure. He denied the suggestion that he did not want RC/HC Zacarias to know that he was the author of the assessment.¹¹⁸

151. RC/HC Zacarias was upset on receiving that assessment. He called a meeting of the UNCT where he told those in attendance that the Applicant had told New York that the UNCT was not prepared for effective humanitarian intervention. He referred to the assessment prepared by the Applicant and told the meeting that this was something that OCHA had done in the past, to put the UNCT in trouble.¹¹⁹ While showing a copy of the document, he said that it "was done by [the Applicant] who is worse than his predecessor. He thinks that we are not doing our job. He thinks that he knows it all".¹²⁰

152. Some members of the UNCT also levelled criticisms at the Applicant and wanted him to apologise. The Applicant who did not feel he had to apologise took the view that the incident was based on a misunderstanding and was in no way meant to undermine the work of the UNCT.¹²¹ In an email of 17 May 2008¹²² addressed to USG Holmes, RC/HC Zacarias wrote concerning the Applicant: "This action by the head of OCHA has seriously undermined confidence of the

¹¹⁵ 23/2 p. 34, R1 p.141.

¹¹⁶ R1 p.3

¹¹⁷ 23/2 and A p.43

¹¹⁸ 25/2 p.73

¹¹⁹ A1 p.91 & 23/2 p.43

¹²⁰ 23/2 p.43

¹²¹ R1 p.14

¹²² R1 p. 9

Country Team on OCHA's ability to support the coordination of humanitarian work”.

153. The Applicant did not agree that he should have had prior consultations with the UNCT or RC/HC Zacarias before distributing the Assessment Form.¹²³ This position was confirmed in an email dated 16 June 2008 from USG Holmes to RC/HC Zacarias in which he informed RC/HC Zacarias that there was no need for the Applicant, as Head of OCHA Office, to clear the assessment form with him and that by holding a meeting on the subject, RC/HC Zacarias had made the situation more difficult whereas he should have instead discussed the issue directly with the Applicant. USG Holmes had stated “... It could easily have been discussed directly, where you could have clarified the issue and understood that the process [the Applicant] followed was the correct one. From the Draft Note it is evident that the meeting only worsened rather than improved the situation.”¹²⁴

154. From then on RC/HC Zacarias adopted a hostile attitude towards the Applicant. RC/HC Zacarias had told the Applicant when he first reached Zimbabwe, “I hope you don't bring me a problem similar to the one A.A.O brought to me because until today the Government of Zimbabwe, Mugabe's government, is still asking me where are the two million people that the report said were displaced”.¹²⁵ The report was a reference to the findings submitted by Mrs. Tibaijuka after her investigation of the displacement of residents in Zimbabwe in 2006.¹²⁶

155. In his testimony USG Holmes confirmed that he told the Applicant when they met in New York that Mr. Zacarias had had problems with his predecessors and to make an effort to have a productive relationship with him.¹²⁷ The Applicant

¹²³ 25/2 p.110

¹²⁴ R1 p.152

¹²⁵ 23/2 p.66/67

¹²⁶ 23/2 65/66

¹²⁷ 7/7 p.33

was also told by Mr. Steve O'Malley that RC/HC Zacarias was a big problem for them.¹²⁸

156. This is how the Applicant related what Mr. O'Malley told him:

“One, Mr. Zacarias is a person that can be very brutal and abusive with someone working under him. Secondly, he has a very strong relation with the Government of Zimbabwe, ZANU, that I should be careful about that. Thirdly, that despite all the negative comments, all the reports they have received in OCHA against Zacarias demanding his departure from Zimbabwe, all these requests have failed to succeed because Mr. Zacarias has very strong support in the UN at headquarters. Fourthly, he told me that with my predecessor they had identified a pattern by Mr. Zacarias of micromanaging OCHA staff behind the OCHA head of office. So Mr. Steve O'Malley made me aware, ‘You should know that Mr. Zacarias will be calling your staff behind you to talk to him about you and often give them instruction that you won't know’. Lastly, Mr. O'Malley told me that they were powerless towards Mr. Zacarias, and it will be up to me to manage that situation. He told me, ‘It's up to you. We are powerless. There's nothing we can do. And therefore this is what I want. I recommend that you do’.¹²⁹

157. There is also undisputed evidence that RC/HC Zacarias had had a negative relationship with the two predecessors of the Applicant, Mr. A.G and Ms. A.A.O. The RC/HC conceded that he was aware of the perception but he was never given a chance to explain his side of the story about the difficult relationships that he was encountering, or if he did explain, he did not believe that he had been understood. He believed he did his best to build a relationship.¹³⁰ The difficulties related to methods of work and substance. Regarding Mr. A.G, RC/HC Zacarias stated that he did not have any contacts with the government of Zimbabwe and was working mostly with NGOs without bringing in any members of the government and so gave the government the impression that OCHA was trying to overthrow it with the help of NGOs. There was also the impression conveyed in a

¹²⁸ 25/2 p.34

¹²⁹ 25/2 p. 37

¹³⁰ 7/7 p.34

report by Mr. A.G, of which Mr. Zacarias was not aware, that there was pandemonium in Zimbabwe whereas this was not in fact the case.¹³¹

158. On 29 August 2005 Mr. A.G. had sent a mail¹³² to Mr. Kevin Kennedy, his superior stating: “The hostile behavior of the Resident/Humanitarian Coordinator of the last 4 months, his misrepresentation of my competences and performances to the UNCT, to my superiors in OCHA and to some UN Under-Secretary-Generals have led to an environment that is not any more conducive to professional relationship. His unjustifiable and unprofessionally spontaneous public outbursts of anger and emotions have been extremely detrimental to collegial relationship. On a personal level, the current situation has been a source of mental distress and deep professional frustration that interferes with my mandate and responsibilities as a senior OCHA staff.”

159. To his mail, RC/HC Zacarias responded: “I don't recall any moment where there has been a collective meeting in which he was present in which I have either criticised him or I spoke to him in that setting. But I have in some occasions indicated my disapproval of his methods, but on one to one”.¹³³ Mr. A.G prematurely ended his tenure in Zimbabwe.

160. It was the testimony of RC/HC Zacarias that neither the Applicant nor the previous heads of office, Ms. A.A.O and Mr. A.G., understood that he had the role of keeping a balance between the development/humanitarian agencies and the government or the fact that a solid analysis of the humanitarian situation was needed in order to continue to build that relationship.¹³⁴ It was his view that OCHA should be first and foremost a team player, and also understand the delicate balance between agencies that are deprived of finance.

161. RC/HC Zacarias also testified that there were continuous difficulties that prevented the consolidation of a solid and positive relationship with the Applicant.

¹³¹ 7/7 pp.6/7

¹³² A1 p.27

¹³³ 7/7 p.54

¹³⁴ 10/7 pp. 3 & 37; 6/7 p. 14

For example, reports were being sent without his knowledge.¹³⁵ He received information from the head office in New York that there was feedback from the donor community that he was not exercising enough leadership on humanitarian affairs or on humanitarian work, and that this complaint was coming from the Applicant as head of office of OCHA.¹³⁶

162. Another major issue between the Applicant and RC/HC Zacarias was in relation to the Applicant's accreditation with the government of Zimbabwe. It was the responsibility of Mr. Zacarias to sort the issue with the government.

163. When the Applicant's family arrived in Zimbabwe, the Government did not give them accreditation to reside in the country. The Applicant's wife and children therefore had to leave in May 2008 and return to South Africa where they stayed in a hotel for five months in the hope that the accreditation would be given. The Applicant complained about this first to RC/HC Zacarias and later to New York only for the RC/HC to tell him on 6 August 2008 that he had no idea of the consequences. Whenever he had mentioned the issue to RC/HC Zacarias, he would reply that he forgot to tell the minister about it and would promise to deal with it but never did.¹³⁷ After the Applicant complained to New York a letter of protest was sent by the RC/HC to the Government of Zimbabwe.¹³⁸

164. The Ministry of Foreign Affairs then summoned both the Applicant and RC/HC Zacarias to a meeting. The Permanent Secretary told RC/HC Zacarias in the presence of the Applicant that: *"You are playing ball with us and you are sending this letter to your people in New York to present the Zimbabwean government badly. We are seen here as denying a UN senior staff and his family entry to Zimbabwe yet, Mr. Zacarias, you are the person who asked us not to give them accreditation."*¹³⁹

¹³⁵ 7/7 pp. 50/51

¹³⁶ 7/7 p.51

¹³⁷ 23/2 pp.93-94

¹³⁸ 7/7 p.47

¹³⁹ 23/2 p.95

165. After that meeting, the Applicant became very scared of RC/HC Zacarias because he had been exposed. He called Chris Hyslop and asked for protection. He also told him to inform USG Holmes about that situation. That same evening RC/HC Zacarias wrote the minutes of the meeting without showing them to the Applicant and sent them to USG Holmes, but omitted a number of details.¹⁴⁰

166. Mr. Muller told the Tribunal that he was aware that the Applicant faced difficulties in securing accreditation in Zimbabwe for his family. He did not think that RC/HC Zacarias had deliberately obstructed the accreditation but rather that he did not engage in the matter.¹⁴¹ He agreed that RC/HC Zacarias was the direct link between the United Nations and the Government of Zimbabwe and in his capacity as RC/HC, he was responsible for securing the accreditation.¹⁴²

167. In regard to the said accreditation of the Applicant's family, the driver of the Applicant, Mr. Shikisha, testified that whenever he went to the Ministry of Foreign Affairs to find out about it, he would be told it was not ready. He was told that the accreditation had been blocked by RC/HC Zacarias and Mr. Muktar.¹⁴³

The nature of the relationship between the Applicant and his Deputy, Mr. Farah Muktar

168. Mr. Farah Muktar who was the deputy head of OCHA office had competed for the position of HoO with the Applicant. In August 2008 the Applicant was informed by one of the humanitarian affairs officers that the deputy had been telling the local staff false stories about him and was promising to help them with their careers if he were to become the Office-in-Charge (OIC) of OCHA again. Some of the support staff had already given the Applicant similar information. The interviews with local staff conducted by the PDOG substantiated these accounts. Interviews with the past heads of office also showed they had

¹⁴⁰ 23/2 pp.96-97

¹⁴¹ 6/7 pp. 44/45

¹⁴² 6/7 p.45

¹⁴³ 5/7 from notes of judges

experienced the same pattern of behaviour from the same deputy during their terms.

169. On this issue, paragraph 18 of the PDOG report states:

"In September 2008, according to the complainant, a local support staff requested to speak to him outside the office. During the conversation, the local staff informed the complainant that the deputy had taken all the local staff out to lunch and had informed them that he was getting rid of the head of office. He informed them that he had filed a complaint against the head of the office and in response a mission team was coming to conduct an investigation into the matter. Also during this lunch meeting the local staff was instructed to 'say bad things about him' to the officials coming from New York. The deputy had warned the local staff that they would lose their contracts if they did not carry out this instruction. These events were substantiated by testimonies provided during the panel interviews with local staff."¹⁴⁴

170. In a memorandum¹⁴⁵ sent by Mr. Muktar to the Applicant and copied to a number of persons including RC/HC Zacarias, Mr. Chris Hyslop, and Ms. Rosa Malango, Mr. Muktar had complained that the Applicant unfairly refused him approval to attend a workshop in Geneva in September 2008.¹⁴⁶ Ms. Rosa Malango, a P4 officer from OCHA New York, who was junior to the Applicant, wrote to him that, "I have read with concern the message below from Farah Muktar regarding his apparent difficulties to complete the humanitarian field coordination training programme you had previously approved".¹⁴⁷

171. The Applicant explained that he had put Mr. Muktar in charge of leading the CAP process and was surprised that he wanted to go for training during the week that the CAP was being finalized. The Applicant said he had arranged with Ms. J.D.N who was in charge of the Geneva training to find another slot for Mr. Muktar and Ms. J.D.N had agreed that Mr. Muktar could attend the same training in November.¹⁴⁸ Mr. Muller agreed that the Applicant had the right not to

¹⁴⁴ 23/2, p.13

¹⁴⁵ A1 p 239

¹⁴⁶ 24/2 p 37/38

¹⁴⁷ A1 p 243

¹⁴⁸ 24/2 p. 41

authorise Mr. Muktar to attend the workshop in Geneva in September 2008 because in times of intense work every hand was needed.¹⁴⁹

172. RC/HC Zacarias said that he was well aware of the problems the Applicant was having with Mr. Muktar and that even before the Applicant's arrival, he could foresee the problems coming, because they had competed for the same post. He added that when Mr. David Kaatrud came to Zimbabwe, they discussed that he would need to resolve the issue because the two would be in the same office.¹⁵⁰

173. In an email dated 23 September 2008¹⁵¹ to USG Holmes, RC/HC Zacarias referred to the deteriorating relationship between the Applicant and Mr. Muktar and stated: "While I could call [the Applicant] and Muktar to address their personal issues, it has become apparent that the intervention of Headquarters is needed to enable me to turn my attention to my responsibilities as Humanitarian Coordinator during these trying times".

174. The absence of unity and team work between the Applicant and his deputy was amply highlighted in an email sent on 5 May 2008 by Mr. Muktar¹⁵² to Steve O'Malley in which he furtively reported that:

Georges has taken the confrontational mode with Zac and the country team. He has also sensitized NGOs against the HC in one of the meetings. He requested their assistance to confront Zac. He is claiming Zac is not fulfilling his role as HC. [...]While I believe there are a number of limitations of Zac [sic] performance as HC, it is clear that we need to strengthen his role rather than confronting him for the sake of humanitarian action. Do I have a suggestion toward this? Yes, HQ to regularly call him and discuss with him how he is doing? What he sees as his challenges and how OCHA could help him. It does not help when every OCHA Head of Office only sees his faults and lack of capacity".¹⁵³

¹⁴⁹ 6/7 p.44

¹⁵⁰ 7/7 p.84

¹⁵¹ R1 p.34

¹⁵² R1 p.7

¹⁵³ R1 p.7

175. On his part, on 10 October 2008, the Applicant sent an email to Chris Hyslop requesting help to diffuse the situation created by the disruptive behaviour of his deputy.

176. Mr. Muller testified that Mr. Muktar felt bad that he was not made head of office and that there was very serious burning enmity and hostility between the Applicant and Mr. Muktar.¹⁵⁴ He added that the Applicant not approving the Geneva course for him was contributory and that it was evident that Mr. Muktar wanted to get rid of the Applicant.¹⁵⁵

177. According to Mr. Muller, Mr. Muktar had mentioned his negative relationship with the Applicant, and alleged that the Applicant had abused his religion, Islam, in front of the staff¹⁵⁶ but that he did not take the allegation seriously because none of the staff mentioned it.¹⁵⁷ He said he believed that Mr. Muktar had a share in this course of events and found his credibility somewhat doubtful.¹⁵⁸

178. The Applicant's driver, Mr. Edmore Shikisha, also testified about problems between the Applicant and Mr. Muktar, who he said campaigned against the Applicant because he was unhappy that he could not go to Geneva. Mr. Muktar had also told him that the Applicant was not a good person and was harsh. He said that when he was asked about the Applicant by the Muller mission he told them what he knew about the relationship between the Applicant and Mr. Muktar and how they were fighting.¹⁵⁹

179. The witness said that after the Muller mission left Zimbabwe, the situation was tense in the office and that when he wanted to go and pick up the Applicant, Mr. Muktar told him that he was now head of the office and that the Applicant should already have left, and that if he went to pick up the Applicant he would be

¹⁵⁴ 6/7 p.40

¹⁵⁵ 6/7 p.40

¹⁵⁶ Transcript of hearing of 8 July 2010 (hereinafter "8/7"), p.60

¹⁵⁷ 8/7 p.61

¹⁵⁸ 8/7 p.61

¹⁵⁹ 5/7 from notes of judges

fired. The locks of the office were changed and Mr. Shikisha could not even retrieve the documents of the Applicant. Following these events, he said, the Applicant collapsed and had to be hospitalized.¹⁶⁰

Would the removal of Mr. Zacarias have diminished the problems and helped the situation?

180. According to USG Holmes during his testimony, RC/HC Zacarias is a very intelligent operator, a very good analyst of the situation in Zimbabwe, and he had maintained for three years a kind of relationship with the Government of Zimbabwe, which was not very easy to maintain in the circumstances. On the humanitarian side, he said that the office had never regarded his performance as particularly brilliant as a Humanitarian Coordinator. In very difficult circumstances the HC managed to maintain a reasonable balance between staying in touch with the government and therefore having influence over them on issues where influence over the Government of Zimbabwe was needed without entirely compromising humanitarian principles or becoming so close to them that RC/HC Zacarias was not telling them what they needed to hear.¹⁶¹

181. On the matter of the balance to be struck between closeness to the government and ability to speak out and document human rights and humanitarian problems, USG Holmes testified that while they might have wished at different times that RC/HC Zacarias had spoken out more clearly; on balance he was doing a reasonable job in extremely difficult circumstances. For example he pressed the government on the reinstatement of NGOs and the need to take action during the cholera crisis.¹⁶²

182. USG Holmes told the Tribunal that while he had no power to remove RC/HC Zacarias as the Resident Coordinator, he could have removed his designation as humanitarian coordinator but this would have raised all kinds of

¹⁶⁰ 5/7 from notes of judges

¹⁶¹ 6/7 p.96

¹⁶² 6/7 p.96

other problems.¹⁶³ Although there were clearly concerns about his relationship with OCHA heads of office, he occupied an extremely difficult and sensitive position at that particular moment, and therefore some very difficult balancing acts were required.¹⁶⁴ The Tribunal finds this justification for the non-removal of RC/HC Zacarias from the humanitarian coordinator position to be unconvincing especially in light of the fact that the OCHA senior managers had never regarded his performance as a humanitarian coordinator to be particularly brilliant. The bottom line is that the political agenda that RC/HC Zacarias was engaged in with the Government of Zimbabwe far outweighed any humanitarian concerns that OCHA may have had and called for the use of kid gloves in the handling of the political masters of the day.

183. In very difficult circumstances the HC managed to maintain a reasonable balance between staying in touch with the government and therefore having influence over them on issues where influence over the Government of Zimbabwe was needed without entirely

184. USG Holmes did not formally investigate the possibility of removing the HC, and he did not instigate any formal investigation. He was quite aware of the concerns as he had had discussions with the previous head of the OCHA office, Ms. A. A. O, about all of the problems that she had faced with the HC. However, his view and the view of others around him was that although this was reason for serious concern, it was not reason for either a formal investigation or his removal.¹⁶⁵

185. Why would the top echelon of OCHA management in New York become totally, blissfully and deliberately unaware of the principles of objectivity and fairness in their dealings with the situation in OCHA Zimbabwe? In the Tribunal's considered view, protecting RC/HC Zacarias and saving his skin was of paramount importance to OCHA leadership in New York rather than the interest

¹⁶³ 6/7 p.95

¹⁶⁴ 6/7 p.95

¹⁶⁵ 6/7 p.95/96

of the situation in Zimbabwe. The position of RC/HC Zacarias had to be saved at any cost, notwithstanding the fact that the Applicant was the third HoO that he was having problems with and whom he wanted to get rid of, as indeed he succeeded in doing with the active or passive complicity of the top management of OCHA. Even Mr. Muller in his report expressed the view that for the external partners of OCHA the relationship between the HC and OCHA heads of office was a key component of the dysfunction of OCHA in Zimbabwe.

186. While RC/HC Zacarias played a prominent role in the undoing of the Applicant, unfortunately and sadly USG John Holmes told the Tribunal that removing Mr. Zacarias would “have caused all sorts of other difficulties”.¹⁶⁶

187. The clear conclusion that can be drawn by the Tribunal is that the OCHA management was bent on keeping the HC and sacrificing the Applicant. Was that done on the altar of good management or on the principles of good governance and fairness? Certainly not! It is significant that USG Holmes had written in an email dated 27 September 2008, when the relationship between the Applicant and the HC had deteriorated: “...I think this is the fourth time where there is a discordant relationship between the HC and the OCHA office”.¹⁶⁷

188. No action was taken to resolve the thorny issues between RC/HC Zacarias and the Applicant in spite of a pattern of conduct on the former’s part, as evidenced by the departure of the two predecessors of the Applicant. The only timid reaction came from USG Holmes, who told RC/HC Zacarias in an email dated 16 August 2008 that he and the Applicant should work closer together. RC/HC Zacarias was eventually moved to South Africa, but as the Applicant testified, that move was too late for him personally. It was unfortunately only after the Applicant had been moved out that the USG prepared a policy paper to clarify the relationship between the HC and the HoO OCHA.

¹⁶⁶ 6/7 p.139

¹⁶⁷ A1 p.252

189. In the light of the evidence, OCHA leadership in New York had knowingly sent the Applicant into a terrain that can be described either as a lion's den or a minefield. At least two former predecessors had prematurely exited from the same location with badly mangled limbs. With no plan to tame the lion or to demine the field, OCHA leadership had merely armed the Applicant with a warning that the lion was dangerous and that he must be careful of the field as it was mined. What is curious is why OCHA needed to maintain an office in Zimbabwe at all when it was obvious that whomever they sent to man said office would become prey for RC/HC Zacarias. Why was OCHA unreservedly setting up its heads of office, including the Applicant, for failure when its support of RC/HC Zacarias was unshakable regardless of the objectionable behaviour the RC/HC exhibited towards the OCHA personnel?

The Tribunal's findings on whether the non-renewal of the Applicant's contract was motivated by extraneous factors or improper motive

190. There can be no dispute that RC/HC Zacarias and the Applicant had a strained relationship. Each one had his own perception of the approach that should be taken towards the humanitarian crisis in Zimbabwe. It is conceded that as HC, Mr. Zacarias had to tread very carefully in the host country and not give the overall impression that he was taking sides, especially at a time of deep political confrontation in Zimbabwe.

191. The Applicant, on his part, was working in a difficult social and political environment where the stakeholders engaged in the humanitarian field faced seemingly insurmountable challenges. This situation was compounded by the hostile environment created by RC/HC Zacarias, who should have been supporting the Applicant, and the negativity and hostility of Mr. Muktar, who carried the grudge of not having been selected for the position of HoO, OCHA. The top echelons of management did not appear to care that Mr. Muktar had his own agenda in trying to undermine the Applicant. The evidence of both RC/HC Zacarias and Mr. Muller is clear on the matter of the hostile relationship between the Applicant and his deputy.

192. While RC/HC Zacarias stated that it was obvious that even before the arrival of the Applicant to Zimbabwe he could foresee problems between the Applicant and Mr. Muktar as they had competed for the same post, Mr. Muller in his report found that Mr. Muktar had his share of responsibility in the dysfunctionality of OCHA in Zimbabwe. These matters were simply ignored by the top management of OCHA, who only focused on how to ascribe full blame to the Applicant for the problems of the office.

193. The OCHA management in New York could not have been unaware of the tensions between the Applicant and Mr. Muktar. Some of this could be attributable to the Applicant's style of work. Mr. Muktar complained to the driver that the Applicant was "hard". Mr. Hepie – who shared a floor with OCHA – said that the Applicant was the "first to come, last to leave" and this may have put too much strain on his staff. Further, there is no doubt that Mr. Muktar was unhappy that he was not allowed to go to a training course in Geneva.¹⁶⁸

194. The OCHA management in New York should have realised that Mr. Muktar had a motive in dividing the office and turning the staff against the Applicant. Ironically, instead of taking the required action, when the Applicant was assigned to Johannesburg it was Mr. Muktar who was appointed OIC-HoO OCHA. Edmore Shikisha gave evidence that in the course of a dinner with Mr. Muktar, the latter urged him to tell the Muller mission bad things about the Applicant. Shikisha added: "He [Muktar] said he'd called a delegation from New York – when they come, tell them Georges is not a good person, he is hard."¹⁶⁹ Mr. Hepie said that after Muller and Hyslop had left, "the Deputy came to me to say the mission had come for [the Applicant] and this time he was telling me it would be very difficult for him to escape."¹⁷⁰

195. As to the Applicant's problems with Mr. Zacarias, it started in earnest with his report on the unpreparedness of the UNCT to face up to the looming

¹⁶⁸ A1 p.243

¹⁶⁹ Evidence from the notes of judges 5/07/10

¹⁷⁰ Evidence from the notes of judges 5/07/10

humanitarian challenges. The anger of RC/HC Zacarias led him to take a singularly hostile stance; not so much because this was done behind his back, but because it reflected the real situation in Zimbabwe. He saw the report as indicating on the side of the Applicant a lack of solidarity with the other members of the UNCT and effort to undermine or tarnish the image of the UNCT. The Tribunal has no hesitation in concluding that this was the starting event that led to the tribulations of the Applicant with different stakeholders and the ultimate decision not to renew his Contract.

196. The RC/HC Zacarias had gone very far to undermine the Applicant thereafter, just as the undisputed evidence shows how he undermined the two predecessors of the Applicant who had to leave. The evidence shows that RC/HC Zacarias, made life very difficult for the Applicant in regard to his accreditation with the Government of Zimbabwe. The un-contradicted evidence of both the Applicant and Ms. Kerry Kay was that he closed his eyes to the obvious in regard to the humanitarian situation in Zimbabwe.

197. According to USG Holmes, Mr. Zacarias saw the need to maintain a working relationship with the government, because otherwise he would not be able to do the job. But to say that he wanted to maintain a relationship with the government at any cost was going too far.¹⁷¹ The Tribunal rejects this statement in view of Mr. Zacarias' hostility towards the Applicant following the issuance of the Assessment Form on the dire humanitarian crisis in Zimbabwe and the lack of support from OCHA management.

198. The dysfunction of OCHA in Zimbabwe was laid at the door of the Applicant. A number of complaints or alleged complaints started flooding in following the assessment he made on the real humanitarian situation in Zimbabwe with Mr. Zacarias leading the show. He had started by calling a meeting following that report at which the Applicant was admonished and condemned. It would appear that once this process of character assassination started, everyone joined

¹⁷¹ 6/7 pp.96/97

the fray including USG Holmes, ASG Bragg, Mr. Muller, Mr. Kaatrud and Mr. Muktar.

199. Notwithstanding these constraints, the Applicant showed that he had a grasp of the humanitarian situation and what was required to deal with it. There is clear and un rebutted evidence of a number of positive actions that the Applicant took during his short tenure in Zimbabwe, whilst having to confront two hostile “colleagues”, namely RC/HC Zacarias who felt he was in an all-powerful position and untouchable, and Mr. Muktar who was indeed “the enemy within.”

200. The passive attitude of top management in New York in the teeth of a hostile RC/HC Zacarias and an undermining Mr. Muktar served to compound the problems faced by the Applicant who was taken to task and became the target simply because he had the courage to inform the OCHA Headquarters in New York that Zimbabwe was on the brink of a humanitarian crisis while RC/HC Zacarias was pretending to the contrary. To this must be added the physical and emotional stress caused by the recalcitrance of RC/HC Zacarias in obtaining accreditation for him and his family. In spite of these myriad challenges, which the Applicant faced in struggling to fulfil his mandate, the OCHA leadership in New York targeted and sacrificed him for the benefit of RC/HC Zacarias and Mr. Muktar.

201. RC/HC Zacarias took the Applicant to task for having addressed the humanitarian concerns in Zimbabwe in June 2008. Why would he do that? His attitude betrayed a consistent pattern of undermining the successive heads of OCHA office. Although this pattern was known to the top management of OCHA in New York, they failed in their duty to both the Applicant and the work of the OCHA office in Zimbabwe by their complacency and inaction in instituting protective measures to resolve the clearly identified management issues.

202. Following the departure of one of the predecessors of the Applicant, Ms. A.A.O, and before the arrival of the Applicant, there was an Executive Coaching

Mission headed by Mr. Raffeurin Ahmed who visited Zimbabwe between 13 January and 7 February 2007. In its report¹⁷² the mission recommended certain measures on the respective roles of the HC and the HoO of OCHA. The report enjoined the HC: 1) to play a proactive and strong leadership and advocacy role and demonstrate through words and actions his commitment to the alleviation of the humanitarian situation in Zimbabwe; 2) to provide the Head of OCHA Office with overall guidance and encouragement for the development of a common UN strategy for relief and recovery through utilizing the IASC; 3) take the initiative in keeping the Head of OCHA Office informed of any discussions which may impinge upon the humanitarian situation, and pro-actively engage her¹⁷³ in a dialogue on issues of concern; 4) respond in a timely manner and provide substantive feedback on documents and communications from the Head of OCHA Office; 5) hold daily meetings with the Head of OCHA and convene monthly meetings with the entire OCHA staff; remain accessible to Head of OCHA and visit the OCHA office once a month.

203. The report also recommended that 1) the HoO accept the leadership of the HC; 2) refrain from taking action that may lead to a perception that OCHA was an autonomous office; 3) facilitate the development of a common UN strategy for relief and recovery through utilizing the IASC with a view to buy-in of all humanitarian actors in Zimbabwe; 4) engage more actively and in a more transparent manner with the HC and the UNCT; 5) keep the HC fully informed of discussions with other stakeholders.

204. These recommendations had been disregarded since neither RC/HC Zacarias nor the OCHA leadership chose to be guided by them. There is no evidence to show that the Applicant was instructed by OCHA to use the said recommendations as a guide.

205. The foregoing leads the Tribunal to the conclusion that RC/HC Zacarias found that the balanced relationship he had cultivated with the Mugabe

¹⁷² A1 p. 36

¹⁷³ The person referred to is Ms. A.A.O, the then HoO, OCHA Zimbabwe.

Government was being threatened by the three successive heads of OCHA, the latest of which was the Applicant. It is the finding of the Tribunal that the non-renewal of the Applicant's contract was motivated by extraneous factors or improper motive.

The work performance of the Applicant

206. The reasons given for the non-renewal of the Applicant's contract were set out in a letter to him from ASG Bragg dated 27 January 2009. These were firstly, the issuance of a letter of no confidence by the NGO community and the conclusions of the Muller mission. A second reason was related to the Applicant's internal management of his office. Accordingly, the Tribunal will examine the work performance of the Applicant in Zimbabwe.

207. The Applicant was the one who sounded the alarm about the impending humanitarian crisis in Zimbabwe within three months of his arrival to the country. When ASG Bragg was questioned on this issue, she was dismissive of this initiative on the part of the Applicant and stated thus: "I think it is a wrong characterisation to say that he predicted it. It is the job of the OCHA office headed by any head of office to do contingency planning for any country team".¹⁷⁴

208. For his part, USG Holmes agreed in cross-examination that due to the efforts of the Applicant, the CAP had been vastly expanded and monies had been doubled. This expanded CAP reflected the needs that arose from the cholera crisis and food insecurity because of poor harvests. USG Holmes stated "... the evidence suggests that [the Applicant] did a good job on that CAP, and it is not my contention that [he] was incompetent or stupid or never did any useful things as head of the OCHA office. The problem was more that whatever he was doing in those kinds of areas, his relationships with the rest of the community were such that he could not do his job properly."

¹⁷⁴ 10/7 p.49

209. He also agreed that the Applicant had done a good job in relation to the Ruwa incident. However, from a wide variety of sources, and not just sources which could be influenced either by the Humanitarian Coordinator or by Mr. Muktar, the OCHA leadership was simply forced by the weight of evidence and complaints against the Applicant to separate him.

210. According to Mr. Hepie, the UNCT started to plan the humanitarian response to assist the country and he participated in the meetings. He met the Applicant for the first time in the field and had a professional relationship with him. He found the Applicant articulate, intelligent and professional and very supportive of the work of UNHCR. He understood the gap that existed in the UNCT in regard to UNHCR, and he greatly assisted UNHCR to fit into the UNCT and managed to present projects to help UNHCR to play their role in Zimbabwe, which until then was not being done.

211. When Mr. Hepie came to Zimbabwe, he tried to improve UNHCR's role and found support from the Applicant. He believed that the Applicant was doing a good job and was a great supporter of humanitarian needs.¹⁷⁵ In a mail dated 26 January 2009,¹⁷⁶ after the Applicant's re-assignment to Johannesburg, Mr. Hepie wrote: "My overall assessment of OCHA's contribution to the life of the Country Team has been very positive under the leadership of its dynamic Head of Office [the Applicant] during the past 9 months".

212. Interestingly, Mr. Steve O'Malley sent an email¹⁷⁷ to the Applicant on 8 August 2008, about four months after his assessment of the Zimbabwean humanitarian situation for which he was in trouble with Mr. Zacarias. The email stated in part: "John [Holmes] has asked us for an update on the situation in Zim, and indicated to us that he is not happy with the level of info he is getting".

¹⁷⁵ 5/7 Notes of judges

¹⁷⁶ A2 p.362

¹⁷⁷ R1 p. 5

213. In relation to that email, the Counsel for the Respondent put it to the Applicant that he was not sending sufficient information to USG Holmes. The Applicant in his reply pointed out that the early warning assessment he had sent in April only earned him blame and punishment from RC/HC Zacarias. Without support from OCHA leadership, he had resorted to doing things in the way the RC/HC wanted by seeking his validation before sending any information to New York.

214. It is ironic that one of the complaints against the Applicant was that he was not sending enough information to New York. Yet when he did alert New York on the humanitarian situation he was vilified publicly by RC/HC Zacarias and received no support from OCHA New York.

The Tribunal's findings on the performance of the Applicant

215. Though the Applicant was trying to fulfil his duties, it should not be overlooked that he was functioning in a new environment and, as any employee, was bound to bring his own particular management style. He not only had to face a hostile RC/HC Zacarias but also an undermining Mr. Muktar. It is also very pertinent to note that in a mail¹⁷⁸ that was sent to USG Holmes and Mr. Kaatrud on 29 October 2008 after she had met the HC, ASG Bragg referred to the dissatisfaction of the HC with the Applicant and she informed the HC that Mr. Muller would be in Zimbabwe in November to look into “management and relational issues”.

216. She also wrote: “I did indicate to Zac [HC] that in my meetings with interlocutors, it became apparent to me that many of them had difficulties separating their complaints between those directed at the HC and those directed at the Head of OCHA, and that we should view the discontent as directed at humanitarian coordination and the UN and not at individuals.”¹⁷⁹ This is very revealing and indicates that the Applicant should not have been the one targeted

¹⁷⁸ A2 p.540

¹⁷⁹ A2 p.540

as being the prime cause of any discontent. No adequate steps were taken to analyse the real issues in an objective and fair manner.

217. The Applicant may have made mistakes, shown an excessive zeal, or may have taken too much initiative – just like a man in a hurry to achieve what he felt had to be done – much to the dislike of people and stakeholders that were used to a particular style of management before his arrival. But this should not and cannot be interpreted as poor performance or non-performance on the Applicant's part. All the complaints relate more to the concrete actions and positive steps that the Applicant was undertaking rather than to poor performance on his part.

218. USG Holmes and ASG Bragg had concluded that the primary impediment in the delivery of humanitarian aid was the difficulties that they were experiencing with the Applicant.¹⁸⁰ The Tribunal has found no evidence of the Applicant being an impediment. On the contrary the number of actions taken by the Applicant such as his intervention in RUWA, IDPS, early warning, bringing NGO's and donors together and doubling the CAP were some of the Applicant's achievements, which negates that submission of the Respondent.

219. The Tribunal finds that nothing substantial or conclusive was found against the Applicant insofar as his performance was concerned. The alleged non-performance or poor performance of the Applicant was not based on any proper appraisal process, lacked substance and was used as a means to remove the Applicant while protecting Mr. Zacarias.

220. Thus, the Tribunal finds that there was absolutely no justification in holding that the Applicant was not performing his duties as required of him according to the Terms of Reference (TOR) of his position. Even ASG Bragg wrote that the Applicant seemed to be unaware that there was a relationship issue.¹⁸¹ Though she did not elaborate on this, the clear inference is that the

¹⁸⁰ Transcript of hearing of 13 July 2010 (hereinafter "13/7"), p.7

¹⁸¹ 10/7 p.9

management blamed the Applicant for any relationship issues and thus ignored the negative attitude of RC/HC Zacarias and Mr. Muktar towards him.

Was a proper performance appraisal conducted in respect of the Applicant?

221. As already stated, the main ground for the non-renewal of the Applicants employment contract was his alleged non-performance. The Tribunal has already made a finding on this. But even on the assumption that the Applicant was not performing, was the proper process for separation on the grounds of non-performance followed?

The e-PAS and reporting line

222. A system for appraising the performance of United Nations staff members was established by ST/AI/2002/3. Under section 1 of this administrative instruction, the PAS system applies to all staff members except for staff at the level of Assistant Secretary-General and above.

223. Section 2.1(d) of ST/AI/2002/3 states that one of the purposes of this system is to recognize successful performance and address underperformance in a fair and equitable manner.

224. Section 2.2 further provides that the PAS is:

[a] management tool based on linking individual work plans with those of departments and offices and entails setting goals, planning work in advance and providing on-going feedback. An important function of the PAS is to promote two-way communication between staff members and supervisors on the goals to be achieved and the basis on which individual performance will be assessed. PAS also encourages continuous learning, fosters teamwork, and assists in planning career development.

225. If the PAS is truly a management tool for promoting communication between staff members and their supervisors and the basis for assessing individual performance, then the starting point must be the proper understanding between

supervisors and supervisees of each other's roles. Was this the case in respect to the Applicant?

226. ASG Bragg testified that the first reporting officer was RC/HC Zacarias but since the Applicant was an OCHA employee, there was also a dual reporting system through the section chief to the deputy director, Mr. Muller. According to ASG Bragg, it was the responsibility of Mr. Muller to manage the performance of the Applicant and this was what Mr. Muller did when he was in Zimbabwe in November 2008.

227. ASG Bragg further stated that the e-PAS had been a complicated process, especially for the field, for a number of reasons. Firstly, the electronic process was not available in Zimbabwe in 2008 and so the compliance rate in terms of preparing the e-PAS, both from the staff side and from the management side, had not been the greatest. This was compounded by the fact that in 2008 there was still a lack of clarity as to who in fact was responsible for the e-PAS of heads of offices because of the lack of clarity around reporting relationships.

228. In that era, there were some heads of offices who considered themselves as reporting to the section chief in New York in the CRD division. There were some heads of offices that considered themselves and called themselves deputy humanitarian coordinators and saw themselves as reporting directly to USG Holmes. There were others who saw themselves as reporting to the humanitarian coordinator in the field.¹⁸² This uncertainty as to who was the first reporting officer contributed to the fact that e-PAS' were not done.

229. RC/HC Zacarias told the Tribunal that the Applicant never submitted a work plan because he had a different understanding about the reporting lines and that despite the fact that he was the first reporting officer of the Applicant, the Applicant felt that he should be reporting to New York. The second reporting

¹⁸² 10/7 p.19

officer was Mr. Kaatrud. RC/HC Zacarias said he informed Mr. Kaatrud about this situation and asked him to clarify with the Applicant.¹⁸³

230. As the first reporting officer and supervisor, RC/HC Zacarias said he was conscious that it was his duty to bring the failings of any OCHA HoO to their attention and suggest to them what they should do in a coherent way to improve. He tried to comply with this role, but when he did so, the two previous OCHA HoOs in Zimbabwe and the Applicant felt that he was micromanaging them. When he was told that under the PAS rules there was a very heavy responsibility on him to ensure that he complied with the rules he went to Mr. Kaatrud to discuss the case of the Applicant, who did not recognize him as the first reporting officer.¹⁸⁴

231. The e-PAS of the Applicant had not been completed before the decision to separate him was taken. On being informed that he would be separated, the Applicant filed an application before the then JAB, which ruled that he could not be separated before the completion of the e-PAS. The Applicant testified that his e-PAS was initiated by ASG Bragg after that ruling on 29 January 2009, but there was no work plan.¹⁸⁵

232. ASG Bragg then instructed Mr. Kaatrud to prepare the PAS. In an email¹⁸⁶ sent to his colleagues on 4 February 2009, the Applicant informed them he was completing his current performance assessment for the year 2008/2009. He asked all of his chiefs for their contributions and then he sent them to Mr. Kaatrud and asked for discussion, as is the procedure. He received no response. Instead he received a full PAS from Mr. Kaatrud and signed by Chris Hyslop as first reporting officer and Mr. Kaatrud as second reporting officer. One of the comments¹⁸⁷ in the PAS read:

¹⁸³ 7/7 p.18

¹⁸⁴ 7/7 pp. 35/36

¹⁸⁵ 26/2 p.99

¹⁸⁶ A2 p.382

¹⁸⁷ A2 p. 497

“His [Applicant’s] inability to constructively engage with the Humanitarian Coordinator, some members of UNCT and many NGOs operating in Zimbabwe, posed an obstacle in the successful performance of his Terms of Reference, specifically those aspects requiring communication, representational and negotiation skills with the humanitarian community in Zimbabwe. The inability of the HoO [Head of Office] to establish and maintain positive working relationships with key constituencies resulted in unwillingness by them to work productively with OCHA on basic aspects of humanitarian coordination. These shortcomings were communicated to the HoO on several occasions but actions were not undertaken by him to rectify the situation.”

233. When the rating, which was “partially meets performance expectations”, was communicated to the Applicant, he filed a rebuttal,¹⁸⁸ and the Panel directed that the e-PAS be nullified. Subsequently his rating was changed to ‘fully meets performance expectation.’¹⁸⁹

234. The Rebuttal panel had made a critical observation in the opening sentence of paragraph 32 of its report, which read: “... the Panel notes that little effort was made by OCHA's senior management to put in writing to [the Applicant] any concerns about his performance and to give him the opportunity to take corrective action in a timely manner in the context of a properly structured performance management process.”¹⁹⁰

235. When the Applicant assumed duties in Harare, his first reporting officer should have been RC/HC Zacarias. However, Ms. Bragg was not sure that the Applicant or RC/HC Zacarias were fully aware of that. That was subsequently clarified by policy guidance that USG Holmes issued to all humanitarian coordinators and heads of offices after the Applicant’s exit in 2009.¹⁹¹

236. ASG Bragg agreed that this confusion was further compounded by the sour relationship between the RC/HC and the Applicant, and that management

¹⁸⁸ A2 p.487

¹⁸⁹ A2 p. 503

¹⁹⁰ R1 p.119 para 32

¹⁹¹ 10/7 p.20

should have done something about it in regard to the reporting line. USG Holmes was communicating with RC/HC Zacarias to impress on him that it was part of his management responsibility of the OCHA office. At the same time, ASG Bragg was not sure that the Applicant actually accepted that RC/HC Zacarias was his first reporting officer.¹⁹² ASG Bragg conceded that OCHA as an organization did not use the e-PAS as a means of trying to improve the performance of the Applicant.

237. USG Holmes was asked whether OCHA needed to complete his performance appraisal and give the Applicant a chance to rebut before separating him from service. He responded that OCHA could not afford the luxury of completing the e-PAS, of going through proper appraisal procedures, of going through the possibility of coaching and mentoring and courses and so on to correct the problems in view of the critical humanitarian situation they were facing in Zimbabwe. The credibility of OCHA with its donors and partners was at stake. OCHA is a coordination organisation, which depends on the credibility and the skills of its coordinators. So the considered judgment at that time, based on all the available evidence (positive as well as the negative), was that the Applicant was not capable of performing his function in those circumstances, and therefore the decision to remove him was taken.¹⁹³

238. He stated also that it is the responsibility of the officers themselves to make sure that the e-PAS is completed, although it is also the responsibility of the reporting officers to make sure the process is underway. There is a balance there, and it would have been better if this had been respected in the case of the Applicant. USG Holmes did not think that their process in that context was perfect, but he believed that the right decision was taken to remove the Applicant in very difficult circumstances.¹⁹⁴

¹⁹² 10/7 p.20

¹⁹³ 6/7 pp.113/114

¹⁹⁴ 6/7 p.115

239. USG Holmes referred to other steps that were taken to deal with the Applicant. He mentioned the very long interview ASG Bragg had with the Applicant in South Africa, the ample opportunities that he had to express his point of view and the mission led by Mr. Muller that provided the kind of feedback and the kind of knowledge OCHA needed to take their decision.¹⁹⁵

240. Concerning OCHA management's use of the e-PAS system, USG Holmes conceded: "It is true that we have not had, until recently anyway, a good record of full compliance with e-PAS requirements. ... It's been a weakness of OCHA. ... I accept that clearly it would have been better if the process of the e-PAS had been started earlier and there had been the usual midpoint review of performance. That might have provided a more formal opportunity for these issues to be addressed."¹⁹⁶

Informing the Applicant about his performance

241. ASG Bragg testified that throughout 2008, as management, they had tried to be as responsible as possible. When they heard that there were difficulties in the office, they sent Mr. Muller in to have a discussion with people around and in the office and with the Applicant himself so that they could have a better understanding.¹⁹⁷ In the course of that, there was feedback to the Applicant. When ASG Bragg met with the Applicant, she had also indicated to him the importance of maintaining a relationship with the humanitarian partners. This was not a counselling session. But in her conversation with the Applicant, when she realised that he had a pattern of relationship difficulties, she did point out to him the expectation of OCHA and the need to maintain the kind of relationship that would be conducive to getting the humanitarian coordination work done.¹⁹⁸

242. She also believed that Messrs Muller and Kaatrud had all spoken to the Applicant about his situation and his performance. She stated that in spite of the

¹⁹⁵ 6/7 p.115

¹⁹⁶ 6/7 p.107

¹⁹⁷ 10/7 p.60

¹⁹⁸ 10/7 p.60

Applicant's denial, she knew that these conversations had taken place although there were no written records of them.¹⁹⁹ According to her, OCHA management tried to deal with the situation in the context of a raging humanitarian crisis that was killing thousands of people and they had tried to do it as responsibly as possible by trying to find the Applicant a transition out of Harare. Unfortunately, because of his background and his level, they could not find him something more permanent. This was unfortunate and she did regret that they were not able to do so. She added that their responsibility would have been to the humanitarian situation of saving lives.²⁰⁰

243. She added: "There are lots of things that we probably could have done differently in hindsight, but I think we treated him with decency, I think we treated him with respect, I think we tried very, very hard to give him a transition out, but we had no choice but to have him leave Harare so that someone else could do the work that needed to be done in order to save lives."²⁰¹

Findings on the Applicant's performance appraisal

244. The Tribunal notes that there may have been discussions or conversations between the Applicant, Mr. Muller and ASG Bragg about his work performance. But the plain fact is that on the assumption that the discussions took place, they were one sided in that they focused on the alleged shortcomings of the Applicant without giving him credit for the good work he had done. His positive achievements outweighed any negatives aspects. Consideration was not given to the difficulties that the Applicant was encountering in view of the hostile attitude of RC/HC Zacarias and Mr. Muktar against him. Management's assumption that it was the Applicant who was at fault had no objectively verified basis.

245. To start with, there was no clear reporting line, and even if it turned out that it was RC/HC Zacarias who was the first reporting officer, management

¹⁹⁹ 10/7 pp.60/61

²⁰⁰ 10/7 p.61

²⁰¹ 10/7 p.61

should have realised that the tense situation between the RC/HC and the Applicant would make it impossible for RC/HC Zacarias to act as an objective and impartial reporting officer. Events confirm this. RC/HC Zacarias had managed to establish very close contacts with a number of stakeholders, and criticisms against the Applicant came from these close contacts of RC/HC Zacarias.

246. Secondly, both USG Holmes and ASG Bragg stated that the proper e-PAS procedures were not followed. They described the difficulties experienced in the field and the lack of proper logistics to access the e-PAS electronically. ASG Bragg also explained the lack of clarity in the reporting line with regard to heads of office. Mechanisms had not been put into place for this purpose.

247. While the Tribunal has taken into account how the lack of logistics or proper mechanisms may have adversely impacted on the compliance necessity with the e-PAS rules, it does not have the least bit of sympathy for the lack of clarity in the reporting line. It was incumbent on OCHA senior management to set out clearly who the first and second reporting officers of the Applicant were, and leave them to deal with and manage performance and other issues. This was done only in 2009, after the Applicant had gone through nightmarish tribulations and been forced to leave Zimbabwe. On this aspect there was a total, unjustifiable failure on the part of management.

248. To try to excuse that flaw by arguing that humanitarian concerns were the priority and justified the flouting of rules regarding e-PAS is simply untenable. There is nothing in the rules that says that a staff member who is working in a field mission is deemed to have impliedly waived his/her right to be governed by the United Nations Staff Regulations and Rules or the administrative instruction governing the Performance Appraisal System, or that in the absence of a clear reporting line that staff member should bear the consequences of his/her alleged non-performance.

249. It is natural to expect fluctuations in the performance of a staff member. But the Organization has put in place a system whereby if a supervisor or an

officer higher than a staff member makes an allegation of incompetence he/she must bring clear facts in support of that allegation. There is also a duty on the manager alleging incompetence to take remedial measures. This would be especially required when a staff member has in the past been rated as outstanding in the core competencies. It is significant to note here that the Rebuttal Panel on the e-PAS of the Applicant changed his rating to one of “fully meets expectations.”

250. There is no evidence that a proper discussion on the performance of the Applicant ever took place, and what remedial action was taken if any shortcomings had been identified. There may have been conversations between the Applicant and a number of people like Mr. Muller, Mr. Kaatrud and ASG Bragg who all wanted him out. Since the reporting line was very hazy, and in the absence of any guidance from management in New York on this issue, there was no proper first or second reporting officer who sat down with the Applicant to discuss his alleged shortcomings and give him time to improve as is required by the very rules that the Organization has established.

251. Given that the Applicant was never even informed of his performance, making exceptions for wholesale criticisms and the desire to get him to resign voluntarily, it is unlikely that any remedial action could have been attempted. The Respondent failed to establish to the satisfaction of the Tribunal in what manner they explained the precise shortcomings to the Applicant and what action had been taken to remedy the alleged shortcomings. Of course this could not have happened in the confusion on the reporting line.

252. It was only in February 2009 that a document titled “Policy Instruction - The Relationship between Humanitarian Coordinators and Heads of OCHA Field Offices”²⁰² was issued. The purpose of the document was to improve the coherence and effectiveness of the country-level humanitarian coordination by

²⁰² A2 p.402

clarifying the relationship between the Humanitarian Coordinators (HCs) and the Heads of OCHA Field Offices.

253. While USG Holmes agreed that before the issuance of this policy instruction, the relationship between the HC and OCHA head of office had lacked clarity, he rejected the suggestion that the policy instruction was as a direct result of what happened in Zimbabwe. His explanation was that they had been consulting all HCs and heads of offices about it, because they recognised that there was a degree of confusion about what the relationship was between the reporting line and the head of office to the humanitarian coordinator, and the reporting line of the head of office back to headquarters. The policy instruction clarified that the head of office works for the humanitarian coordinator, which had been less clear previously.²⁰³ He agreed that the relationship would have been clearer if the policy instruction had been in place in 2008, before the direct clash between a humanitarian coordinator and a head of office. The principles embodied in the document, had it been issued in 2008, would have removed those problems altogether.²⁰⁴

254. This is indisputable evidence of singular managerial ineptness – not to say bad faith on the part of senior management of OCHA in New York – to have waited until RC/HC Zacarias had succeeded in victimising a third HoO before attempting to clarify the relationship between the HC and the HoO and OCHA. And yet, in that prevailing confusion that the OCHA management had been so complacent about and which they themselves acknowledged was lacking in coherence and efficiency, the Applicant was taken to task on alleged non-performance and pilloried without being given an opportunity to respond as provided for by the very regulations of the Organisation.

255. As first reporting officer it was the responsibility of RC/HC Zacarias to set out the work plan with the Applicant; to conduct the mid-point review and the final appraisal; and to provide supervision on the overall work of the Applicant

²⁰³ 6/7 p.111

²⁰⁴ 6/7 p.111

during the course of the reporting period.²⁰⁵ The deadline for the work plan, according to ST/AI/2002/3, is 1 April of each year.²⁰⁶ A work plan is a process that requires a discussion between the staff member and his supervisor or first reporting officer.²⁰⁷ A work plan cannot be imposed on a staff member in an arbitrary manner. The Applicant would have had to work with RC/HC Zacarias as his first reporting officer to devise the plan for the performance cycle and to determine the competencies that would be used to carry out the work plan.²⁰⁸ This, as has been pointed out above, was materially impossible.

256. It was also the responsibility of RC/HC Zacarias, as the first reporting officer, to ensure the implementation of all aspects of the PAS in a timely manner. Section 7.4 of ST/AI/2002/3 relevant at the time states emphatically that the “timely implementation of all aspects of the PAS and compliance with the spirit and the letter of the process, including completion of the PAS forms and development of remedial action under section 8.3 if necessary, rests with the supervisor acting as the first reporting officer.”²⁰⁹ Instead of trying to attain that important objective, RC/HC Zacarias adopted a hostile attitude against the Applicant with the result that no PAS was ever completed.

257. As mandated by section 7.3 of ST/AI/2002/3, USG Holmes and ASG Bragg bore the primary responsibility for the timely execution of the PAS and for the overall compliance and consistent and fair implementation.²¹⁰ This responsibility was not met. No action was taken in regard to the e-PAS and management compounded the situation by taking no remedial action.

258. In the case of a shortcoming in the performance of a staff member, the first reporting officer should have discussed the situation with the latter and taken steps to rectify the situation, such as the development of a performance improvement

²⁰⁵ Section 4.1 ST/AI/2002/3

²⁰⁶ Section 2 ST/AI/2002/3 & the Guide on the Use of e-PAS.

²⁰⁷ Section 6.1 ST/AI/2002/3

²⁰⁸ Section 6.1 ST/AI/2002/3

²⁰⁹ Section 7.4 ST/AI/2002/3

²¹⁰ ST/AI/2002/3

plan in consultation with the staff member.²¹¹ While the Respondent seems to allege incompetence and shortcomings on the part of the Applicant in several instances, the record is silent as to what remedial action was taken to address those shortcomings. The Tribunal concludes that no such remedial action, or any action of substance, was taken to assist the Applicant.

259. Counsel for the Respondent had submitted that non-compliance with the e-PAS instructions would not have made any difference to the outcome as the evidence showed that the “Applicant proved intransigent when confronted with issues of his own performance”. He quoted in support of his proposition the case of *Riquelme* UNDT/2010/107.

260. In the case of *Noguiera* UNDT/2009/088 the Tribunal held that failure to discuss alleged shortcomings in the performance of a staff member is a denial of due process. In *Riquelme* the Tribunal stated that there may be circumstances whereby a departure from the requirements of the e-PAS process would be inevitable and cited as an example the failure of a staff member who refuses to participate in the process. The learned Judge who decided *Riquelme* never laid down a general principle that any breach of or departure from the e-PAS requirements would be permissible. This Tribunal finds therefore that failure to follow the e-PAS rules is not acceptable managerial behaviour and that the Applicant was denied due process.

The true aim and effect of the Muller Mission to OCHA Zimbabwe and its impact on the non-renewal of the Applicant’s contract

261. In view of the tension between the HC and the Applicant, Mr. Holmes said he took the decision to send a mission to Zimbabwe, consisting of Mr. Rudi Muller and Mr. Chris Hyslop. The object of the Muller mission was to get a proper sense of what was happening on the ground, find out where the real faults

²¹¹ Section 8.3 ST/AI/2002/3

lay or where the balance of faults lay so that they could be in a position to take the corrective action which was clearly more and more urgently needed.

262. The request for the mission came from the RC/HC and this appears in the report of Mr. Muller where it is stated: “It also must be noted that the mission followed the receipt of a letter by the RC/HC Zimbabwe on 20 October of a letter [sic] from the NGO Heads of Agencies expressing dissatisfaction with the OCHA leadership in the country”.²¹² Mr. Muller agreed that the letter received from the RC/HC was determinative and decisive in the decision to go to Zimbabwe. He rejected the suggestion that the mission was meant to take the Applicant by surprise by not giving him adequate notice.

263. According to him, the purpose of the mission was not to investigate the Applicant but to look at the dysfunctionality of the OCHA office there. He believed that the Applicant had something to do with that dysfunctionality.²¹³ He added, however, that he was dealing with a strictly confidential issue, which was about the performance of the Applicant.²¹⁴ Mr. Muller stated that this issue was conveyed to him by the rumours on the ground. But he did not go on that mission “to produce something which would serve as a basis to get rid of [the Applicant] or anything like that”.²¹⁵

264. The purpose of the mission can be gathered from the exchange of emails between Mr. Muller and the Applicant. On 24 October 2008 Mr. Muller sent a mail to the Applicant informing him that he and Chris Hyslop would be visiting Zimbabwe from 10 to 13 November. In that mail Mr. Muller wrote that they planned to discuss with the Applicant, the OCHA team and the HC how they could resolve the tensions within OCHA Zimbabwe, which “seem to have a major impact on the functioning of your office on the ground and on the credibility and reputation of OCHA at large”.²¹⁶

²¹² A1 p.309

²¹³ 6/7 p.68

²¹⁴ 8/7 p.57

²¹⁵ 6/7 p.36

²¹⁶ R1 p.57

265. Mr. Muller sent another mail dated 4 November 2008²¹⁷ to the Applicant in which it was stated that: “The objective of our trip is to follow up on your request for headquarters support regarding the tension between you and your Deputy. Since that request, we have also received the message from some NGOs to the HC expressing dissatisfaction in OCHA leadership”. When he arrived in Zimbabwe, he gave three reasons: first to become familiar with Zimbabwe; secondly to look at the relationship between the NGOs and the UN and the third objective was to see how his office in New York could help the Applicant and his office.²¹⁸

266. The Applicant stated that the ASG had told him that Rudi Muller would be going to Zimbabwe to look into the issues with the NGOs. She never told him that the mission would be looking into his relationship with the RC/HC or his deputy Mr. Muktar.²¹⁹

267. Mr. Muller stated that the Applicant discussed his relationship with the RC/HC, the Government of Zimbabwe and also with his deputy Farah Muktar. He testified that the staff members were scared of Mr. Muktar but more so of the Applicant. Mr. Muller did not agree that most of the people he interviewed thought the relations between the RC/HC and the Applicant were the cause of dysfunctional state in the humanitarian community in Zimbabwe. The OCHA staff (he spoke to about ten of them) put more emphasis on the relationship between the Applicant and Mr. Muktar. The United Nations agencies had mixed answers. The NGOs had a similar attitude. But he agreed that for the external partners, the relationship between the Applicant and the HC was a key component of the dysfunctional state.

268. The Applicant also told him that Mr. Muktar had a close relationship with the RC/HC and he was being used by the RC/HC to fight him. The Applicant said that Mr. Muktar accused him of being a womanizer and of having no heart and

²¹⁷ R1 p.66

²¹⁸ 24/2 pp. 100/101

²¹⁹ 24/2 p.91

had vowed to get him. The Applicant added that the donors, NGOs and HC had banded against him. Staff members of the information management unit told Mr. Muller that there was a deliberate attempt on the part of Mr. Muktar to undermine the head of office.

269. In the Muller report²²⁰ given under the signature of Mr. David Kaatrud it is stated “While recognizing that the current HoO [Applicant] is a committed and hardworking person with a solid understanding of the overall situation, most²²¹ expressed concern about his managerial capacities and interpersonal style, often described as disrespectful, non-consultative and a hindrance to proper coordination”. To this the Applicant pointed out that this mission, which also included a desk officer who was not a manager, was not in a position to review the head of office in that way.²²²

270. Based on the findings of the Muller mission,²²³ USG Holmes was convinced that there was a serious situation where the head of office seemed to have lost credibility with many other parts of the humanitarian community.²²⁴ There were very serious management problems within the OCHA office, which were attributed to difficulties between the head of office and Mr. Muktar,²²⁵ leading to an environment of fear within that office.²²⁶ Also, key partners of the humanitarian office were saying very serious and negative things about the head of office, the Applicant.²²⁷

The Tribunal’s findings on the impact of the Muller Mission

271. Judging from the Muller report and from David Kaatrud's comments on it there was a real problem with the head of office, which had nothing to do with or went well beyond any problems there might have been between him and the

²²⁰ R1 p.74

²²¹ The staff of the Applicant as suggested by Counsel for the Respondent.

²²² 26/2 p.87

²²³ A1 pp.309-311 and R1 p.74

²²⁴ 6/7 p.77

²²⁵ 6/7 p.77

²²⁶ 6/7 p.77

²²⁷ 6/7 p.78

humanitarian coordinator and/or him and his deputy, and some action had to be taken.²²⁸

272. The Muller mission had one mandate, namely to look into the working of the OCHA Zimbabwe office. In the end however, this report was used as a basis for not renewing the employment contract of the Applicant. There is evidence before the Tribunal that Mr. Muller himself, who was not the supervisor of the Applicant, accused him of not being a manager and phoned him to ask him to resign. The mandate of the Muller mission indicates clearly that the purpose of the mission was to look at the OCHA office and not to investigate or to pass value judgments on the performance of the Applicant. There were rules contained in the administrative instruction governing the Performance Appraisal System in place at the material time.

273. Mr. Muller chose to accuse the Applicant of mismanagement and ignored the tense relationship between RC/HC Zacarias and the Applicant, and between the Applicant and his deputy Mr. Muktar. By so doing, he unjustifiably arrogated to himself the power of a supervisor insofar as performance was concerned and converted his mission to an appraisal team. Whilst engaging in this process, Mr. Muller did not follow the strict rules governing performance assessment. Yet the Muller report was the trigger for the Administration in New York to conclude that the continued presence of the Applicant in Zimbabwe would not be conducive to the proper functioning of OCHA.

274. The Tribunal concludes that the Muller mission was a device used by OCHA top management to evaluate and investigate the performance of the Applicant without a proper and objective discussion and with the specific purpose of getting rid of him. Ms. Custodia Mandlhate, the WHO head in Zimbabwe, was interviewed by the Muller mission. In an email²²⁹ sent on behalf of her organization, she wrote of the said mission:

²²⁸ 6/7 p.110

²²⁹ A1 p.300

I feel a lot of tension between Zac [the UN RC/HC] and [the Applicant] but never expressed at UNCT level. I had two people from OCHA New York who came to see me and ask how WHO is working with OCHA, but I could sense from their attitude that their mission was something else. They were looking at the time... and in hurry... and even not paying much attention on whatever good I was saying about the collaboration between WHO and OCHA. I don't know if they are still around because no debriefing was provided to the UNCT... at my knowledge.

275. Further, she expressed her frustration with the mission's perceived goals:

“Zimbabwe is on a very difficult Humanitarian crisis, I would have expected to have the Deputy director of OCHA Mr. Rudi Muller who came to see me and many of you, concentrating really on how to help us- how to help the UNCT to face the humanitarian challenges in Zimbabwe, and not to spend all those resources (Travel and DSA all along from New York to discuss interpersonal relationships with OCHA or OCHA Country Director)”.

276. Instead of abiding by its stated mandate which was to assess the humanitarian situation in Zimbabwe at the time and to look at the functioning of the OCHA office, the Muller mission passed damning judgment on the Applicant while no mention was made of humanitarian concerns. Counsel for the Respondent conceded that Mr. Muller's mission was derailed by all that was being said by the NGOs, the UNCT and the staff. It should be noted that Mr. Muller never explained why he abandoned his stated mandate for the Zimbabwe mission. This notwithstanding, the Tribunal finds the argument of Counsel for the Respondent on the derailment of the Muller mission and report totally preposterous, and finds that that mission's real aim was to discredit the Applicant.

The Applicant's separation process

277. The Tribunal will now turn to the manner in which the Applicant was separated from service as Head of Office in OCHA Zimbabwe to determine whether the requirements of due process and fairness were observed by OCHA.

278. According to the Applicant's testimony, he met ASG Bragg in Johannesburg on 27 October 2008 and she brandished the letter from the Heads of Agencies. She told him that what had been written about him was correct. The Applicant did not know on what basis or what rationale ASG Bragg was coming to her conclusions.²³⁰ He was not given an adequate opportunity to respond, and anything he said was dismissed by ASG Bragg.²³¹ She did not ask the Applicant any questions about the humanitarian situation in Zimbabwe, the political violence in Zimbabwe, or about the CAP of Zimbabwe. He did not have a chance to speak to her again on that day.²³² He thereafter sent an email to ASG Bragg expressing concerns on a number of issues including the attitude of RC/HC Zacarias, the attitude of his deputy Mr. Muktar, and the difficulties in having the CAP completed.²³³

279. In a mail²³⁴ purporting to be confidential that ASG Bragg sent to Mr. Kaatrud, and copied to one Mr. Gaby Douek, she gave a list of the topics that were raised at the meeting between her and the Applicant. She wrote: "During the 90-minute meeting, ASG Bragg engaged [the Applicant] in discussion primarily on his relationship with the RC/HC, his subordinate [sic] (in particular his Deputy), partner organizations, and the government, as well as his perception of his accomplishments." The Applicant denied in his testimony that these topics were ever discussed. According to him, the said meeting lasted barely one hour.²³⁵

280. ASG Bragg also wrote of the same meeting: "The overwhelming impression from the conversation was that [the Applicant] perceived himself to be the only one who could see the situation in Zimbabwe clearly." The Applicant stated that this was a comment by ASG Bragg over which he had no control.²³⁶

²³⁰ 24/2 p.79

²³¹ 24/2 p.80

²³² 24/2 p.82

²³³ A1 p.304

²³⁴ R1 p.58

²³⁵ 24/2 p. 89

²³⁶ 24/2 p.89

281. In an email²³⁷ dated 20 December 2008 addressed to RC/HC Zacarias and copied to ASG Bragg, USG Holmes wrote: "For your information only at this stage, we are taking action to ensure that [the Applicant] does not return to Harare after leave, and urgently looking for at least temporary capacity to help you the next few weeks. Mukhtar [sic] may well need to move on too but not yet." Earlier, on 11 December 2008, USG Holmes wrote a mail²³⁸ to Mr. Kaatrud in which he said:

“As we have discussed, as the cholera situation - and the humanitarian situation more widely- becomes more critical, the resolution of the Head of Office in Zimbabwe is now urgent. We need to withdraw Georges next week, whether or not we know what is going to happen to him next, and get some surge capacity in there very rapidly, while we find a longer-term replacement. I would be grateful if you, with Catherine, could initiate action accordingly’.

282. In fact, the Applicant had applied for two days’ leave on health grounds and had gone to South Africa.²³⁹ He then sent an email²⁴⁰ dated 5 January 2009 to his assistants and copied RC/HC Zacarias, informing them that for health reasons he was delaying his return. RC/HC Zacarias immediately wrote²⁴¹ to Mr. Kaatrud about this request of the Applicant: “I have alerted HQ of this systematic practice by [the Applicant], which brings an administrative nightmare.” That email was copied to Mr. Muller, Mr. Hyslop and Ms. Dagash. The Applicant testified that he found this to be cruel and inappropriate.²⁴²

283. On 25 January 2009, when the Applicant was in Johannesburg, he received a call from ASG Bragg whose tone he found to be brutal. As a measure of precaution, he taped the phone conversation and explained the technology he used to do the recording.²⁴³ When Counsel for the Applicant sought to put in a recording of the conversation into evidence, objection was taken by Counsel for

²³⁷ A1 p.342

²³⁸ R1 p.151

²³⁹ 24/2 p. 124

²⁴⁰ A1 p.341

²⁴¹ A1 p.341

²⁴² 24/2 p.124

²⁴³ 24/2 p.p. 134-139

the Respondent.²⁴⁴ The thrust of the argument of Counsel for the Respondent was that the original of the conversation was not available and that the transfer of the recording on a CD showed that the conversation had been broken in parts and was not complete.

284. The Tribunal ruled²⁴⁵ the recording admissible and stated:

“The Applicant is seeking to put in conversations that allegedly took place between the Applicant and Ms. Bragg. Counsel for the Respondent has objected to this and is insisting that the original be produced. The Applicant has given explanations as to why the original no longer exists and which has been recorded. It is a basic rule of evidence that when the best evidence is not available and if the foundation and explanations have been given why the best evidence does not exist, then we can rely on secondary evidence.

One should not confuse between admissibility per se and probative value of evidence. Article 18 of the rules of procedure is clear on the admissibility of evidence. I would add also that it is true that Article 18 does not elaborate further on the rules of evidence and that therefore the Tribunal finds itself in the situation where it has to construe and go on interpreting these rules of evidence as laid down in Article 18 of the rules of procedure.

The explanations given by the Applicant as to the non-existence of the original recording are in view of the Tribunal satisfactory enough to allow secondary evidence of the tape. Having said this, it will be perfectly open and it should be the duty and responsibility of Counsel for the Respondent to minutely cross examine the Applicant on that conversation and, if need be, call one of the protagonists in that conversation in order to clear the matters and call evidence in rebuttal.

So, to that extent, the tape will be admissible. And as far as the probative value is concerned, this is another matter for the Tribunal to decide.”

285. The conversation, according to the Applicant, went along these lines: ASG Bragg asked, “What are you still doing in Zimbabwe? I've asked that you be removed from Zimbabwe, and this instruction has not been followed. And I'm hereby – I'm calling you to tell you that you are no longer the head of office of OCHA in Zimbabwe.” The Applicant who said he was unaware of said

²⁴⁴ 24/2 p. 131/132 and p. 142

²⁴⁵ 24/2 p.153/154

instruction²⁴⁶ replied: "I've worked for the UN for ten years. I've never seen somebody to be fired verbally".²⁴⁷ ASG Bragg raised her voice and it was then that the Applicant decided to tape record the conversation.²⁴⁸ ASG Bragg went on by repeating, "You are ending, – your appointment in Harare is ending today." The Applicant asked her to clarify: "Do you mean that tomorrow morning Monday, I am no longer allowed to work in Zimbabwe, in Harare?" The ASG answered in the affirmative: "Yes, we are reassigning you."

286. The Applicant said: "Tomorrow you don't want me to be working here anymore, so who is taking over? I have to do a handover. I have to give the office to the newcomer and tell him what is pending and so on, what needs to be followed up and so on. And I will go. I'm not even refusing to go."²⁴⁹

287. Following that conversation, ASG Bragg wrote a mail dated 25 January 2009 to USG Holmes, David Kaatrud, RC/HC Zacarias, and copied Ms. Dagash, Mr. Hyslop, Ms. Linda Ryan and Ms. Kelly David, stating: "This is to confirm that this evening [South Africa] time, I spoke to [the Applicant] personally in my capacity as OIC and stated clearly that it is the wish of the Emergency Relief Coordinator [ERC]²⁵⁰ that he be re-assigned to Johannesburg immediately. He was informed that we considered him to have been notified two weeks ago when David Kaatrud spoke to him and that it was discussed with him that this would be effective as of January 26".²⁵¹

288. She did not know as a fact that Mr. Kaatrud had spoken to the Applicant. She was not a party to that discussion, but her understanding and USG Holmes' instruction to Mr. Kaatrud was to tell the Applicant that arrangements had been made for a post in Johannesburg for him. Her understanding was that it "was a bit

²⁴⁶ 24/2 p. 136

²⁴⁷ 24/2 p. 136

²⁴⁸ 24/2 p. 136

²⁴⁹ 24/2 pp. 157/158

²⁵⁰ The ERC was Mr. John Holmes

²⁵¹ A2 p.360 & 10/7 p.16

unclear as to whether [the Applicant] has agreed. I think he was informed, but he was not agreed”.²⁵²

289. The next day, 26 January 2009, ASG Bragg sent another mail to USG Holmes, Mr. Hyslop, Ms. Dagash, Mr. Muller and Mr. Kaatrud and copied Andrew Cox, Shani Harris and Paola Emerson and said: “Now that [the Applicant] has been formally notified, Chris and Rania are working with Muktar to be OIC for two months now.” She also wrote: “I had spoken to Zac [HC] on the weekend and told him we saw the internal management problems as caused by many people, not just one, so that what we were doing with [the Applicant] was not scapegoating one person. But we have to get on with addressing the situation in the country. I also indicated from my trip to Canada last week, it seemed that the donors were still unhappy with him and that he needed to engage more with them”.²⁵³ She added that the Canadians on different occasions had complained about both the head of office and the humanitarian coordinator.²⁵⁴

290. When asked by the Bench why it was urgent to get the Applicant out of Zimbabwe, Ms. Bragg answered:

“By January I believe that the number of deaths from cholera has already reached the thousands at that point. The number of affected has already reached tens of thousands. I don't think this is a situation where we – it was rolling so fast and spreading so quickly that we needed all to be on top of that, and we did not have the right team on the ground and so we needed to do something about that. Part of that not having the right team was not having the OCHA head of office who could pull together the OCHA office in order to do what we needed to do. That was the main reason why we did that. For humanitarian reasons we could not have waited any longer”.²⁵⁵

291. She added that though she was having problems with the two other persons, namely RC/HC Zacarias and Mr. Muktar, and that the UNCT had a weak

²⁵² 10/7 p.45

²⁵³ A2 p.361 & 10/7 p.16

²⁵⁴ 10/7 p.26

²⁵⁵ 10/7 p.50

team, it was the Applicant that was the source of most problems, as he had lost the confidence of the NGOs, the UN Agencies and a number of donors. The Applicant also had management difficulties in the sense that the OCHA office was badly managed, as found by Mr. Muller.²⁵⁶

292. Also on 26 January 2009, the Applicant challenged the decision to send him to South Africa before the New York JAB. The JAB questioned OCHA during the hearing that took place on whether it was a mission or reassignment.²⁵⁷ In reply to the JAB, ASG Bragg stated that she was sending the Applicant on mission to Johannesburg. Further, in her evidence, ASG Bragg stated that the Applicant was being sent on mission to Johannesburg. Her exact words were: “We chose Johannesburg because his family was there, and we also sent him on mission and that's an important word because he could then collect DSA.”²⁵⁸ She added that that was a way to ease the situation in which they found themselves in Zimbabwe.²⁵⁹

293. The same Monday evening, the Applicant went back to Harare and was told by his driver who came to fetch him in a taxi that his office lock had been changed and that Mr. Muktar, his deputy, was the Officer in Charge (OIC) of OCHA.²⁶⁰ A staff member of OCHA showed him an email²⁶¹ from Mr. Muller to Mr. Muktar informing him he was OIC. That email was not copied to the Applicant.²⁶² In the email²⁶³ sent by Mr. Muller to Mr. Muktar it is stated: “As you are no doubt aware, [the Applicant] has been asked to go on mission to support the OCHA Regional Office in South Africa, effective 27 January 2009. As of that date and for the coming interim period, you will be Officer-in-Charge of OCHA Zimbabwe while we identify a new Head of Office”.

²⁵⁶ 10/7 p. 17

²⁵⁷ 24/2 p. 158

²⁵⁸ 10/7 p.46

²⁵⁹ 10/7 p.46

²⁶⁰ 24/2 p. 159/160

²⁶¹ A1 p.378

²⁶² 24/2 p. 160

²⁶³ A2 p.378

294. Ms. Tomás testified that it was decided to change the locks of the office of the Applicant and the decision was reversed but by that time the locks had been changed. A key was remitted to the driver of the Applicant to be given to him but the Applicant refused to take it and it was returned to Ms. Tomás. She said that she had assumed that the Applicant who was not coming to the office as from 23 January because he was sick.²⁶⁴

295. In an email²⁶⁵ dated 27 January 2009 that ASG Bragg addressed to the Applicant, she wrote that the OCHA office in Zimbabwe was not capable of delivering adequate support to the RC/HC and the humanitarian community. She indicated that many of the interlocutors of the humanitarian community did not have confidence in the leadership of the Applicant. She also expressed concerns about management of staff and OCHA's partnership building – in particular with NGOs and to some extent with the HC. She then wrote "I understand you have been fully briefed on these concerns on three occasions immediately following the mission and have held extensive telephone discussions with David Kaatrud." The email stated, *inter alia*, "...after discussion with senior management, OCHA does not intend to renew your contract after its expiry on 23 March, 2009."²⁶⁶

296. The Applicant testified that these issues had not been addressed as alleged by Ms. Bragg. He did receive a phone call from David Kaatrud but "the phone call from David Kaatrud had nothing to do with these issues. David Kaatrud called me to know how the humanitarian situation in Zimbabwe was and what were my views on how – what we can do to strengthen it, the response. And then I say here the truth in front of the Court, he also asked me what are my plans, my career plans".²⁶⁷

297. In an email²⁶⁸ entitled "End of Assignment in Zimbabwe" dated 09 February 2009 and sent to ASG Bragg the Applicant wrote: "I have not received a

²⁶⁴ 8/7 p.23

²⁶⁵ A2 p.364

²⁶⁶ R1 p.92

²⁶⁷ 24/2 p.p. 160/161

²⁶⁸ A2 p.391

TA (Travel Authorisation), air ticket and DSA (Daily Subsistence Allowance) for my mission to Johannesburg”. The Applicant stated he was never paid any of this.²⁶⁹

298. On 10 April 2009 the Applicant sent an email²⁷⁰ to USG Holmes in which he requested to talk to him about his non-renewal. The Applicant was hoping that USG Holmes would give him a chance to talk to him and avoid his termination. He never received a response to that correspondence.²⁷¹ He returned to his country on 16 April 2009.²⁷²

299. USG Holmes testified that he took the decision to move the Applicant and not to renew him. He took full responsibility for that decision in discussions with ASG Bragg, David Kaatrud and others in which he told them that the immediate concern was to get the Applicant out of Zimbabwe. Given that the Applicant had been very uncooperative, it was very hard to imagine that they were going to be able to find a productive role for him in the future.

300. At the end of March 2009, since there was no obligation to renew the kind of contract that the Applicant was on, USG Holmes decided that the most logical conclusion was not to renew that contract because he did not think that they would be able to find a good use for the Applicant elsewhere, given the continuing difficulties they were having with him.²⁷³ In his view, the issues that RC/HC Zacarias had raised about the difficulties with the Applicant were related to his work performance. There were also elements about the personal behaviour of the Applicant, but the distinction between personal behaviour and work performance is not a black and white one. The difficulties largely related to work issues.²⁷⁴

²⁶⁹ 24/2 p 170/171

²⁷⁰ A2 p.491

²⁷¹ 25/2 p. 16

²⁷² 25/2 p. 16

²⁷³ 6/7 p.87

²⁷⁴ 6/7 p.88

Findings on the Applicant's separation process

301. After discussing the Muller report as recorded by David Kaatrud, USG Holmes decided that they needed to find a way to get the Applicant out of Zimbabwe because the situation was critical. David Kaatrud had been talking to the Applicant on the telephone in an attempt to persuade him that his best interests now lay in recognising the seriousness of the situation and finding a way to withdraw gracefully.

302. The said telephone conversation appeared to not have led to a quick resolution of the situation and USG Holmes was concerned about this. The resolution of the problem, which was seen to be the removal of the Applicant from Zimbabwe needed to be accelerated.²⁷⁵ But these discussions seemed to be going around in circles, and the humanitarian situation with regard to the cholera epidemic was becoming more and more critical.²⁷⁶ In a mail dated 20 December 2008 addressed to USG Holmes, RC/HC Zacarias recommended that Mr. Muktar be recalled from his holiday to act as OIC in the OCHA office in view of the decision that the Applicant should leave. USG Holmes endorsed that recommendation on the same day.²⁷⁷

303. The Tribunal notes with approval the PDOG's views in its report in relation to the Applicant's removal from Zimbabwe²⁷⁸ "It was not clear to the Complainant why he was being reassigned in such a hurry and what his new assignment would be. It seemed a similar lack of clarity also existed on the OCHA management side: for example, the language on the process changed from "reassignment" to "being sent on mission" in a matter of a few days. More importantly, it was not clear to the Panel why exactly the head of office was being sent on a long mission away from his duties where major humanitarian circumstances were evolving, including an outbreak of cholera, in Zimbabwe".²⁷⁹

²⁷⁵ 6/7 p.82

²⁷⁶ 6/7 p.83

²⁷⁷ R1 p.78 and 6/7 p.84

²⁷⁸ A2 p.472

²⁷⁹ 10/7 p.46 & PDOG Report A2, p.480, Para 44

304. The Tribunal finds that the Applicant was sent to South Africa as a prelude to his ultimate separation not so much in the interest of the Organization, or in the pursuit of using the best resources of the Organization for the achievement of the purposes under the Charter, and Rules and Regulations made under its authority. Strangely, the removal of the Applicant would serve the interests of RC/HC Zacarias and to a lesser extent of Farah Muktar both of whom USG Holmes, ASG Bragg and other OCHA personnel had acknowledged were part of the problem. Why was it a better choice to get rid of the Applicant who had predicted and confronted the humanitarian challenges facing the country by his early warning assessment and commendable management of the Ruwa crisis?

305. The Tribunal also finds that by appointing Mr. Muktar as OIC without the knowledge of the Applicant and by having the lock to the Applicant's office changed, also without his knowledge, OCHA senior management showed clearly that they had had no intention of dealing fairly with the Applicant or according him a modicum of due process. He had, obviously, already been tried in absentia and sentenced by a mock court, which had nothing but disdain for the principles of law and justice.

306. Based on foregoing, the Tribunal finds that the requirements of due process and fairness were completely disregarded by OCHA in relation to the manner in which the Applicant was separated from service as Head of Office in OCHA Zimbabwe and as such, his rights as a staff member of OCHA were violated. A humanitarian Organization such as OCHA must act in a humane manner towards its own staff members.

Conclusions

307. This case has brought to light not only managerial ineptitude and high-handed conduct but also bad faith from the top management of OCHA. This mismanagement and bad faith were compounded by a sheer sense of injustice against the Applicant who was hounded right from the beginning by the RC/HC

for not doing his work according to the RC/HC's methods but according to his own style of management and leadership.

308. Even ASG Bragg had testified that there were problems with the RC/HC and Mr. Mukhtar and that the UNCT was weak so that by January 2009 deaths from cholera had reached the thousands. In spite of this, the Tribunal finds that whenever something went wrong in Zimbabwe at the material time, the blame was laid at the door of the Applicant. It appeared that while he achieved some positive results no credit was given to him. In fact, ASG Bragg told the Tribunal that the achievements made by the Applicant in Zimbabwe were nothing extraordinary because it was his job. Management listened to rumours from all quarters instead of objectively assessing the situation and the performance of the Applicant.

309. The matter of the Applicant's said interpersonal relationships with some of those in the humanitarian community in Zimbabwe at the material time and the criticisms of him by these people or groups constituted the singular issue that informed his removal by OCHA. The critical question is: what was the Applicant doing wrong? Principal among his wrongdoing is that by the time he had spent one month in the country, he had published an early warning -suggesting that the UNCT, which had been operating before he came on the scene was ill prepared for an impending humanitarian crisis. In spite of the fact that no one could successfully counter his prediction, he appeared to have stepped on some big toes by stating the obvious. Thus the Applicant, a new-comer, had attempted to upset the applecart in a situation where, clearly, humanitarian considerations only played second fiddle to political issues.

310. Based on the totality of the evidence adduced, the Tribunal concludes that the Applicant was not, at all material times, treated fairly and in accordance with due process, equity and the core values of the Charter of the Organization.

311. It is pertinent to recall the opening words of the Charter of the United Nations in which the founding fathers of the Organization stated:

WE the peoples of the United Nations

Determined

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women

...

To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...

312. In *Tadonki* UNDT/2009/016, the Tribunal was of the view that:

“The core principle that guided the stakeholders involved in the reform of the administration of justice within the UN was the need to, ‘...*establish a new, independent, transparent, professionalized, adequately resourced and decentralised system of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.*’

“Employment gives rise to civil rights and this is recognized by various international legal instruments. The right to work is enshrined in Article 23.1 of the Universal Declaration of Human Rights ... [and] in Article 6 of the International Covenant on Economic, Social and Cultural Rights, where the right to work emphasizes economic, social and cultural development ...

The European Court of Human Rights has ruled that the right to continue in professional practice is a civil right. There is no reason why that principle should not be applicable to all contracts of employment in any civilized society. It follows that disputes arising out of a contract of employment should be dealt with according to fair procedures and the provisions guaranteeing the right to work should be interpreted according to international human rights norms.”

313. It is abundantly clear that all of these humanitarian values were simply ignored by the OCHA management in New York when dealing with the Applicant.

314. In view of the foregoing, the Tribunal holds that the non-renewal of the Applicant's employment contract was unlawful.

315. The case for the Applicant succeeds.

Compensation

316. The Applicant claims compensation under the following heads:

- a. A finding that the termination of his employment was wrongful and/or illegal;
- b. Reinstatement of his employment under the same terms that existed at the time of his wrongful termination, including retroactive reinstatement of his automatic conversion to long-term appointment as of 1 January 2009, with associated entitlements;
- c. Payment of his salary for May 2009 and the remaining portion of salary and entitlements withheld as a consequence of his wrongful termination;
- d. Monetary damages to compensate him for injuries to his physical health and wellbeing, including but not limited to pain and suffering, caused by the Respondent and/or OCHA;
- e. Implementation of the recommendations contained in the report of the PDOG dated 29 June 2009, including but not limited to protection of the Applicant's job status and security, together with his appointment to a duty station with his family that is free from harassment and enjoys adequate medical facilities;
- f. Nullification of his 2008-2009 PAS insofar as it violates ST/AI/2002/3 and his rights to due process, and contains defamatory statements;
- g. Permanent purging from his personnel files of all documents containing false statements;
- h. Reimbursement of all legal expenses;

- i. An Order from the Secretary-General to take disciplinary measures against Ms. Catherine Bragg and Mr. John Holmes as a result of their wrongful conduct, which violates his “right to due process and the ethical foundation of the Organization as a fair and exemplary employer”;
- j. Punitive damages in an amount sufficient to deter the Respondent and/or OCHA from engaging in similar intentional and malicious conduct against others;
- k. Such other and further relief as the Tribunal deems just and proper.

317. In regard to the remedies sought by the Applicant, the Respondent submits that reinstatement is not possible as the Applicant was not separated from the Organization; conversion is not possible in view of the rule that a staff member should have served five years of continuous service under intermediate appointment and an extension of one year under the applicable rules and regulations. In regard to the payment of salaries for the month of May 2009 the Respondent avers that OCHA has consistently informed the Applicant on his contractual status as well as payments and the reasons for the delays for the payment. The Respondent adds that since the Applicant was on sick leave, OCHA had no other option than to place him on sick leave without pay for the period 5-28 May 2009.

318. On the nullification of the 2008/2009 e-PAS, the Respondent submits that ST/AI/2002/3 makes no provision for the invalidation of a performance appraisal that has been completed. As such an original appraisal should stand and the only change that can be made is the rating. In relation to the expunging from the Applicant’s personnel files all documents allegedly containing false statements, the Respondent avers that OCHA is not aware of any adverse material contained in the Applicant’s official status file.

319. On the request to take disciplinary proceedings against USG Holmes and ASG Bragg, the Respondent submits that OCHA had valid reasons to remove the

Applicant from Zimbabwe and send him to Johannesburg and that the issue of disciplinary proceedings does not arise.

Whether the manner in which these proceedings were conducted on behalf of the respondent amounted to an abuse of process or which an order for costs would be appropriate under art. 10.6 of the Tribunal's Statute

320. The Tribunal was concerned about the manner in which the proceedings were conducted by and on behalf of the Respondent in certain material respects, which raise issues regarding the application of art. 10.6 of the Statute of the Dispute Tribunal which provides:

"Where the dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party."

321. The Tribunal was concerned at the Respondent's introduction, partway through the proceedings, of an allegation of sexual harassment on the part of the Applicant. Such allegations are properly regarded by the Organisation as extremely serious under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

322. At paragraphs 95-97 above the Tribunal describes briefly, the nature of this allegation. It is clear that this allegation had never been the subject of an investigation under the relevant rules and regulations of the Organisation. It is also clear that any such conduct played no part in the decision not to renew the Applicant's contract. It was never even suggested that the decision-makers were aware of this allegation. In so far as this allegation was introduced in order to cast doubt on the credibility of the Applicant, it was totally lacking in justification. There is a heavy onus on parties making serious allegations to have a sufficiency of evidence before bringing such allegations to the attention of the Tribunal.

323. In any event, the Respondent, who was represented by experienced counsel, failed to produce any credible evidence that was capable even of raising a mere suspicion that the Applicant had sexually harassed any person. The Tribunal

is confident that counsel would not have brought this serious allegation on such flimsy grounds, unless he was asked to do so by those instructing him. Bringing this allegation and the manner in which it was presented served no purpose that was relevant to the task before the Tribunal.

324. The Tribunal concluded that the allegation was brought for improper purposes, which had nothing to do either with the legal or factual issues that the Tribunal had to determine. If ever there was an appropriate case in respect of which the Tribunal's power under article 10.6 of the Statute applies, it is this case. The Tribunal holds therefore that by trying to bring in evidence of an alleged sexual harassment that had never been the subject of an investigation under the relevant rules and regulations of the Organisation and devoid of any substance, the Respondent's conduct constituted a manifest abuse of proceedings.

325. Further, the Tribunal finds that the Respondent manifestly abused the proceedings with his motion to recall RC/HC Zacarias after he had been thoroughly examined, cross-examined and re-examined. The reason put forward by the Respondent in his motion was that the witness had been taken by surprise by a number of questions that were put to him during cross-examination. It is a well-established rule of evidence that when a witness has given testimony, it is under rare circumstances that he may be recalled. In the present case, the Tribunal finds that this was not one of those rare circumstances.

326. Lastly, the Tribunal finds that the Respondent manifestly abused the proceedings in his handling of the motion for reconsideration of Order No. 052 (the grant of interim relief) by filing submissions that were irrelevant, unnecessary, gratuitous and intended solely to undermine the credibility of the Applicant before the Tribunal and to cause needless distress to the Applicant.

327. The Tribunal holds that the foregoing are examples of the Respondent's manifest abuse of process, which unnecessarily complicated the conduct and management of this case. Consequently, the Tribunal orders the Respondent to

pay to the applicant costs in the sum of USD10,000.

Did the Applicant suffer any moral damage as a result of the way he had been treated and, if so, what was the degree of such damage?

328. The Tribunal finds that as a result of the behaviour of USG John Homes, ASG Catherine Bragg, RC/HC Agostinho Zacarias, and the Deputy Head of OCHA, Farah Muktar, and of the Applicant's wrongful separation from service, he has suffered a high degree of stress, anxiety and moral damage.

329. According to *Crichlow* UNDT/2009/028, "the quantification of such damages is an inexact science", but non-statutory principles to take into account whilst deciding the amount of moral damages to award include:

- a. Damages may only be awarded to compensate for negative effects of a proven breach;
- b. An award of compensatory damages is not punitive against the employer; and
- c. An award should be proportionate to the established damage suffered by the Applicant.

330. Any award of compensation to the Applicant must reflect the effects of the proven breach of duty towards the Applicant by the Organization. In the current case, the evidence shows that the Applicant was hospitalized in January 2009 after being locked out of his office and was placed on certified sick leave from at least 13 April to 28 May 2009. There is also medical documentation in the record indicating that the Applicant suffered emotional harm and was on medication for various ailments from approximately February 2009 to October 2009.

331. In light of the foregoing, the Tribunal ORDERS the Respondent to pay the Applicant USD50,000 under the head of moral damages for the extreme emotional distress and physical harm suffered by the Applicant.

Unlawful loss of employment and reinstatement

332. According to article 10.5 of the Statute of the Tribunal:

“As part of its judgment, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.”

333. The Tribunal finds and holds that the decision not to renew the Applicant’s contract was tainted by both bad faith and improper motive, and that the non-renewal decision was unlawful.

334. By its Judgment UNDT/2009/016, The Tribunal directed the Respondent to pay the Applicant half of his salary from 1 September 2009 until the final determination of the case.

335. The Tribunal hereby ORDERS the Respondent to pay to the Applicant the other half of his salary, between 1 September 2009 and the date of this Judgment, minus the amount the Applicant has already received as advances by virtue of Order No. 052 (NBI/2010).

336. Given the circumstances and the history surrounding this case, the Tribunal does not find it appropriate or pragmatic to reinstate the Applicant under the same terms that existed at the time of his wrongful separation from service.

337. In the PDOG report, the Panel recommended, *inter alia*, that there should be an official apology from senior OCHA management to the Applicant, and a

formal investigation into the harassment exercised against the Applicant by the RC/HC. These recommendations of the PDOG should be implemented by the Respondent.

338. As an alternative to reinstatement, the Tribunal ORDERS that the Respondent shall further pay the Applicant two years' net base salary as compensation.

Nullification of PAS and Purging of all false statements from personnel files

339. It is crystal clear that the requirement of due process was totally disregarded in this case. It is also noteworthy that the process not to renew the contract of the Applicant was initiated even before the Rebuttal Panel that had been convened to decide on the rebuttal of his PAS for the year 2008-2009 had delivered their conclusions, which was on 30 July 2009.

340. The Applicant's PAS for the cycle 2008-2009 was prepared hastily and improperly; it was unclear who, as first reporting officer, had the responsibility to complete it; it contained untrue statements; it was not fully edited in line with the recommendations of the Rebuttal Panel; and the whole PAS process was infected by the sour relationships between the Applicant and those around him who took it upon themselves to complete his PAS.

341. The Tribunal therefore ORDERS that the Applicant's PAS for 2008-2009 be nullified and that all adverse material in relation to this PAS be purged from his personnel file.

Exemplary or punitive damages

342. In line with article 10.7 of the Statute, the Tribunal cannot award exemplary or punitive damages to the Applicant.

343. These two requests of the Applicant are rejected.

Referral to the Secretary-General

344. The Tribunal has extensively discussed the attitude of the RC/HC, Mr. Zacarias, the USG for Humanitarian Affairs, Mr. Holmes, and the ASG for Humanitarian Affairs, Ms. Bragg, as well as others. The Tribunal refers the cases of these individuals to the Secretary-General for accountability purposes in compliance with article 10.8 of the Statute of the UNDT.

345. Mr. Holmes, Mr. Zacarias and Ms. Bragg gave evidence under oath at the hearing. Mr. Muktar did not give evidence, but the Tribunal was handed a copy of a statement made by him by Counsel for the Respondent. The Tribunal has perused that statement and has analysed it in the light of the evidence presented in the case. It reached the conclusion that the attitude and conduct of Mr. Muktar was such that he must also be referred to the Secretary-General for accountability.

JUDGMENT and CONSEQUENTIAL ORDERS

346. Having considered the facts as presented in the Application, pursuant to article 10 of the UNDT Statute, and article 19 of the Rules of Procedure, the Tribunal **ORDERS**:

- i) The payment of the remaining half of the Applicant's salary between 1 September 2009 and the date of this judgment, minus the amount ordered by Order No. 052 (NBI/2010);
- ii) The implementation of paragraphs 76 and 77 of the PDOG Report of 30 June 2009;
- iii) The payment of two years' net base salary as compensation;
- iv) The payment of USD50,000 to the Applicant in moral damages;
- v) The payment of USD10,000 to the Applicant as costs for the Respondent's manifest abuse of proceedings;

vi) That the Applicant's PAS for 2008-2009 be nullified and that all adverse material in relation to this PAS be purged from his personnel file; and

vii) The referral of the Humanitarian Coordinator, Mr. Agostinho Zacarias, the Under-Secretary-General for Humanitarian Affairs, Mr. John Holmes, the Assistant Secretary-General for Humanitarian Affairs, Ms. Catherine Bragg, and the Deputy Head of OCHA, Mr. Farah Muktar, to the Secretary-General for accountability purposes. This, however, presupposes that these individuals are still staff members of the Organization.

347. In assessing the damages, the Tribunal emphasizes that it took care to avoid double counting under the heads of the awards made.

348. Under article 11.6 of the Statute of the UNDT it is provided that when a judgment is published, care should be taken to protect the personal data of persons. Personal data is nowhere defined in the Statute. Be that as it may, the present Tribunal would adhere to its practice of publishing names unless there are valid reasons to the contrary.

349. The Tribunal would wish to note that the names in the present case have not been redacted. It is the considered view of this Tribunal that when individuals occupy high public offices, if the circumstances so warrant, their actions that lead to injustice should be exposed openly. This is also a component of transparent justice and accountability of public servants as reiterated by the General Assembly in resolution 63/253 of 17 March 2009.

(Signed)

Judge Vinod Boolell

(Signed)

Judge Nkemdilim Izuako

(Signed)

Judge Goolam Meeran

Dated this 26th day of February 2013

Entered in the Register on this 26th day of February 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi