Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2013/018
Judgment No.:	UNDT/2013/172
Date:	16 December 2013
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

BASTET

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
François Loriot

Counsel for Respondent:
Susan Maddox, ALS/OHRM, United Nations Secretariat

Introduction

1. By application filed on 27 October 2010 with the New York Registry of the Dispute Tribunal, where it was registered under case No. UNDT/2010/090, the Applicant contests the decision of 27 April 2010 to dismiss him from service.

2. The Applicant is seeking:

a. Rescission of the decision of 27 April 2010;

b. Reinstatement in service with the United Nations, with all his rights and emoluments, with retroactive effect from 27 April 2010;

c. Payment of two years' net base salary as compensation for the moral harm resulting from the violations of his rights;

d. In view of the exceptional circumstances, payment of additional compensation of three years' net base salary should the Administration decide, pursuant to art. 10, para. 5, of the Tribunal's Statute, not to reinstate him;

e. Payment of costs by the Respondent owing to abuse of the disciplinary process;

f. Removal of all adverse documents concerning the Applicant from his personnel records and the Organization's websites.

Proceedings in front of the Tribunal

3. By Judgment *Bastet* UNDT/2012/196 of 11 December 2012, the judge then in charge of the case decided that the application was receivable.

4. By Order No. 74 (NY/2013) of 21 March 2013, the judge then in charge of the case convoked the parties to an oral hearing set for 28 to 30 May 2013.

5. By Order No. 96 (NY/2013) of 12 April 2013, the case was transferred to the Geneva Registry of the Tribunal, where it was registered under case No. UNDT/GVA/2013/018 and assigned to Judge Cousin.

6. The Tribunal then decided, by Order No. 49 (GVA/2013) of 2 May 2013, to postpone the oral hearing, and informed the parties that witnesses would be convoked subsequently if necessary.

7. By Order No. 58 (GVA/2013) of 16 May 2013, the Tribunal ruled that, for the time being, no witnesses would be convoked to the oral hearing, that the Applicant's motion for travel costs for him and his counsel was rejected, and directed the Applicant to produce additional documents.

8. On 6 June 2013, the Applicant filed a motion of suspension of proceedings before the Dispute Tribunal in view of the appeals he had filed against Orders No. 96 (NY/2013) and No. 58 (GVA/2013); he also informed the Tribunal that his father was undergoing medical treatment of unpredictable duration.

9. By Order No. 80 (GVA/2013), dated 14 June 2013, the Tribunal rejected the Applicant's motion for suspension of proceedings and decided to reschedule the oral hearing in light of the Applicant's exceptional personal circumstances.

10. By Order No. 130 (GVA/2013) of 11 September 2013, the Tribunal convoked the parties to an oral hearing on 16 October 2013.

11. On 23 September 2013, Counsel for the Applicant informed the Tribunal of his motion for interim measures in the case filed with the Appeals Tribunal. On 10 October 2013, he also informed the Tribunal that the Applicant's father could not testify as a witness owing to his medical condition and that the Applicant had to remain near his father and would therefore be unable to attend the hearing.

12. By order No. 153 (GVA/2013) dated 11 October 2013, the Tribunal informed the parties that the date of the oral hearing was upheld and recalled its decision in Order No. 58 (GVA/2013) that witnesses would not be convoked at the current stage of the proceedings and that the Applicant could attend the hearing by telephone.

13. On 16 October 2013, at 2.17 p.m. (Geneva time), Counsel for the Applicant informed the Tribunal that he had been in an accident the previous day, that he required treatment at the hospital and that he would therefore be unable to attend the oral hearing. By Order No. 158 (GVA/2013) of 18 October 2013, the Tribunal ordered Counsel for the Applicant to produce a medical certificate from the hospital where he had received treatment.

14. By Order No. 160 (GVA/2013) of 22 October 2013, the Tribunal ordered the Respondent to provide additional documents concerning the decisions taken in the framework of the disciplinary process.

15. On 29 October 2013, the Respondent responded to Order No. 160 (GVA/2013) and transmitted to the Tribunal the letter of 22 February 2010 in which the Officer-in-Charge of the Administrative Law Unit recommended to the Officer-in-Charge of the Office of Human Resources Management ("OIC, OHRM") that a disciplinary process should be initiated against the Applicant and a memorandum of 22 March 2010 from the OIC, OHRM, sent to the Secretary-General through the Under-Secretary-General for Management, recommending to the Secretary-General the dismissal of the Applicant.

16. By Order No. 168 (GVA/2013) of 1 November 2013, the Tribunal once again sought clarification from the Respondent concerning the decision-makers in the framework of the disciplinary procedure; the Respondent was also asked to specify in what capacity and on what legal basis the decisions had been taken by the individuals in question.

17. By Order No. 174 (GVA/2013) of 7 November 2013, the Tribunal convoked the parties to an oral hearing set for 4 December 2013.

18. On that same day, 7 November 2013, the Respondent responded to Order No. 168 (GVA/2013). He produced, *inter alia*, a memorandum from the Assistant Secretary-General for Human Resources Management ("Assistant Secretary-General, OHRM") dated 30 July 2009 addressed to the Secretary-General through the Under-Secretary-General for Management recommending that the Secretary-General should delegate to the Under-Secretary-General for Management the

authority to take disciplinary measures and to dismiss staff members. He also produced a note from Mr. Nambiar, Chef de Cabinet of the Secretary-General, sent to the Under-Secretary-General for Management on 17 August 2009 to inform her that the Secretary-General had approved the delegation of authority to the Under-Secretary-General for Management, effective 1 July 2009, for disciplinary decisions and the dismissal of staff members.

19. The Applicant filed a motion for summary judgment on 15 November 2013.

20. By Order No. 179 (GVA/2013) of 18 November 2013, the Tribunal rejected the Applicant's motion, but nevertheless ordered the Respondent to respond, point by point, to the issues of law raised by the Applicant in his submission of 15 November 2013.

21. The Respondent submitted his response to Order No. 179 (GVA/2013) on 25 November 2013 and the Applicant replied on 27 November 2013, requesting, *inter alia*, that the Tribunal order the Secretary-General to appear as a witness concerning the delegation of authority.

22. The oral hearing was held on 4 November 2013, attended by Counsel for the Respondent (by videoconference) and Counsel for the Applicant (by telephone).

Facts

23. A deed of sale was signed on 1 August 1991 by Mr. Mascarotti, as the grantor, and Mr. Bruno Bastet, the Applicant, as the grantee, for an apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States.

24. On 22 August 1991, the father's attorney registered the deed of sale of the apartment in the register of Manhattan, NY, as a real estate transaction, on behalf of the Applicant.

25. The Applicant joined the Organization on 6 March 2000 and in February 2005 was transferred to the Department of Economic and Social Affairs ("DESA") at United Nations Headquarters in New York, as a Governance and Public Administration Officer. At the time of the contested decision, the

Applicant was still serving as a Governance and Public Administration Officer in DESA, at the P-4 level.

26. In November 2004, the United Nations granted the Applicant a dependency allowance for his domestic partner, Ms. Eve de Lengaigne, effective 1 February 2004. The Organization also recognized Ms. Eve de Lengaigne's daughter as a dependent of the Applicant, as his stepdaughter.

27. On 3 August 2005, the Applicant submitted a first rental subsidy claim for himself, his domestic partner (Ms. Eve de Lengaigne) and her daughter, as well as for their common son, as the tenant of the apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States, with a monthly rent of USD 4,600. The Applicant attached to the claim submitted to the Organization in or around the month of September 2005 a lease dated 25 July 2005 with EuroConsulting S.A., as well as documents from the United Nations Federal Credit Union indicating that USD 4,600 had been debited from his account on 2 August 2005 and 1 September 2005. The 25 July 2005 lease submitted by the Applicant pertains to the rental of the apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States; it is signed by the Applicant as the tenant and by EuroConsulting S.A., c/o Mr. Christopher Saladin; EuroConsulting S.A. is shown as the landlord of the apartment.

28. In or around August 2006, the Applicant submitted a second rental subsidy claim to OHRM for the same apartment with a monthly rent of USD 5,100. The claim was dated and signed on 3 August 2006 and covers the period from 1 August 2006 to 31 July 2007. The Applicant attached to his claim a second lease signed by him and EuroConsulting, S.A., c/o Mr. Christopher Saladin, on 26 July 2006 for the same apartment, with a monthly rent of USD 5,100. He also attached two cancelled cheques issued by the Applicant to Mr. Christopher Saladin in the amounts, respectively, of USD 5,100 for the "rent" and USD 500 for the security deposit. The Applicant also submitted to OHRM travel documents from August 2006 for his wife and the two children as proof that they were living with him. From that date, he received a higher rental subsidy payment as a married staff member with two children.

29. On 19 July 2007, the Applicant submitted a third rental subsidy claim to OHRM, dated and signed on 18 July 2007, for the same apartment, with a monthly rent of USD 5,355, for the period from 1 August 2007 to 31 July 2008. He attached to his claim a third lease, for that period, dated 3 July 2007 and signed by him and EuroConsulting S.A., c/o Mr. Christopher Saladin, with a monthly rent of USD 5,355, as well as a cancelled cheque in the amount of USD 5,355 as proof of payment of the rent.

30. On 6 August 2008, the Applicant submitted another rental subsidy claim to OHRM, dated and signed on 6 August 2008, for the same apartment and with a monthly rent of USD 5,729.85, for the period from 1 August 2008 to 31 July 2009. Once again, the Applicant attached to his claim a lease dated 3 July 2008 with EuroConsulting S.A., this time c/o Ms. Shira Debara, stipulating a monthly rent of USD 5,729.85, as well as a cancelled cheque.

31. On 17 February 2009, the Applicant submitted a rental subsidy claim to OHRM for an apartment in New Jersey ("NJ") for the period from 1 December 2008 to 30 November 2009, for a monthly rent of USD 7,350. The claim is dated and signed on 28 December 2008 and in the section on family composition it indicates a spouse, two daughters and the son of the Applicant. Attached to the claim was a lease, signed by the Applicant on 12 November 2008, for an apartment at 625 Bower Street, Linden, NJ, 07036, for a monthly rent of USD 7,350; the Applicant is shown as the tenant and Ms. Norma Mota as the landlord. Also attached to the claim were four cancelled cheques issued by the Applicant to the order of Ms. Norma Mota, one for the security deposit and three for the rent, as proof of payment.

32. In May 2009, the Applicant's personal status was changed to "divorced", effective 30 April 2009, and the dependency allowance was discontinued in relation to Ms. Lengaigne and her daughter. As from 1 May 2009, Ms. Gloriza Saladin and her two daughters were recognized by the Organization as dependents of the Applicant. From that date, he received dependency allowances for his son, as well as for for Ms. Saladin and her two daughters.

33. On 27 August 2009, the Office of Internal Oversight Services ("OIOS") was informed of a press report that the Applicant had falsified his address in order to illegally obtain a housing allowance in France. According to the article, the Applicant had allegedly indicated that he lived in a rent-controlled housing complex (HLM) in France, whereas he had been living in New York since 2004, and his domestic partner, Ms. de Lengaigne, had been living in the Dominican Republic with her daughter and the couple's son since 2005. The article also indicated that the Applicant was receiving rental subsidies from the United Nations even though he owned an apartment in Manhattan.

34. On 4 September 2009, OIOS interviewed Ms. Lengaigne by telephone. On 18 September 2009, the OIOS investigators went to 625 Bower Street, NJ. On 22 September 2009, the town of Linden, NJ, provided OIOS with a certified list of landlords which showed that the landlords of 625 Bower Street, NJ, were Ms. Marie and Mr. Joseph P. The investigators reached Mr. Joseph P. by telephone on 24 September 2009, and according to the investigators, Mr. P. informed them that he did not know any "Bruno Bastet" and had never signed a lease agreement with anyone by that name, nor did he know who Norma Mota was. Mr. Joseph P. would also have stated to them that until August 2009 he had rented one of the apartments at 625 Bower Street to Ms. Gloriza Saladin, who had lived there with her two daughters for approximately five years, and that he had signed lease agreements with her on an annual basis.

35. On 24 September 2009, the investigators held their first interview with the Applicant. According to the investigation report, signed by the Applicant and the two OIOS investigators on 6 October 2009, the Applicant informed them that from 2005 until the fall of 2008 he had lived at 140 East 56th Street with Ms. de Lengaigne, his son and his stepdaughter, and that subsequently, from the fall of 2008 until August 2009, he had lived at 625 Bower Street, NJ, with Ms. Saladin and her two daughters, leasing the apartment from Ms. Norma Mota. Then, in August 2009, he had moved to Bedminster, NJ. During the interview, the Applicant also stated that he had never owned property in the United States. With respect to the purchase of the apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States, he said that this was a real estate investment of

his father and that at the time of the purchase, his father's attorney had mistakenly used the Applicant's power of attorney rather than his father's. This error had never been corrected subsequently because it was more beneficial to his father for tax reasons. The Applicant also stated that he paid rent to his father while he lived at 140 East 56th Street and that the increase in rent was owing to the changing real estate market conditions in New York City. He also said that he paid taxes for the apartment which were reimbursed by his father and that EuroConsulting S.A. was an international management company based in the Dominican Republic that his father had set up at Ms. Lengaigne's suggestion in order to lease 140 East 56th Street.

36. On 1 October 2009, the investigators went to 20 Beekman Place, NY, in order to ascertain whether the Applicant was living or had lived in the building. According to the unsigned note to file, the investigators spoke with the doorman and a person in charge of building maintenance, who said they recalled that the Applicant had previously lived in apartment No. 11 of the building.

37. On 2 October 2009, the investigators telephoned Ms. Diana Sullivan of Solil Management, the company in charge of the management of the building at 20 Beekman Place, NY. According to the unsigned note to file, Ms. Sullivan confirmed that the Applicant had leased a studio apartment at 20 Beekman Place, Unit No. 11, NY, from 1 August 2005 to 31 July 2009 for a monthly rent of USD 2,100.

38. On 5 October 2009, the investigators telephoned Mr. Kan Devnani, who, according to the unsigned note to file, confirmed that he had leased the 140 East 56th Street apartment from the Applicant since July 2006 for a monthly rent of USD 2,730.

39. On 6 October 2009, one of the OIOS investigators in charge of the investigation wrote an e-mail to Mr. Devnani referring to their telephone conversation of the previous day and requesting him to send OIOS a copy of the lease agreement he had signed with the Applicant for the apartment located at 140 East 56th Street, NY. By e-mail of 7 October 2009, Mr. Devnani answered that he did not want to send the lease agreements because they contained private

information about him. On the same day, the investigator called Mr. Devnani, who, according to the unsigned note to file concerning the call, confirmed that he did not want to provide copies of the lease agreements because he was afraid that the Applicant would not renew his lease; Mr. Devnani also informed the investigator that the Applicant had called him and told him that, if he was contacted by the investigators, he should not give them any information or documents.

40. On 6 October 2009, the investigators had a follow-up meeting with the Applicant in order to allow him to review the report on the interview of 24 September 2009. At this meeting, the Applicant signed the investigation report of 24 September 2009 and gave the investigators some documents, including a letter of 23 June 2005 signed by the successor attorney at the law office retained by the Applicant's father for the purchase of the apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States. In the letter, the attorney states that as the father, unlike the Applicant, did not have a social security number in the United States at the time of the apartment purchase, it had been purchased through the Applicant, but that the money for the purchase had been provided by the father and that the purchase had been made for the father's benefit. According to the note to file, the Applicant, upon being informed by the investigators that they had received confirmation that Ms. Norma Mota was not the landlord of 625 Bower Street, Linden, NJ, was unable to give an explanation. He was also unable to give an explanation when he was informed by the investigators that Mr. Joseph P., the actual landlord of the apartment, had never heard the name "Bruno Bastet" and that he had signed an agreement with Ms. Gloriza Saladin, but not with the Applicant. The note to file also indicated that the Applicant admitted to having leased apartment No. 11 at 20 Beekman Place, NY, but that he had leased it for his brother, who did not have a social security number and therefore was unable to lease an apartment in the United States.

41. On 9 October 2009, the OIOS investigators interviewed Ms. Dabara, whose name appeared, on behalf of EuroConsulting S.A., on the last lease agreement submitted by the Applicant for the apartment at 140 East 56th Street, NY.

According to the unsigned note to file concerning the interview, Ms. Dabara denied having signed an agreement with the Applicant and stated that the signature on the lease was not hers and that she had never received or cashed cheques for that or any other apartment. In an e-mail of 10 October 2009, Ms. Dabara confirmed that she had never signed an agreement with the Applicant and that the signature on the lease was not hers.

42. On 16 October 2009, the investigators interviewed Mr. Christopher Saladin by telephone; according to the (unsigned) note to file concerning the interview, Mr. Saladin informed the investigators that he had never been employed by a company named EuroConsulting S.A. and that he had never signed a lease agreement with the Applicant, whom he did, however, know in a personal capacity; he also stated that he had lived with the Applicant in apartment No. 11 at 21 Beekman Place, NY, for a few weeks in July 2006.

43. For the period from 1 August 2005 to 30 September 2009, the Applicant received monthly rental subsidy allowances from the Organization in the following amounts: USD 13,562.78 for the period from 1 August 2005 to 31 July 2006; USD 23,492.66 for the period from 1 August 2006 to 31 July 2007; USD 23,305.83 for the period from 1 August 2007 to 31 July 2008; USD 7,686.05 for the period from 1 August 2008 to 30 November 2008; and USD 23,836.05 for the period from 1 December 2008 to 30 September 2009.

44. On 11 December 2009, the Applicant received a copy of the draft preliminary investigation report of OIOS and was invited to submit comments thereon.

45. On 24 December 2009, the Applicant submitted his written comments on the draft report in which he stressed that he was the victim of defamation by his former domestic partner and that, while the apartment at 140 East 56th Street, 14H, New York, NY 10022, United States, had been put in his name for bureaucratic reasons during its purchase, its real owner was his father, Mr. Guy Bastet.

46. OIOS finalized its preliminary investigation report on 31 December 2009.

47. On 12 January 2010, the Under-Secretary-General, OIOS, sent a bi-weekly report to the Secretary-General informing him that the investigation undertaken by OIOS following the media reports about the Applicant had been completed and that the investigation report had been submitted to the Programme Manager.

48. By memorandum dated 22 February 2010, the Officer-in-Charge of the Administrative Law Unit recommended to the OIC, OHRM, to institute disciplinary proceedings against the Applicant under sec. 5 of ST/AI/371 (Revised Disciplinary Measures and Procedures, available in English only).

49. By memorandum of the same day, the OIC, OHRM, informed the Applicant that he faced charges of misconduct for knowingly submitting inaccurate claims for rental subsidy allowance to the Organization between 3 August 2005 and 17 February 2009 and certifying the accuracy of such claims, and for receiving from the Organization rental subsidy allowances for the period from 1 August 2005 to 30 September 2009 to which he knew he was not entitled. In this letter, the OIC, OHRM, requested the Applicant to submit comments or explanations in writing in response to these accusations within two weeks.

50. The Applicant submitted his comments on the charges letter on 9 March 2010, requesting that all charges against him be dropped as they resulted from false accusations and a biased investigation report. In his comments, he states that while he appears on paper to be the owner of the apartment at 140 East 56th Street, NY, the apartment actually belongs to his father.

51. By memorandum of 22 March 2010 addressed to the Secretary-General through the Under-Secretary-General for Legal Affairs and the Under-Secretary-General for Management, the OIC, OHRM, recommended the Applicant's dismissal. This memorandum was signed by the Under-Secretary-General for Legal Affairs and the OIC, Under-Secretary-General for Management, but no date of signature is indicated on the memorandum.

52. By letter of 27 April 2010, the OIC, OHRM, informed the Applicant that the Under-Secretary-General for Management, on behalf of the Secretary-General, had decided to impose the disciplinary measure of dismissal from service,

effective as at the date of the Applicant's receipt of the letter. She also informed him that, in accordance with staff rule 3.17 (c) and the provisions of ST/AI/2009/1, the Organization would take the necessary action to recover his indebtedness to the Organization for the rental subsidy overpayments.

Parties' submissions

53. The Applicant's contentions are:

a. The investigation procedures applicable at the United Nations were not followed and his due process rights were violated. The Respondent failed to consider all the legal problems of the case; in particular, the exculpatory evidence was not taken into account; the dismissal decision is unlawful and was based on false evidence and hearsay. OIOS obtained testimony from individuals who were biased against him;

b. His former domestic partner, Ms. Eve de Lengaigne, launched a campaign against him in the press and on the Internet; she is acting in bad faith and is not credible; during his two interviews with the OIOS investigators, they did not inform him that they had already spoken with Ms. de Lengaigne; in addition, Ms. de Lengaigne does not speak English, whereas the unsigned note to file concerning her conversation with the investigators, which they drafted, is in English;

c. The other witnesses interviewed by the investigators are not credible either; they made false statements and the OIOS investigation report relies mainly on this evidence; unless he is given the opportunity to cross-examine Ms. Eve de Lengaigne and the other witnesses heard by OIOS, all of their testimony should be discarded;

d. He is not the owner of the apartment located at 140 East 56th Street, 14H, New York, NY 10022, United States. This is established by the management mandate that his father signed in 1991 concerning the apartment, which was owned by his father, and by the letters of 23 June 2005 and 25 October 2005 from his father's lawyers;

e. The investigation was opened within a media-hyped and politicized context; on 24 September and 6 October 2009, he was invited by the OIOS investigators to discuss the news stories that had appeared in the press; contrary to what was stated in the charges letter, the OIOS investigators never informed him that they were conducting a formal investigation into allegations of rental subsidy fraud against him; he was not informed of the scope of the OIOS investigation or the charges being investigated, nor was he informed of his right to the assistance of counsel; there were complex legal issues involved and the Applicant responded to the investigators in good faith; he explained to them that his father, Mr. Guy Bastet, was the sole owner of the apartment located at 140 East 56th Street; the OIOS investigators did not take the Applicant's exculpatory evidence into account;

f. During his interview with the investigators on 6 October 2009, he requested the opportunity to add some clarifications and comments to the investigation report at home before signing it and returning it to OIOS, but the investigators forced him to sign it immediately; he therefore added some comments in the margins and signed the report;

g. It was only in late February 2010 that he was informed of his right to the assistance of counsel, and of the charges against him; the counsel assigned to him by the Office of Staff Legal Assistance was incompetent;

h. The report of 12 January 2010 of the Under-Secretary-General, OIOS, addressed to the Secretary-General shows that the Applicant was used to set an example on the accountability of United Nations staff members; the Under-Secretary-General, OIOS, unduly interfered in the investigation and disciplinary process;

i. It was only in the charges letter of 22 February 2010 that the Applicant was invited to seek the assistance of counsel from the Office of Staff Legal Assistance; the charge set out in the letter was very vague;

j. The Administration violated the *Sokoloff* jurisprudence of the former United Nations Administrative Tribunal (Judgment No. 1246 (2005)) in that

it failed to disclose to the Applicant the evidence and testimony on which the investigation was based and failed to give him the right to seek the assistance of counsel during the investigation;

k. Following the OIOS investigation, no formal investigation was ever conducted before the dismissal decision was taken, contrary to the provision in sec. 3 of ST/AI/371 and the jurisprudence of the United Nations Appeals Tribunal and Dispute Tribunal;

l. The OIC, OHRM, was not authorized under staff rule 10.3(a) to initiate the disciplinary process; that authority rests exclusively with the Secretary-General himself; there was no such decision of the Secretary-General in this case; the decision on dismissal of the Applicant must be considered non-existent;

m. He should be awarded the amount of USD 20,000 for the failure to provide him with competent counsel from the Office of Staff Legal Assistance, which forced him to seek assistance from outside counsel.

54. The Respondent's contentions are:

a. The Tribunal's review is limited to considering whether the Secretary-General abused his discretionary authority in disciplinary matters and whether he exercised it in a reasonable and lawful manner while following the applicable procedures; the Tribunal cannot substitute its judgment for that of the Secretary-General;

b. Contrary to the Applicant's contention, there was sufficient evidence to provide grounds for the dismissal decision; the Administration did not rely unduly on the information provided by Ms. de Lengaigne;

c. The procedure followed in this case is in compliance with Chapter X of the Staff Rules and ST/AI/371 of 2 August 1991; this is an administrative procedure and the procedure is not the same as in a criminal procedure;

d. United Nations investigation procedures must give staff members the opportunity to defend themselves and in this case the Applicant had that opportunity; during the preliminary investigation, he was properly interviewed and the investigators informed him of the facts on which the allegations against him were based and showed him the relevant documents, including the notarized deed for the apartment on East 56th Street;

e. At that stage of the process, the Applicant had no right to the assistance of counsel and the jurisprudence of the former United Nations Administrative Tribunal in *Sokoloff* Judgment No. 1246 (2005) does not apply; on 6 October 2009, the Applicant signed the interview report; that interview report shows that he did not request counsel;

f. The Applicant also had the opportunity to submit his comments on the draft investigation report and they were duly taken into consideration;

g. The Applicant did not provide any evidence that the investigation process was biased or show how his lack of counsel during the proceedings might have caused him harm;

h. Subsequently, by memorandum of 22 February 2010, the Applicant received notice of the charges against him and of his right to seek the assistance of counsel; the preliminary investigation report was conveyed to him and he had the opportunity to refute the allegations against him; he also had the opportunity to submit comments on the final investigation report, which he did in his note of 9 March 2010;

i. The notarized deed of 1 August 1991 establishes unequivocally that the Applicant is the owner of the East 56th Street apartment;

j. The Applicant's explanations concerning the purchase of the apartment are contradictory: he first stated that the purchase made in his name was an error that was not corrected subsequently for tax reasons, but he later stated that the apartment had been deliberately purchased in his

name for his father's benefit because, unlike the Applicant, his father did not have a social security number in the United States;

k. There is sufficient evidence to establish that the Applicant, with or without the collusion of Mr. Saladin and Ms. Dabara, fabricated the lease agreements between him and EuroConsulting S.A., a company in which he and/or his domestic partner held shares, so as to enable him to inflate his rental payments; there is also evidence to support the conclusion that the Applicant, for all or part of the period during which he received rental subsidy allowances for this apartment, was not living at East 56th Street and that he had leased the apartment to a third party at the market rate; the Applicant's explanations in that regard are not credible and do not refute that conclusion;

l. The evidence also leads to the conclusion that the Applicant fabricated the lease agreement for the apartment at 625 Bower Street at an inflated rental price while he was residing elsewhere;

m. Consequently, it has been established that between 3 August 2005 and 17 February 2009, the Applicant knowingly and with intent to defraud the Organization submitted inaccurate rental subsidy claims after certifying, with his signature, the accuracy of the information contained therein; he also attached falsified documents to his applications; accordingly, from 1 August 2005 to 30 September 2009, the Applicant received rental subsidy allowances from the Organization to which he knew he was not entitled;

n. Documents were submitted to the Tribunal to substantiate that on the date on which the dismissal decision was taken, the Secretary-General had delegated his disciplinary authority to the Under-Secretary-General for Management; there is also a long-standing practice in the Organization whereby an official may designate a subordinate as OIC of his or her office in order to manage all the affairs of the office on his or her behalf. The decision was taken by the person performing the duties of the Under-Secretary-General for Management at the time, in accordance with the Secretary-General's delegation of authority for dismissals to the Under-

Secretary-General for Management effective 1 July 2009. This authority was not delegated to Ms. Kane in her individual capacity, as in that case the Secretary-General would have mentioned her by name. A duly designated OIC replaces the absent individual in order to fully exercise that person's authority and carry out all the functions of the office; consequently, in order to ensure the good functioning of the office, he or she has full authority and even an obligation to take all decisions that lie within the remit of the absent individual, even major ones such as dismissal decisions;

o. The Respondent therefore concludes that the dismissal decision is lawful and requests that the application be rejected in its entirety.

Consideration

UNDT proceedings

55. By Judgment *Bastet* UNDT/2012/196 of 11 December 2012, the judge then in charge of the case in New York decided that the application was receivable. It is not therefore for the present Tribunal to review that point. However, although the judge who ruled on the receivability of the application subsequently found that it would be necessary to hear certain witnesses, the judge who took charge of the case in Geneva following its transfer found that, despite the Applicant's and Respondent's requests on the hearing of witnesses, the case could be decided without hearing witness testimony. In fact, he found that he was sufficiently enlightened by all of the evidence on file, particularly by the contract of sale. Indeed, it appeared to the Tribunal that most of the testimony that might have been heard would have been of little value, given that this litigation is unfolding within a context of damaged family or personal relationships. Moreover, most of the testimony that might have been useful to the Tribunal would have come from persons outside the Organization who could not be compelled to appear. In addition, although the Tribunal attempted several times to set a date for the oral hearing that would allow the Applicant to appear in person together with his counsel, the Applicant was unable or unwilling to attend the hearing. Therefore

the Tribunal considers itself sufficiently informed as at the date of the present judgment.

Lawfulness of the decision

56. To contest the decision to dismiss him from service, the Applicant maintains, *inter alia*, that the decision was taken by an unauthorized official.

57. As at 27 April 2010, the date on which the Applicant was informed of his dismissal from service, the applicable texts on disciplinary measures were regulation 10.1 (a) of the Staff Regulations (ST/SGB/2009/6), according to which "The Secretary-General may impose disciplinary measures on staff members who engage in misconduct"; and rules 10.1 to 10.3 of the Staff Rules (ST/SGB/2009/7), which provide as follows:

> **Rule 10.1**
>
> **Misconduct**
>
> (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
>
> (b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.
>
> (c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

...

Rule 10.3

Due process in the disciplinary process

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary measure or non-disciplinary measure, except as provided under staff rule 10.2 (b) (iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

...

58. Furthermore, ST/AI/371 of 2 August 1991 then in effect, for which there is no official French translation, stipulates in para. 9 (c) that:

> Should the evidence clearly indicate that misconduct has occurred, and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the staff member be summarily dismissed. The decision will be taken by or on behalf of the Secretary-General.

59. In the instant case, the Applicant was informed by letter of 27 April 2010 signed by the OIC, OHRM, in New York that the Under-Secretary-General for Management, on behalf of the Secretary-General, had decided to impose the disciplinary measure of dismissal from service. It should be pointed out that the letter does not indicate the date on which the dismissal decision was actually taken. The Applicant argues firstly that on the date on which the dismissal decision was taken the Under-Secretary-General for Management had not received proper delegation of authority from the Secretary-General. At the Tribunal's request, the Respondent, to justify that the Under-Secretary-General for Management had duly received such delegation of authority tendered into evidence a letter dated 30 July 2009 addressed to the Secretary-General from the Assistant Secretary-General, OHRM, through the Under-Secretary-General for Management, in which it is proposed that the Secretary-General should delegate his disciplinary authority, including the authority to dismiss staff members, to the Under-Secretary-General for Management, and in addition, a note signed by Mr. Nambiar, the then Chef de Cabinet of the Secretary-General, informing Ms. Kane, the Under-Secretary-General for Management, that the Secretary-General had approved that delegation of authority. The Tribunal considers that there is no reason to doubt the latter document and that the Secretary-General did indeed wish to delegate that authority to the Under-Secretary-General for Management. However, while such delegation does exist, the Tribunal notes that at the material time of the facts, it had not been officially published through any of the means generally used by the Administration to publish official documents that are enforceable against staff members. In a matter as important as disciplinary measures against staff members, particularly their dismissal, it is imperative that they should have knowledge of the texts that authorize the individuals imposing

such measures to take those decisions. Delegations of authority are important decisions because they alter the authority conferred on staff members by the regulations. In the instant case, ST/AI/371 of 2 August 1991, which was officially published, provides in para. 9 (c) cited above that a dismissal decision will be taken "by or on behalf of the Secretary-General". Official publication of the Secretary-General's decision to delegate his authority to dismiss staff members was therefore necessary in order for that decision to take effect and enable Ms. Kane, the Under-Secretary-General for Management, to exercise that authority. Since no such publication occurred, the dismissal decision would have been unlawful on that ground alone even had the Under-Secretary-General for Management signed it herself.

60. Moreover, according to the Respondent the decision to dismiss the Applicant was taken by Mr. Adlerstein on 15 April 2010 while he was the OIC designated by the Under-Secretary-General for Management by memorandum of 5 April 2010. The Tribunal notes that no decision of 15 April 2010 was submitted and therefore the only document that might be considered the decision taken by Mr. Adlerstein is the memorandum of 22 March 2010 sent by the OIC, OHRM, to the Secretary-General through the Under-Secretary-General for Management, a document that should contain the signature of Mr. Adlerstein as OIC designated by the Under-Secretary-General for Management, with a stamp reading "Approved on behalf of the Secretary-General".

61. The Tribunal observes, first, that it had to press the Respondent twice before he finally conveyed the name of the official who had actually taken the contested decision, and second, that until that information was conveyed it was impossible for the Applicant to know the name of the person who had decided to dismiss him, which in the Tribunal's view is a violation of an essential right. All administrative decisions should include not only the date and the decision-maker's signature but also his or her position and in case it is indecipherable from the manual signature, the name should be mentioned in all letters.

62. The Tribunal decided above that the dismissal decision was unlawful on the sole ground that the decision to delegate authority for dismissal to the Under-

Secretary-General for Management had not been published. Nevertheless, it must also examine another argument put forward by the Applicant, to wit, that the dismissal decision was not actually taken by the Under-Secretary-General for Management but by Mr. Adlerstein as the OIC designated by the Under-Secretary-General for Management. The Tribunal must decide whether the decision by Ms. Kane, Under-Secretary-General for Management, to designate Mr. Adlerstein OIC during her absence from the office from 12 April 2010 to 15 April 2010 gave him the decision-making authority to dismiss the Applicant.

63. While there are some texts in the Secretariat that mention the possibility for an official to delegate signing authority to a subordinate during a temporary absence from the office in order to ensure continuity of service, the Tribunal ascertained from the Respondent that there is no general text that regulates this practice in the Organization. The Respondent merely asserted that this is a long-standing practice that ensures the proper functioning of a service, particularly in respect of routine matters, when an official is unable to act. The Tribunal finds that if a practice, long-standing and widely followed as it may be, may be allowable for handling minor or urgent matters, it may never be directed towards or result in the delegation of the Secretary-General's authority to anyone other than the person designated by the Secretary-General.

64. The Secretary-General has the authority to dismiss a staff member from service. The aforementioned ST/AI/371 allowed the Secretary-General to delegate that authority as he did to the Under-Secretary-General for Management. No text allowed the Under-Secretary-General for Management to delegate that authority in turn to another staff member of her office. In order for delegated authority to be sub-delegated in turn, the initial delegation must provide for that eventuality. In the instant case, there was no such provision. The Secretary-General's intention in delegating his disciplinary authority to the Under-Secretary-General for Management was certainly not to enable another person to take a decision concerning the dismissal of a staff member. If that was his intention, he should have made such a provision in the initial delegation of authority, which he did not do. The dismissal of a staff member for misconduct is one of the most serious management actions that the Under-Secretary-General for Management can take.

This is a discretionary decision that requires very careful consideration and an assessment of the gravity of the misconduct involved. According to the Respondent, the contested decision was taken by Mr. Adlerstein on 15 April 2010, yet Ms. Kane returned to the office on 16 April 2010. There was no urgent need for this decision to be taken on 15 April 2010. The Tribunal finds that the decision to dismiss the Applicant was taken by an unauthorized individual and that on that ground as well it is unlawful and should be rescinded.

65. The Tribunal observes, lastly, that whereas ST/AI/371 of 2 August 1991 in effect on the date of the contested decision stipulates those officials who are authorized to be part of the disciplinary process, in the instant case none of those officials was personally involved in the decision-making. The recommendation dated 22 February 2010 to initiate the disciplinary process was signed by the OIC of the Administrative Law Unit, OHRM, and addressed to the OIC, OHRM. On the same day, it was that OIC, OHRM, who informed the Applicant that a disciplinary process had been instituted against him and, as noted above, the same was true of the decision of 22 March 2010. Thus, throughout the disciplinary process, all the major decisions concerning the Applicant, starting with the recommendation to initiate the disciplinary process and ending with the decision to impose a disciplinary measure, were taken by OICs. This clearly shows that the outcome of the current "practice" in the Organization of designating officers-in-charge is that highly important decisions are not actually being taken by the individuals authorized to take them, despite the fact that a personal assessment of a given situation might be required.

Prejudice

66. Pursuant to art. 10, para. 5, of its Statute, when the Tribunal orders the rescission of a decision concerning termination it 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. If the Administration elects to apply the rescission order it must reinstate the Applicant and may, as it deems necessary, impose another disciplinary measure in accordance with proper procedure.

67. This Tribunal must set the compensation to be paid by the Administration should it elect the alternative. The Appeals Tribunal has ruled on the criteria that the judge must apply in setting such compensation, which is to be considered compensation for the material damage to the Applicant. It is necessary to consider first the nature of the unlawful action and then the causal link between the unlawful action and the material damage suffered.

68. The Tribunal found above that the decision to dismiss the Applicant was unlawful owing to a procedural defect, to wit, the lack of authority of the decision-maker. This is a mere formal defect that does not necessarily warrant compensation if the disciplinary measure was justified in any case on the merits. The material damage suffered by the Applicant owing to his dismissal consists in the loss of his salary. The question to be decided by the judge is whether the loss of salary is connected with the fact that the dismissal decision was taken by an unauthorized individual or whether it is the result of the Applicant's own misconduct. In other words, the Tribunal must assess whether the Applicant's misconduct would have led the authorized official, which is the Secretary-General, to take the same dismissal decision.

69. The Tribunal must therefore rule on whether the dismissal decision was justified on the merits.

70. To that end, it must first assess whether the reality of the reproached facts is established. The letter of 27 April 2010 addressed to the Applicant by the OIC, OHRM, informs him of the disciplinary measure taken against him on the grounds that he knowingly submitted inaccurate claims for rental subsidy allowance to the Organization and certified their accuracy, and thereby received from 1 August 2005 to 30 September 2009 rental subsidy allowances to which he was not entitled.

71. It is first reproached to the Applicant that he submitted a rental subsidy claim as the tenant, from 1 August 2005 to 30 November 2008, of an apartment located at 140 East 56th Street, 14H, New York, when he was actually the owner of the apartment. The Applicant maintains that this apartment belongs not to him but to his father, to whom he pays rent through the company EuroConsulting S.A.

The Respondent tendered as evidence the OIOS investigation report, which includes a notarized deed of 1 August 1991 whereby Mr. Mascarotti sells to Mr. Bruno Bastet apartment No. 14H in a building located at "140 East 56th Street, in the Borough of Manhattan, City, County and State of New York".

72. In claiming that this apartment on East 56th Street belongs to his father, the Applicant maintains that his father paid for it and that when the deed was drawn up his father's agent mistakenly wrote the name "Bruno" rather than "Guy" Bastet as the name of the purchaser. Even if this error was made when the deed was drawn up, the Applicant has admitted that he was aware of the error but that nothing was done to correct it because of the additional taxes that would have entailed and the difficulty his father would have had in purchasing an apartment in his own name in the United States owing to the fact that, unlike his son, he did not have a social security number.

73. Then at the oral hearing it was contended that the contract was fraudulent because it did not bear Mr. Bruno Bastet's signature. However, the Applicant's signature was clearly not required on the document since he was not present when it was signed but was represented by Mr. Kurt Dinkelmeyer.

74. The Applicant, having acknowledged that he paid property taxes which were reimbursed to him by his father, maintained that in the eyes of French law the apartment belongs to his father. Having been invited by the Tribunal to produce any document showing that his father had declared the apartment in France as his property, the Applicant failed to do so. In any event, it is United States law that governs the ownership of property in the United States held by United Nations staff members residing there and the Tribunal finds that the Applicant could not ignore that he was requesting a rental subsidy for an apartment of which he was the official owner under United States law.

75. The second issue that the Tribunal must consider is whether requesting a rental subsidy for an apartment that belongs to him amounts to misconduct on the part of the Applicant.

76. ST/AI/2000/16 (Rental subsidies and deductions) of 23 January 2001, which was in effect at the time of the alleged misconduct, stipulates in sec. 2, para. 2.1, that "No rental subsidy shall be paid to staff who live in their own homes or do not pay rent for their dwellings."

77. As noted above, the Applicant could not ignore that he was the official owner of the apartment on East 56th Street by virtue of a notarized deed. In order to receive payment of a rental subsidy, he therefore knowingly submitted to the Administration a lease agreement with EuroConsulting S.A. without informing the Administration that, although he was the official owner, he considered that the apartment belonged to his father. The Tribunal finds that hiding from the Administration the fact that he officially owned the apartment on East 56th Street constitutes serious misconduct, considering the standards of conduct expected of United Nations staff members.

78. In order to decide that the Applicant committed serious misconduct, the Tribunal did not deem it necessary to consider the many other breaches that were the grounds for the disciplinary measure. In fact, it was reproached to the Applicant, *inter alia*, that he falsified lease agreements, paid rent by cheque to persons who were not the landlords, had not actually resided at East 56th Street and had leased the apartment, and made inaccurate declarations about the number of persons for whom he was claiming a rental subsidy allowance etc..

79. All of these items are reflected in the investigation report. However, United Nations investigators have limited authority when conducting investigations outside the Organization and face difficulty in obtaining signed witness statements. In view of these difficulties and the fact that the Applicant strongly contested the investigation procedure, the Tribunal deemed it preferable, in assessing whether the Applicant had committed misconduct, to base its finding on the principal and least questionable piece of evidence on file: the notarized deed of sale. As a consequence, all of the Applicant's contentions concerning the unreliability of the witness statements taken by the investigators must be rejected, since the Tribunal did not use them in reaching its decision.

80. The Tribunal therefore finds that the Applicant committed serious misconduct and that had the Secretary-General himself imposed the disciplinary measure, as he ought to, he would have taken the same decision to dismiss the Applicant. It follows that the loss of the Applicant's job was attributable not to the purely technical illegality committed by the Administration but solely to the Applicant's misconduct. The material damage he sustained was thus exclusively the result of his own actions and the Tribunal therefore decides that, should the Administration elect not to comply with the Tribunal's rescission order, no compensation for material damage is to be paid to the Applicant.

81. With respect to moral damage to the Applicant, the difficulties of livelihood for which he requests compensation were caused solely by his own misconduct and the Tribunal therefore finds it inappropriate to award him any such compensation.

82. The Applicant also requested that all adverse documents relating to the disciplinary proceedings should be expunged from his file. If the Administration executes the rescission order, it must remove from the Applicant's file all documents relating to the disciplinary proceedings. If it does not execute the order, given that the disciplinary measure was justified on the merits, it is inappropriate to order that the documents relating to the disciplinary proceedings be removed from the Applicant's personnel file.

83. Lastly, the Applicant requested that the Respondent be ordered to pay costs owing to the abuse of the disciplinary process. It should be recalled that the only provision which allows the Tribunal to award costs is contained in art. 10, para. 6, of its Statute, which stipulates that: "Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party". In the instant case, the Tribunal finds that there was no abuse of the proceedings by the Respondent and the Applicant's plea is therefore rejected.

Conclusion

84. In view of the foregoing, the Tribunal DECIDES:

a. The decision to dismiss the Applicant is rescinded on the grounds of procedural defect; should the Respondent elect to rescind the decision, all evidence relating to the disciplinary proceedings shall be removed from the Applicant's file;

b. Should the Respondent elect not to execute the above rescission order, no compensation shall be paid to the Applicant and the evidence relating to the disciplinary proceedings shall remain in the file;

c. All other pleas of the Applicant are rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 16th day of December 2013

Entered in the Register on this 16th day of December 2013

(*Signed*)

René M. Vargas M., Registrar, Geneva