UNITED NATIONS DISPUTE TRIBUNAL

Cases No.: UNDT/NY/2010/107
UNDT/NY/2011/004
Judgment No.: UNDT/2013/176
Date: 20 December 2013
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

NGUYEN-KROPP

POSTICA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Thad M. Guyer

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. This is a consolidated Judgment on two cases filed by investigators of the Investigations Division in the Office of Internal Oversight Services ("OIOS") in the UN Secretariat. Ms. Ai Loan Nguyen-Kropp (P-3 level investigator) and her supervisor, Mr. Florin Postica (P-5 level investigator) filed separate applications contesting, in essence, the same administrative decision made in April 2010 to investigate them.

2. Ms. Nguyen-Kropp filed her application (Case No. UNDT/NY/2010/107) on 28 December 2010. She identified the contested administrative decisions as: (a) the "conduct [of] a secret and retaliatory investigation" against her and, (b) the denial of her request to be granted "an appropriate transfer or paid administrative leave". On 5 January 2011, she submitted an amendment to her application in which she added new facts in support of her initial application stating that by memorandum dated 30 December 2010 from Ms. Angela Kane, the then Under-Secretary-General ("USG"), Department of Management ("DM"), she was placed under formal investigation. The Applicant received this memorandum by email of 4 January 2011 from the USG/DM's office. By Order No. 19 (NY/2011), dated 26 January 2011, the Tribunal (Judge Ebrahim-Carstens) allowed Ms. Nguyen-Kropp to amend her application by including the additional facts. However, the Tribunal ordered that the Applicant was not permitted to amend her application to challenge any other separate administrative decision which ought to be subject to separate proceedings. The Tribunal also extended the time for the Respondent's reply to 12 February 2011.

3. By reply dated 11 February 2011, the Respondent submitted that Ms. Nguyen-Kropp's application was not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal and contended, in regard to the initiation of an investigation against Ms. Nguyen-Kropp, that her appeal was time-barred and that

it did not concern a contestable administrative decision. The Respondent stated that the claim in relation to the alleged denial of her request to be granted an appropriate transfer or paid administrative leave was moot as the Applicant had been granted appropriate interim relief.

4. Mr. Postica filed his application (Case No. UNDT/NY/2011/004) on 12 January 2011 and identified the contested decision as the decision to commence what he described as "a secret and retaliatory investigation" against him.

5. By reply filed on 13 February 2011, the Respondent submitted that Mr. Postica's application was not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal in that the Applicant's appeal was time-barred and did not concern a contestable administrative decision.

6. The replies in respect of both applications did not address the substance of the allegations made.

7. On 22 February 2013, the Tribunal issued Judgments on the preliminary issue of receivability in *Nguyen-Kropp* UNDT/2013/028 and *Postica* UNDT/2013/029. The Tribunal found both applications receivable. The Judgment also dismissed for want of prosecution Ms. Nguyen-Kropp's appeal with respect to the decision not to grant her an appropriate transfer or paid administrative leave.

8. It should be noted that in addition to these two cases, both Applicants filed Cases No. UNDT/NY/2011/054 and UNDT/NY/2011/055 against the findings of the Ethics Office that they were not subject to retaliation. By Order No. 65 (NY/2013) of 5 March 2013, the Tribunal consolidated the present Cases (No. UNDT/NY/2010/107 and UNDT/NY/2011/004), and stayed the proceedings in Cases No. UNDT/NY/2011/054 and UNDT/NY/2011/055 against the Ethics Office's findings. The Tribunal also ordered the parties to file a joint submission on agreed facts and law.

9. On 16 August 2013, the parties filed their joint submission in Cases No. UNDT/NY/2010/107 and UNDT/NY/2011/004, including a very large bundle of annexes, the list of which is contained in a 16-page annex. The joint submission includes agreed facts and law as well as an indication of issues in disagreement. The Respondent requested that the names of all staff members other than the names of the Under-Secretary-General, OIOS ("USG/OIOS") and the Applicants not be used and published. At the case management discussion of 7 October 2013, Counsel for the Applicants opposed the request on the grounds that it would be tantamount to administering justice behind closed doors and would be promoting an unhealthy and unwarranted degree of secrecy. By Order No. 240 (NY/2013), dated 8 October 2013, the Tribunal refused the Respondent's request on the grounds that:

> 5. In resolution 61/261, the General Assembly stated that: "[It] [d]ecides to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration 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".
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> 6. It is the Tribunal's view that the General Assembly set out a new system of justice to ensure accountability and transparency and that giving blanket anonymity would not be consistent with this aim. It was agreed that whether individuals should be named is a matter for the Judge's discretion.

Issues

10. The Tribunal had regard to the Judgment of the United Nations Appeals Tribunal in *Massabini* 2012-UNAT-238, which states:

> 2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or

> her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
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> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

11. Consistent with these principles and judicial guidance by the Appeals Tribunal, it was necessary, given the issues and the volume of documents presented, for this Tribunal to hold a series of case management discussions to avoid any confusion, and to define the issues with precision. During the 7 October 2013 case management discussion it was agreed that the issues for determination by the Tribunal are as follows:

a. Whether Ms. Ahlenius, USG/OIOS at the time, had sufficient reason to believe that the Applicants may have committed misconduct justifying an investigation and whether her decision was supported by the documents. The Applicants believed that her decision to commence the investigation was retaliatory because they had made certain allegations of impropriety on the part of Mr. Michael Dudley, then Officer-in-Charge of ID/OIOS;

b. Whether the manner in which Ms. Angela Kane, USG/DM, and those acting on her behalf, sought the service of external investigators caused them reputational damage;

c. Whether there was disparity and inconsistency of treatment as between the Applicants and the way in which Mr. Dudley had been treated in relation to the allegations of misconduct made against him.

12. At the hearing held from 21 to 25 October 2013, the Tribunal had cause to remind the parties that the issues are as defined above. Evidence was given by the Applicants as well as the witnesses for the Respondent, namely Ms. Inga-Britt

Ahlenius; Mr. Byung-Kun Min, then Special Assistant to the USG/OIOS; Mr. Mario Baez, Chief, Policy and Oversight Coordination Service, Office of USG/DM ("OUSG/DM"); Ms. Suzette Schultz, Head of the Professional Practice Section ("PPS"), OIOS; and Ms. Beverly Mulley, Investigator, PPS/OIOS.

13. During the course of the hearing, Counsel for the Applicants invited the Respondent to call Mr. Michael Dudley as a witness to give him the opportunity to answer the references that were made to his role in relation to the issues to be determined. The Respondent considered that evidence by Mr. Dudley was neither relevant nor necessary given the scope of the case. Notwithstanding what may be regarded as references that were adverse to Mr. Dudley, the Respondent decided not to call him as a witness. In the absence of a request by either party that the Tribunal should order his attendance, the Tribunal took into account the strong objections of the Respondent together with the fact that this case was not about whether there was any misconduct on the part of Mr. Dudley but whether there was disparity in the treatment accorded to him compared to the manner in which both Applicants were treated in circumstances that were comparable. Additionally, the Tribunal noted that Mr. Dudley was not the decision maker in relation to the issues to be determined. Accordingly, the Tribunal did not use power under the rules to order, of its own motion, Mr. Dudley's attendance. It was a matter for the Respondent. However, the Tribunal took a different view in relation to Ms. Carman Lapointe, USG/OIOS, as a witness, and proposed, without ordering, that the Respondent may wish to call her in relation to evidence that she had expressed the view, as the incoming USG/OIOS, that the investigation into the Applicants' conduct was unnecessary and a waste of public money. The Respondent opposed the suggestion that she may be called and the Applicants' Counsel did not request that the Tribunal order her attendance. Since the Respondent declined the opportunity to call rebuttal evidence from Ms. Lapointe, the Applicants' evidence in this regard remains unchallenged. It is accepted by the Tribunal.

14. At the end of the hearing, the Tribunal acceded to the request for final closing submissions to be sent in writing. A schedule was agreed for filing submissions to ensure simultaneous exchange and an opportunity for each party to comment on the other party's submissions.

15. In their closing statement, Counsel for the Applicants sets out the sequence of events which aims at demonstrating retaliation and improper motives against them.

16. In her closing statement, Counsel for the Respondent submitted that the Applicants had failed to set out the facts that they proposed to rely upon to prove retaliation and improper motives and that this placed the Respondent at a disadvantage. She also asserted, in essence, that any statements made by the Applicants during the hearings as well as any documentary evidence not agreed upon by the Respondent should not be used by the Tribunal. Counsel for the Respondent submitted that should the Tribunal wish to use such evidence, the Tribunal should hold a further hearing on this matter to permit the Respondent to provide submissions and further evidence. Finally the Respondent submitted that since "testimony is coloured by the deliverer's point of view", the best evidence available is that of contemporaneous documentary evidence.

17. This submission does not find favour with the Tribunal. First, it is not clear to the Tribunal why Counsel for the Respondent considered that the authors' point of view may not similarly colour the contemporaneous documents. Second, this submission defeats one of the fundamental purposes of a hearing where both documentary evidence and witness testimony may be tested and challenged before being assessed and evaluated. This is of particular importance in cases like the present involving alleged misconduct and/or retaliation. Counsel for the Respondent had ample opportunity during the cross-examination of the Applicants to challenge their evidence and to call witnesses in rebuttal.

18. The facts provided below draw, where relevant, from the facts agreed upon by the parties in their joint submission of 16 August 2013, the documentary evidence submitted by the parties, and the testimony of the witnesses who appeared before the Tribunal, including that of the Applicants.

Facts

19. There are two issues which are central to the determination of the question whether the decisions taken by the Administration were in breach of the Applicants' contracts of employment. First was a "Note to File" dated 29 October 2009 sent to Ms. Ahlenius, signed by Mr. Postica and co-authored by Ms. Nguyen-Kropp, recommending that action be taken in relation to Mr. Dudley's handling of evidence in two cases involving the Medical Services Division of the United Nations Secretariat. The second issue concerns detrimental action taken against the Applicants' as a direct consequence of the review/investigation into their concerns expressed in the Note of 29 October 2009. The Tribunal sets out a brief account of relevant and significant events as they unfolded over a course of time. These provide a basis and context for factual findings that demonstrate a catalogue of extraordinarily toxic interpersonal relationships that existed at the time amongst a few individuals at the higher echelons of OIOS and, in particular, within its Investigations Division.

January 2009

20. With effect from 1 January 2009, Ms. Inga-Britt Ahlenius, then USG/OIOS, designated Mr. Michael Dudley as Officer-in-Charge/Acting Director for ID/OIOS.

21. On 26 January 2009, Mr. Dudley received, by telephone, information suggesting serious misconduct in the Medical Services Division. The complaint was made by a member of staff who will be referred to hereinafter as "Ms. X". Ms. X submitted to Mr. Dudley, via emails, a number of photographs and a video-recording

to substantiate her complaint that certain physicians were engaged in the improper prescription of controlled substances or medication.

22. On 30 January 2009, Mr. Dudley formally assigned the investigation to Mr. Postica, who in turn assigned Ms. Nguyen-Kropp to assist him. The investigation was given case no. ID/0052/09.

February 2009

23. The Applicants interviewed Ms. X on 2 February 2009 and uploaded the details in the Integrated Case Management System ("ICMS") folder of OIOS on 17 February 2009. The Applicants interviewed two more witnesses in February 2009. Mr. Postica testified that he also uploaded in ICMS the complaint made by Ms. X, which had not been uploaded as per usual intake procedure by Mr. Dudley when he had received the complaint.

24. By email dated 17 February 2009 (in response to an email from Ms. X that was addressed to Mr. Dudley and forwarded to the Applicants), Mr. Postica wrote to Mr. Dudley, with a copy to Ms. Nguyen-Kropp, giving reasons why he considered that Ms. X's account did not appear to be entirely credible. On 20 February 2009, Mr. Dudley confirmed to Mr. Postica that "[it] seems that [the case] might be a closure with an advisory report".

March 2009

25. On 18 March 2009, Mr. Postica submitted a draft closure report on case no. ID/0052/09 for PPS review, a unit under the direct supervision of Mr. Dudley. The PPS review consists in clearing investigation reports before submission and review by the Director (on this occasion, by Mr. Dudley as Acting Director). The clearance process was described at the hearing by Ms. Suzette Schultz, the Head of PPS, who stated that her unit was given the task of undertaking editorial and legal

review of all draft investigation reports and clearing reports which met procedural standards governing investigations.

April 2009

26. On 23 April 2009, an article outlining the allegations of misconduct being investigated by the Applicants appeared in the Inner City Press, a daily online media outlet that specializes in reporting on the United Nations.

27. By email dated 27 April 2009, Mr. Postica advised the head of PPS that the interview records were being "reformatted" and had not yet been uploaded in Citrix, another document management system in OIOS, because he wanted Ms. Nguyen-Kropp to see them first.

28. On 28 April 2009, the advisory draft report was redrafted again and the closure of case no. ID/0052/09 was signed off by Ms. Schultz, the Head of PPS, then acting as Officer-in-Charge of ID/OIOS in Mr. Dudley's absence on leave.

May 2009

29. On 1 May 2009, Mr. Dudley emailed Ms. Ahlenius, stating:

> Further to recent media reports about the medical service investigation, I did an initial review of the investigation closed by [Mr. Postica]. As a result, I have recommended that he prepare a request for OLA [Office of Legal Affairs] advice on access to certain information, the absence of which he used to justify closure of the investigation with an inconclusive finding and, therefore, no further action.
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> …
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> I will also ask [Ms. Nguyen-Kropp] and [Ms. Schultz, Head of PPS] to do a post mortem on this investigation and prepare a brief report on lessons learned. It appears there were some procedural and operational issues that I still don't understand. This note also will become part of the record to illustrate our due diligence in case closure.

30. On 1 May 2009, Ms. Ahlenius responded that the standard procedure on closing a case should be followed and queried "if and how such a request should be submitted [to OLA]. Could you please send me the 'old' request and the response that we received at the time by OLA".

31. There followed email exchanges between Mr. Dudley, Ms. Ahlenius and Mr. Postica regarding the investigation of case no. ID/0052/09 and in particular the question whether as investigating officers the Applicants were provided with all the information initially provided to Mr. Dudley by Ms. X. There was also an issue regarding the informant's credibility and whether she had misled the investigators and manipulated the information, giving rise to a wholly misleading article in "Inner City Press". As a continuation of the email exchange, by email dated 13 May 2009, Mr. Postica requested Mr. Dudley to provide him with Ms. X's original emails and photographs. In this email, Mr. Postica stated that his view was that Ms. X had "reported her issues to [Mr. Dudley] with a malicious intent" and that she had "provided [Mr. Dudley] with selected pictures of the … log book only because she knew that if she had given [Mr. Dudley] complete pictures … there would [have been] no investigation and no case". Mr. Postica concluded that "hence it is very reasonable to infer that she made a *mala fide* reporting which needs to be investigated. But in any event, this will be clarified after [he] received from [Mr. Dudley] the original complaint and pictures".

32. Ms. Ahlenius later commented that it appeared to be a "clear case of *mala fide* reporting" and that all relevant documents concerning Ms. X's complaint should be collected.

33. On 14 May 2009, an investigation regarding Ms. X's possible malicious complaint was initiated under case no. ID/0234/09 and was subsequently assigned to the Applicants.

34. By email dated 19 May 2009, Mr. Dudley forwarded a message sent by Ms. X by which she made her initial complaint in January 2009. The same day, he confirmed by a note to file that the photos he had attached to his note to file were true copies of the photographs provided to him by Ms. X.

35. Later that day, Mr. Postica informed Mr. Dudley that the photographs attached to the 26 January 2009 intake note to file and 19 May 2009 note to file were not the same in that there had been an alteration to the pictures attached to the 26 January 2009 note. Specifically, the pictures attached to the May 2009 amended intake note to file were more numerous and lacked the graphics and annotations included in the January 2009 intake note.

36. On 20 May 2009, Mr. Dudley stated that he had placed red-lines around certain information highlighted by Ms. X on the photographs she provided when she first made her complaint in January 2009 and that any questions regarding the evidence should be addressed to Ms. X.

June 2009

37. On 22 May 2009 and 3 June 2009, the Applicants prepared draft addenda to the closure report for case no. ID/0052/09. On 24 June 2009, Ms. X's interview record of 2 February 2009 was modified (the modified version was uploaded to Citrix on 6 November 2009).

July 2009

38. On 2 July 2009, the Applicants interviewed Ms. X with respect to case no. ID/0234/09. Ms. X stated that she had given a great number of pictures to Mr. Dudley and that these photographs had not been shown to her during the 2 February 2009 interview. She added that she had dozens of other pictures as well as a video-recording of the narcotics log.

39. By email of 22 July 2009 to PPS, Mr. Postica indicated that PPS had included factual inaccuracies in the draft reports concerning Ms. X.

40. By email of 23 July 2009, Mr. Dudley asked if the investigation was completed. Mr. Postica indicated that completion was subject to getting the "missing emails". In response Mr. Dudley asked: "Are you still going on about the message she sent me when she first called? I cannot see how this pertains to the contraventions you are now investigating unless you are investigating my role". In response, Mr. Postica stated: "As professional investigators, we must be able to clearly explain in the report what evidence she provided to us, when and how. … I trust you would agree that this is very basic investigative procedure, and is particularly important because I cannot otherwise safely conclude (or rule out) malicious reporting on her part … I did [ask Ms. X for copies of her photographs], and although she provided some, she is apparently unable to find the remaining and critical ones that you said—and she confirmed—she sent to you. I otherwise take note of your close interest and involvement in this case, since its inception. But we still must follow proper investigative standards. And these standards require to have in the case file, to use and to assess the (any) initial probative material (particularly digital pictures that were subsequently edited by you) transmitted by (any) complainant. Finally, nobody is investigating you, at least not to my knowledge and not on this issue". Mr. Dudley and Mr. Postica also exchanged comments on whether Mr. Dudley modified the photographs sent to him by Ms. X.

41. By email dated 28 July 2009, Mr. Postica raised with Ms. Ahlenius the issue of the photographs first provided by Ms. X to Mr. Dudley as being necessary to finalize the investigation. Mr. Postica added that the need to obtain the original photographs was particularly important given that Mr. Dudley has edited some of these original pictures after they were given to him.

42. By email dated 28 July 2009, Mr. Postica reiterated the need for the original photographs provided by Ms. X to Mr. Dudley as well as other exchanges of information between Mr. Dudley and Ms. X.

August 2009

43. By email dated 4 August 2009, Ms. Ahlenius confirmed that the documents submitted by Ms. X to Mr. Dudley should be part of the investigation file and that, if need be, Mr. Dudley should have his old emails restored.

44. Various draft reports of a further closure report/addendum to the investigation report were prepared by the Applicants from early August 2009 in case no. ID/0052/09.

45. By email dated 20 August 2009, Mr. Dudley forwarded the emails he received from Ms. X in January and February 2009 to Mr. Postica.

September 2009

46. At a meeting on 25 September 2009 with Ms. Ahlenius, Mr. Postica expressed his concerns regarding Mr. Dudley's actions in the cases concerning Ms. X.

47. On 28 September 2009, Mr. Postica forwarded to Mr. Dudley further pictures he had received from Ms. X which he stated were "unaccounted for", and asked Mr. Dudley whether he would confirm if he had received them from Ms. X and, if so, to provide them to him.

October 2009

48. On 1 October 2009, Mr. Postica and Mr. Dudley corresponded about the lack of documents that had been uploaded in Citrix for case no. ID/0234/09. By email of

the same day to the OUSG/OIOS, Mr. Postica complained that Mr. Dudley had threatened to reassign the work on Ms. X's case and lower his electronic performance evaluation system ("ePAS") rating over the missing file documentation.

49. On 2 October 2009, Mr. Postica met Mr. Dudley to discuss the issue of the photographs provided by Ms. X. By email dated the same day, he stated that "my Note to File will clarify these issues. In particular, it will reflect the fact that: (a) the last two pictures of your original note to file recording (Ms. X's) complaint show only parts of both sides of the register; and (b) on 7 July 2009—after we interviewed [Ms. X] as a subject—[Ms. X] supplied three pictures—of which only one shows both sides of the register".

50. On 21 October 2009, a witness in the first case no. ID/0052/09 signed a copy of his 6 February 2009 interview record for case no. ID/0052/09. Compared to the unsigned version of the interview record, text had been added to paragraph no. 11 of this version of the interview record, as follows: "In the context, he mentioned that [his Office] will cooperate with ID/OIOS to the extent possible whilst keeping in mind that ID/OIOS does not have access to privileged medical information about the UN staff members".

51. By Note to File of 29 October 2009, Mr. Postica signed a complaint, co-authored by Ms. Nguyen-Kropp alleging that Mr. Dudley mishandled evidence related to the cases in connection with the complaint of 26 January 2009 (cases no. ID/0052/09 and ID/0234/09). Mr. Postica sent a copy of this note to Ms. Ahlenius by email of 29 October 2009. This Note to File formed a central part of the case that there was disparity of treatment accorded to Mr. Dudley on the one hand, in relation to the issues raised in the Note to File, and the investigation that had been initiated against the Applicants on the other. The note alleged that Mr. Dudley withheld and altered evidence in a case that attracted media attention and that the alterations resulted in suggesting wrongdoing on the part of persons in the office

being investigated. The Note recommended that appropriate action be taken and suggested a number of questions to be addressed.

November 2009

52. On 6 November 2009, Ms. X's interview record, together with the bulk of documents related to case no. ID/0234/09, was uploaded in Citrix.

53. By email dated 9 November 2009, Mr. Postica informed Ms. Schultz, the Head of PPS, that the draft investigation report dated 6 November 2009 for case no. ID/0234/09, recommending closing the case, was ready for review in Citrix. He commented to PPS that the investigation was marred by "some unfortunate events related to the handling of evidence".

54. By email dated 23 November 2009 to the Head of PPS, Mr. Dudley noted that Mr. Postica had raised some concerns over his role in case no. ID/0234/09. In the circumstances he asked that contrary to normal practice the finalized draft not be sent to him.

December 2009

55. On 4 December 2009, Ms. X filed an application before the Dispute Tribunal challenging her placement on special leave with pay. The status of the investigation report for case no. ID/0234/09 became urgent as Ms. X was accusing OIOS of having leaked to the press the pictures she had provided to Mr. Dudley.

56. By email dated 8 December 2009, Ms. Ahlenius forwarded the Applicants' Note to File of 29 October 2009 to PPS, with a copy to Mr. Dudley, who was the subject of the complaint, and Mr. Postica. Ms. Ahlenius stated that she had spoken to Mr. Postica and the subject of the complaint about the matter and that it was being submitted to PPS for its review and assessment and to address the questions raised by Mr. Postica "in the course of [PPS] process to review

the [draft] investigation report". Ms. Ahlenius instructed PPS to "seek further clarifications and explanations both from [Mr. Postica] and [Mr. Dudley] during [her] review". By email also dated 8 December 2009, Ms. Schultz, the Head of PPS, requested Ms. Beverly Mulley, one of PPS investigators, to undertake the assessment of the Note to File dated 29 October 2009 as she was scheduled to go on leave.

57. By email of 8 December 2009 to Ms. Ahlenius and copied to Ms. Schultz, Mr. Dudley requested that the Note to File from Mr. Postica be removed from Citrix.

58. The next day, the Head of PPS went to Ms. Ahlenius to request that the Note to File be removed from Citrix because it could be disclosed to the United Nations Appeals Tribunal as "supporting documentation" in any future appeal of a decision to impose a disciplinary measure in connection with Ms. X matters. Ms. Ahlenius accepted that the Note to File be taken out of the case file in Citrix as it was not relevant to the second Ms. X matter.

59. By email of 10 December 2009, PPS requested Mr. Dudley's comments on the Note to File, in accordance with the instruction in Ms. Ahlenius' email of 8 December 2009. However, contrary to Ms. Ahlenius' instruction, the Applicants were not provided with a similar opportunity to comment.

60. On 14 December 2009, Mr. Dudley provided his comments to PPS. By email exchange dated 10 and 15 December 2009, Ms. Mulley sought and obtained advice from the Office of Human Resources Management ("OHRM") regarding the use of confidential/privileged material obtained during investigations.

61. By email dated 16 December 2009, the Information Technology ("IT") team in OIOS determined, upon Ms. Mulley's request, that Ms. X's interview of 2 February 2009 in case no. ID/0052/09 had been last modified on 3 February 2009 and had been placed in Citrix on 17 February 2009. It was also determined that

Ms. X's interview in respect of case no. ID/0234/09 was placed in Citrix on 6 November 2009.

January 2010

62. On 14 January 2010, Mr. Postica noted that the investigation details as amended by PPS were not correct as they mentioned that OIOS had received seven photographs from Ms. X when in fact OIOS had received a total of 10 photographs from Ms. X through Mr. Dudley. Mr. Postica indicated that this controversial issue should not have been reviewed by PPS but reviewed by OHRM.

63. The next day, Ms. Ahlenius requested "hard copies which very clearly show [her] where the investigations team differs from the PPS and where there is a disagreement between the two on presentation of facts and conclusions".

64. On 15 January 2010, Mr. Postica moved to another non-UN Secretariat job in Europe, with the European Anti-Fraud Office ("OLAF").

65. The same day, Mr. Postica wrote to the USG/OIOS office to complain that Ms. Nguyen-Kropp was being retaliated against by the Acting Director by his lowering of her ePAS report.

66. On 19 January 2010, on instruction from Mr. Dudley, Ms. Nguyen-Kropp was asked to vacate her desk in an office and move to a cubicle. By email of the same day, Mr. Postica complained to Ms. Ahlenius' office that this removal was retaliatory in nature. At the hearing, Ms. Nguyen-Kropp's unchallenged evidence was that the desk she had been requested to vacate remained vacant for eight months.

67. By email of 22 January 2010, Ms. Mulley provided a document entitled "Assessment Note of Evidence Collection and Preservation in Case Numbers 0052/09 and 0234/09". This note, comprising 16 pages and three annexes, stated on its first page that no one was interviewed when preparing the assessment but that

the subject of the complaint, Mr. Dudley, was requested to submit his comments in writing, which were attached as annex B. Three pages of the note relate in a rather cursory manner to Mr. Dudley's role during the intake procedure and conclude with respect to his role that "there has clearly been an unfortunate misunderstanding as to the exact nature and number of photographs that [Ms. X] initially sent to Mr. Dudley on 26 January 2009" and that he did not have "any ill-motivated purpose".

68. The rest of the document focuses on the conduct of the Applicants pointing out anomalies found in different versions of a number of interview records in cases no. ID/0052/09 and ID/0234/09 prepared by the Applicants. In particular, PPS found that a few statements were signed months after the interview took place, "documents were reformatted, text was added, and the initial version was removed from [C]itrix and substituted with the later version" after PPS had conducted its quality assurance review and that all "documents in Case No. 0234/09 were not placed on [C]itrix until more than 5 months after the case was assigned for investigation". The Applicants were not requested to provide their comments on the anomalies found. It appears to the Tribunal that these anomalies are, in large measure, editorial changes or additions to the interview records. The document records extensive comments and conclusions regarding the failures of Mr. Postica and, by implication, Ms. Nguyen-Kropp, such that it would appear that they were the subjects of the investigation. However, the report does not make findings of any intentional act of wrongdoing or "ill-motivated purposes" on the part of the Applicants.

69. In its footnote 10, the document also indicates that the version of the Citrix case file that had been reviewed by PPS at the time of the assessment of the closure report of case no. ID/0052/09 was the version retained by the Head of PPS, who had downloaded it to her computer. By email of 25 January 2010, the staff member in PPS provided the Head of PPS with a possible redrafted finding regarding the documents received by Mr. Dudley from Ms. X in January 2009.

70. The document also makes proposed policy development changes regarding the intake, interview methodology and file management practices adopted in the cases which were reviewed. PPS states that the intake procedures were developed and implemented as a result of the creation of the Intake Committee in April 2009. PPS also notes that a detailed procedure regarding "Interviews" has been promulgated to all ID/OIOS staff and compliance is mandatory. As a result of this assessment, it is proposed that additional issues be inserted into the procedure, including certification of audio transcripts of taped interviews and the requirement for all interviewees (including sources) to be provided with the opportunity to review and sign their interview record. PPS notes the need to write a case file management procedure and that it intends to commence the drafting of this procedure as a priority.

71. On 25 January 2010, Mr. Postica wrote again to Ms. Ahlenius to complain that the removal of Ms. Nguyen-Kropp from her office was retaliatory in nature.

72. On 27 January 2010, Ms. Mulley sent to the Head of PPS her "assessment memorandum" regarding Ms. X's matters, which was forwarded to Ms. Ahlenius for her consideration. PPS assessment contained no recommendations as to the course of action to be followed.

February 2010

73. By email of 17 February 2010, Ms. Ahlenius invited PPS to a meeting to discuss the conclusion of the investigation report in case no. ID/0234/09.

March 2010

74. By email dated 18 March 2010, Ms. Ahlenius stated to PPS that she may have had "a solution on a peer review of [PPS] review of the investigation". By email of 18 March 2010 to Ms. Schultz and Ms. Mulley, Ms. Ahlenius conveyed an eminently sensible instruction to them to obtain Mr. Postica's comments:

> Therefore I believe it is now time to send the findings and the conclusions of your review to [Mr. Postica] for his comments. It seems to me that he should be provided with all material we have, ie a copy of the binder that you have prepared. It seems fair to give him 2 weeks for his review. I also believe it is appropriate that you submit the conclusions to him for his review.

75. The Tribunal notes that the allegations contained in the Note to File dated 29 October 2009 were prepared by both Applicants albeit the note was signed by Mr. Postica. In any event, PPS did not comply with the instruction to seek comments from the Applicants and stated during the hearing that they considered the instruction of the USG/OIOS to be "optional" or not necessary. This raises a significant question regarding the legitimacy of any belief as to the possible culpability of the Applicants when they were not afforded the due process right to explain the anomalies and apparent procedural errors in their conduct of the investigations of cases no. ID/0052/09 and ID/0234/09.

76. By email exchange dated 23 and 24 March 2010, PPS requested the OIOS IT focal point to restrict access to Citrix folders for cases no. ID/0052/09 and ID/0234/09 and asked why documents in Citrix folder for case no. ID/0052/09 were shown as being created on 11 March 2010 and about the details of two documents that had been missing from case no. ID/0052/09 but reappeared on 11 March 2010. The response from the IT focal point was that "the creation date" in Citrix merely reflects when the documents were last uploaded into Citrix.

77. By email of 25 March 2010, PPS sent to the USG/OIOS two notes on the outcome of its review of the note to file of 29 October 2009. In the first note, PPS indicated that the alleged claims of misconduct against the Acting Director of ID/OIOS were not substantiated.

78. In the second note of 25 March 2010, PPS alleged, without asking the Applicants to explain, possible misconduct by them with regard to what they

described as "significant procedural and investigative irregularities" in Ms. X matters. PPS made the following findings:

> a. There are two versions of the same interview record of Ms. X dated 2 February 2009 "in the respective case folders 0052/09 and 0234/09";
>
> b. "Most of the interview records in case 0052/09 were amended after PPS had completed its quality assurance review. Significantly, the documents had text added, and the initial versions were removed from Citrix and substituted with the later version. These measures draw negative inferences about the veracity of the records and the investigators' actions which may adversely impact on the integrity of cases 0052/09 and 0234/09";
>
> c. "Some witness statements in case 0052/09 were signed more than eight months after the interview took place, and well after the case was closed";
>
> d. "The document registers in both cases 0052/09 and 0234/09 have incorrect dates as to when specific documents were placed into Citrix, which undermine the integrity of the case management system and questions the motives of the concerned investigator/s";
>
> e. "The overall pattern of conduct by [the Applicants] regarding the procedural and investigative irregularities identified above demonstrates actions which may constitute possible misconduct".

79. PPS recommended in that second note that "this matter be addressed in the first instance to an external consultant for an independent fact finding inquiry to be conducted" and suggested the World Bank as an appropriate entity to identify an independent investigator to assist with this inquiry. PPS also stated: "Importantly, we believe that the claims of possible misconduct against [the Applicants] should be forwarded to [Mr. Dudley] as soon as possible as the Officer-in-Charge of

the Investigations Division". No explanation has been offered as to why they considered it appropriate to adopt this course of action bearing in mind that they had just concluded their investigation/review of the Applicants' allegations against Mr. Dudley, which resulted in exonerating him and pointing the finger of suspicion towards the Applicants.

80. By email dated 29 March 2010, PPS was informed of a meeting with Ms. Ahlenius to be held the next day in order to discuss the notes. By email of 30 March 2010 to Ms. Ahlenius, Ms. Schultz wrote "[f]urther to our discussion, kindly find proposed language for the email informing Mr. Postica of the outcome of his complaint against [Mr. Dudley]" and a draft of a closure letter to Mr. Dudley.

81. By email dated 31 March 2010, PPS provided a draft of the communication to Ms. Ahlenius about the investigation into possible misconduct by the Applicants. In response, by email dated 31 March 2010, Ms. Ahlenius indicated there was "no rush" and "we should carefully consider words". Ms. Ahlenius also asked PPS to consider if the alleged misconduct "had any influence on the conclusions in Cases No. 0234/09 or 0052/09".

April 2010

82. On 1 April 2010, Mr. Postica's ePAS reports for the cycles of 2008–2009 and 2009–2010 were signed off by Mr. Dudley who, unlike in previous years, lowered significantly his performance evaluation. Further, Mr. Dudley included a negative comment in Ms. Nguyen-Kropp's ePAS report. The Applicants were distressed and regarded these adverse ratings and comments as being retaliatory following the note to file of 29 October 2009.

83. By a note dated 9 April 2010, finalized with the assistance of PPS, Ms. Ahlenius requested the then USG/DM, Ms. Angela Kane, to investigate a report of possible misconduct against the Applicants with respect to their work on Ms. X

matters, using an "external independent expert with the requisite technical investigative background". The USG/OIOS suggested the World Bank and stated that OLAF (the European Anti-Fraud Office) "cannot be a proper venue in this case because of the close affiliation with OLAF by one of the investigators in question".

84. By email of 12 April 2010, Ms. Ahlenius informed Mr. Postica that with regard to his note to file dated 29 October 2009, an assessment had been completed by PPS and that she had "examined the PPS assessment material and concur[red] with their findings that there [was] no evidence to substantiate the claim that the Acting Director for ID/OIOS mishandled evidence related to cases no. ID/0052/09 and ID/0234/09". In response, Mr. Postica expressed his dissatisfaction and indicated that the assessment had been undertaken by PPS colleagues, who are directly reporting to Mr. Dudley. Mr. Postica stated that he trusted that "this matter [would]—sooner rather than later—be subjected to an external, independent and objective review free of any conflict of interest, or appearance of a conflict of interest". The Tribunal notes that Ms. Ahlenius had already decided that there should be a preliminary fact-finding inquiry against the Applicants pursuant to ST/AI/371 and had communicated this to Ms. Kane but made no mention of this to the Applicants.

85. By memorandum dated 29 April 2010, Ms. Kane responded to the 9 April 2010 request for a fact-finding inquiry from Ms. Ahlenius and referred to para. 2 of ST/AI/371 (Revised disciplinary measures and procedures) and its requirement that a preliminary investigation be conducted by the head of office or department before a matter is referred to DM for investigation. Ms. Kane stated as follows:

> Only when such preliminary investigation has been finalized, its results shall be submitted to this Department, specifically to the Assistant Secretary-General of the Office of Human Resources Management (OHRM), for further action.

May 2010

86. By email of 5 May 2010, PPS provided input to a draft note from Ms. Ahlenius, the USG/OIOS. The next day, Ms. Ahlenius indicated in a note that there were sufficient grounds for proceeding with an investigation and that the matter had been referred to OUSG/DM "for administering a fact finding investigation on behalf of [USG/OIOS'] office". The USG/OIOS indicated that once the investigation was completed, OIOS would be deciding on whether appropriate action should be taken under ST/AI/371.

87. By note of 6 May 2010, Ms. Ahlenius responded to Ms. Kane's memorandum of 29 April 2010 and stated as follows:

> 4. In light of the findings of PPS, I wish to submit this matter to the Department of Management recommending a preliminary fact-finding inquiry pursuant to ST/AI/371. Due to the nature of the matters raised by PPS, any inquiry should be conducted by an external independent expert with the requisite technical investigative background. I have with been provided with a possible focal point to assist in the identification of this expert …
>
> 5. It should be noted that OLAF cannot be a proper venue in this case because of the close affiliation with OLAF by one of the investigators in question.

88. With effect from May 2010, Ms. Nguyen-Kropp went on special leave without pay due to a family emergency. Her leave was subsequently extended until 17 September 2010, due to a death in her immediate family.

June 2010

89. On 10 June 2010, Mr. Mario Baez, Chief, Policy and Oversight Coordination Services, OUSG/DM, sent a summary of three cases for which the UN was requesting the assistance of OLAF, without including the names of the persons to be investigated. During the hearing, Mr. Baez indicated that he had approached OLAF despite being aware that Ms. Ahlenius had cautioned Ms. Kane against approaching

OLAF in view of its affiliation with Mr. Postica. He testified that he had approached OLAF because DM was already discussing the investigation of other cases with them. By email dated 25 June 2010, OLAF indicated its willingness to undertake the investigation and requested the submission of the material

90. On 28 June 2010, Ms. Kane made a formal request for assistance to OLAF and, the next day, Mr. Baez requested OLAF to give priority to the case of "tampering of investigation". The Tribunal notes that it is highly questionable whether such a description of the alleged wrongdoing on the part of the Applicants was appropriate. On 30 June 2010, Mr. Baez sent the documentation to OLAF. By email of the same day, Mr. Baez noted that OLAF may not be the appropriate entity to undertake this investigation "because of the close affiliation of OLAF with one of the investigators in this case" and that OLAF should bear this in mind "when putting together the team that would work on this specific case to avoid any perception of conflict of interest". It is not clear what enquiries were made by the Office of the USG/DM to cause them to override or set aside the concerns expressed by Ms. Ahlenius that OLAF should not be approached. Had any diligent enquiries been made, they would have discovered the nature of the senior position held by Mr. Postica at that time in the office of the Director General, OLAF, so that all requests for investigations would have to go through his manager, thereby exposing him to reputational risk.

July 2010

91. Following the subsequent refusal by OLAF to undertake the investigation because of the close affiliation of Mr. Postica to OLAF, by letter dated 8 July 2010, Ms. Kane requested the assistance of the World Bank to conduct the proposed investigation. On 13 July 2010, Mr. Baez sent, as an attachment to the email, the complaint from PPS to the World Bank. Subsequently, Mr. Baez contacted the Inter-American Development Bank, the United Nations Development Fund,

the European Bank for Reconstruction and Development ("ERBD") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") to explore the possibility of their undertaking the investigation. On each occasion, Mr. Baez sent a copy of the complaint against the Applicants prior to obtaining confirmation of the undertaking.

August 2010

92. On 2 August 2010, after being made informally aware of the complaint against them that was being circulated to a number of organizations, Counsel for the Applicants filed on their behalf a claim of possible retaliation with the Ethics Office. On 4 August 2010, the Ethics Office requested Ms. Kane "to freeze any further action on the OIOS matter regarding the allegations of evidence tampering" against the Applicants.

September 2010

93. With effect from 14 September 2010, Ms. Carman Lapointe assumed the functions of USG/OIOS.

October 2010

94. By a letter dated 4 October 2010, Counsel for the Applicants requested management evaluation of, among other things, the dissemination of information relating to the report of possible misconduct by the Applicants to external entities without obtaining the Applicants' prior input and the decision by Ms. Ahlenius to request PPS to investigate the Applicants' possible misconduct.

95. On 6 October 2010, the Ethics Office determined, with respect to the Applicants' complaints, that a *prima facie* case of retaliation existed.

December 2010

96. By memoranda to the Applicants dated 30 December 2010 from Ms. Kane, the Applicants were informed that an investigation into alleged irregularities set out in PPS note dated 25 March 2010 about possible misconduct would be undertaken by an investigator from ICTY.

January 2011

97. On 4 January 2011, the Applicants received their first written notification that an investigation into their conduct was to take place.

March 2011

98. During the hearing, Mr. Postica stated that, on 2 March 2011, the findings of the investigation undertaken by the investigator from ICTY were transmitted to him for comments, which he submitted on 11 March 2011. Ms. Nguyen-Kropp also submitted her comments. In both their comments, the Applicants included an objection that the investigator designated to conduct the investigation had a conflict of interest because he was a former OIOS investigator who was, at the time, a candidate in selection processes being handled under the authority of the Acting Director. The Applicants testified that, during the interview with them, the investigator asked them not to mention this fact to anyone.

May 2011

99. On 2 May 2011, shortly after the investigation report prepared by the investigator in ICTY was provided to Ms. Lapointe, she verbally informed the Applicants that the investigation should never have taken place, was a waste of public funds, and that the shortcomings identified did not amount to misconduct and that they were cleared of any misconduct. This evidence was left unchallenged except for the comment by the Respondent that it was an expression of a difference

of opinion which does not mean that the decisions by Ms. Ahlenius and Ms. Kane were an improper exercise of their prerogative as managers. The Tribunal provided the Respondent with the opportunity of calling Ms. Lapointe to rebut the evidence given by the Applicants. This opportunity was not taken.

100. Coincidentally on the same day, 2 May 2011, the Ethics Office made a finding that no retaliation under Secretary-General's Bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) had occurred, and the case of alleged retaliation was closed. The Applicants appealed the actions of the Ethics Office before the Dispute Tribunal (Cases No. UNDT/NY/2011/054 and UNDT/NY/2011/055). By Order No. 65 (2013/NY), these cases were stayed pending this Judgment. Accordingly, the role of the Ethics Office falls to be determined at a later date following promulgation of this Judgment.

101. By letters dated 10 November 2011, Ms. Lapointe formally informed the Applicants of the outcome of the investigation carried out by the ICTY investigator and cleared them of misconduct. The Tribunal notes that the formal official clearance took over six months for reasons that have never been explained.

Considerations

102. The essence of the Applicants' claims, distilled from the documents and several case management discussions, is recorded in Order No. 240 (NY/2013) following the case management discussion held on 7 October 2013. Accordingly, the following questions fall to be determined by the Tribunal:

a. Did Ms. Ahlenius, USG/OIOS, have sufficient reason to believe that the Applicants had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed;

b. Was the decision to investigate the Applicants' conduct proper or tainted by improper motives, namely retaliation or the intent to taint the reputation of the Applicants so that their allegations of wrongdoing against the Mr. Dudley would not be believed?

c. Did the manner in which Ms. Kane, USG/DM, and those acting on her behalf sought the services of external investigators cause the Applicants reputational damage?

d. If it did, what was the extent of this damage?

e. Was there a disparity and inconsistency in the manner in which the allegations against Mr. Dudley were treated compared to the allegations against the Applicants?

f. Were the Applicants accorded due process?

103. The Tribunal will first determine whether the decision to initiate what was referred to as a "secret" investigation into the Applicants' conduct was proper, before turning to whether the decision was, as alleged by the Applicants, improperly motived.

Applicable administrative instruction

104. The parties relied on the administrative instruction ST/AI/371 on revised disciplinary measures and procedures, which governs the initiation and conduct of investigations at the UN.

105. As a preliminary matter, the Tribunal must determine which version of the administrative instruction on revised disciplinary measures and procedures applies since ST/AI/371 was amended on 11 May 2010. The distinction is relevant as the revised administrative instruction, which entered into force on 11 May 2010,

removed the need for the head of office to conduct a preliminary investigation prior to requesting a full-fledged investigation.

106. Paragraph 2 in ST/AI/371, which was applicable at the time the complaint against the Applicants was made, stated (emphasis added):

> Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *a preliminary* investigation.

107. Paragraph 2 of ST/AI/371/Amend.1, which took effect on 11 May 2010, after the complaint against the Applicants was made but before the investigation by an external entity was initiated, stated with respect to the initiation of an investigation that may possibly lead to disciplinary measures (emphasis added):

> Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *an* investigation.

108. The Tribunal finds that the applicable version of ST/AI/371 is the one in force at the time of the allegations against the Applicants made by PPS. The beginning of the entire procedure against the Applicants commenced when the allegation that they committed procedural and other investigative errors that could constitute misconduct was formally made, namely in March 2010. Ms. Ahlenius' decision to investigate was conveyed to Ms. Kane, USG/DM, on 9 April 2010.

Whether there was reason to believe misconduct may have occurred

109. ST/AI/371, in force at the material time, includes the following provisions:

> 2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall

> undertake a preliminary investigation. Misconduct is defined in staff rule 110.1 as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant". Conduct for which disciplinary measures may be imposed includes, but is not limited to:
>
> (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
>
> ...
>
> (g) Acts or behaviour that would discredit the United Nations.
>
> 3. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses or any other document or record relevant to the alleged misconduct.

110. In *Abboud* UNDT/2010/011, the Tribunal stated:

> 4. … The "reason to believe" must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded – though of course not necessarily proved – to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. This is a question of fact and degree. It is a question of judgment, however, and not of discretion.

111. Consistent with the opinion expressed by Ms. Lapointe, the current USG/OIOS, the Tribunal finds that the facts and circumstances of this case were not of such an order as would appear to rationally incline the mind of an objective and reasonable decision-maker to the belief that the Applicants engaged in possible misconduct. More specifically, it is unclear in the present cases how the irregularities identified by PPS could have created "reason to believe" that what happened was possible misconduct rather than instances of managerial shortcomings. For example,

PPS stated that the lack of compliance by the Applicants in relation to certain investigative procedures showed that the procedures should be amended to include new steps such as certification of audio-transcripts of taped interviews and the requirement that all interviewees be provided with the opportunity to review and sign their statement. PPS also stated that clear case management file procedures and instructions were needed and that PPS would commence the drafting of this procedure as a priority. It should also be noted that as part of their quality control functions PPS had previously approved the investigation reports without identifying the shortcomings which were now being relied upon as evidence of irregularities which gave reason to believe that the Applicants had engaged in unsatisfactory conduct for which disciplinary measures may be imposed.

112. The Respondent had access to the necessary information needed to formulate an objective opinion as to whether there was "reason to believe". For example, Ms. Ahlenius instructed PPS to obtain the views of the Applicants on their "assessment". Despite this instruction, it was not done.

113. The assessment of the new USG/OIOS, Ms. Lapointe, is notable in this regard. On 2 May 2011, having reviewed the investigation report prepared by the investigator in ICTY, Ms. Lapointe verbally informed the Applicants that the investigation should never have taken place, was a waste of public funds, and that the shortcomings identified did not amount to misconduct and that they were cleared of any misconduct. This, in the Tribunal's assessment, should have been apparent to an objective and reasonable decision-maker even before any preliminary investigation took place.

114. The Tribunal finds that the decision that there was "reason to believe" that the misconduct may have occurred was manifestly unreasonable. It was also arrived at in breach of due process and was thus unlawful.

Whether due process rights were respected during the preliminary investigation

115. As the United Nations Appeals Tribunal stated in *Appellant* 2012-UNAT-209 and *Powell* 2013-UNAT-295, the full scope of due process rights envisaged by ST/AI/371 apply following the formal disciplinary charges. However, this does not mean that, during the preliminary investigation stage, staff members are not entitled to basic, fundamental due process rights and guarantees. Even OIOS Investigations Division's own Investigations Manual (dated March 2009) speaks of the following standards that apply during preliminary investigations: confidentiality, objectivity, impartiality, fairness, and avoidance of conflicts of interest (see pp. 17–18 of the Manual).

116. The Tribunal finds that the subsequent preliminary investigation was flawed in several respects. First, the Applicants were subjected to an investigation even though, on the facts, an objective and reasonable decision-maker should not have reached the conclusion that there was "reason to believe" that misconduct may have occurred.

117. Second, the way in which the preliminary investigation was solicited (with the involvement of OLAF, Inter-American Development Bank, the United Nations Development Fund, ERBD, and ICTY) among the very same professional circles in which these Applicants work resulted in a wide dissemination among several international offices of harmful and prejudicial material concerning the Applicants. The Applicants were presented in a very negative light throughout their professional community even before they were aware that any type of investigation was initiated.

118. Third, the Tribunal finds that, as explained below, the decision to initiate the preliminary investigation was marred by a fundamental irregularity: namely, retaliatory intent. This necessarily marred the entire process. The reasons for this finding are explained below.

Whether the decision to conduct the preliminary investigation was retaliatory

119. The Respondent did not submit a reply on the merits of the allegation of retaliatory motive. However, it was submitted by the Respondent in the joint submission and in a footnote to Counsel's closing statement that the UN policy on retaliation, ST/SGB/2005/21, does not apply outside of the context of actions taken by the Ethics Office. In the joint submission, Counsel for the Respondent stated:

> The Respondent is unclear as to what the Tribunal intended in relation to the request for identification of the "protected act" given that this is a concept the Respondent understands to be applicable to the retaliatory policy set out in ST/SGB/2005/21 (Protection against retaliation or reporting misconduct and for cooperating with duly authorized audits or investigations). In the context of the present cases, the Respondent maintains that the only possible "protected act" of the Applicant under the policy was the Note to File dated 29 October 2009. With regard to the consideration of the actions of the USG/OIOS and OUSG/DM, the Respondent's position is that independent of the Organization's policy on retaliation, there is no manifest relevance of the concept of a protected act and the need for a nexus between that protected act and the "retaliatory action". Accordingly, the Respondent submits there is no need to identify the protected act in the matter before the Tribunal.

120. The Applicants allege that retaliation was the true reason or improper motive underlying the decision to conduct a "secret" investigation against them in denial of due process and in callous disregard of the reputational damage that would inevitably be caused to them.

121. As stated in its preamble, Secretary-General's Bulletin ST/SGB/2005/21 was promulgated by the Secretary-General for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigation, and in accordance with para. 161(d) of General Assembly resolution 60/1.

122. Section 1.4 of the Bulletin provides a definition of retaliation, as follows:

> 1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.

123. The aim of the Bulletin is to provide protection to those who make a report of misconduct (sec. 2.1(a)) to their head of department or office (sec. 3). The Bulletin specifies the role of the Ethics Office with respect to claims of retaliation (secs. 5 and 6). However, although individuals who believe that retaliatory action was taken against them, for instance because they have reported misconduct, are encouraged to seek the assistance of the Ethics Office, they may also, in accordance with sec. 6.3 of the Bulletin, seek redress through other means. Section 6.3 of the Bulletin states as follows:

> 6.3 The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

124. This provision in the Bulletin is essential. Indeed, retaliation does not occur in a vacuum but in relation to acts which may constitute administrative decisions that can be separately challenged before internal recourse systems, such as decisions concerning non-renewal, non-promotion, performance evaluation, etc. Should staff not be in a position to take parallel courses of action, both before the Ethics Office and before internal recourse systems, they would be prevented from accessing the full protection of the law that allows them to seek judicial redress in regard to administrative decisions alleged to be in violation of the terms of their contract of employment.

125. As mentioned above, each of the Applicants has another case before the Tribunal, in which they challenge the finding of the Ethics Office that there was no evidence of retaliation against them. In contrast, the present cases are concerned

with the direct application of the principles in the Bulletin as a distinctly separate matter to the findings of the Ethics Office.

126. The fact that the Applicants pursued a parallel recourse before the Ethics Office does not preclude them from contesting before the Tribunal an administrative decision allegedly motivated by retaliation and seeking judicial redress, nor does it preclude the Tribunal from determining the scope of retaliation as a motive in accordance with UN policy.

The legal test for retaliation

127. Retaliation has three essential elements: participation in a protected activity, being subjected to a detriment, and a causal connection between the protected activity and the detriment suffered.

128. The preamble of ST/SGB/2005/21 states:

> The Secretary-General, for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigations, and in accordance with paragraph 161(d) of General Assembly resolution 60/1, promulgates the following.

129. The prohibition against improper motives, in particular retaliation, is not just a matter of law. It is to make certain that employees feel empowered to voice their concerns. An organization cannot function effectively when its employees are afraid to raise a concern or report an issue. The aim of the system of internal justice is to ensure that the United Nations continues to make every effort to ensure that improper motive does not taint its operational decisions and that its staff members are treated fairly, transparently and in a way that promotes justice, efficiency and human rights.

130. The objective test for identifying decisions tainted by retaliation may be stated in simple terms. If a staff member engages in a protected activity, for instance

the filing of a complaint to the head of a department or office, and is thereby subjected to detrimental action such as a change in office space, an unprecedented and unjustified downgrading of a performance evaluation report, or a counter-complaint and investigation, then a causal link may exist. In appropriate circumstances, a finding of retaliation may be adequately sustainable in fact and in law.

The burden of proof of retaliatory intent

131. It is generally accepted that proof of the causal link between protected activity and adverse action in the work place is usually elusive and difficult to show.

132. The Bulletin specifically places the burden of proof in a retaliation claim on the Administration. Section 2.2 states that "the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity". However, such a burden is only shifted onto the Administration once the individual complainant has made out a *prima facie* case of retaliation.

133. In the present cases, retaliation is asserted by the Applicants as constituting the ulterior motive underlying the decision to investigate their conduct and the cases do not concern the action they have taken before the Ethics Office. Nevertheless, the same principle applies in that the staff member must raise a *prima facie* case before the Tribunal at which point the burden shifts onto the Respondent to prove by clear and convincing evidence that it would have taken the same action absent the protected activity.

134. While retaliation may be effected by the decision-maker, it will more often than not be the case that the report or protected activity is not directly against the decision-maker but against a person whose interests the decision-maker seeks to protect. This is because often, but not always, the decision maker has a direct or

indirect interest in the matter or because the retaliatory act may have been procured by a person who has power or influence over the decision maker. Any other interpretation that would permit the Administration to evade the protection afforded to employees by claiming that the causal link between the report and the person making the adverse decision is not direct would completely undermine the effectiveness of the prohibition against retaliation and could rarely if ever be proven.

Whether there was retaliatory intent: the law applied to the facts

135. The fact that the Applicants made, in effect, a complaint of evidence tampering against the Acting Director falls squarely within the scope of protected activity. The Tribunal also finds that the decision to investigate the Applicants and the manner in which this decision was implemented after they made a complaint against their Acting Director falls squarely within the ambit of the Bulletin and is wholly consistent with international norms for the protection of whistleblowers.

136. The Tribunal has carefully reviewed the documentary evidence on record, the sequence of events admitted to by the parties, as well as evidence elicited from witnesses during the hearing. Considering and evaluating the evidence in its entirety, the Tribunal finds, on a preponderance of evidence, that the decision to initiate an investigation against them was tainted by improper motive, namely, retaliation.

137. A summary of the sequence of events that particularly illustrates improper motive against the Applicants is provided below:

a. On 29 October 2009, the Applicants lodged a formal complaint against Mr. Dudley, then Acting Director of ID/OIOS. The complaint suggested that Mr. Dudley failed to hand over without delay all the evidence given to him by an informant (Ms. X), thereby compromising the integrity of the investigation, casting a shadow of suspicion against the Medical Services

Division and obscuring what appeared to be an ulterior motive on the part of Ms. X who may have acted in bad faith.

b. The testimonies of the Special Assistant to the then USG/OIOS and Mr. Postica reveal that shortly after the complaint against him was made, Mr. Dudley threatened Ms. Ahlenius to report her to the United States permanent mission to the United Nations and the Secretary-General for incompetence were she not to "protect" him. The Head of PPS testified that she was also aware of this fact at the relevant time;

c. Mr. Dudley requested that Ms. Nguyen-Kropp move from her office and be placed in an open space under the pretext that another colleague needed the office desk. This desk in Ms. Nguyen-Kropp's former office remained unoccupied for eight months;

d. Shortly thereafter, Ms. Ahlenius requested Ms. Schultz, Head of PPS, a unit directly supervised by Mr. Dudley, to review the complaint against Mr. Dudley;

e. PPS sought the views of Mr. Dudley when reviewing the complaint against him and the review resulted in a 16-page memorandum, three pages of which contain a cursory review of the conduct of the Acting Director, exonerating him of any misconduct, and 12 pages containing a catalogue of errors in investigative procedures by the Applicants as if they were the subject of the investigation rather the complainants or informants. Many of these alleged shortcomings would ,or should, have been picked up during the quality assurance review, for instance unsigned witness statements or what appeared to be editorial or text changes. PPS acknowledged in the memorandum that the errors showed the need to clarify procedures, in particular case management file procedures;

f. Upon review of the memorandum from PPS, Ms. Ahlenius' instruction was that the views of the Applicants be sought before any further step was taken. PPS failed to comply with this instruction, stating at the hearing that the USG/OIOS instruction was "optional" and that obtaining the views of the Applicants regarding the errors identified was not necessary since an investigation would take place and at that point they would be given an opportunity to explain;

g. At the end of the UN performance evaluation period in 2010, the Applicants' performance evaluation was drastically downgraded from previous years by Mr. Dudley, by way of rating for Mr. Postica (in reports for cycles ending in 2008 and 2009) and by way of adverse comments for Ms. Nguyen-Kropp. The Respondent did not provide an explanation or justification for this;

h. The memorandum containing the allegations against the Applicants was eventually split into two, one being the three-page review of the complaint against Mr. Dudley, the other being the complaint against the Applicants. The part of the memorandum concerning Mr. Dudley resulted in PPS drafting for Ms. Ahlenius a three-line email advising him that he had committed no wrongdoing despite his admission to having altered and having withheld evidence obtained at the intake stage. The comments and findings regarding the Applicants were used to initiate a formal complaint against them, recommending that possible misconduct had occurred and that an investigation be conducted, preferably by World Bank investigators;

i. The complaint against the Applicants was forwarded to DM for investigation under ST/AI/371, although it is unclear in which way the allegations therein may constitute misconduct rather than procedural errors in the management of the investigation. There were no findings made

in respect of the intent of the Applicants in committing alleged procedural violations; rather, there were suggestions that the integrity of the evidence collected by the Applicants was put at risk. The complaint was made by the persons assigned with the responsibility of reviewing the first complaint and who were directly supervised by the subject of that complaint;

j. Ms. Kane initially refused, quite properly, to conduct the investigation, stating that a preliminary investigation by the relevant head of department should first take place. Ms. Ahlenius insisted that DM undertake the investigation, stating that the final decision upon receipt of the investigation report would be that of OIOS;

k. DM took the matter over and contacted OLAF despite having been cautioned against it. DM contacted a number of international organizations for assistance in conducting the investigation before settling on ICTY;

l. The ICTY investigator was a former OIOS colleague who was involved at the time in selection processes for a post as investigator in OIOS under the authority of the Acting Director;

m. Upon receipt of the investigation report from the ICTY investigator, Ms. Lapointe, the new USG/OIOS, advised the Applicants that the investigation should not have commenced in the first place, that the allegations had resulted in a waste of public funds, and that the Applicants were cleared of misconduct;

n. The communication exonerating the Applicants was transmitted to them after an unexplained delay of over six months. The communication, contrary to what was provided to Mr. Dudley, consisted of a long letter listing a number of managerial shortcomings, thereby diminishing its intended exonerating effect.

138. The Administration has not demonstrated by clear and convincing evidence that the actions taken by it would have been the same absent the complaint of 29 October 2009. In fact, the complaint against the Applicants was the direct result of the review of the 29 October 2009 complaint. It is difficult to find a more direct causal link between a protected activity and an adverse action. In addition, the nature of the complaint against the Applicants should have rung alarm bells. The violations identified were alleged to have been in breach of the Investigations Manual, and PPS stated that the errors identified showed that investigation and case management file procedures should be clarified or re-written. In addition, non-conformity with provisions in a manual or a document that was not a properly promulgated administrative issuance, be it regarding investigation or hiring procedures, normally raises managerial rather misconduct issues unless it is persistent or negligent.

139. The fact that a relatively greater number of individuals acting on behalf of the Administration participated in the adverse action against the Applicants does not mean that the decision cannot be tainted by improper motive. As mentioned above, retaliation as a motive generally eludes precise identification and is often subtle or disguised. Its intended effect is to intimidate or inhibit the staff member from reporting misconduct thereby undermining the UN's oversight policy. A number of persons or offices contributed to the tainted decisions in these cases. The Administration should have exercised a greater degree of caution since they were clearly put on notice of possible improper motive when the complaint against Mr. Dudley resulted directly in a complaint against the Applicants. At no point was it suggested that the Applicants' complaint was not made in good faith.

140. Although Mr. Dudley admitted to altering and withholding evidence at the intake phase, PPS absolved him of any wrongdoing, stating that he did not intend to commit misconduct. This finding is inconsistent with the task stated to be assigned to PPS, which was not to conduct a preliminary investigation into the conduct of Mr. Dudley but to carry out an assessment of the complaint against him.

141. There is also uncontradicted evidence that Mr. Dudley threatened Ms. Ahlenius to ensure that she protected him. Irrespective of any such threat, as Head of Department, the then USG/OIOS had a duty to act with fairness and resist pressure. The Tribunal infers from the totality of the circumstances and the unchallenged evidence that she failed to exercise an appropriate degree of power and control and thereby effectively condoned the significantly different treatment accorded to the Applicants compared to the treatment accorded to Mr. Dudley.

Conclusion regarding retaliatory motive

142. The Tribunal finds that the decision to conduct an investigation against the Applicants and the manner in which it was carried out was tainted by procedural irregularity and manifest unfairness. The Respondent has failed to discharge the burden of demonstrating by clear and convincing evidence that the actions taken against the Applicants' would have been the same absent the protected activity, namely the complaint in the Note to File dated 29 October 2009.

143. Having found in favour of the Applicants, the Tribunal will consider the issue of remedy.

Remedy

144. The issue of remedy is governed by arts. 10.5–10.8 of the Dispute Tribunal Statute, as follows:

> 5. As part of its judgement, 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.
>
> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.
>
> 7. The Dispute Tribunal shall not award exemplary or punitive damages.
>
> 8. The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

145. The Statute of the Tribunal is silent on the issue of damages except to specifically exclude the award of exemplary or punitive damages and to limit compensation, both pecuniary and non-pecuniary, to a maximum of two years' salary unless the case is exceptional.

146. It is well-established jurisprudence, both of the Dispute and Appeals Tribunals, that once the Tribunal has made a determination of liability against the Organization, the applicable principle in determining entitlement to compensation is that the applicant be placed, as far as money can do so, in the same position she or he would have been had the contractual obligation been complied with (*Warren* 2010-UNAT-059). Compensation cannot be awarded where no harm has been suffered. Accordingly, it is for the Applicants to prove that the breaches of contract caused loss or injury (*Sina* 2010-UNAT-094; *Antaki* 2010-UNAT-095).

Pecuniary or material damage

147. With respect to the Applicants' claims of pecuniary loss, the Tribunal finds that the only claims that warrant compensation relate to the legal costs incurred by them.

148. Ms. Nguyen-Kropp sought compensation for part of the period she was on special leave without pay (namely, for the period of 17 August and 17 September 2010). However, the Tribunal finds on the evidence before it that, during that period, the Applicant was on special leave due to family reasons and not on account of retaliatory conduct by the Respondent. Accordingly, no compensation is warranted under this head of claim.

149. With respect to legal costs, the Tribunal further finds that, as a result of the breach of their rights, the Applicants incurred direct economic loss in the form of attorney fees. The Tribunal finds it appropriate to make an order that each Applicant be paid USD10,000 as a contribution towards the legal costs necessarily incurred by them. This is a compensatory award under art. 10.5(b) and not under art. 10.6 of the Tribunal's Statute which provides that if a party "has manifestly abused the proceedings before [the Tribunal], it may award costs against that party". Article 10.6 does not preclude the Tribunal, in appropriate circumstances, from awarding legal costs under the heading of economic loss. Thus, in the present case, the award of USD10,000 to each Applicant is not an award of costs within the meaning of art. 10.6 but a compensatory award for costs under the head of economic loss (art. 10.5(b)), which costs were necessarily incurred as a result of the unlawful manner in which the Applicants were dealt with. The Applicants have the right to be reasonably compensated for those economic losses.

Non-pecuniary (moral) damages

150. The Applicants seek compensation for moral damage suffered as a result of the adverse action taken against them. In the joint submission, the Applicants seek

compensation in the amount of two years' salary for emotional distress suffered and for damage to their professional reputation.

151. The Tribunal considers that an award for moral damage does not justify a link to the staff member's grade or status. Instead, a principled approach should be adopted in that an assessment should first be made of the extent of the damage suffered, then a monetary value should be placed on the harm without regard to the status of the individual.

152. The Tribunal endorses the finding in the judgment of the Dispute Tribunal for the United Nations Relief and Works Agency ("UNRWA), *Abdel Khaleq* UNRWA/DT/2013/022, at para. 84, that assessment of whether moral damage should be awarded should take the following steps:

> a. There should be a finding as to whether or not the Applicant did in fact suffer such damage;
>
> b. If he did not, there would be no basis for such an award;
>
> c. If he did, it will be important for the Tribunal to make a factual determination of the level of damage, bearing in mind that feelings of upset, stress, anxiety, psychological damage and all such components that either singly or cumulatively make up what has been referred to as "moral damages" are at varying levels of severity. At one end of the continuum lies a minimal level and at the other end a level of extreme severity. Between these two extremes is the appropriate level and the task of determining this level is properly entrusted to the Tribunal which has seen or has heard the individual giving evidence and describing his feelings and emotional state;
>
> d. The Tribunal has to be satisfied that the damage as described was attributable to action taken by the Respondent;

e. Where the unlawful act was performed maliciously or was high-handed and without due regard for the legitimate concerns and feelings of the staff member, it is bound to have aggravated the feelings of distress and will accordingly attract a higher award;

f. The Tribunal has to take account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly, the Tribunal has to bear in mind the principle of appropriateness and proportionality;

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

153. The Tribunal is persuaded by the evidence presented by the Applicants during the hearing regarding the moral injury and reputational damage suffered as a result of the decision to investigate them and, more importantly, by the manner in which the Office of the USG/DM trawled amongst the small band of professional investigators in international organizations to identify an investigator.

154. The Applicants had a right under their contract of employment to have their complaint against the Acting Director fairly considered. This did not occur. Moreover, their complaint against the Acting Director resulted in a complaint against them, questioning their competence and professionalism and suggesting that these alleged shortcomings amounted to misconduct. These matters comprise a substantial breach of the Respondent's contractual obligations towards the Applicants and caused them substantial damage requiring compensatory payment of an amount sufficient to vindicate the Applicants' rights and demonstrate that the decision to investigate them for possible misconduct was not only unjustified but tainted by retaliatory intent and breach of due process.

155. At the hearing, the Applicants made convincing representations before the Tribunal regarding the extent of the injury the action taken against them caused to their well-being, the harmonious work environment they are entitled to, and their professional reputations.

156. Ms. Nguyen-Kropp had to deal with the adverse action taken against her at a time when her mother was dying of cancer. She described the humiliation she suffered when she was moved from her office desk on a flimsy pretext and the fact that her normally outstanding performance evaluation contained an unjustified negative comment from the Acting Director. She also described the reasons for her move to another city, in another continent, on a much less secure contract of employment, with consequences on her family life, in order to escape the harm caused by the decision to investigate her, including harm to her professional reputation.

157. Shortly after Mr. Postica moved to OLAF, he became aware of rumours regarding a secret investigation against him and Ms. Nguyen-Kropp, which had been referred to OLAF to investigate despite the Respondent being aware that they were his new employer. He left his new position to clear his professional reputation and stated that his new employer suggested that he should not return until his name was cleared. Mr. Postica's evidence was compelling on the damage to his and Ms. Nguyen-Kropp's professional reputation amongst the finite group of professional investigators in international organizations. This damage will endure for some time to come and is bound to continue to cast a shadow over their professional competence and conduct.

158. The median amount of compensation for non-pecuniary harm in final judgments of the Dispute Tribunal and the Appeals Tribunal in the period of 1 July 2009 to 31 December 2012 was USD17,000 (see para. 147 of (A/68/346, Report of the Secretary-General on the Administration of Justice at the United

Nations (dated 23 August 2013)). Thus, the amount of USD17,000 is a useful reference point when assessing compensation for non-pecuniary harm, considering, of course, that in any particular case the circumstances may justify a higher or lower award.

159. The Tribunal finds, on the evidence before it, that both Ms. Nguyen-Kropp and Mr. Postica suffered non-pecuniary loss (moral damage) of a high order, far in excess of the median sum of USD17,000. There were a number of aggravating factors, as explained above, including the manner in which both Applicants were treated throughout the relevant period of time up to the official notification of clearance, which was delayed by six months, and the fact that senior managers who were directly involved in the decision-making process failed in their duty to uphold UN policies and safeguard the integrity of its oversight framework and commitment to accountability and responsibility.

160. The Tribunal notes, in this regard, the International Civil Service Commission's 2001 Standards of Conduct for the International Civil Service, para. 19 of which states that "[i]t must be the duty of international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions".

161. The factual circumstances in these cases are, of course, quite particular. In determining the appropriate amount of compensation for non-pecuniary harm in these cases, the Tribunal considered the judgments of the United Nations Appeals Tribunal which involved a significant degree of non-pecuniary harm attracting high awards similar in scale: see, e.g., *Chen* 2011-UNAT-107 (affirming the award of six months' net base salary at the P-4 level for non-pecuniary harm); *Appellant* 2011-UNAT-143 (affirming the award of USD40,000 for emotional distress); *Cabrera*

2012-UNAT-215 (reducing the award for non-pecuniary harm to 10 months' net base pay); *Abubakr* 2012-UNAT-272 (reducing the award for non-pecuniary harm from USD40,000 to USD25,000); *Goodwin* 2013-UNAT-346 (affirming the award of USD30,000 for non-pecuniary harm); and *Appleton* 2013-UNAT-347 (affirming the award of USD30,000 for emotional distress).

162. Having considered the overall circumstances in this case, this Tribunal finds that the award of USD40,000 to each Applicant is the appropriate sum of compensation under the head of non-pecuniary loss. All other claims for relief are rejected.

Conclusion

163. The Tribunal finds that the decision that there was "reason to believe" that misconduct may have occurred was manifestly unreasonable and unlawful. The Tribunal finds that the manner in which, and the process whereby, the subsequent preliminary investigation was embarked upon and effected were procedurally flawed and marred by due process breaches and retaliatory intent. The decision-makers paid scant regard to the risk of reputational damage to the Applicants and failed to have full regard to the principles and imperatives of the UN's oversight policy.

164. The Applicants are entitled to an effective remedy as compensation for the damage inflicted upon them in the course of their upholding the Organization's policy on protection against retaliation.

Orders

165. The Tribunal awards the followings sums, in order to place the Applicants in the position they would have been had the contested decisions not been taken:

a. USD10,000 to each Applicant as a contribution towards the economic loss suffered by each Applicant in the form of legal costs. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment;

b. USD40,000 to each Applicant for the non-pecuniary loss (moral damages) suffered. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

166. All other claims are rejected.

(*Signed*)

Judge Goolam Meeran

Dated this 20th day of December 2013

Entered in the Register on this 20th day of December 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York