



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

FLORES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Miles Hastie, OSLA

**Counsel for Respondent:**  
Bartolomeo Migone, WFP  
Simone Parchment, WFP

## **Introduction**

1. The Applicant contests the decision to separate her from service without termination indemnities from the World Food Programme (“WFP”) following the completion of an investigation by the Office of Inspections and Investigations (“OSDI”), WFP. The Applicant requests the rescission of the decision, her reinstatement with payment of salaries and benefits since the time of separation and recognition of relevant seniority, compensation for material and moral damages, expunction from her file of all annotations, comments or negative references, written apologies for the arbitrary actions against her, and a letter objectively recognizing her performance.
2. The Respondent contends that WFP acted lawfully and within its discretion when imposing the disciplinary measure of separation from service and requests that the application be dismissed in its entirety.

## **Relevant background**

3. On 4 March 1999, the Applicant joined the Honduras Country Office, WFP, as a Logistics Assistant under Service Contract (locally-recruited staff). This contract was renewed on several occasions until June 2005, at which time she was appointed to a GS-7 fixed-term contract as a Senior Logistics Assistant.
4. On 10 October 2008, OSDI received a written complaint regarding the Applicant’s conduct which stated, *inter alia*, that a supervisor in the Logistics Unit had insulted and threatened another staff member in the Applicant’s presence, that she had ordered the distribution of damaged goods from WFP’s warehouses and that she deviated from the Financial Regulations, Rules and Procedures of WFP.
5. On 6 August 2009, the Applicant was interviewed by OSDI as part of their investigation into the October 2008 allegations, following which she was suspended

and placed on administrative leave with pay pending the completion of the investigation.

6. On 20 November 2009, OSDI provided the Director, Human Resources Division (“HRD”), WFP, with its “Investigation Report on [the Applicant]: Investigation into alleged violation of WFP Policy on Harassment, Sexual Harassment and Abuse of Authority and allegations of Unsatisfactory Conduct”, whereby they recommended that “appropriate disciplinary action be taken against [the Applicant]”. The analysis and conclusions section of the investigation report addressed the Applicant’s role in:

A. [The] failure to intervene and correct [PM’s] offensive conduct in violation of the WFP HSHAP [Harassment, Sexual Harassment and Abuse of Authority] Policy.

B. [The] deviation from Financial Regulations, Rules and Procedures of the Organization.

C. Directing the distribution of damaged beans and oil and permitting the removal of expiration dates from boxes and bottles containing expired vegetable oil.

D. Directing the removal of expiration dates from bottles containing vegetable oil and ordering the repacking of the expired oil in new boxes to conceal the expiration date.

7. On 29 December 2009, the Director, HRD, WFP, informed the Applicant that the OSDI investigation had found that she had “breached various WFP Staff Rules and Regulations and related issuance and ha[d] displayed a standard of conduct which is below that required in international civil service”. OSDI’s report considered that (emphasis in original):

25. OSDI gathered voluminous evidence that [the Applicant] knowingly directed the distribution of damaged and expired commodities, attempting to conceal that they were in bad conditions and thus committing fraud and exposing WFP’s reputation to risk.

26. The gravity of [the Applicant’s] conduct is compounded by the fact that [she was] were perfectly aware of the fact that the commodities were damaged at least since [her] receipt of

complaints from food monitors. Despite such awareness, far from taking steps to eliminate or reduce the risks related to the distribution of damaged food, [she] persisted in [her] course of action.

27. In light of your status as an international civil servant and of your significant experience, including more than ten years in the area of Logistics, WFP is entitled to expect you to adhere to high standards of care and prudence in exercising your functions. Moreover, the specific position with which the Programme entrusted you, which includes responsibilities in connection with the management and dispatch of WFP commodities, requires that you display a particularly high degree of prudence and attention.

...

### **Conclusions and Charges**

29. Your alleged actions, as outlined above, are considered to amount to misconduct within the meaning of Staff Rule 10.1. ...

30. In light of the foregoing, this is to charge you with misconduct in that you:

- Failed to exercise your managerial and supervisory responsibility under WFP HSHAP policy;
- Deviated from WFP's established procedures for processing invoices, thereby violating Financial Regulation 12.1(a) and Section 9.3 and 9.3.1 of the WFP Consolidated Financial Manual;
- Knowingly directed the distribution of damaged commodities, trying to conceal their conditions, and continued doing so despite having received complaints from food monitors;
- Directed the distribution of expired commodities, instructing staff under your supervision to delete the expiration date from the commodities thus misrepresenting their condition;
- In doing the above, violated Section 5.1.5 and 4.43 of the WFP Transport Manual, committed fraud and exposed WFP to the risk of disrepute as well as of legal liabilities.

8. On 26 March 2010, the Applicant provided WFP with her responses to the charges filed against her. As part of her response, the Applicant raised a number of concerns regarding the investigation and disciplinary process, including that she was interviewed on the final day of the investigation; that prior to her interview she had no idea that she was being investigated; that she was not advised of her right

to have a lawyer present during the interview; that a number of witnesses who were favorable to her case were not interviewed (e.g., regional and international logistics officers and food monitors).

9. On 24 June 2010, following a review of her responses to the findings of the investigation report, the Director, HRD, WFP, informed the Applicant that (emphasis in original)

[t]he confirmed findings against you are of such serious nature that they entail the irretrievable breach of the trust on which your employment with the Programme is based.

Your actions are found to amount to fraud in that they aimed at misrepresenting the conditions of the commodities to food monitors and WFP beneficiaries. [Your] actions had the potential to negatively impact the Organization's reputation ... [and] had a very serious risk to the health and/or lives of WHP beneficiaries ... [T]he findings against you highlight a pattern of serious misconduct and a series of grave incidents protracted over a significant period of time, from 2007 to 2009. The gravity of your confirmed misconduct is compounded by your significant seniority and experience with the Programme ...

In light of the foregoing ... this is to inform you of the decision to impose the proposed disciplinary measure of "***Separation from Service***" with no termination indemnities in accordance with UN Staff Rule 10.2(viii).

10. On 22 September 2010, the Applicant filed an application with the Dispute Tribunal contesting the decision to separate her from service. The Respondent's reply was filed with the Tribunal on 25 November 2010.

11. On 4 June 2012, the undersigned Judge was assigned to the present case.

12. On 9 August 2012, the Tribunal, by Order No. 164 (NY/2012), requested that the parties file a joint statement regarding the agreed and disputed facts and legal issues in this case as well as whether there were any reasons that the court should not hold a hearing.

13. On 27 September 2012, the parties filed a joint statement as directed by the Tribunal whereby they identified the agreed upon legal issues and facts. Where applicable, the parties identified the facts which were contested.

14. From 12 to 14 March 2013, the Tribunal held a hearing during which it heard oral testimony from the Applicant as well as from four witnesses proposed by the parties.

15. On 8 and 9 October 2013, the Tribunal held a hearing during which it heard oral testimony from three additional witnesses.

16. On 1 and 8 November 2013, the parties, in response to Order No. 250 (NY/2013), filed their closing submissions.

### **Legal issues**

17. As part of their joint submission, the parties stated that the legal issues in the present case were as follows:

2. Whether the disciplinary measure of “separation from service” with compensation in lieu of notice and without termination indemnities was proportionate.

3. Whether the investigation and subsequent disciplinary proceedings in this case were conducted in accordance with applicable rules and standards of due process rights of the Applicant, including production and evaluation of evidence.

4. Applicant’s Position – Whether the Applicant’s conduct constituted serious misconduct.

5. Respondent’s Position – Whether the Applicant’s conduct constituted misconduct.

### **Applicant's submissions**

18. The Applicant's principal contentions may be summarized as follows:

6. The investigators, by not interviewing the Applicant until the last day of the fact-finding process, by not giving her advance warning that she was to be questioned in connection with an investigation, and by not interviewing witnesses who were identified by her as potentially being able to provide relevant evidence, violated her due process rights. The failure to include testimony or documentation supporting her assertions constituted a violation of the Uniform Guidelines for Investigations which clearly state that both inculpatory and exculpatory information must be examined during investigations. This was not an investigation against her in the strict sense and she was prevented from defending herself appropriately during it;

7. The Applicant denied breaching WFP Policy on Harassment, Sexual Harassment and Abuse of Authority. She contends that she tried to do everything in her power to maintain cordial relations among the staff members and she dealt with all the complaints brought to her attention as best she could, including discussing incidents with the supervisor of the unit. The use of contested language was part of a collective pattern and the words used were part of a colloquial vocabulary. While her interventions in preventing some of the offensive behaviour were appreciated, they were not successful. Further, she never used any such language nor is there any legal support for her being responsible of any type of harassment;

8. There is no proof that at any time she ordered the distribution of any damaged or expired goods for consumption or ordered that inappropriate measures be taken for the distribution of such goods to occur. The persons responsible for supervising and participating in these procedures are the warehouse managers and in cases where problems with damaged goods

occurred, she ordered their replacement. She denied her implication in the distribution of the expired oil in 2008 and she mentioned that following the laboratory tests, the oil from 2009 was still good for human consumption;

9. At no time did she knowingly deviate from any of the financial regulations nor did any of her actions result in her obtaining any type of personal financial gains. She considered that the decisions taken with regard to the transport companies enabled WFP to avoid payment delays and an interruption of the services provided by transport companies. She was never involved in the transport companies' invoicing process and she was not aware that some of her staff used their forms and/or stamps. She only advised her supervisee to help the transport companies by making sure that the invoices showed the correct amounts;

10. With regard to each of the above allegations, the decision to separate the Applicant from service was not proportionate to either the charges held against her or her actual involvement in the contested activities;

11. The Applicant highlighted in her closing submissions that she was not directly involved in any of the charges held against her and that the Respondent did not produce sufficient evidence to support the proportionality of the sanction that was applied;

12. The Applicant requests that she be reinstated or paid all salary and benefits retroactively until the date of the judgment as well as compensation for the moral and professional damage caused by her wrongful termination.



## **Respondent's submissions**

19. The Respondent's principal contentions may be summarized as follows:
- a. There is clear and convincing evidence that the Applicant violated WFP's Policy on Harassment, Sexual Harassment and Abuse of Authority by not preventing and condoning the use of offensive language in her unit;
  - b. The fact that other staff members may have engaged in such activities does not absolve her own conduct, especially when taking into consideration that she had supervisory responsibilities;
  - c. The Applicant knew that several shipments of beans and oil were not fit for distribution, yet she attempted to conceal those problems and distribute them;
  - d. The Applicant breached WFP's financial guidelines by assisting transport companies in preparing invoices that were to be submitted to WFP;
  - e. The investigation was conducted in accordance with the rules and procedure established by WFP's OSDI Quality Assurance Manual;
  - f. The disciplinary sanction of separation from service was proportionate. Further, the Tribunal's jurisprudence clearly states that the application of a disciplinary measure falls within WFP's discretion and the Tribunal's review will limit itself to whether there is evidence of illegality, irrationality, procedural impropriety or a violation of the Applicant's due process rights;
  - g. The application should be dismissed in its entirety.

## **Consideration**

### *Receivability*

20. By the application filed on 22 September 2010, the Applicant contests the disciplinary decision to separate her from service without termination indemnity. The application was filed within 90 days from the 24 June 2010 notification of the decision to the Applicant. The Tribunal considers that the application meets all the receivability requirements from art. 8 of the Dispute Tribunal's Statute and is receivable.

### *Applicable law*

21. Staff Regulations of the United Nations and provisional Staff Rules (ST/SGB/2009/7) of 16 June 2009 state:

#### **Chapter X**

#### **Disciplinary measures and procedures**

#### **Rule 10.1**

#### **Misconduct**

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

## **Rule 10.2**

### **Disciplinary measures**

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

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

- (i) Written or oral reprimand;
- (ii) Recovery of monies owed to the Organization;
- (iii) Administrative leave with or without pay pursuant to staff rule 10.4.

## **Rule 10.3**

### **Due process in the disciplinary process**

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary

measure or non-disciplinary measure, except as provided under staff rule 10.2 (b)(iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

## **Regulation 1.2**

### **Basic Rights and Obligations of staff**

#### **Core values**

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental rights, in the dignity and worth of the human person and in equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

...

## **Article X**

### **Disciplinary measures**

#### **Regulation 10.1**

(a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;

(b) Sexual exploitation and sexual abuse constitute serious misconduct

22. WFP's Directive ED2007/003 (Policy on Harassment, Sexual Harassment and Abuse of Authority) dated 14 February 2007, states:

**Policy Statement**

3. WFP is committed to ensuring that all its workplaces are free from abuse, offensive behaviour, harassment, abuse of authority and discrimination. WFP is also committed to promoting a work culture in which every member of staff understands, and is able to carry out, his/her personal responsibilities for maintaining the dignity of work colleagues.

4. Harassment and abuse of authority of any kind is never acceptable. WFP will not permit or condone such behaviour under any circumstances. It is against WFP policy for any employee to abuse the authority delegated to her/him or to harass or intimidate any individual in the workplace. WFP will not tolerate any form of harassment or abuse of authority, whether based on age, disability, ethnic origin, gender, marital status, race, religion, sexual orientation or any other personal characteristic. WFP will also not accept any conduct that is offensive, humiliating, embarrassing or intimidating to other members of staff.

5. Complaints of harassment or abuse of authority will be taken seriously by WFP. Any conduct that is found to constitute harassment or abuse will be dealt with in a manner consistent with the severity of the infraction, including appropriate administrative or disciplinary measures.

**Definitions**

6. **Harassment** is any improper conduct by an individual that is directed at and offensive to another person in the workplace and that the individual knew, or reasonably ought to have known, would cause offence or harm to that person.

...

8. **Abuse of authority** is when an individual improperly uses the power and authority inherent in his/her given position to endanger another person's job, undermine the person's performance in that job, threaten the person's economic livelihood, or in any way maliciously interfere with or influence a person's career.

9. **Retaliation** is any behaviour or threatened behaviour against an individual or individuals for raising concerns, making a complaint under this procedure or supporting someone else in doing so,

participating in an investigation, or challenging conduct that may be inappropriate.

...

## **Prevention**

### **Role of managers and supervisors**

13. Employees with supervisory and/or management responsibilities are responsible for:

- maintaining a high standard of personal conduct in dealing with all employees, and leading by example in maintaining the personal dignity of employees;
- ensuring that all employees are aware of their rights and responsibilities under this policy, and of the courses of action and sources of support that are available to them;
- intervening promptly when alerted to actual or potentially inappropriate or offensive conduct, and reiterating the required standards of conduct;
- taking prompt action to report, informally resolve, refer as appropriate or investigate, under the guidance of OSDI, alleged incidents of workplace harassment;

...

- attending any relevant training related to this policy;

...

### **Role of WFP**

14. Under the overall leadership of the Executive Director, WFP is responsible for:

- providing leadership in the prevention of workplace harassment by fostering a climate of mutual respect and by providing role models of the required standards of behaviour;
- ensuring that all employees are informed of the required standards of conduct, informing them of this policy, and ensuring that all staff are aware of their responsibilities and rights, and of how to obtain support if needed;
- briefing new employees on this policy during orientation sessions, and providing ongoing training for all staff on preventing and managing harassment in the workplace;

- ensuring that timely and appropriate action is taken when workplace harassment is alleged, and that the confidentiality of individuals is reasonably protected;
- taking appropriate action to maintain the safety and well-being of relevant parties and to protect the interests and reputation of WFP;
- where necessary, taking disciplinary or other corrective measures to deal with breaches of this policy, including breaches made by perpetrators of harassment, managers who unreasonably fail to take proper action to deal with harassment or abuse of authority, and individuals who make frivolous or malicious complaints of harassment;
- monitoring the effectiveness of this policy's implementation.

15. The Human Resources Division (ADH) is responsible for the overall maintenance of this policy by:

- developing training and information material to inform employees, supervisors and managers about harassment, sexual harassment and abuse of power (SHAP) and measures for its prevention;
- advising employees, supervisors and managers concerning the informal resolution process and mediation, and taking all steps possible to resolve complaints informally;
- consulting with the Office of Inspections and Investigations (OSDI) to set a reasonable time frame for the completion of the investigation, and reviewing findings and recommendations;
- determining the outcome and appropriate action to be taken in responses to breaches of the policy, in consultation with the Legal Services Division (LEG) as appropriate;
- ensuring that the parties are informed of the outcome in a timely fashion;
- in consultation with the Ombudsman, making appropriate arrangements for dealing with requests for review of decisions or with complaints about how this policy was applied during a complaint;
- ensuring that appropriate and up-to-date information regarding this policy is provided on the Intranet.

## **Rights**

...

17. *Alleged perpetrators* have the right to:

- be assured of due process during the handling of any complaint or the investigation into a complaint;
- be offered reasonable and appropriate support to deal with the impact of any harassment or abuse of authority;
- be accompanied during the key stages of this procedure—e.g., during interviews—by a willing work colleague;
- be informed at the appropriate stage when a formal complaint has been made, and be informed of the allegations levelled against him/her;
- be assured of confidentiality and professional standards of conduct while the complaint is being investigated.

...

## **The formal process**

26. The formal process consists of the following steps. A detailed description of the process to be followed appears in Annex II.

...

### *Step 3 – Preliminary review of the complaint*

...

34. If ADH decides that a fuller investigation is warranted to obtain additional information, the complaint will be forwarded to OSDI for necessary action. The complaint will be registered by OSDI and the complainant will be notified of this.

### *Step 4 – Mediation*

35. If the complainant and the alleged perpetrator agree to mediation, the Director ADH may obtain professional mediation services from outside WFP, or from any suitably experienced individual within WFP who is acceptable to both parties.

...

### *Step 6 – Conclusion of the investigation*

41. The investigator(s) will review all the facts and evidence surrounding the complaint of harassment, and will prepare a written report containing the findings, conclusions and recommendations.



The report of the investigator(s) investigating under the direction of OSDI will first be submitted to OSDI for review of completeness and consistency of investigation standards. After resolution of any concerns, the final investigation report will be submitted to the Executive Director and the Director ADH.

42. Malicious complaints are considered as misconduct, and if during the course of an investigation it is determined that the complaint was malicious, the complainant may be subject to administrative or disciplinary action.

*Step 7 – Decision and disciplinary phase*

43. On receipt of the investigation report, the Executive Director or the Director ADH, acting on the Executive Director's behalf, will review the findings and recommendations and—after the alleged perpetrator has been afforded due process, and in consultation with LEG—make a decision regarding the administrative or disciplinary action that should be taken, if any.

44. The Executive Director or the Director ADH or her/his delegated representative will inform the complainant and the alleged perpetrator of the decision, in writing, within 30 working days of receipt of the investigation report and after completing all due process requirements. A summary of the reasons for the decision will be provided at the discretion of the Director ADH.

*Request for review*

45. Both the complainant and the alleged perpetrator may request a review of *either* the decision *or* any alleged failure to implement the procedures and principles of this policy fairly and reasonably. Reviews shall be conducted in accordance with the established internal mechanism applicable to the employee's contract of employment.

46. Administrative/disciplinary action taken as a result of the original complaint may be implemented and enforced during the time of the appeal and review, with the consent of the Director ADH or his/her delegated representative.

23. WFP's Directive states, *inter alia*, that the following behaviour constitutes harassment: verbal abuse, insults and name-calling; shouting and aggressive behaviour; use of derogatory or offensive nicknames. Further, it also defines workplace as any place where the harassment can "be identified or connected ... directly ... to working for WFP".

24. WFP Consolidated Financial Manual states (emphasis added):

**Section 9.3**

The Invoice is the document through which a vendor/supplier requests payment from WFP after delivery of the goods and/or services specified in the contract. ...

**Section 9.3.1**

**Receipt**

It is the responsibility of the vendor/supplier to forward the invoice to WFP after having provided goods and/or services.

**Verification**

- The purpose of invoice verification is to ascertain that the goods and/or services contracted have been satisfactorily received;
- Vendor is the correct payee;
- Terms and conditions of the sale of goods and/or services have been adhered to.

*Scope of the review*

25. When the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed (see *Mahdi* 2010-UNAT-018, *Masri* 2010-UNAT-098, *Yapa* UNDT/2010/169).

26. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service without termination indemnity and with payment of compensation in lieu of notice.

27. Article 9.2 of the International Labour Organization ("ILO") Convention on termination of employment (Convention No. 158) of 1982, which is applicable to all branches of economic activity and to all employed persons (art. 2), states that:

In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation ... shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of valid reason for the termination ... shall rest on the employer
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for termination having regard to the evidence provided by the parties and according to procedures ... and practice.

28. Similarly to the principle of the burden proof in disciplinary cases in the ILO Convention No. 158, the Tribunal held in *Hallal* UNDT/2011/046 that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

29. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal decided that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, the Applicant must demonstrate that these flaws affected her/his rights.

30. The charges against the Applicant were as follows: (i) failure to exercise her management and supervisory responsibilities and violations of WFP policy on harassment, sexual harassment and abuse of authority; (ii) deviation from the Financial Regulations; (iii) directing the distribution of damaged and expired commodities.

#### *Regularity of the procedure*

31. The Tribunal notes that one of the Applicant's contentions in the present case is that there were irregularities during the disciplinary proceedings. In her application the Applicant stated that the investigators, by not interviewing her until the last day of the fact-finding process, by not giving her advance warning that she was to be questioned in connection with an investigation, and by not interviewing witnesses

who were identified by her as potentially being able to provide relevant evidence, violated her due process rights. The failure to include testimony or documentation supporting her assertions constituted a violation of the Uniform Guidelines for Investigations which clearly state that both inculpatory and exculpatory information must be examined during investigations. This was not an investigation against her in the strict sense and she was prevented from defending herself appropriately during it. The Applicant further contends that her suspension following the completion of her interview with OSDI appeared to have been decided prior to the commencement of the investigation, and without her having been heard, because the questioning to which she was subjected looked like a mere formality. The Tribunal therefore needs to consider whether there were any procedural irregularities leading to the application of the contested disciplinary sanction.

32. In considering whether the Applicant's due process rights were respected during the disciplinary proceedings there are two separate aspects of the case that the Tribunal needs to take into consideration: the investigative phase conducted by OSDI and the disciplinary process undertaken by Director, HRD, upon receiving OSDI's investigation report.

#### *Investigative phase*

33. The purpose of OSDI is to conduct a neutral fact-finding investigation into, in cases such as the present one, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to HRD being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.

34. In *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once a staff member has become

the target of an investigation he or she should be accorded certain basic due process rights. Once the Administration forms an opinion as to the likelihood that the staff member committed the acts in question, due process rights must be respected.

35. The fundamental human right to defend oneself and present evidence in one's own support is proclaimed by art. 14 of the International Covenant on Civil and Political Rights, a general legal instrument on human rights, and is also mirrored in the regional instrument of the European Convention on Human Rights (art. 6). Consequently, once a staff member becomes aware of the allegations held against him or her, the staff member then has the right to defend himself or herself in person.

36. The legal framework with regard to disciplinary matters involving locally recruited WFP staff in Country Offices and Regional Bureaux states that cases of alleged misconduct must be handled in compliance with the principles of due process which require that the staff member concerned be fully informed of the allegations against him or her, be afforded the opportunity to rebut those allegations, notified of the outcome of the investigation and be allowed to challenge that outcome should she or he wish to do so. A staff member who is subject of the investigation is to be informed in writing of the allegations of misconduct which triggered the investigation and has to be provided with the opportunity to give his or her version of the matter, to suggest people of whom inquiries might be made of, and to call witnesses on his or her behalf (see para. 5.2 of WFP's OSDI Quality Assurance Manual).

37. In accordance with WFP's OSDI Quality Assurance Manual, para. 5.28, interviews are a key part of the information gathering process for any investigation and the investigators are obliged to interview the complainant, the subject of any allegations and any witnesses that either of these parties may indicate in order to support their respective version of events. In conclusion, interviewing the subject of the investigation and the witnesses indicated by him or her in support to the events presented by him or her is mandatory and should generally occur in the following

order: complainant, witnesses and subject. Para. 5.32 of OSDI's Quality Assurance Manual states that

[i]nterviewees will be notified of the purpose of the investigation and of their rights and obligations with regard to the interview process before any questioning begins. This may be done either orally or by handing the interviewee the Notes on Investigations. Interviewees may be required to sign a copy of these notes to confirm that this information has been clearly communicated to them.

38. Further, para. 6.9 of the Quality Assurance Manual states that

[s]ubjects must be given the opportunity to answer all allegations before these are mentioned in a report. In cases where an investigation's findings recommend administrative/disciplinary action against a person who was not subject of allegations (e.g. for managerial lapses that may have enabled the misconduct), such information may still be included on the condition that the report clearly indicates in the section on "due process" the initiating bodies' responsibility to provide for full due process.

39. The Tribunal considers that the subject of an investigation must always be informed by the investigators in a clear manner of each of the specific allegations against him or her and of their rights and obligations with regard to the interview process before any questioning begins. In *Borhom* UNDT/2011/067, the Tribunal observed that an investigator must be neutral, without bias and must approach each case from the standpoint of a presumption of innocence of the subject of the investigation.

40. The transcripts of the Applicant's 6 August 2009 interview with OSDI show that at the start of the interview the Applicant was

... provided with the opportunity to read the written notification of allegations informing her that she is the subject of investigation ... . [OSDI] will be conducting an interview with [the Applicant] as a subject of investigation ...

... [A]lthough at this stage this is a fact finding interview, the investigation may result in administrative or disciplinary action against staff, including yourself as a subject of investigation.

The information you will provide will be used by OSDI to determine the facts, reach conclusions and make recommendations to management. OSDI does not initiate proceedings, nor does it decide whether disciplinary actions should be taken.

41. The Tribunal observes that the Applicant was informed of the authority under which the investigators were proceeding, as well as her duty, as a WFP staff member, to cooperate with the investigation, including her obligation to maintain the confidentiality of the investigation, her right to take breaks during the interview session and that any evidence gathered may be submitted as part of any future disciplinary or administrative processes.

42. During the oral hearings in front of the Tribunal, the Applicant declared that when the investigators first called her she was in her office preparing a presentation she was about to give. They said that they wanted to meet with her about an investigation into the supervisor of the Logistics Unit and that it is only after 20 minutes that she was told that she was the subject of an investigation. She did not know that she was being investigated until that morning, which was a very unpleasant surprise. After the interview was completed, she went to give her presentation at which point she was told that she was suspended and she was escorted off WFP's premises.

43. The written notification informing the Applicant of the allegations against her, which was to be provided to her before the interview started, was not part of the evidence produced by the Respondent and the content of the interview confirms the statement made by the Applicant in front of the Tribunal in that regard. The Tribunal considers that the Applicant was not informed prior to the beginning of the interview of the specific allegations held against her which would have enabled her to clarify the relevant facts and properly defend herself against the allegations. She was interviewed by OSDI investigators for four hours, without knowing during most of the duration of the interview that any of her declarations could incriminate her. It is only later, after she cooperated with the investigators, answered most of

their questions, and inquired of the allegation behind her being investigated that she was informed of the allegations' content.

44. The Tribunal observes that the transcript of the Applicant's interview is 138 pages and the allegations against her are first mentioned on page 123 in response to the Applicant enquiring as to why she was under investigation. The investigators stated that she was

under investigation because of the responsibilities that [she] failed to undertake under the provision of the Harassment Policy. [She was] also under investigation for ... the procedures that were reported to [the investigators] involving ... things that are going on in the Logistic Unit as it relates to expired food and how [they] handle that. And corporately, from a reputational risk perspective of what would happen if the beneficiaries or the Government should understand that [they were] manipulating expiration dates, when [they] have procedures in place to conduct a laboratory test to ensure that food is fit for human consumption.

45. Paragraph 5.31.3 of the Quality Assurance Manual requires that investigators proceed to obtain "as complete a picture as possible of the events surrounding the allegations before approaching the subject, giving him/her the opportunity to answer all allegations in full". Additionally, para. 5.34 states that "[a]ny further evidence or witnesses indicated by an interviewee, and especially a subject, must be followed up on by the investigators. It may be necessary to interview participants to an investigation on more than one occasion, and investigators reserve the right to do so".

46. The Tribunal finds that the Applicant was not informed of the allegations held against her at the beginning of the interview and she did not get the opportunity to respond to them in full.

47. Not knowing the accusations held against her, the Applicant had no real chance to present her version of the contested events. She was also not re-interviewed in relation to any of the allegations held against her before they were



included in the investigation report. The Tribunal observes that according to the Policy on Harassment, Sexual Harassment and Abuse of Authority, “the investigator(s) will review all the facts and evidence surrounding the complaint of harassment, and will prepare a written report containing the findings, conclusions and recommendations”. Additionally, par. 6.9 of the Quality Assurance Manual states that the subjects must be given the opportunity to answer all allegations presented to them before they are mentioned in the final report. The Tribunal also observes that OSDI has the obligation to review the completeness of its investigation report and the consistency of the investigative process. It is only following the resolution of any concerns that the final report is to be submitted to the Director, HRD. Not having being re-interviewed in relation to any of the allegations against her, she had no real chance to defend herself.

48. It does not result from the transcript of the interview that she was informed during the interview of her rights: to be treated fairly (which includes the right to defend herself); to be offered a reasonable and appropriate support to deal with the impact of any harassment or abuse of authority, to be accompanied during the key stages of this procedure (e.g., during interviews by a willing colleague); and to identify other witnesses or evidence that would support her version of events, with the exception of a mention related to the documents referring to the distribution of the expired oil from April to May 2009.

*Procedure in front of the Human Resources Division*

49. The Applicant’s statements during her interview that were made prior to her being informed by the investigators of the allegations against her were later used as evidence in the investigation report sent to the Director, HRD. On 29 December 2009, the Applicant was officially charged with misconduct as a result of her “fail[ing] to exercise [her] managerial and supervisory responsibilities under WFP’s HSHAP Policy”; “deviat[ing] from WFP’s established procedures for processing invoices”; and “[k]nowingly direct[ing] the distribution of damaged

commodities”.

50. Per the 24 June 2010 memorandum which imposed the disciplinary measure of a separation from service, the Applicant, as part of her 26 March 2010 response to the charges, raised a number of concerns regarding the investigation and disciplinary process, including that she was interviewed on the last day of a two week investigation; that she had no idea that she was being investigated until she sat down for the interview; that two favourable declarations were not included as exhibits to the investigation report and that no food monitors were interviewed.

51. The Tribunal considers that the decision-maker wrongly determined that the investigation had been conducted in accordance with the provisions of para. 5.31 of the Quality Assurance Manual. In fact, the investigation was not conducted in accordance with para. 5.2 of the Manual, which requires that the investigation balance the fairness to the subject and the need to protect the investigation.

52. The Tribunal notes that the complainants and all of the witnesses, with the exception of the former Country Director, had already been interviewed before the Applicant. The only person interviewed after the Applicant was the other subject of the investigation, the supervisor of the Logistics Unit on 6 August 2009. The investigators knew that they had already interviewed the complainants, the key witnesses and that they were going to interview the other investigation subject that afternoon. There was no risk for the investigation to be compromised or for the witnesses to be influenced by the Applicant.

53. In accordance with OSDI's rules, and contrary to what occurred in the present case, the Applicant should have been interviewed or at least re-interviewed after the last witness in her case, the former Country Director, who was interviewed by the investigators on 14 October 2010.

54. After reviewing the transcript of the Applicant's interview, the decision-maker stated that it appeared that the Applicant had been asked by the investigators

whether she wanted to nominate any witnesses to which she replied that she could provide supporting documentation, however, she did not indicate any witnesses to be considered by the investigators.

55. The Tribunal, after carefully reviewing the transcript of the interview, concludes that the Applicant was informed as to why she was under investigation, but only after she had answered most of the questions and after she enquired as to the allegations held against her. The Tribunal observes that the Applicant was not asked by the investigators if she wanted to identify any witnesses to be interviewed in her favour. The investigators only mentioned that she could send them relevant documents related to her statement and to the delivery of the expired oil from 2009.

56. In the present case, it was wrongly considered by the decision-maker that the Applicant did not propose any new witnesses to be interviewed. The Applicant had no opportunity to identify the witnesses during the initial interview simply due to the fact that she was not informed of her due process rights. The Applicant's rights to a fair disciplinary procedure, including the right to defend herself, were not respected during the later stages of the disciplinary process because the decision-maker considered that additional testimonies of the field monitors were irrelevant to the case. The Tribunal considers that, seeing that most of the orders to distribute damaged or expired food were given orally, it was relevant to the Applicant's case for the investigators and/or decision-maker to interview the individuals the Applicant had identified as having relevant information about activities in the Logistics Unit during 2007–2009.

57. The Tribunal considers that interviewing the witnesses proposed by the subject of the investigation is not at the discretion of the investigators or decision-maker. These persons must be interviewed and it is only following these interviews that the decision-maker can decide as to the relevance of their testimonies. Nevertheless, the decision-maker, instead of requesting the Applicant to indicate the names of the proposed witnesses, considered that “the evidence gathered by

[OSDI] fully supports the allegations ... the collection of further testimonies from food monitors does not appear to be ‘essential’ as stated by you”. (emphasis in original).

58. The Tribunal concludes that the Applicant’s due process rights were not respected during the interview and the breach was not cured later during the procedure in front of the HRD.

59. In *Buendia et al.* UNDT/2010/176, the Tribunal held that it could not uphold the findings and conclusion of a disciplinary process where the due rights were breached. The Tribunal rescinded the decisions to impose disciplinary sanctions against the applicants, stating:

42. Due process safeguards which are enshrined in the rules are and must be regarded by all concerned within the United Nations as essential components of a fair and just system of dealing with and resolving disputes. This Tribunal has been established to give effect to principles enshrined in the Charter of the United Nations, highlighted in various decisions and utterances of appropriate organs of the United Nations System and further emphasised and developed by the case law of the former Administrative Tribunal. In paragraph XIV of Judgment No. 815, *Calin* (1997), the Administrative Tribunal stated with regard to due process:

The Tribunal ... respects the Secretary-General’s authority to exercise his discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent’s exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors.

60. Consequently, the ground of appeal related to the irregularity of the disciplinary proceeding is accepted and the Tribunal does not need to analyse the rest of the Applicant’s contentions.

61. The Statute of the Dispute Tribunal states:

**Article 10**

...

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.

62. The Tribunal considers that art. 10 includes two types of legal remedies:

a. Article 10(a) refers to the rescission of the contested decision or specific performance and to a compensation that the Respondent may elect to pay as an alternative to the rescission. The compensation which is to be determined by the Tribunal when a decision is rescinded reflects the Respondent's right to choose between the rescission or specific performance ordered and the compensation. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it in appropriate cases, even if the staff member does not expressly request it because the legal provision uses the expression "the Dispute Tribunal shall also set an amount of compensation".

b. Article 10(b) refers to a compensation.

63. The Tribunal considers that the compensation established in accordance with art. 10.5(a), which is mandatory and directly related to the rescission of the decision, is distinct and separate from the compensation which may be ordered based on art. 10.5(b).

64. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately “shall normally not exceed the equivalent of two years net base salary of the applicant”, respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

65. When the Tribunal considers an appeal against a disciplinary decision, the Tribunal can decide to:

- a. Confirm the decision.
- b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or
- c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case the Tribunal considers that it is not directly applying the sanction but is partially modifying the contested decision by replacing, according to the law, the applied sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct.

d. Set an amount of compensation in accordance with art. 10(b).

66. The Tribunal notes that the Respondent can, on his own volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescinding of the contested decision represents a legal remedy decided by the Tribunal.

67. When an applicant requests her or his reinstatement and compensation for moral damages, she or he must bring evidence that the moral damages produced by the decision cannot be entirely covered by the rescission and reinstatement.

68. The Organization's failure to comply with all the requirements of a legal termination causes a prejudice to the staff member since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his/her reinstatement into service with compensation for the lost salaries (restitution *in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement together with compensation for the damages produced by the rescinded decision for the period between the termination until his or her actual reinstatement.

69. A severe disciplinary sanction like a separation from service is a work-related event which generates a certain emotional distress. This legal remedy generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction and consequently will consist of a partial compensation.

70. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation

that existed prior to the termination. According with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Further, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example if during the proceeding in front of the Tribunal the staff member reached the retirement age, is since deceased or her or his contract expired during the judicial proceedings.

71. In light of the above considerations, and in accordance with art. 10.5(a) of the Tribunal's Statute, the contested decision of 24 June 2010 imposing the disciplinary measure of separation from service without termination indemnity to the Applicant is to be rescinded and any references relating to the Applicant's sanction are to be removed from her official status file.

72. Regarding the Applicant's request for reinstatement, as results from the Respondent's 23 April 2013 response to Order No. 104 (NY/2013),

3. The Applicant was hired by the World Food Programme as a Logistics Assistant under a special services agreement valid from 4 March 1999 until 15 May 1999. That special services agreement was subsequently extended from 16 May 1999 to 30 June 1999 and 1 July 1999 to 30 September 1999. ...

4. The Applicant was hired by the Programme as a Logistics Assistant under a service contract valid from 1 October 1999 until 31 March 2000. That service contract was subsequently extended from 1 April 2000 to 30 September 2000; 1 October 2000 to 31 December 2000; 1 January 2001 to 31 March 2001; 1 April 2001 to 31 May 2001; 1-30 June 2001; 1-31 July 2001; 1-31 August 2001; 1 September 2001 to 31 January 2002, modified to 30 September 2002; 1 October 2002 to 31 January 2003; 1 February 2003 to 31 January 2004; 1 February 2004 to 31 January 2005; 1 February 2005 to 31 January 2006. ...

5. On 1 June 2005, the Applicant was appointed under a fixed-term contract as Senior Logistics Assistant, GS-7 valid from 1 June 2005 to 30 September 2005. That fixed-term contract was subsequently extended from 1 October 2005 to 30 September 2006; 1 October 2006 to 30 September 2007; 1 October 2007 to 30 September 2008; 1 October 2008 to 30 September 2009;



1 October 2009 to 31 March 2010; 1 April 2010 to 30 June 2010.

73. Consequently, the Tribunal considers that had the Applicant not been separated from service on 24 June 2010 for disciplinary reasons, her fixed-term appointment would have expired on 30 June 2010 and her request for reinstatement with payment of salaries and benefits since the time of separation is to be rejected (see discussion at para. 69).

74. Taking into consideration the particular circumstances of the present case, the Tribunal considers that the rescission of the contested decision is, *per se*, a fair and sufficient remedy for the moral prejudice caused to the Applicant and there is no evidence that would show that the moral prejudice she suffered as result of the contested decision cannot be covered by this remedy.

75. According to art. 10.5(a) from the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must set also an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the decision. The amount of compensation to be awarded as an alternative to the rescission of the contested decision is USD5,000 for the emotional distress suffered by the Applicant (the emotional distress will be otherwise covered by the rescission of the decision).

**Conclusion**

In light of the foregoing the Tribunal DECIDES

76. The contested decision from 24 June 2010 is rescinded.

77. References relating to the Applicant's sanction, separation from service without termination indemnity, are to be removed from her official status file.

78. In the event that the Respondent decides not to rescind the decision, he is ordered to compensate the Applicant in the amount of USD5,000.

*(Signed)*

Judge Alessandra Greceanu

Dated this 28<sup>th</sup> day of February 2014

Entered in the Register on this 28<sup>th</sup> day of February 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York