



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ONIFADE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Monika Bileris

Counsel for the Respondent:

Susan Maddox, ALS/OHRM

Cristiano Papile, ALS/OHRM

Introduction

1. The Applicant has challenged the decision dated 30 July 2014 to separate him from service following disciplinary action against him (Contested Decision). He requests the Tribunal to order the following:

- a. Rescission of the Contested Decision.
- b. Substitution of the disciplinary sanction with an administrative remedy in light of the mitigating measures he has already taken or, alternatively a sanction under staff rule 10.2(a)(i-iii) or (v-vi).
- c. His immediate reinstatement with all other emoluments from 30 July 2014.
- d. Compensation for moral damages in the amount of USD50,000.
- e. Compensation in the amount of USD50,000 for his wrongful separation and the humiliation he suffered.
- f. Removal of all records pertaining to the case from his personnel file.

Procedural history

2. The Respondent filed a reply on 15 October 2014. The Tribunal granted leave to the Applicant to file a response to the Reply. This was filed on 10 March 2015.

3. In compliance with case management orders the Parties filed a joint statement of facts and issues, submitted documents and addressed the proportionality of the sanction imposed on the Applicant in the light of information circulars on the practice of the Secretary General in disciplinary matters.

4. The Parties agreed that the issues could be decided on the papers. Notwithstanding that art. 16.2 of the Tribunal's Rules of Procedure states that "a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure", the Tribunal is satisfied that the matter does not require an oral hearing although it notes that the Respondent requested the opportunity to make further submissions on the question of compensation should that become an issue and, if warranted, to attend an oral hearing on that issue. The Applicant reserved the right to object to such a request.

Facts

5. The facts below are taken from the joint statement of facts submitted by the Parties which were augmented by the Tribunal as necessary from evidence submitted by the Parties on the case file.

6. The Applicant joined the Organization on 23 February 2001, at the P-3 level, on an Appointment of Limited Duration ("ALD") with the United Nations Office of the Humanitarian Coordinator for Iraq ("UNOHCI"). He served UNOHCI until 16 November 2003, when his ALD expired. He was reappointed on 26 December 2006, at the P-3 level, to the United Nations Mission in Sudan, and served the Organization continuously and without incident from that date until 30 July 2014, when he was separated from service following the conclusion of a disciplinary process.

7. On 3 November 2012, upon his promotion to the P-5 level, the Applicant commenced duties as State Coordinator of Warrap State with the United Nations Mission in the Republic of South Sudan ("UNMISS"). The Applicant was stationed in Kuajok, South Sudan.

8. In his role as State Coordinator, the Applicant had the delegated authority to approve movement of personnel forms ("MOPs"), for travel of both United Nations and non-United Nations personnel on UNMISS assets.

9. In March 2013, the Applicant invited Ms. M, a Civilian Police Officer with the African Union-United Nations Hybrid Mission in Darfur ("UNAMID")

to visit him because he claimed he needed support while he was suffering from some medical issues. She agreed to visit the Applicant, but was unable to complete the electronic MOP for travel to Kuajok.

10. On or about 11 March 2013, the Applicant prepared an MOP for Ms. M to travel on a United Nations flight from Juba, South Sudan, to Wau, South Sudan, on 15 March 2013. On the MOP, the Applicant stated that Ms. M was travelling by virtue of her association with an organization by the name of “Peace Alliance”. In the field provided for the endorsement of the traveler’s head of organization, that is, Peace Alliance, the Applicant provided and signed his name.

11. The Applicant also provided and signed his name as the approving officer for the MOP and stamped the form using a stamp that identified him as “State Coordinator”.

12. In conjunction with the MOP, the Applicant prepared and submitted, on behalf of Ms. M, a General Release from Liability in Connection with Travel by Third Parties on UN-Provided Aircraft form (the “general release form”). This purported to release the Organization from all risks and liabilities for any loss, damage, injury, or death sustained by the traveler during the course of travel. In this document he again stated that Ms. M was affiliated with “Peace Alliance”.

13. On 15 March 2013, on the basis of the MOP and general release form, Ms. M travelled on a United Nations flight from Juba to Wau. There was no security or safety incident during the flight.

14. From 15 to 27 March 2013, Ms. M stayed with the Applicant in his UNMISS-provided residence. The Applicant neither requested nor obtained authorization for a temporary occupant to stay in his residence, and claims that he was unaware of the need to do so. There was no security or safety incident during Ms. M’s stay at Applicant’s accommodation.

15. On or about 21 March 2013, the Applicant prepared another MOP and general release form for Ms. M to travel from Kuajok to Juba on 27 March 2013. The Applicant again stated that Ms. M was travelling by virtue of her supposed

affiliation with “Peace Alliance”, endorsed the MOP as head of the traveller’s organization and approved the MOP in his capacity as approving officer.

16. On 27 March 2013, the Applicant and Ms. M travelled from Kuajok to Juba on an UNMISS flight. There was no safety or security incident during the flight.

17. On 9 April 2013, the Office of Internal Oversight Services (“OIOS”) received a report of possible misconduct with regard to the foregoing matter.

18. On or about 22 April 2013, the Applicant, of his own accord, publicly disclosed, admitted to, and apologized for his actions during a Town Hall meeting. The Respondent alleged that according to a witness present at the meeting he made statements in an apparent attempt to excuse his behaviour¹.

19. On 5 June 2013, the matter was referred by OIOS to the Department of Field Support (DFS), UNHQ, for “appropriate action”. The letter of referral stated that upon DFS’ acknowledgment of receipt of the referral, OIOS would “consider the matter closed”.

20. On 2 July 2013, DFS/UNHQ referred the matter to UNMISS. On 8 July 2013, the UNMISS Conduct and Discipline Team (“CDT”) referred the matter to the UNMISS Special Investigations Unit (“SIU”) for investigation.

21. The Applicant considers that the initiation of the investigation and the entire process, including the gathering of witness testimony, was unnecessary and born out of malice, ill-will, and abuse of authority, and that the investigation and findings were tainted by prejudice. He objects to the facts about the conduct of the investigation being included in the statement of facts. However, in order for his claims to be examined it is necessary for the Tribunal to establish how the investigation proceeded.

¹ This hearsay evidence was not submitted to the Tribunal in an attested form. It was not evidence considered by the investigators and the Applicant had no opportunity to respond to the allegation which was made subsequent to the decision. As such it is unreliable evidence and has no probative value.

22. The Applicant was interviewed twice by SIU investigators during the course of the investigation, on 22 July 2013 and on 24 July 2013. The SIU investigators also interviewed Ms. M and six other individuals.

23. The Applicant's interviews were recorded in the form of statements which he signed as a true and accurate record of the interview. At the beginning of each of his statements it is recorded: "My name is [the Applicant], State coordinator of Warrap State. I am making this statement with no objection to the Chief of SIU Unit.... In regard to an incident of possible misconduct in 2013 at UNMISS Kuajock State Headquarters".

24. In his first interview, the Applicant admitted to filling out the 11 March 2013 MOP incorrectly and allowing Ms. M to stay at his UNMISS-provided residence without having sought authorization. He stated that he was not aware at the time of the rules requiring him to do so.

25. The Applicant also told the investigator:

The copy of an MOP you showed me labeled (DR-1) is a true copy of the UNMISS NON-UN MOP that I prepared for Ms. M.

In part 1 of the MOP **Traveler's Details**, I inserted [Ms. M's] names, under the heading Organization: I inserted "Peace Alliance", under the heading Grade/Rank/Title: I inserted "Admin" and under the heading Purpose of Travel: I indicated "Leave" under the heading Signature: I authored the name in my handwriting [Ms. M]; this is not [Ms. M's] signature. I completed the form according to her consent.

In Part 3 of the MOP **Head of Organization Endorsement**: I affixed my name, title and signature in my handwriting and stamped it with my official office stamp. I am not the Head of Peace Alliance nor am I affiliated with them." (Emphasis in original).

26. In his second interview, the Applicant explained that he had stated that Ms. M was affiliated with "Peace Alliance" at her suggestion after her first MOP, which noted her affiliation with UNAMID, had been rejected.

27. During her interview by SIU investigators, Ms. M said that: (i) she was not affiliated with "Peace Alliance"; (ii) the Applicant had inserted the name "Peace

Alliance” without her permission; (iii) she did not know why the Applicant had used the name “Peace Alliance”; and (iv) given her position as a police officer in her home country, she was not allowed to be affiliated with any non-governmental organization. She also told the investigator that she did not object to the Applicant signing her name on the MOP and General Release form because he was her good friend and had her permission to sign her name on “any document”.

28. The investigation report was completed on 10 August 2013.

29. By memorandum of 18 September 2013, the Special Representative of the Secretary-General (SRSG) of UNMISS sent the SIU investigation report and CDT conclusions and recommendations to the Under-Secretary-General of DFS (USG/DFS). A copy of the report was not sent to OIOS.

30. On 3 April 2014, the Chief, Human Resources Policy Service, Office of Human Resources Management (HRPS/OHRM) sent the Applicant a letter containing the formal allegations of misconduct. Specifically, it was alleged that:

a. On or about 11 March 2013, he knowingly included false information in an MOP that he prepared on behalf of Ms. M and approved in his official capacity;

b. On or about 21 March 2013, he knowingly included false information on an MOP that he prepared on behalf of Ms. M and approved in his official capacity;

c. From approximately 15 to 27 March 2013, the Applicant allowed Ms. M to reside in his UNMISS-provided residence, without requesting or obtaining the required authorization.

31. The Applicant was informed that, if established, his conduct would constitute a violation of staff regulations 1.2(b), which requires staff members to uphold the highest standards of efficiency, competency and integrity; and 1.2(g) which states that staff members shall not use their office...for private gain, financial or otherwise, or for the private gain of any third party, including family,

friends and those they favour....; former staff rule 1.2(h)² which prohibits, inter alia, the intentional alteration or falsification of official documents entrusted to them by virtue of their functions. In addition, under paragraph 16 of UNMISS Administrative Instruction No. 008/2011, it would be in violation of his obligation as a United Nations official who approves MOPs to ensure that travel policies are complied with and paragraph 2.3 of UNMISS Administrative Instruction No. 005/2011 which requires written authorisation to have a temporary occupant in an assigned accommodation.

32. The letter included the referral memorandum from the Assistant-Secretary-General of DFS, dated 27 November 2013, the SIU Investigation report, the SRSG's cover memorandum to the investigation report and the Applicant's personnel action history.

33. The Applicant was requested to provide any written statements or explanations in response within two weeks and was informed of his right to request more time and of the availability of the assistance of the Office of Staff Legal Assistance (OSLA).

34. On 6 May 2014, the Applicant responded with a written submission concerning the alleged misconduct, citing as mitigating factors for his behaviour the severe emotional, physical, and psychological problems from which he was suffering and the medications he was taking, the difficult living and working conditions he was experiencing, and perceived racial tensions, all of which he claims may have clouded his judgment. He referred to his voluntary disclosure of his error, satisfactory performance reports, repayment of the cost of the accommodation charges of Ms. M, his readiness to repay the cost of Ms. M's air transportation, his newness on the job and lack of staff support, positive references from the Governor of Warrap State and colleagues. He also said that he had instituted more rigorous screening of MOPs. He likewise expressed remorse for his actions and requested leniency in light of his circumstances.

² This is the rule that applied as at 1 January 2013 in ST/SGB/2013/3. The language was changed in ST/SGB/2014/1, which was issued on 1 January 2014.

35. By letter dated 30 July 2014, the Applicant was notified that the Under-Secretary-General for Management (USG/DM), on behalf of the Secretary-General, had concluded that the allegations against him were established by clear and convincing evidence and had decided to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.

36. The USG/DM noted that the measure for a staff member's failure to comply with the provisions of UNMISS Administrative Instruction No.005/2011 may be limited to administrative measures however his misconduct was not limited to violations of that Administrative Instruction but also staff regulations 1.2(b) and (g), former staff rule 1.2(h) and UNMISS Administrative Instruction No. 008/2011.

37. The decision letter listed the established facts and the conclusion based on these facts that this conduct violated staff regulations, a former staff rule and two administrative instructions. It stated that the USG/DM on behalf of the Secretary-General had considered the past practice of the Secretary-General in similar cases, the circumstances of the Applicant's case and aggravating and mitigating factors.

38. The mitigating factors included the stress that the Applicant was experiencing at the time due to the difficult working conditions of the mission, the subsequent payment of Ms M's accommodation charges; his offer to pay for her flight costs; his cooperation with the investigation and admissions; his publically expressed remorse and his records of positive performance.

39. The aggravating factors included his abuse of trust as the P-5 head of office and approving officer; that his conduct prevented the Organization from accurately determining the purposes for which air assets were being used and that his conduct involved a fundamental lapse in integrity.

Issues

40. The Parties agreed on the issues to be determined. The Tribunal has reformulated these in accordance with the established jurisprudence as follows:

- a. Were there were any procedural irregularities in the investigation that vitiated the outcome of the process?
- b. Were the facts established by clear and convincing evidence?³
- c. Did the facts established amount to misconduct?
- d. Was the disciplinary measure imposed on the Applicant proportionate?

Considerations

Legal Framework

41. In *Nyambuza* 2013-UNAT-364, the United Nations Appeals Tribunal (the Appeals Tribunal) summarised the role of this Tribunal as follows:

Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT must “examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”.

“[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.” When termination is a possible sanction, the “misconduct must be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable”.

42. Staff rule 10.1⁴ defines misconduct as:

(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.

³ *Molari* 2011-UNAT-164.

⁴ ST/SGB/2013/3 (Staff rules and staff regulations of the United Nations).

(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.

43. The guidelines and instructions on the application of Chapter 10 of the Staff Rules are provided in paragraph 1 of ST/AI/371/Amend.1 (Revised disciplinary measures and procedures):

II. Investigation and fact-finding

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 an investigation. [...] Conduct for which disciplinary measures may be imposed includes, but is not limited to (those relevant to this case are):

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the Staff Rules and instructions implementing it;

(c) Misrepresentation, forgery or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;

(f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

(g) Acts or behaviour that would discredit the United Nations.

44. The Staff Regulations and Rules that the administration alleges were breached in this case are:

a. Staff regulation 1.2(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".

b. Staff regulation 1.2(g):

Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

c. Former staff rule 1.2(h) from ST/SGB/2013/3:

Staff members shall not intentionally alter, destroy, falsify or misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization

45. General Assembly resolution 59/287 established that investigations into serious misconduct shall be conducted by professional investigators.

46. Chapter 1.2.1 of the OIOS Investigations Manual, dated March 2009, (the Manual) states that the role of OIOS is to assist the Secretary-General in fulfilling his or her internal oversight responsibilities in respect of resources and staff of the Organization. OIOS exercises operational independence under the authority of the Secretary-General⁵. Its roles include conducting investigations based on reports of possible misconduct. It establishes facts and makes recommendations in light of its findings. It has discretionary authority to decide which matters it will investigate. OIOS is not responsible for deciding whether to initiate disciplinary proceedings or to take corrective administrative action.⁶

47. The Manual further states⁷:

If a staff member is found to have engaged in misconduct, the programme manager should, in accordance with ST/AI/371, Revised Disciplinary Measures and Procedures, refer the matter to the Office of Human Resources Management for possible disciplinary action. On the basis of the evidence presented, the

⁵ See A/RES/48/218B (Review of the efficiency of the administrative and financial functioning of the United Nations) and ST/SGB/273 (Establishment of the Office of Internal Oversight Services).

⁶ Chapter 1.2.1 of the OIOS Investigations Manual.

⁷ Page 7.

Assistant Secretary-General for Human Resources Management shall decide whether the matter should be pursued as a disciplinary case.

48. Paragraph 7.1.1 of the Manual states:

As the investigation function may be discharged through different offices and departments within the United Nations Secretariat (see Chapter 1), matters received by one unit may be referred, in whole or in part, to another unit that has sole or primary responsibility for investigating the matter.

49. The Manual classifies misconduct into Category 1 (Serious) and Category 2 (Routine) according to the relative seriousness of the contravention and risk to the Organization. This distinction is used to determine whether OIOS should investigate or whether another authority may assume the role. Category 2 matters can be handled at the “direction of programme managers”.

50. The Manual states that Conduct and Discipline offices do not conduct investigations. They receive, screen and categorize reports of possible misconduct in the respective missions and report to the heads of the missions, to whom they provide technical advice and assistance on a series of misconduct-related issues. They also determine which investigative body will receive a particular report of misconduct, depending on its seriousness and the type of personnel involved.

51. Investigations conducted in the context of UNMISS are subject to the procedures in the UNMISS SIU Standard Operating Procedures dated 15 October 2012 (SIU SOP) which states at paragraph 5.2 that: “[the] SIU is tasked to conduct investigations...into accidents or incidents involving UN personnel and properties other than those under the jurisdiction of the [Force Provost Marshall]”.

52. Investigators are required to obtain testimonial evidence by interviewing individuals who witnessed or have knowledge or information about the relevant incident. The SIU SOP prescribes the form of the record of interview. Once a person has been identified as a subject of an investigation he or she must be advised of his or her status during the interview.

53. The form of the investigation report is prescribed as is its distribution⁸. Under this SOP, investigation reports are treated as confidential United Nations documents and must not be provided to subjects, witnesses and specified others except under special circumstances.

Was the Applicant accorded due process and procedural fairness in the investigation?

Applicant's submissions:

54. These may be grouped under two headings:

The investigation was ultra vires

55. The Chief of OIOS acted *ultra vires* on 8 July 2013 by requesting SIU to conduct an investigation after the Director of Investigations had already referred the matter to DFS on 5 June 2013.

56. UNMISS Chief of CDT acted *ultra vires* by improperly launching an investigation through SIU on 8 July 2013 on behalf of ID/OIOS. According to ST/AI/371 (Revised disciplinary measures and procedures) and ST/SGB/2011/1 (Staff rules and staff regulations of the United Nations), the SRSG was supposed to authorise and initiate the investigation.

57. SIU conducted an unauthorised new investigation on 10 October 2014 which the Respondent wilfully used to disparage the remorse of the Applicant.

Procedural and substantive errors in the investigation

58. The investigation was rife with procedural and substantive errors which render the impugned decision null and void. The defiance of the procedures in ST/AT/371 is evidence of bias by the responsible officers.

⁸ See paragraph 9.14 of the SIU SOP.

59. He lists these errors as:
- a. The informer overstepped his boundaries by collecting evidence of misconduct without authorisation prior to reporting it.
 - b. The OIOS chief prejudiced the preliminary investigation by calling witnesses and meeting with the group that reported the incident.
 - c. The SIU officer was aware of the Applicant's personal disclosure, showed prejudice and did not disclose to the Applicant that the investigation might lead to findings of misconduct as required in the OIOS Manual.
 - d. SIU interviewed witnesses who were publically against the Applicant and had no knowledge of the case.
 - e. SIU failed to report on the ancillary reasons such as lack of adequate advice to the Applicant and poor physical living conditions which caused him mental stress.
 - f. The Chief of UNMISS CDT prevented the Applicant from bringing up his claims of racial discrimination and disparaged his claims of mental and emotional stress in the report of the CDT.
 - g. The Administration took 16 months to conclude the investigation and disciplinary action.
 - h. Lack of confidentiality regarding the outcome of investigation before the Applicant was informed of the decision on 30 July 2014.
 - i. An investigation was not warranted because his actions did not and could not be proven to have discredited or harmed the Organization.

Considerations

Was the investigation *ultra vires*?

60. The OIOS referral of the investigation of the Applicant's alleged misconduct to the USG/DFS was in accordance with the procedures set out in the relevant instruments noted above.

61. Once OIOS completed its referral to DFS on 5 June it closed the case and left the matter to be investigated by the Mission.

62. CDT reports to and advises the Head of Mission, in this case the SRSG, and determines which investigative body will receive a report of misconduct. The Tribunal finds that the UNMISS Chief of CDT did not launch an investigation through SIU on 8 July 2013 on behalf of OIOS as alleged by the Applicant but, in accordance with its functions, the case was referred by CDT to SIU on 8 July for it to conduct the investigation.

63. Having handed over responsibility for the investigation when it referred the case to DFS, OIOS was not obliged to receive a copy of the report.

64. The Tribunal rejects the Applicant's submission that the investigation was commenced by OIOS and that it was *ultra vires*. There is no evidence of improper delegation or referral of the allegation of misconduct against the Applicant for investigation.

65. The unsuccessful attempt by the Respondent to introduce hearsay evidence of what the Applicant allegedly said at a meeting was ill-advised but does not provide proof of what the Applicant refers to as "an unauthorised new investigation" commencing on 10 October 2014.

Were there procedural and substantive errors in the investigation?

66. The Applicant alleges that the person who gathered material against him and informed the Authorities of his misconduct was ill-motivated towards him. The Tribunal notes that staff rule 1.2(c) imposes a duty on staff members to report

any breach of the Organization's regulations and rules and to cooperate with duly authorized audits and investigations. The rule further states that staff members shall not be retaliated against for complying with these duties.

67. There is no evidence to support the Applicant's allegation that the OIOS Chief called witnesses and met with the informers, however, if the OIOS Chief had made the enquiries as alleged this did not prejudice the preliminary investigation. In any event, a preliminary investigation is a safeguard against unfounded allegations proceeding to full investigation. It does not result in a final determination. In this case the report of misconduct was justifiably found to have been well founded and sufficient to require an investigation.

68. The Applicant submitted that the SIU Investigator was aware of his personal disclosure and showed prejudice. It is not surprising that the Investigator referred to the Applicant's disclosure as this was a vital piece of evidence that he needed to investigate. The Applicant, who bears the burden of proving his allegations, did not provide any other evidence or example of the investigator's alleged prejudice.

69. The Applicant also alleged that the SIU investigator did not disclose that the investigation might lead to findings of misconduct as required in the OIOS Manual. The Tribunal finds that he was told at the start of each of his interviews that he was being interviewed about possible misconduct.

70. Following the completion of the report, the Applicant was fully and fairly advised of the precise allegations of misconduct and given a full opportunity to comment on those before the final decision was made.

71. The Applicant alleged that the investigator interviewed witnesses who were publically against him and had no knowledge of the case but he neither elaborated on this allegation nor produced any evidence in support of it. The Tribunal finds that the SIU investigation was conducted in accordance with the SIU SOP and with the principles of due process by conducting and recording interviews with the Applicant and relevant witnesses.

72. The Applicant correctly states that the investigator did not report on the reasons proffered by him to explain his misconduct, such as his inexperience, poor living conditions and mental stress. However in his response to the allegations of misconduct the Applicant took the opportunity to set these matters out in detail. They were fully considered by the decision maker. The Tribunal concludes that the Applicant was not prejudiced by this information not appearing in the report.

73. The Applicant alleged that the Chief of UNMISS CDT prevented him from bringing up his claims of racial discrimination and disparaged his claims of mental and emotional stress in the report of the CDT. He failed to submit any evidence to support this allegation.

74. The Applicant's complaint that it took 16 months to conclude the investigation and disciplinary action is not factually correct. SIU started its formal investigation around 8 July 2013 and concluded its report on 10 August 2013. The subsequent disciplinary process came to an end on 30 July 2014 when he was separated from service. The process therefore took approximately 12 months. The Applicant does not specify what prejudice, if any, he suffered as a result of this delay. The Tribunal observes that he remained in employment until the release of the final decision.

75. The Applicant alleges that there was a lack of confidentiality of the outcome of the investigation before he was informed but again provides no evidence of this or of the prejudice to him if the event did occur.

76. The Tribunal rejects the Applicant's submission that the investigation into his actions should not have been commenced because there was no evidence of harm to the Organization. Pursuant to ST/AI/371/Amend.1, once there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, an investigation is mandatory. Whether misconduct caused the Organization harm is to be considered as part of the investigation and its consequences. It is not a factor in deciding whether an investigation should be commenced.

77. The Tribunal concludes that the investigation was carried out in accordance with the correct procedures and that the Applicant has not discharged his burden of proving that the procedure was biased against him.

Were the facts established by clear and convincing evidence?

Submissions

78. The Applicant submits that the impugned decision was based upon incomplete consideration of the facts, including the psychological and physical stresses suffered by the Applicant. His mental, emotional and medical state were seriously compromised at the time of the impugned conduct as a direct result of the extremely dissonant working relationship among staff, the stressful work and living environment, which contributed towards his having exercised poor judgment at the time. He was just four months on the job, adjusting to a racially charged, physically and psychologically challenging working environment which makes one prone to mistakes.

79. The Respondent submits that there is clear and convincing evidence that the facts on which the disciplinary measure was based were established.

Considerations

80. The facts relevant to the finding of misconduct by the Applicant were not in dispute. The evidence against him was overwhelming. At his interview, the Applicant candidly accepted each of the allegations made against him and accepted responsibility for his actions at a public meeting.

81. The Tribunal notes that when he raised his psychological and physical stresses in his 6 May 2014 response to the allegations, he stated that these factors had clouded his judgment but did not deny the facts of the offences.

82. He also claims that the absence of loss or damage to the Organization was not taken into account. This is not a fact that is determinative of the finding of misconduct but a matter of mitigation or aggravation and goes to the degree of severity of the disciplinary measure imposed.

Conclusion

83. The Tribunal finds that the material facts relied on by the decision maker (which did not include the hearsay evidence of statements allegedly made by the Applicant at the Town Hall meeting obtained by the Administration after the decision) were established by clear and convincing evidence.

Did the established facts legally amount to misconduct under the staff regulations and rules?

Submissions

84. The Applicant submits that his actions did not rise to the level of “misconduct” according to existing case law and previous decisions of the Secretary-General in similar cases. He cites *Powell* UNDT/2012/039 and 2013-UNAT-259.

85. The Respondent submits that the established facts legally amount to misconduct under the applicable regulations and rules. These included the Applicant’s inclusion of false information in two non-UN MOPs that he prepared and approved in his official capacity and his failure to seek or obtain permission to obtain the required authorisation for Ms. M’s stay in his UNMISS provided residence which amounted to a violation of UNMISS Administrative Instruction No. 005/2011.

Considerations

86. The case of *Powell* must be distinguished as it is factually different from that of the Applicant. The staff member in that case submitted MOP forms which were relied on but he was not responsible for approving MOPs. More importantly, the staff member in that case was also charged with sexual exploitation and it was that charge which he was sanctioned for. The charges against him relating to the MOP forms were not considered by the Tribunal⁹.

⁹ *Powell* UNDT/2012/039 at para. 11.

87. In the decision letter of 30 July 2014, the USG/DM noted that while the measures for a staff member's failure to comply with the provisions of UNMISS Administrative Instruction No 005/2011 may be limited to administrative measures, the misconduct of the Applicant was not limited to a breach of this administrative instruction but was also in breach of staff regulations and a former staff rule.

88. The Tribunal finds that the facts established to a high degree of probability that the Applicant had breached staff regulation 1.2(g). He used his office as a P-5 State Coordinator to obtain a private, albeit non-financial, gain for himself – an unauthorised extended visit to the Mission by his friend. In addition, he intentionally falsified official documents entrusted to him by virtue of his office. This was a breach of former staff rule 1.2(h).

Conclusion

89. The Tribunal holds that the established facts warranted a finding of misconduct.

Was the disciplinary sanction proportionate to the offence?

Applicant's submissions

90. The Applicant submits that the sanction of separation from service was disproportionate to the conduct alleged, and deviated exceptionally from previous administrative rulings.

91. The Administration failed to prove loss or damages as a result of the MOP he prepared, or that the misrepresentation or mistake compromised the United Nations flights or that there was an abuse of trust. No investigation was warranted because his actions did not and could not be proven to have discredited or harmed the Organization.

92. The Administration confused misrepresentation on the MOP with misrepresentation as defined in ST/AI/371/Amend.1, para. 29 and failed to consider that the penalty for contravening UNMISS Administrative Instruction

No.005/2011 is limited to administrative measures. He paid the accommodation of Ms. M retroactively. The sanction of separation was too excessive.

93. He lists the aggravating and mitigating factors which should have been taken into account at the stage of deciding the sanction and submits that for the sake of fundamental justice and fairness and given the mitigation factors, the penalty should be quashed or substantially reduced or commuted to an administrative measure. He referred to examples documented in Information Circulars of sanctions less than separation from service imposed for what he submits are similar types of misconduct.

94. The Administration abused its power by continuing the investigation despite the Applicant's voluntary disclosure thus causing him moral and emotional damages.

Respondent's submissions

95. The disciplinary measure applied was proportionate to the offence taking into account the circumstances of the case, including aggravating and mitigating factors which resulted in the reduction of the sanction to separation from service with compensation in lieu of notice and termination indemnity.

96. The Respondent submitted that a comparison of the cases of imposed disciplinary measures listed in the Information Circulars on the Secretary-General's practice cannot alone be determinative of the proportionality of an impugned disciplinary measure but can be used to assess whether a given disciplinary measure is consistent with and falls within the range of measures imposed for comparable conduct in the past.

97. By his actions the Applicant deprived the Organization of its ability to fulfil its duty to maintain an accurate account of the people and property occupying its premises and to ensure the safety and security thereof.

Considerations

98. The available disciplinary measures in staff rule 10.2(a) for proven cases of misconduct range from written censure to loss in grade, deferment of salary increment or promotion, demotion, separation from service with or without notice and with or without termination indemnity; to the most severe measure of dismissal.

99. The penalty for contravening paragraph 1.2 of UNMISS Administrative Instruction No. 005/2011 is limited to administrative measures such as a warning, temporary suspension or withdrawal of accommodation privileges.

100. It is not for the Tribunal to interfere with the exercise of the Administration's discretion to determine the degree of a sanction unless it can be shown that the sanction imposed appears to be "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity [...]".¹⁰

101. The Tribunal infers that the reference to 'limits stated by the respective norms' is to the principle of proportionality as defined in *Sanwidi* 2010-UNAT-084 by the Appeals Tribunal that: "... an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive".

102. The Secretary-General's practice on disciplinary matters is documented in annual information circulars which contain brief summaries of misconduct and the sanctions imposed. These circulars demonstrate that the whole range of available sanctions is utilised by the Administration in response to cases of misconduct by staff members. A review of such cases can assist in assessing the proportionality of a sanction but with the caveat that there are significant factual differences between the cases.

¹⁰ *Portillo Moya* 2015-UNAT-523; *Jaffa* 2015-UNAT-545.

103. As noted by the Applicant, the information circulars contain some indicators of the factors that are considered by decision makers. For example, paragraph 14 of ST/IC/2014/26 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior, 1 July 2013 to 30 June 2014) states, inter alia, “examples of possible mitigating factors are sincere remorse, a staff member’s personal circumstances, and voluntary disclosure of the acts of misconduct.”

104. The decision letter sets out the matters that were taken into consideration including sanctions imposed in similar cases. It addressed all the relevant aggravating and mitigating circumstances submitted by the Applicant in his comments dated 6 May 2014.

105. The Applicant’s misconduct was found to have gone beyond a mere administrative breach. The sanction imposed on the Applicant for breaches of the Staff Regulations and Rules was within the available range of disciplinary measures in staff rule 10.2(a).

106. The Tribunal notes that the Applicant used his senior position and delegated authority to prepare and approve several false documents, including making a false signature and dishonestly holding himself out as an official of another organisation. While these may not be the most serious forms of misconduct, they are not minor as they represent a lapse of integrity. The sanction imposed on the Applicant led to his separation but was not the most severe of those available to the Secretary-General. He was given payment in lieu of notice and termination benefits. The Tribunal finds that the sanction was reasonable and not excessive or abusive.

Conclusion

107. In the absence of any of the factors which would impugn the decision to impose the disciplinary measure it is not for the Tribunal to interfere with the exercise of the Secretary-General’s discretion. The sanction was within the range of options available for the misconduct which was proven to have been committed by the Applicant and was therefore lawful.

Judgment

108. The Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 29th day of October 2015

Entered in the Register on this 29th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi