



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/023

Judgment No.: UNDT/2015/120

Date: 22 December 2015

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NYEKAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Ron Mponda

Counsel for the Respondent:

Karen Madeleine Farkas, UNHCR

Elizabeth Brown, UNHCR

Introduction

1. The Applicant, a former staff member of the United Nations High Commissioner for Refugees (UNHCR), filed the current Application to challenge the decision of the High Commissioner for Refugees, dated 26 February 2013, to impose on her the disciplinary measures of a written censure as per staff rule 10.2(a)(i) and a fine of one month's net base salary as per staff rule 10.2(a)(v) (the Contested Decisions).

Procedural history

2. The Applicant filed her Application with the Nairobi Registry on 23 May 2013. The Respondent filed his Reply on 28 June 2013.

3. The Tribunal held a hearing of the case on the merits from 12-15 May 2014 during which extensive evidence was received from individuals who were then staff members of the UNHCR Branch Office in Kigali, Rwanda, (BO Kigali):

- a) The Applicant;
- b) Mr. Joel Jackson Kubelabo, former BO Kigali Administrative Officer, for the Respondent;
- c) Mr. Tamfu Hansen, former BO Kigali External Affairs Officer, for the Respondent;
- d) Mr. Yohondankoul Sakor, former BO Kigali Senior Programme Officer, for the Respondent;
- e) Ms. Iris Blom, former Head of the Kibuye Field Office, for the Respondent;
- f) Witness 6, the Applicant's former driver in BO Kigali, for the Respondent;
- g) Mr. Paul Njagi, former BO Kigali Logistics Officer, for the Respondent;
- h) Mr. Arshad Mahmood, former BO Kigali Administrative/Finance Officer, for the Respondent;

- i) Ms. Lydie Ntaganda, former Administrative/Finance Assistant for BO Kigali, for the Respondent;
- j) Mr. Jose Antonio Canhandula, then UNHCR Deputy Representative in Nairobi, for the Respondent; and
- k) Ms. Honorine Sommet-Lange, former BO Kigali Deputy Representative for Protection, for the Respondent;

4. The Applicant and her Counsel attended the hearing in person while the Respondent and his witnesses attended by telephone. The Parties filed synopses of their written closing submissions on 14 May 2014 and gave their oral closing submissions on 15 May 2014.

Facts

5. The Applicant joined BO Kigali in February 2007 as the Representative at the P-5 level. She was promoted to the D-1 level in November 2007. The Applicant's assignment in BO Kigali ended in December 2010 and in January 2011, she became a staff member in between assignments (SIBA) pending her next posting. In April 2012, she was temporarily reassigned to Bangui, Central African Republic, as the Representative. She returned to SIBA status in September 2012 and retired from the Organization on 30 June 2013.

6. In 2010 there was a theft in one of the warehouse managed by BO Kigali, which resulted in the loss of thousands of non-food items earmarked for refugees. The incident was reported to the Rwandan Police and various offices at UNHCR headquarters in Geneva, including the UNHCR Inspector General's Office (IGO). According to the Applicant, as of the time she departed from Rwanda in December 2010, neither the IGO nor the Rwandan Police had concluded its investigation into the theft.

7. On 23 August 2010 and 8 November 2010, the IGO received two complaints of alleged misconduct involving the Applicant.¹ In Complaint 1, dated

¹ Respondent's Reply, paragraph 5.

21 August 2010², the Complainant made allegations of abuse of power and harassment against the Applicant on the basis that the Applicant:

- a. intentionally excluded her from the operations of the office;
- b. tried to cause the Complainant to make mistakes so she could blame her for them;
- c. was using the Administrative Officer to harass her;
- d. tried to discredit her among the staff;
- e. violated the code of conduct and fundamental professional ethics of UNHCR by the way she treats the Complainant;
- f. used her driver every weekend but only paid him a pittance and refused to let him take leave; she hit the driver on the shoulder and threw a barbecue grill that hit and injured one of his legs; the driver was obliged to seek treatment at the United Nations clinic and was given three days' sick leave;
- g. intimidated staff in weekly meetings by making threatening remarks;
- h. Attempted to derail the career prospects of another staff member; and
- i. Mismanaged office funds in relation to new office space.

8. In Complaint 2, dated 20 October 2010, the Complainant made allegations of abuse of office, mismanagement and unprofessional conduct against the Applicant on the basis that the Applicant:

- a. refused to let him take leave prior to joining BO Kigali;

² Respondent's submission of 16 February 2015 in compliance with Order No. 057 (NBI/2015) dated 10 February 2015.

- b. refused to follow procurement rules especially in relation to financial thresholds, requisition of goods and the membership of the Local Committee on Contracts (LCC);
- c. verbally abused him on 18 October 2010;
- d. made racist comments against Kenyans;
- e. intimidated staff in BO Kigali by threatening to fire them;
- f. used abusive language on staff;
- g. created a culture of fear and mistrust in the office;
- h. favored national staff while ignoring their supervisors;
- i. failed to act on complaints in an attempt to protect the staff being complained about;
- j. interfered with his career prospects by telling another United Nations office not to offer him a job;
- k. tried to cause the Complainant to make mistakes so she could blame him for them; and
- l. tried to discredit him among the staff;

9. As a result of the complaints, on 1 December 2010, the IGO established an *ad hoc* inspection mission (Inspection Mission) to examine and report on the overall management of the UNHCR operation in Rwanda and, in particular, the internal management of BO Kigali. The Inspection Mission was led by Mr. Ruven Menikdiwela, the Deputy Director of the Division of International Protection and comprised of Ms. Aicha Limam, the Senior Administrative Officer in the Africa Bureau, and Ms. Patricia Capt, the Executive Assistant to the Inspector-General.

10. The Inspection Mission visited Kigali from 14 – 20 December 2010 and issued its report in January 2011. It looked into several allegations regarding the

working environment and management decisions in BO Kigali and concluded that there was an absence of evidence to support any of the allegations made against the Applicant.

11. In March 2011, the IGO established an Investigation Team, comprised of Ms. Nooriya Koshen, the Chief of the Staff Development and Training Unit of the United Nations Office at Nairobi (SDTU/UNON), and Ms. Vanessa Mattar, UNHCR's Senior Resettlement Officer in Nairobi, to investigate the allegations of harassment and abuse of authority contained in the two complaints received by the IGO on 23 August 2010 and 8 November 2010³.

12. The Investigation Team commenced its work by interviewing one of the Complainants on 24 March 2011. It visited Kigali from 15-19 May 2011 to interview staff that had worked with the Applicant and followed up with telephone interviews upon its return to Nairobi. The Applicant, who was in the United States of America, was interviewed on 31 May 2011 by telephone. The second Complainant was interviewed on 3 June 2011 in Nairobi. In addition to the Applicant and the 2 Complainants, the Investigation Team interviewed 24 witnesses during the course of its investigation. The Investigation Team finalized its investigation report on 18 October 2011 in which it concluded that the Applicant had harassed a number of staff under her supervision and that she had abused her authority based on a number of factors.

13. On 24 May 2012, a letter entitled "Allegations of misconduct" (the charge letter) signed by the then Director of the UNHCR Division of Human Resources Management (DHRM), together with a copy of the investigation report were sent to the Applicant for a response in accordance with ST/AI/371 (Revised disciplinary measures and procedures) and its amendment 1.

14. The Applicant submitted her written response to the allegations of misconduct on 17 July 2012.

15. By a letter dated 26 February 2013, the High Commissioner, Mr. António Guterres, informed the Applicant of his decision to impose on her the disciplinary

³ Application, Annex 7.

measures of a written censure and a fine of one month's net base salary. The Director/DHRM, by a letter dated 11 March 2013, reiterated Mr. Guterres' decision to impose disciplinary measures on the Applicant.

16. The Applicant was notified of the High Commissioner's decision on 4 April 2013 and on 23 May 2013; she filed the current Application with the Dispute Tribunal in Nairobi.

Issues

17. The issues the Tribunal will examine in the present matter are as follows⁴:

- a. Whether there were any substantive or procedural irregularities;
- b. Whether the facts on which the disciplinary measures were based have been established;
- c. Whether the established facts legally amount to misconduct under the United Nations Regulations and Rules; and
- d. Whether the disciplinary measures imposed are proportionate to the offence.

Were there were any substantive or procedural irregularities?

Parties' submissions

18. The Applicant submits that there were breaches of due process because:

- a. The Reports of the Inspection Mission and the Investigation Team were diametrically opposed although the same allegations were investigated. The Respondent failed to provide a credible explanation as to why the adverse Investigation Team Report was favored to her detriment. If sufficient attention had been paid to the Inspection Mission Report, which was objective and well-reasoned, as opposed to that of the

⁴ *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098.

Investigation Mission, the Respondent would have reached a different conclusion on the facts.

b. The Respondent exercised his discretion capriciously by failing to place equal or due weight on the credible explanations she offered on the charges.

c. The Respondent failed to pay due or any attention to the gaping irregularities in the conduct of the investigation by the Investigation Team. The Investigation Team placed reliance on matters that were not specifically brought to the attention of the Applicant so as to allow her to exercise her due process rights.

d. The Respondent failed to pay due regard to basic evidentiary rules and rules of natural justice.

e. The Investigation Team failed to draw her specific attention to the “actual” Complainants or what they complained about on the basis of an erroneous understanding of the principle of confidentiality in the face of concrete allegations which formed the basis of disciplinary charges.

f. The Investigation Team took the Complainants’ and witnesses’ statements at face value; failed to evaluate the nature and quality of these statements and their overall relationship to each other; and in some instances, selectively used evidence seemingly against the Applicant despite the existence of contradictory evidence in favour of the Applicant.

g. The Investigation Team completely ignored staff member RN’s assessment of the Applicant’s manner of speech, voice and tone when it concluded that she shouted at staff. The Investigation Team also ignored the statement of staff member FA who denied witnessing any shouting or being shouted at himself.⁵

⁵ Application, annex 5.

19. The Respondent contends that the Applicant was afforded due process during the course of the investigation process and thereafter. The Applicant was interviewed during the investigation, informed of the allegations against her, provided with a copy of the draft Investigation Report for her comments, subsequently provided with all the documentary evidence against her and given the opportunity to consult with legal counsel and to submit her response in writing.

a. Provision of the complaints to the Applicant – in accordance with IOM/FOM/054/2005 (Role, function and *modus operandi* of the Inspector General's Office), the confidentiality of the identity of a complainant shall be safeguarded. Additionally, the Applicant was informed of all the allegations against her and was provided with copies of the witness statements of the two complainants.

b. Payment of damages for delay between the issuance of the charges against the Applicant and the High Commissioner's decision – the Respondent submits that the delay was not unreasonable because the case was complex with numerous witness statements and a voluminous response from the Applicant to be reviewed. Additionally, the Applicant has not established that the delay was excessive or that she suffered injury as a result of such delay.

c. Previous unsubstantiated allegations – the reference in the Investigation Report to previous unsubstantiated allegations was mentioned in the context of a pattern of behavior that could have been addressed at an earlier stage. The Investigation Report clearly states that the allegations were unsubstantiated and therefore were not taken into account in reaching the findings in the case.

d. The Reports of the Inspection Mission and the Investigation Team – the Respondent submits that *ad hoc* inspections and investigations are not mutually exclusive. Pursuant to paragraph 4.4 of IOM/FOM/054/2005, inspections are an internal oversight and management tool designed to

provide a detached and objective assessment of the quality of management of UNHCR operations and activities at Headquarters and in the Field. The Respondent asserts that at least half of the Inspection Mission Report related to certain management decisions which are not the subject of the present case. The Respondent concedes that while the remaining part of the Inspection Mission Report entitled “working environment” does have some degree of overlap with the investigation, it does not however consider a number of complaints that were the subject of the Investigation Team Report and for which disciplinary measures were imposed, such as the treatment of the Applicant’s driver and the soliciting of loans. Thus, the Applicant’s assertion that the findings of the Investigation Team Report should be rejected in favour of the conclusions of the Inspection Mission Report is without merit.

Was it a proper exercise of discretion for the Administration to establish an Investigation Team to conduct an investigation in view of the findings of the Inspection Mission?

20. Paragraph 1 of ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) amends paragraph 2 of ST/AI/371 (Revised disciplinary measures and procedures) as follows:

2. Where there is a 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.

21. Paragraph 2 of ST/AI/371/Amend.1 amends paragraph 3 of ST/AI/371 as follows:

3. If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.

22. On the basis of the evidence presented after the investigation, the Assistant Secretary-General, on behalf of the Secretary-General, decides whether or not the matter should be pursued.⁶ If the case is to be pursued, then the appropriate official/head of office: (i) informs the staff member in writing of the allegations and his/her right to respond; (ii) provides the staff member with a copy of the documentary evidence of the alleged misconduct; and (iii) notifies the staff member of his/her right to seek assistance of counsel.⁷

23. In *Hallal* 2012-UNAT-207, the United Nations Appeals Tribunal (UNAT) held that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted. In *Nyambuza* 2013-UNAT-364 and *Messinger* 2011-UNAT-123, UNAT also held that: “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”.

24. The Tribunal notes that Inspection Mission was established as a result of complaints that the IGO, the Ombudsperson and the Staff Welfare Section had received from staff members who were supervised directly and indirectly by the Applicant. These complaints made serious allegations with regard to the Applicant’s personal and professional behavior in the Rwanda Country Office and alluded to the existence of extremely tense and stressful working relationships between the Applicant and the BO Kigali staff. The Inspection Mission carried out its investigation between 14 and 20 December and filed its report in January 2011.

25. The mandate of the Inspection Mission was *inter alia*:

Working environment:

- 1) To Review the overall management of the UNHCR Operations in Rwanda, and in particular the internal management of the office in Kigali. More specifically, the Ad Hoc Inspection will

⁶ ST/AI/371, paragraph 5.

⁷ Ibid, paragraph 6 and paragraph 5 of ST/AI/371/Amend.1.

assess the working relationships between the Representative and staff members in the Rwanda operation, and identify the reasons for the complaints made against the Representative;

- 2) To assess the possible impact that the related events may have on the operational capacity of the office, as well as on the well-being of staff members; and
- 3) Where possible negative impact is determined, to provide specific recommendations on measures to be taken in order to improve the situation.

26. In pursuance of its mandate the Inspection Mission interviewed a number of Headquarters-based staff who had been involved in the management of the various complaints received against the Applicant. The Mission also interviewed 29 current and former staff members of BO Kigali, including the Applicant and the two Complainants. The IGO also authorized the Inspection Mission to contact staff members who had worked with the Applicant in other operations in order to establish whether the alleged behavior was isolated to the Rwanda operation or not.

27. A scrutiny of the Inspection Mission Report indicates beyond dispute that the following matters were probed into by the Inspection Mission namely: (i) the disrespectful attitude of the Applicant towards staff who incurred her displeasure; (ii) her harsh and insulting behavior towards staff; (iii) her racial motivation in her attitude towards staff; (iv) her intolerance at mistakes made by staff; (v) display of favouritism towards some staff members; (vi) her moody, extremely hierarchical and divisive attitude; and (vii) arbitrariness in exercising her privilege in the granting or denial of leave to staff.

28. The Inspection Mission however found unsubstantiated: (i) the allegation of racism; (ii) the open disrespect towards staff; and (iii) the arbitrary denial of leave to staff. The Inspection Team explained that it dismissed as frivolous the allegation that the Applicant had any influence over the Organization's doctor in matters of leave.

29. The Inspection Mission went on to state that:

Some of the malaise recorded by the complainants can be attributed to the personality of the Representative: she is a dominant personality, who maintains stringent standards in her work and demands an equal level of competence and commitment from the staff under her supervision. She is reportedly quick to openly praise those who do well, but is equally blunt in her criticism of those who fail, although this criticism has apparently never been demonstrated by public displays of hostility, as had been alleged by two complainants.

30. On the relationship of the BO Kigali staff with the Applicant, the Inspection Mission found that: “staff members who accept her criticism as part of their learning experience-both local and international alike-have established a good rapport with her, have benefited from her support and guidance, speak warmly of her, and regret her imminent departure from Kigali”.

31. The Inspection Mission also met with the United Nations Resident Coordinator in his capacity as Head of the United Nations Country Team (UNCT). According to the Inspection Mission Report, the Resident Coordinator “confirmed the overall positive image of the Representative and pointed to her leadership and team-building abilities as the reasons why he regularly appointed her as the Resident Coordinator *a.i.* in his absence”.

32. According to the Inspection Mission, “most of the staff, however, admitted that the Representative could be moody on occasion but was eminently approachable and supportive when staff members chose the right moment to address their concerns”.

33. On the issue of alleged favouritism, the Inspection Mission found:

[R]eason to believe that [the Applicant] was over-reliant on three local staff members. While this relationship may be innocuous, the Representative pointed out that these persons were either extremely competent and/or possessed the institutional memory in CO Kigali due to their long years of service, and that she therefore depended on them a great deal. However it has been misinterpreted by other staff members particularly by those who have incurred her displeasure as favouritism.

34. On the overall impact of the attitude of the Applicant on the operational capacity of BO Kigali, the Inspection Mission concluded as follows:

Possible impact on the operational capacity of the office and well-being of staff: The mission was unable to determine any negative impact of the above on the operational capacity of the office. Complainants or detractors of the Representative appear to be in a minority in CO Kigali, and the operations seem to be running smoothly. In terms of the well-being of the staff, it should be noted that the Representative has made exemplary efforts to build the team spirit and morale of the staff since her arrival in Rwanda. She has established regular ‘happy hours’, staff picnics and staff retreats where she is always present and to which she contributes extensively. She also undertakes regular missions to the Field Offices (more than any previous Representative, according to the field staff) in order to be more connected to the operational realities and to the staff in the field. Finally, she has followed up in detail on the findings of the 2008 Global Staff Survey as it pertained to CO Kigali, notably in terms of addressing local staff concerns in regard to participation in decision-making processes, promotion and information-sharing. Extensive documentation on the foregoing was provided to the mission”.

35. The Inspection Mission finally stated that: “Given the lack of objective evidence to support the allegations of the complainants and the imminent reassignment of [the Applicant], there is little ground to provide recommendations to improve the situation”.

36. The Investigation Team started its investigation on 24 March 2011 and filed its final report on 18 October 2011. It inquired into the following matters: (i) shouting at and insulting behaviour towards staff; (ii) humiliation of staff; (iii) racist remarks about nationalities; (iv) displays of favouritism towards some staff members; (v) negatively influencing careers of staff; and (vi) irrational approach in granting leave of absence. The Investigation Team grouped its findings under two heads: Harassment and Abuse of Authority.

37. Under “Harassment”, the Investigation Team found that the allegations of shouting, public humiliation of staff, pejorative references to race and nationality and divisive attitude of the Applicant had been established.

38. The findings of the Investigation Team read:

The majority of the staff at all levels, national and international spoke of the [Applicant] raising her voice or shouting. Despite the subject's denial, the number of testimonies supporting this finding leads the panel to conclude that the subject consistently raised her voice and shouted at staff. Although a few were able to manage or ignore it, such behavior was intimidating and abusive, constituting a clear pattern of harassment.

39. The Investigation Team came to the following conclusion on the allegation of public humiliation of staff: "As corroborated by a number of witnesses, the panel found credible the allegation that the subject singled out individuals, publicly humiliated and belittled colleagues. It is the panel's view that this amounted to harassment".

40. On the allegation of racism, the Investigation Team concluded that: "Based on a number of persons and diverse nationalities mentioning the subject making comments of a racial nature, the panel concludes that these statements were made by the subject. They were not only inappropriate but amount to misconduct".

41. The Investigation Team also found that the conduct of the Applicant "fostered divisions among staff, leading to a deterioration of the work environment". Though the Applicant stated that she made an effort to improve relationship in the office by organizing social events like picnics and "happy hour" she nonetheless stated that the situation deteriorated on account of the conduct of international staff. The Investigation Team rejected that explanation and concluded that "the actions on the part of the subject such as publicly ridiculing colleagues, playing staff off against each other, creating divisions and not respecting rules or reporting lines contributed significantly to the malaise or unhealthy ambiance to which staff referred".

42. Under abuse of authority, the Investigation Team concluded that there was evidence to establish that the Applicant had: (i) negatively influenced the careers of staff; (ii) her attitude had impacted the health of staff; and (iii) blurred the lines between personal and professional relationships, the last finding being hinged on

the fact that the Applicant had borrowed money from a staff member and had used her pin code to make phone calls.

43. The Investigation Team found on the evidence of three staff members that the Applicant supported by “highly credible senior managers” used her influence to “negatively affect their careers”.

44. The Investigation Team took note of the testimony of at least nine staff members who stated that their health had deteriorated “in some cases seriously, as a result of the conflict with the Representative”.

45. The Investigation Team also found that the Applicant blurred lines between personal and professional relationships by borrowing money from a subordinate staff, by asking staff to run personal errands and by using the pin code of a staff member to make phone calls.

46. The Investigation Team also came to the conclusion that the security of staff was at stake in view of the connection the Applicant had with the Government of Rwanda and the chief of a security company.

47. In *Nwuke* 2010-UNAT-099, UNAT held that:

An investigation into management and administrative practices in general or of disciplinary cases is usually a matter within the discretion of the Administration. But that does not mean that the administrative decision whether or not to undertake an investigation cannot be subject to judicial review. Whether or not the UNDT may review such a decision depends on whether it falls into the UNDT’s jurisdiction pursuant to Article 2(1) of the UNDT Statute.

48. The Administration has the right to launch an investigation into managerial practices in its own interest. This would be an internal matter and the Administration should be allowed to exercise that power without any hindrance or impediment. UNAT has held that as a general principle “tribunals should not interfere with matters that fall within the Administration’s prerogatives, including

its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality”⁸.

49. In the present matter, when the IGO received the complaints it was perfectly proper and legitimate, in the absence of any improper motive, for the Respondent to initiate an investigation into the management and operation of the Rwanda Country Office. This was done by the establishment of the Inspection Mission, which extensively examined both the working environment and the management of the BO Kigali operation. In the pursuit of its mandate the Inspection Mission accessed a number of documents and interviewed the same witnesses, including the Complainants, as did the Inspection Team.

50. The Tribunal notes that Inspection Mission was tasked with making recommendations in areas “where possible negative impact was determined” during its investigation. The only additional investigation recommended by the Inspection Mission was an OIOS audit into the financial, administrative, protection and programme management of BO Kigali. It did not recommend the initiation of another IGO investigation into the same complaints it had examined. Further, the Inspection Mission recommended that the IGO finalize its ongoing investigations relating to the Kigali operation and its staff that dated back to 2009 and 2010 and to share the findings of the Inspection Mission with the Applicant.

51. Consequently, the Tribunal holds that the Inspection Mission, which was established by the IGO, was in fact the investigation and fact-finding exercise set out in paragraph 1 of ST/AI/371/Amend.1. Thus the Respondent’s next step should have been to follow the procedure set out in paragraph 2 of ST/AI/371/Amend.1 by forwarding the matter to DHRM if he believed that there was sufficient evidence indicating that the Applicant had engaged in wrongdoing that could amount to misconduct. The IGO should not have initiated another investigation.

52. It appears however that the Respondent was dissatisfied with the conclusions of the Inspection Mission and established a second investigation with

⁸ *Nguyen-Kropp & Postica* 2015-UNAT-509. See also *Nwuke* 2010-UNAT-099.

a view to finding something substantive against the Applicant. The impression is that the Investigation Team was sitting in judgment of the findings of the Inspection Mission. This is borne out by the long observations the Investigation Team made on the work of the Inspection Mission to justify its own findings.

53. Additionally, the starting point for the initiation of an investigation is paragraph 1 of ST/AI/371/Amend.1. The existence of a “reason to believe” is the premise on which an investigation can start. What amounts to “reason to believe” was explained by Judge Adams in *Abboud* UNDT/2010/001 as follows:

The “reason to believe” must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded – though of course not necessarily proved – to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. This is a question of fact and degree. It is a question of judgment, however, and not of discretion. Whether there is “reason to believe” the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. The official does not ask, “Do I have reason to believe?”, let alone, “Do I believe?” He or she must ask, “Is there material that would give an objective and reasonable decision-maker reason to believe?”

54. In *Ibrahim* UNDT/2011/115 Judge Kaman stated that: “The very purpose of this initial examination is precisely to establish the facts of the matter in question in order to enable the relevant decision-maker to decide whether the situation may give reason for initiating a disciplinary case”.

55. To the extent that the Inspection Mission investigated the same complaints as the Investigation Team and found nothing adverse against the Applicant, the question arises as to what facts the Respondent relied on to reach the conclusion that there was “reason to believe” the Applicant had engaged in unsatisfactory conduct. In *Marshall* 2012-UNAT-270, UNAT held that:

For the Organization to embark on a preliminary fact-finding investigation into the claims about Mr. Marshall’s conduct it was required, by Statute, to have “reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”

There were no such facts as she had been cleared by the Inspection Mission.

56. Based on UNAT's reasoning in *Nwuke*, the Tribunal holds that in the light of the findings of the Inspection Mission, which investigated the same complaints as the Investigation Team, it was an abuse of discretion on the part of the Respondent to establish a second body and labeling it an Investigation Team to carry out the same exercise that had been carried out by the Inspection Mission.

57. In *Abu Hamda* 2010-UNAT-336, UNAT held that:

As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety". The Tribunal holds that it was irrational for the Respondent to restart the process on investigating the same complaints against the Applicant and sanction her.

58. It is a matter of fairness and justice that a staff member should not be made to go through two distinct processes in regard to the same facts thus putting him/her, in "double jeopardy". The term double jeopardy is not being used in the criminal sense. It is being used just to convey the principle that once an individual whose actions have been exhaustively examined by one body, however called; he/she should not be re-investigated on the same grounds. The Tribunal will here refer to what UNAT stated in *Nwuke*:

The General Assembly established the new internal justice system and approved the Statutes of both the UNDT and the Appeals Tribunal. The Member States of the United Nations made a great effort to achieve an "independent, transparent, professionalized, adequately resourced and decentralized system ... consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" (A/RES/63/253, preamble, paragraph 2). According to the Statutes, the jurisdiction of both Tribunals and the content of the possible judgments they can render match those high goals and the UNDT should not decline to exercise its competence when the respective right is provided for to the claimant by the rules.

59. The Tribunal is also concerned about how the Investigation Team sought to justify its conclusions that materially departed from those of the Inspection Team. This is what the Investigation Team had to say by way of either comparison of their findings with those of the Inspection Mission or by way of justification.

While the conclusions of this report differ with those of the inspection team, which visited Kigali office in December, this panel believes that this is for several reasons. Firstly, [the Applicant] was still the Representative and a significant intimidatory presence. We note that both complainants advised against an investigation taking place while the Representative was still on board. Given the atmosphere of suspicion and mistrust in the office, it is our view that staff did not speak as openly as they did following her departure. Secondly, the workings of an inspection team and an investigation panel are very different. The Inspection team does not record or take notes of interviews, while the investigation panel is obliged to do so. Interviewees are therefore aware that what they say is on record and it provides some kind of protection, should they be victimized. Finally, the interview panel had already seen the initial complaints and conducted a number of interviews. These provided a basis for asking more specific questions to support or negate the allegations. Indeed, one interviewee stated that he did not volunteer any information, simply answered the questions posed by the inspection team. In short the investigation panel has the mandate to conduct a more comprehensive, in-depth inquiry than that afforded to the inspection with the result that the findings may be and in this case are different.

60. The Inspection Mission explained the approach it took in the course of its mission:

The mission to Kigali took place from 14-20 December 2010, and was both preceded and followed by extensive meetings and telephone conversations with key entities/staff at Headquarters as well as in other duty stations. All persons interviewed were routinely notified that any information shared with the inspection team would remain strictly confidential and would not be attributed in the final report. The mission also had access to various documents pertinent to its work, such as the minutes of the Local Committee on Contracts, of the Local Asset Management Board, of staff meetings in Kigali, leave of absence records of the staff, correspondence with the Legal Affairs Section, the Country

Operation Plan for 2010, and the findings of the 2008 Global Survey.

61. The Tribunal is of the view that it was not within the mandate of the Investigation Team to justify or compare its findings with another fact finding mission that essentially looked into the same issues. The mandate of the Investigation Team was simply to establish the facts and let the appropriate authorities take whatever decision they deemed fit.

62. The Tribunal holds that it was an improper exercise of discretion by the Administration to establish an Investigation Team to investigate the same complaints that had been investigated and reported on by the Inspection Mission.

Were there procedural irregularities in the investigation process?

63. UNHCR's IOM/29/2005 – FOM/29/2005 (UNHCR's policy on harassment, sexual harassment and abuse of authority) states:

42. The goal of an investigation is to find facts which will, for the most part, be obtained by interviewing the victim, the alleged offender and other witnesses as deemed relevant by the investigating body. The facts should establish the time, sequence and nature of the occurrence.

43. Normally, no investigative findings should be reported in an investigation report before the subject of an investigation has been afforded the opportunity to respond to the allegation made against him/her. The subject of the investigation will be afforded such opportunity as soon as possible with due regard to the interests of all parties concerned, the interests of the Office and the integrity of the investigation process.

64. On the issue of the conduct of the investigation, Judge Meeran made the following observation in the case of *Mmata* UNDT/2010/053:

It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.

65. The Applicant's Record of Interview of 31 May 2011 shows that the Investigation Team did not specify to the Applicant the nature of the allegations against her. At the beginning, she was informed generally that the interview was "part of an ongoing exercise to establish facts" and that the result of the fact finding exercise would either be a closure report or a preliminary investigation report on the facts established. She was informed of the confidentiality of the investigation process, the duty of staff members to cooperate with investigations and that fact that she would be provided with a written transcript of the questions and answers to confirm her agreement by signature.

66. The closest the Investigation Team came to apprising the Applicant of the allegations against her was to tell her that: "The team that visited in December was an inspection team which is separate to what we are doing which is an investigation based on complaints and allegations that were made against your management of the office in Kigali". She was not informed that the allegations against her were those of harassment and abuse of authority.

67. The Investigators went on to ask the Applicant very general questions regarding: the ambiance in the office, problems she had had with some of the international staff; advise she had allegedly given to other UNHCR Offices regarding their recruitment of BO Kigali staff members (Mr. Njagi, Ms. Sommet Lange, etc.); her use of pin codes belonging to staff under her supervision; her borrowing of money from some staff under her supervision; her use of staff to run personal errands, including sending the driver to buy pork; the incident of the grill and an injury to the driver; her calling the BO Kigali doctor about sick leave of staff members; whether Mr. Mahmood had fainted during a meeting; whether she had ever brought a witch doctor to the office to drive away bad spirits; whether she had threatened staff with non-renewal of contracts; her making "pejorative" statements about certain nationalities; and whether she ever shouted at and criticized staff.

68. Even if the questions are viewed in the most favorable light, the Tribunal cannot conclude that they were specific and/or comprehensive enough to have put

the Applicant on notice of the actual nature of the allegations contained in the complaints of 23 August 2010 and 8 November 2010. Thus, it stands to reason that since the Applicant was not informed of the precise allegations against her, she was not afforded a proper opportunity to respond as is set out in IOM/29/2005 – FOM/29/2005.

69. There is a minimal requirement of fairness that an investigating panel must exhibit in the conduct of an investigation. This requires a fair and proper questioning of witnesses and the accused staff member; consideration of facts that may tend to inculcate and exculpate the accused staff member; justifying why witnesses as well as the accused staff member are to be believed or not; and justifying its conclusions in a rational manner.

70. The Tribunal has to ask itself whether the manner in which the investigators reached their conclusion constituted gross procedural irregularities. The Tribunal is not here passing value judgments on the inferences or conclusions reached by the investigators as due deference must be paid to the Investigators who saw and questioned the witnesses. The Tribunal has to the duty to look at the approach taken from a procedural standpoint by the Investigation Team in their assessment of the credibility of the witnesses they heard.

71. A perusal of the report of the Investigation Team indicates that the Investigators recited the testimonies of all the witnesses that tended to establish the allegations leveled against the Applicant and came up with general conclusions. The credibility rests on the number of witnesses as opposed to the few who had almost nothing to say against the Applicant. Quantity rather than quality seems to have been the yardstick used by the Investigators.

72. The Investigation Team did not explain how and why it rejected the testimony of the Applicant the more so as the latter had told the Investigators that individuals like Mr. Mahmood, Ms. Sommet-Lange, Ms. BM, and Mr. Njagi were always making statements against Rwandese.

73. The Investigation Team found that the allegations had been made out on the number of testimonies gathered without explaining or discussing how and why

the testimony of the witnesses was preferred over that of the Applicant. There was hardly any reference to the long explanations of the Applicant except for a general finding that she denied the explanations.

74. A number of documents were filed that concerned complaints of abuse of authority against Mr. Mahmood. None of this was taken into consideration. It was when Mr. Njagi appeared to be a suspect in regard to the theft at the warehouse that the relationship between him and the Applicant started to deteriorate. To properly evaluate the credibility of these two witnesses the Investigation Team should have analysed their testimony in the light of the complaint against Mr. Mahmood and the suspicion against Mr. Njagi. The Investigators did not question Mr. Njagi when he came with a very serious allegation against the Applicant that she had staged the alleged theft of the sheeting.

75. The Investigation Team made a total impasse on the evidence provided by the Applicant and one or two witnesses that the Applicant was trying to improve the working environment in the office by organizing social functions.

76. The Tribunal cannot come to any other conclusion except that in reaching its conclusions the Investigation Team committed a number of procedural irregularities by failing to inform the Applicant of the precise allegations against her; by putting words in the mouth of witnesses; by asking highly leading questions; by coming to conclusions in the absence of evidence; by ignoring the testimony and comments of the Applicant; and by sitting on appeal on the findings of the Inspection Mission to justify their conclusions based on the same set facts.

Were there procedural irregularities in the disciplinary process?

77. Pursuant to paragraph 6 of ST/AI/371, if the case of misconduct is to be pursued, the appropriate official shall take the following steps:

- (a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her 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, and offer information on how to obtain such assistance.⁹

78. In *Wishah* 2013-UNAT-289, UNAT held that:

32. Due process required in the case, that the staff member be able to assess by himself the relevance or irrelevance of the content of the investigation report, after a direct reading of it, as the Administration's charges were mainly founded on that investigation, the characteristics and outcome of which were under discussion.

33. When challenging a termination for disciplinary reasons, the staff member is entitled to review by him - or herself the evidence used to support the conclusion of misconduct, to examine whether the fact finding conducted by the Administration indeed leads to the conclusions and the impugned administrative decision. If that opportunity is denied, due process of law is not respected, as it occurred in the present case.

79. In *Rangel* 2015-UNAT-535, disciplinary proceedings were initiated against the applicant following two investigations. The applicant was not however notified in writing of the charges. The respondent argued that since the investigation reports were communicated to the applicant, she had been notified of the charges against her in compliance with the relevant rule. The Appeals Tribunal held that the charges are the legal conclusions that the Administration reaches on the basis of an investigation and that assert that somebody has committed misconduct. A panel that has conducted an investigation is tasked only with conducting a "fact-finding investigation" and not making legal conclusions or "charges" as to the possible resultant misconduct. Sending the reports of the investigation to the applicant was not the same as charging her with misconduct. She was therefore not apprised of the charges. The Appeals Tribunal disregarded the findings of the investigations.

⁹ ST/AI/371/Amend. 1, paragraph 5.

80. The same situation obtains here. The charge letter of 24 May 2012 read as follows:

Dear [Applicant],

Please find attached a Report for the Office of the Inspector General dated 18 October 2011. The report contains allegations of harassment and abuse of authority. If proven, this would constitute misconduct as defined in Staff Rule 10.1 of the Staff Regulations and Rules of the United Nations.

In accordance with paragraph 6 of ST/AI/371 on Revised Disciplinary Measures and Procedures of 2 August 1991 (copy attached), you are hereby informed of your right to respond in writing. I invite you to answer to the allegations and to produce countervailing evidence, if any, within two weeks of receipt of the present letter. If no reply is received within the time-limit, the matter will nevertheless proceed.

I also wish to inform you that in accordance with paragraph 5 of ST/AI/371/Amend.1 of 11 May 2010 (copy attached), it is your right to be assisted by a counsel of your choice. In this regard, you can contact the Director of the Office of Staff Legal Assistance [...] at osla@un.org. You can also choose to be assisted by an outside counsel at your own expense. Please note that it is your own responsibility to contact such a counsel in case you wish to avail yourself thereof.

81. The Tribunal finds that the charge letter failed woefully to comply with paragraph 6(a) of ST/AI/371 because it did not inform the Applicant of the precise nature of the allegations made by the Complainants or the facts that had been proven to support said allegations. The charge letter merely forwarded the Inspection Team's investigation report that contained general "allegations of harassment and abuse of authority" to the Applicant and gave her a two-week deadline within which to go through and blindly respond to a report that was riddled with numerous allegations.

82. Since the charge letter did not set out the precise allegations that the Applicant was supposed to answer, she set off on a fishing expedition and tried to respond to every single allegation in the Report and the 26 witness statements. She subsequently ended up with a longwinded 66 page response. In her comments, the Applicant denies the allegations, attempts to answer each of the

allegations made against her by the witnesses and the findings of the Investigation Team and tries to explain a number of ancillary matters raised in the report.

83. The Tribunal finds that sending the Investigation Team Report to the Applicant was not the same as charging her with misconduct. She was therefore never apprised of the precise charges against her. Thus, this Tribunal, based on the reasoning and conclusions in the *Rangel* decision, also disregards the findings of the Investigation Team.

84. Additionally, the Tribunal finds that the Respondent failed to comply with paragraph 6(b) of ST/AI/371, which states that if the case is to be pursued after an investigation, the staff member will be provided with “a copy of the documentary evidence of the alleged misconduct” and paragraph 48 of IOM/29/2005 – FOM/29/2005, which states that: “All documentary evidence on which the allegations are based will be shared with the staff member”. In this respect, the Tribunal notes that when the Applicant was charged with misconduct, she was not provided with copies of the complaints, which formed part of the documentary evidence of the alleged misconduct. This flaw is even more critical in light of the fact that the Applicant had left Rwanda at the end of December 2010 and was not in a position to interfere with the process as the Complainants had alleged in their complaints.

85. The Tribunal wishes to reiterate what it stated in *Powell* UNDT/2012/039 regarding due process:

Regrettably, the record indicates that the Applicant was not accorded any of the due process rights particularized in paragraph 108 above prior to and/or during the conduct of the SEA Investigation. The available evidence shows that the Applicant was redeployed to Kinshasa prior to the arrival of the SEA Investigation Team in Kisangani. The Applicant gave evidence that he initially heard of the SEA investigation informally through a friend and formally when he received the “Allegations of misconduct” dated 28 March 2005, which included the SEA investigation report of 26 February 2005 as an attachment. The Applicant was not notified in writing by the SEA Investigation Team of the allegation against him. He was not provided with copies of the documentary evidence of the alleged misconduct nor was he informed of his right to legal representation.

Conclusion

86. In *Mushema* UNDT/2011/162, the Tribunal held that:

Now since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted. Flaws may exist in an investigation because relevant witnesses have not been interviewed or because the “suspected” staff member has been denied the right to call witnesses on his behalf or because the investigators have declined to call witnesses named by the staff member, or because the staff member was not legally represented at this initial stage, he/she may have answered seemingly innocent questions that turned out to be incriminating. Since the preliminary investigation is the harbinger of a disciplinary proceeding it is vital that it be conducted in a rational, lawful and judicious manner. It should not be the gateway to a foregone decision to the establishing of a disciplinary committee or a finding of guilt

87. Given the egregiousness of the procedural irregularities in this case, the Tribunal considers that a lengthy discourse as to whether the facts on which the disciplinary measures were based have been established and whether the established facts legally amount to misconduct would be a purely academic and unnecessary exercise.

88. In light of the finding above, the Tribunal would urge the Administration to have recourse to well-trained investigators to conduct investigations.

Remedies

88. The Applicant is seeking the following remedies:

- a. Rescission of the Contested Decisions;
- b. That the fine, which was deducted from her emoluments for April 2013 be refunded with interest; and
- c. An award of moral damages for the Respondent’s inordinate delay in bringing the matter to a close and for the humiliation and financial loss

suffered for the Respondent's failure to assign her to a regular post upon the inception of the investigation process.

89. Pursuant to article 10 of its Statute, the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

90. In the case of *Abou Jarbou*¹⁰ UNAT held:

But not every delay will be cause for the award of compensation to a staff member. Rather, the staff member's due process rights must have been violated by the delay and the staff member must have been harmed or prejudiced by the violation of his or her due process rights.

91. In *Asariotis* 2013-UNAT-309 UNAT stated:

An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

92. The Applicant has not established even on a preponderance of evidence that her due process rights were violated by the delay or that she suffered any prejudice. Thus, the Tribunal will not grant the Applicant an award for moral damages.

¹⁰ 2013-UNAT-292

Judgment

93. The finding of misconduct against the Applicant is nullified.
94. The decision to impose the disciplinary measures of a written censure and a fine of one month's net base salary on the Applicant is rescinded.
95. The Respondent is ordered to:
- a. Reimburse the Applicant for the fine of one month's net base salary that was deducted from her salary; and
 - b. Remove the written censure from the Applicant's official status file.

(Signed)

Judge Vinod Boolell

Dated this 22nd day of December 2015

Entered in the Register on this 22nd day of December 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi