UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/041
Judgment No.: UNDT/2016/038
Date: 22 April 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bart Willemsen, UNICEF

Introduction

1. The Applicant, a former Investigator at the P-4 level in the Office of Internal Oversight Services ("OIOS"), contests the 1 April 2015 decision, signed by the Deputy Secretary-General, on behalf of the Secretary-General, and based on the recommendation of the then Director of the Division for Human Resources ("DHR") of the United Nations Children's Fund ("UNICEF"), to place a written letter of reprimand in the Applicant's Official File. As relief, the Applicant requests the rescission of the decision finding him guilty of misconduct, the rescission of the decision to impose a written reprimand, and financial compensation for him not having sought to renew his employment contract and having separated from the Organization.

2. The Respondent claims that the application is not receivable *ratione materiae* because the contested decision was not taken following the completion of a disciplinary process and that the Applicant did not request a management evaluation as required under staff rule 11.2(a). Alternatively, the Respondent claims that the application is without merit since it was within the Administration's discretion to determine that the Applicant, who was not charged with misconduct, had behaved inappropriately and that this warranted the imposition of a written reprimand issued pursuant to staff rule 10.2(b)(i).

Factual and procedural background

3. On 20 December 2013, the Dispute Tribunal issued *Nguyen-Kropp & Postica* UNDT/2013/176.

4. On 14 January 2014, on a white board in the Investigation Division of OIOS ("ID/OIOS"), was written: "If the facts don't fit the theory, change the facts – Albert Einstein". In reference to the Dispute Tribunal's judgment in *Nguyen-Kropp & Postica* and for satirical purposes, the Applicant changed the ending to read:

"If the facts don't fit the theory, change the photographs" and attributed the quote to another staff member in OIOS.

5. By memorandum dated 17 January 2014, the Applicant's first reporting officer requested the Director of ID/OIOS to initiate a formal investigation into the matter in accordance with sec. 5.11 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

6. By memorandum dated 31 January 2014, the then Under-Secretary-General of OIOS ("USG/OIOS") appointed a fact-finding panel to investigate the first reporting officer's report against the Applicant for prohibited conduct under ST/SGB/2008/5. On the same date, by memorandum, the then USG/OIOS informed the Applicant of the initiation of the fact-finding investigation and the establishment of a fact-finding panel.

7. On 4 February 2014, the Applicant requested management evaluation of this decision, and after receiving the management evaluation response on 10 March 2014, he appealed the decision to the Dispute Tribunal (Case No. UNDT/NY/2014/017). In *Gallo* UNDT/2015/073, the Tribunal dismissed the Applicant's application against this decision as not receivable, and the decision was not appealed.

8. On 31 March 2014, the fact-finding panel submitted its investigation report concluding that the Applicant's actions and behavior towards one of his OIOS colleagues constituted harassment under sec. 1.2 of ST/SGB/2008/5.

9. By a memorandum dated 9 April 2014, the USG/OIOS forwarded the fact-finding panel's investigation report to the Assistant Secretary-General, Office of Human Resources Management ("ASG/OHRM") for her consideration of disciplinary action against the Applicant and informed the ASG/OHRM that the USG/OIOS concurred with the finding that the Applicant's behavior together with continuing following the complaint actions constituted to misconduct.

10. By a note dated 29 October 2014, the Under-Secretary-General, Department of Management ("USG/DM") advised the then Chef de Cabinet that the matter would be more suitably assessed and administered by an entity outside the United Nations Secretariat in order to avoid the appearance of any potential conflict of interest, and therefore it would be transferred to UNICEF.

11. On 6 November 2014, the USG/DM requested the Executive Director of UNICEF to assess and administer the possible disciplinary matter concerning the Applicant and, on the same day, approval was provided on behalf of the Secretary-General for delegating authority with regard to this matter to UNICEF.

12. By memorandum dated 1 December 2014, the USG/DM informed the Applicant that the fact-finding panel had found that the available evidence supported the allegations that he had engaged in conduct amounting to harassment, as defined by sec. 1.2 of ST/SGB/2008/5. The USG/DM further stated that the Secretary-General had decided to delegate to UNICEF the authority to assess and make a final recommendation on the resolution of the matter.

13. On 5 January 2015, the Applicant presented his comments to the fact-finding panel's investigation report.

14. On 11 February 2015, the then Director of DHR/UNICEF, informed the USG/DM of his decision not to pursue the matter with reference to sec. 5 of ST/AI/371 (Revised disciplinary measures and procedures) and of his recommendation for a written reprimand to be issued against the Applicant.

15. On 16 March 2015, the Applicant separated from service with the United Nations Secretariat following the expiration of his fixed-term appointment.

16. By letter dated 1 April 2015, the Deputy Secretary-General, on behalf of the Secretary-General, informed the Applicant that the Secretary-General had accepted the recommendation of the then Director of DHR/UNICEF and that "the

current letter will serve as a written reprimand, issued pursuant to Staff Rule 10.2(b), which shall be placed in [the Applicant's] Official Status File".

17. The present application was filed on 2 July 2015.

18. Following its administrative completion, the application was served on the Administrative Law Section ("ALS") in OHRM in New York on 14 August 2015. The Respondent was instructed to file his reply within 30 calendar days of the date of receipt of the application, namely by 13 April 2015, pursuant to art. 10 of the Dispute Tribunal's Rules of Procedure.

19. On 17 August 2015, the Tribunal was informed that the UNICEF Legal Office would serve as Counsel for the Respondent in the present case.

20. By Order No. 198 (NY/2015) dated 27 August 2015, the Tribunal (Duty Judge) ordered that the Applicant file the standard "Legal Representative Authorization Form" by 4 September 2015. On 3 September 2015, the Applicant filed the above-said authorization form.

21. On 7 September 2015, the Respondent filed a motion "to consider receivability as a preliminary issue and to suspend the deadline for the Respondent to submit his reply on the merits".

22. By Order No. 220 (NY/2015) dated 9 September 2015, the Tribunal (Duty Judge) instructed the Applicant to file a response, if any, to the Respondent's motion by 11 September 2015. No response was filed by the Applicant on or before the assigned deadline.

23. By Order No. 226 (NY/2015) dated 14 September 2015, the Tribunal (Duty Judge) rejected the Respondent's 7 September 2015 motion and instructed the Respondent to file a reply on receivabilty as well as on the merits of the application on or before 15 September 2015.

24. On 14 September 2015, after Order No. 226 (NY/2015) was issued, the Applicant filed his response to the Respondent's motion filed on 5 September 2015, whereby he waived "the right to make any submissions in response or to address the Tribunal thereon".

25. On 15 September 2015, the Respondent filed his reply to the application both on receivability and on the merits.

26. By Order No. 233 (NY/2015) dated 17 September 2015, the Tribunal (Duty Judge) ordered that the present case join the queue of pending cases and be assigned to a Judge in due course. The Tribunal further noted that it had a backlog of cases awaiting assignment and that cases were generally considered by the Tribunal based on the date of submission of the application (i.e., first priority is normally given to older cases).

27. The case was assigned to the undersigned Judge on 14 January 2016.

28. By Order No. 28 (NY/2016) dated 1 February 2016, the Tribunal instructed the parties as follows (emphasis omitted):

> 13. On or before 5:00 p.m., Friday 19 February 2016, the Applicant is to file a reply, if any, to the receivability issue raised by the Respondent in his reply;
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> 14. On or before 5:00 p.m., Friday 19 February 2016, each of the parties is to inform the Tribunal if additional evidence and/or a hearing is requested and, if so, stating the relevance thereof. The parties are further to inform the Tribunal if they are amenable to resolving the matter informally either through the Mediation Division or through *inter partes* discussions;
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> 15. On or before 5:00 p.m. on Friday, 26 February 2016, if both parties are of the view that the case cannot be resolved informally, that no further evidence is to be produced, and that the case can be decided on the papers, each of them is to file a closing submission based only on the submissions already before the Tribunal."

29. By notice of change of counsel dated 8 February 2016, the Applicant informed the Tribunal that he had requested that his previous counsel withdraw from

acting as counsel in the present case and that he would proceed with the litigation *pro se*.

30. In the Applicant's response to Order No. 28 (NY/2016) dated 19 February 2016, he requested additional evidence, indicating that a number of orders would be required "for delivery of all e-mail traffic, correspondence and other documents in which he was named that was either drafted, sent or received" by the following persons: the then USG/OIOS; the current "Deputy Director" of OIOS; the current "Unit Chief" of OIOS; two members of the fact-finding panel; the then ASG/OHRM; the Officer-in-Charge of OHRM on 17 January 2014; the former Chef de Cabinet; the former Director of the Ethics Office; the USG of the Department of Management; the Deputy Secretary-General; the Executive Director of UNICEF; the then Director of DHR/UNICEF; and the Chief, Policy and Administrative Law Section, DHR/UNICEF. The Applicant also included a list of nine witnesses to be examined during the requested hearing. Regarding the mediation and *inter partes* discussions, the Applicant stated that, if the Respondent would be willing to propose an acceptable independent mediator, he would at least be prepared to give the suggestion serious consideration and also be willing to engage in *inter partes* discussions subject to the Organization being represented by independent external counsel.

31. In the Respondent's response to Order No. 28 (NY/2016) dated 19 February 2016, he notified the Tribunal that he did not request additional evidence and/or a hearing and that he was not amenable to resolving the case informally through the Mediation Division or through *inter partes* discussions.

32. By Order No. 48 (NY/2016) dated 23 February 2016, the Tribunal considered, after having reviewed the legal nature of the contested administrative decision and the Applicant's response to Order No. 28 (NY/2016), that the additional written and oral evidence requested by the Applicant would not be relevant in the present case and, pursuant to arts. 18.3, 18.5, and 16.1 of the Rules of Procedure of the Dispute Tribunal, rejected his request for orders for the production of all email traffic,

correspondence and other documents as well as his request for a hearing to examine nine witnesses. The Tribunal further directed the parties to file "their closing submissions on the receivability and on the merits of the case based only on the submissions and documents already before the Tribunal" by 4 March 2016.

33. On 4 March 2016, the parties filed their closing submissions.

Applicant's submissions

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

a. The Applicant did not request a management evaluation under staff rule 11.2(a) but instead relied on staff rule 11.2(b) which states that, "A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation";

b. On 1 April 2015, the Applicant received a letter informing him of the decision to issue a written reprimand. That decision was taken pursuant to a process initiated because of an alleged violation of ST/SGB/2008/5, and the investigation of the alleged misconduct and the subsequent actions were all taken under the provisions of ST/SGB/2008/5;

c. The Respondent cites ST/AI/371 which states, at para 5: "On the basis of the evidence presented, [the ASG/OHRM], on behalf of the Secretary-General, shall decide whether the matter should be pursued". The word "pursued" does not exclude the previous stages in the process also being disciplinary in nature. Significantly, ST/AI/371 does not say: the ASG/OHRM shall decide if disciplinary (or even non-disciplinary) action "should be taken"

as this would make it clear that the disciplinary process only commences at that stage;

d. The Applicant was subjected to a preliminary investigation with a disciplinary objective";

e. Investigations under the provisions of ST/SGB/2008/5 can be distinguished from investigations conducted exclusively under the provisions of ST/AI/371 because any action taken as a consequence of the matter being referred under ST/SGB/2008/5, para. 5.18(c), must be "disciplinary" by definition. The fact that ST/AI/371 provides for a right of reply when dismissal is being considered does not affect the nature of the decision made under sec. 5.18(c) of ST/SGB/2008/5 if dismissal is not being considered;

f. Section 5.20 of ST/SGB/2008/5 provides that an aggrieved individual or alleged offender who has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, may file an appeal;

g. Having received a complaint, the Director of ID/OIOS acted on the instructions of the then USG/OIOS and conducted a preliminary fact-finding investigation, as required under ST/AI/371.

h. The decision to find misconduct and impose a reprimand against the Applicant is unsound, and the Applicant's rights were violated by unreasonable prejudice on the part of the then USG/OIOS. In particular, because: (i) the decision to find misconduct was made on the basis that it was foreseeable that the complainant would feel distressed and/or embarrassed by the comment on the whiteboard; (ii) the decision to find misconduct was made on the basis that a satirical comment was a breach of a prior commitment which constitutes "harassment" per se; (iii) the decision to find misconduct was made on the basis of the Applicant's response to the then USG/OIOS's decision; (iv) the Applicant was improperly denied the right to freedom of

expression; (v) the complaint against the Applicant and the decision to appoint the fact-finding panel were made in bad faith; (vi) the fact-finding panel was willfully blind to clear conflicts of interests; (vii) the fact-finding panel lacked impartiality and acted under the direction of the then USG/OIOS; (viii) the fact-finding panel failed to establish elements of "harassment"; (ix) the fact-finding panel was negligent in failing to recognize bias; (x) the Department of Management had a conflict of interest that should have prevented them from selecting the external party to whom the decision-making authority should be delegated; (xi) the Applicant has continued to experience a pattern of retaliation and prejudice; (xii) the Respondent has willfully failed to identify "retaliation" contrary to ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations); and (xiii) the Respondent has failed to act on misconduct complaints submitted by the Applicant;

i. The Secretary-General endorsed the opinion that the satirical comment was not protected as freedom of opinion under in the Universal Declaration of Human Rights, as this is subject to the restriction to act in accordance with the Staff Regulations and Staff Rules. The Joint Declaration on Freedom of Expression issued on 4 May 2015 by the United Nations Special Rapporteur on Freedom of Opinion and Expression, together with the Organisation for Security and Co-operation in Europe, (2) the Organisation of American States and (3) the African Commission on Human and Peoples' Rights, states, at para 5(b):

> Individuals who expose wrongdoing, serious maladministration, a breach of human rights, humanitarian law violations or other threats to the overall public interest, for example in terms of safety or the environment, should be protected against legal, administrative or employment related sanction, even if they have otherwise acted in breach of a binding rule or contract, as long as at the time of the disclosure they had reasonable grounds to believe that

the information disclosed was substantially true and exposed wrongdoing or the other threats noted above.

j. The United Nations Special Rapporteur for Freedom of Opinion and Expression condemns efforts by Governments who use the excuse of "the protection of national security or public order" to make use of the criminal law as a pretext to clamp down on free speech. The Secretary-General, on the other hand, appears to condone the excuse of that United Nations Staff members are required to act in accordance with the United Nations Staff Regulations and Rules—which are of lesser importance than the criminal law—and that those rules constitute a "reasonable restriction" on freedom of expression.

Respondent's submissions

35. The Respondent's contentions may be summarized as follows:

a. The Application is not receivable *ratione materiae* as the Applicant did not request a management evaluation of the decision to impose a reprimand as required under staff rule 11.2 (a);

b. In his appeal, the Applicant confirms that he did not request a management evaluation of the decision to issue him a written reprimand as this was "[n]ot required". This assertion is incorrect. Staff rule 11.2(a) states that for a staff member to appeal an administrative decision he/she shall—as a first step—request a management evaluation of the same decision;

c. It appears that the Applicant, in support of his assertion that he was not required to request a management evaluation, relies on staff rule 10.3(c). In the present case, the disciplinary process was never initiated and, consequently, it was not completed, a requirement under staff rule 10.3(c) to permit an applicant to submit an application to the Tribunal without first requesting a management evaluation;

d. Upon his review of the fact-finding panel's report and after having invited the Applicant for his comments on the report, the then Director of DHR/UNICEF decided not to pursue the matter under sec. 5 of ST/AI/371/Amend.1 and did therefore not charge the Applicant; the act that, for all intents and purposes, represents the initiation of the disciplinary process;

e. In *Applicant* 2013-UNAT-381, the Appeals Tribunal held that the Dispute Tribunal had erred in determining that the applicant's appeal against the issuance of a reprimand was receivable, as the applicant had failed to request a management evaluation of the decision to issue the reprimand;

f. The Applicant's assertion that he was found guilty of misconduct is incorrect. The 1 April 2015 letter from the Deputy Secretary-General does not state that the Applicant had been found guilty of misconduct and the fact that the Applicant was not charged with misconduct under sec. 6 of ST/AI/371/Amend.1 confirms that his actions did not amount to misconduct as only such a finding is reserved to the officials identified in sec. 9 of ST/AI/371/Amend.1;

g. The decision to issue the written reprimand was a valid exercise of discretion and it was issued in view of the facts that: (i) the alteration of the inspirational quote was inappropriate in that it was foreseeable that the OIOS colleague would see the comment and feel distressed and/or embarrassed; (ii) the Applicant had made a prior commitment to refrain from confrontational conduct directed at the OIOS colleague; and (iii) the Applicant circulated his reply to the then USG/OIOS's decision to establish a fact-finding panel to all staff members of OIOS, a reply in which the Applicant referred to the OIOS colleague in a highly unfavorable manner;

h. Upon receipt of an investigation report such as the fact-finding panel's report prepared under ST/SGB/2008/5, the then ASG/OHRM was not

required to pursue the matter and there is nothing in the terms of ST/AI/371/Amend.1 that suggests that he/she does not have the authority to issue an oral or written reprimand if the acts and/or omissions of the staff member(s) under assessment warrant such action;

i. In the present case, the Applicant was not charged with misconduct. Accordingly, what matters is whether it was reasonable to view the Applicant's actions, in particular his alteration of a quote on the white board and his decision to circulate his response to the then USG/OIOS's memorandum to all staff members in OIOS, which included unfavorable comments about another OIOS colleague, as a failure to observe the standards of conducted expected of an international civil servant. This is very much the case, in particular in view of the Applicant's earlier commitment to refrain from further confrontational conduct directed at the other OIOS colleague and the Applicant's awareness of the already hostile working environment in ID/OIOS. In this connection, the Respondent notes that he does not argue that the issuance of the written reprimand was the only reasonable conclusion available to the Secretary-General. However, it cannot be contended that the Secretary-General's conclusion that the Applicant's conduct was inappropriate and warranted the issuance of a written reprimand was unreasonable and thus unlawful;

j. As to the Applicant's due process and/or procedural concerns about the actions undertaken under ST/SGB/2008/5—without conceding any violations of the right to due process and/or applicable procedure, these concerns are immaterial as the Applicant admitted to having altered the comment and to having circulated his memorandum to all staff members in OIOS, and it cannot be contended that it was unreasonable to issue the Applicant a reprimand for these actions, which is what ultimately occurred;

k. Moreover, it was not unreasonable for the then USG/OIOS to establish the fact-finding panel under ST/SGB/2008/5 after determining that the report was made in good faith and that there were sufficient grounds to establish a fact-finding panel to commence an investigation. It was likewise not unreasonable for the fact-finding panel to take note of the Applicant's actions connected to his alteration of the comment, in particular the Applicant's prior commitment to refrain from improper conduct vis-à-vis his OIOS colleague and the circulation of his email to the then USG/OIOS (in which he included inappropriate comments about the OIOS colleague) to other staff members in OIOS. The Applicant had sufficient opportunities to comment on these two elements prior to the issuance of the reprimand;

l. In support of his assertion that his "comment" on the whiteboard was protected in accordance with the right to freedom of opinion, the Applicant refers to the Joint Declaration on Freedom of Expression issued on 4 May 2015 by the United Nations Special Rapporteur on Freedom of Opinion and Expression. Without prejudice to the fact that the Joint Declaration in general appears to refer to circumstances other than the Applicant's circumstances (the Respondent notes, in particular, the scope of the Joint Declaration reflected in art. 1), the Respondent has no difficulties to accept that staff members who reveal misconduct, serious maladministration, a breach of a human right, a violation of humanitarian law and/or other threats to the overall public interest, are entitled to protection. However, the Applicant did not reveal misconduct or other improper acts and the fact alone that the Applicant refers to his comment on the whiteboard as a "satirical reference" confirms the same;

m. As stated in the letter of the Deputy Secretary-General, the right to freedom of opinion is subject to reasonable restrictions, including the requirement to act in accordance with the Staff Regulations and Staff

Rules, which finds reflection in art. 19.3 of the International Covenant on Civil and Political Rights;

n. In view of the fact that: (i) it was foreseeable that the Applicant's comment on the whiteboard would distress and/or embarrass his OIOS colleague; (ii) the Applicant had made a prior commitment to refrain from inappropriate, or confrontational conduct directed at this colleague; and (iii) the Applicant's comments about the colleague in his email to the USG/OHRM, on which he copied all staff members in OIOS, were inappropriate, the Applicant cannot claim that his "actions" or "opinions" are immune from reasonable restrictions, including administrative action after determining his conduct was inappropriate, in this case the issuance of a written reprimand.

Consideration

Applicable law

36. Articles 97 and 101.1 of the United Nations Charter provides that:

> [Article 97]
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> The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.
>
> [Article 101]
>
> The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

37. Articles 2 and 8 of the Statute of the Dispute Tribunal state, in relevant parts:

> [Article 2]
>
> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in

article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

…

[Article 8]

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

…

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for

> a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

38. Articles 7 and 35 of the Dispute Tribunal's Rules of Procedure on time limits for filing applications and waiver of time limits, respectively, state in relevant parts:

> [Article 7]
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> 1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:
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> (a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;
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> (b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or
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> (c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.
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> 2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.
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> 3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.
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> …
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> 5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.
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> …
>
> [Article 35]
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> Subject to article 8.3 of the statute of the Dispute Tribunal, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.

39. Staff rule 10.1 of ST/SGB/2014/1 (Staff rules and staff regulations of the United Nations) on misconduct states that:

> (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
>
> (b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be willful, 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.

40. Staff rule 10.2 of ST/SGB/2014/1 on disciplinary measures states, in relevant parts, that:

> (a) Disciplinary measures may take one or more of the following forms only:
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> (i) Written censure;
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> (ii) Loss of one or more steps in grade;
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> (iii) Deferment, for a specified period, of eligibility for salary increment;
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> (iv) Suspension without pay for a specified period;
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> (v) Fine;
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> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
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> (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
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> (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or

without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

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

(i) Written or oral reprimand;

…

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

41. Staff rule 10.3 of ST/SGB/2014/1 on due process in the disciplinary process states that:

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

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

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

(d) An appeal against a judgement of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations Appeals Tribunal in accordance with chapter XI of the Staff Rules.

42. Staff rule 11.2 of ST/SGB/2014/1 on management evaluation state in relevant parts:

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
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> …
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> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.
>
> (d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.
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> …

43. Staff rule 11.4 of ST/SGB/2014/1 on the Dispute Tribunal states in relevant parts:

> (a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

44. Sections 9 and 10 of ST/AI/371, as revised by ST/AI/371/Amend.1, provides as follows:

9. Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

(a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General. The Office of Legal Affairs shall review recommendations for dismissal of staff under staff rule 10.2 (a)(ix). Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

III. Application to the United Nations Dispute Tribunal

10. A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process shall be made within 90 calendar days of receiving notification of the decision. The filing of such an application shall not have the effect of suspending the measure.

45. Sections 1.2, 1.5, 2.1, 2.2, 3.1, 3.2, 3.3, 5.3, 5.14-5.18, 5.20 and 6.5 of ST/SGB/2008/5 provides as follows (footnotes omitted):

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not

considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

1.5 For the purposes of the present bulletin, discrimination, harassment, including sexual harassment, and abuse of authority shall collectively be referred to as "prohibited conduct".

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding

investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged.

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable

> disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.
>
> 5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.
>
> 6.5 Once the investigation has been completed and a decision taken on the outcome, appropriate measures shall be taken by the head of department/office/mission to keep the situation under review. These measures may include, but are not limited to, the following:
>
> (a) Monitoring the status of the aggrieved party, the alleged offender and the work unit(s) concerned at regular intervals in order to ensure that no party is subjected to retaliation as a consequence of the investigation, its findings or the outcome. Where retaliation is detected, the Ethics Office shall be promptly notified;
>
> (b) Ensuring that any administrative or disciplinary measures taken as a result of the fact-finding investigation have been duly implemented;
>
> (c) Identifying other appropriate action, in particular preventative action, to be taken in order to ensure that the objectives of the present bulletin are fulfilled. The Office of Human Resources Management may request information from the head of department or office, as necessary.

Receivability framework

46. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073; *O'Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

47. In the present case, the Respondent states that the application is not receivable *ratione materiae* because the Applicant did not request a management evaluation of the decision to impose a reprimand as required under staff rule 11.2 (a) which did not follow a disciplinary process.

48. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and art. 7.1–7.3 of the Rules of Procedure.

49. It results that for being considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae *and* ratione temporis

50. The present application was filed by the Applicant—a former OIOS staff member—on 2 July 2015, namely within 90 days from the date of notification of the contested decision on 9 April 2015. Consequently, the application is receivable *ratione personae* and *ratione temporis*. The Tribunal, therefore, will consider whether the application is receivable *ratione materiae*.

Receivability rationae materiae

51. According to the contested decision, a written reprimand was imposed on the Applicant under staff rule 10.2(b)(i). This follows directly from the Secretary-General's 1 April 2015 letter (signed on his behalf by the Deputy Secretary-General) to the Applicant in which he states that this "letter will serve as a written reprimand pursuant to Staff Rule 10.2(b)(i), which shall be placed in [the Applicant's] Official Status File".

52. In the same letter, the Applicant was informed that, on 9 April 2014 and in accordance with sec. 5.18(c) of ST/SGB/2008/5, the USG/OIOS referred to the ASG/OHRM a report from a fact-finding panel established by the USG/OIOS in accordance with sec. 5.14 of ST/SG/2008/5, which found that he engaged in misconduct, in particular harassment directed at an OIOS colleague. It was further explained that, on 6 November 2014, the USG/DM requested the Executive Director of UNICEF to assist the United Nations Secretariat with this matter and this request was accepted. The then Director of DHR/UNICEF, to whom the appropriate authority had been delegated, informed the USG/DM that, after a careful assessment of the report and the Applicant's comments thereon, he decided, with reference to sec. 5 of ST/AI/371, not to further pursue the matter but he recommended the issuance of a written reprimand. This recommendation was accepted by the Secretary-General, and the letter issued pursuant to staff rule 10.2(b)(i) on 1 April 2015 constituted a written reprimand placed in the Applicant's Official Status File.

53. The Tribunal considers that the contested decision clearly stated that the written reprimand was imposed by the Secretary-General pursuant to staff rule 10.2(b)(i). In accordance with the mandatory provisions of this rule, the written reprimand is not a disciplinary measure but an administrative (non-disciplinary) measure.

54. The Tribunal notes that staff rule 11.2(a) provides as follows:

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

55. The Tribunal considers that staff rule 11.2(a) constitutes the general rule according to which a management evaluation of the contested administrative decision is mandatorily to be requested as a preliminary step within 60 days from the date of notification for an appeal to be receivable before the Dispute Tribunal. This is also consistently confirmed by the jurisprudence of the Dispute and the Appeals Tribunals.

56. The Tribunal also notes that, in accordance with staff rule 10.3(c), a staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed, following the completion of a disciplinary process, may submit an application challenging the imposition of such measures directly to the Dispute Tribunal. Furthermore, according to staff rule 11.2(b), a staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at the Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation. The Tribunal considers that staff rule 11.2(b) constitutes the exception from the general rule established in staff rule 11.2(a).

57. The Tribunal further considers that staff rule 10.3 and staff rule 11.2(b) indicate the administrative decisions which are exempted from the general requirement of staff rule 11.2(a) that an appeal cannot be filed to the Dispute Tribunal without first requesting a management evaluation of the contested decision. These decisions may therefore be appealed directly to the Dispute Tribunal, namely:

a. Administrative decisions taken pursuant to advice obtained from technical bodies as determined by the Secretary-General;

b. Decisions taken at the Headquarters to impose disciplinary measure(s) following the completion of a disciplinary process; and

c. Decisions taken at the Headquarters to impose administrative measure(s) following the completion of a disciplinary process including, but not limited to those listed in staff rule 10.2(b) (written or oral reprimand, recovery of monies owed to the Organization, and administrative leave with full pay or partial pay or without pay pursuant to staff rule 10.4).

58. Moreover, sec. 10 of ST/AI/371, as revised by ST/AI/371/Amend.1, further clarifies that a staff member has the right to file an appeal directly to the Dispute Tribunal against a non-disciplinary measure as it states that:

> 10. A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process shall be made within 90 calendar days of receiving notification of the decision. The filing of such an application shall not have the effect of suspending the measure.

59. It clearly results that the disciplinary and non-disciplinary (administrative) measures taken at the Headquarters can be appealed directly to the Dispute Tribunal within 90 days from the date of notification. The preliminary step of requesting a management evaluation of the contested decision for appeals against such decisions is therefore no longer mandatory but optional. The Tribunal underlines that this exception is strictly applicable only to the decisions previously mentioned according to the general principle of law *exceptio est strictissimae interpretationis* (an exception is of the strictest interpretation) and cannot be extended to other administrative

decisions than the ones expressly mentioned in the relevant legal provisions. Furthermore, the Tribunal underlines that the applicability of this exception cannot be ignored and must be applied each time when the contested decision is one of those mentioned in staff rule 11.2(b) in accordance with the general principle of law *actus interpretandus est potius ut valeat, quam ut pereat* (the legal provisions are to be interpreted in such a way to give effect to them, rather than in such a way to deprive them of any effect).

60. Consequently, the Tribunal considers that, as results from the factual background and the evidence on the record, all the cumulative and mandatory conditions analyzed above for an appeal to be filed directly to the Dispute Tribunal are fulfilled in the present case:

a. The contested decision is the non-disciplinary measure of a written reprimand pursuant to staff rule 10.2(b)(i);

b. The non-disciplinary measure was taken following the completion of a disciplinary process initiated pursuant to ST/SGB/2008/5;

c. The non-disciplinary decision against the Applicant was taken at the Headquarters in New York.

61. Regarding the second condition under b. above, the Tribunal notes that the procedure followed by the Administration pursuant to secs 5.14–5.18 of ST/SGB/2008/5 had all the characteristics of a disciplinary process: a fact-finding investigation was conducted by a panel established by the USG/OIOS following a written complaint of harassment against the Applicant; the fact-finding investigation included interviews with the aggrieved individual, the Applicant as the alleged offender and with witnesses considered to have relevant information for the investigation process; the panel analyzed the testimony and the documentary evidence and prepared a full report concluding, based on this evidence, that the Applicant's actions and behavior toward one of his OIOS colleagues constituted misconduct (harassment). The responsible official, the then USG/OIOS, referred

the matter to the ASG/OHRM for consideration and following the delegation of authority, the then Director of DHR/UNICEF reviewed the fact-finding investigation report together with the Applicant's comments to it and then decided not to pursue the matter with reference to ST/AI/371 but recommended to impose on the Applicant a non-disciplinary measure, namely a written reprimand. The Secretary-General decided to accept the recommendation and issued the letter of reprimand signed on his behalf by the Deputy Secretary-General.

62. It results that, under staff rule 11.2(b), the Applicant is exempted from having to request a management evaluation of the contested decision before filing his application with the Dispute Tribunal.

63. After reviewing *Applicant* 2013-UNAT-381 invoked by the Respondent, where an appeal against a non-disciplinary measure taken by the UNICEF office in Tanzania was found non-receivable because a request for management evaluation was not filed prior to the appeal before the Dispute Tribunal, the Tribunal considers that the Appeals Tribunal's findings are not applicable to the present case because the contested non-disciplinary measure of a reprimand was taken by the UNICEF Office in Tanzania and not by the UNICEF Office in New York (Headquarters) and one of the cumulative and mandatory conditions from rule 11.2(b) to apply was not fulfilled. Moreover, the applicability of the exception from staff rule 11.2(b) was not addressed by the Appeals Tribunal in *Applicant* 2013-UNAT-381 and the present case is therefore distinguishable from *Applicant* 2013-UNAT-381. The Tribunal considers that applying this jurisprudence in the present case will have the effect of extending the general requirement of mandatory management evaluation request from staff rule 11.2(a) to a non-disciplinary measure expressly exempted from such a requirement under staff rule 11.2(b) and not to give the required legal effect to the exception.

64. The Tribunal concludes that, according to the letter and spirit of the mandatory staff rule 11.2(b), the Applicant is exempted from the requirement of

having to request management evaluation and any opposite interpretation would prevent him from access to justice by denying him the right to file an appeal before the Dispute Tribunal.

65. The Tribunal underlines that a management evaluation request of a disciplinary or non-disciplinary measure taken at the Headquarters can be subject to a management evaluation if requested, but the application to the Dispute Tribunal must always be filed within the mandatory deadline established in staff rule 11.4(b), namely 90 days from the date on which the applicant was notified of the contested decision.

66. In the light of the above considerations, the Respondent's arguments regarding the non-receivability *ratione materiae* of the application, i.e. (a) the application is not receivable because the Applicant did not request a management evaluation of the contested decision; and (b) the non-disciplinary measure was not taken following the completion of a disciplinary process, are to be rejected and the application is to be considered receivable *ratione materiae*.

The imposition of the administrative (non-disciplinary) measure of a written reprimand

67. The Tribunal notes that staff rules 10.1, 10.2(b)(i) and (c), and 10.3 state as follows:

[Staff rule 10.1]

> (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
>
> (b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to

reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be willful, 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.

[Staff rule 10.2(b)(i) and (c)]

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

(i) Written or oral reprimand;

…

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

[Staff rule 10.3]

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

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

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

> (d) An appeal against a judgement of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations Appeals Tribunal in accordance with chapter XI of the Staff Rules.

68. It clearly results that the Secretary-General, as the Chief Administrator, or the official with the delegated authority, has the discretionary authority to launch an investigation into allegations of misconduct, to institute a disciplinary process when the findings of an investigation indicate that misconduct may have occurred, and to impose disciplinary or an administrative (non-disciplinary) measure against a staff member, who failed to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuance, or to observe the standards of conduct expected of an international civil servant.

69. The Tribunal considers that both disciplinary and non-disciplinary measures of oral and written reprimand have the scope of either sanctioning or imposing an administrative measure on a staff member for his/her failure to comply with his or her obligations under the employment contract with the Organization or to observe the standards of conduct required of an international civil servant.

70. The Tribunal underlines that all the legal provisions mentioned above have a common mandatory element, notably that they apply only to an existing, valid contract based on which the Secretary-General, as the employer, can exercise his discretionary authority to impose a disciplinary or administrative (non-disciplinary) measure against the staff member (the employee) for his/her failure to comply with the obligations established by the Charter, Staff Regulations and Rules and other administrative issuances, or for his/her failure to observe the standards of conduct required of an international civil servant.

71. Furthermore, the Tribunal concludes that a disciplinary or a non-disciplinary measure can be imposed only on an actual staff member as confirmed by the relevant quotations from following staff rules (emphasis added):

a. Staff rule 10.1(a): "Failure by a *staff member* to comply … may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct";

b. Staff rule 10.1(b): "Where the *staff member's* failure to comply… such *staff member* …";

c. Staff rule 10.2(c) "A *staff member* shall be provided with the opportunity to comment … prior to the issuance of a written or oral reprimand";

d. Staff rule 10.3(a): "… No disciplinary measure may be imposed on a *staff member* …unless … The *staff member* shall also be informed of the right to seek assistance …";

e. Staff rule 10.3(b): "Any disciplinary measure imposed on a *staff member* …";

f. Staff rule 10.3(c): "A *staff member* against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2 have been imposed …".

72. *Per a contrario*, a disciplinary or non-disciplinary measure cannot be imposed on a former staff member, since the Secretary-General's authority to sanction no longer exists from the date of separation from the Organization, for reasons other than the termination for disciplinary reasons, including the expiration of a fixed-term appointment.

73. As results from the facts, in the present case, the Applicant's fixed-term contract expired on 16 March 2015 and it was not renewed. Therefore, as confirmed by the parties' submissions, the Applicant separated from the Organization on the same day, and the non-disciplinary measure of written reprimand was taken after his separation on 1 April 2015. The Tribunal finds that the administrative measure (non-disciplinary) imposed against the Applicant is therefore unlawful because, at the date of issuance of the contested decision, there was no longer an existing

employment contract with the Applicant who was no longer a staff member. Accordingly, the Secretary-General had no longer the authority to impose such a measure.

74. The Tribunal underlines that the entire complex process of launching an investigation into allegations of misconduct, instituting a disciplinary process and completing it by issuing the final decision, if any, to impose a disciplinary or non-disciplinary measure against a staff member must be finalized before the expiration of the contract. If the decision to impose a disciplinary or non-disciplinary measure is not finalized before the expiration of the contract, no course of action can be taken after this date, except if both parties (the staff member and the Organization) agree for the contract to be extended.

75. In the present case, the Tribunal notes that the investigation and the disciplinary process took place before the expiration of the Applicant's contract on 16 March 2015. However, the final decision concluding the disciplinary process is the letter of written reprimand, which was issued after the expiration of the contract. The Tribunal concludes that the mandatory requirement for a non-disciplinary measure to be imposed only on a current staff member was not observed, and this is sufficient for the contested decision to be considered unlawful. The Tribunal considers that there is no need to further analyze the grounds of appeal on the merits of the contested decision.

Relief

76. The Tribunal notes that the relief requested by the Applicant is the rescission of the decision finding the Applicant guilty of misconduct, the rescission of the decision to impose a written reprimand and "financial compensation for not seeking to renew his employment contract and separated from the Organisation as a result of:

> a) OIOS management's unwillingness to address the unwarranted and defamatory [Performance Improvement Plan];
>
> b) The harassment and the retaliation that followed,
>
> c) The lack of accountability following the *Nguyen-Kropp and Postica* judgment,
>
> d) The failure of OIOS management to address the malicious accusation of a "possible assault" made against the Applicant and
>
> e) The combined series of failures of the part of
>
> (i) the Department of Management,
> (ii) the Ethics Office and
> (iii) the Chef du Cabinet."

77. Under art. 10.5(a) of the Statute of the Dispute Tribunal, the Tribunal may order one or both of the following:

> *(a)* Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> *(b)* Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

78. Regarding the requested relief, the Tribunal considers that, as results from the reasoning of contested decision, the then Director of DHR/UNICEF decided not to pursue the matter with reference to sec. 5 of ST/AI/371 and, consequently, there was no final decision finding the Applicant guilty of misconduct and no disciplinary action was taken to impose a disciplinary measure. The Tribunal considers that the implicit legal effect of the decision, which was not appealed by the Applicant, is that the disciplinary case was closed and the disciplinary charges were dropped.

However, the then Director of DHR/UNICEF recommended that it was appropriate for the non-disciplinary or administrative measure of a written reprimand to be imposed on the Applicant and to include it in the Applicant's Official Status File. This recommendation was accepted by the Secretary-General who decided to issue the letter of reprimand and to include it in the Applicant's Official Status File. Since no decision was taken finding the Applicant guilty of misconduct, the request to rescind such a decision is to be rejected.

79. As results from the above considerations, the decision to impose a non-disciplinary measure against the Applicant, who was no longer a staff member at the date of the issuance of the written reprimand, is unlawful and, pursuant to art. 10.5(a) of the Tribunal's Statute, the Applicant's request for this decision to be rescinded is to be granted. Consequently, the written reprimand is to be removed from the Applicant's Official Status File by the Respondent.

80. Regarding the Applicant's final request for financial compensation, the Tribunal considers that no evidence on record demonstrates any economic loss suffered by the Applicant, and such a request is not related to the decision contested in the present case, but to the Applicant's decision not to seek to renew his employment with the Organization. The non-renewal of his fixed-term appointment was not contested. Consequently, this request is also to be rejected.

Conclusion

81. In the light of the foregoing, the Tribunal DECIDES:

The application is granted in part:

a. The decision to impose a written reprimand against the Applicant is rescinded and the Respondent is to remove the 1 April 2015 letter constituting the written reprimand from the Applicant's Official Status File; and

b. The request to rescind the decision finding the Applicant guilty of misconduct and the request to grant him financial compensation are rejected.

(*Signed*)

Judge Alessandra Greceanu

Dated this 22nd day of April 2016

Entered in the Register on this 22nd day of April 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York