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UNITED NATIONS DISPUTE TRIBUNAL

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Case No.:	UNDT/GVA/2017/005
Judgment No.:	UNDT/2017/082
Date:	20 October 2017
Original:	French

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**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

VEYRAT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Victor Rodriguez

**Counsel for Respondent:**

Adrien Meubus, Administrative Law Section/OHRM, United Nations Secretariat

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## **Introduction**

1. By application filed on 5 February 2017, the Applicant contests his separation from service with three months' notice and a termination indemnity in accordance with Staff Rule 10.2 (a) (viii) and pursuant to paragraph (c) of annex III to the Staff Regulations.

2. The Respondent filed his reply on 6 March 2017.

## **Facts**

3. The Applicant joined the United Nations Office at Geneva ("UNOG") as an Usher at the G-2 level in April 1991, under a temporary contract. He occupied various positions until in 1997 he joined the Office for the Coordination of Humanitarian Affairs ("OCHA"), Geneva, where he started work in April 2004 as a Human Resources Assistant at the G-6 level. His contract was converted to a permanent contract on 1 July 2009.

4. In November 2014, the Applicant's team in OCHA was disbanded in preparation for the transition to Umoja. The Applicant was lent to the UNOG Human Resources Management Section for one year, in order to prepare the roll-out of Umoja in OCHA, scheduled for June 2015. At that time, there were problems with the roll-out and the staff dealing with its implementation – including the Applicant – were under considerable pressure.

5. Between 13 and 17 November 2015, three beehives disappeared from pedestals behind the trees in the Cour d'honneur in the park of the Palais des Nations. These beehives, a gift from the Permanent Mission of Switzerland to UNOG, had been on a slope leading down from the Cour d'honneur since 2012. They each bore one of the following nameplates: paix, coopération, sécurité, humanitaire, solidarité, droits de l'homme, justice, universalité, désarmement, environnement.

6. On 11 January 2016, the UNOG Buildings Service reported the disappearance of the three beehives to the UNOG Security and Safety Service (SSS). Following an official request from the head of the Buildings Service, the Chief of SSS ordered an investigation on 20 January 2016.

7. On 4 February 2016, a fourth hive, with the nameplate "justice", disappeared.

8. The investigators viewed the tapes from the video surveillance camera. According to the investigation report, they showed that the fourth hive had been removed by someone, acting alone, on 4 February 2016, at dusk, between 6.24 and 6.34 p.m. The person, who was on foot, walked across the field towards the hives twice and returned carrying something twice, making two trips to his vehicle with the hive. Again according to the investigation report, the surveillance cameras also showed one vehicle driving up and down the Allée du Secrétariat just before and immediately after the hive was taken. This car had driven out of the P16 Villa du Bocage car park and had then paused for 15 minutes in the Allée du Secrétariat before leaving via the Allée du Secrétariat at 6.36 p.m. and departing from UNOG by the Chemin de Fer gate heading for the Lake. The investigators then went to the Bocage car parks in order to identify the potential suspect. Only one car of the same style and shape as the one in question was parked every day in the P16 car park (Villa Bocage): a white Kia Rio found to be registered to the Applicant.

9. The investigators went to the Applicant's home on 15 February 2016 to check from outside whether the UNOG hives were there. They did not see the UNOG hives but did note that the staff member or a member of his family had a knowledge of apiculture because two hives of a different shape from the UNOG hives were visible in the garden.

10. The investigators returned to the Applicant's residence on 14 March 2016 to check whether, in the meantime, he had placed one or more of the UNOG hives on his land. That was not the case.

11. On 16 March 2016, the investigators summoned the Applicant to an interview the same day. The summons indicated, inter alia:

Between the end of October 2015 and 4 February 2016, four of the ten beehives in the UNOG park disappeared.

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In view of the facts established by the investigation conducted, we should like to interview you, on the record, as a witness.

12. In the interview record and the testimony given during the hearing on the merits, the Applicant confirmed the following:

I fully understand why I have been summoned today: it is because of the disappearance of four beehives owned by UNOG. I agreed to come voluntarily to your office to reply to your questions and to explain what happened.

13. The record shows that the Applicant's answer to the first question ("Do you think that we had a reason for summoning you in connection with the disappearance of these four beehives?") was as follows:

I am going to tell you the truth immediately. I took these beehives myself. I cannot tell you the exact dates, but it was between the end of October 2015 and the beginning of February 2016.

Each time, I loaded them into my Kia Rio car ... I parked in the Allée du Secrétariat and came and went once or twice on foot, crossing the grassy slope under the Press car park.

I took them to my home in Sciez. They are now in my garage. I was planning to place them in my garden later.

14. He also admitted that he had repainted the red sides of the hives' "chalet" roofs white and thrown away the nameplates. The Applicant returned the four beehives on 17 March and again apologized.

15. The preliminary report of the investigation into the disappearance of the UNOG beehives conducted by the SSS investigation unit and dated 23 March 2016, was transmitted to the Director of the UNOG Division of Administration by memorandum dated 29 March 2016.

16. On 5 April 2016, the UNOG Director of Administration referred the Applicant's case to the Assistant Secretary-General, Office of Human Resources Management ("OHRM") in New York, requesting that a disciplinary process should be instituted under chapter X of the Staff Regulations and Rules of the United Nations and paragraph 5 of Administrative Instruction ST/AI/371/Amend.1 (Revised disciplinary measures and procedures).

17. In a letter of apology dated 4 May 2016, the Applicant tried to explain the circumstances surrounding his actions and expressed his regret and deep distress. The Chief of OCHA transmitted the letter to OHRM in New York.

18. In a memorandum of 19 July 2016, the Chief of the Human Resources Policy Service in OHRM notified the Applicant of the allegations of misconduct brought against him and gave him two weeks to respond to them. The Applicant received these allegations on 8 August 2016.

19. On 5 September 2016, the Applicant and a lawyer from the Office of Staff Legal Assistance submitted responses to the allegations of misconduct against the Applicant.

20. In a letter dated 18 October 2016, the Officer-in-Charge of the Office of Human Resources Management in New York informed the Applicant that a disciplinary measure was to be imposed on him in the form of separation from service, with compensation in lieu of notice and with termination indemnity. The letter noted that, in reaching the decision, the Organization had taken into account the mitigating factors of the Applicant's long record of satisfactory service, his expression of remorse, his admission of the theft and his personal circumstances at the time of the events. The letter also emphasized that the fact that the beehives were a gift from the Mission of Switzerland made the Applicant's misconduct that much more serious.

21. The Applicant has been under the care of a physician since 28 November 2016.

### **Parties' submissions**

22. The Applicant's submissions are as follows:

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- a. The Administration did not perform due diligence vis-a-vis the Applicant, who during the transition to Umoja was experiencing considerable tension and stress and dealing with a very heavy workload, in an unclear professional situation;
- b. The stress affecting the Applicant at the time of the events, caused by the transition to Umoja, as well as the bizarre nature of his actions were not really taken into account in the procedure and in OHRM's determination of the disciplinary measure; those circumstances diminished his responsibility or absolved him;
- c. A procedural irregularity was committed, because the Applicant was summoned to meet with the investigators as a witness and not as a suspect; at the time when he was summoned, the investigators had already been to his house twice, and had ruled out the other people who owned a car identical to the one seen on the surveillance video; the fact that the Applicant had been summoned as a witness, and not as a suspect, thus constituted a violation of his right to due process;
- d. The penalty imposed is completely disproportionate to the nature and gravity of the misconduct committed, in violation of Staff Rule 10.3, because the consequences of the disciplinary measure applied far exceed the alleged misconduct and do not really take into account the circumstances of the Applicant; the Administration showed a lack of compassion;
- e. Regardless of whether this was the most severe penalty, separation from service with three months' notice and a termination indemnity is a professional death sentence for the Applicant; he applied for 59 posts in the Geneva-based international organizations but, with the disciplinary measure and at age 50, he was unable to find work in the area in which he had performed well in the United Nations over 25 years; and
- f. The procedure was flawed and the Applicant did not enjoy due process during the consideration of his case; he requests clemency from the Tribunal, cancellation of the disciplinary measure and therefore his reinstatement, payment of salary and benefits since the date of his separation, as well as moral damages.

23. The Respondent's submissions are as follows:

- a. The penalty imposed on the Applicant is proportionate to the acts committed; contrary to his assertions, the Applicant acted with premeditation when, over a period of five months and on four occasions, he took four beehives; the fact that he repainted them and removed their nameplates shows that he intended to keep them;
- b. The beehives were a gift of the Swiss Government; the bond of trust between the Applicant and the Organization was involved; his actions deserved a severe penalty;
- c. The penalty is in line with the measures imposed in similar cases; in general, cases involving unauthorized possession of property of the Organization result in separation from service;
- d. The Applicant's long and satisfactory career, his expression of regret and his rapid confession, as well as his personal circumstances at the time of the facts - namely, the stress to which he was subject - were taken into consideration as mitigating factors, resulting in a penalty less serious than dismissal, in accordance with Staff Rule 10.2 (a) (ix);
- e. The Applicant did not establish that he was suffering from a mental condition at the time of the events; the fact that he was under stress was duly taken into account; the testimony of Doctor R. is not relevant and should not be taken into consideration because the Applicant did not consult him until November 2016;
- f. The Applicant's right to due process was respected; it can be argued that, when he was interviewed by the investigators on 16 March 2016, the evidence against him was not sufficient for him to be described as a subject of the investigation; when he was summoned, on 16 March 2016, he was told clearly - in writing and orally - what was to be the topic of the interview;

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- g. A staff member is entitled to be informed in writing of the formal allegations against him only when the investigation has concluded and the disciplinary procedure has commenced;
- h. Because he was informed of the purpose of the investigation, the Applicant had every opportunity to put forward his version of the events and to offer exonerating evidence; he was also in a position to submit comments and supplementary information following receipt of the charge letter, in accordance with Administrative Instruction ST/AI/371/Amend.1;
- i. Even if the Tribunal were to find that the Applicant's right to due process was violated, he nevertheless did not suffer prejudice and his requests should be rejected; he confessed immediately, as he was obliged to do under paragraph 1.2 (c) of the Staff Rules; his replies would not have been different from those which he gave to the investigators if he had been informed that he was the subject of the investigation;
- j. The applicable rules state that a staff member must be informed of the purpose of the investigation and that was done in this case; they do not state that the person must be specifically informed that he or she is a "subject"; and
- k. The decision constitutes a reasonable exercise of the Organization's discretionary power and was taken in accordance with the applicable rules.

## **Judgment**

24. First of all, it should be noted that the Tribunal's Statute gives it limited authority in disciplinary matters.

25. It has been the constant jurisprudence of the United Nations Appeals Tribunal that, in the case of an application contesting disciplinary sanctions, the Tribunal must answer the following questions (*Masri* 2010-UNAT-098, *Shahatit* 2012-UNAT-195, *Portillo Moya* 2015-UNAT-523):

- a. Have the alleged facts been established to the required standard of proof?
- b. Do the facts constitute misconduct or impropriety? and
- c. Is the disciplinary measure proportionate to the gravity of the offence?

26. The Tribunal must also consider whether due process was observed.

27. At the time of the contested decision, the texts applicable to disciplinary sanctions were Staff Regulation 10.1 (a) (ST/SGB/2016/1),<sup>1</sup> according to which "The Secretary-General may impose disciplinary measures on staff members who engage in misconduct" and the provisions of Staff Rules 10.1 to 10.3, which read as follows:

### **Rule 10.1**

#### **Misconduct**

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

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

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

### **Rule 10.2**

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<sup>1</sup> Cancelled and superseded by ST/SGB/2017/1.

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### **Disciplinary measures**

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

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding Staff Rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

...

### **Rule 10.3**

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

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. 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.

28. In the light of these provisions, the Tribunal will now analyse whether the disciplinary procedure that was instituted observed due process and whether the disciplinary measure that was imposed by the Organization on the Applicant was proportionate to the gravity of the offence.

#### *Establishment of the facts constituting the basis for the disciplinary measures*

29. The Applicant admits that, on four occasions and without authorization, he removed a total of four beehives belonging to UNOG and took them home, between October 2015 and 4 February 2016. He also admits that he repainted them, removed their nameplates and intended to place them in his garden. Thus the facts are not disputed by the Applicant.

#### *Do the facts established constitute misconduct?*

30. According to the letter of 18 October 2016, the acts committed by the Applicant constitute a violation of Staff Regulations 1.2 (b) and (q). In the section *Basic rights and obligations of staff*, these regulations state:

#### **Core values**

...

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

...

#### **Use of property and assets**

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(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

31. In order to determine whether the removal of the four beehives by the Applicant constitutes a violation of the standard of integrity under Staff Regulation 1.2 (b), it is not necessary to evaluate whether, in his previous behaviour, the Applicant had *always* displayed integrity. In order to describe his behaviour as lacking in integrity, a single event suffices, which in this case was actually repeated four times. The fact that the Applicant had never previously displayed a lack of integrity can be considered subsequently in the context of extenuating circumstances.

32. The Tribunal notes that, at the hearing on the merits, the Applicant's Counsel himself described the acts committed by the Applicant as theft. While the Applicant stated in his application that he had thought the beehives were abandoned, he nevertheless affirmed that he had wanted to return them to the Palais des Nations but had been unable to do so because he could not go through the United Nations security check at the entrance to the Palais with the beehives in his car. The Tribunal is of the opinion that the removal of the beehives can only be described as a theft.

33. The Tribunal is therefore convinced that, by taking possession of the four beehives in question, the Applicant displayed a lack of integrity within the meaning of Staff Regulation 1.2 (b). The theft of the beehives also constitutes a lack of reasonable care when utilizing the property of the Organization, within the meaning of Staff Regulation 1.2 (q). Consequently, the Tribunal is of the opinion that the removal of the beehives constitutes misconduct within the meaning of Staff Regulation 10.1 (a).

#### *Due process*

34. The Tribunal asked the parties to comment on whether the fact that the Applicant had been summoned by the investigators on 16 and 17 March 2016 as a witness rather than as a subject could invalidate the procedure adopted and the disciplinary measure imposed on him.

35. The jurisprudence of this Tribunal and of the United Nations Appeals Tribunal has set the standard for the rights of the defence in the context of disciplinary procedures under the internal rules of the United Nations. In particular, the United Nations Appeals Tribunal has clarified that disciplinary cases are administrative and not criminal in nature and that consequently the standards for criminal law procedure do not apply to disciplinary cases (*Jahnsen Lecca* 2014-UNAT-408).

36. Internal jurisprudence has also confirmed that certain rights exist only at the stage of the disciplinary procedure. For example, in *Powell* 2013-UNAT-295, the United Nations Appeals Tribunal ruled that:

24. During the preliminary investigation stage, only limited due process rights apply. In the present case, the UNDT was correct in finding that there was no breach of Mr. Powell's due process rights at the preliminary investigation stage in that, by 21 December 2004, Mr. Powell had been apprised of the allegations against him and had been given the opportunity to respond. (footnote omitted)

37. A reading of the provisions of Administrative Instruction ST/AI/371 (Revised disciplinary measures and procedures) shows that the disciplinary procedure commences only when, in accordance with paragraph 6 of that Instruction, the Administration informs the staff member in writing of the allegations and of his or her right to respond. The investigation preceding the commencement of the disciplinary procedure is not adversarial and the staff member is not entitled to counsel until the letter has been transmitted stating the misconduct allegations against him or her.

38. The Tribunal has also taken note of the jurisprudence of the Appeals Tribunal, which in a recent case (*Michaud* 2017-UNAT-761) ruled:

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60. This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

39. The Tribunal also noted that the Investigators’ Training Handbook of the Department of Safety and Security does not explicitly state that, during the interview, the person being interviewed must be informed of his or her status as witness or subject/suspect. However, several sections of the Handbook clearly differentiate between a subject/suspect and a witness (see, for example, paragraphs 25, 41 and 67). Paragraph 67, for example, states the following about interviewing a subject:

### **Interviewing a Subject**

67. They must be advised of the matter being investigated, but not entitled to the complainant’s or other sources of information details. They have to be given the opportunity to speak and explain their account without constant interruptions from the investigator. They can provide evidence to support their account and name witnesses that support their version. Interviewers can question subject on all aspects deemed relevant, in rhetorical manner, in free conversation or strict question and answer format.

40. First of all, the Tribunal notes the Respondent’s argument that, at the time of the Applicant’s interview on 16 February 2016, the evidence against him was not sufficient for him to be described as the subject of the investigation. It also notes that the Applicant’s Counsel stated, in his concluding remarks, that at the time of the interview the investigators did not have in their possession elements of material proof against the Applicant, had only blurred images and had visited the Applicant’s private domicile twice to no avail. It would thus be reasonable to conclude that at the first interview, on 16 March 2016, in the absence of conclusive proof, it was within the discretion of the investigators to describe the Applicant as a witness rather than as a suspect. However, the situation was different at the interview on 17 March 2016, because the Applicant had confessed during the interview on 16 March 2016 that he had removed the beehives.

41. In any case, the Tribunal considers that the result would have been the same if the Applicant had been summoned as a suspect on 16 and/or 17 March 2016: when he was summoned to the interview of 16 March, the Applicant had definitely been informed in writing and orally of the subject of the investigation – namely, the disappearance of the beehives – and given every chance to respond and to suggest witnesses in his defence. Yet the Applicant simply admitted immediately that it was he who had removed the beehives and that he had taken them home. He thus met his obligation under Staff Rule 1.2 (c).

42. The Tribunal is of the view that, even if there could conceivably be situations in which the fact that someone is summoned as a witness rather than as a subject might have a bearing on the findings of an investigation; that was not the case here. It follows that, in the light of the *Michaud* jurisprudence, the fact that the Applicant was summoned as a “witness” had no bearing on the procedure followed and the disciplinary measure imposed on the Applicant. Consequently, this irregularity – if irregularity there was – does not lead to the conclusion that the decision being contested was unlawful.



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43. In any event, the Tribunal takes this opportunity to note that other organizations have a slightly higher standard as regards the right of defence, particularly as regards the legal standing in which someone is heard in the context of a disciplinary investigation.

44. The Guidelines on Investigation Procedures for Staff of the European Anti-Fraud Office (“OLAF”),<sup>2</sup> which is an organ of the European Union (“EU”) whose task is to detect, investigate and stop fraudulent use of EU funds, differentiate between the hearing of a “witness” and the hearing of a “person concerned”(suspect).

45. In chapter II (Investigations and coordination cases), article 16 (Interviews) of the Guidelines states:

...

16.4 If in the course of an interview it becomes apparent that a witness is in fact a person concerned, the interview shall be ended. He shall be informed that he will be treated as a person concerned, informed of his rights and upon request he shall be provided with a copy of his past statements.

46. In addition, paragraphs 16.2 and 16.5\* of the Guidelines specify different rights for the “witness” and for the “person concerned”. The former must be informed of “his right not to incriminate himself”; the latter must be informed of “his right not to incriminate himself and of his right to be assisted by a person of his choice”. Last but not least, paragraph 16.6 indicates that, when a “person concerned” was previously interviewed as a witness, his past statements may not be used against him in any way.

47. Despite the foregoing, the Tribunal can only reiterate that, under the rules applicable in this particular case, the fact that the Applicant was summoned as a “witness” does not mean that the contested decision was unlawful, for the reasons explained in paragraph 41 above, including his free and spontaneous confession.

#### *Proportionality of the disciplinary measures*

48. It remains for the Tribunal to decide whether the penalty imposed is proportionate to the misconduct committed. In this connection, the Tribunal refers to the judgment of the United Nations Appeals Tribunal in *Aqel* 2010-UNAT-040:

35. Having established misconduct and the seriousness of the incident, the Appeals Tribunal cannot review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General, can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which has not been established.

49. The above-mentioned jurisprudence, confirmed by several other jurisdictional decisions (see e.g. *Sanwidi* 2010-UNAT-084, *Shahatit* 2012-UNAT-195), shows that the judge has limited control over the proportionality of the sanction and may overrule a sanction only if it is clearly disproportionate. It is therefore appropriate to analyse the proportionality of the disciplinary sanction imposed on the Applicant.

50. The Applicant claims that the measure applied amounts to a professional death sentence on him and was excessive, especially in view of his professional and disciplinary record (consistently good evaluations and a conduct that was always exemplary) and of the context in which he took the beehives.

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<sup>2</sup> For the text, see: [https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip_en.pdf)

\* *Translator’s note*: The French refers again to paragraph 16.4 but paragraph 16.5 contains the cited text.

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51. The Tribunal finds that the evidence on file and the testimony given at the hearing show that the Applicant, like the other staff dealing with the transition to Umoja, was exposed to a particularly high level of stress. It is of the opinion that, although the Organization took certain measures to help these staff members to manage their stress, the psychological impact on the persons concerned appears to have been under-estimated.

52. Despite the Appeals Tribunal's jurisprudence in *Ouriques* 2017-UNAT-745, the Tribunal therefore decided that it was appropriate to allow testimony from the physician whom the Applicant had consulted. In *Ouriques*, the majority opinion was as follows:

21. Further, it is our finding that all the relevant facts on which the sanction was based in this case had been satisfactorily established such that the decision-maker was in a position to adequately weigh all of them. The Administration fully complied with its duty to investigate the facts, which were established in the preliminary report. Contrary to the UNDT's reasoning, and as the Secretary-General submits, the mental health status of Mr. Ouriques was considered upon receipt of the information provided and the Administration was under no duty to inquire further into his mental state.

53. However, in a dissenting opinion, Judge Halfeld noted:

*Unlawfulness: the failure of the Administration to fulfil its duty of care*

6. The Organization has a duty of care towards its staff members. This duty of care required the Administration in this case, as the UNDT concluded, to inquire further into the staff member's mental health once it was on notice of its possible relevance prior to concluding the disciplinary investigation and to making a final determination vis-à-vis the staff members' disciplinary sanction. It is not good practice to separate a staff member suffering from a mental health condition without first fully discharging its duty of care.

54. This is why (although the Applicant consulted Doctor R. for the first time several months *after* taking the last beehive) the Tribunal decided to seek additional information on the Applicant's medical situation at the time of the events.

55. In January 2017, Doctor R. testified that the Applicant was suffering from "an alteration of his psycho-emotional state that had existed for over a year". In his testimony to the Tribunal, the physician emphasized that his comment was essentially based on what the Applicant had reported at the time of the consultation, which he had found entirely convincing. He also confirmed that he found it "virtually impossible to discuss the psychological situation [of the Applicant] at the time of the events and of the theft of the beehives", because he was "literally unable to assess what someone's situation had been more than two weeks prior to seeing the person". According to Doctor R., it was possible to make assumptions or "establish probabilities" but "not to establish facts so far back". The physician also noted that he himself had never visited the Applicant's place of work

56. Regarding the question whether the Applicant's psycho-emotional state could have caused him to be confused about unlawful acts or unable to tell the difference between right and wrong, the physician replied that he did not think that it could globally be the cause of bad judgement on the part of the Applicant. However, he did emphasize that the state which he had diagnosed in the Applicant, on the strength of his own remarks, might create a certain amount of irritability and impulsiveness.

57. The Tribunal points out, first of all, that at the time of the investigation, the disciplinary procedure and OHRM's decision, the Applicant had not consulted the physician;

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consequently, the Administration could not refer to any medical factor that might potentially exonerate the Applicant. In addition, in the light of the testimony of Doctor R., the Tribunal is satisfied that, at the time of the events, the Applicant was not in a state that prevented him from differentiating between right and wrong and that could thus be grounds for exoneration. Although the Applicant does indeed seem not to have realized the *consequences* that his behaviour might have, he was well aware that the beehives were not his property but that of the Organization and that he did not have the right to remove them and take them home.

58. As for the argument that the Applicant displayed a *singular* lack of discernment, the Tribunal found it unconvincing, because the Applicant removed the four beehives on four occasions, over a period of several months; he also repainted them and removed their nameplates. The Tribunal is of the opinion that these actions prove a certain amount of premeditation.

59. The Tribunal is also satisfied that, according to information available at the time of the disciplinary procedure and OHRM's decision, the stress which the Applicant had been experiencing had been duly and correctly taken into account as an extenuating circumstance.

60. The Tribunal recalls that its role is not to act for the Secretary-General and to choose the disciplinary sanction that it finds most suitable. It is limited to considering whether, in the choice of disciplinary measure, the Secretary-General has reasonably exercised the discretionary power which he possesses in disciplinary matters.

61. In the light of all these extenuating and aggravating circumstances (the fact that the beehives were a gift of the Swiss Government), the Tribunal is of the opinion that separation from service, with notice and a termination indemnity, although it might appear harsh, was not obviously disproportionate to the nature and gravity of the misconduct committed by the Applicant.

## **Decision**

62. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 20th day of October 2017

Entered in the Register

On this 20th day of October 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva