UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/090
Judgment No.: UNDT/2019/015
Date: 31 January 2019
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

GANBOLD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Katrina C. Waiters, UNFPA
Christina Zantis, UNFPA

Introduction

1. The Applicant, a former Finance and Administrative Associate (G-7, step X) at the United Nations Population Fund ("UNFPA"), Ulaanbaatar, Mongolia Country Office ("CO"), filed an application on 24 October 2017 challenging the decision to separate her from service with compensation in lieu of notice and without termination indemnity, following adverse findings in respect of the leasing by UNFPA of storage space from the Applicant, members of her family and associated entities.

2. The application was served on the Respondent and a reply was filed on 26 November 2017.

Procedural background

3. The Tribunal issued several Case Management Orders, namely, Order No. 253 (GVA/2017), Order No. 7 (GVA/2018), Order No. 37 (GVA/2018) and Order No. 50 (GVA/2018) of 18 December 2017, 11 January 2018, 9 and 27 February 2018, respectively, calling the parties to case management discussions, summoning witnesses and ordering production of documents in preparation and in support of matters that were examined during the hearing, which was held on 20, 21 and 23 February 2018.

4. The Applicant filed her closing submissions on 28 February 2018 and the Respondent filed his on 5 March 2018; on 12 March 2018, the Applicant filed her comments to the Respondent's closing submissions.

Facts

5. An investigation into the Applicant's conduct was initiated following an allegation of fraud made to the Office of Audit and Investigation Services ("OAIS") by the UNFPA Mongolia Country Office Representative on 31 March 2014. The Representative reported that UNFPA was leasing a building for storage belonging to the Applicant or that she co-owned with others, and that the former Operations Manager of UNFPA, Mongolia CO, who was the Applicant's former First Reporting Officer ("Applicant's former FRO"), had entered into lease agreements on behalf of UNFPA.

6. Subsequently, OAIS conducted a preliminary review of the matter and determined that "there were sufficiently serious indications of misconduct" on the part of the Applicant and, therefore, it opened an investigation.

7. On 31 August 2015, the Applicant was served with a Notice of Formal Investigation setting out the allegations and the scope of the investigation.

8. The scope of the above-mentioned investigation was indicated in the investigation report, dated 21 March 2016 as follows:

> The investigation sought to establish whether [the Applicant]:
>
> - held a financial interest in, or was associated with, the management of the building complex located at [address], premises rented by UNFPA;
> - Was actively associated with [Company 1, LLC], [Company 2], Ms. N. and/or Ms. T.; and
> - Benefitted improperly, directly or indirectly, from her association with any of the above by reason of her position with the United Nations.

9. OAIS investigators interviewed the Applicant and five other witnesses. The investigation concluded that:

> - [The Applicant's] spouse and mother are actively associated with [Company 1, LLC] and Ms. [N.], UNFPA suppliers of rental space located at [address], and recipients of UNFPA payments amounting to USD 22,178.23;
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> - [The Applicant] failed to disclose this association to the appropriate management level. Specifically, she failed to disclose that [Company 1, LLC] was owned by her relatives and that Ms. [N.] only acted for and on behalf of her mother;
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> - In her capacity as both Administrative/Finance Associate and [Operations Manager a.i. ("OM a.i.")], [the Applicant] failed to excuse herself from procurement transactions with [Company 1, LLC] and Ms. [N.];
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> - [The Applicant] repeatedly misrepresented her association with [Company 1, LLC] by falsely attesting in her financial disclosure declarations that her spouse did not have any interest in, or association, with, any entity dealing with the Organization; and
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> - As a result of her actions and omissions, [the Applicant] benefitted improperly, directly or indirectly, from her association with [Company 1, LLC] and Ms. [N.] by reason of her position with the United Nations.

10. Furthermore, the investigation report read:

> 92. Finally, although OAIS found that [the Applicant's] mother held shares in [Company 2], the investigation did not find any evidence that [Company 2] was engaged by UNFPA Mongolia as a supplier. Therefore, the allegation that [the Applicant] benefitted improperly, directly or indirectly, from her association with [Company 2] by reason of her position with the United Nations is unsubstantiated.[1]

[1] It is apparent that the decision maker adopted this view.

11. By memorandum dated 21 June 2016, the Director, Division for Human Resources ("DHR"), UNFPA, shared the full investigation report with the Applicant and gave her the "opportunity to submit comments on the factual findings described [therein]". The Applicant submitted her comments by email of 30 June 2016.

12. By letter dated 25 May 2017, the Director, DHR, UNFPA, charged the Applicant with three counts of misconduct and *inter alia* gave her ten calendar days to respond to the charges and produce any exculpatory evidence. The Applicant responded to the charges on 4 July 2017.

13. By letter dated 17 July 2017, the Acting Executive Director, UNFPA, informed the Applicant of her separation from service with compensation in lieu of notice and without termination indemnity ("contested decision") as a disciplinary measure.

14. The above letter informed the Applicant that the three counts below, which were exactly the same as in the above-mentioned 25 May 2017 charge letter, had been deemed established and supported a finding of misconduct:

> **Count 1:**
> By awarding and signing a contract with a UNFPA vendor, [Company 1, LLC], without the necessary authority, without conducting market research and considering other potential suppliers, and by involving yourself in procurement activities in relation to Ms. [N.], another UNFPA vendor, you violated Staff Regulation 1.2 (b), UNFPA Financial Rules and Regulations, Regulation 14.8 (revision of year 2010), Rule 114.12, (revision of year 2010), Financial Regulation 14.7 (revision of year 2012) and Financial Regulation 15.2 (revision for year 2014), UNFPA Procurement procedures for year 2008, paragraph C.1, UNFPA Procurement Procedures for year 2012 paragraph 6.3.1.1 and standards of Conduct for the International Civil Service (year 2013) paragraph 5.

Count 2:
You failed to excuse yourself from procurement transactions with two UNFPA vendors, [Company 1, LLC] and Ms. [N.], in your capacity as Administrative/Finance Assistant, Administrative/Finance Associate and later as Operations Manager a.i. of the UNFPA Mongolia Country Office ("UNFPA Mongolia CO"). Moreover, you failed to bring to the attention of the Representative of the UNFPA Mongolia CO, your association with the UNFPA vendors [Company 1, LLC] and Ms. [N.]. By doing so, you also provided an advantage to your family in the award of contracts by UNFPA Mongolia CO. Your actions therefore violated Staff Regulation 1.2 (b), Staff Regulation 1.2 (g), Staff Regulation 1.2 (m), Staff Rule 1.2 (p and q as indicated below) and Standards of Conduct for the International Civil Service paragraphs 5 and 23.

Count 3:
You failed to uphold the highest standards of efficiency, competence and integrity expected of a United Nations staff member by repeatedly misrepresenting in your filed Financial Disclosure Forms for January 2006 to December 2014, submitted to the UNFPA Ethics Office, that you and your close relatives, namely your spouse and mother, did not have any association to entities that engaged in commercial transactions with UNFPA. By doing so you also violated Staff Regulations 1.2 (b) and Staff Regulations 1.2 (m), Staff Rule 1.2 (p and q as indicated below), Paras. 5, 21, 22 and 23 of the Standards of Conduct for the International Civil Service (2011) and para. 5 of the Standards of Conduct for the International Civil Service (2013).

Parties' submissions

15. The Applicant's principal contentions are that:

a. She did not award or sign contracts with UNFPA vendors without authorisation as alleged in count 1; she never made any approvals because they were made by the Operations Manager and the UNFPA Representative;

b. The signing of small value contracts on paper does not represent the commitment or release of funds; it is rather part of the procurement process that is cleared and approved by the approving authority;

c. She was not responsible for conducting market research, which was the responsibility of Administrative Assistants who OAIS investigators failed to interview during the investigation process despite having all their contact information;

d. She is committed to UNFPA's mandate and did her best to protect the interests of the Organization. Thus, when the CO was faced with a difficulty in identifying a garage for a new vehicle during the winter, she suggested the family garage facility;

e. She disclosed her association with UNFPA vendors to her FRO even before he decided to engage with the vendors on behalf of UNFPA; she never had an intention to financially gain from UNFPA but to provide a solution;

f. She concedes that she should have exercised utmost care when completing the financial disclosure forms because to her knowledge [Company 1, LLC] was owned by her father-in-law and not by her husband, who was never involved in the management of the company;

g. In the absence of an actual calculation of the alleged financial loss to UNFPA and or gain to the Applicant, the Organization cannot justify the severity of the Applicant's actions;

h. The investigators breached national laws in their pursuit of confidential company documents and information; and

i. The decision maker did not fully consider all facts and mitigating circumstances when imposing the disciplinary measure, which is disproportionate.

16. The Respondent's principal contentions are that:

a. UNFPA established the facts relating to all three counts against the Applicant and the disciplinary measure imposed was lawful and proportionate to the misconduct;

b. The Applicant's claim that she was not personally responsible for conducting market research does not excuse her for failing to ensure that the CO received quotations or otherwise noting a justification before putting her signature on the lease agreement;

c. The Applicant not only failed to excuse herself from but actively participated in transactions with [Company 1, LLC] and Ms. N;

d. The Applicant, in her 2006, 2011 and 2012 financial disclosure forms, answered "no" to the question asking if to the best of her knowledge her spouse or dependent children had any interest in entities dealing with UNFPA, thereby failing to disclose her husband's association with [Company 1, LLC], a company the Applicant was required to have dealings with on behalf of UNFPA and that had a commercial interest in the work of UNFPA during those years;

e. The Applicant's personal interest negatively impacted the performance of her professional duties and severely impaired her integrity, independence and impartiality required to perform as a procurement professional;

f. The relevant inquiry is not the financial value of the deal, but the transparency of the transaction; the Organization is concerned because of the reputational harm, not the financial harm. The Applicant put the reputation and standing of the Organization in general, and its procurement division more specifically, at risk. UNFPA's source of funding is derived 100% through fundraising and donations from its Member States. Those Member States must have confidence that their funds are rigorously regulated;

g. Once the Applicant's former FRO left UNFPA Mongolia CO in 2013, the Applicant did not disclose to the new UNFPA Mongolia CO Representative her potential conflict of interest, despite the change in the UNFPA Procurement Procedures in October 2012 requiring staff members to disclose any potential conflict of interest to the Field Office Manager and no longer to the FRO;

h. The information relating to the Applicant's and her family's ownership of the companies was obtained by OAIS from the Mongolian Anti-Corruption Commission through official channels and in accordance with UNFPA's rules, regulations, policies and procedures; and

i. The Applicant's misconduct is proven, the disciplinary sanction taken is proportionate and appropriate and the decision maker took into account both mitigating and aggravating factors. Thus, the Applicant did not receive the most severe sanction.

Consideration

Legal Framework

17. In considering the requirements imposed on the Administration when making disciplinary decisions, it is noted that "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred." Furthermore, when termination is a possible sanction, the "misconduct must be established by clear and convincing evidence," which "means that the truth of the facts asserted is highly probable" *Nyambuza* 2013-UNAT-364, *Hallal* 2012-UNAT-207.

18. The *Policies and Procedures Manual, Disciplinary Framework* of UNFPA ("the Manual"), dated 7 January 2014, provides at para. 12.3.1 that:

> The purpose of the Investigation phase is to seek and collect evidence capable of ascertaining facts to permit a determination whether or not Misconduct has occurred.

19. Investigators must be entirely fair in their investigation and in the presentation of their results given that the legal framework of disciplinary procedures within the Organization restricts the rights of the suspected staff member. Staff members do not have the right to legal representation during the interview phase, no right to challenge witnesses and are generally required to answer summaries of unsworn statements made by witnesses, who may or may not have an ulterior motive in making a statement.

20. The investigators have a duty to work within the scope of the defined investigation when writing the investigative report. They must set out all relevant matters touching upon the issues, whether inculpatory or exculpatory, so as to produce a report providing a full, fair and clear picture of all the facts involving the alleged misconduct, within their context, noting that it is the Secretary-General who has the burden of proof in any disciplinary matter.

21. Furthermore, investigators must not be biased or mislead decision makers in respect of the findings of fact or in respect of statements of the law. They should advise in their reports of limitations in respect of investigations and of any evidence that would have been relevant but they were unable to obtain, expressing reasons.

22. If they find additional relevant information after writing the investigation report, they have a duty of procedural fairness, due process and in respect of natural justice, to disclose such information to the decision maker and to the staff member, who should be given the opportunity to comment upon it.

23. The role of investigators in the Organization is unique in many ways. In investigative terms, investigators within the legal framework of the Organization are not in the position of police investigators within the common law jurisdictions, where inculpatory evidence is collected in line with a prosecutorial case theory, and with exculpatory evidence being disclosed only if it happens to be found.

24. The role of investigators in the Organization is rather more closely aligned with the civil law investigative model where they search for the truth of a matter looking for both inculpatory and exculpatory evidence, which is then fully disclosed to any suspected person and any decision maker. A suspected staff member has very limited rights in an investigation. They may suggest where evidence is to be found and who would be appropriate to interview. Investigators are, however, fully in control of the investigation process, whereby they decide who will be interviewed or ignored and what evidence they shall seek, notwithstanding the suggestions of the suspected staff member. With this control goes significant responsibility and an utmost duty to act entirely fairly to suspected staff members, the Organization and any victims.

25. In *Mbaigolmem* 2018-UNAT-819, the Appeals Tribunal, in looking at the conduct of the Dispute Tribunal in the handling of disciplinary cases before it, found that:

> 27. In the present case, the UNDT followed a different approach. It essentially reviewed the investigative process, concluded that it resulted in an unreasonable determination and referred the matter back to the Administration for further investigation and fact-finding. The right of a staff member to "appeal" an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body a quo had neither the institutional means or expertise to conduct a full and fair trial of the issues.
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> 28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.
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> 29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

26. Therefore, the Tribunal, in reviewing an impugned disciplinary measure, may conduct an appeal *de novo,* which comprises of a complete re-hearing and redetermination of the merits of a case, with or without additional information, to ascertain whether:

a. The facts on which the sanction is based have been properly established;

b. The established facts qualify as the misconduct complained of at the appropriate level of proof; and

c. In the event of there being a finding against the staff member, the sanction is proportionate to the offence (see *Haniya* 2010-UNAT-024, *Applicant* 2013-UNAT-302, *Kamara* 2014-UNAT-398, *Portillo Moya* 2015-UNAT-423).

27. It is a general principle of justice that administrative bodies and administrative officials shall act fairly, reasonably, and comply with the requirements imposed on them by law. As a normal rule, a reviewing Tribunal will not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety (*Abu Hamda* 2010-UNAT-022).

28. It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028, *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

Background for the examination of the issues in this case

Facts leading UNFPA Mongolia CO to lease property from the Applicant's family

29. The evidence, which is set out more fully below, shows that sometime in September 2007, the UNFPA Director of the Asia Pacific Division visited Mongolia and, on noting the conditions under which the country's offices were operating, decided to give UNFPA Mongolia CO an additional USD1 million for medical and communication equipment for all of its five regions.

30. The additional USD1 million had to be allocated and spent before the end of the year 2007. Therefore, UNFPA Mongolia CO had four months to conduct the procurement of the goods, receive them, and have appropriate storage for all of them before distributing them to the field offices in Mongolia. Planning for this was undertaken with some urgency and an additional person was engaged to assist with this procurement process.

31. The procured goods began arriving in Mongolia in November 2007. UNFPA Mongolia CO did not yet have storage space for all the items, which required repackaging before delivery to the field stations in the country. The Applicant's former FRO, who was the then Operations Manager, informed OAIS investigators and the Tribunal in his evidence that due to the lack of storage space and with the items being delivered, he decided to ask the Applicant if it was possible for UNFPA to use her family's storage space because it was available.

32. As is discussed further below, he found that the price at which this storage space was offered was even lower than merely the overhead cost for space that UNFPA Mongolia CO paid to the Government of Mongolia for its "free" office space, including some storage. Therefore, he believed UNFPA did not suffer any losses in the process.

33. Accordingly, the Applicant's former FRO made the decision to lease storage space from the Applicant's family with the full knowledge that the owners of the property were related to the Applicant. The Applicant and her former FRO, the then Operations Manager, provided all this information to the investigators but none of it was included in the investigation report.

34. At the hearing, both the Applicant and her former FRO testified that UNFPA Mongolia CO rented its office space from the Government of Mongolia and for which, though it was "free", UNFPA paid for the overhead costs. Sometime in 2010, the building where UNFPA was housed was to be demolished because it did not meet some of the construction standards in Mongolia; thus, UNFPA had to evacuate the building and relocate to another structure.

35. In the process of relocating to a new building, it was found that the temporary location did not have sufficient storage and, additionally, that while at the old building UNFPA was using some shipping containers for storage, the same was not available in the new building. Furthermore, due to the ongoing construction at the old building, access to the containers was restricted. The evidence showed that UNFPA required external storage for a period of at least six years, namely the period of time covered by the investigation.

36. It is apparent from the "record of conversation" of the Applicant's former FRO of 19/20 October 2015, that when he started giving detailed information that was exculpatory, or contextual, the investigators terminated his interview. The relevant parts of the record of conversation are set out below:

> 10. OAIS asked [the Applicant's former FRO] to elaborate on the location of UNFPA Mongolia CO and what type of storage facilities were available. According to [the Applicant's former FRO], the Mongolia CO used to be located at the UN House but moved from 2010 to 2012 to the Orient Plaza. The CO stayed at the Orient Plaza for approximately two years before moving back to the new UN House.
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> 11. [The Applicant's former FRO] recalled that, the Mongolia CO had access to a shared small storage room at the Orient Plaza which was not enough for all the UN agencies. He added that prior to moving to the Orient Plaza, the Mongolia CO had storage facilities in the UN Plaza.
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> 12. When asked to elaborate on the type of storage available to the Mongolia CO, [the Applicant's former FRO] replied that when they moved to the Orient Plaza, a construction company restricted access to a container that was used for storage due to construction work. Therefore, the Mongolia CO had to externally archive publications. He explained that the publications were moved to an offsite storage room.
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> 13. [The Applicant's former FRO] stated that the Mongolia CO also used the services of a private medical warehouse to store all medical RH commodities.
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> 14. He recalled that at the end of 2007, the Mongolia CO started renting a storage room which was over 100 square meters.

> 15. OAlS asked [the Applicant's former FRO] about a lease agreement he signed for the use of a storage facility. [The Applicant's former FRO] recalled this lease agreement. He recalled that the vendor that owned the storage facility was a close relative (father-in-law) of [the Applicant], Administrative/Finance Associate, UNFPA Mongolia. The company that leased the storage unit was, owned by [the Applicant's] close relative. He also recalled that the Mongolia CO, would occasionally rent garage space from this same vendor.
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> 16. When asked how the ownership of the storage and garage space came [the Applicant's former FRO] replied that he knew that [the Applicant's] family owned a building complex here and asked about the possibility of renting out that space for the Mongolia CO.
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> 17. OAIS asked if [the former Resident Representative] knew about the lease agreement and the fact that [the Applicant's] close relative owned the storage and garage facility, [the Applicant's former FRO] responded that [the former Resident Representative] did not know.

37. Somewhat astonishingly, the investigators immediately drew the interview with the witness to an end. Indeed, the record of conversation continues as follows:

> 18. OAIS thanked [the Applicant's former FRO] for his cooperation and informed him that they would contact him again for a follow up interview after reviewing the information he provided OAIS. OAIS again requested that he keep the conversation confidential, and to not discuss this matter, even in general terms, with anyone.

38. During the hearing, the investigator was questioned in respect of why she terminated the Applicant's former FRO's interview when he was obviously about to give a detailed background of the facts leading to UNFPA renting storage space from the Applicant's family. The investigator said that this was the "normal practice", that when an interviewee may be considered to have engaged separately in behaviour that could form the basis of another investigation, his/her testimony was terminated.

39. When asked why she did not offer a warning to the Applicant's former FRO that his testimony could incriminate him and that it was his choice to continue, either to testify or terminate the interview, the investigator stated that she cared about the rights of the Applicant's former FRO. When asked about the rights of the Applicant, who was the subject of the investigation and the reason why her former FRO was being questioned, the investigator did not have a response. The Tribunal notes that in any event all staff members of the Organization are bound to cooperate with investigations. They have no right to remain silent.[2]

40. The Tribunal is greatly concerned with the investigator in this case not properly weighing the rights and obligations of the subject of an investigation (the Applicant) and the witnesses. Investigators must ensure that the rights of all involved in an investigation are respected but shall not lose sight of their duty to establish facts impartially, and to gather all inculpatory and exculpatory evidence. Failure to do so prevents investigations from being impartial and holistic.

41. The Tribunal finds the way in which OAIS conducted its investigation clearly led to great unfairness to the Applicant given the circumstances of this case. The rights of the suspected staff member must be paramount, especially in disciplinary cases, where, as noted above, all staff members have an obligation to cooperate and do not have a right to remain silent. Thus, a staff member's witness statement possibly incriminating himself or herself should not override the rights of the suspected staff member.

42. OAIS investigators had an obligation to ask the Applicant's former FRO about financial inquiries, if any, that he, or anybody else, made to ascertain what the cost comparators were with other storage facilities that may have been available, to ascertain, in turn, whether the costs were in fact such that UNFPA was benefiting or loosing from the arrangements. It was imperative for the investigation being undertaken to be taken through to finality, regardless of whether there could be grounds for an additional future investigation.

[2] See Staff Rule 1.2(c), Basic rights and obligations of staff.

43. The knowledge of the witness about the ownership of the space rented also required much further explanation and inquiry. By not completing the interview, the investigator significantly breached her professional and legal duty, vis-à-vis the Organization and the Applicant, to establish the facts in an impartial manner.

44. The Applicant's former FRO informed the Tribunal under oath that there was a conversation with the investigators before his witness statement was recorded on 19 October 2015, which referred to the financial arrangements and the analysis of the costing of the storage space. This cost, he stated, was significantly less than just the overhead paid by the Organization, and such rental for the storage space also included the rental of the floor space as well as the heating and lighting, when needed. The contents of this conversation were neither recorded nor presented to the decision maker.

45. The Tribunal only had before it a summary of the evidence of the Applicant's former FRO, as summarised by the investigators in the "Record of Conversation". The Tribunal called for the audio recording of the evidence taken from all the witnesses, including that of the Applicant's former FRO. It wished to be able to hear his full statement as it was given to the investigators to ascertain the truth of his assertion, the veracity of the summary from record and to also examine the full interview. However, the audio recording was never produced.

46. The Tribunal was informed that the audio recording of the Applicant's former FRO's testimony during the investigation was lost, with no explanation given. An apology to the Tribunal was proffered, but was of no assistance.

47. The Director, OAIS, in a memo to the Chief, Legal Unit, UNFPA, indicated that the interview was recorded and that the Applicant's former FRO was provided with a "summary record" of the conversation for his review and comments and that he returned a signed copy of the record of the conversation "confirming the document's accuracy". Indeed, the summary record of the evidence of the Applicant's former FRO contains his signature. The signature is in a column headed "present". Nowhere does the interviewee state that the contents in the summary are

accurate, in part or in whole, and that the record reflects the entire conversation that had occurred.

48. The Tribunal observes that for a body whose work is specialised in carrying out investigations, it is most surprising that the forms used by OAIS are so deficient. The loss of an audio recording of a vital conversation with a witness is most extraordinary and should never happen. It raises further concerns about the conduct of the investigation. The Tribunal was deprived of examining what was actually said to determine if the Record of Conversation was full or not. While it appears to be a practice of OAIS to provide a "Record of Conversation", rather than a transcript of an interview of witnesses, it is of crucial importance that the Record of Conversation be accurate, and that audio-recordings be available when the Record of Conversation is challenged.

49. The Applicant's former FRO informed the Tribunal that the investigator told him during the recorded conversation not to worry about the matter of space allocation for UNFPA, as the space of the United Nations was "free". The Applicant's former FRO informed the Tribunal that he told the investigator that the space was not free, as the Organization was required to pay the overhead costs of electricity and heating at the rate of USD11 per square metre. He also stated that the cost of the storage space provided by the Applicant's family for 100 square metres was the same as a single garage space provided by the Government of Mongolia to UNFPA, which was USD100 per month. In other words, it was USD1 per month per square metre, which was USD10 per square metre less than merely the overhead costs of the "free" space provided to UNFPA by the Government of Mongolia.

50. When asked about this cost analysis, the investigator told the Tribunal that she did not recall if anything to this effect was said to her or not before the audio recording of the interview. The Tribunal favours the evidence of the Applicant's former FRO, which was not only quite precise and detailed but also later corroborated in exact form in February 2016. It is apparent that there was in fact an analysis of the expenses and that, as the Operations Manager, the Applicant's

former FRO had concluded that the arrangements were very much to the financial advantage of UNFPA.

51. This was not mentioned in the investigation report. In fact, the entire investigation report does not contain any facts as to how the Applicant's former FRO decided that UNFPA Mongolia should rent out space from the Applicant's family. The Tribunal finds that the facts regarding any improper financial benefit, whether direct or indirect, that the Applicant could have received were not analysed, yet it was part of the formal scope of the investigation.

52. If the investigator had carried out her task to completion, her conclusion in respect of the possible financial loss would not have been equivocal, unlike the finding that was reached indicating that the Applicant "benefitted improperly, directly or indirectly from her association with [Company 1, LLC] and Ms. [N.] by reason of her position with the United Nations", while also indicating that "OAIS was unable to establish whether the [Applicant's] actions caused an actual financial loss to the Organization" and that, rather, "her actions and omissions exposed the Organization to the risk of financial loss."

53. Unfortunately, the position in respect of this matter became of even greater concern to the Tribunal when it observed that in the group of audio recordings provided to it there was a recording of an interview of the Applicant's former FRO of 9/10 February 2016, of which the Tribunal had no prior notice at all. It was not mentioned by the investigator in giving her evidence before the Tribunal in this matter, notwithstanding that she was the person who conducted this interview.

54. The Tribunal is extremely concerned that it was not initially provided with this audio recording or the transcript thereof, as the 9/10 February 2016 interview was directly relevant to the matters before it. The Tribunal was informed by the investigator that this interview was in respect of allegations of mismanagement against the Applicant's former FRO and of no relevance to the investigation in respect of the Applicant. In the Tribunal's view this is entirely incorrect, as the 9/10 February 2016 interview followed on directly from the curtailed and incomplete

interview of 19/20 October 2015, with this earlier interview being referenced in that of 9/10 February 2016.

55. Having listened to the audio recording and read the transcript of the 9/10 February 2016 interview, the Tribunal is most concerned that the investigator expressed a view that it was not relevant to the investigation of the conduct of the Applicant. On the contrary, it is *pivotal* to the investigation, providing a full and clear context and the otherwise missing evidence from the investigation report.

56. The interview of the Applicant's former FRO of 9/10 February 2016 contained the relevant material that he provided in his testimony before the Tribunal, and that he shared with the investigators during his interview of 19/20 October 2015. However, this material was not included in the Summary of Conversation, the recording of which was lost by the investigators. The Tribunal is left to ask in light of this later recording of the interview of 9/10 February 2016, whether the investigators have sought to conceal evidence from both the decision maker and the Tribunal. At the very least, negligence is a serious consideration.

57. The interview of 9/10 February 2016 contained matters that should have been in the interview of 19/20 October 2015, had it been completed properly. The interview of 9/10 February 2016 explained the original context and the *modus operandi* of UNFPA leading to the urgent need for the storage being required. It explained the role of the Applicant's former FRO, the cost analysis he made leading to the decision to request the Applicant to assist through her family, his knowledge of the Applicant's family's ownership of the storage facility, the fact that such was not a secret and that the Applicant was not involved in these decisions and that it was his decision to lease the property from the Applicant's family.

58. The missing facts not included in the investigation report into the complaints against the Applicant further comprise the fact that there was USD1 million donor funds that had to be spent before the end of the 2007 financial year, otherwise they would be lost. It is apparent that in the desire of the management of the Organization to spend money or lose it, UNFPA senior management had not properly considered the logistical issues involved with deliveries to Mongolia just prior to winter. The

medical equipment, which was being procured, could not be stored in shipping containers due to very cold temperatures during the winter. The audio recording and the transcript disclose that the need for heated storage space was urgent and essential, or electrical equipment bought as part of the supplies would be destroyed by the cold winter.

59. In the interview of 9/10 February 2016, the Applicant's former FRO told the investigators as follows:

> 124. **AB:** In the Orient Plaza, the storage situation was very bad, actually. We didn't have enough space, actually, there. The Orient Plaza we occupied all possible spaces for our offices. Yeah, it was pretty short. Actually, in the old UN House, we also didn't have much space for storage, but the advantage was we had a huge compound, and there was space to put containers within our compound. And we put containers as our storage. But, of course, containers were not suitable to store except things like files and documents and publications, because in Mongolia, the winter is so long and very harsh, reaches minus 40 degrees. And sometimes, even in the locations, it even reaches minus 50 and you cannot keep everything there.
>
> …
>
> 133. **KK:** Okay. Now, just to get more into what we've put to you in that notice, when did the need arise for storage, for extra storage?
>
> 134. **AB:** Yeah, that I remember. The storage need actually arose in September. No, not September. In 2007 September, I would say. As I said, I went to Afghanistan in 2007 from, I think, June or even May, late May to August. I went to Afghanistan for detail assignment. And at that time, actually, the Afghanistan office was requesting our Asia and Pacific Regional office to extend my assignment in Afghanistan, but I was called back by the representative because of the urgent need of me in Mongolia office. So the need was actually related to our extensive procurement activities within a very short time. And it started back in the back of this was actually while I was away. At that time, the director of APD, that time it was still not APRO actually. It was APD, Asia-Pacific Division, which was located in New York. And at that time, Mr. Sultan Aziz, the Director of APD, visited Mongolia. And he visited the western five provinces of Mongolia, where the most difficult.
>
> 135. **KK:** Right. And let me rephrase my question. Who identified—

…

138. **AB:** Then during the visit, actually, the APO Director decided to give additional $1 million in USD for medical and communication equipment for these western five provinces. But that additional $1 million dollar was supposed to be allocated or spent by the end of the same year. So the country office had only September, October, November, December, so four months. So the procurement started, and we hired additional Operations Assistant, who would solely handle the logistics of that procurement. And starting from November, the supply goods started arriving to the country. And so finding the storage was really urgent, and we had a very short time to find storage facilities, because all these equipments were, for example, delivery beds and HF radios. Then all these things should be repackaged, because the end users are not one organization. It's they're also for multiple end users.

139. **KK:** Right. No, I understand what you're saying, that there was a need for extra storage.

60. Thereafter, the Applicant's FRO confirmed that he is the one who signed and entered into all the lease agreements prior to 2013. Additionally, he confirmed that the storage was first used in 2007, explained why the leases were continued due to the need for space and the very low cost, and when he was asked who made the decision to use the storage space, he said, contrary to the findings in the investigation report and the final determination by the decision maker, that he made the decision and when asked why, he responded as follows:

156. **AB:** Why? Because we really direly needed the storage, and we had the risk of damaging UNFPA assets-we had the equipment and supplies.

157. **KK:** Okay. So you needed storage space. No, that's clear. You needed storage space. What was stored in those premises?

…

159. **KK:** What exactly was stored? What items?

160. **AB:** The radio equipment was there and various medical equipment. And later on furniture came. Initially, the storage was hired for that $1 million project. Then, actually, starting from 2007, 2008, and 2009, we had huge procurements. And actually, if I correctly remember, it's actually that time, if I correctly remember, the procurement amounts really ranged from $1.5 million to $2.7

> million. And of course not all these procurements were stored under this storage, but this volume just gives need of extra storage. Actually, I think I mentioned to you that the Ministry of Foreign Affairs arranged free, how to say it, charge-free storage for UNFPA. And those were, for example, all these medical supplies, which required the special treatment. And those were stored by the Government arranged warehouse.
>
> 161. **KK:** Right, right. Okay.
>
> 162. **AB:** And some of the equipment doesn't need the storage. We receive and immediately hand over to the Government. But those supplies and equipment, which needed to be shipped to western regions and needed to split among various end users, they were actually requiring some transit point.
>
> 163. **KK:** Okay. All right. No, it's clear. Thanks, [Applicant's former FRO]. How big was the storage space? Do you recall? Back in 2007 when you first rented it out.
>
> 164. **AB:** I don't exactly remember, but I think it was over 100 square meters. Because why I'm thinking that because that time when we, I just recall that that time, actually, the UN House also rented some.
>
> It's not rented. It's just UN House provided free space to agencies. And that time the cost of space was then 11USD per square meter. And that time, what I recall is that, the storage which we found was like 51USD per square meter. 50 when I saw that from the ATLAS, the cost of the monthly PO voucher, I saw that it's 150,000, which is around 5100 dollars per month.
>
> 165. **KK:** Okay. We'll go over that a little bit later in terms of the payments.

61. Thereafter, the Applicant's former FRO informed the investigator that he knew that Ms. N. was related to the Applicant. He further informed the investigator of the price difference between renting from Ms. N. and the UN House, that is, USD1 per square metre as opposed to USD11 per square metre for the overhead costs of the Mongolian Government. He also informed the investigator that though UNFPA had shipping containers at the UN House compound, those containers could not be used to store electric equipment because of the Mongolia harsh winters, where temperatures could fall to minus 30° or minus 40° Celsius and, as a result, such containers could only be used for archive purposes. The Applicant's former

FRO stressed once again to the investigator that there was no space at all for storage and that is why he approached the Applicant to ask her about her family storage space. The Respondent neither challenged this evidence with respect to overhead costs or the square metre cost of commercial storage, nor did he produce any evidence that was contrary to the assertions made by the Applicant's former FRO.

62. The Applicant's former FRO then informed the investigators that since the amount of the lease was under USD5,000, "we didn't need any agreement [under] UNFPA Financial Rules and Regulations and UNFPA Procurement Guidelines." He further informed the investigator that since the agreement was of low value, the risk to UNFPA was almost non-existent because the legal liability was low and also that UNFPA was not subject to the local courts but to arbitration. Thus, for such low value, UNFPA did not require a written agreement. He further importantly stated that he had the authority to enter into the agreement with Ms. N. without the authority of his supervisor.

63. When the investigator asked the Applicant's former FRO if UNFPA tried to get quotes from other vendors, especially after Ms. N. increased the rent for the storage due to an increase in electricity and heating costs in Mongolia, the Applicant's former FRO responded:

> 296. **AB:** Actually, I think we couldn't find any prospective quotes from anyone at that time. And the thing is, according to the UNFPA procedures, it didn't require formal solicitation and formal (sic), so my reference point at that time, we just compared it with the UN House costs, and the cost was, now I see that it's 110 square meters. Yeah, and it's.
>
> 297. **KK:** So let me just confirm. UNFPA didn't get any other quotes to compare this rental rate?
>
> 298. **AB:** We tried to, but we couldn't find any.
>
> 299. **KK:** When you mean "tried," what do you mean?
>
> 300. **AB:** "Tried" means just to find a storage facility. If you don't have any storage facility, which is available for rent, you cannot get any quotes. So this was the only one which we found, and it was completely okay to proceed, because the guideline and policy allowed us to do that.

64. The Applicant's former FRO in his entire interview indicated that he knew the storage rented by both Ms. N. and [Company 1, LLC], which was owned by persons associated to the Applicant and to Ms. N.. He also advised that it was not a secret in the office, though he did not know specifics of which of the Applicant's relatives owned what.

Financial loss to UNFPA

65. Since a pivotal part of the scope of the investigation was to establish financial loss to the Organization and or financial benefit to the Applicant as a result of the UNFPA leases, it was surprising for the Tribunal to note that there was no certain finding of the actual financial loss that UNFPA incurred.

66. The investigators reached a conclusion that they were not in a position to compare the rental prices in Ulaanbaatar from 2006 to 2013 and, therefore, were unable to conclude whether UNFPA suffered actual financial loss. Once again, the incomplete nature of the investigation is revealed because during the entire investigation and the record of interview of the Applicant and that of her former FRO, which is now lost but confirmed by the former FRO before the Tribunal in his sworn testimony, the investigators had all the necessary information to conduct a comparative analysis of the financial loss, or gain, for that matter.

67. Before the Tribunal, the investigator disclosed that she made no effort to undertake such an investigation to determine if, indeed, UNFPA incurred any financial losses. The investigator stated that the time of the happening of the events was so long ago that finding evidence would be difficult. She did not look for the information and records of the Organization, which may show the cost of the overhead costs per square metre. Although there are many real estate agents, she did not approach any to ask them about the cost of storage in respect of the period 2012 to 2013, being the relevant period after the change of UNFPA Financial Regulations policy in October 2012.

68. The Applicant's former FRO explained precisely before the Tribunal the financial analyses he undertook, stressing that there was no other storage space available at such a short notice when the procured items were being delivered in Mongolia during the winter. He noted that it was not possible to undertake other price comparisons, but that his analysis disclosed a substantial financial advantage to UNFPA resulting from the arrangement.

69. These were highly relevant issues to be considered and that ought to have formed part of the investigation report to inform the decision maker of the entire facts and their context. The conclusion that no comparative analysis of the costs of the storage could be undertaken prior to the entry into the contract is found to be entirely incorrect.

70. From the evidence given before the Tribunal and that contained in the statement of the Applicant's former FRO in February 2016, the analysis undertaken by the Applicant's former FRO in September 2007 effectively resulted in the following:

a. Cost of storage space owned by the family of the Applicant USD1 per square metre x 110 = USD110 per month. The annual cost thus being USD1,320;

b. Market cost of storage space, if available, which it was not, USD51 per square metre x110 = USD5,610 per month. The annual cost thus being USD66,320;

c. The overhead cost incurred in respect of the otherwise free space provided by the Mongolian Government: USD11 per square metre x 110 = USD1,100. The annual cost thus being USD14,520.

71. It would be reasonable to extrapolate from this that the utilities' cost per square metre charged by the Government of Mongolia approximated the actual costs incurred, but would have included an administrative overhead and would have also included not only heating, but lighting every working day. There was also evidence that the cost of security may have also been included. Notwithstanding

these costs, the Applicant's family were not in receipt of a sum anywhere nearly approaching a commercial rent, or it may appear, a rate which may have covered their costs. The Applicant's family cannot, on any view, be said to have received a financial gain.

72. It was the UNFPA Mongolia CO that received an apparent financial benefit over the market rate for 110 square metres of storage space. The procured goods of USD1 million were also saved from damage by the Applicant's family agreeing to rent the storage space. From all points of view, the analysis undertaken by the Applicant's former FRO disclosed a very great advantage to UNFPA. This financial advantage for UNFPA continued for the duration of the lease of the storage facilities until 2013. It represented tens, if not hundreds of thousands of dollars gain for UNFPA, being the difference between the actual charges made and the market rate chargeable for the space. The Tribunal is satisfied that the uncontested cost of the storage provided by the Applicant's family over the period of seven years from 2007 to 2014 was USD22,178.23. The evidence clearly supports the view that cost of the same storage at the commercial rate would have been hundreds of thousands of dollars over the same period.

73. The investigator made no effort whatsoever to check any of the records to confirm the overhead costs of the "free" space provided to UNFPA by the Government. The Tribunal finds that this was also evidence that entirely contradicted the assertions of the investigator in respect of the financial exposure of the Organization. No such exposure existed on any proper or reasonable view of the facts.

74. The Applicant's former FRO's interviews provided further vital context, including the open knowledge of the ownership of the storage space and a garage and the authorisation by sub-delegation to the Applicant's former FRO to enter into contractual arrangements up to USD30,000. This was a further pivotal matter not followed up by the investigator, but belief of the authorisation of the Applicant's former FRO as to such authorisation was the subject matter of disciplinary action taken against the Applicant's former FRO. This belief by the Applicant's former FRO as to his authority as operating manager was directly relevant to the

investigation in respect of the Applicant, providing an explanation as to why she later behaved as she did in respect of the execution of a contract extension in 2013, as discussed below.

75. From the evidence on file and the testimony of the Applicant's former FRO, which this Tribunal considers truthful and correct, especially considering that he incriminated himself in the process of his testimony, the investigators had all the requisite information to conduct a comparative analysis between the rent paid by UNFPA Mongolia CO to the Applicant's family and the then market price. However, they did not do so, but notwithstanding this failure, they still concluded that:

> As a result of her actions and omissions, [the Applicant] benefitted improperly, directly or indirectly, from her association with [Company 1, LLC] and Ms. [N.] by reason of her position with the United Nations.

76. The Tribunal finds no support for this conclusion.

Have the facts upon which the decision is founded been properly established?

77. It became clear to the Tribunal during the hearing that there were significant flaws in the investigation and the investigation report. The findings expressed in the investigation report are significantly misleading and incomplete. Specifically, after considering the material filed and hearing the witnesses before it, the Tribunal concludes that:

a. Relevant facts, known to the investigators, were omitted or simply not disclosed;

b. The investigation was significantly incomplete;

c. The investigation failed to disclose the whole context of the transactions subject of the case;

d. A crucial audio recording was lost by the investigators;

e. A witness statement was not initially taken in a proper and professional manner, and when later taken in respect of a related matter, the exculpatory evidence for the Applicant that was provided by the witness was not added to the investigation report or drawn to the attention of the decision maker or the Applicant, at a time well prior to the contested decision being made;

f. Conclusions drawn that were not based on convincing evidence were made by the investigators and included in the investigation report as being "conclusively established"; and

g. The Investigation Report included an error as to the state of the law for the entire period under investigation.

78. The Tribunal finds that little reliance can be properly placed upon the entirety of the investigation report, which appears to be biased in its approach and presentation. It has the appearance of being approached with a prosecutorial case theory in mind. The Tribunal, therefore, determined that the only course properly open to it was to reconsider the matter as an appeal *de novo*, considering both the material filed before it and the evidence of witnesses called, and then to reach its own determination on its finding of the facts, as directed by the Appeals Tribunal in *Mbaigolmem supra*.

79. The Tribunal heard evidence from:

a. The Applicant;

b. An OAIS investigator who led the investigation into the complaints against the Applicant ("the investigator"),

c. The Applicant's former FRO who was also her former supervisor, and

d. A former Country Representative of UNFPA in Mongolia.

80. The Tribunal found the witnesses to be reliable. The evidence given by the Applicant, both in chief and in cross examination, disclosed that she was truthful and frank with the Tribunal. The Applicant's former FRO was also extremely frank with the Tribunal and was also found to be an entirely truthful witness. The OAIS investigator answered questions when put to her, which were addressed to matters that should have been included in her investigation but were not. When it was discovered that evidence was missing, she disclosed this fact freely. She also disclosed issues in her evidence that were required to assist the Tribunal. Equally, the former Country Representative of UNFPA was a most helpful witness.

81. With respect to the counts against the Applicant (see para. 14 above), the Tribunal makes the following specific findings and determinations.

Count 1 – Awarding and signing of contracts

82. The Applicant did not award or sign binding contracts with a UNFPA vendor, save for a contract renewal in 2013, when she was acting as the Operations Manager. She executed a 2013 contract which she believed to be a continuation of a previously authorised arrangement. Such contracts were initiated, authorised and signed by the Applicant's former FRO, a matter in respect of which he freely admitted and was later formally found to have done and was sanctioned in respect of such after an investigation. Strictly, the Applicant was in breach of UNFPA Policies and Procedures Manual, Financial Regulations and Rules by executing the 2013 contract, but she did not act for corrupt or dishonest gain or out of favouritism.

83. The Applicant did not undertake market research or consider other potential suppliers. This was undertaken by her former FRO to the extent possible given the market conditions and the availability of comparators. It is apparent that the Applicant was also involved in the processing of some payments, which were made under the contracts entered into by her former FRO. It is noted that there was no dishonest intent on her part.

Count 2 – Failure to excuse herself from certain procurement transactions and to disclose her association with two UNFPA vendors

84. It is apparent that the spouse of the Applicant and her mother were associated with Company 1, LLC and that payments were made in the sum of USD22,178.23. There is no evidence that the spouse of the Applicant was "actively" associated with Company 1, LLC. The use of the adverb "actively" was unwarranted as there is no evidence to support its use, but leads to a conclusion that there was a breach of Staff Regulation 1.2(m) (2011), which the Tribunal finds not to be the case.

85. The conclusion that the Applicant failed to disclose the association to the "appropriate management level" is based upon the premise that the amendment to the applicable UNFPA rules in October 2012 had applied for the entire time of her employment, which was not the case. Prior to this date all declarations were made to her supervisor and to the Ethics Office, as was then required. This was a very serious error of law, giving an entirely incorrect appearance to the conduct of the Applicant. It is true that for a period of 18 months the Applicant did not provide the required notification to the Resident Head of Mission, as required. Whilst ignorance of the law is no excuse, it is noted that there is no evidence of such a significant change being brought to the attention of staff. It was noted that the Applicant's former FRO gave evidence that even he was unaware of the change in the requirements.

86. The association of the Applicant with the procurement transactions was such that, apart from one renewal of an existing contractual relationship, she was not involved with "transactions", save for the processing of invoices in the ordinary course of her responsibilities. The Tribunal finds this to be a breach of a technical nature, negligent, but not based upon any fraud, corrupt motive or dishonesty on the part of the Applicant.

87. There is no proof whatsoever that the Applicant received any benefit from her family members being associated with the storage which was leased by UNFPA at well below market rates. The Tribunal accepts the evidence of the Applicant.

88. The Applicant was not involved in "procurement transactions" in any manner requiring her withdrawal from such. She did not make any decisions in respect of such and complied with the declaration procedures as required until October 2012. In so far as this count refers to such alleged involvement, it is a duplication of Count 1.

89. The Applicant did not award contracts, as she had no delegation, power or authority to do so. This is a further matter in respect of which her former FRO was sanctioned, as he is the one who entered into the procurement contracts.

90. No advantage to the family of the Applicant has been demonstrated. The analysis of the costing rather shows a significant advantage to UNFPA through it receiving storage space at significantly below the commercial or market rate.

Count 3 – Making misrepresentations in Financial Disclosure Forms

91. Prior to October 2012, the Applicant substantially complied with the strict disclosure rules of UNFPA, making the financial interest declarations required of her pursuant to the applicable rules. Between October 2012 and her separation, she did not comply with the disclosure requirements in the amended rules. It is debatable as to whether she complied with UNFPA Policies and Procedures Manual Disciplinary Framework Paragraph 6.1.1, as all in her office were aware of the relationship she had with the owners of the storage facilities used by UNFPA. She did not disclose such in writing, which may appear to be required when taking the applicable UNFPA Rules and Regulations together.

92. It is noted that the Applicant's former FRO was expressly sanctioned for not bringing the association of the Applicant with the leased storage to the attention of his supervisor and the Representative of the Mongolia CO. At no time did the Applicant conceal from her supervisor her relationship with UNFPA vendors, and the knowledge of her relationship with those vendors was clearly disclosed during the period 2007 to 2012.

93. The Applicant had a *bona fide* explanation for not knowing that she was on a title as the owner of one of the properties of part of the leased storage. She received no financial gain from any rent payments, such being made to either the UNFPA vendor directly, or the agent of the vendor. All declarations made by the Applicant were on the basis of her knowledge and belief, which are found to have been *bona fide*.

94. It is noted that the Applicant disclosed her association with UNFPA vendors to her former FRO before the latter decided to engage with the vendors on behalf of UNFPA. This fact is clearly borne out by the evidence. The Applicant admits that she should have exercised utmost care when completing the financial disclosure forms, particularly because her knowledge in respect of the corporate dealings and associations of her husband turned out, upon closer examination, to be deficient. Indeed, she believed that the company [Company 1, LLC], one of the lessors, was owned by her father in law and not her husband. It is apparent from official records that her husband owned the shares and not her father in law. She asserted, and there is no evidence to the contrary, that she believed that her husband was never involved in the management of that company.

95. The Tribunal has examined all of the disclosure forms filed by the Applicant from 1 January 2006 to 31 December 2014. These forms were provided to the UNFPA Ethics Office and the Applicant's former FRO. In evidence, the Applicant's former FRO stated that he was not aware that there had been a change in the UNFPA Financial Rules in 2012, such that after October 2012 the disclosure forms had to be provided to the Country Representative. It is apparent also that such may not have been communicated to staff by the Country Representative. This was also the position for the Applicant when she provided the forms to her former, then current, FRO and the Ethics Office. The Ethics Office would appear not to have advised of the need to provide the forms to the Country Representative. Failure to know of a change in the rules, and thus the law, is no excuse for non-compliance. Each of the Financial Disclosure forms completed by the Applicant provides for some general disclosure in respect of income and assets. Each form has "Follow up Questions", the last of which states:

> 4. To the best of your knowledge, does your spouse and/or dependent child(ren) have an interest in, or association with, any entity with which you may be required directly or indirectly, to have dealings on behalf of the Organisation, or which has any commercial interest in the work of the United Nations, or a common area of activity with the United Nations?
>
> If yes, please specify the name(s) of the relevant interest or association.

96. It is to be noted that the question is quite specific; it requires an answer "[t]o the best of [one's] knowledge". It does not require one to search out and to make inquiries. The knowledge that a person may have of the business affairs of her/his spouse may depend upon many factors. The approach taken by the investigator appears to have been to assume that the Applicant would know in detail the financial and other interests of her husband.

97. In fact, the Applicant informed the Tribunal that she did not have the knowledge of all of the financial interests of her husband. It is also apparent that the Applicant had not been aware of property being in her name until she was provided with a copy of the certificate of title by the investigator. When interviewing the Applicant, the investigator obtained a bare admission about ownership. Satisfied with this, she did not seek explanations or the actual knowledge of the Applicant. The Applicant stated in her evidence that she agreed that the property was in her name, as this was what the copy of the title showed but she denied having actual knowledge thereof.

98. The Tribunal sought and was given explanations as to how the property could have been placed under the name of the Applicant, with her mother being in receipt of all rents. The Applicant stated that she had provided her mother with a power of attorney and that subsequent to the interview she had learned that this was used by her mother to put the property under her name, without her knowledge, as there were apparently inheritance matters involved since she is the only child.

99. The Applicant informed the Tribunal that she received no rent from this property. The rent was paid to her mother and she thus had no reason to believe that the property could have been in her name. The Applicant received no benefit, direct or indirect. There is nothing to show that the Applicant dishonestly, fraudulently or otherwise deliberately withheld facts. The Tribunal is satisfied that she provided information on the basis of it being to the best of her knowledge. There is not, unlike other forms of disclosure in the United Nations, a requirement that the person make a search and undertake full inquiries before answering such questions on the declaration. It is not a definitive declaration in that sense, although it appears to have been taken as such by the investigator. Unfortunately, the investigator did not seek to talk with the Applicant's mother who was the proprietor of the property or with the Applicant's husband. It is apparent that the Applicant, being involved in procurement, should have considered making enquiries about precise ownership of the leased storage, but the regulations and the rules of the Organization do not appear to directly require such for a staff member at the General Service level.

100. It is further observed from the Financial Disclosure documents that the Applicant completed them in some detail, with disclosure as to the ownership of 10 household apartments by her husband and a one-bedroom apartment she owned. A range of the value of these properties is provided and was increased over time. The Applicant was meticulous in providing details of contracts her husband had with the Government of Mongolia, and receipts she had in respect of universal monthly child grants from the Government of Mongolia. She also disclosed the UN employment of an aunt, who was not a blood relative.

101. It is apparent that the Applicant took seriously her duty to provide information of which she was aware. It is also apparent that unlike many who may seek to defraud the Organization, the Applicant at no time sought to hide the relationship she understood she had with the owners of the leased storage. Indeed, it was common knowledge in her particular office and it was this common knowledge that lead the Applicant's former FRO to approach the Applicant in the first place. This places this case of non-disclosure into the category of a formal breach of the rules which may have been negligent, but was clearly without an intent to defraud the

Organization. Thus, there was not an intention to defraud or *mens rea* present. Quite the contrary, the intent of the actions taken by the Applicant's former FRO and the Applicant was to assist the Organization in providing urgently needed storage space when none could be had at such short notice and at costs well below market rates. The Financial Disclosure form was limited in the nature of the declaration required, including who was covered by it.

102. The investigation report further erroneously analysed the law applicable during the whole of the time of the investigation. There was a total failure to note that prior to October 2012, the Applicant fully complied with the notification provisions of the Organization in respect of conflicts of interest. She did not comply once a change in the rules occurred which required her to provide the Country Representative with the Financial Declaration form. This placed the Applicant in a position where she was perceived as having been in the most serious breach of a probity obligation, when she was not. With the other views expressed in the investigation report, the decision maker must have concluded that not only did the Applicant breach a probity obligation, namely failing to disclose ownership of an asset rented, but also that she obtained a financial benefit in respect of such and entered into the agreements herself. The decision maker must have also believed that there was a significant and continuing breach of the obligations by the Applicant.

103. The Applicant does, however, accept that she should have more formally disclosed the relationship she had with those who owned the leased storage facility and that such was required by the procurement rules and guidelines of UNFPA. The Tribunal agrees with this. The failure to disclose was negligent; it did not reach the level of gross negligence in all of the circumstances. No dishonesty is found on the part of the Applicant in this respect.

104. The Applicant's former FRO categorically told the investigator in his interview of 9/10 February 2016 that he was the one who entered into the agreements with both Ms. N. and [Company 1, LLC], with the full knowledge that the owners of those entities had a relationship with the Applicant. He even told the investigators that there was no secret or anything to hide this fact nor that the

Applicant was untruthful about it. It is also apparent that there was no favouritism or preference in the award of the lease contract for the storage.

105. The interview record of the Applicant's former FRO that was conducted on 9/10 February 2016 was not made available to the decision maker, although it was completed before the matter was submitted to her for her decision. It was not available for the Applicant to see before she provided her reply and comments after being charged. It should have been, as the interview of this important witness was not completed.

106. There was a finding that the Applicant made a financial gain, directly or indirectly, but the Tribunal finds none is proven. In fact, the clear and convincing evidence before the Tribunal shows that there was no financial gain made by the Applicant. The fact that some of the property may have been in her name was unknown to her and she did not receive any money therefrom.

107. As already observed, the investigator, upon examination by the Tribunal, agreed that she made no reference in the investigation report to the October 2012 change of UNFPA Financial Regulations and policy in respect of reporting a conflict of interest. It is clear that such a failure would leave the decision maker with the impression that a fundamental breach of disclosure in respect of the October 2012 requirement to declare a conflict to the Representative had been ongoing since 2006. Indeed, it is apparent from the questioning of a former Representative that the investigator did not know, or understand, that there had been a change to the policy and rules in respect of a conflict of interest. The investigator should have known the state of the law over the period under consideration. As it is expected and assumed that a staff member knows the law, it is also to be expected and assumed that an investigator also knows the law and the changes thereto.

108. There is no evidence that the Applicant was actually associated in business, actively or otherwise, with [Company 1, LLC], Mrs N. or Ms T. It is assumed that the Applicant was otherwise associated with Ms. N. as she was her mother. Further, there is no evidence that the Applicant was involved in the management of the complex or the storage.

109. The Applicant has stated that, with hindsight, she should have made better enquiries. The Tribunal is satisfied that when making the declarations she did not have any corrupt, fraudulent or dishonest intent.

Do the established facts qualify as the misconduct complained of at the appropriate level of proof?

110. Any one of the above investigative failures alone is cause for serious concern as to the rigor of the investigation. When all of the concerns of the Tribunal are taken together, it is entirely impossible to conclude that the facts upon which the decision is founded have been properly established clearly and convincingly.

111. Most of the conclusions and recommendations made by OAIS in the investigation report were ill founded and simply not supported by the totality of the evidence. The decision maker clearly placed reliance upon the evidence presented in the report and the recommendation made at paragraph 94 of the investigation report where it was stated that "[b]ased on the foregoing, OAIS recommends that appropriate administrative and/or disciplinary action be taken against [the Applicant]".

112. The Tribunal finds that the decision maker was led into error as a consequence of the flaws in the investigation and the errors of law made which were contained in the investigation report.

113. The decision maker did not have available the evidence the Tribunal has had provided to it which demonstrated the whole context. The Applicant's conduct amounted, at best, to limited negligence insofar as the declarations made should have been more complete, as they failed to disclose a possible conflict of interest. It is noted that the arrangements were highly favourable to the UNFPA. In respect of the execution of the renewal of contract in 2013, it is apparent that she took the lead from her FRO, her former supervisor, who was later found to have acted improperly and without delegated authority. The Applicant was technically negligent, but in no way corrupt, dishonest or fraudulent. She made no gain, and did not seek to conceal any facts from her colleagues.

114. The Tribunal further finds that:

a. At all times, the Applicant's former FRO and UNFPA knew of the fact that the storage facilities subject of the investigation were owned by the Applicant's family;

b. The Applicant in no way attempted to hide details of the ownership of the storage space, nor did she otherwise act in a fraudulent, deceitful or dishonest manner;

c. There is no evidence that the lease contracts were awarded as a result of favouritism, or actual or perceived preferential treatment in the granting of the lease contracts resulting from any actions of the Applicant or any other person. The Applicant was not involved in the use of her office or knowledge gained from her official functioning for private gain;

d. There is no evidence that a conflict of interest existed within the meaning of Regulation 1.2(m) (2014), as the Applicant's personal interests did not interfere with the performance of her official duties. She was not aware of her direct personal interests in the leased property. She should, however, have advised her head of office when new regulations came into effect at the commencement of 2012 of a possible perception of a conflict. The resolution of the matter was such that the lease arrangement was clearly in favour of the Organization, thus requiring no mitigation of other resolution. This position would also hold in respect of paragraph 23 of the Standards of Conduct for International Civil Servants;

e. There was no evidence of financial gain for the Applicant or her family, whereas it was UNFPA that made a substantial saving over the period from 2007 to 2013. It is clear that the storage was rented to UNFPA at 2% of the market rate and 9% of the cost of the overhead of storage space provided "free" to UNFPA; and

f. The Applicant was negligent in respect of considerations of conflict of interest and the formal disclosure of the interests of family members in the leased premises. She is not found to be negligent in failing to disclose her ownership of part of the leased premises as it is found by the Tribunal that she did not know of such ownership or reasonably suspect that she may have been an owner.

Whether the sanction is proportionate to the alleged misconduct?

115. In sanctioning staff members for alleged wrongdoing, it is paramount that the Organization adheres to the principle of proportionality (see *Applicant* 2013-UNAT-280). As such, the sanction should not be more excessive than is necessary. In *Aqel* 2010-UNAT-040, the Appeals Tribunal found that in cases of obvious absurdity or flagrant arbitrariness the sanction imposed can be reviewed by the Tribunal.

116. The Appeals Tribunal in *Bertrand* 2017-UNAT-738 in recalling previous cases noted that:

> [w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

117. This matter of *Bertrand* is, in respect of irregularities concerning procurement, highly unusual. The Tribunal found that the record established that the Administration took into account Mr. Bertrand's difficult and stressful work environment and his good service record. Thus, a sanction of separation from service with compensation in lieu of notice and with termination indemnity was proportionate.

118. During the investigation, the former UNFPA Mongolia CO Representative, the Applicant's former FRO and the Applicant all told the investigator of the storage problem in Mongolia and the need to obtain additional storage. Both the Applicant and her former FRO gave details on how and when the storage problem began. However, as indicated above, all information that appeared to be exculpatory was ignored and disregarded by the investigator in this matter. The investigator did not pay heed to the facts that were provided to her regarding the storage at the UNFPA Mongolia CO. The Tribunal finds that highly relevant exculpatory matters and evidence corroborating the assertions of the Applicant were not ignored by the decision maker, they were simply not put before the decision maker due to errors on the part of the investigators.

119. As was recalled in the evidence of the Applicant's former FRO, which was neither challenged nor was it proven otherwise, there was a storage shortage in Ulaanbaatar, Mongolia and heated garages were in high demand especially during winter, when temperatures could fall to minus 40 degrees. The UNFPA head office decided that it needed to spend money before the end of the year, that is, during winter in Mongolia, and as such embarked on a huge procurement task for goods worth USD1 million.

120. There is no indication that the UNFPA Head Office had inquired of UNFPA Mongolia Country Office in respect of whether they were in a position to store all the items that were being procured in less than three months. Despite having this information, the investigator did not find it fit to actually inquire and include in the investigation report if indeed there was a last minute, unscheduled procurement exercise by UNFPA Head Office to Mongolia in a bid to spend donor money before the end of the calendar year, thus substantiating the facts provided by the Applicant and her former FRO. The Tribunal is satisfied on the evidence before it that such procurement exercise was undertaken, and that it placed the UNFPA Mongolia CO in a position where it could have lost the procured goods had it not been possible to urgently find suitable storage.

121. The Tribunal finds that if the facts that led the Applicant's former FRO to decide to enter into an arrangement with [Company 1, LLC] and Ms. N for the storage of UNFPA procured items had been impartially and properly investigated and presented to the decision maker in the investigation report in an unbiased manner, it would have resulted in a different decision.

122. There is no evidence of fraud, deceit, corruption or dishonesty on the part of the Applicant. On the contrary, through her family there was an attempt to assist UNFPA in a time of particular need in 2007. The Applicant did not solicit or advance in any way whatsoever the use of the storage owned by her family. The Applicant has made no gain from the procurement and her family, and a company associated with them, who became UNFPA vendors as a consequence of the requests to use their storage, appear to also have made no financial gain over what would appear to be very basic overhead costs. It is apparent that in the provision of the storage, they have made a loss when comparing how much they actually charged versus the market value of the storage. Certainly, the UNFPA has saved hundreds of thousands of dollars through not paying the commercial rate for storage for a period of seven years.

123. The Applicant's former FRO informed the investigator during his questioning and before this Tribunal that there was no secret, nor was there motive to hide the fact that the Applicant's family/relatives owned the property where UNFPA rented the storage. During the hearing, the Applicant's former FRO expressed his profound regret that he ever asked the Applicant to assist UNFPA, as she would not have lost her employment as a consequence of assisting in saving the procured goods.

124. In the case of *Kamara* 2014-UNAT-398, a staff member's action leading to the Organization recording a loss of USD190,000 and sanctioned with separation from service without termination indemnity was considered proportionate. The staff member was chastised for failure to have due regard to foreseeable risk and for gross negligence in his functions. In the current case, the Applicant and her former FRO took into account the need to save the Organization from a loss of USD1 million worth of goods, due to a last minute procurement that was done

without prior planning of storage and driven mainly by the need to spend donor funds before the end of the year.

125. Having considered all matters on file and the evidence before it the Tribunal is in a better position to consider all the facts of this matter and their context. The decision maker was denied this. It is clear that there were breaches of the regulations and the implementing guidelines of UNFPA as outlined above. However, when placed into context, it is apparent to the Tribunal that such did not involve a dishonest intent on the part of the Applicant. She did not make the decisions to lease the storage space from time to time. The financial analysis was undertaken by her former FRO, who believed, wrongly as it transpired, that he was authorised to execute the contracts for storage.

126. The decision maker, not having been provided with all of the relevant material, made a decision that was based upon the material before her, but would not be justified based on the material now disclosed before the Tribunal, particularly during the hearing. There is no finding of any procurement fraud that can be made out against the Applicant. She was technically negligent in respect of reporting requirements and no more. The Applicant clearly had no ulterior motive of financial gain. The fact that the UNFPA was never exposed to financial loss and even if the conflict of interest had been disclosed upon the Applicant making further enquiries as to the matters of ownership of land and shares, no mitigation would have been required, as UNFPA was in an advantageous position which needs to be considered. The Tribunal finds that the decision maker was led into error as a consequence of the incomplete and incompetent investigation and a failure of disclosure of relevant facts known to the investigator prior to the decision being made.

127. It is noted that following the investigation into the transactions in respect of the Applicant's former FRO and the breaches of the rules and regulations by him, he was sanctioned with a written censure and the loss of one step in grade. When taking the actual circumstances and findings into account and that this matter essentially concerns negligence in respect of meeting financial disclosure requirements there is demonstrable disproportionality in respect of the manner in which the Applicant was treated.

Remedies

128. Having concluded that the impugned disciplinary measure was disproportionate to the conduct sanctioned, it is appropriate to rescind the decision to impose it. This would result in the reinstatement of the Applicant on her post as well as payment of the full emoluments and entitlements that she would have received from the date of her separation from service was implemented to that of her effective date of reinstatement.

129. As part of the remedies the Tribunal may grant upon finding a disciplinary sanction to be unlawful, it has the power to rescind and modify said sanction by setting a different one (*Portillo Moya* 2015-UNAT-423).

130. Exercising such prerogative, the Tribunal finds that a proportionate sanction to impose on the Applicant, is the loss of one step in grade under staff rule 10.2(vi), and a written censure instead of separation from service with compensation in lieu of notice and with no termination indemnity.

131. To reach the above finding, the Tribunal has balanced the formal failure to make formal declarations of interest and the non-compliance with a number of procurement procedures due to negligence rather than fraud, with the length of time that the Applicant served with an entirely unblemished service record in the Organization, the mitigating and exculpatory evidence, the relevant sanctions referred to and set out in IC/2011/20, IC/2013, IC/2014/26, IC/2015/22/ IC/2016/26 and IC/2017/33 and the sanction applied to the Applicant's former FRO in respect of matters associated with those of the Applicant.

132. It appears that the Respondent has never, or perhaps only once, reinstated a staff member following the rescission of a decision to terminate a staff member. As a consequence of the entirely inadequate and negligent investigation in this matter, which wrongly resulted in the Applicant being terminated, the Respondent should most seriously consider reinstating the Applicant, who has been seriously wronged.

133. However, since this case undeniably concerns the termination of the Applicant's appointment, the Tribunal is bound, pursuant to art. 10.5(a) of its Statute, to set an amount that the Respondent may elect to pay as an alternative to its effective rescission. The Tribunal sets the alternative compensation in this case at 24 months of the Applicant's net salary at the rate that she was paid at the time of her separation.

134. Finally, the decision of 17 July 2017 shall be expunged and removed from the status file of the Applicant. During the course of the hearing the Tribunal was informed that senior staff of UNFPA had acted in a manner which was preventing or limiting the employment opportunities of the Applicant. As a consequence, and to limit further damage to the Applicant, consequent upon the decision being set aside by this Judgment, acting within the equitable jurisdiction of the Tribunal,[3] it will be directed that any person within the Organization who is asked to provide a reference for the Applicant shall not advise that she was separated from service due to procurement or other misconduct.

Further matters

135. The Applicant submitted that the Respondent obtained documents regarding incorporation of companies in contravention of national laws. Upon request by the Tribunal, the Respondent submitted a dossier of communication that UNFPA had with the United Nations Office of Drugs and Crime ("UNODC") to obtain its assistance in securing the relevant information that they needed.

136. The Tribunal finds no illegality in the process of obtaining the information and notes that United Nations entities can and should be able to work together in pursuit of the Organization's interests, which happens to have been the case in this matter. The Tribunal is also mindful that it cannot rule on matters of application of national laws of Member States.

[3] See *Dalgaard et al.* 2015-UNAT-532 at page 7, para 26 and page 10, para 3.

137. Additionally, the Applicant claimed that the UNFPA Mongolia CO Representative made a report to OAIS in retaliation to a complaint that had been filed against her by several staff members of UNFPA Mongolia CO.

138. Although the Applicant was a direct supervisee of the UNFPA Mongolia CO Representative, was copied in correspondence relating to reports against the Mongolia CO Representative, was part of a meeting in an attempt to reach an amicable settlement between the staff members who had complaints and the Mongolia CO Representative in early 2014, and was interviewed in the course of the investigations into the Mongolia CO Representative, the Tribunal has not seen a correlation that would be considered retaliatory.

Referral for accountability

139. The termination of employment is a most serious matter for any staff member. It is the end of a career. If the investigation had been conducted in a competent and proper manner, the investigation report would not have presented the facts as it did. The failure to properly conduct interviews and to bring additional relevant facts discovered to the attention of the Applicant and the decision maker, together with the failure to properly analyse the statements made and to follow-up with further investigations, are all matters of very great concern.

140. The presentation of erroneous statements of law should also never occur, as the consequences are very great. The errors made in the investigation of this matter are so serious as to bring into question the very ability of those involved to be associated with investigative tasks.

141. Therefore, this case is referred to the Executive Director, UNFPA. It is apparent that the OAIS investigator made errors, but there should be some inquiry as to the interaction of those supervising her, the lawyers providing advice as to the state of the applicable law and those responsible for keeping the recording of the evidence, one of which was lost and was vital to the matter. The Tribunal also assumes that there were others involved in the provision of advice to the decision maker and who should have alerted her of errors in the investigation. This

application has disclosed very serious errors of judgment and lack of competence, which require a most serious examination.

Conclusion

142. In view of the foregoing, the Tribunal **ORDERS** the following:

a. The disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity is rescinded and replaced by that of a loss of one step in grade and a written censure;

b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision as per paragraph 142.a above, the Applicant shall be paid, as an alternative, 24 months of her net salary at the rate that she was paid at the time of her separation;

c. The aforementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;

d. It is **directed** that any person within the Organization who is asked to provide a reference for the Applicant, or from whom inquiries are made about the Applicant, shall not advise that she was separated from service due to procurement fraud or other misconduct; and

e. A copy of this Judgment shall be placed in the Applicant's status file.

(*Signed*)
Judge Rowan Downing
Dated this 31st day of January 2019

Entered in the Register on this 31st day of January 2019
(*Signed*)
René M. Vargas M., Registrar, Geneva