



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

AAHOOJA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Salim U. Shaikh

**Counsel for Respondent:**

Chinonyelum Esther Uwazie, UNICEF

Bart Willemsen, UNICEF

## **Introduction**

1. By application filed on 27 April 2017, the Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”), Pakistan, challenged the decision to dismiss her from service on allegations of fraud and gross negligence.

2. The application was served on the Respondent who filed his reply on 30 May 2017. On 1 September 2017, the Applicant filed a motion to comment on the Respondent’s reply. The Applicant’s comments were attached to this motion. By Order No. 170 (GVA/2017), the Tribunal granted the motion and accepted the submission attached therein.

## **Procedural background**

3. The Tribunal issued several case management Orders *vide*; Order No. 170 (GVA/2017), Order No. 257 (GVA/2017), Order No. 31 (GVA/2018) and Order No. 49 (GVA/2018) of 5 September 2017, 22 December 2017, 2 and 27 February 2018 respectively. The Orders called the parties to case management discussions, summoned witnesses and ordered production of documents in preparation and in support of matters that arose during the hearing, which was held on 20 to 23 and 27 March 2018.

4. The Tribunal heard testimony from the following witnesses:

- a. The Applicant;
- b. Mr. M. I., who worked with UNICEF from 2012 to 2014, seconded from the Government of Baluchistan;
- c. Mr. A. R., a Director of a company supplying services to UNICEF and with whom the Applicant had taken holidays;
- d. Mr. S. S., a Government employee;
- e. Mr. H. B., a Government employee;

- f. Mr. R. M., former UNICEF Chief of Field Office, Quetta Zone Office;
- g. Ms. E. N., Investigation Specialist, Office of Internal Audit and Investigations (“OIAI”); and
- h. Mr. M. A., former Government employee.

5. By Order No. 67 (GVA/2018) of 27 March 2018, the Tribunal ordered the parties to file their closing submissions by 9 April 2018, giving the Applicant the opportunity to file a response to the Respondent’s closing submission by 16 April 2018, which he did submit on that date.

### **Facts**

6. The Applicant was a former Child Protection Officer at the NOB-V level at the UNICEF Pakistan Country Office (“PCO”), Quetta Zone Office (“QZO”). On 26 January 2017, she was dismissed from UNICEF (“contested decision”) as a result of the outcome of a disciplinary process instituted against her.

7. The Applicant was charged with seven counts of misconduct in respect of fraud and or gross negligence. The decision-maker, the then UNICEF Deputy Executive Director, Management, UNICEF (“DED/M”), found that there was clear and convincing evidence that the Applicant had committed misconduct and sanctioned him with the disciplinary measure of summary dismissal.

### **Parties’ submissions**

8. The Applicant’s principal contentions are:
- a. Her dismissal was effected improperly, arbitrarily and she was subjected to personal bias coupled with self-vested interests, thereby framing her in false and baseless allegations of misappropriation of programme funds;
  - b. The Respondent did not establish the facts by any solid and verifiable evidence. Rather, the allegations of “fraud” were by virtue of the oral testimony of the OIAI investigator, who admitted at the hearing that she did not observe any fraud by the Applicant;

c. The credibility and worth of Implementing Partners (“IPs”) was thoroughly scrutinized/assessed as per defined UNICEF Policy by a team of a core panel consisting of Programme Heads, Programme Specialists and other staff of UNICEF, and those IPs who met the criteria were allowed to work with UNICEF;

d. She was denied access to information by having her entry into the office and email account blocked, and she lacked access to the necessary records required to produce countervailing evidence;

e. The investigation was a one-sided story and had no evidentiary value. She was deprived of documents to refresh her memory during the investigation; yet, she was returning to work after one year of study leave away from the office;

f. The Respondent has failed to establish and show any gains of alleged kickbacks that the Applicant is accused of receiving or the alleged fraud engaged;

g. The act of combined personal private travel in a group for vacation does not entail commission of breach of UNICEF laws; and

h. Her income at the NO-B level was good and she lived a moderate life. It was years of personal savings that allowed to cover all the expenses of her holiday travels.

9. The Respondent’s principal contentions are:

a. UNICEF found clear and convincing evidence of misconduct due to fraud and, alternatively, gross negligence, which warranted dismissal;

b. Even if UNICEF had not made findings of fraud against the Applicant, it would have separated her for gross negligence in supervising and funding activities;

c. UNICEF did not violate the Applicant's due process rights; the investigation and disciplinary proceedings were conducted in full compliance with the provisions of the Policy on Disciplinary Process Measures CF/EXD/2012-005;

d. The Applicant has argued that her ability to present her case was impeded by UNICEF having lost various files that would have included exculpatory evidence. However, the Applicant has, throughout the process, been unable to provide any specifics with respect to the exculpatory evidence in the files;

e. With respect to the recanted witness statement of Mr. M. A., his allegation that he made his statements under undue pressure and threat for his job was unknown to the investigators at the material time. Therefore, the decision maker "appropriately relied on the statements which provided direct and extremely detailed evidence of a scheme of kickbacks in which Mr. M. A. colluded with [the Applicant]"; and

f. The Applicant's claims are without merit and do not impact the finding of misconduct; as such, her case should be dismissed in its entirety.

## **Consideration**

### *Preliminary matters*

10. As a first preliminary matter, the Tribunal will address the receivability of the Applicant's claims regarding her being initially placed on Special Leave With Pay ("SLWP") and, subsequently, converting it to Special Leave Without Pay ("SLWOP") during the investigation process.

11. These claims are not receivable because the challenge is time-barred. The Applicant's placement on special leave started on 1 August 2015. She should have initiated a challenge against that decision within 60 days of it being made by requesting management evaluation. However, she did not and waited to do so until she filed her application on 25 April 2017.

12. Therefore, all the Applicant's claims in respect of being placed on SLWP and SLWOP during the investigation period and until her termination are not receivable and will not be addressed in this Judgment.

13. As a second preliminary matter, the Tribunal will address the Respondent's allegations of witness tampering and intimidation.

14. On 8 May 2018, the Respondent filed with the Tribunal, on an *ex parte* basis, a submission entitled "[n]otification to the Tribunal concerning to possible witness tampering", In the submission, the Respondent's Counsel inter alia stated the following:

[The witness in question, namely Mr. M. A.,] indicated that, one week prior to the hearing, someone who identified himself as the Applicant's cousin, appeared at his house in Quetta, and threatened him with physical harm should he not give evidence in favor of the Applicant. [Mr. M. A.,] further indicated that he was forced to testify under threat of physical harm by two men, because "[the Applicant] was informed by the Judge that it's not only UNICEF's statement that is in jeopardy, that [the Applicant's] statement is also in jeopardy." [Mr. M. A.] further indicated that when he gave his evidence in Islamabad, the same cousin and another man were present, and that he was forced to read his replies from (a) piece(s) of paper the Applicant and/or her legal counsel had prepared. [Mr. M. A.] indicated that his statements to UNICEF's investigators were truthful, and that he was forced to recant those statements. [Mr. M. A.] informed the undersigned that his attempts to inform the Tribunal of this incident had been unsuccessful.

15. In effect, the Respondent's submission was that what the witness told the investigators during the investigation was the truth and that his sworn testimony before the Tribunal during the hearing was untruthful. The Respondent ended his submission by stating as follows:

The Respondent is very much concerned about [Mr. M. A.'s] safety; at the same time, in view of the fact that [Mr. M. A.] has been adamant that UNICEF assist in obtaining a visa for him to travel to Geneva to speak to the Tribunal in person, the Respondent cannot exclude an ulterior motive. Should the Tribunal deem this important, the Respondent will attempt to obtain a signed statement from [Mr. M. A.,].

16. On 23 May 2018, the Registry of the Tribunal acknowledged receipt of the Respondent's *ex parte* submission and informed him of the undersigned Judge's instruction to submit a motion accompanying the *ex-parte* submission by 30 May 2018.

17. On 11 June 2018 the Respondent filed an *ex parte* motion "to dismiss the application for abuse of the judicial process alternatively to strike witness testimony." In it, he reiterated the same claim as in his 8 May 2018 and 23 May 2018 submissions, and this time sought to have the sworn testimony of the witness be struck out or for the Tribunal to hear the witness' allegations against the Applicant *ex parte* regarding the threats and alleged instruction to recant his testimony to the investigators.

18. The Tribunal notes that neither it nor the Registry were contacted by the witness, Mr. M. A., who the Respondent claims in his submissions attempted to contact the Tribunal but was unsuccessful. Other than the assertions of unsuccessful attempts, the Respondent has also not provided any evidence of these alleged "unsuccessful attempts."

19. The Respondent has made very serious allegations against the Applicant and her Counsel, but failed to provide any evidence in support of them. Such evidence could have been in the form of a sworn affidavit or a police report to prove the filing of a complaint with local/national law enforcement agencies in Pakistan.

20. The Tribunal, however, notes that it summoned Mr. M. A. to appear before it because of the several contradictory statements that he had made to the investigators and in affidavits on file with the Tribunal. The state of the evidence before the Tribunal from this witness amounted to assertions of fact, the withdrawal of such assertions and the advancement of entirely contradictory facts.

21. Counsel for the Respondent asserts that he had been advised that the Applicant and her lawyers passed to the witness papers on how to answer the questions while testifying and being examined before the Tribunal via a video connection. Thus, the Tribunal was able to view the witness. Furthermore, the Applicant and her Counsel were in a geographical location different from that of

the witness. Not only the former could not have given any papers to the witness during the hearing but, also, the Tribunal did not observe any notes being passed to the witness who gave his evidence without hesitation and did not appear to be reaching for any pieces of paper.

22. Additionally, the witness was examined in chief by the Respondent's Counsel, and the Applicant's Counsel cross-examined him immediately after the end of the evidence in chief. Therefore, the possibility of the Applicant and her Counsel to pass him "papers" indicating how to answer the questions was not possible.

23. Counsel for the Respondent further submitted to the Tribunal that he was not sure if the allegations made by the witness were not in fact associated with the witness' earlier stated wish to obtain a visa to travel to Geneva to appear before the Tribunal and not actually based on any alleged threat. This further weakens the credibility of the assertions.

24. In view of the above, the motion of the Respondent, being unsupported by evidence, is rejected. That noted, as earlier set out, Mr M. A. was called to give evidence in the hope that some clarity could be obtained from his testimony. The Tribunal finds that his evidence on all matters totally lacks credibility and due to its conflicting nature is at best unreliable. His different versions of the facts were entirely contradictory.

25. In such a situation the Tribunal has no course other than to totally exclude all evidence from this witness as lacking any probative value. He was clearly not willing to tell the truth and, as the Respondent observed, this may have been motivated by other factors including a desire to have his entry into Switzerland facilitated.

#### *Legal Framework*

26. 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.

27. The OIAI Investigation Manual (December 2014), provides *inter alia* under “Investigation Standards” (Part I, Section 4, para. 14) that

OIAI adheres to the standards set forth in the Uniform Principles and Guidelines for Investigations, as endorsed by the 10th Conference of International Investigators, June 2009. These standards include:

- OIAI and all investigators shall maintain objectivity, impartiality and fairness throughout the investigative process and shall conduct all activities competently and with the highest levels of integrity.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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, ruled 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.

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.

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.

35. 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).

36. 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).

37. 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.

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

38. To undertake this review, the Tribunal assesses each of the counts of the alleged misconduct against the Applicant and the facts on which it was based on. The Tribunal found upon review and further inquiry on an appeal *de novo*, that many facts were missing, incorrectly recorded or illogically considered in the investigation report. It is noted that the structure of the counts in the contested decision is in a somewhat unusual format, lacking the usual and expected precision.

Count 1: Vacation travel and personal ties with Implementing Partners, namely, Society for Community Development (SCD), Balochistan Sustainable Development Society (BSDS), and Society for Advocacy Development (SFAD) (2010-2012) and vacation with Director of recently-appointed implementing partner, Initiative for Change and funding by same (June-October 2013) (see paras. 18 to 31 of the contested decision).

39. The Applicant was accused of going on vacation with people who are from organizations that acted as UNICEF Implementing Partners (“IPs”). The decision-maker, on the basis of the evidence presented in the investigation report, determined, in effect, that the Applicant undertook several trips abroad as a benefit from her association with the IPs, and that when the Applicant was asked to prove how she paid for these trips, her evidence was contradictory and fraudulent. For instance, it was deemed to have been determined that:

- a. the invoice of the travel agency that the Applicant presented was not listed in the Quetta Chamber of Commerce database;
- b. the electronic ticket obtained from the Applicant’s office computer was from a different tour agency than the invoice she presented;

- c. the hours of flight of her trips were not commensurate to the trips she undertook; and
- d. there were typographical errors in the invoices she submitted.

40. In addition, the Respondent also considered as determined that the Applicant undertook “expensive vacations” that occurred after the signing of two Programme Cooperation Agreements (“PCAs”) with IPs. Further, that the travel agency invoice that the Applicant provided for one of her trips indicated its location as near the New Zealand Consulate in Pakistan whereas at the time of the contested decision there was no New Zealand Consulate in Pakistan. That for a trip she took to Malaysia, her invoice postdates the visa and that the itinerary was different, that the travel dates were also different, and that there was no explanation why she would transfer funds to Mr. A. R., who made arrangements for the trip. That for a trip she undertook to Turkey, she provided no explanation as to why she changed travel agents, and why she transferred to the person who organised the trip an amount that was almost twenty percent of her annual salary. Finally, that a visa application form that was found on her computer did not contain the correct work designation title.

41. The DED/M indicated that, from the above, she inferred that the Applicant wished to “conceal circumstances for the payment for the travel” and that it formed “corroborating circumstantial evidence for other allegations of fraud.” She also rejected all the Applicant’s explanations and account of the information as not credible.

42. At the hearing, the Applicant presented her case especially with regard to the documents that UNICEF had considered “fraudulent” or not credible. The Applicant admitted that she had joined travel groups that were organised by a former colleague who worked for Organizations that were IPs in Quetta.

43. During the investigation, the investigator did not ask the Applicant how she could afford all the international trips she had undertaken, though they had access to all her bank statements and knew her salary level with the Organization. At the hearing, the investigator was asked if there was any proof of fraud or corruption

against the Applicant that she had come across during her investigation and she answered that there was none.

44. The investigator testified that based on the Applicant's level of employment and consequent salary with UNICEF, she could afford the kind of lifestyle that she had, including taking all the trips. Despite reaching this conclusion based on the facts of the investigation, the investigator did not include this information in the investigation report. Therefore, when the DED/M was making the decision to dismiss the Applicant relying on the fact that some of the trips were "expensive", she did not know that the Applicant had the financial means to engage in the international travel that she undertook.

45. It also transpired at the hearing that while the Applicant was placed on SLWP and SLWOP during the investigation, her office computer was taken by the investigator and documents from it were recovered and used as part of the investigation. However, some of the documents/itineraries that were gathered were incomplete, in draft form and not the final versions that were submitted to the embassies for visa requirements. The Applicant gave evidence that the reason why she ended up with different visa applications and travel itineraries to the Gulf countries was because some countries had restrictions on single women travellers. She thus had to obtain a travel itinerary from another travel agency, thus the appearance of different dates and tickets for the same trip. This and several other explanations in respect of the documents relied upon by UNICEF in its investigation, without a factual background being requested, disclosed an incomplete investigation.

46. As the Applicant was being investigated several years after the fact about holidays she undertook, and considering that they were private trips for which she had no obligation to keep all her travel documents and records, when faced with questions concerning proof in respect of how and when she undertook the trips, the Applicant gave evidence that she contacted the tour firms that organised or facilitated the tours. She requested invoices from them. This of course was bound to create a problem concerning authenticity, that is, the Applicant was producing documents bearing current dates for trips that were undertaken more than three

years prior, thus creating a look of forged documents. It is unfortunate that the Applicant did not advise the investigator of the difficulty she had in producing the demanded records after some years. The Tribunal accepts, however, that faced with these demands made by the investigator to prove her assertions, the Applicant did not intend to deceive the investigator.

47. It appears that when UNICEF advanced the allegations against the Applicant, the investigators had access to documents, which they could not fully interpret or understand in their proper context. The Organization did not have actual or even a third party proof of payment for the Applicant's holidays but, nonetheless, the burden of proof was reversed, placing on the Applicant the need to prove that she paid for her own holidays. This is contrary to the basic tenet that "who alleges, must prove". At the hearing, the Tribunal heard evidence from Mr. A. R., who was the Applicant's supervisor in a different organization before she joined UNICEF. Mr. A. R. also swore an affidavit that was filed with the Tribunal and this also formed part of his evidence. He testified to have been the person coordinating all the group holidays that the Applicant took and confirmed that she paid for all the trips on her own.

48. Importantly, Mr. A. R. provided the Tribunal his bank statements, relevant to the time, showing bank transfers of equal amounts that he received from the Applicant to pay for various trips, and transfers including to Thomas Cook. The investigator did not seek such evidence during the investigation.

49. The Applicant was also importantly accused by the investigator in the investigation report of presenting a "suspect" invoice regarding a holiday she undertook. She presented an invoice from Thomas Cook-Holidays, where the agency's address reflects that its location is near the New Zealand Consulate in Karachi, Pakistan. In the dismissal letter to the Applicant, the DED/M rejected the Applicant's invoice from Thomas Cook-Holidays indicating that, on the basis of the findings expressed in the investigation report, there "[was] (at least currently) no New Zealand consulate in Pakistan, as the address of the invoice suggested" and regarded the document as "suspect". The decision-maker's remark about the agency's location is surprising, because whether or not at the time of making the

decision in 2017 there was or not a New Zealand consulate in Pakistan is not in any way logically connected to the state of affairs in 2013. Furthermore, such lack of logical connection raises concerns as to the validity of the grounds on which the contested decision was based. This issue is further discussed below when further considering the actions of the investigators.

50. At the hearing, the undersigned Judge questioned the investigator as to whether she had checked the address of Thomas Cook indicated on the invoice, during her time in Karachi to find out whether it did or did not exist. Incredulously, she informed the Tribunal that she had sent some colleagues to do so and that they confirmed that the address was indeed correct in 2013, as asserted by the Applicant and as was showing on her documents. More importantly, said colleagues confirmed that the Thomas Cook office used to be at the address indicated on the invoice, which indeed was next to the then New Zealand Consulate, but that it had moved since. When further questioned about the failure to indicate this in the investigation report, the investigator responded that the failure to advise about the existence of the New Zealand Consulate and that the address on the invoice was in fact correct, was a mistake. This mistake could not have been more serious, given the reliance placed upon it in the contested decision made by the DED/M on the truth of the assertion by the investigator that the address was “suspect”. One has to conclude that the reference to the state of affairs as they were in 2017 was an attempt to divert attention to the consideration of the situation in the relevant period in 2013. It is surprising that the decision maker did not locate this issue, as the state of affairs in 2017 was in no way relevant to the matters under consideration.

51. The undersigned Judge asked the investigator why this information was not corrected and why the DED/M was not informed to ensure that the decision was not based on erroneous facts, but there was no response. The Tribunal is concerned at the apparent cavalier attitude of the investigator to ensure inclusion of the correct and true information in the investigation report. The evidence set out in the investigation report was factually wrong, and, on the basis of her own evidence, the investigator well knew this to be wrong at the time she presented the investigation report. The failure of the investigator to ensure that the investigation report was



correct is not a mere mistake, it is significantly more than that. The decision maker relied, in part, upon the assertion that a document was “suspect” when, in fact, the actual investigation now disclosed by the investigator demonstrates quite clearly that the invoice was not suspect. Leaving the investigation report uncorrected was at the very least unprofessional if not a deliberate act by the investigator to obtain an adverse finding against the Applicant. On any view, it is a serious and deplorable state of affairs, which is made more serious when a staff member could, and in this case, did, lose her employment. In allowing the known error to remain, the investigator is responsible for proffering a serious lie and knowingly making a false statement in an investigation report.

52. The investigation report must be considered as substantially misleading the decision maker in respect of the first count brought against the Applicant. On the basis of the evidence presented before it and that which was provided in the investigation report, the Tribunal is unable to find evidence, on any level, yet alone that of clear and convincing, that the allegations under Count 1 are supported. On the contrary, the evidence supports the contentions of the Applicant that she paid for her overseas trips with her own funds, in respect of which there is clear evidence from the bank records of the organiser of the trips. Furthermore, the decision maker was gravely misled by erroneous material that was placed in the investigation report despite the investigator’s knowledge of it being entirely false. The due process rights of the Applicant were significantly abused by the investigator. This conduct is discussed later in this judgment.

Count 2: Different forms of Child Abuse activity (September 2013), collusion with Social Welfare Department for PKR895,000 (see paras. 32 to 36 of the contested decision).

53. The Applicant is alleged to have colluded with the Social Welfare Department (“SWD”), which was an IP, or with its employees, to inflate the costs of the activity to have the overcharges result in “kickbacks” to the Applicant. In the alternative, the Applicant was alleged to have been grossly negligent in permitting fraudulent transactions that were perpetrated.

54. The allegations of fraud against the Applicant were that she recorded a meeting as having occurred for two days, yet it was only for one day; that a room for the meeting was rented at a Boy Scouts Association but that this was not the case, and that meeting participants had reported that they received a fraction of their daily subsistence allowance (“DSA”) indicated in UNICEF records. In the alternative, the Applicant was charged with being grossly negligent in preventing perpetuation of fraud against UNICEF.

55. At the hearing, the investigator testified that the liquidation file of the particular project included photos of the event and the documents indicated that the event took place on two days, namely on 16 to 17 November 2013. However, when she went to the offices of the Boy Scouts Association to confirm if the meeting had taken place, she was told that no meeting had taken place on 16 November 2013 or 17 November 2013. The investigator said she was shown a register of the meetings held at the Boy Scouts Association hall and it did not include the alleged 16 or 17 November 2013 function.

56. Before the Tribunal, the investigator testified that she saw the liquidation files and photo(s) of the function held by the office of UNICEF, and that she was also aware that the trainers allegedly complained that they were not paid their full DSA for the event. The investigator neither made a copy of the alleged records said by her to show that there was no event booked at the Boy Scouts Association hall, nor did she obtain a witness statement, in summary form or otherwise, from the Manager/Director of the Boy Scouts Association about his assertion that the alleged meeting did not take place at all at the venue, let alone for one day. What was presented to the Tribunal was clearly unverifiable hearsay. The Tribunal was very surprised that the investigator did not even take a copy, by photo or otherwise, of the alleged register that she consulted.

57. At the hearing, the undersigned Judge asked the investigator if she checked to confirm the veracity of the Boy Scouts Association director’s claim that no meeting took place at the premises on either of 16 or 17 November 2013. This is because the liquidation records showed that the meeting was for two days and the presenters at the training claimed that the training took place whilst claiming not to

have been paid in full. Additionally, there was a photo indicating that the participants were present at the hall for the training and a witness, Mr. R, testified that the training took place. All of these matters ran completely contrary to the assertions of the Manager/Director of the Boy Scouts Association that the hall was not used at all.

58. Despite being on the ground, the investigator failed to look beyond the alleged statement of the Manager/Director of the Boy Scouts Association, or to consider that his statements did not gel with the other evidence she had. On the basis of her own evidence the investigator failed to put this to the Manager/Director of the Boy Scouts Association. Though UNICEF claims the meeting to have taken place for one day, the records at the Boy Scouts Association did not even have any record of one day of training taking place. Despite these glaring omissions and inconsistencies in the investigation, the Applicant was still accused of receiving kickbacks, of fraud, and/or of being grossly negligent. The investigator also failed to consider the possibility that the reason the records of the Boy Scout Association did not even disclose one day of use of the Scout hall could have been the theft of the funds paid for renting the hall by the staff of the Boy Scout Association. The investigator simply failed to consider any reason for neither training day being recorded in the records of the Boy Scout Association.

59. Additionally, although the presenters at the event claimed to have been paid less DSA, there is nothing on the record (i.e., the invitation letter, the offered DSA or the sum finally paid) to support this claim or to prove that indeed the Applicant perpetuated any form of fraud. None of the presenters were asked, it appears, to provide witness statements. When asked where the communication between UNICEF and the presenters during the training was to be found to prove that they were paid less, the investigator stated that such communication was not part of the file.

60. The Tribunal is not, and cannot be, satisfied that there is any acceptable evidence in respect of this charge. There is certainly no clear and convincing evidence that has been produced or was before the decision maker. It appears that the investigator, without any satisfactory evidence, asserted that it was proven that

the meeting did not take place for more than one day, when in fact the evidence she had from the Boy Scout Association did not even indicate a one-day activity. The evidence that the decision maker had, and also before the Tribunal, is contradictory, substantially hearsay and illogical. Again, it is surprising that the decision maker, or those providing advice, did not identify the illogicality. There is not one direct witness to say that the training took place for just one day. There is simply no evidence of any acceptable quality one way or the other.

61. If one were to rely on the hearsay evidence gathered from the Boys Scouts Association, then one would have to conclude that the training did not take place at all. The investigator, and the Respondent, in adopting the asserted findings, seem to have ignored evidence where it suited, purporting to assert, by way of admission, that there was evidence showing that the training took place for one day and, in so doing, not accepting the alleged statement that the training did not take place at all. The logic in this is missing. One cannot take part of the purported evidence that favours one's case and reject that which does not support it, especially when it arises from the same alleged observations of a register. Unfortunately, to adopt such an approach appears to be consistent with the conduct of an investigator who appears to have been bent on demonstrating a purported fraud, notwithstanding the lack of evidence.

62. The fraud attributed to the Applicant is simply not proven by the evidence. There was nothing in the evidence to indicate that the Applicant was a recipient of any "kickbacks" and, equally, there was no proof that the presenters at the training were not paid DSA in full. The Tribunal expresses its concern that the investigator did not collect evidence to support the asserted conclusions set out in the investigative report and which were relied upon by the decision maker.

Count 3: Ten Days of Activism activity on child rights - Social Welfare Department fraudulent reimbursement via Society for Community Development (November 2013) - PKR1,806,853 (see paras. 37 to 43 of the contested decision)

63. The Applicant was accused in the following terms:

It is alleged that you colluded with an implementing partner (or its employees) to divert resources for this activity through the NGO Society for Community Development [“SCD”]. It is alleged that the diversion would permit kickbacks to you, [another staff member], the implementing partner or its employees. In the alternative, it is alleged that you were grossly negligent in permitting these fraudulent transactions to be perpetrated.

64. With respect to this count, Section C. of the Charge letter dated 21 September 2016, read in its relevant part as follows:

**1) Fraud and collusion in fraud**

70. You authorized reimbursement for this activity, which ostensibly took place at multiple venues over nine (not ten) days in November 2013. You only attended one of the nine days of events. No evidence of implementation of the other eight days was located.

...

73. It is alleged that you directed or colluded in the diversion of funds from [SWD] to [SCD]. There is circumstantial evidence of your collusion in this fraud by virtue of your relationship with SCD, its companion NGOs, and your participation in the other fraudulent transactions described in this letter.

74. For this period, you are specifically invited to make full financial disclosure of all of your assets, liabilities, and your income and expenses from all sources.

**Gross negligence**

75. In the alternative, it is submitted that your certification of reimbursement of costs, in the knowledge that the budget was prepared by [SCD], who provided no supporting documentation, was grossly negligent.

65. The Applicant was alleged to have been complicit in the fraud and that she “allowed” or “arranged” the original budget submitted by SCD for the project to be inflated.

66. The investigation reached the conclusion that it substantiated the allegation that the Applicant colluded with SWD/SCD in “misappropriating programmatic activity funds.”

67. Regarding this count, the DED/M concluded as follows in the dismissal letter:

43. As the financial disclosure that you have provided is incomplete, both in terms of the months covered and the banks covered (omitting at least your Bank Alfalah account), the transactions are highly unusual (inflows and outflows significantly exceeding your annual income), and in light of the other fraud findings, I am satisfied that there is clear and convincing evidence that you either benefited from fraud, colluded in fraud, or were wilfully blind to it. Had I not reached that finding, I would have nevertheless concluded that you were grossly negligent in your processing of this transaction, resulting in financial loss to UNICEF.

68. The project in question was comprised of several activities including a seminar, a football match, a debate competition, a press conference, a public match and other activities. Part of the allegations against the Applicant is that the activities were for nine days and not ten as indicated. The Applicant testified that she did not attend all the events but attended the last day, which was the tenth day and was also attended by the former Chief of UNICEF Field Office in Quetta (“CFO Quetta”), as well as by representative(s) for the Provincial Assembly of Baluchistan among others.

69. There was evidence that before UNICEF pays any IP, there are several confirmatory checks made by staff in the finance section. However, despite this testimony and lack of proof from the venues of the events, or even staff members, to testify in respect of the occurrence, or not, of the activities, which included a protest march, the DED/M, in her disciplinary sanction letter to the Applicant, rejected all the Applicant’s arguments and stated that:

40. I reject your arguments. I accept the original evidence of Mr. [M. A.], which, far from being self-serving, contained admissions against his interest, implicating himself in the fraud. Mr. [M. A.'s] original statement was broadly corroborated by a recorded telephone conversation that he had with [another staff member]. The circumstantial (but convincing) nature of the evidence was discussed in the charge letter.

70. It is to be noted that the Tribunal, having heard evidence from Mr. M. A., has found him to be an entirely unreliable witness, without any credible evidence to provide. It is clear that he lied under oath before the Tribunal, such that it is impossible to ascertain what part of his evidence, if any, was truthful. It is also noted that the "original evidence" was in the form of a summary statement, with the witness under no obligation to tell the truth, not being under oath when making the statement.

71. The CFO Quetta testified before the Tribunal that he could not remember exactly the number of days he attended to the project but confirmed to have attended some of the events during the ten-day project. Furthermore, he stated that it was not possible to have a programme officer to monitor the entire project being held, especially over several days, and that is why there are several tiers of monitoring.

72. One of the documents gathered from the Applicant's computer was an email of 12 November 2013 from a Program Manager of SCD, IP in the above-mentioned project, addressed to Mr. M. A. and copied to the Applicant. This email contained a budget for the project over the various ten days. However, there is another budget, which was signed by the Applicant and accompanied by a letter from her dated 4 November 2013 to the Assistant Director of SWD in the Government of Baluchistan. The two budgets contained different total sums and it is apparent that this fact was used by UNICEF as evidence against the Applicant to state that she inflated figures by having different budgets. Additionally, the Applicant was challenged in respect of her approval of a budget in her letter of 4 November 2013, yet the budget came by email of 12 November 2013.

73. At the hearing the Applicant testified and explained that out of the two budgets on record, she approved one, which came directly to her after meetings had been held with a representative from the Government of Baluchistan. To this, the Applicant indicated that after this meeting she signed at the bottom of all the pages of the budget that had been approved, and wrote the letter on 4 November 2013. However, the Respondent tried to impute that the Applicant had connived with another individual to come up with an inflated budget that was sent on 12 November 2013 but that the Applicant had given approval prior to even seeing the budget. This is apparent from para. 75 of the charge letter (see para. 64 above), where it is alleged that she colluded with another individual, and was reiterated by the DED/M in the disciplinary sanction letter.

74. In fact, a review of the documents clearly indicate that the Applicant could not have, as alleged, approved the budget on 4 November 2013 before receiving the budget on 12 November 2013 because, in her letter of 4 November 2013 to the Assistant Director, SWD, Government of Baluchistan, she indicates an approval sum of the budget that does not tally with the budget of 12 November 2013, but with the one she signed on 4 November 2013. Additionally, the Applicant confirmed that the investigators' misunderstanding of the documents was due to the fact that they did not have a complete file of the project related documents. This is because in her letter of 4 November 2013, she refers to "discussions held and request received from your department." This part of the information is missing, as UNICEF lost the relevant files while the Applicant was on study leave and later on SLWP/SLWOP, and they would have provided a full picture of how the Applicant ended up approving the budget as presented by the Government of Baluchistan.

75. In her reply to the investigation report, in response to the finding that the Applicant approved on 4 November 2013 a budget that was submitted on 12 November 2013, she clearly wrote as follows:

Most of the times the approval letter is not attached and I do not save each and every letter. It most probably (sic) that after review of documents when they found my preapproval letter is missing I might have reproduces it (sic) for the purpose of processing payment.



76. By the time the Applicant was submitting her comments above, the investigator well knew that UNICEF had lost all the relevant program files and records. Since the Applicant did not have access to them, it is apparent that whatever she said was considered a lie. Had the documents not been lost, they could have corroborated, or not, the statements of the Applicant.

77. The loss of the files constitutes a serious matter that jeopardizes the whole investigation. Perhaps as bad is the fact that the investigator did not inform the Applicant or the decision maker that the files had been lost. Neither the investigator nor the Respondent volunteered this information to the Tribunal. The lost files had to be central to the investigation into this matter, as they contained the program reports. The investigator, after admitting to the Tribunal that the files had been lost, disingenuously attempted to play down their importance. The fact that the investigator had them moved to safe keeping so that they would not be tampered with, notwithstanding that the Applicant had been placed on special leave, indicated that the investigator considered the files to be important for the investigation<sup>1</sup> and required preservation. She even went to the site where they were to be stored to inspect them, discovering that they had been lost.

78. The investigator made no reference whatsoever of the chain of custody in respect of the documents, which was surprising in light of paragraph 61 of the OIAI Investigation Manual which provides “a clear chain of custody must be maintained” in respect of documentary evidence. The loss of the files meant that the investigation could not be undertaken in a fair, just and proper manner. It matters not that the loss is said by the Respondent not to have been intentional, the fact is that they were lost by the Organization making the allegations against the Applicant uncorroborated by the evidence.

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<sup>1</sup> See para 53 to 58, OIAI Investigation Manual. See also para. 36, Conference of International Investigators Uniform Principles and Guidelines for Investigations, Second edition, 2009.

79. The rights of procedural fairness for the Applicant were significantly abused by the investigator and all those who had knowledge of the loss of these files within the Organization. As is mentioned further below, there are also implications in respect of the natural justice rights of the Applicant, as she was denied the right to address the loss of the files when she made her submissions in reply to the charges brought against her.

80. As a consequence, the Applicant was denied access to material which she contends would have supported her assertions and may have been exculpatory.<sup>2</sup> Equally, it is apparent that the Respondent is unable to fully prove his case without these files. The Tribunal is concerned that it is left with the distinct impression that the attempts by the investigator to down play the importance of these files is part of an exercise in trying to justify her non-disclosure of their loss and an assertion that the conclusions she expressed in the investigation report were correct notwithstanding that she did not have the relevant operational files and had not looked for exculpatory evidence. The Tribunal finds that the files were relevant to provide evidence which would have been either inculpatory or exculpatory, and that their loss should have been disclosed to the Applicant, the decision maker and to the Tribunal at the earliest opportunity.

81. In her testimony, the Applicant pointed out that in fact there were no inflated figures because the amount disbursed by UNICEF to the SWD, Government of Baluchistan, was less than the budget presented, and this is supported by the proof of reimbursement. When the Applicant was questioned about the other budget, she stated that she could not comment on it because she was not the addressee of the email and, secondly, that she was dealing directly with the SWD branch of Government. Additionally, despite the approved budget being PKR1,855,800, the Applicant stated that the actual money transferred to SWD, Government of Baluchistan, was less, that is PKR1,806,853.

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<sup>2</sup> The investigator has a clear duty to establish the facts, whether they be inculpatory of exculpatory. See para. 52 of the OIAI Investigation Manual.

82. When asked why this was the case, she referred the Tribunal to the UNICEF request for reimbursement, which contained comments and observations from the Finance and Programme Officer. The Programme Assistant had indicated that some documents for processing reimbursement were missing and, once provided, there were discussions held between the SWD, Government of Baluchistan, the Applicant and other UNICEF representatives concerning the budget and how to submit the reimbursement documents. Clearance was then obtained to reimburse the SWD, Government of Baluchistan. The Applicant indicated this in a hand written annotation on the same reimbursement form and requested the reimbursement to be processed.

83. The Tribunal finds the Applicant's explanation and testimony credible in this regard. It is noted that the budget found on the computer of the Applicant was an attachment to an email in which she was merely copied. It was not her document and she did not authorise it. Nothing on record indicates that the Applicant committed fraud or inflated the budget as alleged. She was not the source of the document, and considering that the project files for this particular project are missing, the basis for the Respondent accusing the Applicant of any fraud or gross negligence is not demonstrated.

84. At the hearing, the undersigned Judge questioned the investigator as to how she was able to conclude that the Applicant inflated the budget and connived with another party to make a fraudulent claim of reimbursement, as concluded in the OIAI investigation report.

85. The investigator's response was that since the reimbursement claim was equivalent to USD17,000, it raised eyebrows because it was a high amount. She also stated that the programme files would not have been important in respect of the amount of money reimbursed. However, when asked if the programme files would have contained the reports of the activities conducted, she responded that they would have, though she was not able to check this because the project files were lost. When asked if she went to the SWD, Government of Baluchistan, to ask them for copies of the report, since UNICEF's copies were lost, she conceded that she did not and that she relied on the documents found in the Applicant's computer.

86. As analysed above, the documents found on the Applicant's computer were neither full and complete records nor were they replicas of project/programme files that UNICEF had lost. The documents clearly did not disclose the context or all matters which were relevant, although the investigator clearly thought that she could act upon an assumption that they did disclose the full picture. The documents had to be placed into context. The investigator failed to do this and in so doing reached conclusions of fact that were contrary to the evidence now before the Tribunal. An incomplete set of documents/emails could not be relied upon to establish by clear and convincing evidence that the Applicant perpetuated any form of fraud or that UNICEF lost any money.

87. The investigator testified that when dealing with a government entity, the government, as an IP, does not need to prove output or outcome of a project in a report. The Tribunal has difficulty with this assertion because if this were the case, then many government entities could simply use the United Nations funds without any monitoring, thereby perpetuating a total lack of accountability. To the contrary, the UNICEF request for the reimbursement form to be filled in by the Director, SWD, Government of Baluchistan, contained the name of the project, the expected output, and the observations by a UNICEF staff member, a Project Assistant. It is clearly indicated therein: "[Project Officer] may like to comment on the overall output of the activity and advice for acceptance of the expenditure accordingly."

88. The Tribunal agrees with the Applicant that reports were and are usually prepared after the project is completed and this is used to satisfy the Project Office of the outputs. How else, or why, would the Project Assistant in the comment section of the reimbursement claim ask for the Project Officer comment on overall output if these were irrelevant to finalising payments? In addition, the charge letter accused the Applicant of fraud stating that "[she] only attended one of the nine days' of events. No evidence of implementation of the other eight days was located."

89. The Tribunal finds that in an attempt to convince it that the project files that UNICEF had lost during the course of the investigation were irrelevant to the case, the investigator downplayed the vital and important role of project and programme files during project implementation. The investigator effectively reversed the onus of proving that the events took place for the period claimed. What the Respondent had to do was to prove that they did not take place. The lost files were effectively the only way that this could be done, as the reports would disclose such, if it were the case, or would provide the exculpatory evidence which the Applicant asserted was to be found in the missing files. If the assertions of the investigator are to be taken as correct, how was the Applicant supposed to prove implementation of a project if IPs do not file project documents after the conclusion of a project?

90. The Applicant was also accused of authorising a reimbursement for a 10-day activity, which took place over nine days only. The Applicant testified that the project took over 10 days and that the 10<sup>th</sup> day was on the Universal Children's Day and everyone was invited to attend. In fact, all UNICEF staff were invited. During her interview, the Applicant also informed the investigator of this. However, most surprisingly the investigator did not obtain a single statement from any staff member at UNICEF QZO to confirm the veracity, or otherwise, of the Applicant's statement.

91. Nevertheless, the Applicant was accused of creating a "ghost project" for an extra day. UNICEF had access to all the material and information regarding this activity but chose not to pursue further any of the Applicant's assertions that disapproved the investigator's theory of the case that there were nine instead of ten days of activity. The Tribunal finds the Applicant's explanation more plausible because the Universal Children's Day falls on 20 November every year, which, in this case, was two days after the nine days of activities on children's rights, making more likely than not that the match to celebrate the Universal Children's Day took place at the end of the project.

92. The Tribunal finds that had the decision maker been provided with all material and information, including knowledge that files that were sent for safe keeping to ensure that they would not be tampered with, had been lost, it would not have been reasonably open to her to find that the allegations were clearly and convincingly proven. The decision maker would certainly have asked for further and better information to clarify matters. Noting that the Respondent has the burden of proof, the Tribunal is concerned that evidence that could have been taken or obtained to prove, or otherwise, the holding of the tenth day of activity was not sought by the investigator. The reversal of the onus of proof was not examined by the decision maker, it should have been. The case of the Respondent is lacking the substratum of necessary factual evidence. The investigator simply did not adequately find the evidence, inculpatory or exculpatory. The Tribunal notes that the failure to disclose the loss of the files to the Applicant and the decision maker is also enough on its own to discount any findings, as the need to comply with the correct procedures and to comply with the due process rights of the Applicant are absolutely fundamental. No investigation can be permitted to stand where an investigator, and their superiors who know of the facts, act in such an abusive manner in respect of the fundamental rights of a staff member.

Count 4: Birth registration project - excessive and fraudulent printing costs paid to implementing partner Local Government and Rural Development Department (October 2013-April 2014) total PKR 12,210,200 (see paras. 44 to 50 of the contested decision)

93. The Applicant was accused as follows:

44. It is alleged that you colluded with an implementing partner (or its employees) to artificially over-procure printing services for this project, which over-charges would result in kickbacks to you, [another staff member], the implementing partner or its employees. In the alternative, it is alleged that you were grossly negligent in permitting these fraudulent transactions to be perpetrated.

94. In connection with this project, the Applicant was accused of approving the transfer of money towards the payment for advertising and publicity of the project. Although she knew that UNICEF had long-term arrangements with printing places in Quetta who had undergone a rigorous vetting process, the printing of this

particular project was done by a different entity, namely Al-Rehman Arts. It is alleged that this particular entity does not exist at the location indicated in the respective invoice, that the Applicant never attempted to visit or to contact it and that she did not attempt to verify any information about the partners that were retained by the IP, namely Local Government and Rural Development Department (“LGRD”), for this project.

95. The investigation concluded that during this project, the Applicant was complicit in the misappropriation of programmatic funds to LGRD in excess of USD75,000. The report also concluded that OIAI could not ascertain the extent to which the Applicant “may have made a personal gain.”

96. The former Accounts Officer of the Directorate General, Local Government, Mr. B., who is now a Senior Assistant Director, Local Government District, Quetta, was the accountant involved in the birth registration project and testified before the Tribunal. Mr. B. adopted his witness statement, which he had sworn as an affidavit and filed through the Applicant. In it, he stated that there were some accounting discrepancies of “dissimilar accounting procedures”, and that the irregularities were not because of mismanagement. He added that these were later streamlined with the support and guidance of UNICEF officials. He further stated that there was a proposal for a meeting regarding proposed liquidation of accounts, but since the Applicant was not available, all the critical points to liquidate accounts were discussed over the telephone. Mr. B. also stated that since the expenditure had already taken place, the department was not in a position to refund UNICEF.

97. Mr. B. testified that during the investigation he responded to several emails and provided answers to questions that were raised. He further stated that the investigator did not meet with him nor was he called to give any statement even though he was not far from Quetta. However, when the investigator was in Quetta, she met with the Director General of the Local Government of Baluchistan (“Director-General”) but not with Mr. B..

98. Regarding this charge, the IP in this matter was a branch of the Government of Baluchistan. In the investigation report, the investigator clearly identifies the UNICEF staff involved in this project: Ms. A. A., a Programme Assistant, Mr. I. R., a Finance Officer, Mr. M. I., a former Programme Officer, and government officials that were involved in this process. These were Mr. S. N., an Assistant Director, who acted as focal person for birth registration in the districts of Baluchistan, Mr. H. B., a former Accounts Officer, and Mr. M., the Director-General.

99. In her response to the allegations and testimony before the Tribunal, the Applicant states that she had a meeting with Mr. B. to clear the discrepancies in the accounts. The Applicant found that, indeed, the Government of Baluchistan used a printing company that was not approved by UNICEF. This was beyond her control, as she only became aware of this after the fact and, as stated by the Finance Officer, it was confirmed that the Government could not refund the money to UNICEF.

100. Mr. B also testified that the Director-General had re-appropriated, meaning he had reset the budget when UNICEF raised the issues of costing and accounting as had been presented to it, noting that payments had been made by the Government in cash without specific receipts and only supported by signatures from the recipients of the payments. The Applicant also testified that the Director-General re-appropriated the budget because UNICEF would not reimburse against the amounts indicated, especially in relation to the cost of printing.

101. Despite all this information and the investigator indicating in the investigation report that the Director-General and the Assistant Director were showed the email exchanges between the Applicant and the Baluchistan Accounts Officer regarding the irregularities, the report indicates that neither of them could recall a debriefing from the Accounts Officer regarding any irregularities. The investigator thus concluded that “[the Director-General’s] view was that this meeting had not taken place.”



102. Other than the above indication in the investigation report, there are no witness statements from these Government officials in respect of how the birth registration project was handled and how the budget was re-appropriated. The Respondent, whose case is that the Applicant allegedly, among other accusations, colluded with employees of LGRD, Government of Baluchistan, to mismanage UNICEF funds by inflating printing costs, relies on the investigator to testify what she was told by the Director-General. The Respondent did not produce any witness summary or statement for the Director-General or Assistant Director or call either of them as a witness. There is no denial of the assertion that it was the Director-General who re-appropriated the budget, which was acceptable to UNICEF.

103. None of these people were called to testify before the Tribunal, leaving it with hearsay testimony of the investigator as to what she says she was told by those involved. On the other hand, the Tribunal has the direct testimony of the Government official who was part of the project and who testified before it about what transpired. The investigator collected a statement from the Senior Assistant Director, LGRD, Mr. S. N., only for the purposes of stating that he did not attend the meeting in which the Accounts Officer participated, because he was not copied in any of the correspondence. Additionally, he confirmed that Mr. B. was the accounts focal point and was in direct communication with UNICEF staff members. The Tribunal finds that this statement does not support any allegations against the Applicant regarding the alleged misappropriation of funds during the Birth Registration Project in Baluchistan.

104. During the hearing, the Applicant was asked if the Government of Baluchistan was obliged to use the printing companies that had been cleared by UNICEF. She responded that there was no obligation of or requirement on the Government of Baluchistan to use the UNICEF cleared printing companies, and that the main problem was that the Government exceeded the UNICEF authorised printing budget. The Government was tasked to use its own process, and that is why when the printing budget was exceeded, she asked for a refund and she was informed by the Accounts Officer that it was not possible.

105. Additionally, the Applicant testified that in normal circumstances, if an IP exceeds the budget, then UNICEF is bound to ask for a refund. If it was not possible to get the refund, then a warning that such would not be tolerated had to be issued. The Applicant testified that the Director-General made a variation on the budget through its re-appropriation and changed it so that UNICEF would be able to be reimbursed. It was also confirmed that the budget was not increased despite the over expenditure on printing and that the Government of Baluchistan bore the loss.

106. In an email of 15 April 2014, the UNICEF Programme Assistant on this project, Ms. A., wrote to the account officer, LGRD, copying the Applicant and the UNICEF Senior Finance Associate, Mr. I. R, and informed him of the shortcomings in the expenditure reports, including the fact that the printing cost exceeded the allowed sum of USD5,000. That email reads as follows in its relevant part:

According to UNICEF rules, only 20% variations can be made in the expenses while being in the agreed budget limit but the expenditure reports show a huge difference. We consider it as the serious breach of UNICEF rules, appreciate if you could come up with a justification for the above mentioned points at your earliest.

107. In a reply of 16 April 2014, the Accounts Officer responded to the Programme Assistant as follows:

The re-appropriations in the budget were made through mutual understanding of UNICEF and LGRD. The DGLG consulted the Program Officer during the program. The Director General, Local Government being the Project Director is authorized to re-appropriate the budgets in accordance with the program requirements.

The re-appropriations were made in the items, which are not exceeding in itemise rates. However, if UNICEF considers these re-appropriations our mistakes, we admit and assure that due care will be taken in future. And please do not consider these mistakes as breach of UNICEF rules as the program has been completed with zest and zeal of the Local Government Department staff and employees under the supervision of Director General, Local Government and Rural Development Department.

108. In addition, on 17 April 2014, the Government Accounts Officer wrote to the Programme Assistant that he and Mr. S. N. would go to her office for a meeting on 18 April 2014. During the investigation, the Applicant was asked about the meeting and she said that it took place. However, the investigators showed her a copy of the visitors' log at the UNICEF Quetta office, and there was no log of the Accounts Officer visiting the office on that day. The investigation report concluded that "[n]either [the Applicant] nor [the Programme Assistant] could explain the absence of the visitors' names from the security records."

109. From the above, it appears as if the Applicant was untruthful about the meeting ever happening. However, she claimed that with the passage of time and considering that she was away from the office on SLWOP for a year of study, combined with the fact that during the investigation she was not provided with all the documents, she could not refresh her memory in respect of exactly why the records did not indicate that the meeting took place.

110. However, the Applicant testified that she later recalled that the meeting instead took place at the office of the Directorate-General and not at UNICEF offices. The Applicant testified that she used UNICEF official vehicle to go to the meeting and produced a copy of the UNICEF Vehicle Log book for 18 April 2014, which had a record for a round trip to the Office of the Director-General, the name of the driver, the speedometer readings, time of arrival and departure and the Applicant's signature. The Respondent did not call the driver to refute the Applicant's claim that she indeed had travelled to a meeting at the Directorate-General using a UNICEF official vehicle. The investigator's assumption that the meeting took place at UNICEF offices appears to have been incorrect and there is proof that official resources of UNICEF were used to provide transportation to the venue of the meeting with Government officials.

111. As indicated above, the Respondent did not call the Director-General to refute that he had re-appropriated the budget as claimed by both the Applicant and the Government Accounts Officer, or to refute, or otherwise, that he had met with the Applicant. Rather, the investigator claimed that the Director-General allegedly

informed her that the Applicant and her then Deputy were involved in some misappropriation.

112. This statement did not have any proof whatsoever to support it and, without such, the Tribunal cannot take it into account, especially noting that the burden of proof in establishing misconduct is on the Respondent, who had several opportunities to discharge this burden with evidence but he did not do so. The Tribunal and a decision maker must act on evidence and cannot act upon unsubstantiated assertions and allegations made by an investigator in a hearsay form. Considering the conduct of the investigator during the investigation, the Tribunal is, in any event, most concerned about the reliability of the investigator's statements, which are not supported by any evidence whatsoever.

113. The Tribunal finds that neither the investigator, nor the Respondent before the Tribunal, established the facts upon which the allegations of misconduct under Count 4 were based. There is no clear and convincing evidence that the Applicant colluded or that she was grossly negligent.

114. The Tribunal notes that if the Applicant and the Programme Assistant were indeed colluding with Government officials to receive a financial benefit, there would be no reason for the Programme Assistant to write the above email in paragraph 106 above requesting an explanation about expenditures by the Government of Baluchistan. Similarly, there would be no justification for the Applicant asking the Government of Baluchistan to refund the excess expenditure, if she was allegedly supposed to benefit from the "inflated" budget.

115. As noted, UNICEF Pakistan Country Office may have been operating in an objectionable way with its IPs but this does not, on the evidence, appear to be the Applicant's fault. It was also not her responsibility to correct this but rather a problem for the entire Country Office. The then Senior Finance Associate at UNICEF QZO, wrote *inter alia* in a written statement that "[y]ou asked whether Quetta office carried our micro-assessment of government implementing partners, as per [Harmonized Approach to Cash Transfers ("HACT")] policy. *I confirm that*

*Quetta Office commenced the assessment of Government implementing partners in September 2015” (emphasis added).*

116. This statement goes to demonstrate that there was a problem at the UNICEF QZO but it was not specific to the Applicant. The fact that the HACT policy of UNICEF was not being applied in Quetta Office speaks to a managerial implementation issue.

Count 5: Child Protection Bill activity – Social Welfare Department reimbursement (26 December 2013, 6 January 2014, 3 February 2014) - PKR1,865,895 (see paras. 51 to 53 of the contested decision)

117. This activity was carried out over a three-day period at the City Hall in Quetta. The venue was selected as a result of a competitive procurement process. During the investigation, the investigator went to the City Hall and allegedly met with the event manager of the venue seeking authenticity of the invoices. The investigator claims that the events manager and the owner both denied that the venue could accommodate more than 60 persons. It was noted that the rates on the invoice did not appear to include the 6% tax payable to the government. The investigation report assessed that the City Hall invoices and the corresponding cheques had been fabricated. There is an email on file, from the investigator to the events/banquet manager at the City Hall sending to the latter copies of the receipts and invoices and asking him to check if they were from the City Hall venue. In reply, said manager stated that the documents were not from his firm and that they had not conducted any sort of events listed in the invoices.

118. The Applicant indicated that she did not attend any of the days for this activity. She however admitted having certified the payments to the events. The investigation report concluded that the Applicant “deceived UNICEF by certifying the three-days activity implementation and colluded with SWD in the misappropriation of funds”. The investigation report concluded that it had substantiated the allegation of collusion with SWD to misappropriate programmatic activity funds against the Applicant.

119. The Applicant testified that though she did not attend the event, she relied on the documents as presented and believed the event took place at the City Hall and there was no reason to doubt it, as all the invoices and receipts were from the City Hall and signed by the banquet/events manager.

120. The investigator testified that based on the email from the events/banquet manager at the City Hall, she concluded that the invoices and documents were fabricated. At the hearing, the investigator was asked if she requested the events/banquet manager for a specimen of his signature because a signature purporting to be his is on all the invoices and receipts from the City Hall and they are all identical. The investigator stated that she did not question him about the signature on the documents. At the hearing, it was posed to the investigator whether it could have been that the proprietors of the City Hall denied having received the payments because of tax ramifications, that is, because they raised invoices without tax and now there was an investigation in respect of them, thus making it easier for them to deny having hosted the meeting at the City Hall than to admit having received payments without paying the taxes due? The investigator stated that this could have been a possibility.

121. Despite the investigator being on the ground, having seen the venue at the City Hall and met the owner of the City Hall and the events/banquet manager, who, allegedly, refuted the occurrence of a three-day meeting at their venue, she did not obtain their written statements to this effect. It is surprising to note that no effort was made by the investigator to obtain a list of attendees or participants at the event, or to obtain a statement from even one invitee or potential invitee to either confirm or deny the occurrence of the various three-day meetings. The fact that the programme and project files had been lost by UNICEF hindered the investigation as they most likely contained information that would have confirmed or otherwise the holding of the event or provided details required for the investigation to be completed. The Tribunal finds that reliance on an email from a person purporting to be the events manager, that an event did not take place at the venue when the investigator was holding signed receipts from a person using his name acknowledging payment, is such a conflict that further evidence was required to

resolve the matter. It is apparent that the investigator simply relied upon an email purporting to come from a person claiming in the email to be the manager of the City Hall, choosing, without any expressed reason, to disregard the only hard evidence she had. The Respondent produced no other evidence.

122. As indicated in the investigation report, the decision for the holding of the event at the City Hall was as a result of a competitive procurement process. The Tribunal finds the investigation to have been entirely inadequate and is left to ponder why the investigator did not actually conduct a full interview, questioning the proprietors of the City Hall if they put a bid, or quote, to host the activity which now they claim never to have taken place? Additionally, the investigator failed to obtain a written statement from an official at SWD, it being the entity that carried out the activity.

123. The count is not backed by sufficient evidence. Mere hearsay assertions of what the investigator asserts she was told and unproven emails are not evidence of the proper quality and standard to be considered as having probative value for anything other than for a preliminary investigation. The conflict between the signed receipts and the statements said to have been made by the manager at City Hall was not tested and resolved. The Respondent has failed to present to the Tribunal any evidence that can be relied upon and is of sufficient quality and probative value to reach the required standard of proof. It was not reasonably open to the decision maker to reach the conclusion that the charge was proven on a clear and convincing basis.

Count 6: Child Protection Minimum Standards training (10-12 February 2014) – double reimbursement of travel claims from Social Welfare Department and Initiative for Change and Development – PKR176,533 (see paras. 54 to 56 of the contested decision).

124. The training was held at the Serena Hotel in Islamabad over three days in which four participants attended; two from SWD, one from the Initiative for Change and Development (“ICD”) and one from SCD. It is reported that the event logistics, arrangements, and payments were made by a third-party entity, namely “FLOWERS”.

125. UNICEF alleges that the Applicant “colluded in ensuring that staff of implementing partners were deliberately or grossly negligently reimbursed twice in connection with a UNICEF-supported activity.”

126. There is nothing in the evidence that points towards the alleged collusion. In fact, there is no evidence or proof of collusion at any point. The Tribunal finds the conduct as being more indicative of neglect by the Applicant.

127. Furthermore, in the contested decision, the decision maker wrote that she had found that the Applicant “should have been aware that a double payment was being processed”, but that she was “unable to conclude that [the Applicant] subjectively [was] aware, or that [her] actions with respect to this particular charge rose to the level of gross negligence.”

128. On the basis of the facts presented, the Tribunal finds that the actions of the Applicant were, at their highest, neglectful.

Count 7: International Child Labour Day Conference (12 June 2014) – excessive and fraudulent charges, paid to Labour Department – total PKR1,507,000 (see paras. 57 to 61 of the contested decision)

129. It was alleged that the Applicant “colluded in fraud with [SCD]to arrange kick-backs, diverting funds ostensibly for [the International Child Labour Day conference]. In the alternative, it is alleged that [the Applicant was] grossly negligent in failing to prevent the fraud.”

130. The accusation against the Applicant relied on the decision maker’s opinion that although the Applicant was not present at the time the transaction was liquidated, because she was on SLWOP for further studies, she was involved at the early stages for preparing/budgeting for the activity and, as such, “she was responsible for budgeting the event”..

131. From the case file, the Tribunal notes that the Organization alleged that the Applicant approved an advance payment to the Department of Labour for the organisation of the function at the Serena Hotel in Quetta. UNICEF paid for the full budget, and claims that “no event was hosted by the Labour Department on that



date. An event was hosted by the NGO Society for Community Development at the same hotel on the same day.”

132. As the number of participants was less than expected and SCD consequently paid significantly cheaper rates for the venue, UNICEF argues that it was overcharged for the venue by 36% and that given that the Labour Department, Government of Baluchistan did not host the activity planned for the expected participants, the charges for DSA and travel allowance that were paid by UNICEF were fraudulent. Further, UNICEF sustains that fraudulent documentation was submitted to it at the time of liquidation, that the cheque purported to pay the Serena Hotel was also fraudulent because the Labour Department’s cheque book reflected that its cheques were not used, and that there was an alleged fraudulent receipt purporting to be from the Serena Hotel indicating the amount paid and that said hotel had not confirmed receipt of such payment.

133. The Applicant was also accused of having instructed the Director of the Labour Welfare Department, Government of Baluchistan to transfer funds to SCD. In respect of this matter UNICEF “invited” the Applicant “to make full financial disclosure of all of [her] assets, liabilities, and [her] income and expenses from all sources.”

134. The Applicant stated that she was on leave the last week of May 2014 and first week of June 2014. She stated that she was unable to reconcile the signing of the document because she came to the office for a short while. However, she stated that another CPO at UNICEF, Mr. M. I. was managing correspondence with the Labour Welfare Department, Government of Baluchistan.

135. The Applicant admitted to linking up SCD with the Labour Welfare Department because SCD was running a street children project for better implementation of the activity and that she introduced Mr. Asif, accountant (SCD) to the Director Labour Welfare Department, for capacity building. Additionally, the Applicant stated that she was not aware of any other arrangements made because she was already away on study leave when the activity was

conducted/implemented. She denied having received any “kick-backs” or perpetuating fraud.

136. In a statement during the investigation, the then Director, Labour Welfare Department Mr. S. S. stated that he had received a request from a Programme Assistant in UNICEF to organise the event with his department. He stated that he advised that it was impossible to arrange the event at such a short notice and that the Labour Welfare Department, Government of Baluchistan, did not have a credit policy with the venue of the activity, that is the Serena Hotel. He also stated that the Programme Assistant informed him that the Finance Manager from SCD, Mr. M. A., would arrange for the activities and that UNICEF would transfer the funds to the Labour Welfare Department account and that the amounts should then be withdrawn and handed over to the Finance Manager, SCD, Mr. M. A., for the expenditure.

137. The then Director of Labour Welfare, Mr. S. S., wrote that they received the funds and wrote a cheque to Mr. M. A., the Finance Manager at SCD, which was cashed. He also wrote that he has only ever written one cheque to the Serena Hotel regarding a different event from the one in question. Therefore, he does not know of any other cheque written by the Labour Welfare Department for the event in question.

138. The investigation report’s assessment was *inter alia* that the Applicant’s use of Direct Cash Transfer was not in accordance to UNICEF’s HACT policy and that she knowingly put the funds at risk of misappropriation because neither UNICEF nor the Labour Welfare Department, Government of Baluchistan, could hold SCD accountable in case of loss due to lack of existence of a contractual arrangement (in the usual form). It was also noted that SCD had financed the events’ implementation and that the Labour Department transferred the funds to SCD. The investigation also assessed that part of the sum advanced to the Labour Welfare Department, Government of Baluchistan, then transferred to SCD had been misappropriated through inflated receipts for expenditure or fabricated receipts and cheques without expenditures being incurred.

139. Though the investigator could not ascertain the extent to which the Applicant made a personal gain through the alleged misconduct, it was concluded that the allegation that the Applicant colluded with SCD in misappropriating UNICEF funds was substantiated.

140. The Applicant approved the event with the Labour Department at the Serena Hotel for the purpose of advancing the Child Labour Bill. However, she did not put in place monitoring measures by which UNICEF could have obtained sufficient reassurance that the money disbursed was used for the intended purpose. The decision maker indicated in the dismissal letter to the Applicant, that she found the statement of Mr. M. A., who the Tribunal has found to be entirely unreliable, to have been corroborated by the Director of Labour Department, Mr. S. S., thus supporting the conclusion that the Applicant instructed Mr. M. A. to redirect funds to Mr. S. A. as well as her finding of clear and convincing evidence existing in connection with the accusation of the Applicant's collusion in fraud.

141. When the Applicant filed her application with the Tribunal, Mr. S. S., the former Director, Labour Welfare Department, Government of Baluchistan swore an affidavit in support of the Applicant's case in the following terms:

There was no discussion or directions given by [the Applicant] for diversion of Funds to any third party i.e. Society for the Community Development. The picture shown to me by [the investigator] of [the Applicant] and [the Programme Assistant], I categorically confirmed to her that I had a formal meeting with [the Applicant] but at no instance any verbal instructions as to the diversion of funds does not arise.

142. At the hearing Mr. S. S. testified that he met the Applicant a couple of days before the event to talk about it, that this was the first collaboration between the Labour Welfare Department, Government of Baluchistan, with UNICEF, that his department did not have experience of working with UNICEF and its processes, and that the Labour Department was unable to organise the event, so SCD organised it and they refunded them. Mr. S. S. also testified that his reservation was with the fact that the funds from UNICEF arrived in their accounts after the event.

143. He testified that the signing of liquidation documents, done after the event, was successfully completed and that a staff member from UNICEF gave him the form(s) to sign. Then, his Department received a cheque from UNICEF, though he did not recall the amount on the cheque. He further testified that the Applicant did not play a role in the event, that she did not attend it and that the event was attended by representatives from UNICEF and some from the Government of Baluchistan.

144. The Tribunal notes that indeed the Applicant was present at the beginning of the planning for the project, but she was gone by the time the project was implemented, liquidation was conducted and reimbursements made. If the Applicant's actions were illegal and done in an alleged effort to receive "kick-backs", the Tribunal is left to ask why did the other UNICEF staff not stop the payments and or the transfers after she had left? The initial Request for Advance form was signed by three different UNICEF staff members: the Programme Assistant, who signed as the person who had checked the transactions, the Applicant, who certified, and the Chief Provincial Officer, who approved. It was then stamped by Mr. I. R., the Finance Assistant. It is difficult to understand that the processes that were followed were permitted to proceed unless all these staff members were part of the collusion to defraud the Organization. The Respondent has not adduced any evidence as to why, even in the Applicant's absence, the alleged fraud was perpetrated, yet as can be seen in the form, she was not the only staff member involved. Further, she had no approving authority, this laid with someone else. If this plan was indeed fraudulent, either everyone who approved the payments was part of it or there was no fraud in the first place.

145. Unfortunately, the Respondent did not call the Chief Provincial Officer who approved the payments to testify as to how the fraud was perpetrated by the Applicant while he was the approving official or how the Finance Assistant let any fraud continue even in the absence of the Applicant.

146. Moreover, during the hearing it was put to the investigator why was the Applicant being accused of the liquidation processes and lack thereof when she was neither in the country nor participated in the event due to her absence from work to undertake a one-year study leave. The investigator replied that it was because the

Applicant was the PO who commenced the process, was aware of the internal process and had created the workflow in advance of her leave. It is noted that evidence of these processes/workflow was not produced.

147. This Tribunal finds that the United Nations as an umbrella organization is constituted of staff members who often move from one mission to another, leave its employment, are taken ill or for other reasons, are no longer available. Therefore, it is incredulous for an investigator to state that a process commenced by a staff member is their responsibility all the way through, even in their absence and in circumstances where there is other senior and qualified personnel overseeing all processes.

148. The testimony presented and heard by the Tribunal does not prove, at the required standard, that the charge of collusion in fraud or gross negligence against the Applicant has been made out. The Respondent had the burden of proof, which he did not discharge. It was, additionally thus not reasonably open to the decision maker to find the charges proven at the standard of clear and convincing on the basis of the actually probative and acceptable evidence produced before her.

#### *The investigation*

##### Lack of logic in the decision and the issues of evidence generally in this case.

149. Much of what is contained in the investigation report is conjecture or hearsay assertion, which is unsupported by primary or corroborative evidence. For the consideration of the final disposition of a matter it is entirely insufficient for an investigator to provide a report substantially devoid of actual evidence and/or evidence that can be tested as part of the fair trial rights and procedural fairness rights of a party before the Tribunal. References to discussions and the sighting of documents by an investigator does not prove the statement made or the contents of a document. The failure to produce a copy of a document said to have been seen by the investigator is inexplicable when such an investigation as this is being undertaken. Documentary evidence requires to be produced, not merely asserted to exist.

150. In this case the evidence, at its highest, appears to be at a level that may be considered prior to making a decision to commence an investigation. The decision maker was presented with evidence of very poor quality upon which it would not have been reasonably or lawfully possible to reach the conclusion that any of the charges brought had been proven on the basis of clear and convincing evidence. There was no evidence of collusion presented. Inferences in respect of such were not even available upon the consideration of the facts as a result of the evidence given before the Tribunal or contained in the investigation report. The decision maker invariably recorded to be “satisfied that there is clear and convincing evidence that [the Applicant] either benefitted from fraud, colluded in fraud, or was wilfully blind to it”. The Tribunal finds that there is neither evidence of benefit nor of collusion. It is further most unfortunate that there is no discussion to be found as to the analysis undertaken by the decision maker in respect of these findings. Such decisions as made in this matter, require clear and logical reasons to be given, not merely a conclusion to be stated.

The quality of evidence in this matter and missing documents

151. It is common knowledge that as with many projects funded by United Nations funds and programmes, after every funded project, the implementing partner files with the Organization a project report on expenditure of the monies, the basis for such, the activities undertaken and the outcomes achieved. These records of the project are meant for audit purposes of the project finances and the project generally. As the Tribunal was concerned about the failure of the investigator to gather all available inculpatory and exculpatory evidence in respect of the allegations against the Applicant, it asked the Respondent to provide the final project reports for the projects listed in Counts 2 to 7. These final project reports would have sufficiently proven the expenditure, duration, costs, activities undertaken and the like.

152. As already observed, to the surprise of the Tribunal, not a single project report could be produced because, as advised in evidence by the investigator: “**they were lost**”. The Tribunal inquired at what point was it established that all the project documents were lost. It was informed that, at the commencement of the

investigation, instructions were given by the investigator to the UNICEF Quetta Zone Office to send all project files to UNICEF Country Office in Islamabad for safekeeping. The Tribunal must find that the investigators regarded these files to be important to the investigation. The investigator informed the Tribunal that when she attended the UNICEF Country Office in Islamabad to view the files, they could not be found. It only came to light at the hearing, when the Applicant argued that proof of her rebuttal of the allegations against her could be found in the project reports, that the investigator told the Tribunal that all the project reports pertaining to the allegations against the Applicant had been lost. When asked how they could have been lost yet they were taken for “safekeeping” from UNICEF Quetta Office to the Country Office, the investigator could not provide a response.

153. The Investigator failed to divulge the loss of the project files in her investigation report and nor did the Respondent in his reply to the Tribunal. Yet these reports are fundamental to the proof, or otherwise, of the allegations in Counts 2 to 7 against the Applicant.

154. The Tribunal is most concerned that the investigator was prepared to conceal the loss of these files. This may well have resulted in a perversion of the cause of justice in the system as it was applied to the Applicant. The Tribunal notes that it does not believe that Counsel for the Respondent was aware of the loss of the files or of their relevance and, thus, is of the view that said Counsel did not mislead the Tribunal.

155. The investigator testified that they used records and reports that they found in the Applicant’s computer to build the case, which, as indicated above, were not a complete record of everything. The Tribunal notes that there is a particular reason given as to why UNICEF decided to place the Applicant on SLWP and later on SLWOP, and even indicated in the letter placing the Applicant on SLWP that **“she was to stay away from the premises”**. This is because they wanted to preserve the documents and reports for their investigation. To lose the core source of evidence that would have supported the Organization’s case or have vindicated the Applicant, and not put this fact in writing, bringing it to the attention of the decision maker before she made the decision to separate the Applicant points

towards a deliberate distortion of the investigation by the investigator. The investigator's conduct was improper, dishonest and unlawful. The investigator had a duty of full candour, which she did not discharge.

156. Additionally, when the Tribunal inquired of the investigator if she made an effort to obtain copies of the missing project reports from the IPs, since they had all the relevant details, she stated that she did not seek to obtain any of the missing records from any of the entities. This Tribunal regrets that the investigator in this matter did not consider it a binding obligation and part of her duty of care owed to both the Organization and the Applicant, to obtain the full records relevant to the investigation. The allegations levied against the Applicant are more than mere misconduct because, taken in proper context, the Applicant is being accused of fraud with NGOs and government entities and officials amounting to corruption, a very serious offence leading to serious consequences for the Applicant. The investigator did not properly discharge her duty as an investigator to obtain all the relevant evidence, both inculpatory and exculpatory. The duty of the investigator is to be objective, impartial, fair and to act with the highest level of integrity.<sup>3</sup> An investigator should not approach the task of investigation with a prosecutorial theory, as was observed recently in the case of *Ganbold, supra*.

157. The investigator testified that there was a forensic audit of one of the projects and that there was a finding of financial malfeasance. However, the finding was not against the Applicant.

Conduct of the investigator and the presentation of evidence before the Tribunal

158. Failure to obtain statements, presentation of unsubstantiated hearsay evidence, lack of rigor in the investigation, failure to consider alternative explanations, the failure to correct obvious and misleading errors in the investigation report and to make full disclosures to both the decision maker and the Tribunal, all cause the Tribunal significant concern in this matter. It is apparent that

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<sup>3</sup> See Para 14 of OIAI Investigators Manual, adopting the Uniform Principles and Guidelines for Investigations, as adopted by the 10<sup>th</sup> Conference of International Investigators, June 2009. It is further noted that it was recorded that UNICEF took an active part in this conference.



the investigator was looking only for inculpatory evidence and not for exculpatory evidence. Upon not being able to find proper inculpatory evidence it appears that the investigator sought to reverse the onus of proof. It is also noted that the investigator admitted to the Tribunal that she also took a secret recording of one of the witnesses. This was also unacceptable.

159. When the investigator found an issue with missing project files, the total failure to advise the decision maker and the Tribunal of this, is a matter of great concern. The total lack of candour amounts to a concealment of an important fact in respect of the case against the Applicant. The decision maker was misled by this omission in the investigation report. The Tribunal would have been equally misled had the true state of affairs not been found out by it. The Tribunal was misled and the blame is not to rest with the Counsel for the Respondent, but rather those instructing Counsel. The Tribunal assumes that the investigator shared the fact of the missing files with her superiors who would have been managing the investigation.

160. The Tribunal is further most concerned that the investigator, on her own admission, left in the investigation report, or inserted, a purported fact which was known by her to be untrue. She referred to the assertions of the Applicant as being “suspect”, well knowing that the assertions were not “suspect”, but indeed true. From this reference to the assertions being “suspect”, it is apparent that the decision maker reached a conclusion that the Applicant had been fraudulent and was thus a liar. This no doubt coloured her entire consideration of the matters before her. Such conduct from the investigator has tainted the entire investigation, notwithstanding any other findings made by the Tribunal.

161. For an investigator to have behaved in this manner is clear evidence to the Tribunal that she failed to undertake the investigation in a fair, impartial, objective manner, with the highest level of integrity. The decision maker and the Tribunal were both misled, as a consequence, as the investigation report was presented to both the decision maker and the Tribunal as being a statement of the actual evidence obtained. It was clearly not, and it was only when before the Tribunal that the investigator decided to admit that she had effectively proffered a lie in her report.

162. It is clear from the evidence given before the Tribunal that the investigator also failed to consider exculpatory evidence and did not adequately or properly seek relevant evidence which was available.

163. The Respondent has a duty of candour to provide a full account of the processes leading up to and including the decision-making process. It is vital that investigators make full and frank disclosures to decision makers, and subsequently the Tribunal upon review, as information which is only in the hands of the Respondent must be made known. If there is not full candour in the information provided to the decision maker, then a proper decision cannot be made. Equally, where there is a lack of candour before the Tribunal, it is not able to properly review the legality of a decision.

164. The rights of the Applicant were comprehensively disregarded in this case. The procedural fairness that should have been provided was absent. The failure to disclose the loss of important files not only impacted upon the procedural fairness rights of the Applicant, but also on the expression of natural justice rights, as the Applicant was not given the right to be heard by submission in respect of this point when making her submissions in respect of the charges brought against her.

165. The whole of the disciplinary system within the United Nations must be based upon all staff members, decision makers, and the Tribunal upon review, being able to rely upon the compliance with the procedures set down in the applicable administrative issuances and with those undertaking investigations doing so fairly, objectively and with the highest levels of integrity. The breaches of the due process rights, procedural fairness and natural justice rights of the Applicant, together with the apparent lack of integrity through both non-disclosure and the inclusion of, or failure to remove, known erroneous material in the investigative report, are matters, which taken on their own, would be such as to justify the rescission of the decision in this matter.

### Some observations

166. The Tribunal, in conducting its review of matters of this nature does not involve itself in matters of conjecture. It looks at the allegations and the supporting evidence to ensure that it has been proven at the proper level. It examines the probative value of the evidence, its credibility and reliability to ensure that the standard of proof demanded has been reached. Hearsay evidence has very little value as it cannot be tested and thus its veracity is always in question. The burden of proof rests with the Respondent. There are cases where there may indeed be a suspicion that a staff member has engaged in serious misconduct, but such must be proven and the requisite standard of proof must be reached. The mere assertion in an investigation report that something is regarded as proven by an investigator does not mean that it is so proven. Decision makers must closely examine the alleged evidence against the charges brought. They must consider the quality of the evidence and fully consider, in a reasoned manner, whether the standard of proof has actually been reached. This is not an easy task, rather it is a very important task which is the subject of a delegation from the Secretary-General. It must be carried out fully and properly, no matter how busy a decision maker may be. If a decision maker finds issues with an investigative report or in documents prepared for them related to a decision, these should be followed up.

167. For instance, in this matter there was a reference to a state of affairs in 2017, when this was not the relevant time, which was 2013. This should have been followed up and clarified by the decision maker. In this case it may have disclosed the fact that there was an erroneous fact being advanced.

168. This case is one of many that has demonstrated the need to conduct hearings in respect of disciplinary appeals. The disclosure of vital facts which had been withheld by the investigator, but discovered during the course of the hearing, have, in part, been determinative of this matter. If the undisclosed facts had been disclosed to the decision maker at an early stage, the matter would reasonably have resulted in there being no need for a case to have been brought before this Tribunal. Either the matter would have been resolved, or the investigation would have been undertaken in a different and more complete manner.

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

169. Based on the above analysis of each of the counts in respect of which the Applicant was charged, UNICEF did not establish all the relevant and necessary facts for the alleged misconduct at the required standard of clear and convincing evidence. Consequently, the facts that are asserted as established, when in fact they are not, do not qualify as misconduct.

170. It is unfortunate that the decision maker did not appear to consider the nature and quality of what was said to be evidence of the misconduct of the Applicant. The contested decision fails to consider the actual evidence and to provide any adequate analysis thereof. It is important for a decision maker to differentiate between assertions made by an investigator and the actual facts as proven. The consideration of hearsay material is not a consideration of actual evidence. The production of hearsay evidence by an investigator is entirely inappropriate unless properly corroborated. It denies a staff member under investigation his or her rights to be able to test the actual evidence. All a person proffering hearsay evidence can respond is that it was what was told to them. The failure to obtain even basic proofs of evidence, rather preferring to place reliance on unsupported assertions, does nothing to provide proof of a matter.

171. In this matter there were very serious allegations of fraud brought against the Applicant with no proof or names of individuals who were beneficiaries or complicit. There was testimony that involved alleged corruption of officials of the Government of Baluchistan, but no proof was provided to support the allegations. There may have been proof, but if not presented in the investigation report or before the Tribunal, it is mere speculation. The Applicant was said to have participated with the corrupt officials, but there was no evidence in support of such. It is also noted that the Applicant was a Programme Officer and did not sign off payments made by the Organization. These had to be checked by her superiors. It is also noted that much reliance was placed upon a witness whose evidence was excluded by the Tribunal. The Respondent also requested its exclusion. It was, as noted above, entirely contradictory in its nature. It is unfortunate that the Respondent did not

consider the contradictory nature of the evidence of this witness at an earlier point and determine how best to deal with the issue.

172. The Tribunal finds that the evidence, such as it was, for the reasons expressed above, is not capable of supporting any of the allegations against the Applicant on a clear and convincing standard of proof or on a lower standard of proof. Therefore, the sanction of summary dismissal is unlawful.

### **Remedies**

173. The Applicant prayed the Tribunal *inter alia*, to find the disciplinary sanction unlawful, to order her reinstatement to her previous position or any other position commensurate with her qualifications and experience, the removal from her personnel records of any complaints and or reference to such, restore her access to all her official records, financial compensation for irreparable moral, reputation and career damage, including financial loss for being placed on SLWOP for a continuous period of time and for being out of a job to the time of filing her submissions as a result of UNICEF's administrative actions. Therefore, the Applicant requested the Tribunal to award her compensation equivalent to two years of her net base salary.

174. The Tribunal has already noted that the claim in respect of financial loss from being placed on SLWOP is not receivable. Being a separate appealable administrative decision, it cannot be counted as consequential damage, although in a national civil court it may be.

175. The Respondent submitted that the relief sought by the Applicant is interlocutory and no longer tenable, and that even if the Applicant did not perpetrate fraud, her separation from service was warranted because she was grossly negligent in processing numerous high value transactions that resulted in fraud upon UNICEF. The Tribunal has found neither fraud nor gross negligence based on the evidence before it.

*Moral damages*

176. In respect of the claim for moral damages, the Tribunal notes that following the position taken by the Appeals Tribunal in *Kallon*, 2017-UNAT-742, granting remedy for moral damages may no longer be ascertained by the evidence from the person concerned alone, but requires “corroboration by independent evidence”. Of this, the Tribunal observed in *Ross*, UNDT-2018-108, at paragraph 79:

The Tribunal notes, nevertheless, that evidentiary matters have thus far been regulated on the statutory level, whereas jurisprudential developments do not afford sufficient notice to the addressees, especially given that the effect of the majority holding in *Kallon* on evidentiary requirements is not obvious. As a practical matter, the main source of evidence for moral damage is always the person concerned, whereas the Applicant had no reason to secure “independent corroboration” at the time when he was filing his application. It would be, therefore, permissible to rely on the affidavit filed by the Applicant, which is “evidence” in the sense of art.5 b of the UNDT Statute, and the Tribunal’s own experience and knowledge of human psyche as to the occurrence of a moral damage such as would normally be suffered under the circumstances. The proposed live testimony from the Applicant would not have any additional import.

177. The Tribunal agrees with and adopts these observations.

178. The evidence of the Applicant was such that she lost her career, for which the Tribunal will make an order rescinding the decision, with compensation in lieu. The Applicant has further claimed moral damages. There is, however, no evidence upon which the Tribunal can consider such claim.

**Referral for accountability**

179. The termination of employment is a most serious matter for any staff member. It is the end of a career.

180. As examined above, there were serious shortcomings in the manner in which the investigator conducted the investigation and the manner in which the findings of fact were presented in the investigation report. It will be for others to ascertain the reasons for this conduct, and that of her superiors to the extent that they are

party to the failure to disclose the fact of the missing files or the presentation of an erroneous fact in the investigation report. As a result, this case shall be referred to the Executive Secretary, UNICEF, for consideration of accountability pursuant to Article 10.8 of the Tribunal's Statute. The Tribunal is also concerned that those who oversaw this investigation did not either locate the errors, consider the gross hearsay nature of the evidence and the illogicality in places, or react in an appropriate manner if these were located.

181. 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, or at all, conduct interviews of important witnesses, obtain copies of relevant documents, to disclose that erroneous facts had been included in the investigation report and, more importantly, to disclose the loss of evidence to the decision maker, are all matters of very great concern. The apparent total failure of the chain of custody of the missing evidence is a matter to also be examined.

### **Conclusion**

182. The Tribunal has found for the Applicant in all matters complained of and makes the following ORDERS:

- a. The disciplinary measure of dismissal from service without notice is rescinded;
- b. Should the Respondent elect to pay financial compensation instead of rescinding the decision, the Applicant shall be paid, as an alternative, 24 months of her net base salary at the rate that she was paid at the time of her separation;
- c. The 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. Any papers referring to the disciplinary matter subject of this application, including the decision of 18 January 2017 made by the Executive Director, UNICEF, shall be removed from the Applicant's Official Status File and placed in a separate sealed file which is to have noted upon it that it is only to be opened by order of the Tribunal; and

e. This case is referred to the Executive Secretary of UNICEF for accountability pursuant to Article 10.8 of the Statute of the United Nations Dispute Tribunal.

*(Signed)*

Judge Rowan Downing

Dated this 27<sup>th</sup> day of February 2019

Entered in the Register on this 27<sup>th</sup> day of February 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva