UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2011/020
Order No.:	93 (NY/2011)
Date:	24 March 2011
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

HASHIMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. On 17 March 2011 the Applicant, a staff member of the United Nations Assistance Mission in Afghanistan ("UNAMA"), filed an application for suspension of action of the decisions to re-investigate allegations of misconduct against him following withdrawal of disciplinary charges for the same alleged misconduct, to subject him to interviews by the Office of Internal Oversight Services ("OIOS"), and to deny the Applicant his right to counsel during the investigation. The Applicant filed a request for management evaluation on 16 March 2011. Accordingly, the present application was filed under art. 2.2 of the Statute of the Dispute Tribunal, which governs suspension of action during the pendency of the management evaluation.

2. The Respondent filed his reply on 21 March 2011. On 22 March 2011 the Dispute Tribunal held a hearing on the present application. Counsel for both parties appeared before the Tribunal in person.

Facts

3. The Applicant first joined the Organisation in July 2002 as a general service level staff member with the Office of the United Nations High Commissioner for Refugees ("UNHCR"). He was promoted to the G-5 level in May 2003 and to the G-6 level in January 2006. The Applicant resigned on 30 December 2007 and was separated from UNHCR in February 2008. Prior to his resignation, he worked as an Administrative Assistant in the Travel Unit of UNHCR. In a memorandum dated 30 December 2007, accepting the Applicant's resignation, the UNHCR Representative, Kabul Branch Office, expressed his gratitude to the Applicant for his distinguished service, stating: "You can feel proud of the contribution you have made and achieved as part of our team". Subsequently, in 2008, the Applicant joined UNAMA.

4. By memorandum dated 24 June 2008 the UNHCR Representative, Kabul Branch Office, informed UNAMA that UNHCR had received a telephone call from an Italian consular official in Kabul. The official sought to verify information contained in two notes verbales dated 1 June 2008, requesting that Schengen visas be issued to the Applicant and another individual, Mr. MH, on the basis of their status as UNHCR staff members. The notes verbales stated that the Applicant was employed as an Administrative Assistant and that Mr. MH was employed as a Finance Assistant in the UNHCR Branch Office, Kabul, Afghanistan. Copies of their Afghan passports were provided with the request. A UNHCR staff member, Mr. CM, allegedly signed the notes verbales as "Assistant Representative Chief of Administration".

5. UNHCR informed UNAMA that its records indicated that the visa applications were filed when the Applicant was no longer employed by UNHCR Afghanistan but had already been employed by UNAMA. UNHCR also confirmed that Mr. MH had never worked with UNHCR in Afghanistan and that UNHCR had obtained credible information that Mr. MH was the Applicant's cousin. UNHCR also informed UNAMA that Mr. CM did not work with UNHCR in Afghanistan as at 1 June 2008, having left Kabul in September 2006, and the signature on the two notes verbales did not match the signature on record for Mr. CM and appeared to be forged. According to UNHCR, there was no record of the notes verbales in its archives.

6. On 26 June 2008, UNAMA referred the Applicant's case to the Investigations Division of OIOS for investigation and supplied copies of the documentary evidence supporting the allegations against him. In his 8 July 2008 memorandum to the Special Representative of the Secretary-General, UNAMA, the Deputy Director of the Investigations Division stated, *inter alia*, that the Investigations Division was "of the opinion that the *prima facie* evidence available obviate[d] need for any further investigation and [was] sufficient for a prompt and decisive disciplinary action". The Applicant's case was thereafter referred to the Office of Human Resources Management ("OHRM") for appropriate action.

7. By memorandum dated 25 August 2008 the Applicant was charged with misconduct. The memorandum alleged that the Applicant submitted two notes verbales to the Italian Consulate in Kabul and that these notes:

a. used the UNHCR letterhead without proper authorisation;

b. contained false information and misrepresented the employment status of the Applicant and Mr. MH; and

c. bore the forged signature of Mr. CM and misrepresented his position with the Organisation.

8. The Applicant was requested to provide OHRM, within two weeks of receiving the 25 August 2008 memorandum, his written statement or explanations. He was further advised that he "may also seek the assistance of any serving or former staff member or any other counsel in [his] defense at [his] own expense".

9. The Applicant responded to the charges on 22 October 2008. His response was prepared with the assistance of the Panel of Counsel, since replaced by the Office of Staff Legal Assistance. The Applicant stated in his reply that he had never made any requests to the Italian Consulate for Schengen visas; that he did not forge any documentation and did not make any false representations to the Italian Consulate; that the person alleged to be his cousin (Mr. MH) was, in fact, not his cousin, but a friend who left Afghanistan in or around November 2007, well before the date on the notes verbales; that the Applicant had not seen Mr. MH since his departure; and that the Applicant could be a victim of retaliation by a former UNHCR colleague, with whom the Applicant had a difficult relationship after refusing that colleague's unsubstantiated request to issue a travel authorisation.

10. On 3 November 2008 the Applicant provided an addendum to his response to the charges of misconduct. Attached to the addendum was a statement of a Mr. AK,

who claimed to be a cousin of Mr. MH. According to this statement, Mr. MH left Afghanistan and his location was unknown.

11. On 24 February 2009, a Legal Officer with the Administrative Law Unit ("ALU", presently known as the Administrative Law Section) of OHRM sent an email to the Applicant's Counsel, stating:

> We [ALU] have concluded consultations with DFS [the Department of Field Support] and OLA [the Office of Legal Affairs] following receipt of [the Applicant's] comments and have decided that the matter should be referred for further investigation prior to a decision being taken on the disposition of the matter. I understand that the Mission [UNAMA] is liaising with OIOS in respect of this investigation.
>
> We trust that [the Applicant] will cooperate fully with this further investigation in accordance with his obligations under staff regulation 1.2(r).
>
> [The Applicant] will be informed of the outcome of the investigation once a report is finalized.

12. According to the Applicant, on or around 15 August 2009 he received an email from the Chief of Operations of the Investigations Division in Vienna, indicating that OIOS would visit UNAMA to interview the Applicant with regard to the charges levied. The Applicant responded to the effect that he would not make himself available for an interview unless his Counsel, who had assisted him in preparing his response to the charges, could be present at the interview. The Applicant did not receive a further response.

13. The next development in this case occurred more than one year later, on 5 November 2010, when, according to the Applicant, a different official of the Investigations Division in Vienna wrote to the Applicant indicating that OIOS would visit UNAMA to conduct an interview with regard to the charges levied. Counsel for the Applicant responded that no interview could take place without his presence, further instructing that all communications from OIOS intended for the Applicant should go through his Counsel. According to the Applicant, no response to this email was provided to him or his Counsel.

14. By memorandum dated 14 January 2011 and received by the Applicant on 24 January 2011, the Applicant was informed by the Chief of Human Resources Policy Service of OHRM of "withdraw[al] of the current charges against [him]". The memorandum stated:

> 1. I refer to a memorandum dated 25 August 2008, charging you with misconduct in relation to the forgery of two notes verbales that were submitted to the Italian Consulate in Kabul. You were afforded the opportunity to comment on the charges and did so by memoranda dated 22 October 2008 and 3 November 2008.
>
> 2. In light of the fact that you were not interviewed during the fact-finding phase of the process, the Assistant Secretary-General for OHRM has decided to withdraw the current charges against you. In making this decision, no evaluation of the merits of your comments on the allegations has been made.
>
> 3. Please note that my decision is without prejudice to the discretion of the Organization to revisit the matter, whether through the conduct of an investigation, the laying of charges relating to the same underlying acts, or otherwise.

15. On 2 March 2011 an OIOS investigator contacted the Applicant, indicating that he would visit UNAMA to interview the Applicant as a subject of an "ex novo" investigation. On 8 March 2011 Counsel for the Applicant wrote to OIOS, stating that whereas the Applicant had been charged with misconduct, he had the right to counsel, and requesting that appropriate travel arrangements be made for him to be present at the Applicant's interview.

16. In an email dated 9 March 2011 the Chief of Operations of the Investigations Division in Vienna responded to Counsel for the Applicant, stating that the Applicant's interview was scheduled to take place between 22 and 31 March 2011; that the Applicant's attendance and full cooperation were required; that the Applicant "[would] not be afforded the right to legal counsel during his interview"; and that all future correspondence would be sent directly to the Applicant.

17. On 10 March 2011 Counsel for the Applicant responded to the email from the Chief of Operations of the Investigations Division in Vienna, expressing regret

regarding the position taken. Counsel reiterated that whereas the Applicant had been charged for the same alleged misconduct and opted to respond to the charges, he was under no obligation to respond to further queries from OIOS and that the Applicant would be advised to attend the interview but not to respond to any queries relating to the set of facts that prompted the charges of misconduct. Counsel indicated that OIOS might therefore wish to reconsider the anticipated travel to UNAMA and stated the expectation that any and all future correspondence in relation to this matter would be directed to him.

18. On 16 March 2011 the Applicant received an email from the Chief of Operations of the Investigations Division in Vienna informing him that an OIOS investigator would arrive in UNAMA the following week; that an interview was scheduled for 27 March 2011; and that the Applicant "will not be afforded the right to counsel during the interview". Counsel for the Applicant was not copied on this email, however, it was forwarded to him by the Applicant on 17 March 2011.

Applicable law

19. ST/AI/371, as amended by ST/AI/371/Amend.1, states, *inter alia*:

> **II. Investigation and fact-finding**
>
> 2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. …
>
> …
>
> 3. If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.

…

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

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

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

(c) Notify the staff member of his or her right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense, and offer information on how to obtain such assistance.

…

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

8. The entire dossier is then submitted to the Assistant Secretary-General, Office of Human Resources Management. It shall consist of the documentation listed under subparagraphs 6(a), (b) and (c) above, the staff member's reply and the evidence, if any, that he or she has produced. In cases arising away from New York, the responsible official shall promptly forward the dossier to the Assistant Secretary-General, Office of Human Resources Management.

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

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

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

Applicant's submissions

20. The Applicant's primary contentions may be summarised as follows:

Receivability

a. The decision to revisit the alleged misconduct, in particular the decision to require the Applicant's attendance and full cooperation whilst refusing his right to counsel, is an administrative decision susceptible to judicial review. The withdrawal of charges and the start of a new investigation are a patent violation of the legal maxim *ne bis in idem*.

b. Whilst OIOS has operational independence, the Secretary-General remains administratively accountable for any and all acts and omissions of officials in those offices, including decisions that breach a staff member's legal rights.

Prima facie *unlawfulness*

c. Section 9 of ST/AI/371/Amend.1 provides for only two courses of action once the Assistant Secretary-General for Human Resources Management is served with the entire dossier: namely, either to decide to close the disciplinary case or to recommend the imposition of one or more sanctions. No possibility exists under ST/AI/371/Amend.1 to withdraw the charges and launch a new investigation into the same allegations.

d. If the decision to withdraw the charges was not taken by the Assistant Secretary-General for OHRM, but by the Chief of Human Resources Policy Service of OHRM, it was *ultra vires*.

Urgency

e. The requirement of urgency is satisfied considering that the interview is scheduled to take place prior to 31 March 2011.

Irreparable damage

f. The requirement of irreparable damage is also satisfied in this case, considering that the implementation of the contested decision would result in a gross violation of the Applicant's due process rights.

Respondent's submissions

21. The Respondent's primary contentions may be summarised as follows:

Receivability

a. The contested decisions are not administrative decisions capable of being appealed. Therefore, the present application is not receivable. Where a decision constitutes but one component of a decision-making process, it does not constitute an administrative decision within the meaning of art. 2 of the Statute of the Dispute Tribunal (*Dudley* Order No. 308 (NY/2010)). The contested decisions in this case are preliminary decisions that may lead to a final decision on alleged wrongdoing at some point in the future. However, it is not until the investigative process is completed or abandoned that the subject of an investigation may have a decision that affects the terms of his or her contract. If the Tribunal were to consider individual steps of a disciplinary process as giving rise to administrative decisions, the Tribunal would supplant the position of the Administration in undertaking the day-to-day management of the disciplinary process.

Prima facie *unlawfulness*

b. The requirement of *prima facie* unlawfulness has not been met. Investigations into a staff member's possible unsatisfactory conduct are lawful and are expressly provided for in Chapter X of the Staff Rules and in ST/AI/371/Amend.1. Contrary to the assertions of the Applicant, the principle of *ne bis in idem*, or double jeopardy, does not apply.

c. The decision to withdraw the charges was not *ultra vires* and, in any event, it does not fall within the scope of the present application as the Applicant seeks to contest only the decision to start a new investigation.

d. There is no right to counsel at the investigation stage (*Zerezghi* UNDT/2010/122). The right to counsel attaches only once the disciplinary process is commenced and a staff member has been charged with misconduct. The Organisation is now conducting a new investigation into the Applicant's conduct and, accordingly, the right to counsel no longer attaches.

Urgency

e. Given that there is no contestable administrative decision, the application is premature, having been brought prior to any administrative decision having been made. However, if the Tribunal agrees with the Applicant that the impugned decision constituted an administrative decision, and that the requirements of unlawfulness and irreparable damage have been met, the Respondent concedes that the application is urgent.

Irreparable damage

f. The Applicant has not shown that irreparable harm would result from the implementation of the impugned decision. Indeed, the Applicant has not shown that any harm whatsoever would result from the implementation of the

impugned decision. Any harm that may flow from the decision can be adequately compensated financially.

Consideration

Receivability

22. As the Dispute Tribunal stated in *Hassanin* Order No. 83 (NY/2011), there are authorities indicating that this Tribunal has moved towards a less rigid and more purposive interpretation of what constitutes an administrative decision that the Tribunal is competent to review. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision (*Andati-Amwayi* 2010-UNAT-058).

23. Generally, appeals against decisions to initiate an investigation are not receivable as they are preliminary in nature and do not at that stage affect the legal rights of a staff member as required of administrative decisions capable of being appealed before the Tribunal (see *Dudley* Order No. 308 (NY/2010)). For instance, a decision to interview a staff member will, ordinarily, not be viewed as a final administrative decision affecting the staff member's legal rights. Interviews are carried out to collect information and, in any case, they are secondary to the decisions to conduct an investigation, to bring charges and to impose disciplinary measures. An interview may be one of many investigative steps and the Tribunal will not ordinarily substitute its view for that of the investigators examining the matter as to whether an interview should take place. This accords with the general principle that the Tribunal should not interfere with matters that fall within the Administration's prerogative, including lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality; otherwise, there is a danger that the Organisation's internal mechanisms would come to a grinding halt.

24. Regarding the subject of investigations, the Respondent relies on the recent ruling of the Dispute Tribunal in *Dudley* Order No. 308 (NY/2010), contending that

the contested decision is not a final decision but one that constitutes a preparatory act and is only one component of the decision-making process. The Tribunal must indicate at the outset that the *Dudley* case is clearly distinguishable from the present matter. The concerned staff member in *Dudley* sought to interdict an investigation that had not commenced and with regard to which no disciplinary charges had been levied. In the Applicant's case, there has been an investigation, the matter reached the disciplinary stage, charges were filed, and the Applicant responded to them on two occasions. Furthermore, almost two-and-a-half years after the charges were levied, they were withdrawn.

25. There may be cases when the decision to launch an investigation and the manner in which it is carried out may be so plainly unlawful and in actual or imminent breach of the staff member's legal rights so as to render such decision capable of being reviewed by the Tribunal. The fact that such a decision was made by OIOS, which exercises operational independence, would not place it outside the reach of the Tribunal, as stated in *Comerford-Verzuu* UNDT/2011/005 and *Kunanayakam* UNDT/2011/006 (see also *Nwuke* 2010-UNAT-099).

26. In the present case the Applicant contests the decisions to re-launch the investigation following withdrawal of the charges of misconduct and to interview him without allowing access to Counsel. It was submitted at the hearing by the Respondent's Counsel that the new investigation has not yet commenced as no interview of the Applicant has taken place. The Applicant claims, *inter alia*, that the Administration's refusal to allow his Counsel to be present at the interview is in breach of his contractual rights. As explained further below, after the Applicant was charged with misconduct, he acquired certain procedural rights under ST/AI/371 and the contested decisions, if implemented, would have the effect of taking away or otherwise materially altering those rights. In the peculiar circumstances of this particular case, the Tribunal finds that these contested decisions fall under art. 2 of the Tribunal's Statute.

27. Accordingly, having found the application receivable, the Tribunal will proceed to consider whether the contested administrative decisions appear *prima facie* to be unlawful, whether the application is of particular urgency, and whether the implementation of the decisions would cause the Applicant irreparable damage. The Tribunal can suspend the contested decision only if all of these three requirements have been met.

Prima facie *unlawfulness*

28. Given the interim nature of the relief the Tribunal may grant when ordering a suspension of action, an applicant must demonstrate that the decision appears *prima facie* to be unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011)).

29. There are a number of significant concerns with the lawfulness of the contested decisions in this case. Firstly, the propriety of the course of action selected by the Administration in this case is questionable. Under sec. 9 of ST/AI/371 and ST/AI/371/Amend.1, after charging a staff member with misconduct and upon consideration of the entire dossier, the Administration may proceed only with one of the following two options—(i) close the case, drop the charges, and immediately inform the staff member that no disciplinary action will be taken in relation to the matter, or (ii) impose one or more disciplinary measures. There is no other option in this case. ST/AI/371 and ST/AI/371/Amend.1 do not envisage the possibility of remanding the case for a further or fresh investigation into the same alleged misconduct, which is what, in effect, happened in the present case.

30. It ought to be stated here that the Tribunal considers that the decisions to re-launch the investigation and to interview the Applicant in the absence of his Counsel

are intrinsically linked with the decision to withdraw the charges. The Tribunal is not persuaded by the Respondent's argument that the decisions to withdraw the charges and to re-launch the investigation are not connected, and that OIOS, of its own volition and without any referral quite coincidently, five weeks after the charges were withdrawn, picked up the matter for a fresh investigation. It is clear from the record, particularly the email from ALU dated 24 February 2009, that, throughout the history of this matter, OHRM, UNAMA, and OIOS have been in contact in relation to this matter and discussed how to proceed with the Applicant's case. Indeed, it is the Respondent's own submission that it is the very act of withdrawal of the charges that apparently allows OIOS to re-investigate the matter afresh.

31. Secondly, it is doubtful whether the Administration has complied with its obligation of good faith and fair dealing with respect to the Applicant. The Applicant was charged on 25 August 2008. He responded to the charges on 22 October and 3 November 2008. While the disciplinary proceedings were ongoing and the charges were still pending, OIOS approached the Applicant with requests for interviews on 15 August 2009 and later on 5 November 2010. The Applicant insisted—correctly, in full conformity with sec. 6 of ST/AI/371 and ST/AI/371/Amend.1—that his Counsel should be permitted to attend his interviews with OIOS investigators. On each occasion OIOS failed to respond and chose not to pursue the matter any further after the Applicant indicated that his Counsel would be present at the interviews. This lends credence to the Applicant's submission that the sole purpose of the withdrawal of the charges and re-launching of the investigation was to deprive him of the procedural rights that had attached under sec. 6 of ST/AI/371 and ST/AI/371/Amend.1. At the same time, it is common cause that there is no consistency or uniformity in practice amongst the various UN entities regarding the attendance of Counsel at the investigation stage. The Tribunal is persuaded that the Respondent breached the principle of good faith and fair dealing in circumventing the application of procedural rights by the use of a procedural device which is clearly not catered for under sec. 9 of ST/AI/371/Amend.1.

32. In his submissions the Respondent relied on the Investigations Manual of the Investigations Division of OIOS ("OIOS Investigations Manual"). The exact place of this Manual in the Organisation's legal hierarchy remains unclear, but it is certainly below properly promulgated administrative issuances such as the Secretary-General's bulletins and administrative instructions, even though it covers such an important subject. In any event, even this document, relied on by the Respondent, permits OIOS to provide assistance to OHRM during the disciplinary stage of the process, including with regard to making further enquiries based on the information provided by the concerned staff member in response to the charges of misconduct. Section 2.3.3 of the Manual, entitled "Investigation Responsibilities in the Justice Process", states, *inter alia*:

> The staff member's response when informed of reports of misconduct against him or her may require further information from the investigator. OIOS is, therefore, often requested to provide extensive comments on the staff member's reply. In addition, new information provided by the staff member in his or her reply to the charge may require further inquiry to establish the authenticity and veracity of the information.

33. Accordingly, if the Administration believed that any further information was required, there was nothing to preclude OIOS from making enquires with the Applicant as part of the disciplinary process. No other reasonable explanation has been provided to the Tribunal as to why this was not done other than the one suggested by the Applicant—namely, that the purpose of the re-launching of the investigation was to circumvent the procedural requirements of sec. 6 of ST/AI/371/Amend.1. It would be a disturbing precedent for the Tribunal, after such a long passage of time, and in the absence of any reasons whatsoever, to allow a fresh fact-finding investigation that circumvents rights that accrued during the disciplinary process by simply wiping the slate clean and starting all over again.

34. Thirdly, it is unclear on what basis a matter that has gone through the disciplinary process is being investigated again two-and-a-half years after the charges were made, when memories may have faded, witnesses departed, and the collation of

evidence rendered unsatisfactory by the passage of time. It is a general principle of administrative law that where there is no time specified for the doing of an act, it should be done within a reasonable time. The reasons for this include the need to have predictability, finality and speedy resolution of issues, which is clearly in the interests of both parties (see also UN Administrative Tribunal Judgment No. 1076, *Shehabi* (2002)). What constitutes a reasonable time of course depends on a number of factors, including the length of delay and the reasons therefor. In this case the Tribunal has not been furnished with any reasons for the delay of two-and-a-half years.

35. The desirability for finality of disputes within the workplace cannot be gainsaid. In its Judgment No. 1239 (2005), the UN Administrative Tribunal stated, at para. V:

> [I]f a proceeding is brought against a staff member, he or she is entitled to have those proceedings brought to a conclusion and to hear the results. If not, proceedings for, for example, termination for unsatisfactory services would "loom as a black cloud over the staff member's record, a cloud that the staff member is powerless to defuse because there is no finality".

36. It must be recalled that the Deputy Director of the Investigations Division stated that the Division was "of the opinion that the *prima facie* evidence available obviate[d] need for any further investigation and [was] sufficient for a prompt and decisive disciplinary action". Paragraph 6 of the charge letter, dated 25 August 2008, reiterated the Investigations Division's opinion that the *prima facie* evidence available at the time obviated the need for any further investigation and "formed a sufficient basis for disciplinary proceedings to be initiated against [him]".

37. If any additional facts required further clarification after the Applicant's reply to the charges in October 2008, such enquiries should have been made in a timeous manner and with the full guarantee of due process rights that apply during the disciplinary process. The Respondent has not submitted that any new and previously

unknown facts have arisen at the time of the decision to withdraw the charges and the decision to re-launch the investigation.

38. The Applicant submits that, if he is again charged with misconduct on the basis of the same set of facts to which he has already filed a response, it would contravene the rule against double jeopardy. The Respondent counters, in effect, that no evaluation of the merits has been made. However, it is unclear how the decision to withdraw the charges could have been made without an evaluation of the merits.

39. Fourthly, in light of the Tribunal's finding that the decisions to withdraw the charges and to re-investigate the matter are intrinsically linked, further questions arise with respect to whether actions undertaken by the Administration regarding the Applicant's case were pursuant to a properly delegated authority. The memorandum dated 14 January 2011, by which the charges were dropped and the disciplinary case was closed, was signed by the Chief of Human Resources Policy Service of OHRM. Although in para. 2 the memorandum stated that the decision to withdraw the charges was made by the Assistant Secretary-General for OHRM, para. 3 stated "my decision", indicating that the decision to withdraw the charges may have been made by the Chief of Human Resources Policy Service of OHRM. It is not certain who the actual decision-maker was and, if it was the Chief of Human Resources Policy, whether she had the delegated authority to make it. Moreover, para. 3 of the memorandum states: "Please note that my decision is without prejudice to the discretion of the Organization to revisit the matter, whether through the conduct of an investigation, the laying of charges relating to the same underlying acts, or otherwise". As explained above, the legal bases for this caveat are unclear.

40. For all the reasons stated above, the Tribunal finds that the contested decisions are *prima facie* unlawful.

Urgency

41. The Tribunal finds, and both parties agree, that the requirement of urgency is satisfied as the interview is scheduled to take place before the end of March 2011.

Irreparable damage

42. The Respondent contends that, as the Applicant has been gainfully employed all along, he has not and would not suffer any irreparable harm as any wrong would be compensable in the final analysis.

43. The requirement of irreparable damage has been discussed in several rulings of the Tribunal. It is generally accepted that mere financial loss is not enough to satisfy this requirement (*Fradin de Bellabre* UNDT/2009/004, *Utkina* UNDT/2009/096).

44. As the Dispute Tribunal stated in *Jaen* Order No. 29 (NY/2011),

> In each case, the Tribunal has to look at the particular factual circumstances. In many instances—but not all—the Tribunal will be able to compensate the harm to professional reputation and career prospects should an applicant pursue a substantive appeal and should the Tribunal decide in his or her favour. Indeed, art. 10.5 of the Tribunal's Statute allows compensation for non-pecuniary loss, and such compensation has been awarded by both the Dispute Tribunal and the Appeals Tribunal. However, the Dispute Tribunal's ability to remedy a loss is not absolute. There are certain types of damages of a non-pecuniary nature that fall under the category of irreparable. In my view, such damages may stem from breach of a right that is so valuable that it cannot be expressed in mere financial terms. … Accordingly, if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied (see also *Fradin de Bellabre*). The Tribunal's determination in this respect, of course, will depend on the particular circumstances of each case.

45. The Tribunal finds that permitting the investigation to proceed in the circumstances of this case would subject the Applicant to a *prima facie* unlawful

process in violation of his acquired procedural rights. The Tribunal finds that in the circumstances, the only way for the Tribunal to ensure that those acquired rights are truly respected is to grant interim relief. Accordingly, the Tribunal finds the requirement of irreparable harm to be satisfied.

Observations

46. For the reason stated above, the Tribunal does not need to consider within the confines of the present Order the broader question of whether staff members are entitled to the assistance of counsel during fact-finding investigations. However, I find it appropriate to make some general observations.

47. Firstly, I note that there is case law of the UN Administrative Tribunal, as well as the Dispute Tribunal, expressing conflicting views as to whether right to counsel exists during the fact-finding investigation stage.

48. Secondly, it appears from the parties' submissions as well as from the case law of the Dispute Tribunal and the UN Administrative Tribunal that there may be differences in the scope of procedural rights afforded during fact-finding investigations depending on the entity or office of employment. It is an unsatisfactory state of affairs that staff members of the Organisation, who all are in a contractual relationship with the Organisation by virtue of their contracts of employment, are treated differently with respect to their important procedural rights depending on their office of employment. This is an important matter with respect to which, in the absence of clear guidance, arbitrary discretion and discrepancy may be the end result.

49. Thirdly, I note that none of the staff regulations, staff rules, bulletins, and administrative instructions stipulate the procedural rights that apply during fact-finding investigations. For example, none of these provisions state clearly whether the right to counsel shall or shall not attach during fact-finding investigations. This is hardly surprising considering that ST/AI/371 was promulgated before OIOS and many other investigative offices were created and thus the instruction could not have

envisaged the comprehensive investigative process that is now in place in the UN Secretariat and other UN entities, including the United Nations Development Programme and the United Nations Children's Fund. It may be that the time is right for the Organisation to consider whether the key procedural aspects of the fact-finding investigative process should be spelt out in an authoritative legal document, adopted pursuant to a properly delegated authority, with details of less significance set out in properly issued manuals and guidelines.

Conclusion

50. The Tribunal orders suspension of action, during the pendency of the management evaluation, of the decision to re-launch the investigation of the Applicant in connection with the matters raised in the charge letter dated 25 August 2008, including the decision to interview the Applicant as part of this investigation.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 24th day of March 2011