



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/056/
UNAT/1569
Judgment No.: UNDT/2011/123
Date: 30 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

JOHNSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Leonard Sclafani

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006;
and

c. Whether the Applicant's due process rights were observed during the interrogations of the Applicant subsequent to his being put on SLWFP.

Facts

5. The following outline is primarily based on the material submitted to the Tribunal by the parties, as well as on the chronology of facts provided in Report No. 1916 of the Joint Appeals Board ("JAB") of 30 August 2007, to which the parties agreed in their 30 August 2007 jointly-signed statement. To provide historical context to the present case, the Tribunal has also made certain references to some factual findings from its judgment in *Cabrera* UNDT/2011/081 of 6 May 2011, which related to the same issues as those in the present case. The Tribunal takes judicial notice of these findings, while also noting that none of the facts for which judicial notice has been taken bear on the outcome of the present case.

6. The Applicant joined the Organization in July 1994 as a Logistics Officer in the United Nations Operation in Somalia. Three years later he assumed the post of Contracts Management Officer within the United Nations Angola Verification Mission. In April 1999, the Applicant was appointed Officer-in-Charge of the Transport Section, Department of Peacekeeping Operations ("DPKO"), at United Nations Headquarters. In April 2004, while still assigned to DPKO, the Applicant was deployed to Khartoum, Sudan, as Chief Administrative Officer ("CAO") of the United Nations Advance Mission in the Sudan ("UNAMIS"). The Applicant also later served as CAO with the United Nations Mission in the Sudan ("UNMIS"). At the time of his application to the JAB, the Applicant was serving as Chief, Logistics Operation Section ("LOGOPS"), Logistics Support Division ("LSD"), Office of Mission Support. His fixed-term appointment was to expire on 30 June 2007.

7. On 15 November 2006, the Applicant was returned to duty after his SLWFP, although he was advised that he would not be permitted to resume his duties as CAO, UNMIS, or to return to his post at Headquarters as Chief, LSD/LOGOPS. The Respondent's representatives also informed the Applicant that he could not return to duty within LSD, but no explanation has been given for this restriction.

2005 and early 2006 developments and the 2005 Draft and Final Reports

9. On 22 June 2005, the General Assembly adopted resolution 59/296 (Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: cross-cutting issues), paragraph IV of which requested OIOS to conduct a comprehensive management audit of the Department of Peacekeeping Operations (“DPKO”).

10. On 30 November 2005, the private consultancy firm, Deloitte and Touche, issued a report on “Assessment of Internal Controls in the United Nations Secretariat Procurement Operations” in response to a 4 October 2005 request from the Secretariat to conduct “a six-week, forward-looking diagnostic assessment of internal procurement controls”.

11. On 20 December 2005, OIOS/IAD prepared draft internal Audit Report AP2005/600/20 titled “Comprehensive Management Audit of the Department of Peacekeeping Operations—Procurement” (“the 2005 Draft Report”). From *Cabrera*: the 2005 Draft Report included a summary of the 2003 and 2004 Draft Reports and was submitted to DM and DPKO as a draft report on 20 December 2005, with a request for comments from DM by 31 December 2005.

12. The 2005 Draft Report associated the Applicant by name with several procurement cases where OIOS claimed that so-called “fraud indicators” existed—the alleged unnecessary acquisition of a heavy helicopter in 2000, the alleged attempt in 2004 to inflate the volumetric fuel estimate for the short-term fuel contract for UNMIS, and the alleged acquisition of avia

contents of [the 2005 Draft Report] and was asked to provide an individual written reply. [The Applicant] complied with this request, researching one particular aspect of the report's findings and providing his submission to DPKO on 13 January 2006, which was incorporated in DPKO's comment concerning the draft audit report ...”;

b. In his 28 June 2007 written interrogatories to the JAB, the Respondent states that:

On 8 January 2006, the [Applicant] was recalled to Headquarters to assist in the preparation of DPKO's response to the conclusions contained in the draft OIOS report [assumedly, referring to the 2005 Draft Report] and was thereby made aware of the contents of the report. Hence the [Applicant] was informed of the nature and seriousness of the preliminary findings concerning unsatisfactory conduct in connection with certain procurement exercises, and of the facts that had been established to date. The [Applicant] provided his full cooperation to DPKO in connection with the preparation of its response to the draft report.

c. In the Applicant's response to Order No. 121 (NY/2011) of 21 April 2011, para. 4(b), the Applicant, however, states that he only received a copy of the 2005 Draft Report on or about 16 August 2006, as part of the JAB appeal, although in para. 6(b) of Order No. 121, the Applicant notes that, on 9 January 2006, he was given “photocopies extract[s]” of the 2005 Draft Report that “contained only the paragraphs in

Creation of the OIOS/PTF and its terms of reference

16. From *Cabrera*:

a. By email dated 13 December 2005, the then-USG/OIOS, Ms. Inga-Britt Ahlenius, informed Mr. Jayantilal Karia (then Officer-in-Charge, United Nations Procurement Service (“UNPS”)) that she had requested the OIOS/PTF to “investigate” cases involving Thunderbird Industries Limited Liability Company (LLC) (emphasis added):

Jay,

I have asked the Procurement investigation taskforce led by Paul Roberts to include in their scope the cases involving Thunderbird that have already been investigated previously. In fact I did give that message already some time ago in an e-mail to Mr. Burnham.

Regardless of the investigation process however, I believe management has a responsibility to act decisively to protect the organization whenever there is adequate reason to believe the organization is at risk. Nothing should stop your action to suspend any vendor or staff member that violates the procurement rules or staff rules ...

Best Regards,

Inga-Britt Ahlenius

b. On 12 January 2006, Ms. Ahlenius, approved the terms of reference for the OIOS/PTF to investigate allegations of wrong-doing in United Nations procurement activities. In its 2006 Report, the OIOS/PTF itself has acknowledged that the creation of the OIOS/PTF was “the result of perceived problems in procurement identified by the Independent Inquiry Committee into the Oil for Food Programme (IIC), and the arrest and conviction of a United Nations Officer”.

c. According to the OIOS/PTF terms of reference, the following decisions were made (emphasis added):

The United Nations on Monday *ordered eight staff members to take paid leave as part of its expanding investigation of fraud and mismanagement in U.N. [United Nations] purchasing for the world body's far-flung peacekeeping operations.*

...

... Secretary-General Kofi Annan has ordered the U.N. internal watchdog *to cooperate with an ongoing criminal investigation by the U.S. attorney's office.* That cooperation has already led to a guilty plea by one U.N. procurement officer, Alexander Yakovlev, who admitted to wire fraud and money laundering in federal court. A probe of the U.N. oil-for-food program had also implicated Yakovlev in corruption in the Iraq operation.

A senior U.N. official, speaking on condition of anonymity because of the sensitivity of the issue, *said the internal procurement audit outlined mismanagement and potential cases of fraud.*

...

19. On 19 January 2006, an internal press release from the United Nations Department of Public Information was issued, and contained the exact names, departments and positions of the eight staff members placed on SLWFP.

20. On 30 January 2006, by an email broadcast to the staff members at the United Nations Headquarters, the Secretary-General stated (emphasis added):

As you know, we are in the midst of a rigorous effort to strengthen management, oversight and accountability throughout the Secretariat, which I regard as essential to the future functioning and credibility of our Organization. As part of that process, we are reviewing our procurement policies, procedures and activities. Indeed, procurement has grown rapidly, from \$400 million a few years ago to more than \$2 billion today. We are also painfully aware that problems in this area have come to light in the past year. If the United Nations is to faithfully serve the world's people, we must remove any hint of suspicion and put in place a professional and trustworthy procurement system.

Last June, the General Assembly requested a comprehensive management audit of the Department of Peacekeeping Operations. From September to December, the Office of Internal Oversight Services performed the procurement portion of that review. Its report documents various instances of non-compliance with procurement rules, and indicates that more serious wrongdoing may have occurred

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The 2006 Report and the Applicant's return to duty

30. On 13 September 2006, the OIOS/PTF presented its final report regarding the allegations against the Applicant (“the 2006 Report”).

31. The OIOS/PTF concluded that the Applicant had not engaged in any fraudulent activity, but had demonstrated a lack of managerial oversight:

...

206. It is evident that certain transgressions were presented to [the Applicant] after they had materialized, and that [the Applicant] was forced to react to a situation in which rules and/or policies were already ignored. Nevertheless, as the Mission's CAO it was incumbent upon [the Applicant] to establish controls to avoid future reoccurrences, create an environment mindful of the need to adhere to the Organization's financial and procurement rules, and operate within existing rules himself—setting an appropriate example. In sum, there must be a cumulative effect when findings intimate similar conduct, namely a lack of managerial oversight and the lack of proper controls to secure adherence to these rules.

...

32. On 15 November 2006, the Applicant returned to duty under the conditions stated in para. 7 of this Judgment.

33. On 4 December 2006, the Applicant provided his written response to the 2006 Report.

34. On 14 December 2006, the Assistant Secretary-General for Peacekeeping Operations, DPKO, sent a memorandum addressed to all staff of the Office of Mission Support, DPKO, informing them, in relevant part, as follows (emphasis added):

I am extremely pleased to announce that effective 17 January 2006, [the Applicant] returned to duty at DPKO headquarters. He has joined

duties and obligations of staff in such cases and the recourse available to them.

38. On 11 August 2008, the Respondent rejected the JAB recommendations informing the Applicant that “the Secretary-General is of the view that it cannot be determined that the decision to place you on SLWFP was taken in a manner that resulted in a violation of your due process rights or in damage to your reputation...”.

39. In his reply to Order No. 121 (NY/2011), the Respondent explains that the reason the Respondent rejected the JAB recommendation in the Applicant’s case was that the Applicant “was reprimanded”. (It should be noted that this “reprimand” was never issued pursuant to the processes of Organization’s administrative instructions, is the subject of a separate analysis in Case 2 (Judgment No. UNDT/2011/124, and has been determined by the Tribunal to have

cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization;

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

...

43. Former staff rule 110.2 (Suspension during investigation and disciplinary proceedings) stated as follows:

(a) If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. The suspension shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.

(b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reason for the suspension and its probable duration.

...

44. Former staff rule 110.3 (Disciplinary measures) stated as follows:

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

...

(iv) Suspension without pay;

...

(b) The following measures shall not be considered to be disciplinary measures, within the meaning of this rule:

(i) Reprimand, written or oral, by a supervisory official;

(ii) Recovery of moneys owed to the Organization;

(iii) Suspension pursuant to rule 110.2.

45. Former staff rule 110.4 (Due process) stated as follows:

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how or why the Respondent accepted the JAB recommendations for payment of two years' salary to another staff member and 18 months' salary for two other staff members placed on SLWFP under similar circumstances; and

h. The Applicant has suffered public humiliation, damage to his career and reputation, and psychological injury; the Applicant was effectively prevented from competing for a vacant post at a higher level within the Organization.

Respondent's contentions

48. The Respondent makes the following primary contentions:

a. The Tribunal should assess whether or not the exercise of discretion was plainly unreasonable or manifestly unjust;

b. The Applicant bears the burden of proving that the Organization exhibited bias and demonstrated a lack of good faith;

c. The decision to place the Applicant on SLWFP was taken on the basis of the draft 2005 Report, and the Applicant was able to reply to it;

d. It was manifestly reasonable to conclude that this was an exceptional case under former staff rule 105.2(a)(ii); the Respondent was not obligated to look behind the fraud indicators as they stood at the time, but rather to take appropriate action on the basis of those findings; "this was a large-scale investigation of an unprecedented nature, following indications of irregular activity";

e. The Applicant was given a reason for placing him on SLWFP as an administrative measure to "assist the Organization in conducting a full assessment of the situation";

f. In concluding whether placing the Applicant on SLWFP was in the best interests of the Organization, the Respondent “considered how such a sensitive investigation would be perceived and the risks of accusations against those involved”; the decision to place the Applicant cannot be dependent on evidence that the Applicant would have interfered with the investigation; “perception of professionalism of the investigation was a legitimate consideration” in placing the Applicant on SLWFP;

g. The Applicant’s due process rights were not violated in deciding whether to place the Applicant on SLWFP; in particular, the Applicant was provided a copy of the Draft 2005 Report and the Applicant provided his comments on it that were communicated to the Chef de Cabinet on 16 January 2006; and

h. The Respondent relies on *Zerezghi* UNDT/2010/122 for authority.

Consideration

Did the Respondent properly exercise his discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006?

Was former staff rule 105.2(a)(i) properly relied upon to place the Applicant on SLWFP?

49. In placing the Applicant on SLWFP, the Respondent has attempted to characterize the SLWFP measure as a non-disciplinary measure by stating to the Applicant that “... your placement on special leave with full pay [pursuant to former

50. The Tribunal notes the discussion in *Kamunyi* UNDT/2010/214 on the issue of placing a staff member on SLWFP under former staff rule 105.2(a)(i) under circumstances that were disciplinary in nature. This Tribunal agrees with and adopts the *Kamunyi* reasoning that former staff rule 105.2 did not permit placing a staff member on SLWFP where an investigation was being made into possible wrongdoing by that staff member. To use former staff rule 105.2 in such a manner would render the provisions of former Chapter X of the Staff Rules and ST/AI/371 meaningless, since the protections of former Chapter X and ST/AI/371 would not need to be respected when the more general former staff rule 105.2 could be relied upon.

51. As stated in *Kamunyi*, former staff rule 105.2 concerned special leave. It was located in Chapter V of the former Staff Rules under the heading, “Annual and special leave”, which provided for annual leave, special leave and home leave. Under former staff regulation 5.2, special leave could be authorized by the Secretary-General in “exceptional cases”.

52. The policy behind former staff rule 105.2 was that where a staff member had reason to request special leave, s/he might do so for the reasons stated in the rule. Special leave could only be granted in exceptional circumstances, including advanced study, research, extended illness, and child care. No reference was made in former staff rule 105.2 to disciplinary measures as possible grounds to impose leave upon a staff member.

53. The Tribunal concurs with and adopts the *Kamunyi* findings that the phrase in former staff rule 105.2 “in the interest of the Organization” constrained the discretion of the Secretary-General in granting special leave. The words “exceptional cases” related to situations referred to earlier in the same staff rule, such as where the staff member was undertaking research that would benefit the United Nations, or where a staff member was unable to perform his or her duties by reason of illness or child care obligations. The phrase “exceptional cases” was not intended to be a catch-all that extended to Chapter X of the former Staff Rules on disciplinary measures.

54. When the Applicant was placed on SLWFP, the Organization in fact was conducting an investigation into “possible fraud, abuse and waste” (30 January 2006 Secretary-General letter to staff) and the Organization was deemed “at risk” (13 December 2005 email of then-USG/OIOS, Ms. Ahlenius, to the then Officer-in-Charge, UNPS). The exact nature of the OIOS/PTF investigation is discussed below in this Judgment. The reasons for placing the Applicant on SLWFP did not fall under the rubrics of advanced study, research, extended illness, and child care of former staff rule 105.2(a).

55. Since the Tribunal has determined that former staff rule 105.2(a)(i) did not permit placing a staff member on SLWFP where an investigation into possible wrong-doing by a staff member was being made, the Tribunal will not address, as being inapplicable, the parties’ contentions regarding “exceptional circumstances” under former staff rule 105.2(a)(i).

56. Juxtaposed against provisions of Chapter V of the former Staff Rules, regarding annual leave, special leave and home leave, are the provisions of Chapter X (Disciplinary measures and procedures).

57. Under former staff rule 110.3(b) in Chapter X, the only measures that were not considered to be disciplinary measures within the meaning of former staff rule 110.3 were: (i) reprimand, written or oral, by a supervisory official; (ii) recovery of moneys owed to the Organization; and (iii) suspension pursuant to rule 110.2.

58. Omitted from the list of non-disciplinary measures under former staff rule 110.3(b) was any mention of placing a staff member on leave pursuant to former staff rule 105.2(a)(i), thus suggesting (as determined in *Kamunyi*) that former staff rule 105.2(a)(i) had a different purpose behind it.

59. Stated another way, the Respondent’s principal argument in this case is that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) was an “administrative measure” only and not disciplinary in nature. However, the listing

of non-disciplinary measures in former staff rule 110.3(b) did not include placing a staff member on SLWFP under former staff rule 105.2(a)(i).

60. Moreover, the 16 January 2006 letter from Mr. Malloch Brown to the Applicant placing him on SLWFP indicates that the decision was taken at the highest level (by the Secretary-General himself), which would not make any sense at all if putting the Applicant on SLWFP was “administrative” in nature.

61. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP and that the Organization did not properly apply its regulations, rules and administrative issuances, when placing the Applicant on SLWFP; this legal determination, in and of itself, would form a sufficient basis for awarding compensation to the Applicant in this case.

Was the OIOS/PTF investigation a preliminary investigation under ST/AI/371, sec. 2, or a formal investigation under ST/AI/371, sec. 6?

62. Having determined that former staff rule 105.2(a)(i) was not properly relied upon as authority for placing the Applicant on SLWFP, the next inquiry is whether the OIOF/PTF investigation constituted a preliminary investigation under ST/AI/371, sec. 2, or whether it, in fact, had the purpose and aims of a formal investigation under ST/AI/371, sec. 6. This inquiry is important, for it determines whether the act of placing the Applicant on SLWFP constituted a *de facto* suspension for disciplinary purposes and whether the Applicant should have been afforded certain due process rights as a result.

63. A preliminary investigation under ST/AI/371, sec. 2, is differentiated from a formal investigation under ST/AI/371, sec. 6, as occupying different places within the overall structure of ST/AI/371. The distinct procedural steps for disciplinary matters are:

a.

...

IV. Having given due consideration to the foregoing, the Tribunal will next state its decision. First, it wishes to underline the importance that procedure has, an importance which has been emphasized in recent years throughout developed legal systems, under the title of due process and otherwise known as the principle of no punishment *sine processu*. That importance has been repeatedly highlighted in the various decisions of appropriate organs of the United Nations system and has been further emphasized and developed by the case law of this Tribunal. ...

V. In conclusion, the Tribunal is of the opinion that *the assurances of due process and fairness*, as outlined by the General Assembly and further developed in the rules of [the United Nations Development Programme], *mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees*. Moreover, the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*.

...

66. Certainly, the OIOS/IAD audit reports spanning a three-year period of time (the 2003, 2004 and 2005 Draft Reports—all in draft form) provided the Organization with “reason to believe” that the eight staff members in question had engaged in

19 January 2006 United Nations press release that also linked the eight staff members to an on-going criminal investigation by the United States Attorney for the Southern District of New York.

68. These identifications of the eight staff members and their linkage to criminal wrong-doing meant that the investigation by the OIOS/PTF had long since passed the preliminary stage and that a *de facto* investigation into actual misconduct was taking place.

69. The 14 December 2006 memorandum from the ASG/DPKO to DPKO staff—issued *after* the OIOS/PTF had concluded its work (on 13 September 2006)—provides the definitive answer to whether the OIOS/PTF acted as a preliminary or a formal investigation mechanism under ST/AI/371. In this memorandum, it is stated that, as a result of the OIOS/PTF investigation, the Applicant had been “specifically cleared” of any instance of “fraud or criminal wrong-doing”. To be cleared of wrongdoing means that the Applicant had been ~~is not~~ suspected of wrongdoing when he

wrong-doing”, the Applicant should not have been reprimanded and should have been returned to his former position within the Organization.

71. This Tribunal notes the case of *Zerezghi* UNDT/2010/122, in which a staff member challenged the lack of due process rights during an OIOS investigation. The Dispute Tribunal there held that the due process rights of ST/AI/371 did not exist during the investigation, which this Tribunal believes is a reference to the preliminary investigation under ST/AI/371, sec. 2.

72. The Applicant’s case is fundamentally different from *Zerezghi*: in that case, at the time the applicant (*Zerezghi*) was interviewed by OIOS, the respondent had not formed any opinion one way or the other (the purpose of a preliminary investigation) as to the likelihood that the applicant likely had committed the acts in question. For the eight staff members placed on SLWFP, including the Applicant, by the time the then-USG/OIOS, Ms. Ahlenius, on 13 December 2005, decided to constitute a special OIOS procurement task force, the Respondent had already decided that the eight staff members should be the target of an investigation into a number of cases of “possible fraud, abuse and waste” and “procurement wrongdoing”, which was announced in the public realm.

73. Thus, the 2006 OIOS/PTF investigation from January-August 2006 into the activities of the eight staff members who were placed on SLWFP *cannot* be regarded as a preliminary investigation only under ST/AI/371, sec. 2.

74. The Tribunal finds that, having passed the threshold of a preliminary investigation, the OIOS/PTF investigation was not a preliminary investigation under ST/AI/317, sec. 2, but rather constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP; this legal determination forms a second basis for awarding compensation to the Applicant in this case.

obligations of staff members; unlawful acts (for instance, theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises; misuse of office, abuse of authority, breach of confidentiality, abuse of United Nations privileges and immunities; and acts or behaviour that would discredit the United Nations.

82. From the above, a suspension under former staff rule 110.2 constitutes an involuntary directive for the staff member to cease all work-related duties and responsibilities for some period of time (defined at the outset but normally not greater than three months) pending completion of an investigation into possible grave wrongdoing, including acts or behaviour that would discredit the United Nations. For a suspension to occur, the Organization must officially charge a staff member with misconduct and the decision must be that of the Secretary-General or his designate. The staff member should also be given reasons for the suspension.

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doing”, mirroring the assessment contained in ST/AI/317, sec. 9, following a formal investigation that the ASG/OHRM should make an assessment whether misconduct has occurred (the Secretary-General would not be involved in making an assessment on a preliminary investigation);

c. The 13 December 2005 email from the then-USG/OIOS, Ms. Ahlenius, to the then Officer-in-Charge, UNPS, Mr. Karia, specifically

fraud, abuse, and waste”—conduct that clearly requires the procedural protections of ST/AI/371;

h. The OIOS/PTF Terms of Reference identified the problems within the Procurement Division as being “of such a magnitude” as to warrant the creation of the OIOS/PTF (a special *ad hoc* task force), reflecting concern over conduct of “such a nature and gravity” that could warrant an investigation and suspension under ST/AI/371, sec. 4;

i. The 15 April 2006 letter from Ms. Grant, Officer-in-Charge, ALU/OHRM, to the Applicant stated that placing the Applicant on SLWFP was “intended to prevent accusations that key personnel involved in procurement influenced the outcome of the investigations”, reflecting the concern in ST/AI/371, sec. 4, that suspension may be contemplated “if there is a risk of evidence being destroyed or concealed”;

j. The same 15 April 2006 letter from

suspension, the Organization's failure to file a formal charge of misconduct against the Applicant is all the more striking.

85. In reality, the Respondent charged the Applicant with misconduct on a *sub silentio* basis, made a decision that the case against the Applicant should be pursued, and constituted the special OIOS/PTF to look into the matter. The impression conveyed is that of a purposeful denial of due process rights for all eight staff members concerned, including the Applicant.

86. The Tribunal finds that the Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006.

87. The Tribunal also finds that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* disciplinary suspension under former staff rule 110.2 and ST/AI/371, following which the Organization should have implemented the due process procedures and protections of ST/AI/371, sec. 6.

88. These legal determinations form additional bases for awarding compensation to the Applicant in this case.

Were the Applicant's due process rights observed when the Secretary-General exercised his discretionary authority to place the Applicant on Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006?

89. Having determined that that the Organization erred in placing the Applicant on SLWFP under former staff rule 105.2(a)(i), that the Applicant was being formally investigated under former staff rule 110.2 and sec. 6 of ST/AI/371, that the act of placing the eight staff members on SLWFP constituted a *de facto* suspension under former staff rule 110.2 and sec. 6 of ST/AI/371, and that the provisions of ST/AI/371 should have applied, it is necessary to dete

93. In response, the Applicant observed that “there is nothing about the nature of my duties or those allegations ... that would suggest I could, or would, interfere with on-going investigations”.

94. The Tribunal is not convinced that the reasons proffered by the Organization formed a sufficient basis for placing the Applicant on SLWFP. The goal of protecting witnesses was not achieved, since the staff members who were placed on SLWFP were not directed to avoid speaking with their colleagues or from entering United Nations buildings while on SLWFP. Further, the Respondent has not provided any objective evidence to show that the Applicant would, or could, have tainted the OIOS/PTF investigation. Therefore, the rationale advanced by the Respondent for placing the Applicant on SWLFP is not supported by the facts in this case.

95. Most problematic, however, is the following explanation proffered by the Respondent in his closing statement, para. 15 (emphasis added):

... In concluding what is in the interests of the Organization, the Respondent considered how such a sensitive investigation would be perceived and the risks of accusations against those involved. A concern that, due to the sensitivity of the investigation, accusations of interference may be made was entirely legitimate and to act on the basis of such concern was reasonable. It may be that additional evidence that the Applicant would have actually interfered in the investigation would have strengthened the conclusion that his placement on SLWFP was in the interests of the Organization, but the decision cannot be dependent on such evidence. To require such evidence would restrict the Respondent’s discretionary authority to an excessive degree.

96. The Tribunal construes this as an admission by the Respondent that the rationale for placing the Applicant on SLWFP was not based on any demonstrated fact that would present potential harm to the Organization, but that the Applicant was placed on SLWFP solely to guard against perceptions that might occur. The decision to place the Applicant on SLWFP was solely “due to the sensitivity of the investigation” and out of concern that “accusations of interference may be made”.

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109. The Tribunal finds that the Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant subsequent to his being put on SLWFP. This legal determination forms an additional basis for awarding compensation to the Applicant in this case

Compensation

110. Under the judgment of the United Nations Appeals Tribunal in *Antaki* 2010-UNAT-096, the Dispute Tribunal has the unquestioned discretion and authority to quantify and order compensation under art. 10.5 of its Statute for violation of the legal rights of a staff member, as provided under the Staff Regulations, Staff Rules, and administrative issuances.

111. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (see *Wu* 2010-UNAT-042).

112. The very purpose of compensation is to place the staff member in the same position s/he would have been in, had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059, *Iannelli* 2010-UNAT-093).

113. The Appeals Tribunal has specifically determined that under art. 10.5(a) of the Statute, an award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization, which is prohibited under art. 10.7 of

Pecuniary, or economic, damages

115. The Tribunal determines that the compensation award made in this case reflects a tangible economic loss to the Applicant.

conduct that had been the direct cause of a “real disturbance” in a difficult moment of the staff member’s life).

119. In a long line of cases, the former Administrative Tribunal granted compensation for moral injury without exact proof of the moral injury being required. Under *Mmata* 2010-UNAT-092, the Appeals Tribunal awarded compensation for egregious conduct surrounding an investigation (“It is apparent from the reasons given ... that this case is particularly egregious, commencing with the findings of the obviously biased investigation ... from the outset”).

120. The Applicant’s case is strikingly similar to *Makil*, a case which also involved placing the staff member on special leave with full pay. In *Makil*, the former Administrative Tribunal presumed the injury was from the circumstances of the breach of rights which included: (a) placing the staff member on special leave with full pay; (b) expelling him from the premises in a precipitous manner; and (c) refusing to give fellow staff a reason for the applicant’s placement on special leave with full pay, which likely caused people to believe that his honesty was being impugned or that he was being excluded from his office so as to prevent him from altering or destroying evidence. In *Makil*, the former Administrative Tribunal observed that nominal damages might be an appropriate measure of compensation where a “mere technical breach of a right” has occurred and where no actual damage has been inflicted, but held that “a more appropriate measure of compensation in relation to the Applicant’s claim under this heading [was] necessary”.

121. The Applicant’s case is also strikingly similar to that of the former Administrative Tribunal in Judgment No. 1029, *Bangoura* (2001), which involved the dissemination of information by a UN spokesperson that had not been verified or corroborated and which caused injury to the staff member’s reputation (see para.

staff member of the United Nations whose reputation is permanently affected as a result, with all the serious consequences that this entails.

122. In the former Administrative Tribunal's Judgment No. 997, *Van Der Graaf* (2001), moral damages were granted for the humiliation brought upon the Applicant, which was considered disproportionate and unnecessary, especially where a press release contained the Applicant's name. The judgment, *inter alia*, found as follows (see para VIII):

...

A letter informing the Applicant of his suspension without pay was delivered by four staff members, and he was escorted from the Vienna International Center by four UN security officers. Additionally, an official statement was issued to the major Austrian daily newspaper on the Applicant's suspension, identifying characteristics and details of the case, including allegations of homosexuality and sexual harassment. This was followed by a press release containing the Applicant's name, nationality and status, and details regarding the allegations against him.

The Tribunal finds this conduct unreasonably insensitive and public. Both the humiliation that resulted from the manner in which the Applicant was escorted from his office and the publication of the allegations against him were unnecessary and inappropriate.

Overall compensation findings

123. The Tribunal finds that the Applicant is entitled to compensation in this case, whether considered as pecuniary damages, or as moral damages. The reasons for the Tribunal's award are based on the cumulative factors and legal determinations made in this case:

- a. Former staff rule 105.2(a)(i) was not properly relied upon;
- b. The OIOS/PTF investigation constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371;

Conclusion

126. The Tribunal makes the overall conclusion that the Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006. In particular:

a. The Tribunal finds that former staff rule 105.2(a)(i) was not properly relied upon to place the Applicant on SLWFP and that the Organization did not properly apply its regulations, rules and administrative issuances, when placing the Applicant on SLWFP;

b. The Tribunal finds that the OIOS/PTF investigation constituted a formal investigation under ST/AI/371, sec. 6, and the Organization should have implemented the due process protections of ST/AI/371 when placing the Applicant on SLWFP;

c. The Tribunal finds that the Organization did not properly exercise its discretionary authority by placing the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006. The Tribunal finds also that that the decision to place the Applicant on SLWFP under former staff rule 105.2(a)(i) constituted a *de facto* disciplinary suspension, following which the Organization should have implemented the due process protections of ST/AI/371.

127. The Tribunal further finds that the Applicant's due process rights were not observed when the Secretary-General exercised his discretionary authority to place the Applicant on SLWFP pursuant to former staff rule 105.2(a)(i) effective 16 January 2006.

a. The Tribunal finds that the Applicant's due process guarantees required under ST/AI/371 were violated when he was placed on SLWFP;

b. The Tribunal finds that that the reasons proffered by the Organization for placing the Applicant on SLWFP were not grounded on facts, making the decision to place the Applicant on SLWFP improper.

128. The Tribunal finds that that the Applicant's due process rights were violated during the OIOS/PTF interrogations of the Applicant subsequent to his being put on SLWFP. This legal determination forms an additional basis for awarding compensation to the Applicant in this case.

129. The Tribunal awards to the Applicant the sum of two years' net base salary in effect in January 2006 as for the substantial and unwarranted irregularities when the Applicant was placed on SLWFP and during the OIOS/PTF investigation thereafter.

130. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation, as detailed in paragraph 129 above is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Observations

131. This case concerns the circumstances existing when the Organization placed the Applicant (and seven other staff members) on SLWFP on 16 January 2006. The Tribunal fully acknowledges the problems in procurement that needed to be addressed following the Independent Inquiry Committee into the Oil for Food Programme, and the subsequent arrest and conviction of a United Nations Procurement Officer. To be sure, the Organization must be a good steward of Member States' resources and must take steps to ensure that these are not wrongfully dissipated through violation of the Organization's procedures and regulations.

132. The Tribunal is troubled, however, by the manner in which the Applicant (and other staff members) were treated when they were placed on SWFLP and thereafter

(as discussed within this Judgment). The way that the Organization handled the Applicant's case creates the impression that the Organization's actions were a rushed response for purposes of preserving its relations with Member States, rather than for the purpose of initiating an impartial inquiry founded the Organization's regulations and accompanying due process principles. The Organization's response in this case did not respect rights clearly and unambiguously afforded to staff members when misconduct is suspected. A strong Organization is one that enforces its regulations and rules, while at the same time affording staff members their rights and while relying on the ultimate assurance that legal processes will provide a just outcome.

(Signed)

Judge Marilyn J. Kaman

Dated this 30th day of June 2011

Entered in the Register on this 30th day of June 2011

(Signed)

Santiago Villalpando, Registrar, New York