



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

MICHAUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
François Lorient

Counsel for Respondent:
Thomas Jacob, UNDP

Introduction

1. On 3 August 2015, the Applicant, an Investigations Specialist at the P-4 level for the United Nations Development Programme (“UNDP”), filed an application contesting the following decisions (emphasis in original):

- a. “[D]ecision to allow the conduct of an unlawful investigation in violation of UN/UNDP procedures and of due process;”
- b. “[D]ecision to issue a reprimand based on such illegal investigation and its highly disputed evidence;”
- c. “[D]ecision, in spite of the above irregularities, to prolong and compound the harm caused to the reputation, health and contractual rights of Applicant and of his family, by denying him due process under the UNDP *Performance Plan Assessment* procedures and UN Staff Rule 1.3, with a threat to use the unlawful [Office of Audit and Investigation Services, “OAIS”] investigation report in the future.”

2. On 2 September 2015, the Respondent filed a reply to the application. The Respondent submits that the Applicant’s challenge to the investigation is not receivable *ratione materiae*, as he did not request management evaluation in relation to this matter, it did not affect his terms of employment, and it was immaterial to the issuance of the reprimand. The Respondent further submits that it complied with the Applicant’s due process rights and the decision to issue a written reprimand was a lawful exercise of managerial discretion.

Facts

3. This case concerns an investigation and an administrative action that was imposed following a complaint submitted by a former UNDP consultant (“the complainant”) regarding her dismissal and alleged improper conduct by the

Applicant. The Applicant and the complainant were both stationed in Afghanistan in 2012. The Applicant was the complainant's supervisor.

Email exchange of 5 September 2012

4. On 5 September 2012, the Applicant wrote to the complainant stating, "Here's the report in the attachment. As I said, if you get bored with it, stop reading ... No worries. See you tonight."

5. The complainant responded as follows: "Thanks [Applicant], no worries, I definitely have the time. Will take a look at this. Dinner? I want a full on spa treatment if it is a dry read!☺" (The smiley emoji was included in the message.)

6. The Applicant wrote back, "As long as I can join you!" to which [the complainant] responded: "Ha!"

Email exchange of 21 September 2012

7. On 21 September 2012, the Applicant wrote to three members of his team, including the complainant, stating: "I'll be out of touch for an hour. I need to go down to gym to decrease the blubber!!!!!" Another member of the team replied to all, stating: "An hour? You'll need a bigger window than that!" The Applicant responded: "Aren't we hilarious!!!!!" Another member of the team replied to all, stating: "Was that an earthquake or did [the Applicant] step onto the treadmill?" The Applicant responded: "[The complainant] won't have any difficulty choosing her date for tonight now that I am much slimmer!!!!!"

Complaint letter

8. By letter dated 14 October 2013, a private law firm wrote to the Director, Office of Audit and Investigations, UNDP, on behalf of the complainant alleging that she had been unlawfully dismissed in August 2013, further alleging that

the Applicant had engaged in inappropriate conduct towards the complainant, including harassment, bullying, and abuse of authority.

9. By letter dated 25 October 2013, the Director, Office of Audit and Investigations, UNDP, referred the complaint to the Director, Division for Oversight Services, United Nations Population Fund (“UNFPA”), thanking her for agreeing to carry out an independent assessment. The letter stated that given that the subject of the complaint was a UNDP staff member, it was requested that the assessment and investigation be carried out “in accordance with UNDP’s HR User Guide on Workplace Harassment and Abuse of Authority, the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct and OAI [Office of Audit and Investigations] Investigation Guidelines.”

10. By letter dated 10 January 2014, the Applicant was informed by the Chief, Investigations Branch, Division for Oversight Service (“DOS”), UNFPA, as follows (emphasis in original):

I am writing to inform you that DOS has been tasked by UNDP/OAI to conduct a preliminary assessment and investigation into allegations that:

1. On a number of occasions between September 2012 and August 2013 you may have engaged in improper and unwelcome conduct that caused offense and humiliation to then OAI investigations consultant [the complainant]. Alleged instances include:
 - Sexual advances to and inappropriate comments about [the complainant] during a mission to Afghanistan in September/October 2012;
 - Repeated sexually inappropriate comments in the context of salary payments to [the complainant];
 - Use of offensive statements relating to ethnicity and religion during a second mission to Afghanistan in April 2013.

This conduct could be categorized as sexual harassment and abuse of authority within the meaning of UNDP User Guide on Workplace Harassment and Abuse of Authority.

...

The investigation is being conducted in accordance with the UNDP Legal Framework, the UNDP User Guide on Workplace Harassment and Abuse of Authority and OAI Investigation Guidelines.

As provided under Chapter II of the Legal Framework, please be advised that you are considered *a subject* of this investigation.

...

You have the right to be interviewed, provide documentation, statements or other evidence in support of any explanation you give to the investigator(s). You are also encouraged to identify any witnesses that might have knowledge of the facts at issue.

Since the role of the investigator is that of a fact-finder with no legal or disciplinary authority, a subject of an investigation does not have the right to have a legal representative present when interacting with the Investigators(s).

...

If the facts established through the investigation do not substantiate the allegations, the matter will be closed and you will be informed accordingly.

If the investigation produces adequate evidence to reasonably determine that misconduct has occurred, DOS will draft an investigation report providing a full account of the facts that are known, with attached documentary evidence, if any. You will be afforded the opportunity to comment on the draft report, in conformity with Chapter II of the Legal Framework.

...

11. On the same day, the Applicant signed the letter to acknowledge receipt and that he understood its content.

Email exchange between the Applicant and the Investigations Branch Chief, DOS/UNFPA

12. By email dated 15 January 2014, the Applicant wrote to the Investigations Branch Chief, DOS/UNFPA (“Branch Chief”) to set out a number of concerns regarding his due process rights regarding the allegations against him. The Branch Chief responded by email the same day.

The OAIS/UNFPA investigation team's interview of the Applicant

13. On 16 January 2014, the Applicant was interviewed by the OAIS/UNFPA investigation team. According to the transcript of the interview, the Applicant was presented with the 5 and 21 September 2012 email exchanges and provided with the possibility to comment on them. In response, the Applicant commented that all of the subject emails were from him.

Draft investigation report

14. By email to the Applicant dated 1 April 2014, the Branch Chief informed the Applicant that the investigation had been concluded and a draft investigation report was prepared. The Branch Chief noted that the report and exhibits were available for the Applicant's review and comment.

Response to draft investigation report

15. On 24 June 2014, the Applicant submitted 73 pages of written comments in response to the draft investigation report.

Investigation report

16. On 24 July 2014, the OAIS/UNFPA investigation team completed its report, recommending that "appropriate administrative and/or disciplinary action be considered against [the Applicant]."

Letter regarding outcome of investigation ("the exoneration letter")

17. By letter dated 6 March 2015, the Assistant Administrator and Director, Bureau of Management, UNDP ("Assistant Administrator") informed the Applicant that, having reviewed the documentation relating to the investigation, including the Applicant's comments on the draft investigation report, he had concluded that the Applicant's conduct did not rise to the level of misconduct and the Applicant "should be exonerated of allegations of misconduct." He stated that while the Applicant's

conduct fell short of the standards of professionalism expected of a manager and supervisor, he had decided “that the issue should be addressed from an administrative perspective, rather than a disciplinary one.” The letter concluded by stating that a written reprimand would be issued separately.

Letter of reprimand

18. By letter also dated 6 March 2015, the Assistant Administrator informed the Applicant that he was issuing a written reprimand, pursuant to staff rule 11.2(b)(i), in regard to the two emails sent by the Applicant to the complainant on 5 and 21 September 2012. The letter stated (emphasis in original):

In your capacity as team leader of the Afghanistan mission, you held a senior supervisory role to [the complainant]. The OAI investigation concluded that you:

1. Sent two emails to [the complainant] on 5 and 21 September 2012 which contained inappropriate comments. On 5 September 2012, [the complainant] wrote you an email stating that she wanted a “*full on spa treatment*” for reviewing a lengthy assignment to which you replied: “*[a]s long as I can join you!*” On 21 September 2012, you wrote an email addressed to [the complainant] and two other members of the OAI mission, stating: “*[The complainant] won’t have any difficulty choosing her date for tonight, now that I am much slimmer!!*” You do not dispute sending the emails and explain that your comments were intended as “*jokes*” to build “*team morale*” and that you had no intention to offend or embarrass [the complainant].

The Assistant Administrator stated that the timing of the emails was noteworthy in that the Applicant made the comment in the first email nine days after the complainant had joined OAI, and “thus, had limited basis to know whether your comments could be offensive or distressing to her.” The Assistant Administrator also noted that the second email was sent to two other OAI members of the mission and colleagues of the complainant. The letter stated that “undisputed evidence shows that

you made inappropriate comments of a personal nature” in the emails, and concluded by stating:

A copy of this letter will be placed in your official status file, and will form part of your accumulated record of service. You may provide a written response within 15 calendar days of receipt of this letter and it will be included with the reprimand. In addition, the OAI Director may require you to undertake an appropriate training course within the current performance cycle.

Please note that a letter of reprimand does not constitute a disciplinary measure.

Applicant’s response to the letter of reprimand

19. By letter to the Assistant Administrator, dated 19 March 2015, the Applicant responded to the two letters dated 6 March 2015, noting that he had received them on 10 March 2015. The Applicant raised a number of concerns regarding the process leading to the two letters and concluded by requesting that the Assistant Administrator (emphasis omitted):

A) Exclude from your exoneration letter on misconduct any reference or allusion to a potential reprimand concerning performance issues, until the due process and procedures related to such performance matters take place and are completed;

B) Replace your proposed letter of reprimand with a full and fair independent gender-balanced review on any remaining specific and contentious performance allegations, which would be timely notified to me in the first place, and on which I will be allowed to defend myself with the due process rules applicable at UNDP; or

C) As an alternative to [B], refer the specific performance allegations to the usual Performance Plan Assessment process and guidelines, as suggested in section 82b of *Legal Framework*, including rebuttal;

D) Making complainant available in the above review processes of B or C, for her deposition under oath, for cross-examination and for an independent forensic evaluation of her “evidence”.

Letter of 1 May 2015

20. By letter dated 1 May 2015, the Assistant Administrator responded to the Applicant's letter of 19 March 2015. The Applicant was informed that the letter of reprimand and his comments dated 19 March 2015 had been placed in his official status file. The letter further stated:

Allow me to also address certain points you raised in your letter of 19 March 2015. First, I note that you repeatedly refer to the written reprimand you were issued on 6 March 2015 as a "*proposed letter of reprimand*". This reference is not correct. As explained in the written reprimand and in the separate letter I wrote to you on 6 March 2015, you were issued a written reprimand pursuant to UN Staff Rule 10.2 (b)(i) following my review of UNFPA's Office of Audit and Investigation Services (OAIS) final investigation report into the allegations of harassment levelled against you by [the complainant], former Investigations Consultant, Office of Audit and Investigations (OAI) and consistent with the procedures as outlined in UNDP's Legal Framework for Addressing Non-Compliance with UN Standards of Conduct.

With respect to your claims of due process violations by OAIS, I would like to highlight that, as explained in my letter to you on 6 March 2015, you were exonerated of allegations of misconduct. The decision to issue you a written reprimand was taken on the basis of the emails you exchanged with [the complainant] on 5 and 21 September 2012. You do not dispute sending the emails or making the statements contained therein.

Request for management evaluation

21. On 4 May 2015, the Applicant submitted to the Assistant Administrator, a request for management evaluation, submitting that the investigation into the complaint against him was seriously flawed. He stated: "I cannot accept to have inserted in my Official Status File a corrupted OAIS report which does not meet any of the most basic standards of fairness, probity and professionalism, including in particular a reprimand which is based on such an unfair and inaccurate OAIS report." The Applicant requested:

- a) an independent and impartial management review, preferably conducted by an independent body outside of the UN system (such as OLAF [footnote: the close professional links between the various UN investigation agencies and the UN legal community call for an independent body to undertake a genuine management review.]), in order to hold a complete audit of the OAIS' investigators misconduct, on their lack of professionalism, on their questionable behavior with my witnesses, on their tampering with evidence, on their due process violations towards me, as well as on their biased and groundless findings against me, essentially rejected by UNDP;
- b) that the 6 March 2015 reprimand, together with the OAIS unfair investigation report on which it was based, be expunged from my Official Status File; and
- c) that an apology be issued to me and to my family for the harm and hardship suffered as a result of the protracted and illegal OAIS investigation and its false findings.

22. By letter dated 1 June 2015, the Assistant Administrator responded to the Applicant's request for management evaluation, stating that there was no factual or legal basis for acceding to his requests.

Procedural history

23. On 3 August 2015, the Applicant filed the application. On 2 September 2015, the Respondent filed a reply to the application.

24. By Order No. 213 (NY/2015), dated 3 September 2015, the Tribunal ordered the Applicant to file a response to the Respondent's reply to the application, including on the issues of receivability.

25. On 24 September 2015, the Applicant filed a response to the Respondent's reply. On the same day, the Applicant also filed a motion for joinder of parties, disclosure of documents, and recusal of the UNDP Legal Support Office as Counsel for the Respondent.

26. By Order No. 257 (NY/2015), dated 2 October 2015, the Tribunal ordered the Respondent to file separate responses to (a) the Applicant's response to the Respondent's reply; and (b) the Applicant's motion.

27. On 8 October 2015, the Respondent filed a response to the Applicant's motion.

28. On 16 October 2015, the Respondent filed a response to the Applicant's response to the Respondent's reply.

29. By Order No. 270 (NY/2015), dated 16 October 2015, the Duty Judge ordered that the case join the queue of pending cases and that the Applicant's motion be decided when a Judge is assigned to the case in due course.

30. On 9 May 2016, this case was assigned to the formerly assigned Judge.

31. By Order No. 129 (NY/2016) dated 3 June 2016, and having reviewed the submissions filed in the present case, the formerly assigned Judge instructed the parties to attend a Case Management Discussion ("CMD") on Monday, 13 June 2016.

32. By email dated 7 June 2016, the Registry was informed that the Respondent changed his Counsel to another Legal Officer in the UNDP Legal Support Office.

33. At the CMD on 13 June 2016, the formerly assigned Judge invited the parties to consider an amicable solution to the present case. On 16 June 2016, the Respondent filed a submission stating that he did not find that the case was amenable to informal resolution.

34. By Order No. 158 (NY/2016) dated 30 June 2016, the formerly assigned Judge recused herself from handling the present case.

35. On 1 July 2016, the case was reassigned to the undersigned Judge.

36. By Order No. 236 (NY/2016) dated 7 October 2016, the Tribunal ordered the Applicant to file his comments, if any, to the Respondent's 16 October 2015 response by 12 October 2016. On 12 October, the Applicant filed his comments.

Consideration

Preliminary procedural issues

Motion for recusal of the UNDP Legal Support Office

37. The Applicant contends that the UNDP Legal Support Office should be recused from acting as Counsel in the case as it and its supervisors were directly instrumental and accountable for the procedural decisions, errors and omissions in this case. Furthermore, he submits that OAI/UNDP investigators, including Applicant, work hand-in-hand on a daily basis with the UNDP Legal Support Office, including the current Counsel, on investigations.

38. The Tribunal does not find that the UNDP Legal Support Office has conflicting interests in handling the present case and dismisses the Applicant's motion in this respect. It is further noted that the Respondent changed the Legal Officer in the UNDP Legal Support Office assigned to case and that the previous Legal Officer against which the recusal request was made is no longer charged with this matter on behalf of the Respondent.

Reviewing the case on the written documents before the Tribunal

39. In his 24 September 2015 motion, the Applicant proposes to call “[the UNDP Office of Legal Support] officials involved in the alleged procedural improprieties, errors and omissions described throughout the Application.” In his 12 October 2016 submission, the Applicant further requests the Tribunal “to invite the UNDP Administrator to testify on [the purported issue of “[t]here is no record that the UNDP Administrator has ever knowingly repealed the due process rights enshrined in bulletin ADM/97/17”] and to explain the consultative procedures which was followed, if any, as well as hear the CGMS [unknown abbreviation] co-chair on the absence of such statutory deliberations.”

40. Article 16 of the Dispute Tribunal Rules of Procedure regarding hearings provides, as relevant, that:

1. The judge hearing a case may hold oral hearings.
2. A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.

...

41. The Tribunal notes that the present case does not concern an appeal against an administrative decision imposing a disciplinary measure but rather an administrative measure. Furthermore, when perusing the extensive written submissions and documentation submitted by the parties, it is clear that the case is ready for adjudication and nothing would be gained by adducing oral evidence. The Tribunal, therefore, decides not hold a hearing in the present case but to determine it on the written record before it.

Applicant's request for disclosure of correspondence between Respondent's Counsel and the UNDP Administrator

42. In his 12 October 2016 submission, the Applicant requests the Tribunal “to order disclosure of all correspondence exchanged with the UNDP Administrator on this UNDT/CMD mediation proposal, and also proof that [its current Counsel] was appointed by the Administrator in order for him to act as the UNDP counsel, acting independently of LSO and of UNDP/OAI.”

43. The Tribunal notes that art. 15.7 of its Rules of Procedure states:

All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal.

44. The Tribunal adds that it is a common legal standard that case-related communications between a lawyer and her or his client are privileged and

confidential. Furthermore, the Tribunal was properly informed by the email of 7 June 2016 that the Respondent had changed his Counsel within the Legal Support Office of UNDP. Accordingly, the Applicant's request for disclosure is dismissed.

Receivability

45. It is the consistent jurisprudence of the Appeals Tribunal that the Dispute Tribunal shall examine its own competence, even if this is not contested by any of the parties (see, for instance, *O'Neill* 2011-UNAT-182, *Christensen* 2013-UNAT-335, and *Tintukasiri et al.* 2015-UNAT-526).

46. As concerning receivability, the Respondent contends that the claim concerning the conduct of the OAIS investigation is not receivable *ratione materiae* because the Applicant has not identified an appealable administrative decision. Furthermore, the Respondent submits that the decision to refer the investigation to OAIS did not have direct legal consequences for the Applicant as the decision to issue the reprimand was not taken on the basis of the investigation report or conclusions, but rather the Applicant's own emails. Finally, the Respondent states that the decision to refer the investigation to OAIS is also not receivable *ratione materiae* because it was not subject to a request for management evaluation.

47. In response, the Applicant concedes that he did not contest the decision to initiate an investigation process, but seeks to challenge the conduct of the investigation and its outcome.

The “decision to allow the conduct of an unlawful investigation in violation of UN/UNDP procedures and of due process”

48. The Appeals Tribunal in *Nguyen-Kropp & Postica* 2015-UNAT-509 held that decisions concerning the initiation of an investigation and its conduct are in themselves generally not appealable:

... The position of Ms. Nguyen-Kropp and Mr. Postica is not entirely correct. Generally speaking, appeals against a decision to

initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

... This accords with another general principle that tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

... The Appeals Tribunal has previously held that certain administrative processes, such as a selection process in *Ishak*, and the Administration's proposal of an alternative rebuttal panel in an ongoing performance appraisal rebuttal process in *Gehr*, are preparatory decisions or one of a series of steps which lead to an administrative decision. Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences.

... Initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute.

49. In an older judgment, *Nwuke* 2010-UNAT-099, the Appeals Tribunal found that decisions to investigate and how to conduct the investigation is only appealable if it directly affects the relevant staff member's rights:

... So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

50. In the present case, the Applicant has not only challenged the investigation but also its outcome, notably the administrative measure of a reprimand imposed against him in accordance with staff rule 10.2(b)(i), in which context the way that the investigation was conducted will be examined (see below). Furthermore, it is for the Applicant to identify and define in precise terms the administrative decision which he seeks to challenge (see, for instance, *Planas* 2010-UNAT-049, *Chriclow* 2010-UNAT-035, *Appellant* 2011-UNAT-143 and *Reid* 2014-UNAT-419). As the Applicant has failed to demonstrate how the "decision to allow the conduct of an

unlawful investigation in violation of UN/UNDP procedures and of due process” in itself and in fact affected his rights, the appeal against this decision is not receivable.

The “decision, in spite of the above irregularities, to prolong and compound the harm caused to the reputation, health and contractual rights of Applicant and of his family, by denying him due process under *the UNDP Performance Plan Assessment* procedures and UN Staff Rule 1.3, with a threat to use the unlawful OAIS investigation report in the future”

51. It follows from staff rule 11.2(a) that a staff member appealing a decision to the Dispute Tribunal must first request a management evaluation of the relevant decision:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

52. The only exceptions to this prerequisite is, under staff rules 11.2(b), if the decision is “taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General” or is “taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process.” In such instances, the staff member is not required to request a management evaluation.

53. In its jurisprudence, the Appeals Tribunal has consistently upheld the requirement of requesting management evaluation before submitting an application to the Dispute Tribunal (see, for instance, *Chriclow* 2010-UNAT-035, *Planas* 2010-UNAT-049, *Syed* 2010-UNAT-061, *Gehr* 2013-UNAT-299, *Dzuverovic* 2013-UNAT-338, *Rosana* 2012-UNAT-273, *Amany* 2015-UNAT-521, *Servas* 2013-UNAT-349).

54. In the present case, in his 4 May 2015 request for management evaluation, the Applicant requested an independent and impartial review of the conduct of the investigation into sexual harassment; the expungement of the reprimand and the OAIS investigation report from his Official Status File; and the issuance of an apology for the harm caused by the investigation. However, he did not mention any issues regarding “the UNDP Performance Plan Assessment procedures” and/or staff rule 1.3 on performance of staff. The appeal against “decision, in spite of the above irregularities, to prolong and compound the harm caused to the reputation, health and contractual rights of Applicant and of his family, by denying him due process under *the UNDP Performance Plan Assessment* procedures and UN Staff Rule 1.3, with a threat to use the unlawful OAIS investigation report in the future” is, therefore, not receivable.

The decision to issue, as an administrative measure, a written reprimand against the Applicant pursuant to staff rule 10.2(b)(i)

Applicable law

55. Staff rules 10.1, 10.2 and 10.3 regarding the investigation into possible misconduct and imposition of the administrative measure of a written reprimand, provide, in relevant part, as follows:

Chapter X

Disciplinary measures

Rule 10.1

Misconduct

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

of a disciplinary process and the imposition of disciplinary measures for misconduct.

...

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

Rule 10.2

Disciplinary measures

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

...

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

...

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

56. The UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct of January 2010, regarding the procedure to be followed by UNDP in cases like the present one, provides, in relevant part, as follows (emphasis in original, footnotes omitted):

CHAPTER III

PROCEDURES FOLLOWING INVESTIGATION

Section 1 – Actions following receipt of the final investigation report by LSO [Legal Support Office]/BOM [Bureau of Management, of which the Assistant Administrator is the Director]

...

... On the basis of a review of the final investigation report, and the comments and evidence presented by the investigation subject thereon, as well as any additional clarification or verification by OAI or the subject of the investigation, the Director, LSO/BOM, may

recommend the following actions to the Assistant Administrator and Director, BOM:

...

1.2 – Exoneration from the allegations

... If the Director, LSO/BOM considers that the allegations are not substantiated or the facts do not warrant disciplinary action, he or she shall recommend to the Assistant Administrator and Director, BOM:

That the staff member be notified in writing of his or her exoneration from the allegations of wrongdoing, and that the matter be closed; OAT and the Resident Representative, Head of Office/Unit/Section/Department/Bureau, or the Executive Director of the Organization to which the staff member is assigned, shall be informed of such notification;

...

That documents related to the investigation be expunged from the staff member's official status file, except those referred to in Chapter III, Section 1, Subsection 1.3.

... The staff member shall be notified in writing as soon as feasible of the decision of the Assistant Administrator and Director, BOM concerning his or her exoneration.

1.3 – Work performance related issues

... While the Director, LSO/BOM may recommend exoneration, he or she may determine that the conduct depicted in the final investigation report as received by LSO/BOM and the circumstances of the case have shown unsatisfactory performance and/or poor judgement not amounting to misconduct on the part of the staff member. In such a case, the Director, LSO/BOM may recommend that:

(a) a letter of reprimand be issued by the Resident Representative, Head of Office / Unit / Section / Department / Bureau or other responsible officer concerned, including OHR [Office of Human Resources]/BOM ...

57. In his 12 October 2016 submission, the Applicant contends that “the UNDP Administrator had knowingly abolished the due process rights established by [UNDP ADM/97/17 on “Accountability, Disciplinary Measures and Procedures”], a major policy Bulletin which was endorsed by the UNDP Administrators, by many Tribunal judgments, as well as by the CGSM.” In this regard, the Tribunal notes that

ADM/97/17 have been replaced by the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct of January 2010, which in sec. 1.3(b) states that “[t]he present document supersedes ... Circular ADM/97/17 of 12 March 1997 entitled Accountability, Disciplinary Measures and Procedures.” In any event, for the determination of the present case, this makes no substantive difference as the applicable due process provisions contained in the UNDP Legal Framework provide no lesser rights to the Applicant than those of ADM/97/17.

The limited judicial review

58. It follows from the consistent case-law of the Appeals Tribunal that the Dispute Tribunal’s judicial review is generally limited. The Appeals Tribunal has held it is not its job to replace the decision-maker but rather to examine whether the decision is reasonable and fair, legally and procedurally correct, and proportionate. See, for instance, *Sanwidi* 2010-UNAT-084 (upheld in many subsequent Appeals Tribunal judgments, including *Jibara* 2013-UNAT-326, *Balan* 2014-UNAT-462, *Said* 2015-UNAT-500, *Mursi* 2015-UNAT-522, *Jaffa* 2015-UNAT-545 and *Ogorodnikov* 2015-UNAT-549):

... [A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

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

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General

59. In disciplinary cases, the Appeals Tribunal has specified the scope of judicial review, in accordance with *Applicant* 2013-UNAT-302 (see also *Nyambuza* 2013-UNAT-364, *Dibagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486) as follows:

... Judicial review of a disciplinary case requires [the Dispute Tribunal] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration [reference in footnote made to *Messinger* 2011-UNAT-123]. In this context, [the Dispute Tribunal] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence” [reference in footnote made to *Masri* 2010-UNAT-098, *Sanwidi* 2010-UNAT-084, *Haniya* 2010-UNAT-024, and *Mahdi* 2010-UNAT-018]. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred” [reference in footnote to *Liyanarachchige* 2010-UNAT-087] ...

60. While it could be argued which judicial review test should be followed in a case like the present one which concerns the imposition of the administrative, as opposed to the disciplinary measure of a written reprimand, pursuant to staff 10.2(b)(i) following an investigation into allegations of misconduct under staff rule

10.1, the difference appears to be of more theoretical than substantive. Thus, in either case, the assessment would necessarily entail an examination of the same basic elements, namely: was the decision-making process fair and in compliance with the appropriate due process rules; was the decision based on reliable evidence, and was the outcome proportionate.

The decision-making process and the establishment of the facts

61. The Applicant contends that OAIS/UNFPA were in a conflict of interest situation due to the relationship between UNDP and UNFPA and because the complainant had previously worked with OAIS/UNFPA. The Applicant submits that he disagrees with the reliance placed by the Respondent on the OAIS/UNFPA investigation report and, therefore, was not prepared to respond properly. He contends that before the 6 March 2015 reprimand, he never received any advance notice nor filed charges from the Assistant Administrator nor during the investigation about his communications being inappropriate in these two emails and that they were only disclosed to him, as a side issue, during an the investigation team's interview with him on 16 January 2014. The Applicant contends that it is not a recognized practice for an Assistant Administrator to have issued a reprimand against a staff member outside of his supervision, outside the framework of performance procedures, and without the benefit of a rebuttal and/or an internal peer review.

62. The Applicant further points to a number of alleged flaws during the investigation and argues that he was not given his due process rights. The Applicant further contends that the reasoning by the Assistant Administrator was arbitrary, subjective and contrary to the facts, context and reality of the situation of which he was never fully apprised. The Applicant states that the reprimand letter erroneously described three emails as "undisputed evidence," but the Applicant consistently contested the spin that the Administration gave to them which resulted in the interpretation that the investigation team gave to them. The Applicant submits that the 21 September 2012 email from the complainant did not constitute undisputed evidence—it was taken out of context, the words of which can be construed in

various ways. The Applicant further contends that the assertions and documentary evidence presented by the complainant were never reviewed by any forensic experts nor court of law.

63. The Respondent submits that the reprimand letter purposely made no reference to the investigation or the allegations of misconduct, which was instead addressed in the exoneration letter and that the decision to reprimand was not taken on the basis of the investigation report. The Respondent further contends that the decision to reprimand the Applicant was taken on the basis of two emails that the Applicant sent to the complainant on 5 and 21 September 2012, respectively, and that he was found to have made inappropriate comments of a personal nature towards the complainant in these emails. The Respondent contends that the Applicant has never contested that he sent the emails nor argued that he did not make the comments contained therein and has not produced any evidence in support of his claim that the complainant's 21 September 2012 email to a friend was "a last minute fabrication of evidence." The Respondent submits that the investigators asked both the complainant and her friend to produce a copy of the email, which was sent from the complainant's email account, and both produced copies of the email, which were accepted by investigation team as evidence and were annexed to the report. The Respondent observes that the Applicant was presented with copies of the relevant email exchanges during the investigation and he presented his comments thereto to the investigation team.

64. The Tribunal notes that it follows from the facts that the Applicant was subjected to a disciplinary investigation conducted by OAI/UNFPA for possible misconduct for which he has been subsequently exonerated by the Assistant Administrator, who instead, considering the circumstances of the case, decided to issue, as an administrative measure, a written reprimand against the Applicant under staff rule 10.2(b)(i). While the Respondent appears to argue that the conduct of this investigation is unimportant, it follows that the evidence on which this administrative measure was based, notably primarily the 5 and 21 September 2012 email exchanges,

were obtained and presented to the Applicant during this investigation. In this regard, the Tribunal notes that it is stated in the 10 January 2014 letter from the Branch Chief that the investigation against the Applicant concerned the accusation against him and that he “[o]n a number of occasions between September 2012 and August 2013 ... may have engaged in improper and unwelcome conduct that caused offense and humiliation to [the complainant].” While the emails are not specifically mentioned in this context, they were sent within the timeframe set for the investigation. Subsequently, during the OAIS/UNFPA investigation, copies of the email exchanges were provided to the investigation team by the complainant and another person. During the interview with the Applicant, the email exchanges were presented to the Applicant after which he commented on them, also admitting that he had sent them. Reference was subsequently made to the emails exchanges in the investigation report to which they were also appended. After the Assistant Administrator’s review of this report, these emails were referenced to and established part of the relevant factual background for him to decide on the misconduct accusations against the Applicant, both with regard his exoneration for any disciplinary offenses and the alternative imposition of an administrative written reprimand.

65. The Tribunal notes that it is for the Applicant to substantiate the existence of any ulterior motives (see, for instance, *Parker* 2010-UNAT-012) but he has failed to do so. Furthermore, no evidence demonstrates that any possible flaws during the investigation in any way impacted the Assistant Administrator’s decision to the Applicant’s detriment, including that the relevant 5 and 21 September 2012 email exchanges could have been fabricated or otherwise lacked credibility. In fact, the procedure followed appears to have complied with all relevant due process rights and guarantees in accordance with staff rules 10.1 and 10.2 and the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct of January 2010.

66. Accordingly, the Tribunal finds that the Assistant Administrator acted properly in accordance with the applicable due process rules and within his discretion

when deciding on this matter, relying on the 5 and 21 September 2012 email exchanges and that, considering the circumstances of the accusations against the Applicant and the outcome of his case, the factual background for his decision was adequately and appropriately established.

Proportionality

67. The Applicant contends that, at the United Nations, misconduct has always been distinguished from unsatisfactory performance and that the complainant always actively participated in the exchange of jokes and humour prevailing in the office's friendly work atmosphere.

68. The Respondent submits that the Assistant Administrator assessed the Applicant's conduct and found that it fell short of the proper conduct of a manager for which a reprimand was appropriate. The Respondent further contends that the Applicant's statement that the reprimand was based on an unfair OAIS report fails to acknowledge that the reprimand was based on communications that the Applicant admitted to carrying out. The Respondent notes that the reprimand does not make any reference to the OAIS investigation nor to any of the allegations raised in the report, for which the Applicant was exonerated. The Respondent submits that the reprimand was not based on a finding of harassment as it is the nature of the communications, not the consequences nor any resulting conduct, that are the basis for the reprimand.

69. In the 6 March 2015 exoneration letter, the Assistant Administrator observed that he had concluded that the Applicant's conduct did not amount of misconduct and that the Applicant would be exonerated of allegations of misconduct. The Assistant Administrator also emphasized that while the Applicant's conduct fell short of the standards of professionalism expected of a manager and supervisor, the issue would be handled as an administrative and not a disciplinary measure, resulting in the Applicant receiving an administrative written reprimand, which was then written in a separate letter to him dated on the same date. In this regard, it is noted that workplace harassment as defined as harassment or sexual harassment are defined in UNDP's

“HR User Guide on Workplace Harassment & Abuse of Authority” of January 2010 reads as follows:

2. Workplace harassment is any improper and unwelcome conduct by a staff member or non-staff personnel against another staff member or non-staff personnel or a group thereof that has or that might reasonably be expected or be perceived to cause offence or humiliation to another.
3. Harassment may be present in the form of words, gestures, electronic communication forms, or other actions that annoy, alarm, abuse, demean, intimidate, belittle, or cause personal humiliation or embarrassment to another, or cause an intimidating, hostile or offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. Harassment may be deliberate, unsolicited, and coercive. It will often consist of a series of incidents, but it may be brought about by a single incident only.
4. The mere expression of disagreement, admonishment, criticism or similar action regarding work performance, conduct or related issues within a supervisory relationship shall not normally be considered harassment within the meaning of this policy. Such work-related disagreement is dealt with under the provisions of the Performance Management Policy.
5. Sexual Harassment, as one form of workplace harassment, is understood as any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature (including pornography, sexually-colored remarks) that has or that might reasonably be expected or be perceived to cause offense or humiliation to another.
6. Sexual harassment may occur when it interferes with work, is made a condition of employment or when it creates an intimidating, hostile or offensive environment. Sexual harassment normally implies a series of incidents. However, a one-time incident could fall within the definition of sexual harassment if it has an unambiguously offensive sexual character. Both male and female staff members can be either the injured party or the offender.

70. The Tribunal finds that it was not unreasonable for the Assistant Administrator to find that the language used by the Applicant in his 5 and 21

September 2012 emails could be perceived as offensive by the complainant, also taking into account the fact that the Applicant was the complainant's supervisor and they only had worked together for a very short period of time. The imposition of the administrative measure of a written reprimand pursuant to staff rule 10.2(b)(i) was, therefore, a proportionate measure.

Conclusion

71. Based on the above findings, the application is rejected in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 12th day of October 2016

Entered in the Register on this 12th day of October 2016

(Signed)

Hafida Lahiouel, Registrar, New York