



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

ASGHAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sultan Khalid

Counsel for Respondent:

Chinonyelum Esther Uwazie, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF") in Quetta, Pakistan, challenges her dismissal on disciplinary grounds.
2. The Tribunal, after a hearing, decided to deal with a number of issues which would be determinative of the case without the need to hear further from the parties. The Tribunal considered it was presented with full and sufficient evidence and submissions.

Facts

3. In February 2015, an investigation was commenced following a formal complaint made to the Office of Internal Audit and Investigations ("OIAI"), UNICEF, by the UNICEF Country Representative in Pakistan, alleging possible corruption and collusion by the Applicant through the payment to her of kickbacks by a number of implementing agencies.
4. On 20 February 2015 the Applicant was placed on administrative leave, with pay.
5. On 5 August 2015, the Applicant was interviewed in respect of the matters leading to the charges against her by an OIAI investigator together with a staff member from the Islamabad office of UNICEF.
6. In June 2016 the investigation report was concluded.
7. On 21 June 2016, the Deputy Director, OIAI, sent the investigation report to Director, Division of Human Resources, UNICEF.
8. By letter of 15 September 2016, the Director, Division of Human Resources, UNICEF, charged the Applicant in the following manner:

112. On the basis of the facts taken from the OIAI Investigation Report and supporting documentation, and particularly those facts described above, you are charged with misconduct. In particular, you are charged with:

(a) Without authorization, accepting receipt of a gift, in the form of a free or subsidized vacation, from a UNICEF civil society partner (nongovernmental source having or seeking to have a contractual relationship with UNICEF), as described in A2,

- (i) in violation of Staff Regulations 1.2(b) and (1), and Staff Rules 1.2(m) and (p), and constituting misconduct under CF/EXD/2012-005, s. 1.4(a), (j), (k) and (m);
- (ii) and failing to disclose the resulting conflict of interest in violation of Staff Regulations 1.2(b) and (m), and CF/EXD/2012-003, s. 2.3, and constituting misconduct under CF/EXD/2012-005, s. 1.4(a), (g), (h), (i), (j), (m);

(b) arranging and assisting in submission of and fulfillment (sic) of false claims from UNICEF resources, for the personal benefit of yourself, Ms. [A.] or staff of civil society partners, and causing financial and reputational loss to UNICEF:

- (i) fraudulently, as described in PART I - D.1, F.1, G.1 and H, in violation of Staff Regulations 1.2(b), (g), CF/EXD/2013-008, s. 2.1, and constituting misconduct under CF/EXD/2013-008, s. 2.1(a) and CF/EXD/2012-005, s. 1.4(a), (b), (h), (i), (k), (l), (m); or alternatively,
- (ii) grossly negligently, as described in PART I - D.2, F.2 and G.2.

9. The Applicant was asked to provide a response to such charges within 15 days of her receipt of the letter of charge. This deadline was extended whilst UNICEF apparently looked for missing emails of the Applicant, as is explained below.

10. The Applicant provided her response to the charge letter on 8 January 2017.

11. On 18 January 2017 the decision-maker, the then UNICEF Deputy Executive Director, Management, UNICEF (“DED/M”), found that there was clear and convincing evidence that the Applicant had committed misconduct and sanctioned her with the disciplinary measure of summary dismissal.

12. In particular, the DED/M found that:
- a. From June to October 2013, the Applicant had failed to declare a conflict of interest in respect of a close relationship she had with a director of a recently appointed implementing partner to undertake an Initiative for Change and fundraising. The Applicant was further found to have received financial assistance in respect of a number of trips arranged by the said director;
 - b. From October 2013 to April 2014, the Applicant colluded with an implementing partner to artificially over-procure excessive and fraudulent printing costs paid in respect of a birth registration project;
 - c. On 12 June 2014, the Applicant colluded in fraud with staff of the Society for Community Development in respect of excessive and fraudulent charges paid to the Labour Department in respect of an International Child Day conference; and
 - d. On 25 January 2015, the Applicant arranged for UNICEF to be fraudulently charged for a non-existent event in respect of Protective and Community emergency services (“PLACES”).
13. On 26 April 2017, the Applicant filed an application contesting the 18 January 2017 decision to dismiss her.

Parties’ submissions

14. The Applicant’s principal contentions are:
- a. The Applicant has contested the findings in respect of all matters alleged;
 - b. The witnesses were biased;
 - c. The charges were selective;
 - d. The applicant was junior to others who made the decisions;

e. That an alleged transcript of a conversation between the Applicant and another staff member apparently implicating her in fraud and collusion was fabricated and should be the subject of strict proof;

f. By a motion of 3 March 2018, the Applicant effectively added to the application a request for the dismissal of the inquiry proceedings, and thus the rescission of the decision consequent upon the conduct of the Respondent in failing to observe the proper procedures in respect of the retention of emails from and to the Applicant, which she maintains are essential for her being able to plead the case against her and rebut the allegations made, as such emails contained exculpatory evidence. This ground was developed during the hearing to be such that the Applicant asserted that there was a failure to show her due process rights, thus rendering the investigation unfair and improper. The Applicant was not informed during the course of the investigation of the loss of emails; and

g. The investigator failed to search for exculpatory evidence.

15. The Respondent's principal contentions are:

a. That the contested decision was correctly made and in compliance with the applicable rules and procedures;

b. The loss of evidentiary material does not have an impact upon the due process rights of the Applicant unless she can demonstrate the specific exculpatory evidence which can no longer be produced; and

c. There is ample evidence to find that the charges proven against the Applicant were so proven on a clear and convincing basis.

Consideration

Preliminary matters

16. At the outset, the Tribunal must consider and decide on two pivotal evidentiary matters and their effect:

- a. Consequence(s), if any, of the loss of potential evidence, namely the Applicant's professional emails relevant to the period under investigation, which the Applicant claims would have disclosed exculpatory evidence; and
- b. Validity of a recording/transcript of a conversation between the Applicant and another staff member and the effect of such in respect of the charges brought.

Loss of Applicant's professional emails (potential evidence)

17. It is not contested by the Respondent that, save for 5,975 emails from 4 July 2014 to 19 November 2015 found on the hard drive of the Applicant, emails to and from the Applicant for the period under investigation were lost through the deletion of her email account.

18. It is useful to recall the relevant events in connection with this loss of documents. At the commencement of the investigation, on 20 February 2015, following a request from the Chief of Operations, UNICEF Pakistan Office, the "VISION (SAP)" system on the computer of the Applicant was "de-provisioned". The evidence is that the helpdesk team assumed that the request also included the email account of the Applicant. They proceeded to delete the account. Following this deletion, the emails were recoverable for a period of only 30 days.

19. By email of 27 November 2015, a Help Desk Officer, IT Solutions and Services Division (ITSS), UNICEF, New York, advised an IT officer in UNICEF, Pakistan, that the Applicant's email account was deactivated on 12 March 2015 and that there was no trace of the request that triggered the deactivation.

20. By email of 30 November 2015, the IT officer in Pakistan responded as follows: "I had disabled [the Applicant's] account on 20 Feb 2015 as instructed by the Senior Management in Pakistan. How it got deactivated in March I am not sure."

21. On 17 October 2016, the Applicant wrote to UNICEF requesting access to her emails in the following terms:

[M]y official email id is restricted by the management. [F]or reference i (sic) need some of the official emails to attach with my response to charges sheet which were sent to IPs and to my supervisors with regards to official matters mentioned in the charge sheet (send by you on 22 [S]ep 2016)[.] It is requested to please allow me to access my UNICEF email id, in order to check the required emails.

22. On 18 October 2016, the Applicant asked for copies of all exhibits and relevant documents upon which the charges were based. The Applicant was provided with the investigation report, the exhibits thereto and the charge letter.

23. An internal UNICEF email of 19 October 2016, stated the following: “We have a situation where access to email ID was restored for [the Applicant], but it is blank as the account remained deactivated for more than a year. After enquiring with the GSSC, we were informed that as per ICTD’s LSA with Microsoft, emails are deleted after an account remains deactivated for more than one month.”

24. By email of 27 October 2016, an Administrative Law Specialist, Policy and Administrative Law Section, Division of Human Resources, UNICEF, New York, advised *inter alia* the Applicant, that “[t]he email archive from [the Applicant’s] computer is being uploaded now to the Google Drive. It is very large I believe that completes the currently outstanding requests for documents for [the Applicant].” It transpired that these emails, being those from only the Applicant’s computer, were not covering the relevant period of the investigation

25. UNICEF recreated the Applicant’s email account in October 2016. However, in line with the applicable policy at the time the Applicant’s account was deleted (2015), all of the Applicant’s data had been purged 30 days after its deletion. The only data recovered was that between October 2016 and March 2017, which had been kept in accordance with a new email retention policy that UNICEF introduced in January 2016 to keep the data for more than 30 days after deletion. The Applicant’s account was deleted again in March 2017.

26. By email of 8 February 2018, the Applicant requested UNICEF “access to [her] official emails record from 2012 onwards to support [her] case before UNDT[.] [I] believe that some important emails are missing (sic) which needs to be attached with my case document.”

27. By email of 9 February 2018, UNICEF Postmaster provided the Applicant with a link to “download a copy of [the Applicant’s] emails available in UNICEF system” also indicating that “the link would expire by the end of 16th February 2018 (EST) without further notice.”

28. The Applicant encountered a number of technical issues to download such copy, which do not appear to have been resolved by 19 February 2018 when she sent an email to UNICEF Postmaster that read: “kindly make sure that I need all my email data including sent items and inbox items and archive folders (sic) from 2012 till the last day/date I was in the office[.] [R]equest of date extension has already been sent to the management considering the issues am facing with the downloading etc.”

29. By email of 27 February 2018, UNICEF informed the Applicant *inter alia* that “the UNICEF Quetta [O]ffice, Pakistan, [had] made the data available and [she could] pick it up at the Quetta [O]ffice.”

30. By email of 1 March 2018, the Applicant responded in the following terms:

I would like to extend my gratitude for the help you have provided, though the issue is still unresolved, Mr [M.] very kindly copied the file in a USB and instructed me to install Microsoft office from Market to open the required files, furthermore i (sic) checked the data and found it useless because in my all emails it is clearly mentioned that i (sic) need my emails data (inbox, outbox, archives and sent items) from 2012 till the last day i (sic) was in the office, data is required to support my case before UNDT , attached screen shots shows that all the emails are of 2016 and 2017 which is of NO USE, kindly look into the matter and advice further.

31. By Order No. 57 (GVA/2018) of 13 March 2018, the Tribunal ordered the Respondent to produce all UNICEF internal communications surrounding and instructing the closure of the Applicant’s “VISION (SAP)” account and subsequently the termination of her email account, together with all current and

former UNICEF Rules, Regulations, Policies, Guidelines and Manuals on data retention especially regarding storage, closure and archiving of staff members' emails.

32. In response to the Tribunal's Order No. 57 (GVA/2018) of 13 March 2018, the Respondent *inter alia* provided it with a screen shot headed "PAK - UserDeProvision for Asma Asghar (AASGHAR)" showing the approval, on 20 February 2015, of a de-provisioning request that the above-mentioned IT Officer created on 19 February 2015. The document also shows that the "approver" commented as follows: "[a]pproving this request on behalf of the office as per the established/agreed process with DFAM Comptroller's Office."

33. The Respondent also submitted UNICEF's "Procedure for Granting, Modifying and Revoking User Access to ICT Resources" (CF/ITSS/PROCEDURE/2012-001). This document records that it applies to all UNICEF staff, consultants and all subsidiaries. In essence, it provides for access to ICT resources as is directed by managers or other designated officers.

34. A further document on record is entitled "Access for UNICEF's Information Assets" (CF/ITSS/POLICY/2011-003). This, in part provides, in para 4.1.7, for de-provisioning access, which will occur immediately after an individual is no longer under contract with UNICEF.

Obligations of the investigator in respect of locating and protecting evidence

35. The Tribunal has heard evidence from the investigator that she did not request that the email account of the Applicant be deactivated, only "de-provisioned", that is, to prevent the Applicant from accessing it. Attempts have also been made to trace any request in respect of the deactivation of the email account. No requests have been located. The IT Officer concerned no longer works for the Organization and has been uncontactable.

36. Furthermore, no correspondence from the investigator concerning the missing emails was provided to the Tribunal insofar as it related to the conduct of her investigation.

37. The general obligations of an investigator have been considered in Judgments *Ganbold* UNDT/2019/015 and *Aahooja* UNDT/2019/033. In particular, it was noted in *Aahooja* that:

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

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

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

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

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

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

Due process in the disciplinary process

43. The Secretary-General may initiate a disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The opportunity to respond must be meaningful and on a basis where the staff member has access to the material which may provide explanation and exculpatory evidence. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

44. In addition to recognising due process rights, the investigator must also recognise and comply with the requirements of natural justice and, importantly, the considerations of procedural fairness, being part of the requirement to be fair. Procedural fairness includes the obligation of candour, that is, to inform the suspected staff member(s) of matters that are relevant and not within the knowledge of the staff member, in other words only known by the Respondent. This obligation of candour also extends to the Tribunal in the event of an appeal being filed.

45. The Respondent has asserted that these rights have been extended in full and that the investigation was undertaken without reference to the emails of the Applicant. The Tribunal is disturbed by this assertion, as it is indicative of the investigator's failure to search for, or even possibly consider, potential exculpatory evidence.

46. The actions of the UNICEF investigator are guided by not only the United Nations Staff Rules, but also the OIAI Investigations Manual ("Investigations Manual") which, whilst at the lower level of administrative instruments, is the primary guide for investigators and expresses the rights, and obligations of the investigators, as well as also recognizing the rights of a staff member who is under investigation. It puts into operation the UNICEF Policy Prohibiting and Combatting Fraud and Corruption (CF/EXD/2013-008) and the UNICEF Policy on Disciplinary Process and Measures (CF/EXD/2012-005).

47. Investigation standards are provided for in section 4.14 of the Investigations Manual, which incorporates a number of international principles. In its relevant part it provides the following (*emphasis* has been added to certain key phrases and words):

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

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

48. Section 5 of the Investigations Manual also provides for rights and obligations of subjects and other investigation participants. It reads in its relevant parts (*emphasis* has been added to certain key phrases and words):

18. All staff members have an obligation to cooperate with an investigation immediately and unreservedly when requested to do so by an investigator by providing all documents and/or testimony requested.

...

20. The subject of an investigation by OIAI has a right to:

- A presumption of innocence during the conduct of the investigation;
- A professional, impartial, thorough and timely investigation; and
- *Due care in the handling and sharing of confidential information during the conduct of the investigation.*

21. In order to ensure an effective internal justice process, the subject of an investigation by OIAI can expect the following:

...

- Investigators accessing official records and facilities according to established procedures that ensure appropriate collection of facts where justified.

...

- *A reasonable opportunity to respond to the allegations.*
- *A reasonable opportunity to present countervailing facts.*

49. Concerning an investigation's "stage 2", i.e., "Assessment", section 8.35 of the Investigations Manual provides that (*emphasis* has been added to certain key phrases and words):

In investigative terms, evidence is any information that may be pertinent to the investigation and the underlying allegation(s). (More detailed guidance in relation to evidence is provided in section 9.5 below.) During the course of assessing an allegation, *the investigator(s) will collect and secure basic evidence*; identify any inconsistencies or outstanding questions concerning the allegation; and analyse the evidence collected to determine whether an investigation into the allegation of misconduct is justified. OIAI may request other UNICEF staff to assist in the assessment.

50. With respect to an investigation's "stage 3", i.e., "Investigation", section 9 of the Investigations Manual relevantly provides that (**bold** emphasis in the original; *emphasis* has been added to certain key phrases and words):

9.1. Work-plan

40. The work-plan will cover the following issues:

...

- Evidence to be gathered - *the plan shall identify the elements which are necessary to establish that the alleged event or transaction occurred and whether the subject committed the alleged misconduct, including the likely sources of the evidence (documents, e-mails, telephone records, hard drives and other electronic storage devices etc.). More detailed guidance in relation to evidence is provided in **section 9.5** of the [Investigations] Manual.*

...

9.5. Evidence

50. Investigations are fact-finding administrative processes that primarily serve *to collect and preserve evidence in a manner such that it can be communicated to appropriate decision-makers.*

51. Evidence is anything that may be pertinent to the investigation. It includes, but is not limited to, documents and records (including any written material and all forms of electronic or digitally recorded information such as computer and phone disks, devices or any other digital recording medium); verbal statements (testimonial evidence); and tangible items (physical evidence), or the physical conditions of those items (forensic evidence).

Relevance of Evidence

52. Evidence should be pertinent to the investigation. The evidence should make the existence of any statement or claim that is material to an allegation under review, more probable or less probable than it would be without the evidence. *The investigator should establish what information is likely to be relevant, whether inculpatory or exculpatory. When in doubt, the investigator should err on the side of collecting rather*

than rejecting evidence, as evidence can always be discarded at a later stage if then deemed irrelevant.

Collecting and Securing Evidence

53. When and how to secure evidence in an investigation is one of the most difficult decisions to make. *The investigator should try to find a balance between the requirements of discretion and confidentiality and his/her duty to secure the necessary evidence in good time to prevent potential concealment, damage or destruction.*

54. With respect to the collection of evidence and the need to inform the subject, consideration should be given as to whether:

- *The documents, records or other materials are at risk of being destroyed, altered or concealed;*
- *The documents or records are under the subject's control;*
- *The subject has access to key documents or records, and if so, can create, delete, or modify these key documents; and*
- *The same records are available at another location that is not accessible to the subject.*

...

56. *Records relevant to the investigation should be placed in a secure location, such as a locked office, a locked cabinet or other locations, ideally within UNICEF or UN premises.*

57. *If the investigator has decided that the records of the case may be at risk, consideration must be given to the best way to secure them, either by physically moving it to a secure environment, or requesting the subject be removed from access to or control over the records.*

58. Investigators are authorised to have full and complete access to all UNICEF data (whether physical or electronic), confidential office files and personnel records located in any UNICEF office or unit, either in hard copy or in electronic form.

...

Electronic Evidence

65. *Electronic evidence consists of electronic mail, data on hard drives or other electronic storage devices, including but not limited to, computer memory, cell phones, SIM cards, PDAs, removable electronic storage media, photos, videos, audio files, graphics, subscriber and equipment identifiers, short text, enhanced and multimedia messages, voice and data active locations, logs, system transactions, e-wallets, network identification, IMEI, ESN and ICC IDs, including automatic key card gate entry. It also may include video and/or audio recordings, whether digital or analogue.*

...

68. *The collection of evidence may include obtaining electronic data from items such as, but not limited to, computers, servers, laptops, electronic storage media, PDAs, and cell phones. Approval must be obtained from the OIAI Director or a delegated staff member, prior to seizing electronic devices, unless it is impracticable to contact any such official and there is an urgent need to seize the device there and then. The Chief of Investigations has been delegated by the OIAI Director to grant approval for the seizure of electronic data and devices.*

...

70. *From the moment the investigator takes control of the evidence, a record of its receipt and subsequent handling must be kept together with the names and times when it was accessed as well as the name of the individual to whom the electronic device was assigned.*

....

73. Following the completion of the UNICEF administrative process, these procedures must continue to be strictly followed.

Consequences of such loss and non-disclosure of the emails

51. The loss of the emails, while not denied by the Respondent, is asserted by him not to be relevant, as there was sufficient evidence to prove the charges. Such an approach to the evidence is erroneous and based upon a common law prosecutorial

approach, which does not meet the balanced requirements for the United Nations. There needs to be a demonstration of fairness and that exculpatory evidence has been searched for, and if found, taken into account.

52. The Respondent has urged upon the Tribunal that it should apply the case of *Arizona v. Youngblood* (1988) 488 U.S. 51, 58, which was said to stand for the proposition that in the absence of a showing that the custodian of evidence acted in bad faith in not preserving evidence that was potentially useful to a party, there is no denial of due process.

53. The Respondent further asserts that other cases from the United States of America stand for the further principal that a defendant who is asserting that a due process right has been violated by not preserving the evidence must show “the exculpatory value of the evidence at issue was apparent before it was destroyed, and the defendant could not obtain comparable evidence by other means”, referring to *People v. Cooper* (1991) 53 Cal. 3d 771, 810-811, and *People v. Johnson* (1989) 47 Cal.3d 1194.

54. The Applicant has submitted that “[t]here is no denial of the fact that the custodian of the evidence has willfully (sic) destroyed the evidence supporting the case of the applicant just to save the skins of the real culprits in the situation.” In connection with the consequence of the destruction of the evidence, the Applicant argued that “[i]f there is no precedent case as that of the applicant let’s have one for the benefit of any person who is being denied justice through willful (sic) destruction of the evidence”.

55. Finally, the applicant, argued that she “cannot plead her case with the available evidence which is not enough”.

56. The Tribunal firstly notes that it does not find that the email evidence was destroyed wilfully. Rather, it was destroyed as a consequence of the negligence of a number of people.

57. Secondly, the Tribunal notes that staff rule 10.3 regulates due process in the Organization. While it does not deal with all due process related matters, making it a rule of limitation by the definition of the due process rights, it constitutes the legal regime applicable in the United Nations and is the one that the Tribunal is to take into consideration when undertaking its judicial review of administrative decisions, together with any specific provisions enacted by United Nations agencies such as UNICEF. Administrative decisions are not made in the context of the criminal law.

58. The Tribunal is not a criminal court of the United States of America and does not apply the domestic law of any single Member State. United Nations disciplinary cases are not to be compared with criminal cases. The rights and duties of prosecutors in a common law criminal system are not the same as those of investigators within the United Nations disciplinary system. The duty of the investigators within the United Nations disciplinary system, as noted above, is to look for both inculpatory and exculpatory evidence, in circumstances where the staff member suspected of a breach of the rules and regulations of the Organization has very limited rights. The investigators have a very high duty to locate and to preserve evidence. The investigators are also taken to know the processes of UNICEF ICT, as they are part of the regulatory regime of UNICEF. They are presumed to understand that emails can be deleted, or be deactivated in the event of an account not being used for a period of time.

59. Further, within the United Nations systems it is the exclusive preserve of the Organization to maintain and keep the email system. Staff cannot use disparate systems and are not responsible for the maintenance of their individual professional email accounts.

60. The very fact that the investigator in this case requested the de-provisioning of the Applicant's email account is clear evidence that she regarded the emails of the Applicant to contain pertinent evidence, which may be either inculpatory or exculpatory and that the emails needed to be preserved.

61. It is asserted that the case of *Arizona v. Youngblood* established the law of lost evidence for the United States of America such that, where there is no bad faith, no due process violation occurs when the police lose potentially exculpatory evidence. This is so even though the evidence may be critical to the defense. Interestingly, *Arizona v. Youngblood* resulted in the conviction of a man who was later found to have been the wrong person, so its factual foundation is questionable, at best, as the application of the principle clearly was not fair. This case also has to be seen within its own context of constitutional and statutory rights and duties within a very particular criminal system. This is entirely unrelated to the rights of a staff member within the United Nations system where not only defined and limited due process rights are considered, but other issues must also be considered. These include:

- a. The right to a fair consideration of a matter, with proper administrative processes being observed;
- b. The fact that the Organization is effectively in control of the entirety of the investigation, having a positive duty to look for both inculpatory and exculpatory evidence and has control of the evidence;
- c. The fact that there is a positive regulatory duty on an investigator to preserve evidence, and
- d. A suspected staff member has no independent investigatory rights and may make only observations and submissions in respect of unsworn evidence contained in an investigative report. This is entirely different from the rights of a defendant in a criminal prosecution in the United States of America which is entirely adversarial, where evidence is tested under cross examination and the defendant has the right to independently call evidence directly before the finders of fact.

62. The case of *Arizona v. Youngblood* does not consider issues of fairness generally or procedural fairness within context in any way related to the United Nations administrative regulatory regime. *Arizona v. Youngblood* is simply not relevant to any case before the Tribunal.

Duty to collect evidence

63. Whilst it is clear from the above that a suspected staff member has a duty to cooperate, with no right to remain silent, the investigator has corresponding regulatory duties in respect of the collection and preservation of evidence which may be exculpatory or inculpatory.

64. The Tribunal is most concerned that there was no apparent effort to ensure the preservation of evidence or potential evidence. The investigator is taken to know that email files would be deactivated if not used for a certain time and that there was a need to ensure that all evidence, or potential evidence, was preserved, not just evidence that would favour the Respondent. There is no mention whatsoever of the loss of the emails of the Applicant for the relevant period in the Investigation Report, notwithstanding that it was known to the investigator.

65. Further, in the investigation report, at page 36, it is noted that “[the Applicant’s] argument was that, if she was benefiting from the activity being carried out, she would not have sent the email to Mr [A.] to say she was not going to attend; OIAI has not seen that email of [the Applicant]”. It was incumbent upon the investigator at this point to have declared that she did not have access to the emails of the Applicant, as they had been lost. Thus, it would be unknown whether such an email had been sent or not. The decision-maker must have been left with the impression that having taken all possible emails into account, the inability to find the email referred to means that it was not sent and thus the Applicant was not truthful. This must have been the intention of the investigator. It is an entirely dishonest and unethical approach to the presentation of an investigation and totally unacceptable. Integrity in the presentation of the investigation was absent.

66. The Tribunal finds generally that the investigator did not take full and appropriate steps to ensure the preservation of evidence, in ensuring that the emails of the Applicant were safely separated and kept safe.

67. At the time when the investigator interviewed the Applicant on 5 August 2015, the investigator, assuming she was not negligent, must have known that the emails of the Applicant were unavailable, but did not disclose this fact. The

investigator was compelled to use emails obtained from recipients of the emails or in respect of which the Applicant had been copied in and this was apparent from the heading of the emails produced by her during the interview and those contained as part of the investigation report.

68. There has been a complete lack of candour by the investigator in respect of the loss of the emails. This is a matter which should have been fully disclosed to both the Applicant, and importantly, the decision-maker. The investigator admitted in evidence that she did not disclose the loss of the emails in the report, notwithstanding her knowledge of such. The approach adopted is entirely misleading, totally unacceptable and unfair. Such unfairness taints and negates the findings in respect of those charges where such emails may have provided exculpatory evidence.

69. The Tribunal further notes, with respect to the investigator, her failure to comply with the requirements set out in the Manual of Investigation, in the following respects:

- a. The investigative process was not conducted fairly due to the loss of her emails, the non-disclosure to the Applicant and the decision-maker of the loss of the emails, together with the failure to search for exculpatory evidence;
- b. The investigation was not undertaken in a timely manner, taking from 6 February 2015 to June 2016, with the charges not being brought until 15 September 2016;
- c. There was a lack of care in the handling of information and potential evidence in circumstances where the de-provisioned of the email account of the Applicant was directed, but it was deactivated and deleted. If properly supervised by the Investigator this would not have occurred in such a manner as to cause the emails to be totally deleted, as the error would have been located in time so as to ensure that the emails were not entirely lost;

d. The investigator failed to ensure she collected and secured basic evidence, including emails and telephone records. The fact that she asked for the de-provisioning of the Applicant's emails disclosed she had identified them as important;

e. There was a failure to maintain a chain of custody and instructions in respect of evidence, as a result of which the evidence was lost;

70. As a result of these failures the Applicant was not given a reasonable or proper opportunity to:

a. Identify information relevant to the investigation;

b. Respond to the allegations;

c. Present countervailing facts; and

d. Present her case properly before the Tribunal in respect of most matters.

Recording/transcript of conversation between the Applicant and another staff member

71. The Tribunal has before it a transcript of a conversation between a colleague of the Applicant and the Applicant in which she makes statements that cause significant concern in respect of the specific charges that she colluded with others to defraud UNICEF, independent of any other possible evidence.

72. The Tribunal is satisfied that the recording of a conversation between the Applicant and a colleague of his in January 2015 is genuine, notwithstanding that the Applicant asserted in her response to the Charge Letter that the reference therein, at para. 105, to a recorded conversation was "fabricated".

73. The Tribunal finds that the contents of the conversation were such that only the Applicant could have known about the matters attributed to her in the transcript in respect of the Children's Day activities, the PLaCES activities and the Serena Hotel. A detailed knowledge of such is disclosed in the transcript of the recorded conversation.

74. It is necessary to consider the fact that the Applicant did not know she was being recorded. She alleged that she had been set up. The Tribunal is concerned with the fact that it has been argued that the recording was obtained without the consent of the Applicant and it is thus illegal in some way and should be excluded.

75. The Tribunal is not able to locate any rule or regulation that would make the recording “illegal” within the United Nations, however it may be that to make such a recording may well be considered as a breach ethical precepts generally applied within the Organization. The use of stolen material has been the subject of consideration in respect of an apparent theft of a CD used in evidence. Boolell J noted in *Massah* UNDT/2011/218¹ the following in respect of illegally obtained evidence:

54. There is no doubt that there was a very disturbing failure on the part of the investigators not to ascertain fully the circumstances in which Mr. Labbi obtained the CD. His account was not, after all, believed by the investigator, Mr. Dzuro. Mr. Labbi was also a man suspected of being a spy within MINURSO, and who perhaps flouted parking rules and practised coercion. That no investigation was carried out on this aspect of the case shows that the investigators decided swiftly to go against the Applicant once the CD was given to Mr. Aghadjanian. Neither Mr. Aghadjanian nor any responsible officer thought it fit to query Mr. Labbi further.

55. This distinctive feature however cannot come to the rescue of the Applicant. Though the CD was illegally obtained it is not per se inadmissible. In criminal matters obtaining in the common law system, which is governed by exclusionary evidentiary rules, illegally or improperly obtained evidence is not inadmissible ab initio. The admissibility or otherwise depends on the discretion of the judge who should weigh in the balance the fairness of the proceedings and the need to admit relevant evidence. Does the probative value outweigh the prejudice caused to the Applicant? The Tribunal does not consider that the CD greatly prejudices the Applicant because the CD itself has not established any charge. The greater incriminating evidence was not that on the CD, but the 58,000-odd images found on the Applicant’s official computer.

...

¹ This case was appealed but on an unrelated point. See UNAT Judgment *Massah*, 2012/UNAT/274.

57. When dealing with disciplinary cases, the standard of proof to establish a particular charge is lower than the standard in a criminal case but higher than that obtaining in civil matters. In the case of *Liyandarachchige* 2010-UNAT-087, it would appear that the Appeals Tribunal placed the bar very high by ruling that no charge can be established against a staff member on the sole evidence of an anonymous witness unless there is some other evidence to link the staff member to the charge. This is a rule that is applicable in criminal cases. Does that mean that a staff member who is suspected of misconduct has much lower rights than those of a suspect in a criminal case? The question is pertinent and relevant because of the obligation resting on a staff member to collaborate with investigations within the Organization. When such collaboration is forthcoming, or the staff member has not much choice, the latter is questioned and any evidence gathered from that staff member, whether it is incriminating or not, is subsequently used against him or her. This is done without any word of caution being administered to that staff member as to the consequences of his or her answering questions which may elicit incriminating answers.

76. As noted above, there is no direct illegality in respect of the recording of a conversation, unlike the theft of an item which is used in an investigation. Notwithstanding such, the Tribunal finds that even if it were relevant to consider the admissibility or otherwise, balancing the fairness of the proceedings and the need to admit relevant evidence, the probative value outweighs the prejudice caused to the Applicant.

77. The Tribunal also considers it important that a staff member must cooperate with an investigator and has no right of silence as part of any due process regime. The rights of a staff member are not to be compared with rights of an accused in a criminal matter where there may be a rights in respect of self-incrimination. Thus, even if the evidence were obtained illegally, the Tribunal would, in any event, admit the transcript into evidence. The evidence was properly before the decision-maker.

78. In *Aahooja*, the Tribunal found that the Applicant's colleague who made the recording was an unreliable witness, totally discounting his evidence after a request from Counsel for the Respondent. However, in this matter even if said colleague were to be found to be also unreliable, the transcript of the conversation speaks for itself, insofar as it contains remarks of the Applicant. It appears to disclose a course

of conduct in respect of the Children's Day activities and the Serena Hotel and an intention to collude to defraud the Organization.

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

79. Due to the primary unfairness in the manner in which the investigator proceeded in not ensuring that the emails of the Applicant were preserved and by her failure to obviously look through the emails, or to disclose their loss to the Applicant, by her dishonest non-disclosure and an obvious intention to mislead the decision-maker through her non-disclosure, the charge about failing to declare a conflict of interest in respect of a close relationship with a director of implementing and receiving financial assistance in respect of a number of trips arranged by the said director cannot be fairly sustained, as the facts have not been properly established according to law.

80. The Applicant was not provided with a reasonable opportunity to present exculpatory evidence and the investigator did not demonstrate that she properly searched for such evidence. The proper procedures were not followed to ensure that the Applicant was considered fairly and properly in respect of the charges where the email evidence may have provided exculpatory evidence. The rights of the Applicant were defeated by the conduct of the investigator and the negligence of others involved in the processes involved in the investigation.

81. The Tribunal is most disturbed that the investigator did not advise the Applicant or, as importantly, the decision-maker, that the emails had been lost for the relevant time under investigation, a matter which she must reasonably have known at the time she interviewed the Applicant in August 2015, assuming that she was diligent in attempting to look at the emails she had sought to preserve as a potential source of evidence.

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

82. The Tribunal finds, given the plain meaning of the contents of the conversation recorded between a colleague of the Applicant and the Applicant, that it is genuine. It also notes the conflict in the assertions of the Applicant. On the one

hand, she asserts that the conversation was a fabrication, whilst on the other hand she refers to it as being part of a set up. If it were part of a set up, then it would not logically have been the subject of fabrication. The Tribunal finds that the conversation took place and that it represents clear and convincing evidence that the Applicant engaged in arranging and assisting in submission and fulfilment of false claims from UNICEF resources for her personal benefit and causing financial and reputational loss to UNICEF, as recorded in the Charge Letter. The facts disclosed by the transcript of the recorded conversation are breaches of 1.2(b), (g) and (m) of the Staff Rules and Para 2.1 of the Policy Prohibiting Fraud and Corruption at the appropriate level of proof.

83. The conclusion reached by the decision-maker in this regard at paragraphs 32 and 33 of the contested decision are correct and unassailable in respect of the allegation of fraud and collusion in respect of the International Child Day conference on 12 June 2014:

32. You provide no explanation for why you raised no concerns that the project was routed entirely through SCD (and you needed to contact Sami Ali and Siraj Aziz). You provide no explanation why, even if Mr. Asif did not like you for your procedural complaints, he would falsely allege a scheme in which he colluded. You provide no explanation of the recorded telephone conversation that you had with Mr. Asif, which confirms a scheme of kickbacks and corroborates his other evidence.

33. Accordingly, I find clear and convincing evidence of collusion in fraud. Had I not reached that finding, I would have nevertheless concluded that you were grossly negligent in your processing of this transaction, resulting in financial loss to UNICEF.

Is the sanction proportionate to the alleged misconduct?

84. Making fraudulent claims, and colluding in respect of such, against the funds of any part of the Organisation are very serious matters. It is basal corruption and fraud in respect of which the Applicant has been shown to be involved in respect of the International Child Day conference on 12 June 2014. There can be no level of tolerance in respect of fraud, particularly, as disclosed by the evidence, it was a calculated activity. The Tribunal finds that the sanction of dismissal was proportionate.

Conclusion

85. In view of the foregoing, the Tribunal DECIDES that:

- a. The application is allowed in respect of the charges insofar as they relate to the following matters, the findings of which are rescinded:
 - i. Accepting receipt of a gift, without authorization, in the form of a free or subsidized vacation, from a UNICEF civil society partner (non-governmental source having or seeking to have a contractual relationship with UNICEF), and
 - ii. Excessive and fraudulent printing costs paid to an implementing partner in respect of the Birth Registration Project
- b. The application is otherwise dismissed, with the decision to dismiss the Applicant being affirmed.

(Signed)

Judge Rowan Downing

Dated this 3rd day of May 2019

Entered in the Register on this 3rd day of May 2019

(Signed)

René M. Vargas M., Registrar, Geneva