United Nations AT/DEC/1447

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1447

Case No. 1522 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 15 January 2007, and once thereafter until 15 April;

Whereas, on 26 January 2007, the Applicant filed an Application in which he requested the Tribunal, inter alia:

"PLEAS

…

8. [T]o order:

(a) that the Applicant be reinstated and given an assignment commensurate with his 25-plus years of UN experience and at the D-1 level, with responsibilities commensurate to those of the CAS [Chief of Administrative Services]/MONUC [United Nations Organization Mission in the Democratic Republic of the Congo] post, for which he had been competitively selected and of which [he] was illegally deprived;

(b) that, in the event he is reinstated, he be awarded compensation of net base salary at the D-1 level for the number of years elapsing between 1 January 2006 and the date of his reinstatement, with the appropriate accrual of interest, to compensate for his pain and suffering, for the damage done to his reputation over that time, the interruption of his career and his financial loss;

(c) that all reference to the reprimand be removed from the Applicant's Official Status file; and

(d) that in the event he is not reinstated, given the time that will have elapsed by the time his case reaches the Tribunal, that the Applicant be awarded compensation in the amount of four years, eight months (the period between 31 December 2005 when he left the United Nations, and August, 2009, his normal retirement age) net base salary at the D-1 level, with the appropriate accrual of interest, for loss of his 25-year United Nations career resulting from the Administration's failure to address the root problems at MONUC and pursue instead an isolated and ill-founded investigation against the Applicant that appears to have been personally motivated and damaged him irreparably."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 8 August 2007, and once thereafter until 8 September;

Whereas the Respondent filed his Answer on 28 August 2007;

Whereas the Applicant filed a communication on 24 September 2007;

Whereas the Applicant filed Written Observations on 11 March 2008;

Whereas the Applicant filed Supplements to his Application on 11 December 2008, 25 February 2009 and 18 May;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***Employment history***

… [The Applicant] first joined the United Nations in 1979. He was assigned to MONUC/Kinshasa effective 1 April 2003 as Senior Administrative Officer on a fixed-term appointment at the P-5 level. Effective 7 August 2003, he received an SPA to serve at the D-1 level as Officer-In-Charge, Administrative Services. He was reassigned from MONUC to United Nations-HQ [Headquarters] effective 12 June 2004. In October 2004, he was assigned to UNMIS in Khartoum, Sudan, at the P-5/11 level on a fixed-term appointment. On 2 November 2005, [the Applicant] informed UNMIS that he did not wish to extend his appointment beyond its expiry date of 31 December 2005.

Summary of Facts

… By a memorandum dated 23 January 2004, [Mr. S.], Director of Administration, MONUC, submitted a complaint of sexual harassment to UN-HQ.

… By a memorandum dated 11 February 2004 ... an investigation panel (IP) [was appointed] to conduct an initial inquiry and fact-finding into the complaint.

… By an email dated 12 February 2004, [the Applicant] was notified of the investigation, which was conducted from 5 to 17 March 2004. The IP looked at allegations that complainant had been the target of managerial harassment by another staff member, and that [the Applicant] failed to assist the complainant in resolving the situation due to her refusal to have a social relationship with him. After conducting 24 interviews, the IP concluded:

> '… [T]he Panel was not able to establish a direct 'quid pro quo' linkage between [the Applicant]'s expressed interest in [Dr. O.] and his failure to take action to address her situation … The Panel is of the view that [the Applicant] has demonstrated behaviour inappropriate to a senior officer. By virtue of his position as Officer-in-Charge of Administrative Services and his perceived and real power, he can greatly influence the careers and well-being of staff, he should be expected to set the example in demonstrating the highest standards of behaviour … This finding is supported by testimony given by colleagues who both viewed his behaviour as inappropriate and those who, while not deeming his behaviour inappropriate, recognized that this approach could be rough and demanding.'

… By a letter dated 14 May 2004 … [the Applicant] was informed …

> 'I agree with the findings of the investigation panel that you have demonstrated behaviour inappropriate to a senior officer who should be expected to set the example in demonstrating the highest standards of behaviour in accordance with the Organization's core values and competencies, including respect for cultural diversity and gender sensitivity. The panel had no doubt that [the complainant] reasonably and genuinely believed that you intended to link your support for her in administrative matters to her willingness to socialize with you. Your behaviour towards her, at the very least, created a wrong impression, and further reinforced the apparent reasonableness of her concern. By virtue of your position as Chief, Administrative Services, you have both perceived and actual power to greatly influence the careers and well-being of staff. I find that, in your dealings with [the complainant] you failed to demonstrate the cultural and gender sensitivity that is to be expected of a senior official with oversight responsibility for personnel matters within the mission.
>
> I have decided not to pursue this matter as a disciplinary case, but to take appropriate administrative measures. You are hereby reprimanded for your conduct referred to above ... In the circumstances, it has also been decided that, at the discretion of DPKO, your assignment to MONUC would be ended and you would be assigned to Headquarters. In addition, you will be required to undergo gender sensitivity as well as leadership and management training, prior to your being considered for any further assignment …'

… On 24 February 2004, [the Applicant] submitted a complaint to the Panel on Discrimination and other Grievances claiming that the DOA created an extremely hostile working environment and that the allegation of sexual and general work-place harassment against him was false.

… On 14 June 2004, a Panel on Discrimination and other Grievances (PDOG) submitted a memorandum … which concluded:

> '…that the DSOA has made a number of allegations against the [Applicant], demonstrating a pattern of deliberate actions to discredit the [Applicant's] personal and professional integrity.
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> 23. The Panel also concludes that the alleged sexual and general work-place harassment case against the [Applicant] by a UNV [United Nations Volunteer] ([complainant]) at MONUC has been handled improperly, in violation of the established UN procedures, denying the [the Applicant] his right to due process.
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> 24. Furthermore the [Applicant] has been reprimanded for an 'inappropriate conduct' without substantiated evidence.'

> … By a letter dated 2 July 2004, [the Office of Human Resources Management (OHRM)] informed [the] Secretary, Panel on Discrimination and other Grievances, that [they] did not agree with the Panel's findings that there was a violation of [the Applicant]'s due process rights.
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> … By a memorandum dated 16 July 2004 to [OHRM] [the Secretary, PDOG] reiterated the PDOG's belief that the procedure in [the Applicant's] case did not comply with ST/AI/379, and brought to her attention the Panel's views concerning two other procedural issues.
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> … By a letter dated 26 July 2004, [the Applicant] submitted a request for administrative review of the decision.
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> … On 5 November and 1 December 2004, [the Applicant] filed a preliminary and full statement of appeal, respectively, with the JAB."

The JAB in New York adopted its report on 19 June 2006. Its considerations, conclusions, and recommendation read, in part, as follows:

> ***"Considerations***
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> 20. Appellant raises an abundance of claims too numerous to address specifically in the course of this review. The Panel examined Appellant's main contentions in order to review whether he had been denied due process, or whether the decision was arbitrary or ill-motivated.
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> 21. Appellant contests the failure to deal with the matter informally, rather than pursuing the formal investigation. The PDOG interpreted ST/AI/379 to require as a matter of procedure an informal approach prior to a formal one, stating that only after the former 'has been unsuccessful,' according to para. 8 of the same AI, may the aggrieved party make a written complaint to the ASG/HRM. This Panel disagrees. Firstly, no compulsory language couches the informal approach described in paragraphs 5-7, nor does that section lay out a hard-and-fast process to be followed: it simply states that, in many cases, 'the situation *can* be resolved informally.' [emphasis added] Advice from a colleague to the aggrieved party 'will *often* be *helpful*.' [emphasis added] It describes a second step after this, but leaves taking that step within the discretion of the aggrieved party: 'As a next step, an aggrieved individual *may wish to consult* the Staff Counsellor …' [emphasis added] Thereafter [it] lists a series of other entities that 'may' be approached in the matter, including the Panel of Counsel, a Focal Point for Women, and a Personnel Officer. This interpretation is consistent with the hortatory language used in ST/IC/2004/4, which informs staff of the means available to them to address and resolve workplace conflict situations, and which in section III encourages staff to first seek an informal solution. It would also seem consistent with the sensitive nature of such cases.
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> 22. Secondly, it is not clear from the wording of the AI that the right to choose informal over formal approaches vests in anyone other than the aggrieved staff member, who is essentially the subject of each sentence in that section. Moreover, paragraph 7 puts staff members on notice that 'incidents which may constitute misconduct will be reported by [personnel or senior members of the department or office] to the Assistant Secretary-General for Human Resources Management.' Even in the absence of a complaint, then, [Mr. S.], the DOA, could have forwarded a report of suspected misconduct to the ASG. Thus, wherever the discretion to decide upon one of the two approaches lies, clearly it does not lie with the alleged offender.
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> 23. The Panel notes that a number of actors in this case, including the complainant herself, had considered an informal resolution desirable. Under the relevant AI, the Panel need not consider whether that approach would have been more appropriate for all concerned; for the purposes of the present appeal, the Panel need only consider whether Appellant was entitled to that

approach. It finds he was not. Based on the foregoing, the Panel finds no lapse in due process in choosing formal over informal action.

24. Appellant also contests the failure to conduct a preliminary fact-finding investigation at the duty station that included both the complainant and Appellant prior to referring the case to UN-HQ. Here, as well, the Panel finds no lapse in due process. Contrary to Appellant's assertion, AI/379 is the controlling instruction in this case, rather than AI/371, although it makes reference to this instruction for the later procedural phases. AI/379 distinguishes between the procedure required at UN-HQ – where, upon receipt of a complaint or report of sexual harassment, the Office of Human Resources Management must conduct an initial investigation and fact-finding provided for in administrative instruction ST/AI/371 – and the procedure required at other duty stations. For its part, the PDOG examined the following language:

> 'At all other duty stations, the Assistant Secretary-General for Human Resources Management shall designate an official who will conduct the initial investigation and fact-finding and report directly to him or her.'

It found that 'this separate sentence in the said ST/AI for 'all other duty stations' allows to conclude [sic] that the said official should be designated from the same duty station. The language here used in identifying the investigation and fact-finding with the word 'initial' implies that there may be another investigation or more.' However, the Panel finds that the designation of 'an official' does not require that one be chosen from either the duty station or from UN-HQ, but rather leaves the question to the discretion of the ASG. Moreover, not only is it not compulsory to designate an official from the duty station, in some cases it would seem counterproductive to do so. In the present case, for example, if MONUC was in fact rife with conflict and tension, to appoint officials from that duty station to conduct interview would have left the process potentially vulnerable to objections of conflict of interest, partiality, and prejudice. In this regard, the Panel disagrees with Appellant's statement that it would have been more logical, relevant and fair for the DOA to hear Appellant's reactions to the accusations before submitting the case to United Nations-HQ. The appointment of outside officials to look into the matter could only strengthen the integrity of the process in this case. The appointment of an independent investigation panel would seem all the more crucial to Appellant if, as he states, the DOA was in fact engaged in a systematic attempt to undermine him.

25. In this case, it seems that a complaint was submitted against Appellant, pursuant to paragraph 8 of AI/379. As mentioned above, the DOA, pursuant to paragraph 7 of AI/379, had the discretion to view the incident as constituting misconduct, and could then report it to the ASG accordingly. The ASG designated officials to conduct an investigation pursuant to paragraph 9, and sent written notification of the investigation to Appellant the following day. Under either AI/379 or AI/371, there is no mention of another investigation after the initial inquiry. In light of the above, the Panel finds no irregularity in the choice of the IP from UN-HQ.

26. Similarly, Appellant claims that, given that it was limited to findings regarding allegations of sexual and workplace harassment, the IP had no authority to make findings regarding behaviour inappropriate to a senior administrative officer. This claim must also fail. First, the ASG, in her letter appointing the IP on 11 February 2004, specifically tasked it with informing her of what occurred 'so that we may determine whether sexual and/or general workplace harassment *or another kind of inappropriate behaviour*' [emphasis added] had taken place.' Even in the absence of a specific mandate, nothing precluded the IP from delving into and rendering conclusions regarding behaviour arising out of the same factual situation and related to the initial charge of sexual/workplace harassment. In fact, to the degree that all staff members – whether serving on an investigation panel or not – have an obligation to report instances of misconduct, nothing would preclude the investigation in this case from findings on any conduct – whether or not they arise out of the same facts – if IP felt these reasonably could be viewed as misconduct.

27. Appellant challenges the factual basis for the finding that he behaved inappropriately, based in part on the fact that the PDOG concluded, inter alia, that 'the allegations by the DOA against Appellant's professional and personal integrity are unsubstantiated and contradicted by both the documentation submitted to the Panel by Appellant and statements made by many who were interviewed.' With regard to the allegations of sexual harassment and inappropriate behaviour, the PDOG based its conclusions on its finding that the case 'was handled improperly, in violation of the established UN procedures, denying the Appellant his right to due process.' The PDOG did not directly respond to the substantive findings of the IP regarding the factual basis for the conclusion. This could have been because, apparently, it did not have a copy of the IP report. It found, nevertheless that the reprimand for inappropriate conduct was 'without substantiated evidence.' However, Respondent rightly points out that the PDOG's recommendations do not trump the findings of the IP or the decision of the ASG: ST/AI/308/Rev.1 makes clear that the PDOG is an advisory rather than a decision-making body, although the record of the PDOG's considerations is certainly relevant to litigation by the JAB and UNAT.

28. However, the PDOG's overall comment regarding lapses of due process raises a number of issues which, while not necessarily going to the factual basis of the case, are relevant to the final disposition. The Panel notes a number of deficiencies in observing Appellant's due process rights. The ASG's 11 February 2004 memorandum notifying Appellant of the allegations against him stated:

> 'After completion of the initial investigation and fact-finding, you shall be informed of the course of action decided upon by me, in accordance with paragraph 12 of ST/AI/379 and para. 5 of ST/AI/371. Please be assured that in the event that that decision is to pursue this case as a disciplinary matter, you would receive formal allegations of misconduct and a copy of the documentary evidence against you, and you would then have the right of the assistance of counsel and the right to formally respond in writing …'

29. The above position, however, would seem to run contrary to UNAT's judgement in [Judgment No. 1246 (2005)], in which it held:

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

Judgment No. 1246 (2005), para. V. It should be noted that, in regards to the general proposition here – that full due process guarantees attach the moment 'a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage' –the Tribunal refers specifically to UNDP's non-observance of its own procedures, which vary from those contained in AI/379 and AI/371. At the same time, however, the Tribunal underlines the fact that a person collaborating in procedures moving contrary to his interests must as a 'general principle of law' be allowed to do so with procedural guarantees, thus signalling the wider application of a fundamental rule underlying all such procedures, whether at UNDP or not. This is confirmed in a reading of Judgement [No. 1242 (2005)], para. VI, in which the Tribunal, again in the context of UNDP's rules, stated: 'These basic requirements of due process apply to all investigations of a disciplinary nature.'

30. However, these Judgements deal with disciplinary matters rather than the administrative action taken in the instant case. Respondent argues that, because the ASG in fact decided not to pursue the case as a disciplinary matter, the due process rights under the relevant AIs failed to

attach to him, ostensibly including the right to receive a copy of the complaint and the memorandum of referral in a timely manner, as well as the right to confront what he considered to be relevant witnesses. In this regard, the Panel takes note of Judgment No. 1176, Parra (2004), para. IV, in which the Tribunal held that due process guarantees are not, as Respondent argues, limited only to cases where disciplinary action is pursued, and ordered that a letter of reprimand be considered as void and be removed from the Applicant's Official Status file. The Tribunal states:

> 'A reprimand is not considered a disciplinary measure within the meaning of staff rule 110.3, as explicitly stated therein. The implication of this rule is that the procedural safeguards contained in the Staff Regulations and Rules in the form of the disciplinary process, which serve to benefit both the Administration and the employees, do not apply to a reprimand.
>
> However, this does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or natural justice, which implies, inter alia, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (audi alteram partem). The Tribunal notes that the letter of reprimand was issued on the same day that the Security Officer had submitted his report. The Tribunal thus finds that such an opportunity was not extended to the Applicant prior to issuing this reprimand, thus violating this fundamental principle.'

31. In line with this precedent, the Panel finds serious lapses of due process in the instant case. Respondent contends that Appellant was given adequate time to defend himself, arguing that there was no undue delay in notifying Appellant of the allegations (a little over a month after she received [Mr. S.]'s report and [Dr. O.]'s complaint, and the day after she had appointed the IP). Based on the evidence, the Panel must agree with Appellant that he was deprived of the opportunity to respond to the allegations. Arguing that Appellant was sufficiently informed of the nature of the allegations against him to permit him to fully and fairly mount a defense during the IP's investigation, Respondent cites Judgment No. 997, Van der Graaf (2001). In that case, as here, the Applicant claimed that the charge in question should be dismissed, as it was not charged ab initio and did not relate to the original charge. The Tribunal rejected the claim, considering that the charge 'came early enough so that the Applicant had an opportunity to defend himself.' For the purposes of the present argument, however, the similarities between the two cases end there, as the Tribunal also found that 'the charge … was made nine months prior to the hearing before the JDC.' As will be discussed in detail below, here Appellant was given the opportunity to address the allegations of harassment, rather than to rebut the question of his behaviour. Essentially, this leads to circumstances where he was given no material opportunity to rebut the allegations at all.

32. The Administration was under no obligation to inform Appellant prior to the appointment of the IP; however, minimal due process required giving him enough time to know the substance of the allegations against him so that he would know how to answer the allegations. He received a copy of the complaint on the day he was to be interviewed, approximately one month after receipt of the notice of the IP's appointment, and had only some twenty minutes to read it prior to that interview. Thereafter, he was not given a copy of the IP report until 25 June 2004, after the reprimand was issued and he had left MONUC. In addition, basic fairness would necessitate transmitting documentation relevant to the complaint to the degree it could have any bearing on the ASG's decision, yet he never received a copy of the referral memorandum from [Mr. S.].

33. Moreover, if the only opportunity he would have to defend himself was at the fact-finding stage, he should have been given an opportunity to have witnesses interviewed who would add counter-testimony. Appellant had apparently requested the IP during the course of the investigation to interview a number of witnesses. The IP, according to Appellant, denied the

request because in their view the witnesses were not relevant to the case. Yet by definition, during the course of a fact-finding investigation, no 'case' exists per se, until the facts are gathered and the investigation concludes. There would seem to be no basis, therefore, for the IP, tasked with gathering the facts and presenting 'a full picture of what occurred' to disqualify witnesses who the staff member considered would be important in presenting the full picture of the case.

34. After it had gathered the facts, the Administration concluded that there was insufficient evidence to sustain a harassment charge against him, yet decided, without soliciting his view on the matter, to reprimand him for 'inappropriate behaviour.' Appellant was given no report of what facts had led the ASG to that view, was afforded no 'interview' on the matter, and was given no written opportunity to put forward evidence that might exonerate him or a statement justifying his behaviour. If witnesses were to be rejected, then, he should have been given an opportunity to review the report and present his own picture of the case. This was particularly appropriate since the IP, which was tasked with finding facts surrounding the incident rather than drawing conclusions on them, nevertheless made several conclusions in its report, not the least of which was the finding of 'inappropriate behaviour.' The fact that Appellant was given no opportunity to rebut the IP's view and interject his own for the benefit of the ASG's review necessarily leads to the conclusion that the decision to reprimand him was taken on the basis of less than a full picture.

35. That opportunity was particularly important to review Appellant's allegations of bias by [Mr. S.] as a possible factor in the case. The PDOG found that the allegations against Appellant 'may have been ascribed to the shared interest of the DOA and the CCPO to discredit the Appellant and to remain 'in control' of MONUC's administration, while others claimed that the conflict was due to 'personality clash' which escalated into its current stage.' The IP itself refers to a duty station which was apparently rife with conflict. Moreover, while an informal approach was not required, several persons considered it desirable and appropriate, not the least of which was the IP and the complainant herself; yet the question was somehow left to [Mr. S.], who preferred to have the complaint filed formally. These circumstances generally and [Mr. S.]'s conduct towards Appellant in particular created at very least a strong perception of bias which deserved more careful scrutiny by the Administration prior to taking the decision to reprimand him.

36. The Panel observes that it is not in a position to come to any conclusions on the allegations made against Appellant or surmise what the outcome might have been if the ASG had solicited a response from him to gain 'the full picture.' Its findings are based solely on the inadequacy of the procedures adopted leading to a decision taken without the full view of the facts.

37. Ultimately, the letter of reprimand carried with it two other actions which, in the Panel's view, were more punitive than purely administrative in effect. The Panel notes the following actions taken in conjunction with the letter of reprimand:

Transfer from MONUC

38. It is reasonable to assume that the effect of this action would affect his reputation. Certainly, it affected his career. Although a letter of reprimand does not constitute disciplinary action, the reprimand in this case, wittingly or unwittingly, had a disciplinary effect. When viewed in light of the violations of process highlighted above, the Panel notes that the obvious harm to his reputation from issuance of the reprimand was compounded by the concomitant decision to transfer him out of MONUC. After his fixed-term appointment expired on 30 June 2004, he was extended effective 1 July 2004 until the end of that year. Particularly given his highly successful performance evaluations, there was no reason for him to expect that the reprimand might operate to end his assignment at MONUC, provided he [fulfil] the training mandated by the ASG. However, following the May letter of reprimand, he was sent to New York for the training on 23 June 2004, and did not return to MONUC thereafter. Rather, he was assigned to UNAMIS in October 2004.

Loss of SPA

39. This resulted in the discontinuation of his SPA, which had been approved in respect of his performance of functions of CAS at MONUC at the D-1 level. It should be noted here that Appellant had applied for the vacant D-1 position in July 2003 and was selected for the post; however, since he maintained his link with UNOG, he could not be appointed at the D-1 level. Because the post of CAS was considered to be at a level higher than his personal grade level, PMSS approved the SPA at the D-1 level on the basis of the recommendation of a MONUC SPA Panel. According to the 21 September 2004 memo from PMSS notifying him, his SPA was ended 'upon [his] departure from MONUC in connection with the recommendation of OHRM, following conclusion of the investigation of the complaint of harassment filed against [him].'

40. The letter of reprimand, in effect, amounts to discipline by stealth.

Conclusions and recommendation

41. In light of the foregoing, the Panel unanimously concludes that Respondent violated Appellant's due process rights in failing to accord him the right to adequately defend himself and respond to the allegations against him. It also unanimously concludes that the resulting letter of reprimand carried with it punitive effects amounting to action that was more disciplinary than purely administrative in nature. It therefore unanimously recommends that the letter of reprimand be removed from his OS file, and that he be compensated in the amount of fifteen months net salary at the time of separation for violation of his due process rights."

On 17 July 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General regrets to inform you that he does not agree with the findings and conclusions of the JAB and, therefore, does not accept the JAB's recommendations in this matter. The policy and practice of the Organization regarding fact-finding exercises is that a staff member is not entitled to be informed in writing of the allegations made against him or her, nor does he or she have a right at this stage to be provided with a copy of the documentary evidence of alleged misconduct. These rights attach during formal disciplinary proceedings, i.e., after a formal charge of misconduct is made against the staff member pursuant to ST/AI/371. During the investigation stage, a staff member who is interviewed regarding possible misconduct has a right to be given an opportunity to put forward his or her version of the facts. The staff member also has a right to be given a reasonable opportunity to present evidence or witnesses. This was done in the present case.

In addition, the transfer from MONUC and the loss of your SPA were not disciplinary actions but administrative ones. Your transfer from MONUC was a natural consequence of the decision that you undergo the gender sensitivity training and the leadership and management training. The loss of SPA was linked to the fact that you were no longer performing full functions at the D-1 level in MONUC for which the SPA was approved.

Accordingly, the Secretary-General has decided to take no further action in this case except that the Department of Peacekeeping Operations shall be requested to remove the recruitment alert from your Official Status file."

On 26 January 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated his due process rights, first by refusing to apprise him fully of the charges against him, thereby depriving him of the right to adequately defend himself and respond to the allegations against him, then compounded its violation by further refusing to provide him in a timely manner a copy of the IP's Report.

2. The IP, which had been charged only with impartial fact-finding, engaged instead in selective fact-finding and drew conclusions.

3. The IP failed to discern, or chose not to recognize, that the Applicant's accuser saw herself as a perpetual victim and made habitual use of the word "harassment" in her dealings in the workplace, especially with male staff, yet only the Applicant was singled out for special investigation.

4. The Administration abused its authority and used the IP to engage in discipline by stealth, effectively ruining the Applicant's reputation and leading to the loss of his career.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters including the right to determine whether a staff member has met the required standards of conduct and the authority to penalize staff members. The reprimand issued to the Applicant constitutes a sanction for inappropriate behavior and is not a disciplinary measure.

2. The Applicant was accorded all due process rights.

3. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

4. None of the Applicant's rights have been violated and, accordingly, he is not entitled to any compensation.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal claiming: (a) that the reprimand issued by the Respondent had the same harmful effect on his career as a disciplinary measure; (b) that the Respondent violated his due process rights by refusing to inform him about the charges against him, by not providing him with relevant documents in order to defend himself to respond to the allegations against him, and by not providing him with a copy of the IP's report in a timely manner; and (c) that the IP was influenced to the detriment of the Applicant and that the investigation was improperly motivated and/or tainted with bias or other extraneous factors. The Applicant also claims that this letter of reprimand also "led to the insertion in the Applicant's OS file of the equally dire 'Recruitment Alert!' notice, which amounted to [an additional] sanction" against the Applicant.

II. The Applicant requests the Tribunal to order that he be reinstated at the D-1 level and to be awarded compensation in the amount equivalent to the net base salary that he would have received at the D-1 level, from 1 January 2006, to the date of his reinstatement, plus interest. He further asks that the letter of reprimand be removed from his Official Status file. In the event that the Applicant is not reinstated, he requests that the Tribunal order that he be awarded compensation in the amount of four years and eight months net base salary at the D-1 level, plus interest.

III. The Tribunal is satisfied that in issuing the Applicant with a reprimand, the Respondent acted within his authority. The Tribunal has consistently recognized the Secretary-General's authority to exercise broad discretion, including the right to determine whether a staff member has met the required standards of conduct and the authority to penalize staff members in cases of misconduct. The Tribunal has established its own competence to review such decisions.

IV. Thus, the Tribunal will not interfere with the Respondent's discretion in disciplinary matters, unless such decision is tainted by extraneous factors, is arbitrary, or in cases where the decision is vitiated by prejudicial factors, by significant procedural irregularity, by a significant mistake of fact, or by failure to accord due process. (See Judgements No. 542, *Pennacchi* (1991); No. 815, *Calin* (1997); and No. 941, *Kiwanuka* (1999)). While the Tribunal notes that under staff rule 110.3 (b) a reprimand is not considered a disciplinary measure, the same principles nonetheless apply.

V. Specifically, the Tribunal takes note of staff rule 110.3 (b) (i) and Sections 5.06 and 8.03 of the UNSSS Manual, which provide that a reprimand may be written or oral; that it needs to be taken by a supervisory official; and, that it is not a disciplinary measure. Clearly, when issuing reprimands, the Administration has a duty to maintain due process of law. This is emphasized in Judgement No. 1176, *Parra* (2004), paragraph IV:

> "[T]his does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or natural justice, which implies, inter alia, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (*audi alteram partem*)."

VI. However, the Tribunal agrees with the Applicant that in the present case, he did not have sufficient opportunity to present evidence and witnesses to defend himself, because he was not allowed access to the documents containing the allegations made against him. In Judgement No. 1245 (2005), a statement was made regarding this element of due process:

> "Moreover, the Tribunal finds that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless he or she has full access to the file. Being

> prevented from having full access may jeopardize the person's rights and interests. The Respondent may argue that disclosure of a file would not respect confidentiality, but this must be balanced with the right of an applicant to defend him or herself. Otherwise, a violation of due process rights may occur."

VII. The Tribunal holds that it is a well-established rule of administrative law, deriving directly from the Rule of Law, that a reprimand or disciplinary action should not be issued or taken, unless the staff member has had the opportunity to have access to the documents containing the allegations. (*Cf.* Judgement No. 1043, *Mink* (2002)). As stated in Judgement No.1246 (2005), when "a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in an investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees".

VIII. The Tribunal does not accept the Respondent's claim that there should be a distinction between the limited due process rights applicable during preliminary investigations regarding possible misconduct and those applicable after a staff member has been charged with misconduct. In Judgement No. 1154, *Hussain* (2003), the Tribunal stated:

> "It is a well established principle of law, part of the wider principle of due process, that whoever is accused of any wrongdoing must be given a fair opportunity to defend him/herself within a proper procedure."

IX. Where a failure of due process in the preliminary investigations has an "inevitable and direct impact on the decision in the following stages" (Judgement No. 1246 (2005)) this may invalidate the decision of the Respondent, and compensation may be awarded for any injury or harm to the Applicant. The Tribunal finds that in this case, the Applicant was denied due process in not being allowed access to the documents containing the allegations made against him. Accordingly, the reprimand should be removed from his official status file, and he should be paid three months' net base salary in respect of the injury sustained.

X. As regards the Applicant's complaint that the investigation was tainted with bias or other extraneous factors, the Tribunal agrees that, while the Assistant-Secretary-General indeed has discretionary authority in this matter, he may not act in an arbitrary manner and it is up to the Tribunal to assess the motives for his decisions. However, the Tribunal finds that the Applicant has not proved that the preliminary investigation undertaken by the IP was improperly motivated or biased. Besides, the fact that the DOA of MONUC specifically requested an independent IP from Headquarters, and that the IP concluded that the Applicant's behavior did not constitute sexual harassment at the workplace, is a clear indication that the IP was not biased or improperly motivated.

XI. The Applicant claims that the IP "turned into an essentially ad hoc instrument in the hands of the Administration which allowed itself to have its cake and eat it too-it started off by fielding an administrative investigation and ended up by imposing disciplinary measures". The Tribunal does not

accept this reasoning and finds that the Applicant has failed to provide the Tribunal with sufficient evidence to support this specific claim.

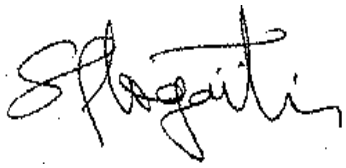
XII. In view of the foregoing, the Tribunal:

1. Orders that the reprimand be removed from the Applicant's Official Status file.

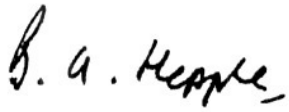
2. Awards the Applicant compensation in the amount of three months' net base salary in respect of the violation to his due process rights, payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected.

3. Rejects all other pleas.

(Signatures)

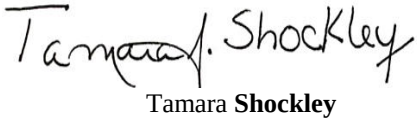


Spyridon **Flogaitis**
President



Bob **Hepple**
Member

Agustín **Gordillo**
Member



Geneva, 31 July 2009

Tamara **Shockley**
Executive Secretary