United Nations AT/DEC/1484

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1484

Case No. 1555 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, President; Sir Bob Hepple, First Vice-President; Ms. Brigitte Stern;

Whereas, on 29 November 2007, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

"II. PLEAS

9. … [T]he Applicant respectfully request the Tribunal:

….

(c) to decide to hold oral proceedings ….

….

10. On the merits, the Applicant respectfully requests the Tribunal:

(a) to rescind the decision of the Secretary-General finding that the charge of verbal abuse in the workplace was justified;

(b) to order that the conclusions and recommendations of the majority of the JDC [Joint Disciplinary Committee] … be upheld;

(c) to find and rule that the decision of the Secretary-General and his actions during the course of the case were improperly motivated by prejudice and other extraneous factors;

(d) to rescind the decision of the Secretary-General to reprimand the Applicant over a disclosed conflict of interest situation;

(e) to award the Applicant five years' net base pay as compensation for the actual, consequential, physical, psychological and moral damages suffered as a result of the Organization['s] actions or lack thereof ….;

(f) to award the Applicant [legal costs and fees]."

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 6 May 2008, and once thereafter until 6 June;

Whereas the Respondent filed his Answer on 19 May 2008;

Whereas the Applicant filed Written Observations on 16 May 2008;

Whereas on 16 November 2009, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

"**I. Charges**

... [The Applicant] was formally charged on 20 July 2005 with:

'Abuse of authority by creating a hostile work environment through harassment and verbal abuse vis-à-vis [Ms. K. M.] and the casual workers under his supervision'. [The Applicant] was advised that, '[i]f established, his behaviour would constitute a violation of staff regulation 1.2, namely the following sections governing the basic obligations [sic] of staff:

'(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;'

and

'(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status'.

... [The Applicant] was further advised that, if established, his behaviour would also constitute a violation of Staff Rule 101.2 (d), which states:

'Any form of discrimination or harassment ... as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.'

… In the transmittal letter to the [JDC] of 18 January 2006 by the Administration, however, it was noted that [the Applicant] had resigned and separated from the Organization while the investigation was still pending, which rendered formal disciplinary charges inoperative.

… The Panel, however, had before it a copy of the memorandum sent on 16 December 2005, by … [the] Director of Administration, MONUC [United Nations Organization Mission in the Democratic Republic of Congo], to … [the] Chief Personnel Management and Support Service OMS [Office of Mission Support]/DPKO [Department of Peacekeeping Operations], re: [the Applicant]. In the memorandum [the Director of Administration] requested, *inter alia* that …

> '3. [The Applicant] has since been engaged as the Regional Representative of the International Criminal Court, an organization with which DPKO has signed agreement of support and cooperation, and it is necessary for [the Applicant] to meet with MONUC officials and to travel aboard MONUC conveyance in the course of his duty.
>
> '4. In the light of the above, we are requesting that you revisit this case with a view to confirming that [the Applicant] may conduct the required liaison with MONUC on behalf of ICC.'

… On 30 November 2006, the Representative of the Secretary General explained to the Panel that [the Applicant] wanted to clear his name and OHRM agreed to refer the matter to the JDC not for recommendation on disciplinary measures but only for review and comment to the Secretary-General.

… Accordingly, the Panel has complied with the Secretary General's request to review the case referred to it on 18 January 2006, considering the charges presented on 20 July 2005 to [the Applicant] and determining whether those charges were supported by the evidence.

II. Employment History

… [The Applicant] joined the United Nations in 1986 as a clerk with UNITAR [United Nations Institute for Training and Research] at the G-4 level. In 1989 he was transferred to UNDP [United Nations Development Programme] as a Procurement Assistant. [The Applicant] was sent on mission to the field in 1994 (MICIVIH [United Nations Civilian Mission in Haiti] 9 Port-au-Prince, Haiti) as a Procurement Assistant. Effective 4 October 1999, he was deployed to the [MONUC] as a Logistics Assistant. In January 2003, he became Senior Facilities/Camp Manager at the FS-5 level.

... Due to the OIOS [Office of Internal Oversight Services] investigation, [the Applicant] was suspended with pay on 24 May 2005. His suspension was subsequently extended through 24 November 2005.

... Effective 18 November 2005, [the Applicant] resigned and separated from the Organization.

[On 23 March 2005, the Applicant received a formal reprimand related to his participation in the procurement of office spaces for MONUC in 2003. An OIOS investigation concluded that although the Applicant disclosed the conflict of interest in the procurement exercise to his immediate supervisor, the conflict that existed warranted a full disclosure to senior management of MONUC and the Applicant's recusal from the procurement process in question. The Joint Appeals Board (JAB) reviewed the Applicant's appeal in the matter and concurred with OIOS's assessment and concluded that the reprimand did not violate the Applicant's rights or terms of appointment, and unanimously decided to make no recommendation. On 7 March 2007, the Secretary-General accepted the JAB's findings and conclusions.]

….

IV. Events Leading to Pressing Charges

... At the end of 2003 or the beginning of 2004, the Investigation Division of OIOS conducted an investigation into … various allegations against [the Applicant], including a matter concerning an altogether unrelated issue (SAFRICAS compound case) and a number of complaints of harassment, racism and sexual harassment.

... On 24 March 2005, OIOS prepared an investigation report outlining findings relating to the harassment allegations. On 9 June 2005, [the Applicant] submitted comments on the investigation report, denying the allegations contained therein.

... In early June 2005, OHRM received copies of the nine statements of the international staff members who had been interviewed by OIOS, a written complaint dated 27 February 2004, filed by [Ms. K. M.], Information Assistant, MONUC, and a conversation record of the OIOS interview with [the Applicant] of 2 April 2004. Based on the evidence in these statements and [Ms. K. M.'s] complaint, OHRM charged [the Applicant] on 20 July 2005.

... In the letter of charges, dated 20 July 2005 OHRM specifically noted in paragraph 3:

> 'According to paragraph 23 of the Report, OIOS interviewed 23 witnesses to investigate the allegations made against you. The Organization decided not to disclose the identity or statements of the daily workers that made allegations against you. Therefore, in order to safeguard your due process rights, the contents of the witness statements of the daily workers have not been taken into consideration by the Organisation. The [charges are] based on Ms. [K.M.'s] complaint of 27 February 2004 and the nine witness statements by international staff members, which are enclosed.'

... In her statement/complaint dated 27 February 2004, [Ms. K. M.] stated that she heard [the Applicant] instructing a daily worker assigned to work in his office to ask for permission to go anywhere, including the bathroom. [Ms. K. M.] also stated that she heard him regularly scream at daily workers and tell them that they were 'stupid' and 'lazy'. [Ms. K. M.] further stated that oftentimes, she would tell [the Applicant] that he was going too far and that he would reply 'that is the only way they understand'.

... In her complaint, [Ms. K. M.] also stated that [the Applicant] sprayed air freshener on two daily workers, while telling them that they needed to take a shower because they stank. [Ms. K. M.] also stated that she remembered an incident where he '... sprayed a bottle of washroom deodorant on one of the staff alluding to her body odour'.

... [Ms. K. M.] indicated that on one occasion, Facilities/Camp Management instructed daily workers to work at a private residence without getting paid. According to [Mr. V-E], [the Applicant] sent daily workers to his supervisor's residence to do 'carpentry, electrical work and gardening'. [Mr. V-E] stated that [the Applicant] instructed the person, who maintained the files of the daily workers, to alter the attendance records: '[T]his was necessary as the workers were first marked present during roll-call in the morning and therefore paid by MONUC for this day'. [Mr. V-E] indicated that he was not sure who performed these services.

... [Ms. K. M.] stated that in November 2003, she made a decision that 'enraged' [the Applicant], and that he used profane language vis-à-vis [Mr. V-E] to describe [Ms. K. M.]. In her complaint, [Ms. K. M.] further indicated that in January 2004, [the Applicant] harassed her. Specifically, he extended his middle finger at her, and used profane language vis-à-vis her on several occasions.

... [Mr. P. M. D.], Administrative Assistant, MONUC, and Staff Union official representing the contractual employees, stated that [the Applicant] was the subject of five written complaints, and an unspecified number of oral complaints that he received from casual workers between

September 2002 and June 2003. According to [Mr. P. M. D.], the complaints pertained to using degrading and profane language vis-à-vis the daily workers.

... [Mr. P. M. D.] also indicated that in the fall of 2002, he informed [the Applicant] that the daily workers '... were traumatized by [his] actions like ripping off the badge, abusing suspension and firing'.

... In his testimony, [Mr. V-E] … stated that he witnessed [the Applicant] ripping off somebody's badge directly, '... but that this was probably after having asked to have it handed over by the daily worker'. The evidence shows that "[f]or suspension, [Mr. V-E] or [the Applicant] ask for the security badge, thereby making re-entry without their knowledge impossible for them. If the daily worker refuses to hand it over, [Mr. V-E] or [the Applicant would] remove it themselves, which sometimes results in pulling or yerking [sic]'. According to [Mr. V-E], [the Applicant] repeatedly told daily workers 'you stink' and made comments towards overweight daily workers such as 'are you pregnant'.

... [Mr. V-E] stated that [the Applicant] behaved like a drill sergeant and that he '... used profanity, abusive language, … both with daily workers, as well as with international staff members'. According to [Ms. K. M.], [the Applicant] was shouting at his subordinates every day.

... [Mr. V-E] stated that [the Applicant] prohibited daily workers from using the same bathrooms as the international staff members. [Mr. V-E] explained that '…due to request from international staff members, or complaints, Camp Manager has begun to 'recommend' to daily workers to use separate toilets'. According to [Mr. V-E], '... these are direct instructions given to the [daily workers] through supervisors, and binding from the point-of-view of the workers ...'

... On 20 July 2005, [the Applicant] was formally charged with misconduct. He was charged with abuse of authority by creating a hostile work environment through harassment and verbal abuse vis-à-vis [Ms. K. M.] and the daily workers under his supervision."

On 5 March 2007, the JDC adopted its report. Its considerations, conclusions, and recommendations read as follows:

"VI. Findings of fact

32. The Panel faced some difficulties in its fact finding since it found that much of the evidence in this case was based on hearsay. The first task of the panel was therefore to separate facts from rumours, a task which was properly within the authority and competence of the Administration.

33. After examining [the Applicant's] OS file and taking note of his statements, the Panel found that in the five years and nine months that he worked as Senior Facilities/Camp Manager, the Organization was satisfied with his work and he received good performance appraisals.

34. The facts established by the evidence supplied to the JDC by the administration are as follows:

a. [The Applicant] was a tough manager who used tough language. The Panel felt that the testimony of [Mr. V-E], who worked with [the Applicant] for a while and was present in many of the encounters mentioned above, gave a reliable picture of [the Applicant's] daily conduct. Specifically, [Mr. V-E] stated that [the Applicant] behaved like a drill sergeant and that he '... used profanity, abusive language … both with daily workers, as well as with international staff members'. Further, [Mr. P. M. D.] … and Staff Union official representing the contractual employees, stated that [the Applicant]

was the subject of five written complaints, and an unspecified number of oral complaints that he received from casual workers between September 2002 and June 2003. According to [Mr. P. M. D.], the complaints pertained to using degrading and profane language vis-à-vis the daily workers. Additionally [Ms. K. M.] stated that [the Applicant] was shouting at his subordinates every day. Finally, the Panel took note of [the Applicant's] own statement where he admitted that there have been '…instances when I have been angry at people who persistently disobeyed orders and at times asked them to hand back their badges and when they hesitated, I might have grabbed the badge from them by removing it over their head'.

b. The Panel found [Ms. K. M.'s] accusations of verbal abuse towards her credible, but noted that there was no independent corroborating evidence even though, in at least one instance, there were potential witnesses. The Panel noted that [the Applicant] disputed the charges stating: "[Ms. K. M.'s] … allegations that there were encounters between us where we exchanged profanity are nonsense'.

c. The Panel felt that it was beyond the scope of its competence to know the full details of the events leading to the pressing of the charges against [the Applicant] due to the lack of sufficient, conclusive evidentiary statements.

VII. Considerations

35. The Panel was requested to advise the Secretary-General, whether or not the established facts found by it, indicated that [the Applicant's] behavior warranted the charges of:

> 'Abuse of authority by creating a hostile work environment through harassment and verbal abuse vis-à-vis [Ms. K. M.] and the daily workers under his supervision'. [The Applicant] was advised that, '… if established his behaviour would constitute a violation of staff regulation 1.2' and
>
> 'Any form of discrimination or harassment ... as well as verbal abuse at the workplace or in connection with work is prohibited.'

36. The Panel noted that in disciplinary matters, the jurisprudence of UNAT [United Nations Administrative Tribunal] clearly provides that the Administration carries the initial burden of proof. Given the role of the JDC as an administrative organ rather than a criminal court, the Administration is not required to prove its case beyond a reasonable doubt. (See UNAT Judgment No. 850, *Patel IV* (1997).) The Administration must present adequate – i.e., reasonably sufficient for legal action – documentary or other evidence regarding the details of its investigations to support the conclusions and recommendations of those conducting the investigations. Once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence justifying the conduct in question (see Judgment No. 484, *Omosola II* (1990)). The Panel applied these guidelines in its review of the present case.

37. The Panel carefully examined the material before it and the comments and observations made at the hearing by the Representative of the Secretary-General and by the staff member and his Counsel. The Panel was not able to summon [Ms. K. M.] as a witness, since she was no longer in service.

38. The Panel found that the issue that was not in dispute was the management style of [the Applicant]. The Panel noted that [the Applicant] has a military leadership style which was alternately recognized in his PAS as being helpful in the situation and later criticized by some during the course of the OIOS investigation.

39. The Panel had to determine whether the tough 'Sergeant Major' management style crossed the line into abuse of power bearing in mind the needs of the mission. The Panel noted the witness testimony concerning certain actions or behaviours of [the Applicant], i.e., like the ripping of somebody's badge off directly or the use of abusive or profane language.

40. Nevertheless the Panel noted that [the Applicant] was not offered enough support and guidance in fulfilling his difficult role. The Panel felt that for a long time the Administration's policy towards [the Applicant's] behaviour and actions was of 'see nothing-hear nothing', bearing in mind that he was required to accomplish certain immediate needs of the mission. [The Applicant] was neither reprimanded nor was any management training pertinent to his supervisory role of a very large number of daily workers offered to him.

41. The Panel further noted that the charges which referred to the hand gesture and words vis-à-vis [Ms. K. M.] brought forward in [Ms. K. M.'s] evidence were disputed by [the Applicant]. The Panel considered that the charges, even had there been sufficient evidence to sustain them, did not rise to a pattern of persistent harassment or abuse. The evidence suggests that there was a degree of animosity on both sides, and that the atmosphere in [the Applicant's] office was already unfriendly and vulgar.

42. The Panel found evidence that [the Applicant] used profanity and inappropriate language constituting verbal abuse at the workplace. Nevertheless, the Panel did not find any evidence of malice or bad intent on his part. The Panel was aware that [the Applicant's] managerial style was tough in dealing with the daily workers, but that he viewed his military style of conduct as needed in order to accomplish the goals of the job he was assigned to do.

VIII. Recommendations

43. The Panel noted that the findings supported by the evidence did not establish the charges of harassment, discrimination or abuse of power. Nevertheless it did establish a charge of verbal abuse in the workplace which constitutes a violation of staff rule 101.2. The Panel found that [the Applicant's] management methods were overly harsh and inappropriate, and that the language he used in his supervisory role was inappropriate for an international civil servant. However, the Panel also found that there were several strong mitigating factors to this finding, including the difficult and stressful job that he was asked to do, the number of daily workers under his supervision, the lack of guidelines given to him, the difficult circumstances of the mission, his 18 years of military training, the comments of encouragement in his PAS on his military management style and [the Applicant's] many years of dedicated service to the Organization.

44. To address the issue of the prohibition of [the Applicant] to enter the grounds of MONUC, his former employment site, and to satisfy the requirement of his current employer (the International Criminal Court) that he be able to enter MONUC, the Panel recommends that [the Applicant] attend the 'Working Together: Ethics and Integrity in our Daily Work' course, at any of the UN locations which offer the course. The successful completion thereof should then be included in [the Applicant's] employment record. While the Panel found that [the Applicant's] management methods were overly harsh and inappropriate, the Panel did not find evidence of a compelling reason that would warrant his being barred from the grounds to MONUC. Given the context and history of events, the recommendation of this training is meant to be in the best interest of [the Applicant] and MONUC staff with whom he may have had past issues.

45. The Panel recommends that DPKO develop appropriate policies, training, and support for its staff in managerial positions to avoid the reoccurrence of similar situations."

On 31 May 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

> "The Secretary-General has examined your case in the light of the JDC's Report, as well as the entire record and the totality of the circumstances. With respect to the findings of the JDC that the evidence did not establish the charges of 'harassment, discrimination or abuse of power' but did establish a charge 'of verbal abuse in the workplace which constitute[d] a violation of staff rule 101.2', the Secretary-General notes that Staff Rule 101.2 (d), which provides, '[a]ny form of discrimination or harassment, including sexual or gender discrimination, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited', is applicable here. On the basis of the JDC's findings, the Secretary-General agrees that you violated Staff Rule 101.2 (d) by verbally abusing others in the workplace. With respect to the JDC's recommendation that you attend the 'Working Together: Ethics and Integrity in our Daily Work' course, the Secretary-General notes that as you are not a staff member of the United Nations, the Organization is not under any obligation to provide any training to you. However, the Secretary-General further notes that with respect to the issue of your being prohibited from entering MONUC, DPKO has indicated that considering the MOU [Memorandum of Understanding] between MONUC and the International Criminal Court and in order to facilitate the work of both Organizations, you would be allowed access to MONUC's premises, exclusively in the context of your liaison functions as ICC representative and, while on UN premises, you would be subject to all rules and procedures applicable to the access and movement of non-UN visitors within UN premises. Finally, the Secretary-General, noting that you are no longer a staff member and, therefore, not subject to sanctions, has decided nevertheless that in view of your violation of Staff Rule 101.2 (d), a copy of this letter and the JDC's report will be placed on your Official Status File."

On 29 November 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His claims are receivable. He timely requested an extension of time to file his Application but the second request for an extension was inadvertently not filed by the Applicant.

2. He disclosed the conflict of interest and therefore, the Secretary-General's decision to reprimand the Applicant was vitiated by mistakes of fact and law, and was improperly motivated by prejudice and other extraneous factors.

3. He received satisfactory performance appraisals and his management style served the Organization. Therefore, the decision to investigate him on charges including verbal abuse was fabricated and constitutes a "vendetta" against him.

4. His counsel volunteered his services and should be awarded fees and costs.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred.

2. The Secretary-General has broad discretionary authority concerning disciplinary matters, which includes the determination of what type of disciplinary measure is warranted, including a reprimand.

3. The Applicant did not properly disclose his conflict of interest in the procurement of additional space for MONUC in 2003, and therefore, the decision to reprimand him was properly taken.

4. The Applicant was charged with verbally abusing his colleagues and daily workers. Hence, the decision to investigate these disciplinary charges was not improperly motivated or vitiated by other extraneous factors.

5. There is no basis for awarding legal fees and costs.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

I. There are three issues for consideration by the Tribunal. The first is the preliminary issue of whether the Application was out of time and therefore not receivable. The second is whether a reprimand issued to the Applicant was justified. The third is whether a finding on a charge of misconduct that the Applicant violated staff rule 101.2 (d) by verbal abuse in the workplace was justified. The Tribunal will deal with each of these in turn.

II. The Application relates to two separate charges against the Applicant. One concerns the alleged failure to disclose a conflict of interest situation and the other, the Applicant's style of work and conduct. These two issues have been rolled into one overarching dispute between the Applicant and the Administration giving rise to a complicated and convoluted set of charges and counter-charges which have dragged on since 2003, and have continued even after the Applicant left the service of the Organization. It is regrettable that the parties have not been able to resolve this entanglement in a more pragmatic way. It is to be hoped that the newly initiated informal mechanisms will be in a better position to cope with similar situations in the future. Be that as it may, it is now for the Tribunal to deal with the issues presented.

Receivability

III. The Applicant did not neglect to assert his rights. He vigorously questioned the decisions affecting him and clearly indicated his desire to have the issues resolved. He claims that the Administration "fabricated" the charges against him and requested that the proceedings be carried to a conclusion even after he had separated from service because he wanted to "clear his name". The Tribunal cannot fault this because the record contains a Note to File dated 1 December 2005 stating that "it would be appropriate that this matter be reviewed" in the event that the Applicant applies for future employment with the UN. This could be construed as a block on future employment.

IV. The Tribunal granted the Applicant an extension of time until 15 August 2007 to file his Application. However, the Applicant filed the Application some three months later, on 29 November 2007.

V. The Applicant claims that the delay in filing his Application to the Tribunal resulted from a confusion which had arisen between him and his Counsel as regards to making a second application for extension of time. They had agreed that an application for the extension of time would be made but the arrangement fell through the cracks and the fresh request for extension of time was not made. What is at issue in this case is not a direct application of statutory time limits but a failure to come in time to the Tribunal to request a second extension which the Applicant clearly wanted and which the Tribunal may well have granted. The Tribunal has emphasized the need for adherence to time limits in the overall interests of the administration of the justice. However, such adherence is not a mechanical issue and different situations must be examined on the facts (See Judgement No. 1046, *Diaz de Wessely*, para. V (2002)). Furthermore, the Tribunal has in specific instances looked beyond time limits where there has been good reason to do so and has either deliberated on or commented on the substantive issues. (See Judgment No. 1301 (2006)).

VI. The power to extend time limits is one which is expressly provided for under article 7 (5) of the Statute of the Tribunal. In Judgement No. 1424 (2008), the Tribunal specifically warned against fettering this discretion. The Tribunal acknowledged that "it is the Tribunal's duty to appropriately balance the significant considerations of policy and justice that are reflected in these provisions". Given the larger issue of justice and fairness which this case raises for the Applicant and the significant effect the final record may have on his career, the Tribunal has decided to find the Application receivable.

The Reprimand

VII. The next question is whether the reprimand issued to the Applicant on 23 March 2005 was justified by the facts in this case. The reprimand was described in the following terms:

> "1. Reference is made to your participation in the procurement of additional office space for MONUC in 2003 (SAFRICAS case)[.]
>
> 2. OIOS concluded that despite disclosing to your immediate supervisors, the Chief Procurement Officer and the Chief of Administrative Services, the conflict of interest that existed based on your relationship to the prospective lessor, your failure to disclose your conflict of interest to the senior management of MONUC and then recuse yourself from any role connected with dealing with your family in the procurement of additional office space for MONUC showed a lack of judgement on your part[.]
>
> 3. Additionally, OIOS concluded that the failure of your immediate supervisors to act on the disclosure of your familial ties with the prospective lessor did not excuse you from your personal and professional responsibility of removing yourself from the activity[.]
>
> 4. In view of the foregoing, please consider this letter for formal reprimand. You are cautioned in relation to the consequences of similar actions in the future regarding your status as an Official of the United Nations[.]"

VIII. The Applicant claims that the mission faced difficulties in finding premises and he was asked to locate suitable options for consideration by his superiors; that he took no part in negotiations or in the procurement of the premises; that the premises were approved by his supervisors including the DOA who visited and actually endorsed the premises in question; that the issue of a failure to disclose a conflict of interest was raised after the fact and as a result of animosity arising out of a complaint made by a relative of the Applicant, alleging misconduct by a close associate of the Director, that, therefore, it lacked good faith and was extraneously motivated; that the administrative and disciplinary process had been abused; that the Applicant had in fact disclosed his relationship to the family that owned the premises to both of his supervisors, the Chief of Procurement and the Chief of Administrative Services; that he did not conceal his relationship to the owners; that this fact was common knowledge in the mission; that senior management were aware of his relationship to the family in question; and, that in effect the whole issue of a non-disclosure of the conflict of interest was a contrived charge.

IX. A failure to disclose a known conflict of interest especially when the transaction involves payment of funds is a serious charge to make against a staff member and it should not be lightly made or dismissed. If sustained, it adversely affects the future of a staff member's career. Additionally, the administrative or disciplinary measure taken against a staff member for such a significant failure is another issue to consider. Consequently, it is paramount to ensure that the facts are fully clarified.

X. It has been acknowledged by both the Management and by the JAB that the Applicant had in fact declared his conflict of interest. The reprimand itself was based on somewhat vague grounds that the Applicant had failed to disclose the conflict of interest to "Senior Management of MONUC". The record contains a Note for the File dated 6 February 2005, the contents of which would indicate that directly or indirectly, Senior Management was aware of the conflict of interest. At least the then DSRSG (Deputy Special Representative of the Secretary-General) appears to have been deeply skeptical about the conflict of interest charge against the Applicant.

XI. The JAB did not go into the details of any of these matters which have a bearing on the Applicant's case but found that the Applicant had not adduced "sufficient evidence of ill-motivation or extraneous circumstances" by the Administration. The JAB did, however, come to the conclusion "…. that the [Applicant] did in fact disclose the conflict of interest but that his failure to put the disclosure in writing showed poor judgment". The trouble is that the reprimand was in fact issued on different grounds. It is based on the Applicant's failure to declare the conflict of interest to Senior Management and to recuse himself "from any role", which demonstrated a lack of judgment on the Applicant's part. These are two separate matters. The JAB failed to examine the issues which were pertinent to the validity of the reprimand such as, whether it was sufficient for the Applicant to inform his immediate supervisor, who was Chief of Administrative Services, and whether the SRSG (Special Representative of the Secretary-General)

or the DSRSG knew about this, and if so, how they knew about it. The Tribunal is faced with a situation where the material facts have not been adequately examined and established to enable a conclusive finding as to whether the reprimand was justified or not.

XII. Furthermore, it is not clear to the Tribunal what role the Applicant actually played in the procurement of the premises and, therefore, the Tribunal cannot determine the obligation of the Applicant to recuse himself from "any role" or "involvement". Clearly, he should not have taken any part in the negotiations or procurement. Did he play any part and if so what? Should he have located suitable premises for use by MONUC if he had in fact been asked to do so? Did it fall within his duties? Were other alternative premises identified? Or, were these the only available premises for the purpose? These are some of the facts that required clarification.

XIII. For all of these reasons, the Tribunal concludes that the reprimand as issued on 5 March 2005 to the Applicant was not sufficiently justified based on the limited facts presented in the case.

The Charges of Misconduct

XIV. The Tribunal will now consider the charges of misconduct which the Administration brought against the Applicant and which were referred to a JDC. The charges were that the Applicant abused his authority by creating a hostile work environment through the harassment and verbal abuse of a named staff member and also other daily workers under his supervision. By the time these matters were referred to the JDC, the Applicant himself had separated from the service of the Organization rendering, as it was claimed, formal disciplinary charges "inoperative". However, the charges were not withdrawn and the Applicant requested that the Organization continue the proceedings so that he could clear his name. In a compromise arrangement, a reference was made to the JDC, not to ascertain facts or make a recommendation of possible disciplinary measures, but for "review and comment". This rather novel procedure led to difficulties. Much of the documentation was in the form of witness statements which were excluded from consideration. The review proceeded primarily on the basis of a complaint made in February 2004 by a staff member. Though a critical witness, this staff member had also left the service of the Organization and could not be summoned, nor did she make herself available for questioning by the JDC. The Applicant claims that this staff member, who was closely associated with the Administration, had been asked to "dig up dirt" against him and had helped to fabricate the case before the JDC.

XV. The JDC in its report acknowledged that "[t]he panel faced some difficulties in its fact finding since it found much of the evidence in the case was based on hearsay" and encountered difficulties in "separating facts from rumours". Nonetheless, the JDC concluded that the charges of harassment and the abuse of staff could not be sustained but that an issue which was not in dispute was the Applicant's

"management style". However, the JDC also concluded that although there was no evidence of "malice or bad intent" on the part of the Applicant, he had used "inappropriate language constituting verbal abuse at the work place". The report further stated that the Applicant's "managerial style was tough in dealing with daily workers, but that he viewed his military style of conduct as needed in order to accomplish the goals of the job he was assigned to do". On balance, the JDC concluded that it did constitute verbal abuse, a violation of staff rule 101.2.

XVI. As with the case of the reprimand and the JAB proceedings, the Tribunal takes the view that the facts relating to the charge needed to be more carefully elucidated and established before it could come to a finding based on established facts. In such a case as this, the Tribunal would normally remand it to the fact-finding body to provide clarification as to what actually occurred. However, for several reasons, the Tribunal does not consider this a practical course of action. Far too much time has passed since these alleged events took place in 2003. The witnesses were not available, even at the time of the JAB and JDC proceedings, which took place in 2006 and 2007, respectively. The Tribunal finds it unrealistic at this stage to expect any real clarification. Furthermore, there have been major changes in the procedures that will place an undue burden on all parties if such an order were to be made. Such limited evidence, as there is to be found in the record, also does not indicate to the Tribunal that the matters in issue are of such significance that a real injustice would be done if these matters are not re-examined. Indeed, the opposite is closer to the truth. The Tribunal considers that unnecessary hardship and difficulties will ensue if these proceedings are not brought to a close. Therefore, based on the circumstances of this case, the Tribunal has decided that the reprimand issued to the Applicant and the Respondent's finding that the Applicant was guilty of the charge of verbal abuse in the workplace should be rescinded and references to the same should be removed from the Applicant's personal status file.

XVII. For the foregoing reasons the Tribunal:

1. Orders the rescission of the decision to reprimand the Applicant;

2. Orders the rescission of the decision charging the Applicant with, *inter alia*, verbal abuse;

3. Orders the Respondent to expunge all references to the reprimand and the allegations of verbal abuse from the Applicant's official status file; and

4. Rejects all other pleas.

(Signatures)

Dayendra Sena **Wijewardane**
President

Bob **Hepple**
First Vice-President

Brigitte **Stern**
Member

New York, 25 November 2009

Tamara **Shockley**
Executive Secretary