7. Based on the evidence gathered during the investigation, OIOS made the following findings:

a. During a coffee break, the Applicant approached a group of participants and queried them about Mr. A. He also voiced allegations of corruption against Mr. A.

b. While the Applicant claimed no recollection of having raised such allegations against Mr. A., OIOS noted that the Applicant did not actually deny having raised these allegations.

c. The Applicant confirmed that, during the material time, he had been frustrated with Mr. A. and the way in which he had been handling a project.

d. The Applicant raised allegations of corruption against Mr. A while having no good faith belief in their veracit/MCI29f239(the0g)8(.be)4(li)441ase having ll

> 6. OIOS determined that you raised allegations of corruption against Mr. [A] while having no good faith belief in their veracity, or otherwise displayed willful disregard for the truth of these allegations and the consequent reputational harm likely to be caused to Mr. [A] as a result of raising these allegations.
>
> 7. The Report states that the established facts constitute reasonable grounds to conclude that you may have failed to observe the standards of conduct expe

12. On 7 January 2016, the Applicant requested management evaluation of the decisions to reprimand him and not to provide him with a copy of the OIOS Investigation Report (Annex 7 to the application).

13. On 12 February 2016 the Applicant received a response from the Management Evaluation Unit upholding the decision (Annex 8 to the application).

14.

15. There was procedural unfairness in the process culminating in the issuance of the reprimand.

a. Section 5.2.2 of the OIOS Investigation Manual sets out the

interviews due to the fact that the investigation may lead to negative consequences against the interviewee. As the Applicant was initially interviewed as a witness, requirements of Section 5.2.2 of the OIOS manual were not implemented.

b. During the second interview and throughout the process investigators and the Administration have relied on questions put and answers given in the

b. Mr. Ward and the MEU seek to read the Judgment in *Adorna* traordinary

was made. In *Adorna*,

memorandum and the reprimand itself. However, purely as a result of their choice of sanction the Administration asserts that the Applicant had no due process rights in the process.

b. The finding of fact required for a reprimand requires the same decision making process as for the imposition of a disciplinary sanction. In such circumstances, it cannot be available to the Administration to argue that their choice of sanction disposes of any requirement for due process or procedural fairness.

c. The case of *Powell* 2013-UNAT-295 asserts that during the preliminary investigation stage, limited due process rights apply. These rights include being appraised of the allegations and being provided an opportunity to respond. This never took place.

d. In the case of *Cabrera* 2012-UNAT-215, the United Nations Appeals Tribunal (UNAT) drew a distinction between a preliminary investigation or simple fact-finding mission and a full-fledged investigation. In the latter, it was found that due process rights applied. Both the OIOS investigation and the reprimand that followed represented such fully-fledged investigations to which due process rights would apply.

20. There was a procedural irregularity.

a. Paragraph 3 of ST/AI/371 (Revised disciplinary measures and procedures) (as amended), requires that if the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing

d. The Respondent sought additional confirmation from OIOS following receipt of the OIOS Report and prior to the issuance of the reprimand. The Applicant was given chances throughout the course of the investigation to provide additional input on the matter and failed to do so.

e. Contrary to the Appli
reprimand was based on the findings of the second investigation and not the first.

f. In accordance with staff rule 10.2(c), the Applicant was also provided with the opportunity to submit his comments on the facts and circumstances of the case prior to the issuance of the written reprimand. The comments provided by the Applicant were taken into consideration prior to the issuance of the reprimand and were reviewed in light of the investigation conclusions. Accordingly, the decision to issue the reprimand was not arbitrary or capricious.

26.

a.
statements reduces the ability of the accused to challenge such statements, in *Liyanarachchige* 2010-UNAT-087, a disciplinary process was at issue rather than an administrative measure. Further, the investigation into the allegations made against the Applicant did not involve the analysis of anonymous statements. The witnesses who participated in the investigation are named in the OIOS Report.

b. With regard to hearsay, the OIOS Manual states that although a witness can provide testimony about what they heard others say, it is considered hearsay if the purpose of that testimony is offered to prove the truth of this statements. Based on that definition, witnesses may provide testimony about what they heard others say as long as that testimony is not

utilized for the purpose of assessing or proving the substantive veracity of such statement.

c. The witness testimony obtained throughout the course of the investigation and consequently the conclusions of the OIOS Report were

d. In sharing a summary of the findings of the Report with the Applicant, a determination was made that the Applicant would not be unduly harmed or prejudiced by not having access to a copy of the Report.

e.
him with a copy of the Report, the Administration submits, regarding the first
ted
staff member will be provided with the opportunity to review the factual

Applicant was interviewed again as a subject in the new case he was read the preamble which outlined that if an investigation report was prepared, it would be the responsibility of OIOS to submit the investigation report with appropriate recommendations to the relevant Programme Manager who may take further action. A reference to the opportunity to comment before the finalization of the Report was not part of the interview.

f. The preamble preceding the 8 May 2015 interview informed the Applicant of the interview conditions and offered him the opportunity to ask any questions regarding the process. The Applicant did not request to receive the draft Report for his comments at any point during the interview or during subsequent communications.

g. The Applicant did not provide a written statement to the investigators and made no request for submission of additional evidence.

28. In summation, the Respondent submits that the decision to issue the written reprimand was a lawful exercise of discretionary authority and was not tainted by procedural or legal errors. The Respondent requests that the Tribunal uphold the decisions to issue the written reprimand and not to provide the Applicant with a copy of the OIOS Report.

Considerations

The scope of review

29. *Koda* that, insofar as the contents and procedures of an individual report are concerned, the UNDT has no

,

however, that *Koda* also asserts that:

> terms or contrac
> example, an OIOS report might be found to be so flawed that the
>
> aside.[3]

30. The holding in *Koda* simply confirms that as much as OIOS is independent in its work, so is the Tribunal in its own. While the Tribunal does not interfere in the making up of the report, the Tribunal is not bound to accept its results.

31. The *Koda* holding is not limited to disciplinary actions and applies to any administrative decisions that may be based upon OIOS reports.

32. The Respondent further submits, relying on UNDT in *Goodwin*[4], that the standard of judicial review applied to disciplinary matters may be applicable in a case where an administrative measure such as a written reprimand is at issue *only* if the administrative measure can be qualified as a disguised disciplinary measure.

33. The Respondent misrepresents *Goodwin*. In *Goodwin*, the UNDT held with respect to the process established by UNAT for judicial review of the disciplinary measures:

> This process has been limited to cases involving disciplinary measures, but the Tribunal finds that it may also be used when considering cases involving other measures referred to by the

[3] *Koda* 2011-UNAT-130 para. 42.
[4] *Goodwin* UNDT/2011/104.

dates ST/AI/234/Rev. 1, or any other legal instrument accessible to the Tribunal and attracts differing pronouncements on United Nations websites.[12] The Tribunal, in any event, observes that had the decision originated from the High Commissioner, given the requirement of written form, it would be expected that the reprimand letter would have been drafted and signed in his name. Alternatively, the reprimand could have been issued by an individual with a further delegated authority, in accordance with section 8 of ST/AI/234/Rev. 1. In that case, there would be a delegation of authority to such an individual. As held by UNAT, the delegation instrument needs not be *a priori* publicized but needs to be available to be produced when the delegated authority is being exercised;[13] UNAT also held against presuming delegated authority.[14]

48. However, according to the Respondent, neither of these is the case. The Tribunal observes that all the participants to this case seem to have been *ab initio* confused as to the proper identity of the authority that issued the written reprimand, including avoidance of the indication of the authorship of all reprimand-related decisions in the memoranda of Mr. Ward. Having undertaken, unsuccessfully, to clarify the matter with the Respondent , the Tribunal is left with no option but to take the reprimand on its face as originating from Mr. Ward and conclude that the Respondent did not show that Mr. Ward had delegated authority to reprimand the Applicant. This renders the action *ultra vires.* For the eventuality that the s her position and finds out that Mr. Ward nevertheless had the requisite delegated authority, below the Tribunal will address other errors in the issuance of the impugned decision.

49. *In dictum*, the Tribunal notes that the question whether notifying the ASG/OHRM as per section 3 of ST/AI/371 is still required in the case where authority to issue a reprimand has been delegated, is to be answered in the negative.

[12] *See* http://www.un.org/en/sections/about-un/secretariat/index.html and http://www.un.org/Depts/otherprgs.htm; accessed 29 June 2017
[13] *Bastet* 2015-UNAT-511
[14] *Malmström et al* 2013-UNAT-357; *Longone* 2013-UNAT-358

The main purpose of notification foreseen in ST/AI/371 is to enable a decision by the ASG/OHRM as to the pursuance of a disciplinary or administrative action. Where the competence to take the administrative action itself has been delegated, the rationale for the notification ceases to exist. But even if it were still formally required, for example, for the purpose of monitoring as per section 12 of ST/AI/234/Rev.1, this omission could not have had any impact on the validity of the impugned decision. is score therefore has no basis.

(b) Whether the Applicant's due process rights were respected

50. The procedure applicable to the issuance of administrative measures is described in staff rule 10.2(c) in a scant fashion:

> A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral

55. Turning to the question whether in the absence of express provisions related to administrative reprimand specific guarantees of due process should be applied per analogy or are, *a contrario*, inapplicable, the Tribunal considers that it would be instructive to first determine the character of the administrative reprimand: whether it is based on an attribution of misconduct and whether it entails negative consequences. Should the response to these questions be positive, the Tribunal will look systemically at the body of United Nations rules governing the disciplinary process and the rationale behind the specific rule in question, with the view to general principles articulated by UNAT. The Tribunal will discuss these three issues below before drawing conclusion as to whether due process was observed in the case at hand.

(i) Whether the reprimand is based on a finding of misconduct

56. Two observations need to be put forth: First, the type of institutional response to improper conduct disciplinary or administrative, is not dichotomously determined in relation to abstract and *a priori* defined categories of conduct, akin to disciplinary offences and administrative infractions. Staff rule 10.1 broadly defines misconduct failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant Whereas staff rule 1.2, staff regulation 10.1 and ST/AI/371 give guidance as to specific instances of prohibited conduct and acts that may entail disciplinary measures, a determination of what constitutes misconduct may be made with a degree of discretion, in consideration of the gravity of the act, circumstances surrounding it and circumstances particular to the staff member concerned. Moreover, staff rules 1.2 and 10.3(a) demonstrate that the Secretary-General has discretion in deciding on the initiation of disciplinary processes where the findings of an investigation indicate that misconduct may have occurred. The wide scope of the notion of misconduct, absent distinguishing disciplinary offences from lesser infractions, and wide discretion in pursuing sanctions demonstrate that the

59. This understanding is confirmed by UNAT in *Akyeampong*:

> reminder, should the staff member *misconduct* herself again. In such an event, the Administration may administer a harsher sanction (emphasis added).[23]

(ii) Whether a reprimand entails negative consequences

60. The former United Nations Administrative Tribunal held:

> at a reprimand is not a disciplinary measure] 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 [24]

61. UNAT considered whether a reprimand may be the basis for denying a promotion in *Akyeampong*. It held, albeit not unanimously:

> promotion, had a good chance of promotion had the reprimands been considered in the correct perspective, as *corrective* measures. (*emphasis added*)
>
> A reprimand is not an adverse entry in the same way as an entry relating to sanction post-disciplinary proceedings would be.
>
> A reprimand is
> reminder, should the staff member misconduct herself again. In such an event, the Administration may administer a harsher sanction.[25]

62. This Tribunal recalls that, as noted in the dissenting opinion in *Akyeampong*,[26] ST/AI/292 (Filing of adverse material in personnel records) does not prevent the drawing of negative consequences from adverse material. Further, it notes in this connection that the United Nations official career portal, *Inspira*, mandates that job

[23] 2012-UNAT-192 para. 31. The Tribunal notes a different understanding in *Goodwin* UNDT/2011/104 where the UNDT held at para. 51
still falling short of proper conduct, may warrant the Secretary-General imposing an administrative measure (for example a reprimand) rather than a disciplinary measure
[24] Judgment No. 1176, *Parra* (2004), para. IV.
[25] 2012-UNAT-192 para 29-31.
[26] *Ibid*, at para. 3 of the dissenting opinion.

applicants disclose all received reprimands. In view of this practice, a reprimand serves not just as a reminder for the staff member and deterrent against future misconduct as postulated in *Akyeampong*, but is also intended to flag performance issues a

65. T

in disciplinary cases, no obligation exists to disclose to the staff member the investigative material upon which the issuance of a reprimand is purported. The ST/AI/371, section 6 which provides:

> If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:
>
> (a) Inform the staff member in writing of the allegations and his or her right to respond;
>
> (b) Provide him or her with a copy of documentary evidence of the alleged misconduct;

66. Whereas ST/AI/371 does not expressly limit the application of section 6(b) to the pursuance of disciplinary liability, moreover, the declared purpose of it is to generally outline the basic requirements of due process to be afforded a staff member against whom [any] ,

misconduct. The same is confirmed by staff rule 10.3 -
General may initiate the disciplinary process where the findings of an investigation

79. ST/AI/ 371, section 9 provides that:

> Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:
>
> (a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or
>
> (b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.
>
> (c) Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General.

80.

standard for the imposition of disciplinary measures; the Tribunal notes that this

the other hand, neither the staff rules nor ST/AI/371 determine to what standard of proof the factual basis for the administrative measures need to be established. This, in

upon a lax determination. The level of 9c[illegible] 97ET389(de)47e

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85. Not a single sentence produced by Mr. Ward indicates that he had undertaken to assess the report
finding of misconduct; to the contrary, it appears that making such finding is purposefully avoided. Instead, the basis for the reprimand is the OIOS evaluation that

sufficient establishment of misconduct.

86. In addition to the formal deficiencies of the impugned decision, the practical consequences of not assessing the report are numerous. The reprimand rests in part on the OIOS noting that in his statement to investigators the Applicant had not denied having raised allegations against Mr. A. This is incorrect. In his first interview the Applicant is recorded
the fact that Mr. A the allegation, the Applicant is recorded as saying that he had not recalled stating the words attributed to him.[40] This cannot be construed as an implied admission. Any inferences from what the Applicant had denied or had not recalled would be only valid when assessed vis-a-vis assessment of veracity and credibility of witness testimony. This has not been done.

87. OIOS relies in part on the Applicant having expressed frustration with Mr.

misconduct. The reprimand does not explain what inference is drawn therefrom. On one hand it may lend support to the finding that the Applicant voiced out allegations against Mr. A., on the other hand it may indicate that he had had factual reasons to voice them; eventually it may be a mitigating circumstance. However, this assessment is absent.

88. As a related issue, OIOS found that the Applicant had raised allegations of corruption against Mr. A. while having no good faith belief in their veracity or

intention to

[40] .