Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MUSHEMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bartolomeo Migone, WFP
Simone Parchment, WFP

Introduction

1. The Applicant, a former staff member of the World Food Programme ("WFP"), filed an application with the former United Nations Administrative Tribunal ("the former UN Administrative Tribunal") contesting the decision of WFP to separate him from service for reasons of misconduct, in accordance with former staff rule 110.3.

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dimensions (i.e. twenty cartons at the front and fifteen at the back). He called GS, another Senior Logistics Assi

undisturbed. The Field Security Assistant concluded that the Applicant, RM, CM and GS were fully aware of the losses but chose to conceal it.

9. As a result of the preliminary investigation, the WFP Country Director for the Tanzania Country Office informed the Chief of WFP's Oversight Services Division – Inspections and Investigations ("OSDI") on 10 October 2007 of the potential theft in the WFP warehouse in Dodoma and that the Applicant, RM, CM and GS were indicated as potential suspects. The Country Director requested that a formal investigation be undertaken.

10. As a result of an agreement between the Tanzania Country Office and OSDI, Mr. Melville Smith, a Forensic Accounting Consultant, was hired to conduct the investigation in accordance with an investigation plan prepared by OSDI. The Forensic Accounting Consultant interviewed the Applicant on 25 and 30 October 2007. He submitted his final investigation report on 1 November 2007. After a review of the investigation report, OSDI conducted further interviews with the Applicant, RM, CM and GS and issued another report on 27 February 2008[1]. This report concluded, *inter alia*, that the Applicant had been grossly negligent in the performance of his duties and responsibilities as a Senior Logistics Assistant and recommended that appropriate administrative and disciplinary action be taken against him.

11. By a memorandum dated 15 April 2008 from the Director, Operations and Management Department of the Human Resources Division ("OMH"), the Applicant was charged with misconduct for gross negligence in the performance of his duties and responsibilities.

12. The Applicant provided his response to the allegations of misconduct by a memorandum dated 19 May 2008.

[1] See "OSDI e-mail Report (OSDI/101/07 – WFP Tanzania – I 45/07: Investigation of Theft of Vegetable Oil".

13. The matter was subseque

18. The parties were given the opportunity to submit supplementary documents in addition to the documents that had already been filed with the former UN Administrative Tribunal. The Applicant did not submit any further documentation. The Respondent submitted supplementary documents and, with leave of the Tribunal, also submitted comments on the Applicant's observations on the Respondent's reply.

19. The Tribunal held an oral hearing in the matter on 10 and 11 November 2010. During the hearing, the Tribunal received testimony from the Applicant, the Forensic Accounting Consultant, Mr. Vittorio Speranza, one of the OSDI investigators who investigated the matter, the HOSO and three people (both former and current WFP staff members) who had worked with the Applicant.

Applicant's submissions

20. The Applicant submits the following:

a. That he was unaware of the loss and theft of the vegetable oil until RM informed him on 18 September 2007 that one stack showed signs of having been tampered with and the casual cleaner informed him that WFP vegetable oil was being offloaded at a shop in Makole;

b. That he performed his duties perfectly and followed all the required procedures in reporting the incident to the logistics focal person who coordinated logistics communication and that in this respect, the Respondent failed to establish how he was grossly negligent;

c. That informing the police of the theft of the vegetable oil was not a negligent act but rather the act of a responsible staff member who was trying to recover WFP property and prevent the destruction of evidence and that he provided a statement to the police in the interests of WFP and in compliance with Tanzanian law;

23. In considering these issues, the Tribunal will scrutinize the facts of the

704 empty/semi-empty oil cartons in the stacks; (ii) GM, who stated that the Applicant was aware of the empty/semi-empty oil cartons but decided, during a meeting with RM, GS, and himself, that the matter would not be reported to the HOSO and that the inventory on the stack cards should be left to reflect the inventory date; and (iii) HD, who declared that he had identified empty cartons during loading and reported it to a Tally Clerk.

Failing to report the missing oil identified during the inventory count on the morning of 18 September 2007 in a timely manner to the HOSO

25. The Tribunal does not doubt that the Applicant made a report on 18 September 2007 to GS regarding the anomalies in the SGR warehouse. What is in contention though is whether the Applicant properly reported the incident to GS or whether he was required to report directly to the HOSO.

26. The Respondent asserts that the Applicant should have reported the situation pertaining in the SGR warehouse on 18 September 2007 directly to the HOSO but failed to do so. In support of his contention that the Applicant was required to report to the HOSO and not to GS, the Respondent submitted an organizational chart for the Dodoma office showing a direct reporting line between the Applicant and the HOSO. While the chart is dated April 2008, the Tribunal will infer from the Applicant's testimony during the hearing that a similar chart existed on 18 September 2007.

27. Additionally, the Respondent invited the HOSO to give testimony at the oral hearing. She testified that she reported to the Dodoma office on 1 September 2007 and that both GS and the Applicant reported to her directly. She stated that she was unaware of any arrangement that had been made prior to her arrival in Dodoma regarding the Applicant reporting to GS.

28. In a response dated 19 May 2008, GS, who had also been charged with misconduct, stated that the Applicant was supposed to report the incident directly to the HOSO and that he was merely "supposed to cooperate with [his] colleagues

35. The Respondent asserts in his closing submission that the Applicant should also be found grossly negligent on the basis that he did not ensure that the HOSO had been informed. The Tribunal does not accept this line of reasoning in light of the fact that the Applicant was not charged with this and the disciplinary measure that was imposed on him was not on this basis. Wh

Applicant to report to GS and GS was, in turn, responsible for reporting to the HOSO on issues arising out of logistics operations. Thus, the Applicant made a timely report to GS upon receipt of the information from the former casual cleaner. It was then for GS to take the report further by calling the HOSO promptly. The Tribunal considers that due to the seriousness of the matter, it would have been prudent for the Applicant to follow up with GS but as been previously noted, this was not his responsibility. The Tribunal will reiterate that in its view, it was the responsibility of GS to ensure that the HOSO was informed in a timely manner. The Tribunal concludes therefore that the facts supporting this allegation of misconduct have not been established.

Reporting the incident to the Police and formalizing statements to the Police without having informed the HOSO and without obtaining her authorization

39. The OSDI investigators advised GS, but not the Applicant, that he had no authority to talk to the police. They told him that decisions regarding cooperating with the police had to be taken by the HOSO because of “immunity reasons”. They

prevent destruction of the evidence." GS explained in his response to the Allegations of Misconduct that "[r]eporting to the police was necessary owing to the fact that any incident of a criminal [*sic*] after noticing it to assist the police to combat crimes".

44. In light of the foregoing, the Tribunal is of the considered view that the Applicant did not act unreasonably by reporting criminal behavior to the police and cooperating with their investigation by providing a statement. Thus, the facts supporting this allegation of misconduct have not been established.

Not identifying even one of the 714[5] semi-empty/empty oil cartons in the warehouse during their regular physical inventory based on the statements of the HOSO, GM and HD

45. With respect to the time period within which the loss/theft occurred, the evidence is quite varied. The Respondent contends that the loss was sustained over a period of time i.e. between July and September 2007. In this respect, the Respondent relies on the statement of GM, a Tally Clerk, who asserted that sometime between 27 and 29 July 2007, one of the loaders discovered gaps in the cartons at the SGR warehouse while a truck was being loaded. The unnamed loader informed GM, who in turn informed the storekeepers, RM and CM. The Applicant was subsequently called to the warehouse and shown the problem. There was then a discussion as to whether the loss should be reported to the Sub-Office but no action was taken at this stage. According to GM, there was a meeting the next day that was attended by the Applicant, GS, RM, CM and himself. It was agreed at this meeting that the loss would not be reported so as to protect their jobs and that instead, an alternative means of replacing the lost oil would be devised. According to GM, stack cards were changed and cartons were transferred from other stacks to cover the losses, which continued to increase over time.

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for July and August but did not notice any empty/semi-empty cartons at the time and never received a report from GM to this effect. JK, a loader who gave evidence on behalf of the Applicant, testified that he did not come across any empty/semi-empty cartons at the SGR warehouse between July and September 2007 and did not receive any reports from the other loaders to this effect.

51. The question that still remains is when the vegetable oil went missing from the SGR warehouse. The Tribunal is of the considered view that the losses were most probably sustained over a period of time. This is borne out by the large amount of vegetable oil that went missing, i.e. 13.033 metric tonnes, and the fact that the remaining cartons were re-arranged so meticulously that it was difficult to discern that anything had been removed without a re-stacking of the oil being done. In this respect, the Tribunal notes the acknowledgment of GK that it was possible for the theft to have occurred over a long period of time. Also noted is the statement of OAM that it would take a very long time to take the oil containers out of the cartons, replace the cartons back in the middle of the stack and load the oil containers in a truck. The amount of time needed to remove cartons from the stacks, open each carton to take out one or two containers, re-arrange the cartons in the stacks and load 13 metric tonnes of stolen vegetable oil on a truck indicates that this could not have been done overnight or during the weekend of 15 and 16 September, as asserted by the Applicant.

52. Nonetheless, the Tribunal is not convinced that the loss/theft started to occur during the July/August timeframe asserted by the Respondent. It is noted that monthly physical stock counts were carried out for the months of July and August and no losses were identified then. The available evidence shows that the physical stock counts for July and August were conducted by all logistics/warehouse personnel and entailed the participants counting the stacks and filling out the relevant counting forms. No evidence was placed before the Tribunal to indicate that the July and August physical stock counts did not occur or were not properly conducted. In light of the foregoing, the Tribunal is of the considered view that the losses were

probably sustained some time between 1 and 18 September since a physical stock count had not as yet taken place.

53. The next issue to be addressed is whether the Applicant failed to identify that there were semi-empty/empty cartons of vegetable oil in the SGR warehouse during the period of 1 to 18 September 2007. The Applicant stated repeatedly in various documents and at the hearing that he had never noticed empty/semi-empty cartons in the past and only became aware of the empty/semi-empty cartons after the 18 September 2007 incident. Based on the Applicant's own admissions, the Tribunal concludes that he failed to identify that there were semi-empty/empty cartons of vegetable oil in the SGR warehouse. Consequently, the facts supporting this allegation of misconduct have been established.

54. In light of the foregoing, the Tribunal concludes that the facts on which the disciplinary measure was based have not been established in relation to the Applicant: (i) not reporting the missing oil identified during the inventory count on the morning of 18 September 2007 in a timely manner to the HOSO; (ii) not reporting to the HOSO that WFP oil was being sold in a shop in Dodoma in a timely manner; and (iii) reporting the incident to the Police and formalizing statements to the Police without having informed the HOSO and without obtaisn0.625 0 Td(ha]TJ3 -adt690 -2(e Appli rm)8opize)- in

identifying the 704 semi-empty/empty oil cartons in the warehouse during the regular physical inventory.

56. The Tribunal wishes to note that in accordance with an agreement dated 18 March 1999 between the United Nations Development Programme ("UNDP") and WFP, national staff or other employees engaged by WFP in Country Offices are subject to the United Nations Staff Regulations and Rules and related UNDP policies/procedures as well as practices.

57. Pursuant to UNDP/ADM/97/17[6] dated 12 March 1997 (Accountability, Disciplinary Measures and Procedures), gross negligence involves an extreme and reckless failure to act as a reasonable person would with respect to a reasonably foreseeable risk, regardless of whether intent was involved or not in the commission of the act or that the staff member benefitted from it.

58. The Tribunal will first examine whether the Applicant failed to perform his duties as required by his terms of reference ("TOR") and the relevant WFP manuals. The Applicant's TOR called for him to perform duties and responsibilities which included, *inter alia*:

a. Monitoring the receipt, dispatch and storage of the commodities for the Country Programme activities (i.e. school feeding, Food for Work, HIV AIDS and Nutrition);

b. Supervision of warehouse staff (stores clerk, tally clerks, loaders, etc.,) to ensure an effective discharge of duties commensurate with WFP warehouse procedures, maintaining warehouse cleanliness, proper stacking and stores record keeping and documentation; and

[6] This circular provides guidelines and directives on the application of Staff Regulation X and chapter 10 of the Staff Rules relating to accountability, disciplinary measures and outlines the basic requirements of due process to be

He asserted that this included removing the top and middle layers of cartons from the stack and checking the contents of the cartons during the monthly physical count.

63. According to the HOSO, the Applicant was responsible for spot checking on either a weekly or monthly basis, which entailed his doing re-stacking on a limited basis to count the contents of the cartons. She also explained that the storekeeper was responsible for checking the stacks every morning to ensure that the stacks were in the same condition as the night before.

64. The Applicant submits that he performed all of the functions required of him. According to the Applicant, he did the following: (i) monitored the storekeepers to ensure that commodities were being properly stored and stacked in the warehouse; (ii) conducted spots checks, which entailed his walking on top of the stacks at regular intervals to ensure that the cartons were properly arranged as required by the Transport Manual; (iii) conducted monthly physical inventories, which entailed staff members counting the stacks and filling out the counting form; and (iv) routinely checked the ledgers and stack cards to ensure they were updated. He stated that monthly physical inventories had been carried out at the end of July and August 2007 by all warehouse/logistics staff. OAM gave evidence that the Applicant conducted spot checks almost on a daily basis before signing the stack cards and ledger books and that whenever there was any movement of commodities, he would be at the warehouse to monitor it.

65. The Applicant stated that they were not moving the commodities around but were just checking the stacks to ensure that they were properly stacked and that the layers were properly arranged. He explained that they could not re-stack because

performed the duties that were required of him by his TOR and the relevant WPF manuals. The Tribunal does not accept the Respondent's assertion that the Applicant should have moved and opened the cartons in the warehouse to check the contents during the monthly physical count (i.e. re-stacked) because this was not detailed in any of the documents submitted by the Respondent. Additionally, the available evidence indicates that re-stacking is a requirement where an anomaly is identified or the manager perceives something to be wrong. It is noted that such an anomaly was not identified until 18 September 2007 and once it was identified, a weeklong re-stacking exercise was undertaken.

69. The Tribunal will now examine whether a reasonable person in the Applicant's position would have been able to identify the semi-empty/empty cartons in the performance of his daily duties.

70. The OSDI investigator gave evidence that the stacks should not be more than 6 or 7 layers so that warehouse personnel can walk on top of the cartons freely. However, the Applicant gave evidence that the stacks in the SGR warehouse were more than 10 layers and that there were 22 stacks. There was also evidence that the SGR warehouse stacks were huge in that a single layer could contain up to 800 cartons. The HOSO gave evidence that the top layer was comprised of about 100 to 200 cartons and that during the re-stacking exercise that was conducted after 18 September to ascertain the extent of the loss, the first and second layers were found to be intact. It was not until they reached the third layer that they began to find the semi-empty/empty cartons. There was evidence that due to the way the semi-empty cartons were replaced in the middle of the stacks, someone could walk on top and not notice that there was a problem underneath. Additionally, since these cartons were not from the same stack but from about 8 different stacks this prevented the stacks from collapsing. There was also evidence that since the semi-empty cartons were in the middle of the stack, they could not be seen from the outside. Thus, in the Tribunal's view the semi-empty/empty cartons could only be identified by re-stacking, which was not called for during the normal performance of the Applicant's duties.

71. However, the HOSO was of the view that if someone had really taken the time to check the stock thoroughly he/she would have noticed the missing cartons. The Tribunal finds this to be an unfair assessment. Noting that there were 22 stacks and each stack had more than 10 layers and each layer contained up to 800 cartons, the Tribunal is of the considered view that the missing cartons would not have been readily noticed using the inspection method outlined in the Food Storage Manual and Warehouse Management Handbook i.e. walking around the store and all stocks and looking carefully for signs of theft, security problems and any other problems. The missing cartons would probably have been noticed during the monthly physical count, which entailed a count of the cartons in the stacks. As noted earlier, monthly physical stock counts for July and August did not reveal any losses and since it was only the middle of the month, the physical stock count for September had not been conducted.

72. Consequently, the Tribunal finds that a reasonable person in the Applicant's position would not have been able to identify the semi-empty/empty cartons in the performance of his routine daily duties.

73. Lastly, the Tribunal will examine the Respondent's contention that the Applicant was grossly negligent because the risk of theft of WFP commodities from the SGR warehouse and the method of theft were reasonably foreseeable and as such, the Applicant recklessly failed to act as a reasonable person would with respect to the risk.

74. As noted earlier, WFP has two warehouses in Dodoma – the main WFP warehouse and the SGR warehouse that WFP was renting from a Government counterpart. The available evidence shows that prior to the rental of the SGR warehouse, WFP stored its commodities in the main WFP warehouse, which consisted of Rubb Halls (i.e. tarpaulin tents). In 2002, 2005 and 2006, there were thefts of commodities, mostly vegetable oil and peas, from the Rubb Halls in about the same way as in the SGR incident of 18 September (i.e. from the third layer in the

middle of the stacks). WFP changed padlocks, enforced security measures and engaged the assistance of the police in an effort to curtail the thefts but without success. Finally, in May 2007, WFP decided to move the vegetable oil from the Rubb Halls to the SGR warehouse, where it was thought it would be safe. The thefts continued at the Rubb Halls so Management implemented daily stack counting in both warehouses. In the Rubb Halls, the storekeepers were required to carry out the daily stack counting with the security guards, who were responsible for the commodities after working hours.

75. The OSDI investigation report notes that the SGR warehouse was guarded by security guards who were hired by the Government counterpart and that due to the poor security control they did not record the inward and outward movements of trucks from the SGR warehouse as part of their duties. Since the security guards at the SGR warehouse were not hired by WFP, they did not participate in the daily stack counting with the storekeepers at this location.

76. According to the Applicant, GM called him some time in July 2007 to report information he had received from an SGR loader about four people, including a key fabricator and a guard, planning to steal vegetable oil and cement from the WFP Rubb Halls. According to the Applicant, he passed this information on to the then OIC, Dodoma, who in turn took the police to the main WFP warehouse but the alleged perpetrators were nowhere to be found. When GM was asked to bring the loader for questioning, he failed to do so.

77. The Respondent submits that in light of the circumstances outlined in paragraphs 74 to 76 above, the risk of theft of WFP commodities from the SGR warehouse and the method of theft were reasonably foreseeable to the Applicant and as such, he should have applied a high standard of diligence with respect to the risk. The Respondent submits that in the high risk environment of the Dodoma Sub-Office, the Applicant should have conducted more frequent spot checks, which should have

included moving and examining a random sample of cartons. The Respondent also asserts that since commodities had been removed from the middle layers of the stacks in the Rubb Halls, the Applicant should have looked in the middle of the stacks during his spot checks.

78. The Tribunal finds no merit in the Respondent's contention that the Applicant

> […] On leaving the compound the vehicle was again checked by the security staff."

81. If the risk was as reasonably foreseeable as asserted by the Respondent, why didn't WFP put in place the same security arrangements at the SGR warehouse that existed at the Rubb Halls? In the Tribunal's view, this was because WFP considered the SGR warehouse, which was comprised of a hard-wall structure, to be safer than the Rubb Halls, which were tarpaulin tents. If the Organization itself fails to appreciate a so-called reasonably foreseeable risk, is it fair to condemn a staff member when he fails to appreciate the same risk? The answer is a resounding no.

82. Secondly, as was noted earlier, the SGR warehouse contained 22 stacks. Each stack was comprised of more than 10 layers. The top layer was comprised of about 100 to 200 cartons. As with the SGR incident, the Rubb Hall vegetable oil was taken from the third layer in the middle of the stacks. This means that the Applicant would have had to re-stack (i.e. remove and individually check) hundreds of cartons of oil on a daily or weekly basis. Further, OAM gave evidence regarding the challenges that WFP faced in relation to the retention of loaders. He told the Tribunal that even though the loaders had service agreements with WFP, they would abandon their WFP duties to go work for other companies because they were paid higher salaries and on a daily basis as opposed to WFP's lower weekly payments. JK also gave evidence in respect of the few numbers of loaders that were available to carry out work at the WFP warehouses.

83. Was the Applicant really expected to re-stack hundreds of cartons of oil on a daily or weekly basis because there had been previous thefts at the Rubb Halls? That, in the Tribunal's view, is an unreasonable demand to make of anyone, especially in light of the evidence that was provided on the lack of adequate numbers of loaders to assist with said re-stacking of commodities. The Tribunal finds that based on the conditions prevailing in the SGR warehouse, which made WFP deem it to be safe, the Applicant adequately performed his duties by: (i) conducting daily spots checks,

which entailed his walking on top of the stacks to ensure that the cartons were properly arranged as required by the Transport Manual; and (ii) conducting monthly physical inventories.

84. The Tribunal concludes therefore that the established facts do not legally amount to misconduct within the meaning of staff rule 110.3.

Whether the disciplinary measure applied is proportionate to the offence

85. Based on the circumstances of this case, the Tribunal finds that the penalty of separation from service was disproportionate and unwarranted.

Whether there was a substantive or procedural irregularity

86. In *Johnson* UNDT/2011/123, Kaman J. noted that there are two distinct investigatory procedures set out in ST/AI/371 (Revised disciplinary measures and procedures) in that section 2 deals with preliminary investigations while section 6 deals with formal investigations. The Tribunal opined that:

> "For an investigation to be regarded as merely preliminary in nature, some "reason to believe" must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must not have reached the stage where the reports of misconduct are "well founded" and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the [Assistant Secretary-General, Office of Human Resources Management]. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member […].
>
> It is a fundamental principle of due process that where an individual has become the target of an investigation, then that person should be accorded certain basic due process rights […]."

has engaged in unsatisfactory conduct, an investigation is ordered by the head of office. But before such an investigation is embarked on, there must be "reason to believe" that a staff member has engaged in "unsatisfactory conduct".

90. The expression "reason to believe" is neither defined nor explained. An investigation in a case of suspected unsatisfactory conduct requires the existence of some cogent evidence of the unsatisfactory conduct. No such investigation can be initiated on a mere hunch or rumor. Nor should such an investigation be used for a fishing expedition to find evidence against a staff member. Those responsible for initiating such an investigation must therefore bear in mind that the threshold of reasonable belief must be satisfied.

91. One may refer by analogy to what obtains in criminal law. An arrest cannot take place if the law enforcement authorities do not satisfy the test of reasonable suspicion or probable cause. If this test is not met the arrest may be unjustified and arbitrary. Likewise, an investigation that is initiated under the rules, regulations and administrative issuances of the United Nations without a justifiable and reasonable belief that an act of misconduct may have taken place may appear to be arbitrary.

92. It is invariably on the basis of the evidence gathered during the paragraph 2.1.b investigation that the head of office will recommend further action. This is provided for by paragraph 2.5, which is entitled "Initial Findings of Misconduct". This section provides that:

> "Where the investigation, as under paragraphs 2.1.b and 2.1.c above, appears to indicate that the report of misconduct is well founded, the head of office or the official responsible for the invest

staff member and there is no ground for disciplinary action, the matter ends here (paragraph 3.2). But if the head of office concludes that a *prima facie* case has been made out, the matter may be referred to a disciplinary committee (paragraph 3.3). If a disciplinary committee is established then the full panoply of due process safeguards, as detailed in paragraph 3.7, comes into play.

94. Now since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted. Flaws may exist in an investigation because relevant witnesses have not been interviewed or because the "suspected" staff member has been denied the right to call witnesses on his behalf or because the investigators have declined to call witnesses named by the staff member, or because the staff member was not legally represented at this initial stage, he/she may have answered seemingly innocent questions that turned out to be incriminating. Since the preliminary investigation is the harbinger of a disciplinary proceeding it is vital that it be conducted in a rational, lawful and judicious manner. It should not be the gateway to a foregone decision to the establishing of a disciplinary committee or a finding of guilt.

95. The due process requirements that come into play in an alleged case of misconduct of a staff member under paragraph 2.2 are the following:

a. The rights and interests of the Organization must be respected;

b. The rights and interests of the potential victims must be respected;

c. The rights and interests of any staff member subject to or implicated by an allegation of misconduct must be respected. The rights of the affected staff member are as follows: (i) he/she must be notified in writing of all the allegations and of his/her right to respond; (ii) he/she must be provided with copies of all documentary evidence of the alleged misconduct; and (iii) he/she

must be advised of his/her right to the advice of another staff member or retired staff member as counsel to assist in prepar

that misconduct has occurred."

102. Was there a "thorough" investigation in the present matter? The Applicant submits that the investigations were inadequate as the investigators failed to interview other Tally Clerks and loaders working at the warehouse.

103. The Respondent avers that the investigation included interviews of individuals who had or were likely to have direct knowledge of the matter, i.e. the Applicant, the other Senior Logistics Assi

Dodoma had been interviewed, he could have easily affirmed or disaffirmed the reporting line for the Applicant prior to the HOSO taking office in September 2007.

106. Additionally, while there were three other Tally Clerks, apart from GM, working at the SGR warehouse, neither the Forensic Accounting Consultant nor the OSDI investigators sought to question any of them about empty/semi-empty boxes prior to 18 September or about the management of the SGR warehouse. There was also evidence that there were three other SGR Storekeepers, apart from RM, and at least 9 other loaders on HD's team but none of these people were interviewed by the investigators. These people may have had very useful information on the management of the SGR warehouse and on the missing/empty cartons. When asked why he did not cross check HD's information with some of the other loaders, the Forensic Accounting Consultant explained that logistically, it would not have made sense for him to interview all the others as they had not complained and he did not want to waste time interviewing people who did not have anything additional to add. He noted however, that if they had come forward to give him information or if the Applicant had suggested they be interviewed, he would have welcomed them.

107. The circumstances of this case also required that the investigators visit the premises and check it meticulously, inside and out. The Forensic Accounting Consultant explained that the day he went to the SGR warehouse, he was able to check the outside of the warehouse but was unable to get inside because the Applicant had decided to fumigate the premises. It is unclear to the Tribunal whether or not he had informed the Applicant he would visit that day and the Applicant intentionally had the warehouse fumigated but the question still remains as to why he didn't go back for another visit. If he had taken the time to go back and examine the contents of the warehouse, he might have been able to provide an overview in his report on the number of stacks, how the cartons were stacked and the volume of cartons within the stacks. Since the Forensic Accounting Consultant was retained to carry out the investigation on behalf of OSDI, the OSDI investigators relied on his report and did not go to Dodoma to examine the premises for themselves. This, in the

Tribunal's view, turned out to not be the best approach because the OSDI investigator who testified at the hearing was under the impression that the stacks at the SGR warehouse contained no more than 6 or 7 layers when they in actuality contained more than 10 layers.

115. The Respondent explained that the Applicant was informed of the possible disciplinary measure in the Allegations of Misconduct so as to alert him of the gravity of the charges against him and to allow him to respond appropriately. The Respondent submits that this was neither a condemnation nor a predetermination of his case but a measure put in place to protect the Applicant's rights. Lastly, the Respondent submits that the Disciplinary Committee had the authority to make its own recommendation independent of WFP management and it did so.

116. The Tribunal acknowledges that the language used in paragraph 25 of the Allegations of Misconduct is inappropriate. However, since the Applicant did not adduce any tangible evidence as to how the Disciplinary Committee was induced by paragraph 25 to recommend his separation from service, the Tribunal does not consider that his right to due process was violated. In this respect, the Tribunal endorses the following observation made in *Mmata*:

> "[…] the language used, in significant parts of the charge letter, is inappropriate in that it states as a fact that the Applicant's actions constituted serious misconduct rather than to use language that will clearly indicate that whilst it would appear that such misconduct may have occurred the Applicant was being given a fair opportunity to defend himself. The Respondents would be well advised to reconsider the terms of such charge letters so as to avoid the impression of a pre-judgment having been made, unless of course that that is precisely the meaning that is intended, which would be a matter of surprise."

117. Lastly, the Applicant claims that his due process rights were violated because

119. Pursuant to section 3.1 of UNDP/ADM/97/17, a "reasonable period of time" should be afforded to the staff member being subjected to disciplinary proceedings. What should be a "reasonable period of time" in this context cannot be measured by a specific yardstick. But it is perfectly permissible for the Tribunal, without imposing a strict time limit, to decide on a case by case basis, what would amount to a reasonable time. Such an exercise should consider the nature of the charges, their complexity, volume of documents, if they are annexed to the charges and whether the staff member needs additional materials to enable him/her to prepare the response.

120. Of course, in the latter scenario a staff member should act promptly and request further particulars and documentation, if that is deemed necessary and should accompany this with a request for an extension of time. Any responsible management should view such a request judiciously. The attitude of both the staff member and that of management will be and should be factors that the Tribunal should consider if at all there is an appeal in a disciplinary matter that raises, amongst other issues, the reasonableness of the time imparted to a staff member to respond to a charge.

121. The Applicant was given ten days within which to file a response to the charges. Given the nature of the charges, the Tribunal believes that this was a reasonable amount of time. The Applicant did not ask for an extension of time to file his response. Nor did he ask for furthcioisned0 Tdsary and s0 Tdember all. VeiplofteextenssAdk foicu

that this was not done in the present case. The Administration should also inform the staff member that he/she may make a requ

> be shared with the parties concerned for comment or rebuttal. At all times, the quorum of a Disciplinary Committee constituted to hear a case shall not be less than 3 members, plus the secretary."[10]

126. The Report of the Disciplinary Committee, dated 11 June 2008, indicates that the members of the Committee reached its conclusions on the basis of the Investigation Report ("OSDI E-mail Report (OSDI/101/07) – WFP Tanzania – I 45/07: Investigation of Theft of Vegetable Oil" dated 27 February 2008), the Allegations of Misconduct, dated 15 April 2008 and the Applicant's response to the Allegations of Misconduct. In light of the conclusion at paragraph 111 that the Applicant received a copy of the OSDI investigation report, the Tribunal does not find merit with the Applicant's contention that the evidence the Disciplinary Committee used to reach its conclusions were not clearly communicated to him.

127. The Tribunal has taken note of the Respondent's submission that the applicable procedures do not require a hearing or the in-person cross examination of witnesses and that as investigations and disciplinary proceedings are not criminal trials, a staff member's due process right to challenge and respond to the allegations against him does not require a hearing at which the staff member may confront his accuser. To accept this submission would amount to a denial of the fundamental rights of employees and to give a freehand to employers to act as they please towards employees. This submission ignores the clear words of the preamble to General Assembly resolution 63/253, which reads in relevant part:

> "*Reaffirming* the decision in paragraph 4 of its resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike […]".

128. No system of justice worthy of that appellation can condone a procedure where the employer adopts a one-way traffic policy that enables that employer to

[10] This same information is reproduced in WFP/DAR/08/0487 (Terms of Reference: WFP Tanzania Disciplinary Committee) dated 9 June 2008.

decide in an arbitrary manner how evidence should be gathered during an investigation or disciplinary proceeding and not be held accountable. The Tribunal simply rejects this submission as totally baseless.

129. Ironically, even though the Disciplinary Committee felt that the documents provided were sufficient and "oral testimony from the three staff [the Applicant, RM and GS] or other parties was not required, they proceeded to take witness testimony from one of the Disciplinary Committee members i.e. the Head of Logistics! He gave evidence to the other Disciplinary Committee members that if the stacking had been done as per procedures and regulations the loss would have been evident. He also told them that, "although not specified in the OSDI Report, the commodities are/were stacked at human height/eye level. Accordingly, it would still have been possible to see the top of the stack without necessarily walking on top of the stack". Seeing that the evidence given by the Head of Logistics to the Disciplinary Committee went to the core of the alleged misconduct, the Applicant should have been given the opportunity to at least cross examine this witness. Once the Disciplinary Committee decided to hear oral testimony from the Head of Logistics, a hearing should have been organized so that the parties and counsel could have been present as provided for under paragraph 3.7 of UNDP/ADM/97/17.

130. In *Borhom* UNDT/2011/067, Izuako J. observed that the preliminary fact-finding was undertaken by someone who was a witness to the Applicant's alleged misconduct. The Tribunal made the following observation:

> "Clearly, an investigator who at the outset of carrying out her assignment to investigate the allegations against any person is convinced of that person's guilt for any reason, is not competent to undertake such an assignment. It is an elementary principle of law and a rule of natural justice that one cannot be a judge in his/her own cause. By the same token, it stands to reason that an investigator, just like the judge, must be neutral, without bias and must approach the case he/she is mandated to investigate from the stand of a presumption of the innocence of the subject of the investigation."

131. The Tribunal wishes to reiterate the pronouncement in *Borhom* with respect to the Head of Logistics stepping out of his role as a fact-finder to become a witness in the matter. Additionally, the Tribunal considers that the conflicting role that the Head of Logistics played tainted the disciplinary process in that the Applicant was deprived of the opportunity to rebut the very crucial testimony he provided and to present countervailing evidence.

Conclusion

132. The facts do not show that the due process rights of the Applicant were respected at the initial stage of the investigation nor is it clear that the investigation was a thorough one. What is worse, notwithstanding the clear wording of paragraph 3.7 on Disciplinary Committee proceedings, the rights of the Applicant were not completely respected.

133. Based on the circumstances of this case, the Tribunal finds that there were procedural irregularities in this matter that forms a separate basis for awarding compensation to the Applicant.

Remedies

134. The Applicant requests that the imposed disciplinary measure be set aside and that he be reinstated and paid damages for the loss of income and inconveniences caused by the unlawful separation from service.

135. The Respondent requests the Tribunal to find that the decision to separate the Applicant from service for misconduct was a valid exercise of discretion and as such, to dismiss all of the Applicant’s pleas and the application in its entirety.

Judgment

136. Pursuant to Article 10 of its Statute the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10(5)(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

137. The Respondent unfairly dismissed the Applicant. The charge of gross negligence is not well-founded.

138. Consequently, the Tribunal orders rescission of the administrative decision and orders the Respondent to reinstate the Applicant and to make good all his lost earnings from the date of his separation from service to the date of his reinstatement.

139. In the event that