

UNITED

Case No

NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MARSHALL

v

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, Mr. Ian Marshall, was appointed as a Communications Assistant on 18 January 2001 at the FS-3 level under an Appointment of Limited Duration (ALD) to serve in the United Nations Mission in Ethiopia and Eritrea (UNMEE) based in Asmara. The Applicant's ALD was renewed on a regular basis for a period of over three years. On 1 April 2004, he was re-appointed under a fixed-term appointment at the FS-4 step 2 level.

2. The Applicant had been serving as supervisor of the Telephone Billing Unit, Communication Centre and Telephone Switchboard, for which he had been competitively selected and formally recommended for a Special Post Allowance to the higher level, FS-5 until he took up a temporary assignment in Addis Ababa, Ethiopia on 1 August 2005. The UN Security Council terminated the mandate of UNMEE effective 31 July 2008 and the Applicant's fixed-term contract expired on 31 December 2008.

Background

3. Sometime in 2001, the Applicant began a consensual co-habitative relationship with one Ms. Pecanin ("the Complainant"), a Telephone Billing Assistant at UNMEE at the FS-2 level. Following the Applicant's promotion in 2003, the Complainant came under his supervision. On 9 March 2005, a son was born to the couple.

4. In the period between March and June 2005, disagreements had arisen between the couple over issues of name, parental rights, nationality and upbringing of their son. The relationship ended by mutual consent in June 2005 and the Applicant and the Complainant ceased co-habitation.

5. Sometime after and about June and July 2005, the Complainant spoke to the Chief Administration Officer (CAO) in UNMEE, Mr. Petrounev, claiming that the Applicant was not supporting her and their son. The CAO informally interviewed the Applicant, told him that the Complainant was requesting a re-assignment to another mission and advised that they try to settle their differences. Their relationship appeared to stabilize for a while after that until the Applicant brought up the issue of the Complainant having unilaterally changed their child's name and of removing his name as the father in the birth registration records.

6. The Complainant then approached their common friend and head of unit, the Acting Chief Communications and Information Technology Section (ACCITS), Mr. Johannes van

11. On 8 September 2005, the Special Representative of the Secretary-General of UNMEE (“SRSG/UNMEE”) Mr. Legwaila, established *ad hoc* panel to undertake a preliminary investigation into the possible misconduct by Applicant based on the allegations made by the Complainant in her memorandum dated 15 August 2005.

12. The Applicant responded to the Notice of Preliminary Investigation by memorandum on 14 September 2005 claiming *inter alia*, that the reason for the unfounded allegations levelled against him by the Complainant was due to a domestic situation that existed between them.

13. He further stated that the situation was *ultimately* about by a point of contention over the possible validity and legality of the name of their son on the child’s birth registration document and the right of the Applicant to be recognized as the child’s father on that

founded and that, pursuant to ST/AI/371, the matter should be referred to the Office of Human Resource Management (OHRM) for further action through Personnel Management and Support Service (PMSS). He further requested PMSS to review the documentation and advise on the disposition of the case and the measures to be taken.

17. On 19 October 2005, the UNMEE Chief Security Officer reported a complaint made against the Complainant by the Applicant and requested an investigation into the public dissemination of adverse personal information and criminal allegations made about the Applicant by other staff members believed to have been instigated by the Complainant. The said report, however, was ignored and there was no follow-up.

18. Having spent more than eleven weeks in Addis Ababa, the Applicant, on 19 October 2005, addressed a memorandum to the CAO noting that his temporary assignment to Addis Ababa at the FS-4 level had been prolonged and asking to be allowed to resume his former functions in Asmara.

19. On 25 October 2005, the ACCITS decided in an internal memorandum, sent through Mr. Win Htut, the Chief of the Integrated Support Services (CISS), to the CAO, that the Applicant's continued temporary assignment to Addis Ababa would be further extended as a result of an official complaint by the Complainant against him and that the said complaint was still under investigation.

20. He stated that until an outcome of the investigation had been reached, the Applicant would retain the FS-4 post whilst another staff member would undertake the duties in Asmara as Communications Supervisor at the FS-5 level, a post the Applicant had encumbered with an SPA. Mr. Htut endorsed the said memorandum on which he added that the Applicant's extension of assignment was indefinite and unconditional.

21. On 6 December 2005, the Eritrean Government wrote to UNMEE with the demand that its personnel with nationalities from the United States of America, Canada and Europe,

22. A meeting which was convened and chaired by Mr. Critchley, the Chief of Administrative Services (CAS) was held in Addis Ababa on 14 February 2006. The meeting, which was based on the allegations against the Applicant by the Complainant, was attended by the Chief Civilian Personnel Officer (CCPO), the Senior Administrative Officer (SAO), the Staff Representative and the Applicant.

23. During the meeting, the CAS insisted that the Applicant had an alcohol problem and ought to undergo treatment for it which was available in Addis Ababa. The Applicant was adamant that he did not have such a problem and did not need any treatment. The CAS, in answer to a question by the Staff Representative stated that the Administration could place the issue of alcohol abuse on the Applicant's official status file.

24. The Assistant Secretary-General (ASG) for Peace Keeping Operations, in a confidential memorandum dated 29 March 2006 to the ASG/OHRM, referred to the Complainant's allegations against the Applicant and reviewed the report of ~~the~~ *ad hoc* panel. She recommended disciplinary action against the Applicant whom she noted had refused treatment for alcohol abuse.

25. On 8 August 2006, the Director for Organizational Development in OHRM, wrote to the Applicant informing him that based on the conclusions made ~~by the~~ panel and the report of the OLA/UNMEE, he was being charged with verbally harassing the Complainant, physically assaulting the said Complainant and thereby acting in a manner unbecoming of his status as a civil servant. The memorandum further stated that these charges, if established, would constitute a violation of former staff regulation 1.2 on the conduct of staff members and former staff rule 101.2 on workplace harassment.

26. The Applicant submitted his response to the charges on 30 October 2006. On 19 December 2006, the ASG/OHRM wrote to the Applicant informing him that following a careful review of the investigation file ~~and~~ his response, the case was being closed in accordance with paragraph 9 (a) of ST/AI/371.

27. The ASG/OHRM further stated that the charges were being dropped and that no disciplinary action would be taken against him. ~~the~~ In the last paragraph of her letter, however, she further noted that the Complainant was a supervisee of the Applicant and "cautioned" that

he should be mindful to avoid the appearance of a conflict of interest between his professional duties and personal interests.

28. On 3 January 2007, the Applicant wrote to the Officer in Charge (OIC) of the Administration in UNMEE, regarding the ASG/OHRM memorandum dated 19 December 2006 stating that it failed to “address some of the consequences of having been presented with unfounded allegations that [had] impugned his character, including spurious charges of substance abuse.”

29. The Applicant further stated that the reprimand insinuated that he had in fact abused his authority with the Complainant as her direct supervisor and that the long process resulting in the closure of the case had negatively impacted on his career prospects. The Applicant requested therefore that action be taken to rectify the situation.

legal advice on international child custody ~~is~~ to obtain custody of his son who was by

practices, the Respondent had an obligation to maintain some neutrality and to refrain from taking sides in a private disagreement.

44. Abuse of authority is at the heart of the Application. The Applicant was not treated fairly from the outset. Instead, all the actions of the Respondent point to a presumption of guilt based entirely on unproven third party statements.

45. The Respondent first attempted to coerce the Applicant into making admissions by offering to treat the matter as a substance abuse problem. The Applicant rejected this dishonest suggestion. The Respondent then decided to treat it as a case of workplace harassment and abuse, only to abandon this attempt at a later stage realizing it could not be sustained. The Respondent's actions in this case constituted a violation of the Applicant's due process rights.

46. The Respondent resorted to a disguised disciplinary measure in the form of a caution to him to avoid the appearance of conflicts of interest between personal and professional interests. This was an entirely new condition that appeared completely gratuitous and labelled him as a potential liability.

47. Although not defined as a disciplinary measure under staff rule 110.3, a reprimand or caution nevertheless carries with it all the same negative connotations of guilt and embarrassment as a disciplinary sanction forms part of the staff member's record of service and could be construed to imply that he engaged in wrongful conduct.

48. The Applicant was issued a *de facto* reprimand, prevented from resuming his career and systematically harassed until he was finally separated from service at the end of 2008.

49. The issuance of the *de facto* reprimand was not the end of the case for him. Although the Complainant was no longer in the UNMEE/Mission, the Applicant was not reinstated to his higher level post in Asmara but forced to remain in Addis at a lower level and try to restart his career in spite of malicious rumours that followed him there.

50. Extraneous considerations informed the actions of UNMEE management against the Applicant as he became the object of the Respondent's unarticulated "zero tolerance" policy towards sexual harassment and abuse. This was with the help of an overzealous Gender

66. The Applicant had not bothered to provide any evidence to prove that the fact that he was not promoted during the period of his transfer to Addis Ababa or that he was not assigned to a Mission other than UNMEE at the end of 2008 was ill-motivated.

67. There is no basis for compensation since the Applicant had not established the existence of a *causal nexus* between the alleged damage he suffered and any of the actions of the Respondent. He had therefore failed to submit his case and to prove that any of the decisions in this regard by the Respondent were abusive.

68. The Tribunal is urged to reject each of the Applicant's pleas and to reject the Application in its entirety, in which case a question of compensating the Applicant's costs does not arise. If, however, the Tribunal finds that the Applicant's pleas do not fail completely, the Respondent submits that there are no exceptional circumstances to justify awarding costs to the Applicant.

Legal issues for determination

69. The following questions were formulated by the Tribunal for consideration of the issues in this case:

- a. Were the charges brought against the Applicant based on conduct prohibited by the relevant staff rules?
- b. Were the required investigation standards in the UN met in the conduct of the investigations in this case?
- c. Were the findings made by the *ad hoc* panel and the charges subsequently brought against the Applicant relevant to the legitimate business of the Organization?
- d. Does the Organization have any jurisdictional competence with regard to the private conduct of a staff member?
- e. Was the Applicant a victim of abuse of position and authority in this case?
- f. Did considerations other than the allegations made against the Applicant inform the instituting of disciplinary action against him?

- g. Did bias against the Applicant and the efforts of UNMEE management to protect the private interests of the Complainant result in personal harm to the Applicant and the Organization?
- h. Did the cautionary note amount to disciplinary sanction by stealth?
- i. Was the Applicant entitled to continue to earn his SPA after his one month temporary assignment to Addis Ababa?
- j. Was the inability of the Applicant to secure a posting to another Mission on the closure of UNMEE a result of the Administration's wrongful interference in his private life?

Considerations

Were the charges brought against the Applicant based on conduct prohibited by the relevant staff rules?

70. The Applicant submitted that the allegations of misconduct contained in the memorandum of 8 August 2006, which were ultimately withdrawn, stemmed from the mistaken premise that allegations by one staff member against another involving private conduct are the proper subject of inquiry and administrative action by the Administration and that in allowing the initiation of disciplinary charges against the Applicant, the Respondent improperly characterised a private, personal di

b. Physically assaulting the Complainant, a staff member of the United Nations;
and

c.

The private life of international civil servants is their own concern and organizations

responsible officer shall undertake an administrative preliminary fact-finding investigation.

82. Allegations that may be investigated are grouped into two categories. All Category 1 allegations are investigated by the Office of Internal Oversight Services (OIOS). Other allegations such as harassment, with which the Applicant in this case was charged, fall within Category 2 and may be investigated by the Special Investigations Unit (SIU) or a panel in peace-keeping and special political missions when the person being investigated is a civilian. The investigation which is conducted and the investigation report produced are fundamental to the disciplinary process.

83. While investigations functions may be carried out by different offices and departments in the Organization, OIOS has the overall responsibility for all the internal investigations in the Organization. The OIOS Manual of Investigative Practices and Policies of 2005 was at the time, the practical guide for all UN staff members, bodies or panels who have or are given the responsibility at any time of conducting internal preliminary and fact-finding investigations into alleged staff misconduct. This means that a panel or officer charged with investigating staff misconduct is expected to perform this task within the standards set by the OIOS guidelines.

84. Some of the standards to be met by investigators are well set out in paragraph 55 of the said Manual. An investigator must be fair, have an open mind, be dispassionate and competent. Any investigative findings should be based on substantiated facts and related

87. As already pointed out, in the complaint letter which was titled "Seeking Protection", the Complainant traced the unfortunate development of an adult, consensual, romantic partnership that produced a son between her and the Applicant into one of jealous rages, alcohol, paranoia and domestic violence. ~~Her~~ ~~letter~~ addressed the issues of dreams and hopes she had had for herself and the Applicant.

88. It told the story of how she had previously been married and had lost her husband in a car accident before she met the Applicant. It told of her family background which it was claimed was peaceful and stable as against that of the Applicant whose parents were said to be divorced and none of whose four brothers married.

89. For the most part, the letter, whose ~~content~~ ~~constituted~~ the subject-matter of the investigation, made mention of undated ~~instances~~ of verbal and physical violence against the Complainant by the Applicant over the years allegedly induced by a drinking habit and fits of jealousy. It also mentioned an incident during which the Complainant claimed to have inflicted a stab wound on her own leg in an effort to prove to the Applicant that she loved him. The same letter addressed the mistreatment of her mother by the Applicant and arguments over a name for their child, whose paternity, according to her, the Applicant sometimes doubted.

90. The Tribunal has examined the many personal and intimate family details raised in the letter with a view to ~~underscoring~~ ~~the fact that the~~ *ad hoc* panel needed to be clear and precise about the matters it had set out to investigate. ~~It~~ ~~failed~~ to do and as a result rendered the entire investigation process flawed even before it had begun.

91. In fact there was nothing in the letter that delineated any cause or facts for investigation that related to the workplace or which was ~~able~~ to have occurred in connection with work. Armed with a complaint letter which read more like a magazine feature article on gender-based violence in the home rather than ~~abuse in~~ workplace as defined by the relevant staff rules, and in the circumstances having ~~failed~~ ~~to~~ delineate the focus of its assignment, the panel's report was grossly lacking in a critical aspect of its work objective.

92. Of the five-page report produced by ~~the~~ *ad hoc* panel, about three and a half of those pages were devoted to summarising the stories and impressions of the ten witnesses that the panel spoke to. These witnesses included the Applicant, the Complainant and eight other staff

members of UNMEE. The Tribunal notes that of the ten witnesses in this preliminary investigation, seven were part of the initial group meeting which had decided, based on their own fact-finding, that the Applicant be reassigned for a cooling-off period to Addis Ababa even before the Complainant's letter of 15 August 2005.

93.

- a. The Applicant and the Complainant lived together for more than four years. The Complainant got pregnant and bore a child during their co-habitation. All the interviewed individuals including the Applicant reasonably believed that the child belonged to both of them.
- b. The Applicant, the Complainant and the majority of the interviewed individuals stated that the Applicant's drinking habits were above average and that under alcoholic influence he could be aggressive.
- c. The Applicant, the Complainant and interviewed persons confirmed that the couple had frequent quarrels and that they had always hidden their problems to everybody including their friends.
- d. Three of the staff members interviewed found the Complainant's story plausible while the Gender Focal Point based on her professional experience as a social worker and counsellor of sexual exploitation and abuse (SEA) victims, strongly believed that the Complainant had been physically and emotionally abused.

98. It is most disappointing that UN resources were spent to make findings as to the paternity of a child of staff members or any person for that matter. In these circumstances, it is just as shocking that resources of the Organization were spent to find: that the Applicant could be aggressive when under alcoholic influence in his home that he and his domestic partner quarrelled frequently and that they hid the fact from their friends.

99. The fourth stated finding informs of the opinions of three of the ten persons interviewed regarding the plausibility of the story of the Complainant and the belief of the GFP that the

102. It is clear that the investigating panel's so-called findings were largely irrelevant in so far as it is not the business of the Organization to concern itself with the private domestic affairs of individual staff members especially where such findings had no bearing on the work environment.

Does the Organization have any jurisdictional competence with regard to the private conduct of a staff member?

103. Former staff rule 101.2(c) provides that staff members must comply with local laws and honour their private legal obligations, including but not limited to, the obligation to honour orders of competent courts.

104. A staff member must be law-abiding. The privileges and immunities of the Organization which generally extend to the staff member do not afford him or her, the excuse to avoid the performance of his or her private obligations. Under this rule, the Organization, apart from treating such non-performance as a disciplinary matter, can act to ensure that the staff member respects the orders of local courts relating to their private obligations.

105. For instance, where a staff member fails to comply with court orders for child support, alimony payments or the repayment of a debt for the due payment of bills or services,

concerning her deteriorating relationship with the Applicant. The ACCITS then spoke about the matter informally with the Applicant and gave his personal advice. When the Applicant told him some weeks later that he intended to brief a local lawyer to pursue the matter of his parental rights legally, the ACCITS then proceeded to arrange a peer's group meeting.

108. At the said meeting, the Complainant informally told her story making several allegations against the Applicant who denied ~~claiming~~ her and sought to explain his position. It was at that meeting that it was decided that the Applicant be temporarily assigned to Addis Ababa for one month to ease tension between them to which the Applicant agreed.

109. When the Applicant assumed the temporary assignment to Addis Ababa on 1 August 2005, the Complainant brought a formal, written complaint against the Applicant. As already observed earlier in this judgment, the ~~written~~ written complaint to UNMEE dated 15 August 2005 was wholly about having suffered domestic ~~violence~~ violence in her home at the hands of the Applicant during and after their co-habitation. Her memorandum was titled "Seeking Protection" and alleged that the Applicant usually abused her after drinking excessively.

110. The SRSG/UNMEE then established ~~an~~ *ad hoc* panel to investigate the possible misconduct of the Applicant pursuant to the complaint. The Tribunal had earlier called attention to the fact that ~~the~~ *ad hoc* panel was totally confused about what it was investigating and that after conducting some interviews produced an irrelevant and unhelpful report.

111. The convening of an informal peers' group to which the Applicant and the Complainant were willing to state their private and domestic ~~problems~~ problems with a view to resolving them ought to have been the limit of the Organization's involvement. The agreement on all sides arrived at during the said meeting that the Applicant should undertake a brief and temporary

grounds that the Organization had no business administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the parties to sort out their rights and responsibilities.

113. The officials of the Administration had neither power nor the capacity to wade into such matters. It was clearly beyond their scope and the Administration had unfortunately acted *ultra vires* by its undue involvement. It had also breached the Applicant's human right to a fair adjudication of a domestic dispute by a properly constituted court when it arrogated to itself powers it did not have in that regard. It did not lie with the Respondent or his agents, whatever their personal convictions, to investigate domestic disputes that had no bearing on the workplace and to convert the same to misconduct.

Was the Applicant a victim of abuse of position and authority in this case?

114. The Applicant had submitted that the Administration's case rested on expedient political considerations rather than facts and law. He also submitted further that he was the object of the Respondent's zero tolerance policy towards sexual harassment and abuse who was aided on that path by an overzealous General Adviser. It was also his case that the decision to allow the Complainant to use the resources of the Organization knowing that her complaint dealt purely with private matters external to the Organization constituted an abuse of authority.

115. The Respondent submitted that the decision to investigate the complaint against the Applicant by his domestic partner was justified in accordance with the applicable rules and regulations and that the Respondent was not biased against him.

116. Neither former staff rule 101.2(c) nor do any other rules, regulations or issuances confer the power of criminal courts or family courts on any officials or entities of the Organization. In fact where a staff member is suspected of having engaged in criminal activity, the Organization may be minded to hand him or her over to the local authorities for criminal prosecution. Section 20 of the Convention on the Privileges and Immunities of the United Nations⁶ states that:

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-

⁶ Adopted by the General Assembly of the United Nations on 13 February 1946.

consider whether the Mission had the capacity to investigate the private conduct in issue and whether the Organization could initiate disciplinary action over the private domestic problems of staff members in rendering its advice that the report of misconduct was well founded.

122. Even more worrisome and shocking is the role played in the handling of the complaint that led to this case by the Gender Focal Point. She was a member of the peers' group meeting that had earlier informally intervened requesting that the Applicant be temporarily assigned to Addis Ababa. When interviewed by *ad hoc* panel, she stated that as the Gender Focal Point, she had an obligation to protect anybody she considered to be a victim.

123. The GFP further told the panel that the Complainant's behaviour presented all the symptoms of an abused woman and that she therefore believed the Complainant had been both physically and emotionally abused by the Applicant. She continued that she based her assessment on the knowledge she had gained from previously working as a social worker and counsellor of sexually and psychologically abused women in New Zealand.

124. The work of a Gender Focal Point within the UN is to provide support to senior managers in carrying out their responsibilities as these relate to the implementation of the policy of gender mainstreaming in their substantive work programs. The GFP is expected to provide the said support through advocacy, advice and monitoring and reporting on progress made. It is also the job of the GFP to disseminate information and develop competencies on gender mainstreaming through trainings and seminars.

125. The Gender Focal Point position "is not linked to the promotion of gender equality within the department, that is, to promotion of gender balance, work/life issues, harassment, including sexual harassment and a gender sensitive work environment. These issues are taken care of by the Department Focal Points for Women. It is important to note that the Focal Points for Women have very different roles from [5639 Tc., hah.4(l P)-39 Tc.,iom

the process of assessing the implications for women and men of any planned action...It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring, and evaluation of policies and programmes in political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.

127. Security Council Resolution 1325¹⁰ requests the Secretary-General "where appropriate, to include in his reporting to the Security Council progress on gender mainstreaming throughout peacekeeping missions¹¹ The Department of Peacekeeping Operations (DPKO) has strengthened institutional mechanisms for gender mainstreaming in support for the implementation of the said Resolution. Some positive interventions include, *inter alia*, "the establishment of gender units in all multidimensional peacekeeping operations, the development of a wide range of policy and operational tools and resources to facilitate gender mainstreaming¹².

128. The GFP, whatever experience she may have had as to the psychology of abused women, had no official role of "protecting anybody she would consider a victim," as she claimed before the *ad hoc* panel. Her job was to work on gender mainstreaming. Since domestic violence is a purely criminal matter and not one that the Organization can investigate, much less adjudicate, the GFP was not appointed to protect or speak for any alleged or perceived victims of domestic abuse of any kind.

129. Because the *ad hoc* panel was confused about its own assignment, it unnecessarily made the GFP's purported assessment of the behaviour of the Complainant part of its report. The GFP had curiously listed the behaviour of the Complainant as "feeling of shame, hiding the problems from everybody and eventually followed by non-stop talking." The panel's conclusion that the GFP's "well1.7485 0 Times9(e)2.18esstnmym[.8()] -6.(-)2.8(G Tiorm)-5.3as the)-i 5

131. It is a matter too for serious concern that the GFP had co-signed the written complaint dated 15 August 2005 detailing the stories and allegations of the Complainant which was sent to the Chief of Personnel section of UNMEE. Such written complaints are required to be confidential. What was the interest and official role of this Gender Adviser in the private dispute between the Applicant and the Complainant that made her sign the written complaint?

132. In the Applicant's response dated 14 September 2005 to a notice of preliminary investigation against him and addressed to the CAO, he mentioned that before the informal peers' group meeting, the GFP had asked him to stay away from the Complainant who she said had made allegations against him that were serious enough to merit an investigation. Whatever friendly support the GFP gave to the Complainant who alleged domestic abuse against her person on a private level, should ~~not~~ have been confused with her official roles.

133. This Tribunal finds that the GFP had been allowed by senior managers at UNMEE to ride roughshod over the Applicant on account of his problems with the Complainant and to assume roles and authorities that were ~~not~~ legitimately hers. The fact was that having been invited to be part of the peer's group which ~~had~~ made informal efforts at a resolution of the dispute; she then gave to herself undue liberties in the handling of the said domestic dispute. Her overbearing influence in the events leading up to the institution of disciplinary proceedings against the Applicant attests to a profound lack of leadership at UNMEE at the material time.

134. It must be recalled that it was the husband of this GFP who ~~told the~~ panel that the Applicant had called his house and ~~spoken~~ to him while drunk telling him that he was guilty of all the allegations made against him. This story by the said husband of the GFP was also relied upon by the ~~ad hoc~~ panel in finding that the Applicant drank excessively. It did no credit to that panel that it would find that the drunken state of anyone could be established through a telephone conversation.

135. It is necessary to recommend that all officials of the Organization, especially those in senior management positions make ~~serious~~ efforts to familiarise themselves with the proper scope of their decision-making powers. They ~~must~~ continually refer to the relevant staff rules, bulletins and other administrative issuances ~~and~~ seek proper legal advice before making

136. It is especially important that managers appreciate that they can help with efforts at informal resolution of private and domestic matters between staff members. Where however such informal efforts fail or prove inadequate, they should advise that these are sent to the proper forum such as counselling or even to the relevant national courts as the case may be.

137. The purported investigations by the *ad hoc* panel and the findings said to have been made actually amounted to, as a whole, an invasion of privacy against the Applicant constituting an abuse of power and authority by those members of senior management who authorised it and acted upon its report.

138. The Convention on the Privileges and Immunities of the United Nations at its section 20 provides that where the need arises, the immunity of a staff member may be waived by the Secretary-General. In this way, domestic allegations, as in this case, which fall outside the competence of the Organization can be properly investigated and prosecuted. Since staff members have a duty to observe and obey the laws of the countries in which they serve, the Organization would be competent to demand compliance.

Did considerations other than the allegations made against the Applicant inform the institution of disciplinary action against him?

139. The Applicant previously submitted that the Administration's case rested on expedient political considerations, not upon legal factual ones, with the help of an overzealous Gender Adviser, to elaborate and amplify spousal abuse that was a combination of exaggeration and fabrication. He submitted that all the actions taken by the Respondent pointed to a presumption of guilt based on unproven third party statements.

140. The Respondent for his part argued that contrary to the Applicant's allegations in this case, the relevant rules, policies and procedures were scrupulously followed both in: (i) conducting the investigation and the disciplinary proceedings against him; and (ii) dismissing the charges while cautioning him against similar situations arising in the future.

141. Evidence before the Tribunal indicated that after the submission of the report by the *ad hoc*

the UNMEE Staff Representative. At the said meeting, the Applicant was asked if he had an alcohol problem to which he replied that he did not.

142. In his oral testimony, the CAS told the Tribunal that the purpose of the 14 February 2006 meeting was to inform the Applicant that “New York” wanted him to take corrective actions to change his behaviour and to discuss the options available to him in Addis Ababa if he was agreeable.

143. The CAS further testified that in holding the meeting, he was merely acting on instructions from OHRM in New York based on the investigative findings that the Applicant drank excessively and that his drinking affected his performance. According to the witness, OHRM had decided that if the Applicant refused alcohol treatment, the matter would be moved up a notch to become a disciplinary matter. The witness continued that this meant that the manner in which the investigation report would be put to use could be determined by the Applicant himself. If the Applicant refused to agree to an alcohol problem and to undertake treatment for it, he automatically would be subjected to a disciplinary process.

144. When it was pointed out to the witness in cross-examination that the investigation report made no mention of drink affecting the Applicant’s performance, the CAS replied that he could not remember what was in the report but that he also got the information about the Applicant’s drink problem from other staff members in the Mission. In answer to a question by the Tribunal, the witness said that he had not made any direct observations about the Applicant’s performance before or after the investigation report.

145. The Staff Representative, who was in attendance at the meeting of 14 February 2006, wrote to the CAO of UNMEE the day after expressing concern at the manner in which it was conducted. Part of his letter read:

During the meeting [the Applicant] was asked if he had an Alcohol problem to which he replied that he had not. At that stage [the CAS] intervened saying that he [the Applicant] had a Drink problem and that on a few occasions a Vehicle had to be sent from HQ to collect him for work from his place of residence. I drew the attention of [the CAS], my initial concern with reference to reflecting the written complaints on [the Applicant’s] performance and behaviour changes in either his Official Status files or in his recent performance report. [The CAS] replied that it may not be on his file however we (the Administration) could place it on his file.

The SM needs support and encouragement from both Administration and FSU in this

combination of their own personal moral standards and convictions, selective grapevine stories, and misplaced gender concerns constructed an entirely new case of alcohol and substance abuse against the Applicant in Addis Ababa.

151. This new issue of alcohol abuse was outside complaint allegations and the factual findings of the confused *ad hoc* panel. It must be recalled that at the 14 February 2006 meeting chaired by the then CAS, he had expressed the view that the Applicant had an alcohol abuse problem because, according to a vehicle had been sent on some occasions to pick the Applicant up from his house to work.

152. From the foregoing, not only had the Respondent's agents unlawfully expanded the allegations of the Complainant with their own views on the Applicant's alcohol abuse, their threat to bring disciplinary proceedings against the Applicant was made good as he persisted in his denial of alcoholism. There is therefore no doubt that matters outside of the Complainant's allegations had been considered and actually influenced the institution of

when he was interviewed but none of them took any notice of his own account or investigated it.

161. It is in evidence that sometime in November 2005, an email was circulated throughout UNMEE with the Complainant's account of allegations against the Applicant. The Chief Security Officer at UNMEE, to whom the Applicant reported the matter, found that some staff members were responsible for circulating adverse material which was either obtained from or provided by the Complainant. A request for an investigation into the matter was ignored by UNMEE management.

162. The records are clear that when it was suggested in July 2005 at the peer's group meeting that the Applicant be temporarily assigned to Addis Ababa for one month to allow tempers to cool, the Applicant was agreeable. An official temporary assignment for one

166. The said section 4 of ST/AI/371 provided for the suspension of a staff member who was under investigation and whose conduct ~~appeared~~ to pose a danger to others or the investigation process. Such suspension ~~of a staff member~~ could only be imposed by the ASG of OHRM. These actions on the part of the said senior officials amounted to bias, abuse of authority and a breach of the Applicant's due process rights.

Documents from local authorities in Asmara

167. When the instant case was brought before ~~the UNB~~, the Administration submitted that the documents obtained by the Applicant from the local authorities in Asmara which confirmed the Complainant's false declarations to obtain a new birth certificate for their child and exclude the Applicant as a parent, had ~~not been~~ made available to it previously. The same document, it was submitted, was also not available ~~to the~~ *ad hoc* panel for consideration when making its investigative findings.

168. This submission cannot be a true reflection ~~of the~~ facts considering that the Applicant had consistently maintained and explained that the real cause of the conflict was the illegal change of his son's identity by the Complainant ~~and~~ putting the Applicant through an official investigation and subsequently charging ~~with~~ misconduct, the Respondent had no real evidence to back up its case but relied upon rumours, speculation and conjecture.

169. Due to the fact that senior UNMEE officials had taken a biased view of the case based on their own personal moral judgment against the Applicant, they were only interested in giving assistance to the Complainant for whatever reasons and in the process compromised the integrity of the Organization. The United Nations Organization demands of its staff members that they comply with their legal obligations and obey the laws of the countries and localities in which they serve. Did these senior UNMEE officials demand this standard of the Complainant?

170. While the Applicant was being ~~assigned~~, investigated and charged with abusing the Complainant, senior UNMEE officials indirectly facilitated the Complainant's false pretences to the Eritrean local authorities to alter ~~the~~ records of the child borne of the Applicant and herself and thereby gain exclusive and sole custody of the said child by removing the name of the Applicant as the father.

171. Part of an official correspondence dated 1 November 2007 from the Maakel Region of the Municipality of Asmara, Eritrea addressed 'To Whom It May Concern', reads:

After thorough investigation it has transpired that Ms. Azra Pecanin has deliberately deceived the municipality of Asmara, Census and Civil Status office into issuing another birth certificate by means of submitting another registration

176. In the said memorandum of the ASG/OHRM which addressed other issues including the request for the withdrawal of the caution, she supported her decision to impose the caution stating that it:

... simply serves to remind you of your obligation as a staff member of the United Nations to avoid situations which may appear to give rise to a conflict of interest between your personal and professional interests, and which may be perceived to compromise your impartiality. The decision to caution you was a managerial action,

the said *ad hoc* panel must have the proper authority and competence to conduct any investigation into the allegations of domestic abuse by the Complainant. The simple and correct position is that the *said hoc* panel had no such authority or competence.

181. The agents of the Respondent who squandered official time and resources chasing after a family dispute which they had no authority to deal with officially cannot hide behind the veneer of managerial action, allowed by the ~~es,ute~~ to have the last word in the face of their manifold abuse of the Applicant's rights. Having failed to compel him to undertake treatment for alleged alcohol abuse, the imprimatur of UNMEE senior managers is writ large in the ASG/OHRM's resort to managerial action.

182. Finding that the nature of the interventions of management in a domestic dispute that should at the very worst have attracted the actions and sanctions of the domestic courts in Eritrea were unwarranted, the least that the ~~Admin~~ Administration should have done in this case was to eat humble pie by dropping all charges against the Applicant unconditionally. Even if a cautionary note is not classified as disciplinary ~~action~~ under the rules, it is not administered to staff members as a matter of course. It ~~gives~~ ~~is~~ a proper factual finding of some level of wrong-doing by the staff member to whom it is directed.

183. In any case, the ASG/OHRM cannot caution the Applicant over the matter of conflict of interest as this was neither part of the ~~outcome~~ ~~findings~~ investigation findings nor reflected in the still-born charges against him. This Tribunal holds that there being no basis for the said cautionary note, what it sought to achieve was disciplinary sanction by stealth.

Special Post Allowance

184. Evidence before the Tribunal is that ~~though~~ though the Applicant was on the FS-4 level, he was at the time of his temporary assignment to Addis Ababa encumbering a post for which he was receiving a Special Post Allowance (SPA) at the FS-5 level. He lost the said SPA owing to his temporary assignment away from Asmara, the Mission's headquarters at the time.

185. The Applicant submitted that he was entitled to earn the SPA from August 2005 when he was assigned away from Asmara until December 2008 when his employment ended.

186. It was the Respondent's contention that the Applicant was never selected for an FS-5

the workplace. The so-called findings bore no relationship to the charges which were later brought against the Applicant; charges which were based on harassment in the workplace.

e. The purported investigations by the *ad hoc* panel and the findings said to have been made actually amounted to, as a whole, an invasion of privacy against the Applicant constituting an abuse of power and authority by those members of senior management who authorised it and acted upon its report.

f. Much as the Organization may require staff members to honour their private legal obligations, it must be careful not to encroach on the private domain of staff. The convening of an informal peers' group to which the Applicant and the Complainant were willing to state their private and domestic problems with a view to resolving them ought to have been the limit of the Organization's involvement.

g. Allegations of domestic violence and conflicts over child custody, maintenance or paternity are properly matters for a criminal court and family court to entertain. The Organization had no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the Applicant and the Complainant to sort out their rights and responsibilities.

h. The officials of the Administration had neither power nor the capacity to wade into such matters. It was clearly beyond their scope and the Administration had acted *ultra vires* by its undue involvement. It had also breached the Applicant's human right to a fair adjudication of a domestic dispute by a properly constituted court when it arrogated to itself powers it did not have in that regard. It did not lie with the Respondent or his agents, whatever their pretensions, to investigate domestic disputes that had no bearing on the workplace and to convert the same to misconduct.

i.

Complainant's allegations had been considered and actually influenced the institution of disciplinary proceedings against the Applicant.

j. The *ad hoc*

Conclusion

194. The Applicant had requested the Tribunal to order the following:

- a. Award of compensation at the rate of 3 year's net base salary in lieu of specific performance and an additional compensation of 5 year's net base salary in view of the special circumstances of this case.
- b. Reinstatement in service with effect from 2009;
- b. Rescission of the letter of caution;
- c. Issuance of a proper exoneration of all allegations made against him by the Complainant;
- d. Removal of any adverse material from his personnel file;
- e. SPA difference in pay between FS-4 and FS-5 from August 2005 to December 2008; and
- f. Compensation for actual, consequential and moral damages.

195. The purpose of compensation is to, as much as possible, place the Applicant in the position he would have been in had the organization complied with its contractual obligations.

196. Article 10.5(a) of the Statute of the Tribunal states that as part of its judgment, the Tribunal may order rescission of the contested decision "provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission." The Tribunal may, as per art.10.5(b), order compensation not exceeding two years' net base salary. It may, however, in exceptional cases order the payment of a higher compensation providing reasons for it.

197. As per ST/AI/2003/3, a Special Post Allowance (SPA) shall be granted for a specific period which may not initially exceed one year. An SPA

203. In light of the finding stated above, the Tribunal makes the following ORDERS:

- a. The cautionary note of 19 December 2006, which was termed managerial action, is hereby RESCINDED and NULLIFIED. As this decision does not concern appointment, promotion or termination no amount of alternative compensation is required to be set.
- b. All references to the said cautionary note shall be removed from the Applicant's UN personnel record.
- c. The Applicant shall be paid the difference between the salary he received, while in Addis Ababa and the SPA earlier granted him. The said SPA shall be calculated from 1 September 2005 when his continued assignment to Addis Ababa became illegal up to the end of the period for which the SPA was initially granted.
- d. Compensation shall be paid, pursuant to 10.5(b), in the a

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of November 2011

Entered in the Register on this 30th day of November 2011

(Signed)

Jean-Pele Fomété Registrar, Nairobi