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The Investigation Procedures of the United Nations Office of Internal Oversight Services and the Rights of the United Nations Staff Member: An Analysis of the United Nations Judicial Tribunals' Judgments on Disciplinary Cases in the United Nations

Tamara A. Shockley
UNICEF

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**THE INVESTIGATION PROCEDURES OF
THE UNITED NATIONS OFFICE OF
INTERNAL OVERSIGHT SERVICES AND
THE RIGHTS OF THE UNITED NATIONS
STAFF MEMBER: AN ANALYSIS OF THE
UNITED NATIONS JUDICIAL TRIBUNALS'
JUDGMENTS ON DISCIPLINARY CASES IN
THE UNITED NATIONS**

Tamara A. Shockley*

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* Ms. Shockley is an Administrative Law Specialist with UNICEF. The views expressed in this article are solely those of the author.

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I. INTRODUCTION

An employee of an international organization misappropriates over one million dollars from a United Nations Peace-Keeping Mission's designated for procurement of supplies. As a staff member of an international organization, he or she has functional immunity and cannot be investigated by the local jurisdiction or by authorities in his home country. Is this the "perfect crime"? Taking into consideration that these misappropriated funds are contributions from Member States of the United Nations, is there any recourse to investigate the facts of the incident to determine culpability?

International organizations have a legal obligation to ensure compliance with internal regulations, rules and policies. This includes the breach of employment obligations in the UN. Investigations internal to the United Nations are unique. The United Nations has partners in all parts of the globe: the investigators may be located in New York, the incident may have occurred in Africa, and the witnesses may be on a new assignment in Asia. In addition to geographic separation, United Nations' investigations may have to contend with a range of different languages, dialects, cultures, customs and ethnic issues. These are all factors that affect an investigator's capability to investigate allegations of staff misconduct or irregular procurement procedures in the United Nations.

The United Nations has become aware that internal investigations must be conducted carefully taking into considera-

tion the staff member's due process rights. If an investigation does not observe the standards of good investigative practices in the investigation process, the Organization may be held financially liable through the newly established U.N. internal administration of justice. As a result, the United Nations has recognized the need to develop a properly planned and carefully conducted internal investigation.

II. WHY DOES THE UNITED NATIONS NEED OVERSIGHT IN INTERNAL INVESTIGATIONS?

The most significant benefit of a good internal investigation is that it enables management to obtain the evidence it needs to manage effectively. Additionally, negligent or corrupt staff can be trained, disciplined or discharged. An investigation provides management with an important tool to identify fundamental changes necessary to ensure an organization's future well-being. An investigation is not without risks; it may uncover information that may establish senior manager's involvement in potential wrong-doing. A poorly managed investigation could also disrupt business operations and possibly cause unwanted negative publicity. It is therefore in the best interests of an organization to seize the initiative and investigate to forestall any implication of a cover-up of fraudulent activities. Timely investigations will allow UN management to control the timing and disclosure of publicity, which may occur in a highly public and sensitive case. Investigations may also reveal that there was no misconduct on behalf of the staff member, allowing for the resumption of normal operations.

An internal investigation may have as its general purpose the investigation of improprieties or wrongdoing by management, the discipline or discharge of a staff member, the location of missing company assets, or the disclosure of certain data.¹ The purpose must be clearly stated and known to all parties involved in the investigation. When the purpose of the investigation is known, the investigation must set out facts, both favorable and unfavorable. If the purpose is to uncover evidence of employee misconduct, the method of interrogation might by itself expose an organization to liability or create inadmissible

¹ Warren Freedman, *Internal Company Investigations and the Employment Relationship* 1, 3 (1994).

evidence that would be useless in subsequent disciplinary hearings.

Misconduct by staff members may range from misappropriation of funds to falsification of employee entitlements, physical assault, and sexual harassment. The UN has a duty to create an internal system, which provides adequate notice to staff as to what behavior is acceptable and what behavior is not acceptable. A crucial question in all investigations is when the Organization should advise the suspect staff member that he or she is under investigation.² There is no definitive time since the outcome of the investigation depends upon the unique facts of the alleged impropriety or wrongdoing.

Since the investigation is conducted by an international organization, the United States constitutional issues do not apply. UN staff members under investigation cannot invoke the Fifth Amendment right against self-incrimination or the Fourth Amendment right against unreasonable searches and seizures. In the United States, the Fourth Amendment protects an individual's reasonable expectation of privacy from unreasonable searches. The United States Supreme Court has held that searches and seizures by governmental supervisors of private property of employees are subject to the restraints of the Fourth Amendment. In *O'Connor v. Ortega*, the United States Supreme Court held that in "searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace."³ The United States Supreme Court held that for a public employer or government to intrude on the interests of government employees for work-related purposes and for investigations of work-related misconduct, the intrusion on the constitutionally protected privacy interests should be judged by the standards of reasonableness under the circumstances. Although the United States Fourth Amendment does not apply to the UN, the principle of the legitimate expectations of privacy of the staff member versus the interests of the UN in investiga-

² *Id.* at 2-3.

³ *O'Connor v. Ortega*, 480 U.S. 709 (1987) (holding that public employees had Fourth Amendment protections during administrative searches in the workplace, and that routine work-related intrusions did not constitute a violation).

tions of work-related misconduct should also be judged by a standard of reasonableness.

The concept of “due process” is central to the UN and staff member relations, as it is in other aspects of law. The UN has a right to expect cooperation from its staff members in an investigation. The UN operates in a dichotomous role: it must conduct internal investigations carefully yet minimize the disclosure of the investigation to the staff and the public prior to a final decision taken by the Secretary-General. Staff members have expectations of fairness in the workplace; an organization has responsibilities in the management of staff. A staff member has a right to know what is expected of him or her and what the consequences will be of not fulfilling those expectations. The staff member has a right to consistent and predictable responses by the Organization to violations of rules of conduct. The staff member has a right to fair discipline based on the facts discovered in an internal investigation. He or she has a right to question the facts found in the internal investigation and to offer and present a defense. In the United Nations, a staff member has the right to appeal a disciplinary decision to a judicial tribunal to ensure that his or her rights are protected under due process of law.

One element of due process is the obligation of the employer to conduct a fair fact-finding process. The right choice of an investigator by the Organization is important. The purpose of conducting appropriate investigations and developing comprehensive policies and training is to minimize liability. Selecting the appropriate investigator or the right investigating team is an effective tool for conducting an internal investigation.

Why does the UN need oversight in internal investigations? The UN, governed by the General Assembly composed of 193 Member States, is important as a multilateral forum for the discussion of global issues. The world is always watching the UN. The Member States also fund the UN and expect transparency and accountability in the expenditure of public funds. In turn, the UN has to demonstrate not only to the Member States, but to the general public that it accords its staff with the same principles as guided by the UN Charter. Good governance in the UN requires internal oversight of staff members and UN operations to strengthen the integrity and respect for the UN.

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These are the general principles of investigation for the UN. The United Nations has an independent investigation division within its institutional structure. Below is a discussion of the Investigations Division, Office of Internal Oversight Services, the section mandated to conduct investigations within the UN.

III. MANDATE OF THE UNITED NATIONS TO CONDUCT INTERNAL INVESTIGATIONS

A. Office of Internal Oversight Services

The Office of Internal Oversight Services (OIOS) was established pursuant to the decision of the General Assembly in its resolution of 48/218 B on August 12, 1994.⁴ OIOS exercises operational independence under the authority of the Secretary-General “in accordance with Article 97 of the Charter [OIOS] have the authority to initiate, carry out and report on any action which it considers necessary to fulfill its responsibilities in regards to monitoring, internal audit, inspection and evaluation and investigations as set forth in the resolution.”⁵

Pursuant to General Assembly resolution 48/218 B, the Secretary-General established OIOS to carry out and report on any action with regards to monitoring, internal audits, inspections, evaluations, and investigations. The executive manager of OIOS is the Under-Secretary-General (hereinafter the “USG”). The USG is accountable to the Secretary-General, but exercises operational independence. The USG is responsible for all administrative activities of the OIOS and advises the Secretary-General on oversight issues and oversees the implementation of internal strategic organizational plans and goals. The Internal Audit Division, the Inspections and Evaluation Division, and the Investigations Division are each headed by Directors who are accountable to the USG for OIOS.

⁴ Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, G.A. Res. 48/218 B, ¶ 5, U.N. Doc. A/RES/48/218 (Aug. 12, 1994). (granting OIOS the assumed functions of the abolished United Nations Office for Inspections and Investigations), *available at* http://www.un.org/Depts/oios/ied/A_RES_48_218_B.pdf [hereinafter “Review of the Efficiency of the Administrative and Financial Functioning of the United Nations”].

⁵ *Id.* at ¶ 5(a).

B. Investigations Division

This Article will focus on the work of the Investigations Division whose mandate is to investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances. The General Assembly resolution 48/218 B mandated the Investigations Division to “investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.”⁶ Following General Assembly resolution 48/218 B, the Secretary-General promulgated the Secretary-General’s Bulletin, “Establishment of the Office of Internal Oversight Services,” ST/SGB/273 on September 7, 1994, which defined the functions of the OIOS.⁷ The Secretary-General’s Bulletin described the activities of the Investigations Division as to assess the potential within programs areas for fraud and other violations through the analysis of systems of control in high-risk operations as well as offices away from Headquarters. On the basis of the analysis by the Investigations Division, recommendations are made for corrective action to minimize the risk of commission of violations.⁸

U.N. Secretary-General, Bulletin on Ethics Office: Establishment and Terms of Reference, U.N.Doc. ST/SGB/2005/22, at ¶ 1.1 (Dec. 30, 2005) [hereinafter Establishment and Terms of Reference].

The UN Secretariat Information Circular, ST/IC/1996/29 on April 25, 1996, on “Terms of Reference for Investigations by the Office of Internal Oversight Services,” identified the jurisdiction of the Investigation Division to investigate

- (i) program areas for fraud and other violations through the analysis of systems of control in high-risk operations, as well as offices away from headquarters; and (ii) to receive reports from staff and other persons engaged in activities under the authority

⁶ *Id.* at ¶ 5(c)(iv).

⁷ U.N. Secretary-General, Bulletin, Establishment of the Office of Internal Oversight Services, ¶ ¶ 10-24, U.N. Doc. ST/SGB/273 (Sept. 7, 1994), available at www.un.org/Depts/oios/documents/st_sgb273.pdf.

⁸ *Id.* at ¶ 17.

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of the Organization suggesting improvements in program activity and reporting perceived cases of possible violations of regulations or rules as well as possible cases of (a) mismanagement, (b) misconduct, (c) waste of resources or (d) abuse of authority.⁹

The Information Circular extended the Investigation Division's jurisdiction to receive and investigate reports from staff and other persons relating to alleged breaches of the Charter of the United Nations, the UN Staff Regulations and Staff Rules, other pertinent administrative issuances and decisions of the (former) United Nations Administrative Tribunal. Alleged breaches of the standards of conduct defined misconduct as activities that would constitute a failure to maintain the highest standard of conduct and unsatisfactory performance defined as lapses from the requirement of staff to perform in accordance with the highest standards of efficiency and competence.

The Secretary-General's Bulletin ST/SGB/1998/2 on February 12, 1998 on "Organization of the Office of Internal Oversight Services" further defined the core functions of the Investigations Division as conducting fact-finding investigations.¹⁰ The Bulletin reaffirmed OIOS's operational independence, under the Secretary-General's authority, to initiate, carry out, and report on any action which it considers necessary to fulfill its responsibilities with regards to monitoring, internal audits, inspections, evaluations and investigations.¹¹ As stated in the Secretary-General's Bulletin, the Investigations Division has a

⁹ U.N. Secretary General, Information Circular, Terms of Reference for Investigations by the Office of Internal Oversight Services, ¶ 3, U.N. Doc. ST/IC/1996/29 (Apr. 25, 1996), *available at* www.un.org/Depts/oios/documents/st_ic1996_29.pdf; *see also* U.N. Secretary-General, Bulletin, Ethics Office: Establishment and Terms of Reference, ¶ 1.1, U.N. Doc. ST/SGB/2005/22 (Dec. 30, 2005), *available at* <http://www.un.org/Docs/journal/asp/ws.asp?m=ST/SGB/2005/22> [hereinafter "Establishment and Terms of Reference"].

¹⁰ U.N. Secretary-General, Bulletin, Organization of the Office of Internal Oversight Services, ST/SGB/1998/2 (Feb. 12, 1998), *available at* http://www.un.org/Depts/oios/documents/st_sgb1998_2.pdf.

¹¹ *Id.* (referencing the establishment of the Office of Internal Oversight Services and dividing OIOS into the following sections: the Central Evaluation Unit to strengthen evaluation oversight activities; the Audit and Management Consulting Division to conduct financial, operational and management audits for UN activities; the Central Monitoring and Inspection Unit to establish a system of program monitoring; and the Investigations Section to receive and investigate reports of violations of UN regulations, rules, and administrative issuances).

broad based investigative authority and cannot be prohibited from carrying out any action within the purview of its mandate. The Investigations Division has the delegated authority to initiate and carry out investigations without any need for prior clearance. The bulletin also provided the Investigation Division with the responsibility to assess whether potential fraud existed within program areas and other violations through the analysis of systems of control in high-risk operations as well as offices away from headquarters and make recommendations for corrective action to minimize the risk of commission of such violations.¹²

On January 31, 2000, the General Assembly conducted a review of the implementation of General Assembly resolution 48/218 B.¹³ General Assembly resolution 54/244 stated that in respect of the investigation functions of OIOS, the Secretary-General must provide procedures to protect individual rights of staff, including those of staff members making reports to the Investigations Section, and to regulate due process and fairness for all parties concerned.¹⁴ This was the first substantive referral to the protection of “whistleblowers” in the UN. The General Assembly expressed interest in the rules and procedures to be applied to the investigation functions performed by OIOS in order to ensure fairness and to avoid possible abuses in the investigation process.

In the “Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations”, A/58/708 on Feb. 10, 2004, OIOS developed additional categories of cases for investigation to include classification of either high-risk Category I cases and low-risk Category II cases.¹⁵ OIOS determined that inquiries into serious matters would be handled by independent, professionally trained, and

¹² *Id.* at ¶ 8.2(d).

¹³ See Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, *supra* note 4.

¹⁴ G.A. Res. 54/244, ¶ 16, U.N. Doc. A/RES/54/244 (Jan. 31, 2000), available at http://www.un.org/Depts/oios/ied/A_RES_54_244.pdf.

¹⁵ Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, G.A. Res. 58/708, ¶¶ 26 - 27, U.N. Doc. A/RES/58/708 (Feb. 10, 2004), available at <https://cdu.unlb.org/Portals/0/PdfFiles/PolicyDocL.pdf> [hereinafter “Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations”].

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experienced investigators; these cases would be classified as Category I. Category I cases would be considered as serious high-risk cases to be conducted by professional and experienced investigators. If a program manager identified such a case, the matter would be referred to professional investigators in OIOS. Category I cases would include matters such as the following:¹⁶

- Serious or complex fraud;
- Other serious criminal act activity:
- Abuse of authority or staff:
- Conflict of interest:
- Gross mismanagement:
- Wasted substantial resources:
- All cases involving risk of loss of life to staff or too others, including witnesses:
- Substantial violation of United Nations regulations, rules were administrative issuances: and
- Complex proactive investigations aimed at studying and reducing risk to life and/or United Nations property.

General Assembly resolution 59/287, dated April 21, 2005, extended Category I cases to include sexual exploitation and abuse (SEA).¹⁷ The General Assembly considered sexual exploitation and abuse to constitute serious misconduct, which warrants investigation by OIOS professional investigators. In UN peacekeeping missions, the Investigations Division has the responsibility of conducting investigations of sexual exploitation and abuse allegations in collaboration with the UN Conduct and Discipline Teams based in the missions and, on a case-by case basis, the Chief Resident Investigator. In the United Nations, sexual exploitation and sexual abuse constitutes serious misconduct and is strictly prohibited.¹⁸ These cases are given priority by OIOS, which include sex through coercion or vio-

¹⁶ *Id.* at ¶ 26.

¹⁷ Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, G.A. Res. 59/287, ¶ 6, U.N.Doc. A/RES/59/287 (Apr. 21, 2005), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/59/287>.

¹⁸ U.N. Secretary-General, Bulletin, Special measures for protection from sexual exploitation and sexual abuse, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=ST/SGB/2003/13>.

lence and sexual activity with persons under the age of 18.¹⁹

The General Assembly distinguished sexual harassment offenses in the workplace, which would be entrusted to the United Nations Office of Human Resources Management (OHRM) and delineated program managers to conduct sexual harassment investigations.²⁰

Category II cases are considered of lower risk to the Organization. These cases include personnel matters, traffic-related inquiries, simple thefts, contract disputes, office management disputes, misuse of equipment or staff, basic mismanagement issues infractions of regulations, and simple entitlement fraud. Category II cases are handled under the direction of United Nations program managers.²¹ The Investigation Division has developed procedures for handling Category II cases and, in collaboration with OHRM, trains managers to investigate Category II cases.

These are the legislative mandates for the creation and the oversight of OIOS. The General Assembly regularly reviews the functions and procedures of OIOS, which has resulted in changes in operational structure, such as staffing and geographic representation, and efficiency in the investigations process. The General Assembly resolution 62/582 on December 12, 2007, "Strengthening Investigations: The Report of the Secretary-General to the General Assembly," noted the challenges to OIOS in the areas of financial, economic and administrative misconduct allegations involving staff and contracted third parties (vendors, consultants, and contractors).²² According to the "Report of OIOS to the General Assembly from July 1, 2010 to June 30, 2011," investigation matters are currently categorized under the following categories: financial, inventory/assets, management, personnel, procurement, programmatic, sexual exploitation and sexual harassment.²³ Within the UN

¹⁹ *Id.* at ¶ 3.2(b).

²⁰ *Id.* at ¶ 3.3.

²¹ Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, *supra* note 15, at ¶ 28.

²² Strengthening Investigations: The Report of the Secretary-General to the General Assembly, G. A. Res. 62/582, ¶ 4, U.N.Doc. A/RES/62/582 (Dec. 12, 2007), [available at](http://www.un.org/ga/search/view_doc.asp?symbol=A/62/582) http://www.un.org/ga/search/view_doc.asp?symbol=A/62/582.

²³ G.A. Res. 66/286, U.N. Doc. A/RES/66/286 (Aug. 10, 2012).

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Secretariat, procurement irregularities are considered a priority because they involve financial risks, which have an effect on the UN's public reputation.

The Investigations Division has placed emphasis on the proactive oversight of UN procurement practices.²⁴

C. Investigations Division Procedures

OIOS has prepared an "Investigations Manual" to establish guidelines to conduct internal preliminary fact-finding administrative investigations.²⁵ The Investigations Manual provides information on investigative techniques, methods and procedures.²⁶ As stated in the "Investigations Manual," OIOS has overall responsibility to conduct internal United Nations investigations to assist the Secretary-General in fulfilling his

²⁴ A Procurement Task Force was created in January 2006 under authority of the USG for OIOS "to address fraud and corruption in the procurement function in the United Nations, both at Headquarters and in the various peacekeeping missions." OIOS considered that potential risks pertaining to outstanding cases in UN procurement activities were of such a large financial impact, they and were likely to cause such damage to the financial integrity and reputation of the Organization that a separate task force needed to be created to address these issues. The terms of reference of the Procurement Task Force was to conduct investigations on matters related to the Procurement Service and examine outstanding procurement cases. Initially the focus of the Procurement Task Force was the investigation of eight UN officials who had been placed on special leave. The investigation concluded with six of the eight staff members charged with misconduct and one serious case, which resulted in a lengthy prison sentence for one UN staff member. The Procurement Task Force referred a number of cases to national authorities for criminal prosecution and recommended civil recovery of monetary damages. As of March 2008, the Procurement Task Force published 25 reports that dealt with more than 40 contracts, and had completed 142 of the 432 cases in its portfolio, with 290 cases remaining to be examined.

²⁵ See, e.g., UNICEF, Policy Prohibiting and Combatting Fraud and Corruption, in Exec. Directive dated Aug. 29, 2013 from Executive Director Anthony Lake to Directors, Representatives, Section Chiefs and, all UNICEF Staff, CF/EXD/2013-008 (Aug. 29, 2013); see OFFICE OF INTERNAL OVERSIGHT SERVICES, INVESTIGATIONS MANUAL 1 (2009), available at http://www.un.org/Depts/oios/pages/id_manual_mar2009.pdf [hereinafter "Investigations Manual"].

²⁶ See Investigations Manual at *Foreword* (The Investigation Manual contains a caveat that the information in the Manual should be viewed as advisory only and the techniques. The methods and procedures as stated in the Manual do not create any substantive rights. This prevents a staff member from claiming procedural due process violations if the Investigations Divisions undertakes a different strategy, than stated in the Manual, in the investigation of a case.).

internal oversight responsibilities.²⁷ The Investigations Manual states that, within the UN context, an investigation is a tool for collecting facts, yet also a “deterrence against possible impropriety” and “a commitment to accountability.”²⁸ The Investigations Division does not have the authority to issue subpoenas as a law enforcement agency. UN staff members are required to cooperate fully with OIOS investigations. The Investigations Division has prompt access to all persons engaged in activities under the authority of the UN as well as all records, documents or other materials assets and premises to obtain information necessary to fulfill its responsibilities.²⁹

OIOS has discretionary authority to decide which matters to investigate. In disciplinary proceedings OIOS is not responsible for deciding whether to initiate disciplinary proceedings or to determine disciplinary action as a result of its reports and recommendations. In accordance with the United Nations Administrative Instruction, ST/AI/371/Amend.1, “Revised Disciplinary Measures and Procedures,” decisions regarding recommendations for the imposing disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General.³⁰ The OIOS investigation and the investigation report with the findings and recommendations are the basis of the UN disciplinary process, which the Under-Secretary-General for Management considers in the determination of whether to impose a disciplinary measure. In cases of criminality, OIOS may make a recommendation to the UN Office of Legal Affairs for referral to national law enforcement authorities.

UN staff members

An investigation determines whether a staff member acted in a manner inconsistent with his or her duties and obligations towards the UN. All staff members are subject to the UN Staff Regulations and Rules and administrative issuances that inform the staff of their duties and obligations. Staff members

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ U.N. Secretariat, Administrative instruction amending administrative instruction ST/AI/371, Revised Disciplinary Measures and Procedures, U.N. Doc. ST/AI/371/Amend.1 (May 11, 2010) [hereinafter “Revised Disciplinary Measures and Procedures 2010”].

are subject to the UN's investigative authority. The Programs and Funds each have its own separate investigative authorities.³¹

Consultants

Consultants are independent contractors. They are not appointed under the UN Staff Regulations and Rules, and are not subject to the UN internal disciplinary process. Contractors provide goods or services under a contract and are obligated to cooperate fully with an OIOS investigation. Consultants can be subject to investigation by OIOS yet the disciplinary consequences would be termination of the contract. For example, if a contractor engages in corrupt practices, such as bribery or extortion, the contractor may be debarred from future procurement exercises and the contract terminated.

Military

In peace-keeping missions, members of UN Military Observers, UN Police Officers, Formed Police Units, and law enforcement officers on secondment by governments of Member States, are all under a duty to cooperate fully with an OIOS investigation, but are under the disciplinary authority and procedures of the Sending State.³² If a member of a Formed Police Unit commits misconduct, then these units are under the disciplinary authority and procedures of the Sending State, and the UN cannot undertake disciplinary action against the personnel. A similar approach is accorded to contingent personnel, individuals provided by and under the military command of a troop-contributing country (TCC).³³ OIOS has the authority to investigate the alleged misconduct of contingent military personnel within the limits of the Agreement with the TCC. The military personnel remain under the command of their nation-

³¹ See Investigations Manual, *supra* note 15; U.N. DEVELOPMENT PROGRAM OFFICE OF AUDIT, INVESTIGATION GUIDELINES (2012), available at http://www.undp.org/content/dam/undp/documents/about/transparencydocs/OAI_Investigations_Guidelines.pdf [hereinafter "OAI Investigation Guidelines"].

³² U.N. Secretary-General, Model Status-of-Forces Agreement for Peacekeeping Operations: Rep. of the Secretary General, ¶ 47, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter "Model Status-of-Forces Agreement for Peacekeeping Operations"].

³³ Report of the Special Committee on Peacekeeping Operations and Its Working Group, G.A. Res. A/61/19/Rev.1, Annex, U.N. GAOR, 66th Sess., Supp. No. 19 (Part III), U.N. Doc. A/61/267 (Part III), at 39 (June 12, 2007).

al military commander. If OIOS investigates an allegation of misconduct committed by a military member of a TCC, the respective national disciplinary authorities determine whether to undertake disciplinary measures.³⁴

Uniform Guidelines for Investigation

As stated in the OIOS Investigations Manual “the standards for OIOS investigations are based on United Nations regulations, rules, and administrative issuances, jurisprudence of the [United Nations Dispute Tribunals and the United Nations Appeals Tribunals], General Assembly resolutions, core principles and best practices for investigation activities.”³⁵ An additional source for investigation standards is the “Uniform Guidelines for Investigations” which provides fundamental standards for investigations and investigators in the United Nations.³⁶ The “Uniform Guidelines for Investigations” provide for basic principles including that “investigative findings should be based on substantiated facts and related analysis, not suppositions or assumption” and recommendations should be supported by the investigative findings.³⁷ Investigators in the discharge of their duties must abide by the UN Staff Regulations and Rules and maintain strict confidentiality, act with objectivity, and disclose any actual or potential conflicts of interest.

Investigations Division Internal Procedures

The Investigations Division has developed internal procedures to be followed for each investigation case. With the first report of possible misconduct comes a process to intake the receiving, recording, screening, and assigning matters for investigation.³⁸ The investigation process continues with planning

³⁴ See Model Status-of-Forces Agreement for Peacekeeping Operations *supra* note 32; see also Investigations Manual, *supra* note 25 (There are other categories of personnel that are subject to OIOS investigations. However, not all are subject to UN Regulations and Rules and UN administrative issuances, such as “Experts on Mission,” UN Volunteers, Interns, and technical cooperation experts.).

³⁵ See Investigations Manual, *supra* note 25, at 17.

³⁶ CONFERENCE OF INTERNATIONAL INVESTIGATORS, UNIFORM GUIDELINES FOR INVESTIGATIONS (2003), available at http://www.un.org/Depts/oios/investigation_manual/ugi.pdf.

³⁷ See Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, *supra* note 15, at 19.

³⁸ See Investigations Manual *supra* note 25, at 15.

and preparation for the investigation. In the investigation fact-finding process the investigator must collect and preserve sources of evidence, and record witnesses' testimonies. The final investigation report will either determine that the matter must be closed or there is sufficient factual information to make recommendations about the reported act of misconduct.³⁹ The OIOS decision determining whether to close an investigation is discretionary and must take into account the interests of the Organization. The investigation report will advise the Secretary-General of potential fraud or possible misconduct of UN staff.

Administration of Justice Oversight

The administration of justice system provides the oversight for the Organization to determine whether the investigation was conducted in accordance with the proper procedures. Investigations of a staff member's conduct must be conducted properly to respect the interests of complainants and witnesses, in addition to avoiding the potential for organizational liability. The investigation is the first part of the system of internal justice, and the resulting investigation report may be the basis of a charge of misconduct.⁴⁰ OIOS is aware that the findings and results of an internal investigation report may be admitted into evidence before the United Nations Dispute Tribunals and Appeals Tribunal, and therefore must take the proper precaution to ensure proper admissibility of evidence, including witness testimony, documents, and records.

IV. THE REGULATORY FRAMEWORK FOR DISCIPLINARY PROCEDURES IN THE UNITED NATIONS

The United Nations is governed by a hierarchal regulatory structure. Under the UN Charter, the UN General Assembly issues Regulations and Rules. UN Staff Rules are promulgated by the Secretary-General to enforce the Staff Regulations, and UN Administrative issuances, which include Administrative Instructions and Secretary-General Bulletins, both issued by the U.N. Administration and Secretary-General's Office respectively.

³⁹ *Id.* at 16.

⁴⁰ *Id.* at 19.

The Charter of the United Nations establishes the basic principles for the UN.⁴¹ Based on the principles in the Charter, the General Assembly Resolutions provides UN Staff Regulations, which set out the broad principles of human resources policy for staff administration within the Secretariat and the separately administered funds and programs. The Secretary-General promulgates and enforces Staff Rules, which provide guidance in the implementation of the Staff Regulations.

Disciplinary measures are provided under UN Staff Regulation Article X of the Staff Regulations. In accordance with Article X on “Disciplinary measures,” the Secretary-General may impose disciplinary measures, as stated in Staff Regulation 10.1:⁴²

- (a) “The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;
- (b) “Sexual exploitation and sexual abuse constitute serious misconduct.”⁴³

Under Chapter X of the UN Staff Rules and Regulations, “Disciplinary measures and procedures,” Staff Rule 10.1(a) defines “Misconduct,” as follows:⁴⁴

- (a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

Chapter X, UN staff rule 10.1(c) states that “the decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.”⁴⁵ The Secretary-General has delegated his authority to launch investigations to

⁴¹ See generally U.N. Charter.

⁴² U.N. Secretary-General, Staff Rules and Staff Regulations of the United Nations: Rep. of Secretary-General, Art. X, Reg. 10.1(a), U.N. Doc. ST/SGB/2011/1 (Jan. 1, 2011). [hereinafter “U.N. Staff Rules”].

⁴³ *Id.* at Art. X, Reg. 10.1(b).

⁴⁴ *Id.* at Ch. X, Rule 10.1(a).

⁴⁵ U.N. Staff Rules, *supra* note 42, at Ch. X, Rule 10.1(c).

OIOS. Whether a disciplinary process is instituted to determine whether a disciplinary measure should be imposed will be based on the findings of an investigation.⁴⁶

The Secretary-General can only initiate disciplinary proceedings against a staff member if the findings of an investigation indicate that misconduct has occurred. UN staff rule 10.3, “Due process in the disciplinary process,” states the following:⁴⁷

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary measure or non-disciplinary measure, except as provided under staff rule 10.2 (b) (iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

During the disciplinary process, the staff member must be accorded due process rights. Disciplinary procedures are undertaken in accordance with Administrative Instruction, ST/AI/371, Amend.1 (May 11, 2010) “Revised Disciplinary Measures and Procedures”.⁴⁸ The Programs and Funds, such as UNICEF and UNDP have their own administrative instruc-

⁴⁶ *Id.* at Rule 10.2(a) (“Disciplinary measures.” The U.N. is limited to the following disciplinary measures which can be imposed upon a staff member: (a) Disciplinary measures may take one or more of the following forms only: (i) Written censure; (ii) Loss of one or more steps in grade; (iii) Deferment, for a specified period, of eligibility for salary increment; (iv) Suspension without pay for a specified period; (v) Fine; (vi) Deferment, for a specified period, of eligibility for consideration for promotion; (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion; (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations; (ix) Dismissal. Non-disciplinary measures or administrative measures are as follows in U.N. staff rule 10.2 (b): “(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures: (i) Written or oral reprimand; (ii) Recovery of monies owed to the Organization; (iii) Administrative leave with or without pay pursuant to staff rule 10.4.”).

⁴⁷ *Id.* at Rule 10.3.

⁴⁸ Revised Disciplinary Measures and Procedures 2010, *supra* note 30.

tions involving disciplinary procedures.⁴⁹

UN Administrative Instruction ST/AI/371 on “*Revised Disciplinary Measures and Procedures*” (hereinafter referred to as “ST/AI/371”) was revised in light of the new administration of justice system in the UN.⁵⁰ For the purpose of implementing General Assembly resolutions 61/261, 62/228 and 63/253, the “*Revised Disciplinary Measures and Procedures*,” ST/AI/371/Amend.1, (hereinafter referred to as “ST/AI/371/Amend.1”) replaced paragraphs in ST/AI/371 concerning investigations. ST/AI/371/Amend.1, was revised in 2010, not abolished, to incorporate the new administration of justice system, as discussed below. ST/AI/371/Amend.1, advises staff members of the basic requirements of due process afforded to a staff member against whom misconduct has been alleged. According to ST/AI/371/Amend. 1, “where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation.”⁵¹ The former ST/AI/371 (2 August 1991) was promulgated prior to the creation of the Investigations Division, thus it does not make any reference to OIOS as the investigative body for allegations of misconduct.

ST/AI/371/Amend.1 defines the acts for which disciplinary measures may be imposed. In paragraph 2 (replacing Paragraph 3 of ST/AI/371),

“(i)f the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as checks, invoices, administrative forms signed written statements by witnesses and any other document or rec-

⁴⁹ UNICEF, Prohibition of discrimination, harassment, sexual harassment and abuse of authority, Exec. Directive, CF/EXD/2012-007 (Nov. 30, 2012); UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (January 2010).

⁵⁰ U.N. Secretariat, Administrative Instruction, Revised Disciplinary Measures and Procedures, U.N. Doc. ST/AI/371 (Aug. 2 1991) [hereinafter “Revised Disciplinary Measures and Procedures 1991”].

⁵¹ Revised Disciplinary Measures and Procedures 2010, *supra* note 30, at ¶ 1.

ord relevant to the alleged misconduct.⁵²

The investigation can be undertaken by the head of department, office, designate, or by OIOS, by its own initiative or at the request of a head of office. According to ST/AI/371/Amend.1, following an investigation by OIOS or an ad hoc body, the head of department or office may refer the matter to the Assistant Secretary-General for Human Resources Management to decide whether the matter should be pursued. The Investigations Division is mandated to transmit the results of the investigation to the Secretary-General with appropriate recommendations to guide the Secretary-General in deciding on the appropriate action including disciplinary or administrative measures, consideration of referral to national authorities, and requesting financial recovery. ST/AI/371/Amend. 1, paragraph 6, states that upon consideration of the entire dossier, the Assistant Secretary-General shall decide whether the disciplinary case should be closed or decide to impose one or more non-disciplinary measures.⁵³

Only if a preponderance of the evidence indicates misconduct, the Secretary-General can recommend the imposition of one or more disciplinary measures.⁵⁴ The Secretary-General has delegated the authority to make recommendations on the imposition of disciplinary measures to the Under-Secretary-General for Management.⁵⁵

At this point, it is necessary to address the issue of workplace sexual harassment and abuse of authority. The Secretary-General promulgated Secretary-General's Bulletin "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority," ST/SGB/2008/5, dated February 11, 2008, wherein informal and formal procedures were established to assist aggrieved individuals who feel that they have been sexually harassed in the UN workplace.⁵⁶ At the discretion of OIOS, issues of sexual harassment may be in-

⁵² *Id.* at ¶ 2.

⁵³ *Id.* at ¶ 6.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.N. Secretary-General, Bulletin, Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, U.N. Doc. ST/SGB/2008/5 (Feb.11, 2008).

investigated by another investigation entity.⁵⁷ The appointed panel consists of at least two individuals who have been trained in investigating allegations of prohibited conduct; the objective of the panel is to conduct a fact-finding investigation and produce a written report with documentary evidence. If the report indicates that there was a factual basis for the allegations, such allegations were well-founded, and the conduct amounts to alleged misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action.

The investigation of sexual harassment allegations must be distinguished from the investigation of sexual exploitation and abuse (SEA) allegations. The Investigation Division conducts investigations of sexual exploitation and abuse allegations, in particular, allegations raised by complainants in UN peace-keeping missions in accordance with the ST/SGB/2003/13, "Prohibition of Sexual Exploitation and Abuse."⁵⁸ The Investigation Division, may not be the first responder involved in the fact-finding process of sexual harassment allegations in the UN workplace. The UN Secretariat has created the Conduct and Discipline Units in the Department of Field Services, to conduct fact-finding in sexual exploitation and abuse cases.

The above shows the regulatory framework for the investigation and disciplinary process in the United Nations. The United Nations Dispute Tribunals and the United Nations Appeals Tribunal provide the judicial process for ensuring that the basic standards of due process are observed during the investigation and disciplinary process.

This next portion of this article will focus on judgments of the United Nations Dispute Tribunals and the United Nations Appeals Tribunal. The United Nations Dispute Tribunals, located in New York, Geneva, and Nairobi, determine the factual issues of the cases. The United Nations Appeals Tribunal renders final judgment on an appeal filed against a judgment rendered by the Dispute Tribunal.

⁵⁷ *Id.* at sec. 5.14.

⁵⁸ U.N. Secretary-General, Bulletin, Prohibition of Sexual Exploitation and Abuse, U.N. Doc. ST/SGB/2003/13 (Oct. 9 2003).

V. THE UNITED NATIONS ADMINISTRATION OF JUSTICE SYSTEM

In 2007, the UN General Assembly established the new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice in the United Nations in resolution A/61/261 of Apr. 30, 2007.⁵⁹ As stated in the resolution, “the new judicial system would be consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure the rights and obligation of staff members and the accountability of managers and staff members.”⁶⁰ The General Assembly agreed the formal system of administration of justice should be comprised of two tiers, consisting of a first instance, the United Nations Dispute Tribunal (hereinafter “Dispute Tribunal”), and an appellate instance, the United Nations Appeals Tribunal (hereinafter “Appeals Tribunal”), which would render binding decisions and order appropriate remedies.

The General Assembly reaffirmed its decision to establish a new and independent system of administration of justice in its resolution A/62/228 on Feb. 6, 2008.⁶¹ The General Assembly decided that the two-tier formal system of administration of justice comprising of the Dispute Tribunal and the Appeals Tribunal would commence as of Jan. 1, 2009. The judges of both tribunals would be appointed by the General Assembly, based on the recommendations of the Internal Justice Council, a panel of independent experts established to ensure independence and professionalism in the selection of candidates for the vacancy of both Tribunals.

A. The United Nations Dispute Tribunal

The UN Dispute Tribunal was created as the first instance of the two tier formal system of the administration of justice in the United Nations. The Dispute Tribunal has the competence to hear and pass judgments on applications filed by individuals against the Secretary-General of the United Nations as the

⁵⁹ G.A. Res. 61/261, U.N. GAOR, 61st Sess., Supp.49, U.N. Doc. A/61/49 (Apr. 30, 2007).

⁶⁰ *Id.* at para. 4.

⁶¹ G.A. Res. 62/228, U.N. GAOR, 62nd Sess., Supp.49, at 458, U.N. Doc. A/62/49 (Feb. 6, 2007).

Chief Administrative Officer of the United Nations.⁶² The Dispute Tribunal also has the competence to hear and pass judgment on the application filed against a specialized agency with the United Nations or other agency where a special agreement has been concluded between the agency and the UN Secretariat.

According to the Statute, the Dispute Tribunal shall be composed of three full-time judges and two half-time judges. The Dispute Tribunal can order one or both of the following remedies:⁶³

(a) Rescission of the contested administrative decision or specific performance, 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 of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

The Dispute Tribunal is competent to hear and pass judgment on an appeal of an administrative decision imposing disciplinary measure.⁶⁴ Under UN staff rule 10.3 (b), "Due process in the disciplinary process," a staff member against whom disciplinary or non-disciplinary measures, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measure directly to the Dispute Tribunal, in accordance with Chapter XI of the Staff Rules."⁶⁵ Under staff rule 11.2 "Management evaluation," a UN staff member is required, as a first step, to submit to the Secretary-General a request for a management evaluation of the administrative decision." A management evaluation is the opportunity for the UN management to reassess the decision

⁶² G.A. Res. 63/253, U.N. GAOR, 63d Sess., U.N. Doc A/RES/63/253 (Dec. 24, 2008) (adopting the Statute of the United Nations Dispute Tribunal).

⁶³ *Id.* at art. 10.

⁶⁴ *Id.* at art. 2.

⁶⁵ U.N. Staff Rules, *supra* note 42, at Rule 10.3(c).

taken by a manager to determine whether the decision was taken in accordance with the UN Staff Regulations and Rules and UN policies.

Under staff rule 11.2(b) “a staff member wishing to formally contest an administrative decision taken pursuant to a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.” The Dispute Tribunal has jurisdiction over applications filed by staff member to appeal an administrative decision imposing a disciplinary measure.⁶⁶ A staff member may file directly to the UN Dispute Tribunal without submitting a request for management evaluation. This process only involves a disciplinary measure decision of (i) written censure; (ii) loss of one or more steps in grade; (iii) deferment, for a specified period, of eligibility for salary increment; (iv) suspension without pay for a specified period; (v) fine; (vi) deferment, for a specified period, of eligibility for consideration for promotion; (vii) demotion with deferment, for a specified period, of eligibility for consideration for promotion; (viii) separation from service, with notice or compensation in lieu of notice, ; and (ix) dismissal. A UN administrative decision on the imposition of a disciplinary measure is the only decision, which can bypass the management evaluation requirement. All other decisions, including administrative decisions regarding investigations, must be submitted to a management evaluation. After the response from management on the request for management evaluation, the staff member has the right to submit an application can be submitted to the Dispute Tribunal.

B. The United Nations Appeals Tribunal

The General Assembly adopted the Statute of the UN Appeals Tribunal in General Assembly resolution 63/253 on Feb. 23, 2009.⁶⁷ The Statute established the Appeals Tribunal as the second instance of the new two-tier formal system of administration of justice. The General Assembly confirmed that the Appeals Tribunal should not have any powers beyond those

⁶⁶ *Id.* Rule 11.4; G.A. Res. 63/253, *supra* note 62, at art. 2, ¶ 1.

⁶⁷ U.N. Staff Rules at Rule 11.4; G.A. Res. 63/253, *supra* note 62.

conferred under its Statutes. Article. 2 (1) of the Statute states the limited competence of the Appeals Tribunal to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal when it is asserted that the Dispute Tribunal has:⁶⁸

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

The Appeals Tribunal established its own Rules of Procedure, which are subject to approval by the General Assembly. In General Assembly resolution 64/119 on Jan. 15, 2010, the General Assembly approved the Rules of Procedure for the Appeals Tribunal.⁶⁹

One of the notable changes in the creation of the Appeals Tribunal is the provision that an appeal may be filed by either party against the judgment of the Dispute Tribunal. Previously under the former UN Administrative Tribunal, only the staff member could file an appeal to the Tribunal. The Appeals Tribunal has the competence:⁷⁰

- (a) To affirm, reverse or modify findings of fact of the Dispute Tribunal on the basis of substantial evidence in the written record; or
- (b) To remand the case to the Dispute Tribunal for additional findings of fact...

The Appeals Tribunal is composed of seven judges appointed by the General Assembly. The UN Appeals Tribunal may order as a remedy the following:⁷¹

- (a) Rescission of the contested administrative decision or specific

⁶⁸ G.A. Res. 63/253, *supra* note 62, at art. 2, ¶¶ 1(a)-(d).

⁶⁹ G.A. Res. 64/119, U.N. GAOR, 64th Sess., U.N. Doc. A/RES/64/119 (Jan. 15, 2010) (adopting G.A. Res. 63/253 and the statutes of the U.N. Dispute Tribunal and the U.N. Appeals Tribunal).

⁷⁰ G.A. Res. 63/253, *supra* note 62 at Annex II, art. 2, ¶¶ 4(a)-(b).

⁷¹ *Id.* at art. 9, ¶¶ 1(a)-(b).

performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

The judgments of the Appeals Tribunal are final and without appeal. The judgments are binding upon both parties.⁷²

VI. THE UNITED NATIONS DISPUTE TRIBUNALS AND THE UNITED NATIONS APPEALS TRIBUNALS JUDICIAL REVIEW OF THE UN DISCIPLINARY FRAMEWORK, ST/AI/371/AMEND.1 (MAY 11, 2010)

The Appeals Tribunal and the Dispute Tribunal have made numerous rulings in the area of investigation procedures and the rights of UN staff members in the area of investigations and disciplinary cases. Since this article focuses on the investigations and judicial review, I will address these issues raised before the UN Tribunals.

The Dispute Tribunal and the Appeals Tribunal, both created in July 2009, considered cases which were carried over from the former administration of justice system. These cases were not heard by the former UN Administrative Tribunal and carried over to the Dispute Tribunal for oral hearings. Therefore, the UN judicial tribunals considered cases under the revised disciplinary framework, ST/AI/371/Amend.1 (May 11, 2010), and the former Administrative Instruction, ST/AI/371 (Aug. 2, 1991). In the initial disciplinary cases considered by the UN judicial tribunals, the disciplinary decisions were taken in accordance with the former Administrative Instruction, ST/AI/371. The discussion of the cases below will refer to whether the decision was taken in accordance with ST/AI/371/Amend.1 (May 11, 2010), or the former Administrative Instruction, ST/AI/371 (Aug. 2, 1991).

⁷² *Id.* at art. 10, ¶¶ 5-6.

A. Is there “reason to believe” that a staff member has engaged in unsatisfactory misconduct to initiate an investigation?

The framework for initiation of disciplinary proceedings commences with the revised UN Administrative Instruction, ST/AI/371/Amend.1.⁷³ ST/AI/371/Amend.1, states the following as the first step in the investigation process: “II. Investigation and fact-finding

2. Where there is reason to believe that a staff member has engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation.”

Based on the above framework, the first step in the investigation process is to determine whether there is “reason to believe” that the staff member engaged in unsatisfactory conduct. This condition is required in both ST/AI/371/Amend.1, and the former Administrative Instruction, ST/AI/371. If there is a reason to believe that the staff member has engaged in unsatisfactory misconduct, then the Organization must undertake an investigation.

A significant difference between the former Administrative Instruction, ST/AI/371, and the revised UN Administrative Instruction is that former Administrative Instruction ST/AI/371 requires the head of office or responsible officer to undertake a “preliminary investigation.” The revised Administrative Instruction, ST/AI/371/Amend.1, eliminated “preliminary investigation” and replaced it with “investigation” which would be undertaken by the head of office or responsible officer. The deletion of the word “preliminary” reinforces the principle that if there is reason to believe that a staff member has engaged in unsatisfactory conduct, the Organization must conduct an investigation. This has been upheld by the tribunals.

As stated in UN Information Circular ST/IC/2013/29, “depending on the subject matter and the complexity of the report of misconduct, the investigation can be undertaken by the head of office or his designees, or by the OIOS, at its own initiative or at the request of a head of office.”⁷⁴

⁷³ Revised Disciplinary Measures and Procedures 2010, *supra* note 30.

⁷⁴ U.N. Secretariat, Information Circular, Practice of the Secretary-General in Disciplinary Matters and Cases of Criminal Behaviour, 1 July 2012-30 June 2013, § 1(C), ¶ 6, U.N. Doc. ST/IC/2013/29 (Sept. 18, 2013).

In *Abboud v. the Secretary-General of the United Nations*, the Appeals Tribunal held that the former Administrative Instruction, ST/AI/371, created the obligation to undertake an investigation into acts or behavior that would discredit the Organization.⁷⁵ According to the Dispute Tribunal, the Organization must conduct an official investigation; this procedure is not optional or discretionary. In *Abboud*, the Appellant sought an order to compel the Administration to undertake a preliminary investigation into the allegedly inappropriate behavior of one of the panel members during the Appellant's interview for a P-5 position.

The Appeals Tribunal determined that the Organization has the obligation to undertake an investigation in cases of “[a]cts or behavior[u]r that would discredit the United Nations.”⁷⁶ In the instant case, the Appeals Tribunal upheld the lower Tribunal's finding that “that the circumstances of the allegation of unsatisfactory conduct in the present case created the obligation to initiate a preliminary investigation, which the USG/DGACM failed to conduct.”⁷⁷ The Appeals Tribunal decided that the obligation to initiate a preliminary investigation is not discretionary if the staff member acts or behaves in a manner that would discredit the UN; under these circumstances, the Organization *must* initiate a preliminary investigation.

In *Marshall v. Secretary-General of the United Nations*, the Appeals Tribunal considered whether the Dispute Tribunal erred in law and fact in its findings that the initiation of a preliminary investigation was met.⁷⁸ In *Marshall*, the Appellant had a relationship with the Complainant, also a staff member with the Organization and the Appellant's supervisee. On August 15, 2005 the Complainant wrote a memorandum to the Chief, Personnel Section, UN Mission in Ethiopia and Eritrea (UNMEE), stating that she had been subject to verbal and physical assault by the Appellant.

The UN Appeals Tribunal inquired what would be the Or-

⁷⁵ *Abboud v. Secretary-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2010-UNAT-100 (Dec. 29, 2010).

⁷⁶ Revised Disciplinary Measures and Procedures 1991, *supra* note 50, at II, ¶ (2)(g).

⁷⁷ *See Abboud*, *supra* note 75, at ¶ 45.

⁷⁸ *Marshall v. Secretary-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2012-UNAT-270 (Nov. 1, 2012).

gанизation's obligation towards the Complainant upon receipt of an allegation of physical and verbal abuse. The allegations in the Complainant's letter were serious allegations by one staff member against another staff member, which put the Complainant in fear of her safety.

For the Organization to embark on a preliminary fact-finding investigation into the claims about the Applicant's conduct, the Organization is required to have "reason to believe that a staff member has engaged in unsatisfactory conduct of which a disciplinary measure may be imposed."⁷⁹ In order to determine whether there was "reason to believe" that the staff member has engaged in unsatisfactory conduct, the Organization must review the facts of the case in light of the statutory prerequisites for "unsatisfactory conduct" as set out in former Administrative Instruction, ST/AI/371:⁸⁰

- (a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the rules and instructions implementing it;
- (b) Unlawful acts (e.g. theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;
- (c) Misrepresentation or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;
- (d) Assault upon, harassment of, or threats to other staff members;
- (e) Misuse of United Nations equipment or files, including electronic files;
- (f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities,
- (g) Acts or behavior[u]r that would discredit the United Nations.

The Organization must initiate a fact-finding investigation to determine if the staff member has engaged in any of the above statutory prerequisites which would constitute unsatisfactory conduct after an investigation has been conducted. The

⁷⁹ *Id.* (Marshall was decided under the former ST/AI/371.).

⁸⁰ Revised Disciplinary Measures and Procedures 1991, *supra* note 50, at II, ¶ ¶ (2)(a-g).

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Appeals Tribunal noted the Dispute Tribunal’s reasoning that the practical guidelines for all staff members, bodies, and panels whose responsibility it is to conduct preliminary fact-finding investigations are contained in the OIOS *Manual of Investigation Practices and Policies* of 2005. Paragraph 55 provides:⁸¹

The fundamental requirement of fairness during a fact finding investigation is that the investigator has to approach the matter with an open mind. An investigator who has formed a concluded opinion on the matter prior to the start of an investigation must not undertake the investigation. Of course, an investigator may be suspicious and those suspicions may strengthen or lessen during the investigation. However, the task of the investigator is to establish facts and draw reasonable conclusions from those facts. It is a dispassionate professional exercise. Allegations from an informant or Program [me] Manager are simply allegations. The investigator will attempt to ascertain the facts by interviewing witnesses, by seeking documentary or other evidence, such as expert opinions or site visits on the basis of which ID/OIOS will make its recommendations to the Program [me] Manager.

The Appeals Tribunal and the Dispute Tribunal relied upon the standards established in the OIOS Investigation Manual to determine that during the investigation stage, the investigator will ascertain the facts through witness interviews, documentary or other evidence, and expert opinions or site visits. On the basis of the findings and conclusions of the OIOS investigation as contained in the final Investigation report, the head of office or responsible officer can determine whether there is “reason to believe” that the staff member engaged in unsatisfactory conduct.

B. Head of office or responsible officer review of the findings and recommendation in the investigation report.

Upon completion of the investigation report, the Investigation Division, OIOS, has concluded the fact-finding process. The OIOS Investigation Report is submitted to the head of office or responsible officer for review in accordance with ST/AI/371/Amend.1, paragraph 3,⁸² [i]f the investigation results

⁸¹ *Marshall*, *supra* note 78, at ¶ 53.

⁸² Revised Disciplinary Measures and Procedures 1991, *supra* note 50, at II, ¶ 3 (U.N. Doc. ST/AI/371 (Aug. 2, 1991), states “If the preliminary investi-

in **sufficient evidence** indicating that the staff member engaged in wrongdoing that could amount to misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management . . .”⁸³

According to ST/AI/371/Amend.1, the Head of Office must present to the ASG, OHRM, a “full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.” These are the documentary evidence contained in the OIOS Investigation Report to support the fact findings and recommendations.

What is ‘sufficient evidence’ for the Head of Office to report the matter to the Assistant Secretary-General, Office of Human Resources Management?

The difference between ST/AI/371/Amend.1, paragraph 3, and the former Administrative Instruction ST/AI/371, paragraph 3, is that ST/AI/371/Amend.1, paragraph 3, establishes a higher standard for the Head of Office to make a determination that the staff member has engaged in misconduct. In ST/AI/371/Amend.1, the Head of Office must determine whether there is “sufficient evidence” that the staff member’s actions amounted to misconduct. The former Administrative Instruction ST/AI/371, paragraph 3, refers to whether the preliminary investigation indicated that the report of misconduct is “well founded” for the Head of Office to report it to the ASG/OHRM.

In one of the first cases decided by the Dispute Tribunal, *Lutta v. Secretary-General of the United Nations*, the Dispute Tribunal reviewed the procedures for initiating an investigation for the purposes of disciplinary proceedings as set out in the former Administrative Instruction ST/AI/371.⁸⁴ The issue in *Lutta* concerned a staff member who was involved in a traffic

gation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management . . .”).

⁸³ Revised Disciplinary Measures and Procedures 2010, *supra* note 30, at ¶ 2.

⁸⁴ *Lutta v. Secretary-General of the United Nations*, Judgments U.N. Dispute Trib., No. UNDT/2010/052 (Mar. 31, 2010) (not appealed).

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accident in Abidjan, Cote d'Ivoire while driving an official UN vehicle.⁸⁵ It was alleged that the staff member was driving under the influence of alcohol at the time of the accident. The United Nations Operations in Cote d'Ivoire (UNOCI) Special Investigation Unit (SIU) conducted the and submitted an investigation report.

The Dispute Tribunal held that the facts in *Lutta* showed that at the investigation stage, the evidence that was relied on to establish that the Applicant was driving under the influence of intoxicating liquor was not based on scientific examination but emanated from the impression formed by investigators who saw the Applicant immediately after the accident. The Dispute Tribunal determined that based on the evidence gathered in the course of the investigation, which consisted of the statements of the SIU Officers and the damage to the two vehicles, the Director, Division of Field Services (DFS), recommended that disciplinary proceedings be initiated against the Applicant. The ASG, OHRM, filed charges of misconduct against the Applicant based on the facts presented by the Director, DFS.

Lutta makes a distinction between the standard in a criminal matter, which requires a *prima facie* case that there is reasonable suspicion or probable cause that a suspect has committed an offense. The Dispute Tribunal relied upon the European Court of Human Rights that "having reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence." The Head of Office must decide whether the evidence in the investigation report indicates that the report of misconduct is well founded for submission to the ASG, OHRM. *Lutta* noted that the report of misconduct has to be reviewed by the Head of Office, yet it is up to the ASG, OHRM, to decide whether the matter should be pursued for a formal disciplinary action.

The Tribunal found in *Lutta* that the SIU investigation did not meet any of the well-recognized international norms of fairness in investigations and that the disciplinary measures imposed on the Applicant, based on the evidence from the investigation, was therefore unjustified and disproportionate. The Tribunal held that "the SIU investigators concluded, from

⁸⁵ *Id.*

what appears to be their subjective observations, that the Applicant was indeed intoxicated at the time of the accident. As the Applicant was under shock and was diabetic, it would have been appropriate to test his behavior in the light of that health condition.”⁸⁶

The Dispute Tribunal held that on the evidence available, it was wrong for the responsible officer to have recommended further action against the Applicant. The Tribunal concluded that at the investigation stage the standard of proof required to establish a charge is not as high as that of the beyond reasonable doubt standard obtaining in criminal matters.

In the Dispute Tribunal’s decision of *Gambari v. the Secretary-General of the United Nations*, the Applicant, a Personal Assistant at the UN Mission in Bosnia and Herzegovina (UNMIBH), was charged with having made threats against another staff member and having improperly used UN information and communication technology for this purpose.⁸⁷ On Dec. 28, 2005, an envelope containing a letter threatening the life of an UNMIL staff member was received at OIOS in New York. An OIOS investigation was initiated to inquire as to the origin of the letter and an OIOS Investigation Report was issued on May 31, 2007. Based on the findings in the OIOS Investigation Report, the Head of Office reported the matter to the ASG and OHRM. The Applicant was charged in disciplinary proceedings as the author of the letter. She contended that the charges were based on an investigation that was not thoroughly or properly carried out and as a consequence erroneous conclusions were drawn from the facts. In *Gambari*, the Dispute Tribunal considered the following questions under former Administrative Instruction ST/AI/371:⁸⁸ was there reason to believe that the Applicant had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed and did the preliminary investigation appear to indicate that the report of misconduct against the Applicant was well founded?

In *Gambari*, the Dispute Tribunal noted, in reference to *Lutta v. the Secretary-General of the United Nations*, that hav-

⁸⁶ *Id.* at ¶ 7.3.3.

⁸⁷ *Gambari v. Secretary-General of the United Nations*, Judgments U.N. Dispute Trib., No. UNDT/2012/193 (Dec. 6, 2012) (not appealed).

⁸⁸ *Id.* at ¶¶ 46(a-b).

ing reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.⁸⁹ The Dispute Tribunal held in *Gambari* that the same approach should be adopted in the exercise of the discretion given to the Head of Office in determining whether the report of misconduct is well founded following the investigation. The Dispute Tribunal noted that the discretion of the Head of Office cannot and should not be used capriciously in order to scrutinize the evidence carefully before deciding whether any act of misconduct has been committed. The Dispute Tribunal held that a judicious exercise of this discretion by the Head of Office requires a proper analysis to indicate that the report of misconduct is well founded in regard to the evidence.

The Dispute Tribunal decided in *Gambari* that the OIOS investigation report had established that the Applicant had been in communication with a person she referred to as “Chad” who, according to her, expressed an intention to threaten and harm another staff member (“FC”). After reviewing the entire dossier, by a memorandum dated June 21, 2007, the Head of Office who was the then Director of the Department of Field Support, referred the case to the OHRM for appropriate action. The Director of the Division of Organizational Development believed that the allegations were well founded and charged the Applicant with acts of misconduct.

The Dispute Tribunal found that the Administration, having reviewed the OIOS report, had reason to believe that the Applicant may have engaged in unsatisfactory conduct for which disciplinary measures may be imposed. Also, forensic examination of the Applicant’s computer and her own admission to investigators showed that she had access to the threat letter which had been written by the said “Chad” against FC. The Tribunal accordingly held that discretion was exercised judiciously by the responsible officers after review of the OIOS Investigation Report.

If the Head of Office or responsible officer concludes that there is ‘sufficient evidence’ (under ST/371/Amend.1) which could amount to misconduct, he or she must report the matter

⁸⁹ *Lutta, supra* note 84.

to the ASG,OHRM.

C. The decision of the Assistant Secretary-General, Office of Human Resources, to recommend imposition of disciplinary measure.

When the Assistant Secretary-General, Office of Human Resources (ASG, OHRM) receives the referral by the Head of Office and the investigation report, it is for him or her to decide whether the matter should be pursued as a disciplinary case. In disciplinary matters, the ASG, OHRM, must decide whether there is sufficient evidence to determine whether the staff member has engaged in unsatisfactory conduct.

In accordance with ST/AI/371/Amend.1., paragraph 9:

9. Upon consideration of the entire dossier, the Assistant Secretary-General,

Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

- (a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or
- (b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

As stated in Lutta:

when the ASG/OHRM receives the report, it is for him/her to decide whether the matter should be pursued on the basis of the evidence presented. The ASG/OHRM is also vested with a discretion that should be exercised judiciously. He/she cannot be seen rubber stamping the decision of the head of office or responsible officer.⁹⁰

In Gambari, the Dispute Tribunal considered the issue whether the ASG, OHRM scrutinized the evidence carefully before deciding upon whether any act of misconduct had been committed. The Applicant contended that the reliance by the

⁹⁰ *Id.* at ¶ 45.

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Administration upon the findings of the OIOS investigation was not a proper exercise of discretion and had denied her due process. The Dispute Tribunal reviewed the case and was satisfied that the findings of the ASG, OHRM, were those of an objective observer who had scrutinized the entire dossier and made conclusions on the basis of the evidence before him. The Tribunal concluded that there was no procedural irregularity on the part of the Organization and there was full compliance with former Administrative Instruction ST/AI/371.

The Dispute Tribunal further noted in Gambari that when the ASG, OHRM, receives the report, it is for him or her to decide whether the matter should be pursued on the basis of the evidence presented. The Dispute Tribunal upheld the decision made by the ASG, OHRM to commence disciplinary proceedings against the Applicant after reviewing the findings against the Applicant contained in the OIOS Investigation Report. The ASG, OHRM must scrutinize the entire Investigation Report and make conclusions based on the evidence in compliance with ST/AI/371. When the ASG, OHRM, decides to pursue the matter as a disciplinary case, a Charge Letter is issued to the staff member. At this stage in the process, the staff member is accorded due process rights.

VII. RIGHTS OF A STAFF MEMBER DURING THE INVESTIGATION PROCESS

A. The Staff Member has limited Due Process Rights during the Investigation

The Appeals Tribunal has held that during the investigations stage, only limited due process rights apply. Due process rights are provided in Staff Rule 10.4 and ST/AI/371/ Amend.1. These provisions only apply in their entirety upon initiation of disciplinary proceedings. These proceedings are brought by various groups including the Investigations Section, OIOS, other ad hoc investigatory bodies, such as a Board of Inquiry and SEA investigations. Due process rights attach only after the initiation of formal disciplinary proceedings in accordance with ST/AI/371/ Amend.1.

In *Powell v. Secretary-General of the United Nations*, the Applicant joined the then United Nations Organization Mission

in the Democratic Republic of the Congo (MONUC) on January 25, 2002 as a Movement Control Assistant at the FS-5 level, and in January 2004, he was appointed Officer-in-Charge in Kisangani.⁹¹ On November 22, 2004 the MONUC Special Representative of the Secretary-General convened a Board of Inquiry (BOI) in order to investigate and report on serious allegations of misconduct by the Appellant in Kisangani in March 2004. The BOI investigated four incidents of alleged misconduct and considered ten other incidents. The BOI concluded that the Appellant should be held accountable for serious misconduct in fourteen incidents of alleged misconduct, which included sexual exploitation of a casual worker.

The allegations of sexual exploitation and abuse (SEA) in the BOI report were submitted to a MONUC SEA Investigation Team. The SEA Investigation Team conducted its investigation in February 2005 and found that the Appellant had a sexual relationship with a daily casual worker. The allegations of misconduct and the allegation of violation of SEA were submitted to a Joint Disciplinary Committee (JDC). The JDC recommended that the relationship between the Appellant and the daily casual worker did not amount to SEA but the preponderance of the evidence suggested that the staff member had engaged in a sexual relationship.

The Appeals Tribunal considered the due process rights of the Appellant under Staff Rule 110.4 and former Administrative Instruction ST/AI/371. The Tribunal determined that the due process rights provided in former Staff Rule 110.4 and former Administrative Instruction ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated.⁹²

24. During the preliminary investigation stage, only limited due process rights apply (emphasis added). In the present case, the UNDT was correct in finding that there was no breach of Mr. Powell's due process rights at the preliminary investigation stage in that, on December 21, 2004, Mr. Powell had been apprised of the allegations against him and had been given

⁹¹ Powell v. Secretary-General of the United Nations, Judgments U.N. Dispute Trib., No. UNDT/2012/039 (Mar. 28, 2013).

⁹² Applicant v. Secretary-General of the United Nations, Judgments U.N. App. Trib., No. 2012-UNAT-209, at ¶ 43, (Mar. 16, 2012).

the opportunity to respond.

25. However, the UNDT then fell into error in finding that the BOI and SEA investigations were final investigations. The BOI, after completing its investigation, delivered its report on January 13, 2005. The SEA report, after completion of the investigation, was delivered on February 26, 2005. Mr. Powell was not charged with four instances of alleged misconduct until March 28, 2005. The two investigations therefore preceded the bringing of disciplinary charges, and were thus preliminary investigations.

The Appeals Tribunal found that the Dispute Tribunal manifestly erred in fact and in law by finding the investigations conducted by the BOI and SEA Investigation Team were final investigations, which would lead to due process rights for the staff member. Due process rights attach only after the initiation of formal disciplinary proceedings under former Administrative Instruction ST/AI/371.

B. Can a staff member compel OIOS to undertake an investigation?

In *Abboud v. Secretary-General of the United Nations*, a staff member was interviewed for a P-5 position in the Department of General Assembly and Conference Management (DGACM).⁹³ Mr. Abboud complained that one of the panel members had behaved inappropriately and requested an investigation into the staff member's conduct. He informed the Under Secretary-General, Department for General Assembly and Conference Management (DGACM) that no action had been taken on his complaint. Mr. Abboud was informed that the Under Secretary-General, DGACM, had decided not to undertake a preliminary investigation. In response, Mr. Abboud filed an administrative review of the decision not to undertake a preliminary investigation. Dispute Tribunal determined that the decision of the Under Secretary-General and the DGACM not to order an investigation "followed a seriously inadequate initial inquiry, was tainted by personal pique" and rescinded the decision of the Under Secretary-General, DGACM.

The Appeals Tribunal held on appeal that ST/AI/371, both the former and the amended version, establish the obligation to

⁹³ *Abboud*, *supra* note 75.

undertake an investigation in cases of “[a]cts or behave[u]r that would discredit the United Nations” (II.2. (g) of the amended version and 2. (g) of the prior version).

The Appeals Tribunal noted that as a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization. It is not legally possible to compel the Administration to take disciplinary action. The Appeals Tribunal referred to ST/AI/371, both the former and the amended version, that establishes the obligation to undertake an investigation in cases of “(a)cts or behavior that would discredit the United Nations.”⁹⁴ The Appeals Tribunal also referred to the “Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority,” ST/SGB/2008/5, paragraph 2.1, which provides that “the Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct”. The Appeals Tribunal decided that the circumstances of the allegation of unsatisfactory conduct created the obligation to initiate a preliminary investigation which the Under Secretary-General and the DGACM failed to conduct. The Appeals Tribunal upheld the decision that there was an obligation to investigate but vacated the award of damages.

In *Nwuke v. Secretary-General of the United Nations*, the Applicant requested the Dispute Tribunal to compel the Administration to investigate a series of complaints about discrimination he had filed against the Senior Management of the United Nation Economic Commission for Africa (ECA), to order the Administration to perform different actions concerning the selection process, and order the Administration to treat him in a non-discriminatory way.⁹⁵ The Dispute Tribunal held that it could not compel the Organization to investigate the staff member’s complaints against the ECA’s Senior Management.

The Appeals Tribunal held that a staff member has no right to compel the Administration to conduct an investigation, unless such a right is granted by the UN Staff Regulations and

⁹⁴ Revised Disciplinary Measures and Procedures 2010, *supra* note 30, at II, ¶ (2)(g).

⁹⁵ *Nwuke v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2010/UNAT/099 (Dec. 28, 2010), *available at* <http://www.un.org/en/oaaj/files/unat/judgments/2010-unat-099.pdf>.

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Rules.

When a staff member files a complaint and makes accusations about administrative violations of law, the Administration can exercise its discretion and decide whether or not to undertake an (at least preliminary or summary) investigation. The investigation into management and administrative practices in general or into disciplinary cases is a matter within the discretion of the Administration.”

In disciplinary cases, a possible disciplinary procedure concerns the right of the accused staff member. Therefore a staff member does not have a right to request the Administration to take a disciplinary action against another staff member. The decision whether to undertake an investigation into allegations against a staff member is a discretionary action of the Administration and does not directly affect the rights of another staff member.

C. Staff Member’s Obligation to Cooperate with OIOS Investigations

In *Yapa v. the Secretary-General of the United Nations*, the Applicant worked at the United Nations Office in Geneva and took a French written exam and was found attempting to cheat during the test.⁹⁶ Mr. Yapa was informed by OHRM that he was charged with attempting to cheat on an examination for promotion when he was found with external papers on his desk. After the incident was reported the Applicant was contacted to obtain his version of the facts. The Applicant refused to discuss the incident or to participate in the investigation. The Applicant was charged with attempting to cheat in an examination and refusing to cooperate in the investigation. The Appeals Tribunal held that a staff member may at any time be required by the Secretary-General to supply information concerning facts relevant to his or her integrity, conduct and service as a staff member. This provision is not incompatible with a fundamental rule or principle of law international law applicable to staff members of the Organization. The Appeals Tribunal found that the Applicant’s refusal

⁹⁶ *Yapa v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/168 (Oct. 21, 2011), *available at* <http://www.staffrights.org/sites/default/files/2011-unat-168e.pdf>.

to cooperate in the investigation to determine whether he had attempted to cheat on an examination constituted professional misconduct.

D. Right to Counsel

The Dispute Tribunal considered in *Atana v. Secretary-General of the United Nations*, the issue of the right to counsel during an investigation interview.⁹⁷ The former Administrative Instruction ST/AI/371 and the revised Administrative Instruction ST/AI/371, Amend. 1., provide for the right to counsel during the formal disciplinary proceedings in which the Administration submits formal charges against the staff member. The OIOS “Investigations Manual” does not provide for a lawyer to be present at the interview.⁹⁸ In *Atana* the written records of the interview did not show that the Applicant requested the assistance of counsel.

In *Atana*, the Dispute Tribunal noted that “UNAT jurisprudence (states) that based on the staff rules there is no mandatory right to counsel for staff members who are undergoing interviews during the preliminary investigation of allegations for misconduct.” In *Powell v. the Secretary-General of the United Nations*, the Appeals Tribunal held that due process rights provided in the former Staff Rule 110.4 and former Administrative Instruction ST/AI/371 cannot apply during the preliminary investigation because “they would hinder it.”⁹⁹ Any investigation preceding the initiation of disciplinary charges is considered a preliminary investigation. Preliminary investigations have limited due process rights. Therefore, *Atana* held that OIOS is not obligated to allow a staff member to have counsel during the preliminary investigations.

In a recent Appeals Tribunal case of *Akello v. Secretary-General of the United Nations*, the Applicant joined the United Nations Department of Safety and Security (UNDSS) as a Ra-

⁹⁷ *Atana v. Secretary-General of the United Nations*, Judgments U.N. Dispute Trib., No. UNDT/2012/068 (Apr. 19, 2013), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-068.pdf>.

⁹⁸ Investigations Manual, *supra* note 25.

⁹⁹ *Powell v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2013/UNAT/295 (Mar. 28, 2013), available at <http://www.un.org/en/oaj/files/unat/judgments/2013-unat-295.pdf>.

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dio Operator in Moroto, Uganda.¹⁰⁰ The Applicant's contract was administered by UNDP. Due to the security situation in the Moroto region, it was mandatory for all UN official travel to be under escort of armed military personnel driven in privately-owned vehicles. These vehicles were hired through the Applicant's UNDSS office in Moroto. In March 2009 it came to the attention of UNDSS, Moroto, that the Applicant was involved in the management of a company, which owned a vehicle on the UNDSS list of companies providing escort vehicle services. A Board of Inquiry was constituted to look into the allegations of conflict of interest and found that the Applicant was involved in the management of the company, which provided services to the UN. The UNDSS Internal Affairs Unit (IAU) subsequently conducted an investigation into other complaints and issued its investigation report finding that the Applicant served as one of the signatories of the companies' bank account and, on behalf of the company, signed invoices and submitted them to the OHCHR. The UNDSS IAU determined that she was guilty of misconduct.

The Applicant contended that the facts of the case imposed an obligation upon the Administration to advise her of her right to seek assistance of counsel and that meeting with investigators indicated the disciplinary process surpassed the preliminary stage. The UNDP Office of Audit and Investigations (OAI Guidelines) described who could be present during an investigation interview:¹⁰¹

[u]nder special circumstances, witnesses or suspects can request to be accompanied by an observer (who has no connection to the investigation and is readily available). Considering the cultural context, gender balance and other elements of the case, the investigator may approve the request and select the observer (e.g. field security officer, lawyer etc.).

The Dispute Tribunal held that the investigators had the obligation to notify the Applicant of her right to the assistance of counsel during the investigation. The Appeals Tribunal in Atana considered, *inter alia*, whether a staff member should be informed of his or her right to seek the assistance of counsel

¹⁰⁰ *Akello v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2013/UNAT/336 (June 28, 2013), *available at* <http://www.un.org/en/oaaj/files/unat/judgments/2013-UNAT-336.pdf>.

¹⁰¹ *Id.* at ¶ 27.

during the investigation phase. The Appeals Tribunal held in a previous judgment, *Applicant v. Secretary-General of the United Nations*, that Staff Rule 10.3(a) provides that disciplinary proceedings are initiated when the “findings of an investigation indicate that misconduct may have occurred.”¹⁰² The Applicant contends that in the first investigation, conducted by the Board of Inquiry, unlawfully and irregularly, had already generated sufficient grounds to believe that misconduct may have occurred. The second investigation, conducted by UNDSS and the IAU, is indicative that investigators knew misconduct may have occurred and thus necessitated the Applicant’s right to counsel:¹⁰³

our jurisprudence remains that the **due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated.** (emphasis added) Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply.¹⁰⁴

The Appeals Tribunal held that the Applicant did not have a right to counsel during the investigation stage. The charge letter initiated the disciplinary proceedings wherein the staff member was notified of her right to counsel to assist in her defense. The staff member has a right to counsel only after the initiation of the formal disciplinary process through a charge letter.

VIII. JUDICIAL REVIEW OF OIOS ADMINISTRATIVE DECISION TO CLOSE THE CASE

A. A decision taken by OIOS not to refer the findings of the investigation to the disciplinary process is an administrative decision which can be appealed before UN judicial system.

Can a staff member appeal a decision by the OIOS not to undertake an investigation?

If OIOS decides to undertake an investigation, then the final outcome of the Investigation Report which contains the

¹⁰² *Applicant v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2012/UNAT/209 (Mar. 16, 2013), available at <http://www.un.org/en/oaj/files/unat/judgments/2012-unat-209.pdf>.

¹⁰³ See Akello, *supra* note 100 at ¶ 36.

¹⁰⁴ See Powell, *supra* note 99.

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findings and recommendations are submitted to the Head of Office or responsible officer in accordance with ST/AI/371/Amend.1. Since this is a recommendation, the Investigation Report cannot be subject to appeal at this stage of the proceedings. However, if OIOS decides not to undertake an investigation, which closes the case and the Report is not submitted, is this decision subject to appeal to the UN Tribunals?

In the case of *Koda v. Secretary-General of the United Nations*, the Appeals Tribunal held that any OIOS decision which affects an employee's terms or conditions of employment can be appealed by a staff member.¹⁰⁵ If an OIOS audit report is found flawed, then the Administration's disciplinary action based upon the findings in the report must be set aside. In the lower court ruling, the Dispute Tribunal found that the OIOS audit report was "inadequate, unfair, and one-sided" and contained such patent shortcomings that it should not have been presented as there was no "process of investigation described or reasoning expressed that justifies any confidence in the recommendations."¹⁰⁶ The Dispute Tribunal held that since the audit report did not constitute a breach of her contractual rights, the Tribunal dismissed her application.

First, the Appeals Tribunal considered whether the OIOS audit report was an administrative decision upon which a staff member can appeal the findings. The Appeals Tribunal determined that OIOS operates under the "authority" of the Secretary-General but has "operational independence". As to issues concerning budget and oversight functions, the General Assembly delegated this function to the Secretary-General.¹⁰⁷ The Appeals Tribunal held that as to the contents and procedures of an OIOS audit report, the Secretary-General has no power or authority to influence or interfere with OIOS. The UN Tribunals can only review the Secretary-General's administrative decisions. As OIOS is part of the Secretariat, it is sub-

¹⁰⁵ *Koda v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/130 (July 8, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-130.pdf>.

¹⁰⁶ *Koda v. Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. UNDT/2011/110 (June 24, 2010), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2010-110.pdf>.

¹⁰⁷ Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, *supra* note 4.

ject to the internal justice system. Therefore, the Appeals Tribunal can judicially review OIOS decisions which affect an employee's terms or contract of employment.

In the case of *Koda*, the Dispute Tribunal held that the Secretary-General does not have any powers in respect of changing the content of an audit report. OIOS is independent in respect of its functions involving the conduct of audit investigations. The Appeals Tribunal determined that the OIOS audit report was fundamentally flawed both legally and factually. The Appeals Tribunal held that, in this case, the OIOS audit report was not used as a basis for determining the disciplinary action, therefore there was no adverse effects on the staff member's reputation and upheld the judgment.

In the case of *Comerford-Verzuu v. Secretary-General of the United Nations*, the Appeals Tribunal relied upon its ruling in *Koda*.¹⁰⁸ The staff member filed an appeal against the failure of OIOS to investigate her complaint against the former Administrator of UNDP and the Director, Office of Legal and Procurement Support, UNDP, for intimidation, harassment, in violation of the UN standards of conduct. OIOS evaluated the staff member's complaint and determined that, since her complaint was similar to a previous complaint, which had been considered, the matter was closed. The Dispute Tribunal found that the staff member's request for administrative review was time-barred and rejected her appeal.

The Appeals Tribunal upheld the decision of the Dispute Tribunal and, of note, held that the contested decision by the Under Secretary-General of OIOS not to consider her request to investigate her complaint was an appealable administrative decision. In the cross-appeal before the Appeals Tribunal, the Secretary-General challenged the UNDT's finding that the Secretary-General may be held liable for the acts or omission of OIOS. The Appeals Tribunal reaffirmed its decision in *Koda* that OIOS as part of the UN Secretariat is subject to the internal justice system whose decisions can be reviewed by the Dispute and Appeals Tribunals:

OIOS operates under the 'authority' of the Secretary-General, but

¹⁰⁸ *Comerford-Verzuu v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2012/UNAT/203 (Mar. 16, 2012), available at <http://www.un.org/en/oaaj/files/unat/judgments/2012-unat-203.pdf>.

has ‘operational independence’. As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General’s involvement. Further, the Secretary-General is charged with ensuring that ‘procedures are also in place’ to protect fairness and due-process rights of staff members. It seems that the drafters of this legislation sought to both establish the ‘operational independence’ of OIOS and keep it in an administrative framework. **We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS.** (emphasis added) Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General’s administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.¹⁰⁹

The Appeals Tribunal held that the OIOS’ reply to the staff member was the administrative decision upon which the Appellant could seek review. The Appeals Tribunal held that any subsequent correspondence did not extend the time limit for seeking administrative review. The UN Tribunals do not have power to interfere with the contents and procedures of an individual report. The Appeals Tribunal held that any communication from OIOS to a staff member concerning a final decision on an investigation is an administrative decision, which can be appealed to the UN Tribunals.

If the decision of OIOS is an administrative decision, as judicially determined by the UN Appeals Tribunal, can it be reviewed as a request for management evaluation under UN staff rule 11.1?

B. Management evaluation of an administrative decision taken by OIOS under UN staff rule 11.2 (a)

The UN requires the staff member to file a quest for a management evaluation of the administrative decision in order to have recourse to the formal judicial system. In accordance with staff rule 11.2 (a):

“A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regula-

¹⁰⁹ See Koda, *supra* note 105 at ¶ 2.

tions and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.¹¹⁰

The Dispute Tribunal in *Nwuke v. the Secretary-General* considered whether a OIOS decision to or not investigation is an administrative decision which can be reviewed under staff rule 11.1.112.¹¹¹

The Appeals Tribunal decided in *Comerford-Verzuu v. Secretary-General of the United Nations* and *Koda v. Secretary-General of the United Nations* that an OIOS decision is an administrative decision. In order to challenge an administrative decision within the UN administration of justice system, according to staff rule 11.2(a), a request for management evaluation must be submitted to the Secretary-General. The purpose of this formal requirement, imposed by General Assembly resolutions 55/159 and 63/253 respectively, as a prior obligation of the staff member for filing an application to the UN Dispute Tribunal is to allow the Secretary-General to undertake a management review and overturn the contested decision, if he considers it necessary.

However, General Assembly Resolution 48/218 B and Secretary-General Bulletin ST/SGB/273 state that the purpose of OIOS is “to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization.”¹¹² Further, OIOS “shall exercise *operational independence* under the authority of the Secretary-General.”¹¹³

How do you reconcile these two principles: the operational independence of OIOS, as stated in the General Assembly Resolutions and the Secretary-General Bulletin, with the legal obligation of the Secretary-General, under staff rule 11.2(a) and also in accordance with the General Assembly Resolutions, to allow the Secretary-General to undertake a management evaluation of the decision to or not to investigate as decided by OIOS?

¹¹⁰ United Nations Staff Regulations and Staff Rules, U.N. staff rule 11.2.

¹¹¹ See *Nwuke*, *supra* note 95 at ¶ 35.

¹¹² U.N. Secretariat, Secretary-General's Bulletin, ¶ 5(a), ¶ 5(c), (Sept. 7, 1994), available at http://www.un.org/Depts/oios/documents/st_sgb273.pdf [hereinafter Secretary-General's Bulletin].

¹¹³ *Id.* at ¶ 2.

The Dispute Tribunal found itself confronted with these two principles, “*on the one hand, the operational independence of OIOS and on the other, the binding nature of the request to the Secretary-General for review or management evaluation of the decision taken by OIOS in the exercise of its investigative function.*”¹¹⁴ The Dispute Tribunal held that:

where the contested decision is a decision taken by OIOS in the exercise of its investigative functions, the Secretary-General may not, by virtue of resolution 48/218 B, annul or modify that decision. It follows that the Secretary-General, faced with the Applicant’s request for review of the decision of OIOS refusing to conduct an investigation, has no choice but to confirm that decision.

In the view of the Dispute Tribunal, the General Assembly intended that the OIOS should be operationally independent of the Administration and the Secretary-General. The General Assembly resolution and the legislative history of the resolution establishing OIOS does not make reference that the decisions of the OIOS cannot be subject to judicial review. Furthermore, as noted by the Dispute Tribunal, it is unacceptable in a legal system such as that of the United Nations that a staff member should not have access to justice to assert his or her rights.

When faced with the apparent contradictory instruments of equal value, the UN Dispute Tribunal held that it must give precedence to the staff member’s right of access to justice. The Dispute Tribunal held that “the fact that the Secretary-General may not modify the OIOS decision cannot operate to prevent the staff member from contesting it before the Tribunal.”¹¹⁵

Based on the jurisprudence of the UN Tribunals, a decision taken by OIOS whether to investigate or not is an administrative decision. As an administrative decision, a staff member may submit a request for management evaluation against the OIOS decision. The Secretary-General must undertake a management evaluation of the OIOS decision. However, by virtue of the “operational independence” of OIOS, the Secretary-General cannot annul or modify the decision. The Secretary-General

¹¹⁴ Comferford-Verzuu, *supra* note 108.

¹¹⁵ Kunanayakam v. Secretary-General of the United Nations, Judgments U.N. Dispute Trib., No. UNDT/2011/006 (Jan. 10, 2011) (not appealed to UN Appeals Tribunal), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2011-006e.pdf>.

can only review whether the appropriate procedures were followed by OIOS in the administrative decision.

After the management evaluation has been concluded, if the staff member is not satisfied with the response to the management evaluation, he or she has a right to file an application to the UN Dispute Tribunal against the contested administrative decision in accordance with staff rule 11.4.

C. Limited judicial review by the UN Tribunals of an OIOS decision to close the case.

What is the judicial review by the UN Tribunals in a dispute between the staff member and the decision by OIOS to close an investigation? In the Dispute Tribunal case of *Kunanayakam v. the Secretary-General of the United Nations*, the Applicant contested the decision of the OIOS not to carry out an investigation into the disappearance of documents and personal effects she had placed in her office.¹¹⁶ The OIOS informed the Applicant that it decided not to take action on her request and to instead refer the matter to the UNOG Safety and Security Section since it was a “Category II matter involving an alleged theft.” The Applicant requested a review of the decision by the Director of the Investigations Division, which rejected her request for an investigation.

In the deliberation of *Kunanayakam*, the Dispute Tribunal referred to the legislative history of the OIOS.¹¹⁷ The Tribunal noted that in the General Assembly resolution 48/218 B, dated 29 July 1994, OIOS shall “investigate reports of violations of United Nations regulations, rules, and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.”¹¹⁸ General Assembly resolution 59/287 of 13 April 2005 furthermore recognized that OIOS “has established an efficient mechanism to enable all staff members ... to convey directly their allegations to the Office of Internal Oversight Services.”¹¹⁹ The Tribunal

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ G.A. Res. 48, ¶ 5(c)(iv), U.N. Doc. A/RES/48/218 (July 29, 1994).

¹¹⁹ G.A. Res. 59, U.N. Doc. A/RES/59/287 (Apr. 13, 2005).

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referred to the Secretary-General's Bulletin, ST/SGB/273, establishing OIOS, which provides: "the Office may receive and investigate reports from staff reporting perceived cases of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority."¹²⁰

The Dispute Tribunal determined that the language of the aforementioned General Assembly resolutions and Bulletin made it clear that UN staff members *have the right to report cases* of presumed violation of their rights directly to OIOS.¹²¹

The Dispute Tribunal cited the Appeals Tribunal's judgment in *Nwuke v. the Secretary-General of the United Nations*, which concerned the refusal by the Administration to investigate complaints by the staff members concerned.¹²² The Appeals Tribunal considered that it was competent to exercise judicial control over such decisions since it was a decision of a discretionary nature and directly affected the rights of the claimant. The Appeals Tribunal thus held, "that this Tribunal has jurisdiction to rule on the decision of the OIOS not to launch its own investigation in response to the Applicant's request. That said, the Tribunal is bound to examine the legal arguments that could operate to negate such jurisdiction."¹²³

The Appeals Tribunal considered that it was clear that the General Assembly intended to confer "operational independence" on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work. However, the Secretary-General, as Chief Administrative Officer, is administratively responsible for any breaches or illegalities OIOS might commit.

The Dispute Tribunal decided in *Kunanayakam* that an OIOS decision not to undertake the investigation requested by the Applicant is an administrative decision appealable to the Tribunal. In *Kunanayakam*, the Dispute Tribunal held that it was clear from the evidence that the refusal of OIOS to investigate the facts brought to its attention by the Applicant was motivated by the view taken by the OIOS Investigations Division, as stated in its letters of 21 April and 7 June 2006 which the

¹²⁰ Secretary-General's Bulletin, *supra* note 112, at ¶ 18.

¹²¹ Cases must fall within the categories listed in paragraph 18 of bulletin ST/SGB/273.

¹²² *Nwuke*, *supra* note 95, at 70.

¹²³ *Id.*

Applicant contests, that the investigation requested by the Applicant could be entrusted to another investigative unit.¹²⁴ The Dispute Tribunal decided that when it receives a request from a staff member for an investigation, OIOS must, as a preliminary matter, determine whether to undertake the investigation itself or refer the matter to another investigative unit. Thus, contrary to the Applicant's contention, OIOS, if deemed appropriate, has the authority to entrust the investigation to another investigative agency, the UN Safety and Security Section. In the light of the foregoing, the Tribunal considered that the decision by OIOS not to conduct an investigation itself, but to refer the case to the Safety and Security Section, was a legitimate and reasonable exercise of its discretionary powers.

Having regard to the nature of the mission conferred on OIOS, the Dispute Tribunal held that the judicial review of the Tribunal over a decision of OIOS is limited as follows:¹²⁵

the Tribunal can exercise no more than a minimum degree of control over the lawfulness of its operational decisions, limited to verifying the regularity of the procedure followed, and determining whether there was a mistake of fact or a manifest error in the exercise of its discretion.

The Dispute Tribunal determined that there is limited judicial review of a decision by OIOS not to investigate or close a case. The judicial review is limited to verifying that the appropriate procedures were followed, whether either was a mistake of fact, or a manifest error in the exercise of its discretionary authority.

IX. JUDICIAL REVIEW OF DUE PROCESS RIGHTS DURING THE DISCIPLINARY PROCEEDINGS

The above considered whether a decision by OIOS not to investigate a case can be reviewed by the UN Judicial Tribunals. The Tribunals have decided that it has the authority to

¹²⁴ See Kunanayakam, *supra* note 115. The possibility for the OIOS to classify cases into two separate categories depending on their seriousness and complexity was introduced in report A/58/708 on strengthening the investigation functions in the United Nations, which that Office submitted to the General Assembly in 2004. It drew a distinction between category I, which included high-risk, complex matters and serious criminal cases and category II, covering cases of lower risk to the Organization.

¹²⁵ *Id.* at ¶ 43.

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review the OIOS decision not to investigate as an administrative decision, which can be appealed to the UN Tribunals. However, the review of the OIOS decision not to investigate is a limited judicial review, can only consider whether the appropriate procedures were followed, whether the decision was based upon a mistake of fact, or whether there was a manifest error in the exercise of its discretionary authority.

If OIOS decides the investigation showed sufficient evidence indicating the staff member engaged in wrongdoing that could amount to misconduct, OIOS will submit an Investigation Report to the Head of Office or responsible officer.¹²⁶ The Investigation Report contains the findings of the investigation, the supporting documentary evidence, and recommendations. The Investigation Report submitted to the Head of Office is not a decision by OIOS; it is a recommendation. At this stage, the Investigation Report itself cannot be appealed to the Dispute Tribunal since it only makes findings and recommendations. The Head of Office reviews the Investigation Report and forwards the matter, which includes the Investigation Report, to the ASG, OHRM.¹²⁷ The ASG, OHRM, upon consideration of the entire dossier, may decide that there is enough evidence to commence formal charges of misconduct against the staff member.¹²⁸

If the ASG, OHRM decided that misconduct has occurred, a recommendation for the imposition of disciplinary measures will be taken by the Under Secretary-General for Management on behalf of the Secretary-General.¹²⁹ The Under Secretary-General on behalf of the Secretary-General makes the final decision whether to impose a disciplinary measure. This is the decision against which the staff member can file an application. A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process is not required to request a management evaluation. The staff member may submit an application directly to the Dispute Tribunal in accordance with Chapter XI of the Staff Rules against the disciplinary meas-

¹²⁶ Revised Disciplinary Measures and Procedures 2010, *supra* note 30, at 69-70.

¹²⁷ *Id.*

¹²⁸ *Id.* at ¶ 9(a) and (b).

¹²⁹ *Id.*

ure.¹³⁰

The following is a discussion on the judicial review of the due process requirements in a disciplinary proceeding based on the facts established in an OIOS Investigation Report.

A. Due Process Rights of a Staff Member during the Disciplinary Proceedings

In *Cabrera v. the Secretary-General of the United Nations*, a disciplinary action based upon former Administrative Instruction, ST/AI/371, stated the specific procedural steps for disciplinary matters as follows, *inter alia*:¹³¹

- d. A decision by the ASG/OHRM, whether the matter should be pursued with written allegations of misconduct (sec. 5);
- e. The initiation of a formal investigation with the filing of formal charges against the staff member (sec. 6);
- f. The implementation of due process rights for the staff member and right of the reply for the staff member (sec. 6); and
- g. The review by the relevant official of the entire dossier on whether the matter should proceed further (sec. 9a);...

Cabrera further stated that where the threshold has been reached, and that the decision has been made, that the matter is of such gravity that it should be pursued further, the investigation ceases to be preliminary and in substance “converts to a formal investigation with a focus on a specific staff member.”¹³²

In the case of the Dispute Tribunal, *Johnson v. Secretary-General of the United Nations*, the Applicant was one of eight staff members who worked for the Procurement Division, the Department of Management.¹³³ The Applicant was placed on special leave with full pay on Jan. 16 2006 following issuance of a Dec. 2005 draft audit report into procurement activities and a follow-up investigation by the Procurement Task Force (PTF) of

¹³⁰ *Id.* at ¶ 10.

¹³¹ *Cabrera v. the Secretary-General of the United Nations*, Judgments U.N. Dispute Trib., No. 2011/UNDT/081, at ¶ 75 (May 6, 2011), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2011-081.pdf>.

¹³² *Id.* at ¶ 76.

¹³³ *Johnson v. the Secretary-General of the United Nations*, Judgments U.N. Dispute Trib., No. 2011/UNDT/123, at ¶ 1 (June 30, 2011), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2011-123.pdf>.

OIOS.¹³⁴ The Dispute Tribunal inquired whether the PTF and OIOS, investigation was a preliminary investigation under former Administration Instruction ST/AI/371, sec. 2, or a formal investigation under ST/AI/371, sec. 6. for the ASG, OHRM to pursue the case. The Dispute Tribunal held that where a decision of the ASG, OHRM has been made that the matter is of such gravity that it should be pursued further, 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.

The Dispute Tribunal in *Johnson* listed the rights afforded to the Applicant under ST/AI/371, sec. 6:

- a. Sec. 6(a)—the right to be informed of the allegations and of the right to respond to the allegations;
- b. Sec. 6(b)—the right to be provided with documentary evidence of the alleged misconduct;
- c. Sec. 6(c)—the right to be informed of his right to the advice of other staff members to assist in his responses;
- d. Sec. 6—the right to have the Secretary-General himself authorize the suspension;
- e. Sec. 7—the right to be given a specified time to answer the allegations and to be informed of the procedure for producing countervailing evidence
- f. Sec. 8, secs. 6(a)-(c)—the right to have the entire dossier (including the staff member's reply and countervailing evidence) submitted to the ASG/OHRM;
- g. Sec. 9(a)—the right to be informed, if the case is closed, that the charges have been dropped and that no further action will be taken:

Following the investigation, the staff member must be notified, in writing, of the charges and given the opportunity to respond to those charges. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless the due process rights are followed. In *Johnson*, the Tribunal found that a fundamental principle of due process, when an individual has become the target of an investigation or reasonably concludes that he has been identified as a possi-

¹³⁴ *Id.*

ble wrongdoer in any investigation procedure, that he has the right to invoke due process. At the post-investigation stage, that person should be accorded certain due process rights.¹³⁵

In *Johnson v. Secretary-General of the United Nations*, the Dispute Tribunal found that having passed the threshold of a preliminary investigation, the OIOS and PTF investigation constituted a formal investigation under ST/AI/371, section 6. The Organization should have implemented for the staff member the due process protections of ST/AI/371.

B. Standard of Proof in Disciplinary Cases – Clear and convincing evidence

How does the UN Tribunals assess whether the evidence in the Investigation Report amounts to misconduct?

In *Molari v. Secretary-General of the United Nations* the Appeals Tribunal held that the standard of proof to terminate a staff member for misconduct must be established by clear and convincing evidence.¹³⁶ Clear and convincing proof requires more than, a preponderance of the evidence, but less than, proof beyond a reasonable doubt. Clear and convincing evidence means that the truth of the facts asserted is highly probable. In the case of *Molari*, the staff member submitted to the Danish Ministry of Foreign Affairs (MoFA) through UNOPS receipts for unusual grocery purchases for VAT reimbursement claim. The Executive Director of UNOPS established an enquiry panel to investigate the matter. The Enquiry Panel determined that Ms. Molari had falsely certified store receipts as being eligible for VAT reimbursement. The UNOPS Executive Director informed Ms. Molari that she would be separated from service with one month's notice and payment of termination indemnity. The decision was upheld by the UN Dispute Tribunal and Ms. Molari appealed the decision to the Appeals Tribunal.

In Ms. Molari's case, the facts were irrefutable that she had committed misconduct, and that there was plausible explanation. The Appeals Tribunal upheld the judgment. The

¹³⁵ See *Johnson*, *supra* note 133.

¹³⁶ *Molari v. the Secretary-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2011-UNAT-164, at ¶ 2 (Oct. 21, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-164.pdf>.

Appeals Tribunal stated that it would not follow the International Labor Organization (ILO) standard of proof in disciplinary cases as beyond a reasonable doubt. The UN Appeals Tribunal held that since disciplinary cases in the UN are not criminal and liberty is not at stake, when termination is a possible outcome, misconduct must be established by clear and convincing evidence.¹³⁷ “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable.”¹³⁸

X. JUDICIAL REVIEW OF THE FACTS IN THE INVESTIGATION REPORT – A RE-INVESTIGATION OF THE CASE OR A LIMITED JUDICIAL REVIEW?

What is the role of the Dispute Tribunals and the Appeals Tribunal when reviewing a disciplinary sanction imposed by the Administration based on the evidence contained in an Investigation Report?

A. *Standard of Review in Disciplinary Cases*

The former UN Administrative Tribunal established standards for the review of administrative actions in relation to disciplinary matters in UN employment. The leading authority relevant to the judicial review of facts of misconduct is the former United Nations Administrative Tribunal’s decision in *Kiwanuka*.¹³⁹ *Kiwanuka* held that in disciplinary matters “the Tribunal had a duty to examine the facts and the evidence critically and fully and to review the Administration’s decision.”¹⁴⁰ It also held that the former United Nations Administrative Tribunal’s jurisprudence would be considered as “prevailing authority”. *Kiwanuka* provided the historical jurisprudence for the UN Appeals Tribunal in the consideration of standards for review of administrative decisions in disciplinary matters.

¹³⁷ *Id.* at ¶ 30.

¹³⁸ *Id.*

¹³⁹ *Kiwanuka v. the Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 941, U.N. Doc. AT/NOV/941 (1999), available at http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00941_E.pdf.

¹⁴⁰ *Id.* at § VI.

The UN Appeals Tribunal established the standard for judicial review in disciplinary cases very early in its jurisprudence. In *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, the staff member gave himself unauthorized access to the telephone line of his employer, UNRWA, and tampered with the billing system.¹⁴¹ A Board of Inquiry (BoI) was established to investigate the allegation of the unauthorized access to the telephone lines. The BoI issued its report and based on its findings, UNRWA summarily dismissed the Appellant. The UN Appeals Tribunal examined the following in reviewing the disciplinary case:

- i. Whether the facts on which the disciplinary measure was based have been established;
- ii. Whether the established facts legally amount to misconduct under the Regulations and Rules; and
- iii. Whether the disciplinary measure applied is proportionate to the offence.

Based on the above standard of review, the Appeals Tribunal affirmed the decision to dismiss the Appellant.

In *Maslamani v. Commissioner-General of UNRWA*, a case relating to summary dismissal, the Appeals Tribunal held that consideration was given to “(1) the broad discretionary authority of the UNRWA Commissioner-General in disciplinary matters; (2) whether the facts on which the Appellant’s termination was based were established; (3) whether the established facts legally amounted to serious misconduct; and (4) whether there had been no substantive or procedural irregularity.”¹⁴² The Appeals Tribunal reaffirmed this standard of review in disciplinary cases and upheld the summary dismissal.¹⁴³

¹⁴¹ *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. Appeals Trib., No. 2010-UNAT-018, at ¶ 1 (Mar. 30, 2010), available at <http://www.staffrights.org/sites/default/files/2010-unat-018.pdf>.

¹⁴² *Maslamani v. Commissioner-General of UNRWA*, Judgments U.N. Appeals Trib., No. 2010-UNAT-028 (Mar. 30, 2010), available at <http://www.un.org/en/oaj/unat/judgments/2010-unat-028.pdf>.

¹⁴³ See also *Haniya v. Commissioner-General of UNRWA*, Judgments U.N. Appeals Trib., No. 2010-UNAT-024 (Mar. 30, 2010), available at <http://www.un.org/en/oaj/unat/judgments/2010-unat-024.pdf>; *Adwan v. Commissioner-General of UNRWA*, Judgments U.N. Appeals Trib., No. 2010-

Shahatit v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East upheld the UNAT approach of the judicial review of a disciplinary sanction imposed by the Administration.¹⁴⁴ In this case, the established facts showed that Mr. Shahatit's negligence facilitated the misconduct of other staff members. Mr. Shahatit was given the opportunity to defend himself and did not prove any flaws in the administrative and disciplinary procedural process. The Appeals Tribunal held that the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts constitute misconduct, and whether the sanction is proportionate to the offence. The Commissioner-General had the delegated authority to impose the level of sanction she considered as appropriate which decision could only be reviewed in cases of "obvious absurdity or flagrant arbitrariness."¹⁴⁵ The Appeals Tribunal dismissed the appeal.

In a case involving a challenge to an OIOS investigation, *Makwaka v. Secretary-General of the United Nations*, OIOS conducted an investigation into the allegations that the Applicant had allegedly engaged in activities that, as a result of his use of the UN information and communication technology resources, were in breach of the UN Staff Rules.¹⁴⁶ The Applicant was interviewed by OIOS during the investigation and shown evidence of numerous pornographic images, including child pornography, which he forwarded to other UN staff members. The Applicant was provided with the opportunity to comment on the evidence before OIOS. OIOS provided its Investigation Report to the Under-Secretary-General, Department of General Assembly and Conference Management, who referred the In-

UNAT-038 (Mar. 30, 2010); *Masri v. Secretary-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2010-UNAT-098 (Mar. 30, 2010).

¹⁴⁴ See *Shahatit v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. App. Trib., No. 2012/UNAT/195, (Mar. 16, 2012), available at <http://www.un.org/en/oaj/files/unat/judgments/2012-unat-195.pdf>.

¹⁴⁵ See *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. App. Trib., No. 2010/UNAT/040 at 9 (July 1, 2010), available at <http://www.un.org/en/oaj/files/unat/judgments/2010-unat-040.pdf>.

¹⁴⁶ See *Makwaka v. Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. 2013/UNDT/002 (Jan. 11, 2013), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-002.pdf>.

vestigation Report to the Assistant Secretary-General, OHRM, for review and determination of the appropriate disciplinary action to be taken in accordance with former Administrative Instruction, ST/AI/371. The USG for Management imposed the disciplinary measures of a written censure, demotion of one grade, deferment for three years of his eligibility for consideration for promotion. The Applicant sought rescission before the UN Dispute Tribunal of the imposition of the disciplinary sanctions.

In *Makwaka*, the Applicant contended that his due process rights were breached during the investigation process. The Tribunal considered whether there were any procedural irregularities leading to the imposition of the contested disciplinary sanctions. In the consideration of whether the Applicant's due process rights were respected, the UN Dispute Tribunal reviewed the disciplinary decision in two separate phases: (1) the investigative phase conducted by OIOS, and (2) the disciplinary process undertaken by OHRM upon receiving the OIOS' investigation report.

The UNDT considered the investigation stage, which provides for the Administration to conduct an investigation in accordance with the established due process procedures. As discussed above, this stage has limited due process rights. The second stage is the submission of the findings in the investigation report to the ASG, OHRM, and, based upon the assessment whether there is sufficient evidence of misconduct, formal charges are commenced against the staff member. The Administration must provide the staff member with a higher standard of procedural due process rights during the formal charges in the disciplinary process stage. These are two separate and distinct stages, which require different standards of procedural due process rights.

In *Makwaka*, the UN Dispute Tribunal examined whether the Administration accorded due process rights to the staff member during the investigation stage. The Tribunal determined that the purpose of OIOS in the investigative phase was as follows:

The purpose of OIOS is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to OHRM be-

ing seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must still be conducted in accordance with the rules and regulations of the Organization and it must respect a staff member's rights to due process.¹⁴⁷

The UN Dispute Tribunal considered in *Makwaka* whether the Applicant was able to review the interview record and the Investigation Report, as well as, all evidence in his favor, including mitigating evidence, prior to the finalization of the report. The Applicant was provided with the opportunity to defend himself during the preliminary stage of the investigation. The Tribunal referred to the International Covenant on Civil and Political Rights (art.14) and the European Convention on Human Rights (art. 6), to determine whether the Applicant's right to defend himself and present evidence in his defense had been respected in the investigation process. The Dispute Tribunal held that the Applicant should have the right to defend himself in person during the investigation. In this case, there was no evidence that the Applicant requested and was denied either access to counsel or further opportunities to defend himself during either the investigation conducted by OIOS or the ensuing disciplinary process by the ASG, OHRM.

Makwaka showed that the Applicant was aware of the allegations that served as a basis for the investigation. The Applicant cooperated with the investigation process and was provided the opportunity to review and provide comments on the investigation report prior to its finalization. There were no unreasonable delays in the investigation conducted by OIOS. Consequently, the Applicant's due process rights were not breached during the OIOS investigation stage. However upon being charged by OHRM with misconduct on November 4, 2008, there were no further communications between the Administration and the Applicant regarding this matter until April 13, 2010. This resulted in a nearly 16 months delay. The Applicant did not request compensation for delay, therefore, the Tribunal did not award any compensation. The Dispute Tribunal decided the disciplinary measures of written censure and demotion were lawful, proportional, and taken in accord-

¹⁴⁷ *Id.* at 13.

ance with the regulations and rules, therefore the disciplinary sanctions were not rescinded.

B. Limited judicial review of the facts of an OIOS investigation

In *Messinger v. the Secretary-General of the United Nations*, the UN Appeals Tribunal held that it is not the task of the UN Dispute Tribunal to conduct fresh investigations but to determine if there was a proper investigation into the allegations.¹⁴⁸ Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence.”¹⁴⁹ The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

In *Sanwidi v. Secretary-General of the United Nations*, the UN Appeals Tribunal considered whether the UN Dispute Tribunal erred on a question of law and exceeded its competence in substituting its own judgment for that of the Secretary-General concerning the evaluation of facts and the appropriate disciplinary action.¹⁵⁰ *Sanwidi* is an important case, which considered the limits of the UN Dispute Tribunal’s judicial review of the Secretary-General’s decision in disciplinary matters.

¹⁴⁸ See *Messinger v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/123 (Mar. 11, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-123.pdf>.

¹⁴⁹ See *Diabagate v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2014/UNAT/403 (April 2, 2014), available at <http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-403.pdf> (citing *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013/UNAT/364; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010/UNAT/098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010/UNAT/084UNAT-024).

¹⁵⁰ See *Sanwidi v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2010/UNAT/084 (Oct. 27, 2010), available at <http://www.un.org/en/oaj/files/unat/judgments/2010-unat-084.pdf> (citing *Masri v. Secretary-General of the United Nations*, Judgment No. 2010/UNAT/098).

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The issue before the Tribunal was whether the staff member was entitled to a complete review of the factual evidence through appeal.

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. **During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision.** (emphasis added) This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

The UN Appeals Tribunal, referring to its holding in *Mahdi*, affirmed the lower court's decision in *Sanwidi* to summarily dismiss the Applicant.¹⁵¹

These two UN Appeals Tribunal cases, *Sanwidi and Mahdi*, are leading precedents for the UN Dispute Tribunal that in the consideration of disciplinary cases, the review must be a judicial review of the facts of the case with due deference to the Secretary-General's administrative decisions. The UN Appeals Tribunal held in *Sanwidi* that the UN Dispute Tribunal, as the judicial authority for reviewing facts, must only consider how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. *The UN Dispute Tribunal cannot undertake a re-investigation of the facts of the case.* Upon a limited judicial review of the facts, the UN Dispute Tribunal must apply the procedures as enunciated in *Mahdi* – whether the facts have been established, whether the established facts legally amount to misconduct, and whether the facts on which the disciplinary measure was based have been established; whether the established facts legally amount

¹⁵¹ *Id.* at 12.

to misconduct under the Regulations and Rules; and whether the disciplinary measure applied is proportionate to the offence.¹⁵²

In the case of *Applicant v. the Secretary-General of the United Nations*, the UN Appeals Tribunal ruled that the UN Dispute Tribunal made an error of law in failing to affirm the summary *dismissal* of the Applicant on the grounds he committed serious misconduct for sexually harassing four young men.¹⁵³ In this case, a UNICEF staff member was summarily dismissed for sexual harassment of young men in a residential compound in Juba, South Sudan. The security guards complained to UNICEF that the staff member had made unwelcome advances and inappropriately touched some of the complainants. The UNDT reviewed the evidence contained in the investigation, including the witnesses' interviews and the investigators' report, and concluded that the sanction of summary dismissal was based on unsubstantiated charges.

The UN Appeals Tribunal held that when the UN Dispute Tribunal reviewed the evidence, it improperly placed itself in the Applicant's shoes and did not evaluate the evidence objectively. The UN Appeals Tribunal considered the review of the investigation by the UN Dispute Tribunal as "rank speculation."¹⁵⁴

The UN Appeals Tribunal concluded that the UNDT erred in law and fact which resulted in a manifestly unreasonable decision when it determined that the Complainants were not credible and the investigation report should not have relied on their statements and those of their supervisors. The evidence in the record did not support the UNDT's legal conclusions and factual findings.¹⁵⁵ The UN Appeals Tribunal vacated the UNDT's decision.

¹⁵² Mahdi, *supra* note 14, at ¶ 27.

¹⁵³ See *Applicant v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2013/UNAT/302 (Mar. 28, 2013), available at <http://www.un.org/en/oaj/files/unat/judgments/2013-unat-302.pdf>.

¹⁵⁴ *Id.* at 16.

¹⁵⁵ *Id.*

XI. PRODUCTION OF OIOS INVESTIGATION REPORT TO THE STAFF MEMBER

A. Staff Member's right to receive a copy of the Investigation Report

In *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, the Applicant, a staff member with UNRWA, was charged by the local courts in Dier Al Balah, Jordan, with assault of family relatives in an altercation at a wedding.¹⁵⁶ UNRWA suspended the Applicant from duty without pay, pending an investigation. UNRWA undertook an investigation and appointed a Legal Aid Assistant from Gaza to investigate the allegations. The investigator allegedly was a relative of the Applicant and the complainants. UNRWA concluded that the investigator had uncovered credible evidence to support the allegations of misconduct and decided to terminate the Applicant's employment for misconduct under UNRWA Area Staff Regulation 10.2.

The Applicant appealed to the UNRWA Dispute Tribunal. In the UN Dispute Tribunal hearing, he requested an order for full disclosure of all documents pertaining to the investigation including the investigation report. The UNRWA Dispute Tribunal decided, after reviewing the contents of the investigation report, that it would disregard and remove the investigation report from the Applicant's file and upheld the Applicant's termination. The Applicant was not given a copy of the investigation report. The UN Appeals Tribunal held that the UNRWA Dispute Tribunal committed an error in procedure when it denied the Applicant's request for a copy of the investigation report.

Due process requires, in the present case, that the staff member be able to assess by himself the relevance or irrelevance of the content of the investigation report, after a direct reading of it, as the Administration's charges were mainly founded on that investigation, the characteristics and outcome of which were under

¹⁵⁶ See *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. App. Trib., No. 2013/UNAT/289 (Mar. 28, 2013), available at <http://www.un.org/en/oaj/files/unat/judgments/2013-unat-289.pdf>.

discussion. When challenging a termination for disciplinary reasons, the staff member is entitled to review by him- or herself the evidence used to support the conclusion of misconduct, to examine whether the fact finding conducted by the Administration indeed leads to the conclusions and the impugned administrative decision. If that opportunity is denied, due process of law is not respected, as it occurred in the present case.

The UN Appeals Tribunal held that the Appellant had the right to make an assessment of the investigation report himself and the failure to provide the Appellant with the investigation report prejudiced his right to due process.

When challenging a termination for disciplinary reasons, the staff member is entitled (a) to review the evidence used to support the conclusion of misconduct, and (b) to examine whether the fact finding conducted by the Administration appropriately led to the conclusions and the impugned administrative decision. If that opportunity to review the investigation report is denied, due process of law is not respected. If the staff member is the person of interest in the investigation report, the staff member has the right to review and make an assessment of the investigation report. In this case, the UN Dispute Tribunal erroneously decided that the investigation report contained no relevant material without giving the report to the Appellant. The failure to provide a staff member who is a person of interest in the investigation with an investigation report prejudices his right to due process.

In *Seddik Ben Omar v. the Secretary-General of the United Nations*, the Applicant made a number of serious allegations concerning the conduct of the Special Representative of the Secretary-General for Iraq (SRSG).¹⁵⁷ OIOS undertook an investigation into the 13 allegations made by the Applicant against the SRSG and found that only two of the Applicant's allegations were substantiated. OIOS further observed that the Applicant was imprecise and vague with providing information to OIOS. It is of note that the OIOS investigation was not of the Applicant's behavior but of his complaints against the SRSG. There was no obligation upon the Organization to disclose the results of the investigation to the Applicant, since

¹⁵⁷ See *Seddik Ben Omar v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2012/UNAT/26 (Nov. 1, 2012), available at <http://www.un.org/en/oaj/files/unat/judgments/2012-unat-264.pdf>.

the he was not a person of interest in the investigation and the Report did not concern his conduct. However, the Organization proceeded to place a Note on the Applicant's OSF arising from OIOS comments on the Applicant's behavior during the investigation.

The placement of the Note on the Applicant's OSF, which referred to the Investigation Report, gave rise to the obligation to share the investigation report with the Applicant. OHRM notified the Applicant of OIOS findings and informed him that a Note would be placed in this Official Status File referring to the OIOS observations, and that the Note also stated he should not be employed by the Organization in the future. The UN Appeals Tribunal upheld the lower Tribunal's decision that the placement of the Note in the OSF was unlawful since it referred to the OIOS Report, which the Applicant had not reviewed. The UN Appeals Tribunal held that the investigation report had to be shared with the Applicant.

In *Featherstone v. Secretary-General of the United Nations*, an investigation was conducted under the UN policy, "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority" (ST/SGB/2008/5), and the manager referred the case to the ASG, OHRM.¹⁵⁸ The Applicant was informed that the ASG, OHRM, decided not to pursue disciplinary proceedings against her on the basis of the investigation report. The Applicant repeatedly asked for the investigation report as well as other documents. The Registrar of the ICTY did not address the Applicant's request for access to documentary evidence since the ASG, OHRM had decided not to pursue disciplinary proceedings. The Applicant was informed that the matter was closed and that no information was in the Human Resources file. The Applicant raised the issue that she has a right to receive documentary evidence concerning the allegations brought against her, even though the matter was dismissed.

The UN Dispute Tribunal held that Administrative Instruction, ST/AI/371., Amend. 1, sections 5 and 6, clearly restrict the right of a staff member to receive documentary evi-

¹⁵⁸ See *Featherstone v. Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. 2012/UNDT/203 (Dec. 21, 2012), available at <http://www.un.org/en/oaaj/files/undt/judgments/undt-2012-203.pdf>.

dence concerning allegations brought against him or her only to cases where the ASG, OHRM decides to pursue the case.¹⁵⁹ The staff member did not have a right to access documentation from a disciplinary investigation if the ASG, OHRM decides not to pursue disciplinary proceedings. The UN Dispute Tribunal held that Applicant has no right to obtain the investigation report or any other documentary evidence when the case is closed.

B. Staff member's request to the UN Appeals Tribunal to produce documents

In *Bertucci v. the Secretary-General of the United Nations* the OIOS launched an investigation into allegations of irregularities that allegedly occurred with the Division for Public Administration and Development Management, Department of Economic and Social Affairs, of which the Applicant was the Director.¹⁶⁰ The Applicant was charged with negligence in the fulfilment of his managerial duties. In the UN Dispute Tribunal proceedings, the Applicant requested the Tribunal to allow him to access certain documents. The UN administration responded that the documents were privileged and would not produce the documents to the UN Dispute Tribunal. The UN Dispute Tribunal ordered the production of documents to determine whether they should be disclosed to the Applicant. The Administration appealed to the UN Appeals Tribunal. The UN Appeals Tribunal upheld the UN Dispute Tribunal that the refusal to give the staff member access to the investigation file during UN Dispute Tribunal hearing was unlawful.

The UN Appeals Tribunal determined that the Applicant had raised sufficiently serious questions before the United Nations Dispute Tribunal, regarding the propriety of the process leading to the decision not to select him, to give the UN Dispute Tribunal grounds for ordering the production of documents. The UN Appeals Tribunal held that the case should be remanded for production of documents.

¹⁵⁹ Revised Disciplinary Measures and Procedures 2010, *supra* note 30, at ¶ 5-6.

¹⁶⁰ See *Bertucci v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/121 (Mar. 11, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-121e.pdf>.

In *Ahmed v. the Secretary-General of the United Nations*, the Applicant, a staff member with the United Nations Information Centre in Islamabad, Pakistan, received a Performance Appraisal System (PAS) report within overall performance rating of “does not meet performance expectations.”¹⁶¹ The Applicant filed a rebuttal to his PAS reports and in his rebuttal letter he included allegations that his supervisor had isolated various staff member, including himself, to cover up “financial irregularities mismanagement and corruption” at UNIC. An investigation was conducted by UNDP and found that there was no evidence to substantiate the allegations. In the case before the UN Appeals Tribunal, the Applicant reiterated his allegations of corruption and financial fraud and submitted that he had been denied access to the reports of the OIOS on the investigations into his allegations. The Applicant requested the UNAT to order the production of those reports.

The UN Appeals Tribunal addressed the issue of the Applicant’s request to the Tribunal for production of the OIOS reports. The UN Appeals Tribunal referred to Article 8(1) of the UN Appeals Tribunal Statute, which states the Appeals Tribunal may “order production of documents or such other evidence as it deems necessary, subject to Article 2 of the present statute”. Article 2(5) of the Statute of the Appeals Tribunal provides that in exceptional circumstances, the Tribunal “may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings”. In this case, the UN Appeals Tribunal referred to *Calvani v. the Secretary-General* and *Bertucci v. the Secretary-General*.¹⁶² The Appeals Tribunal held that it has discretionary authority in the conduct of its proceedings and the production of documents would be granted for the purpose of achieving a fair and expeditious disposal of a case. The Appeals Tribunal held that in *Ahmed* it did not have sufficient reason to order the production of documents.

¹⁶¹ *Ahmed v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/153 (July 8, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-153.pdf>.

¹⁶² *Calvani v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2010/UNAT/032 (Mar. 30, 2010), available at <http://www.un.org/en/oaj/unat/judgments/2010-unat-032e.pdf>; see *Bertucci v. Secretary-General of the United Nations*, *supra* note 162.

XII. EXAMINATION OF WITNESSES

A. *Anonymous Witnesses*

In *Cohen v. the Secretary-General of the United Nations*, the Applicant was a staff member in the Democratic Republic of the Congo (MONUC) as a Procurement Assistant at the FS-4 level.¹⁶³ The Applicant was charged with “having solicited, received and accepted sums of money from Transport Fluvial et Commerce (TFCE), a vendor who did business and sought to do business” with MONUC.¹⁶⁴ The allegations made against the Applicant were forwarded to OIOS which referred that matter to the Procurement Task Force (PTF), an ad hoc investigative unit of OIOS created to address problems in the procurement processes in that UN. The Applicant was interviewed and afforded the opportunity respond to the allegations. The PTF provided the Applicant with its draft findings, which alleged that she had improperly solicited, accepted and received sums of money from TFCE. The Applicant denied the allegations.

The Director of the Administrative Services Division, Office of Mission Support, Department of Field Support, referred the case of the Applicant to OHRM with the recommendation to take appropriate disciplinary action. The Applicant was charged and responded that she lacked the authority to issue contracts and challenged the credibility of the witness and questioned the PTF’s reliance on his statement over the owners of TFCE and herself. The Secretary-General notified the Applicant that she was summarily dismissed for serious misconduct in accordance with Staff Regulation 10.2. The case was referred to the Joint Disciplinary Committee which found that the summary dismissal was “not warranted by the evidence adduced in the PTF Report and that the facts underlying the charges have not been established.”

The Applicant filed before UN Dispute Tribunal. According to the UN Dispute Tribunal the summary dismissal was based on evidence allegedly told to the PTF investigators by a confidential witness, CW-4, who was also an employee of

¹⁶³ *Cohen v. Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. UNDT/2010/118 (July 12, 2010), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2010-118.pdf>.

¹⁶⁴ *Id.*

TFCE, after the owners of TFCE refused to discuss the payment of bribes. By way of proof of alleged bribe-takings, CW-4 is said to have shown the PTF investigators an index card on which he said he recorded payments made to the Applicant and some of her colleagues in the Procurement Section.

The UN Dispute Tribunal found that a *prima facie* case was never made against the Applicant. Reliance was placed on the witness' version in deciding to dismiss the Applicant. The witness, CE-4, was afforded anonymity from the Joint Disciplinary Committee, the Applicant, and the UN Dispute Tribunal were denied the opportunity to test the witness evidence. The UN Dispute Tribunal questioned how the statements of the witness was placed in the investigative report and how the index card which was shown to the investigators as proof of his allegations was not included in the dossier of the investigators. The UN Dispute Tribunal made a number of findings in the case to justify the recession of the summary dismissal, including, "the Applicant was denied her due process rights in not being afforded an opportunity to test the veracity of her accuser CW-4". The UN Dispute Tribunal held that the OIOS/PTF investigation report was unfair and prejudiced against the Applicant and "portrayed an unfortunate desperation to establish her guilt and unprofessionally served up accusations as facts in this case."¹⁶⁵ The UN Dispute Tribunal rescinded the decision to summarily dismiss the Applicant.

The UN Appeals Tribunal reviewed the Dispute Tribunal's decision in *Cohen v. the Secretary-General of the United Nations* and upheld the decision to rescind the summary dismissal of the Applicant.¹⁶⁶ The UN Appeals Tribunal accepted that the OIOS PTF investigation report had been unfair and prejudiced towards the Applicant and that the accusations as facts in the case where the staff member's right to due process had been breached, such findings constituted aggravating factors in a case of irregular, prejudicial dismissal without corroborating evidence. The UN Appeals Tribunal upheld the Dispute Tribunal's judgment but reduced the compensation for loss of earnings.

¹⁶⁵ *Id.* at ¶ 70.

¹⁶⁶ *Cohen v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/131 (July, 8 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-131e.pdf>.

In *Liyanarachchige v. the Secretary-General of the United Nations*, a staff member of the United Nations Operation in Cote d'Ivoire (UNOCI) was accused of sexual exploitation and abuse in violation of ST/SGB/2003/13, "Special measures for protection from sexual exploitation and sexual abuse"; improper use of UN property for transporting passengers in a UN vehicle; and conduct inconsistent with the obligations expected of an international civil servant.¹⁶⁷ The Applicant was charged on the basis of evidence contained in the OIOS report. The Applicant challenged the decision of summary dismissal before the UN Dispute Tribunal. During the trial, the UN Dispute Tribunal in Nairobi heard the testimony of five witnesses, four witnesses called by the Applicant and the fifth witness by the Secretary-General. Two witnesses who identified the Applicant from evidence of an OIOS investigator had been repatriated to the Philippines and did not appear. The UN Dispute Tribunal upheld the summary dismissal noting that although the Applicant had not been afforded the opportunity of confronting the two witnesses at the hearing, it had not undermined the adversarial nature and fairness of the proceedings. The Applicant filed an appeal to the UN Appeals Tribunal.

The UN Appeals Tribunal held in *Liyanarachchige v. the Secretary-General of the United Nations* that a disciplinary measure may not be founded solely on anonymous statements.¹⁶⁸ In disciplinary matters, as in criminal matters, the need to combat misconduct must be reconciled with the interest of the defence and the requirements of adversary procedure. The UN Appeals Tribunal noted that the charges in this case were based solely on statements made to the OIOS investigator by anonymous witnesses. The UN Appeals Tribunal held that the UN Dispute Tribunal erred in law by upholding the Secretary-General's decision to summarily dismiss the Applicant solely on the basis of the statements of anonymous witnesses.

However, the UN Appeals Tribunal noted that in certain cases *anonymous statements may be used as evidence*, in excep-

¹⁶⁷ *Liyanarachchige v. the Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. UNDT/2010/041 (Mar. 9, 2010), available at <http://www.un.org/en/oaaj/files/undt/judgments/undt-2010-041.pdf>.

¹⁶⁸ *Liyanarachchige v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2010/UNAT/087 (2010), available at <http://www.un.org/en/oaaj/files/unat/judgments/2010-unat-087e.pdf>.

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tional cases, because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization. The Organization may need to maintain anonymity for the protection of the witness. The UN Appeals Tribunal decided that if it is possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements, the Appeals Tribunal may allow the anonymous statements to be admitted into evidence.

B. Right to Cross-Examination of Witnesses

In the case of *Applicant v. Secretary-General of the United Nations* the Appeals Tribunal decided upon the issue of whether a staff member facing summary dismissal has the due process right to confront and cross-examine those making allegations against him or her.¹⁶⁹ The Applicant was a staff member with UNICEF as Chief of the Southern Sudan Water and Environmental Sanitation Section. Several young male security guards employed by an external security company complained that the Applicant sexually touched them and filed written complaints. An investigator was appointed to conduct a formal investigation into the Complainants allegations. The investigation report concluded that there was clear and convincing evidence that the Applicant had “inappropriately touched” witnesses C1, C2, C3 and C5, which amounted to sexual harassment.

During the hearing, the UN Dispute Tribunal interviewed the Investigator who testified that the Complainants did not testify “because the (Secretary-General) could not produce any of them.” The UN Dispute Tribunal concluded that the “sanction of summary dismissal was based on unsubstantiated charges”, since the witnesses could not be found to testify. The UN Dispute Tribunal determined that the evidence of the investigation should be discounted since the truth of the contents of the statement could not be tested by cross-examination in an open hearing. The Dispute Tribunal decided that it was in error the Respondent not to provide any of the witnesses for judi-

¹⁶⁹ Applicant v. Secretary-General of the United Nations, Judgments U.N. App. Trib., No. 2013/UNAT/302 (Mar. 28, 2013), available at <http://www.un.org/en/oaj/files/unat/judgments/2013-unat-302.pdf>.

cial scrutiny but merely to submit oral statements gathered in an investigation.

The UN Appeals Tribunal overturned the lower court's decision and held that the facts established by the evidence showed sexual harassment, even without the Applicant's confrontation of the witnesses.

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.¹⁷⁰ In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct (under the Staff Regulations and Rules), and whether the sanction is proportionate to the offence."¹⁷¹

The UN Appeals Tribunal held that as a general principle, the importance of confrontation, and cross-examination of witnesses is well-established. As noted in *Molari v. Secretary-General of the United Nations*, "disciplinary cases are not criminal. Liberty is not at stake."¹⁷² The Appeals Tribunal held that due process does not always require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers. Under certain circumstances denial of the right to cross-examine witnesses does not necessarily flaw the entire process. In the instant case, the Appeals Tribunal determined that it proved impossible for the Administration to produce the Complainants to testify and be cross-examined before the Dispute Tribunal. The United Nations operates globally and in certain situations staff can be highly transient. The Appeals Tribunal accepted that the Organization was unable to produce witnesses in the South Sudan almost five years after the incidents. The Tribunal held that the key elements of the Applicant's rights of due process were met: (1) the Applicant was fully informed of the charges against him, (b) he was informed of the identity of his accusers and their testimony; (3) he was able to mount a defense (5) and he was able to call into question the veracity of their state-

¹⁷⁰ *Messenger v. Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. 2011/UNAT/123 (Mar. 11, 2011), available at <http://www.un.org/en/oaj/files/unat/judgments/2011-unat-123.pdf>.

¹⁷¹ See Masri, *supra* note 143.

¹⁷² See Molari, *supra* note 136.

ments. The Appeals Tribunal was satisfied that the interest of justice was served in the case despite the Applicant's inability to confront the persons who had given evidence against him during the initial investigation.

The Appeals Tribunal distinguished the Applicant's case from *Liyanarachchige v. the Secretary-General of the United Nations* in which the Tribunal concluded that "a disciplinary measure may not be founded *solely on anonymous* statements."¹⁷³ In the Applicant's case the statements of the Complainants were neither anonymous nor the only evidence against the Applicant. Since the Applicant knew the identities of the Complainants and other witnesses, he was able to prepare a defense to each of the alleged incidents. In determining the credibility of the Complainants, the UN Dispute Tribunal erred in focusing on minor inconsistencies in their statement rather than on the clear and convincing evidence established by the record. The Appeals Tribunal vacated the UN Dispute Tribunal judgement and held that the Applicant's misconduct warranted summary dismissal.

XIII. PROSECUTION OF STAFF MEMBERS IN LOCAL COURTS

In *Manokhin v. Secretary-General of the United Nations*, the staff member was summarily dismissed for engaging in a visa fraud scheme and in unauthorized outside activities.¹⁷⁴ The staff member was alleged to have taken part in a fraudulent scheme involving the provision of documentation to sponsor citizens of Uzbekistan and other countries to obtain visas to enter the United States ostensibly for the purpose of attending conference of the United Nations. The United States authorities, who were investigating the external criminal matters, searched the Applicant's office at the United Nations and discovered documents suggesting that the Applicant was involved as a commodity trading advisor. The OIOS conducted its own investigations, as distinct from the United States criminal investigation, and concluded that he had operated the company

¹⁷³ *Liyanarachchige*, *supra* note 170.

¹⁷⁴ *Manokhin v. Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. UNDT/2009/006 (Aug. 13, 2009), *available at* <http://www.un.org/en/oaj/undt/judgments/undt-2009-006.pdf> (not appealed to the UNAT).

from his office at the UN and that he had used his status as a member of staff of the UN as a supplementary guarantor in relation to outside activities. The Applicant was indicted in the United States District Court Southern District of New York for wilfully and knowingly conspiring with other individuals to violate the laws of the United States. The Applicant was found guilty and sentenced to serve one year in prison for immigration fraud scheme to fraudulently procure United States entry visas for non-U.S. citizens while he was a UN employee.

In the UN Dispute Tribunal deliberations on the Applicant's appeal against the sanction of summary dismissal from the UN, the Applicant alleged, *inter alia*, that he was the victim of entrapment by OIOS. The UN Dispute Tribunal noted that the UN authorities carried out its own investigations, as distinct from the investigation of the US authorities in connection with the criminal proceedings. The Dispute Tribunal considered that the primary concern was the thoroughness and integrity of the internal UN investigatory procedures. The Dispute Tribunal considered the primary issue for the internal UN administrative disciplinary proceedings was whether the UN provided a full and fair opportunity for the Applicant to defend himself and whether the evidence obtained was sufficient to sustain the disciplinary findings. The UN Dispute Tribunal concluded that the internal disciplinary investigations complied with the "principles of natural justice." The Applicant was accorded his due process rights and there were no procedural irregularities in the investigation and the sanction of summarily dismissal was proportionate to the misconduct.

In a case where there is a concurrent judicial proceeding in local courts, the UN Dispute Tribunal will conduct an independent judicial review of the facts and procedures of the case to determine whether the disciplinary measure was appropriate. *Manokhin v. Secretary-General of the United Nations* does not address the instance where the Organization has separated the staff member for misconduct and the local courts have dismissed the case for lack of sufficient evidence. However, it must be noted that the standard of proof in the UN for a disciplinary case is that of "clear and convincing evidence"; and the standard of proof in a local jurisdiction criminal trial is "beyond a reasonable doubt". This distinction must be considered since the UN has a limited power to only dismiss a staff member

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from employment, and the local courts has the power to imprison and take away the liberty of a person. This distinction in standard of proof and penalties in the local courts requires a separate and independent investigation by the UN.

XIV. DAMAGES FOR MORAL AND PROFESSIONAL INJURY DUE TO AN INADEQUATE INVESTIGATION

In *Gambari v. the Secretary-General of the United Nations*, the Applicant sought to be compensated for moral and professional injury and damage to her reputation caused by the conduct of the investigators in the investigation and disciplinary proceedings.¹⁷⁵ In an action against an individual and/or Organization for defamation of character, the burden lies on the Applicant to prove defamation to the Tribunal. The UN staff rules and regulations require that investigations and disciplinary proceedings be carried out with a high degree of confidentiality. Where the staff member's reputation is injured because the responsible officials have breached the required confidentiality, compensation might be considered. The Dispute Tribunal held in *Gambari*, that the Applicant did not present sufficient evidence beyond making the assertion of defamation. The Applicant did not present evidence to corroborate her emotional distress and its impact on her health as a result of the actions of the Organization's investigation.

In *Gambari*, the Applicant showed in her pleadings and other documents the emotional suffering and depression she underwent and how she was treated for depression in New York, Dubai and Abidjan. However, the Applicant did not tender medical records to support this claim. The OIOS investigation report recorded that the Applicant told the investigators that the difficulties she had experience and by February 2005, she suffered from depression and required hospitalization. The Applicant's references to her depression pre-dated the investigation, disciplinary proceedings and the involvement of the Organization. The UN Dispute Tribunal found that a case had not been made out by the Applicant to warrant the award of compensation for any injury to her health caused by the OIOS in-

¹⁷⁵ *Gambari v. the Secretary-General of the United Nations*, Judgments U.N. Disp. Trib., No. UNDT/2012/193 (Dec. 6, 2012), available at <http://www.un.org/en/oaj/files/undt/judgments/undt-2012-193.pdf>.

vestigation.

In *Marshall v. the Secretary-General of the United Nations*, the Secretary-General appealed against the award of compensation to the Applicant for non-economic harm and moral damages.¹⁷⁶ The UNDT awarded 24 months' net base salary for "the substantial and grave mishandling by the Administration in this matter", as well as nine months' net base salary for "the stress and moral damages suffered.

The Appeals Tribunal held that UN Dispute Tribunal erred in awarding compensation to the Applicant. The UNDT's erroneously found that the Organization was not entitled to investigate the allegations and that the Organization's role ought to have been limited to being the conduit through which the Applicant and other staff member's disputes could have been directed "to the relevant authorities, namely a family court".

The UN Appeals Tribunal held that the Dispute Tribunal erred in its conclusion that the decision taken by the Administration to investigate the allegations of misconduct amounted to an abuse of power and an invasion of the Applicant's privacy. The Organization had a legal entitlement to take action in this case.

In *Abboud vs. the Secretary-General of the United Nations, UNAT -2012-100*, the UN Dispute Tribunal awarded damages acknowledging that the Applicant had suffered no economic loss and that no actual damage existed. The UNDT awarded damages awarded because the request for an investigation was treated with unseemly disdain, subject to insult, patronizing comments and retaliatory threats. The UN Dispute Tribunal stated that the matter was incommensurable, and that it was not a case of punitive damage and that there was no intent to punish the Organization.

The UN Appeals Tribunal overruled the *Abboud* decision of the UN Dispute Tribunal based on Article 11 of the UNDT Statute. Article 11 establishes that "[t]he judgments of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based". In *Abboud*,

¹⁷⁶ *Marshall v. the Secretary-General of the United Nations*, Judgments U.N. App. Trib., No. UNAT/2012/270 (Nov. 1, 2012), available at <http://www.un.org/en/oaaj/files/unat/judgments/2012-unat-270.pdf>.

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the UNDT awarded damages – a relief which the Applicant had not requested - without stating the facts and law underlying this decision. The Appeals Tribunal therefore vacated the award of damages.

XV. CONCLUSION

What is the role of OIOS investigations in the United Nations? It is fundamental that internal investigations must have as its core mandate the purpose to determine whether any improprieties or wrongdoing has occurred in the Organization. The most significant benefit of a good internal investigation is that it enables management to determine whether there are any problems with corrupt staff, organizational structure, or administrative policies and procedures. An internal investigation provides UN management with an essential tool of oversight to identify any necessary changes to ensure on-going business operations and to disclose potential misconduct, which may affect staff moral and bad publicity among the Member States.

The United Nations has field duty stations all over the world, especially in geographic regions where there are different languages, cultures, customs and ethnic issues. Some countries have developed formalistic rule of law structures and other countries have informal legal systems which are factors that affect the ability to thoroughly investigate the allegation. OIOS must apply its investigative needs and priorities to each situation in a given country, especially with the cultural and legal differences as well as in difficult locations where the UN may not be widely accepted by the local communities.

The UN Judicial Tribunals provides an impartial and independent forum for the resolution of disputes between the staff member and the Organization. The UN Dispute Tribunals and the UN Appeals Tribunal has earned the UN international community's public trust as they balance the need for respect for the individual rights of the staff member and the need of the Organization to conduct internal investigations on breaches of the employment relationship. The UN Judicial Tribunals must lead the justice system in resolving staff and management disputes over internal investigation procedures. Indeed, the evolving jurisprudence of the UN judicial system

has led to OIOS conducting internal investigations more carefully to ensure a proper, timely investigation to minimize the risks and costs of staff litigation before the UN Judicial Tribunals.