UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/120
Judgment No.: UNDT/2011/104
Date: 21 June 2011
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

GOODWIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

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

Introduction

1. The Applicant contests the Secretary-General's decision to reinstate a reprimand issued to him upon the recommendation of the Joint Disciplinary Committee ("JDC"), following its review of allegations of misconduct. The Applicant seeks a rescission of this decision (including the removal of the reprimand from his file), an apology, the reinstatement of his position (including promotion), financial compensation for actual, consequential and moral damages in the amount of three years' net base pay, and legal costs.

2. Article 16.2 of the Tribunal's Rules of Procedure states that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. Although this matter concerns the Applicant's alleged misconduct and the resulting sanctions, this case is not *per se* a disciplinary case, as discussed below.

3. Following an extensive case management hearing at which Counsel for both parties appeared the Tribunal issued Order No. 167 (NY/2009), which reads, *inter alia*, as follows:

> 3. It was further agreed that a full hearing on the merits is not required, that there is no need for a *de novo* opening of the original allegations, and that the case can be decided on the papers with final oral submissions if necessary. The applicant's Counsel reserved his client's wish to explain why the reprimand was not warranted.

4. In terms of this Order, the Tribunal also directed that the parties submit a list of agreed and disputed facts, as well as a submission on any further and final legal arguments. These were all duly filed. The Tribunal subsequently requested the parties to confirm whether an oral hearing in the matter was necessary.

5. The Applicant advised the Tribunal that "in light of the differences of fact contained in [the list of agreed and disputed facts], the applicant wished to request a

hearing", whilst the Respondent contended that there was no need for an oral hearing on the merits of the matter, in accordance with paragraph 3 of the aforesaid Order.

6. The Applicant has requested an oral hearing due to the existence of disputed facts, and presumably to explain why the reprimand is not warranted. Although the Applicant has not sought to identify what evidence he would seek to call orally, from a perusal of the submissions, these disputed facts relate to the merits of the matter, and would constitute a reopening of the original allegations. As agreed at the case management hearing, the Applicant's Counsel reserved only his client's wish to explain why the reprimand was not warranted, and not to reopen the matter *de novo*.

7. The Applicant has, in his initial pleadings and subsequent submission on legal arguments, comprehensively explained his position regarding whether the reprimand is warranted. These arguments do not require oral evidence. Accordingly, having considered the pleadings, including the agreed and disputed facts, issues and subsequent legal arguments, and as the Tribunal's findings are based largely on agreed facts, the Tribunal will proceed to determine the matter on the basis of the pleadings and submissions already before it. The present Judgment deals with the issue of liability; further submissions on the issue of compensation will be required from the parties.

Facts

8. From 2001 to 2003 the Applicant served with the United Nations in Timor Leste, and from 2003 to 2004 in Liberia. In early 2004 he was involved in the planning for the United Nations Advance Mission in Sudan ("UNMIS"), after which he was deployed there with UNMIS, first as a Logistics Officer, and then as the Chief Aviation Officer.

9. In November 2004 UNMIS entered into a contract for air flight services with a vendor company ("the Flight Services Contract"), which was signed by the Applicant as Chief Aviation Officer. The Flight Services Contract provided a credit-

type of arrangement for the fuelling and servicing of the Lear jet maintained by UNMIS to provide flight services to the Special Representative of the Secretary-General and important guests. The purchase order provided that the line of credit was not to exceed USD45,000, accessible via a "fuel card".

10. In July 2005 UNMIS was responsible for arranging and providing flight services for the deployment of Egyptian troops to the Sudan region on an urgent basis. In order to transport the troops, UNMIS utilised the Flight Services Contract, accruing costs via the use of the fuel card in excess of the amount of the Contract's limit of USD45,000.

11. From September to December 2005, at the direction of the General Assembly, the Office of Internal Oversight Services ("OIOS") conducted a comprehensive management audit to review peacekeeping activities, including at UNMIS. OIOS issued a draft report for comment on 20 December 2005 which referred to the improper use of the Flight Services Contract to provide flight support services for the Egyptian contingent.

12. On 10 January 2006 the Applicant was recalled to Headquarters in New York and on 16 January 2006 he received a letter from the Chef de Cabinet stating that, in view of the ongoing OIOS investigation, the Secretary-General had decided to place the Applicant on special leave with full pay ("SLWFP"), pursuant to staff rule 105.2(a)(i). The Applicant was requested to assist the Department of Peacekeeping Operations ("DPKO") in the preparation of a response to the findings and conclusions contained in the draft OIOS report. The Applicant cooperated fully with this exercise. OIOS released its final audit report on 26 January 2006, detailing, *inter alia*, the alleged improprieties regarding the use of the Flight Services Contract.

13. In January 2006, a Procurement Task Force ("PTF") within OIOS was established to investigate allegations of wrongdoing in United Nations procurement activities. The PTF conducted a further investigation into matters the subject of the OIOS audit report. In late May 2006 the Applicant was informed by DPKO that he

was to make himself available for interview by the PTF. It is alleged that he was told he was not entitled to have counsel present or to record the interview.

14. On 4 August 2006 the PTF issued a report ("the PTF Report") detailing allegations against the Applicant in relation to the Flight Services Contract, procurement exercises for runway lights and weather observation equipment, and also detailing allegations that the Applicant had failed to take appropriate action after becoming aware that a subordinate was having inappropriate contact with vendors seeking to obtain contracts with the United Nations. On 15 August 2006 the Applicant was provided with separate letters from the Chef de Cabinet and the Office of Human Resources Management ("OHRM") regarding the outcome of the PTF investigations, and enclosing the PTF Report. The Applicant was informed that the PTF had found that, amongst other things, that he had been derelict in his managerial responsibilities as Chief Aviation Officer at UNMIS and that he had failed to exercise sound and prudent oversight, although both letters noted that there was no allegation that the Applicant had personally benefited from the procurement exercises. The letters stated further the PTF's findings that the Applicant had failed to ensure that the Organisation's procurement rules and financial regulations were followed, resulting in an accumulated debt of more than USD1.3million, and that he had made misleading statements to investigators, attempted to blame subordinates for his failings, and failed to ensure that the Organisation's resources were properly used. The Applicant was advised that, based on the PTF Report, he was charged with misconduct, (specifically, that he contravened article 101.3 of the Charter of the United Nations and staff regulations 1.2(a), 1.2 (b) and 1.3(a)).

15. The Applicant was asked in the letter from OHRM to provide his statement or explanation in relation to the charges, in accordance with paragraph 6 of ST/AI/371 (Revised disciplinary measures and procedures). He was informed that he would be advised by separate letter that his SLWFP was being ended and that he could return to duty in another duty station performing functions unrelated to his post in Sudan. In

August 2006 the Applicant returned to duty at United Nations Headquarters at DPKO's direction.

16. On 14 September 2006, by three separate letters, the Applicant was given a revised version of the PTF Report, withdrawing one of the original charges due to a factual error. The Report was revised in relation to an erroneous allegation that the Applicant had been aware of a subordinate's "improper contacts" with a vendor during a bidding process.

17. By letter dated 13 October 2006 the Applicant responded to the charges, rejecting the allegations that he was unilaterally responsible, that he had tried to place the blame on his subordinates, or that he misled the investigators. He stated his contention that:

> Any failures manifested in the matter at hand lay only in not having better exercised certain of [the Applicant's] managerial responsibilities … [which] should accordingly have been considered as administrative shortfall(s) in performance … examined under a normal, chain-of-command performance appraisal.

The Applicant further stated that:

> [he] did then and continue[d] to accept responsibility for not ensuring that [his] Unit Chief had initiated the correct procedural control measures to monitor expenditure on the [fuel] card concerned.

18. In his response, the Applicant further stated that he had already received an oral reprimand from his then-supervisor in October 2005 in relation to the Flight Services Contract and the procurement of fuel. He also contended that there had been numerous procedural irregularities in the conduct of the PTF investigation which violated his rights to due process.

19. In December 2006 the Respondent decided that administrative rather than disciplinary action should be taken against the Applicant, and on 8 January 2007 the Applicant was advised that the disciplinary charges against him would be dropped, with any remaining issues to be handed over to DPKO for administrative action, as

appropriate. He was also advised that he would be receiving a written reprimand from an Assistant Secretary-General within DPKO ("ASG/DPKO").

20. On 16 January 2007 the ASG/DPKO issued the Applicant a reprimand by letter which confirmed the findings of the PTF Report, as communicated to him in the 15 August 2006 letter (including the subsequent revision withdrawing one charge relating to his subordinate's contact with a bidder). The Organisation concluded that the Applicant had satisfactorily explained his conduct in relation to some of the PTF's findings, but that, despite mitigating factors (such as the difficult demands during the Mission's start-up phase, in respect of the Flight Services Contract the Applicant "failed to put a system in place to control [its] use … did not exercise proper managerial oversight … [and] failed to fulfil [his] managerial and supervisory responsibilities", resulting in unauthorised debts. With regard to the sanction, the letter concluded:

> The shortcomings noted above are viewed very seriously by the Organization. You are accordingly strongly reprimanded for your failure to fulfil your functions and responsibilities to the standard required by the Staff Regulations and Staff Rules, and to exercise the necessary level of oversight over subordinate staff in the Aviation Section in order to ensure a high standard of administration and full compliance with the rules of the Organization. You will not be returned to your assignment in UNMIS, but will, rather, be placed in another position commensurate with your qualifications and the Organization's needs, and your performance will be closely monitored.
>
> A copy of this letter will be placed on your Official Status File.

21. On 19 January 2007 the Director of the Administrative Support Division, DPKO, informed the Applicant that the new Administration had instructed that the reprimand be withdrawn and that he was to return the original letter of reprimand. The Applicant was informed that the reprimand would be withdrawn pending a further review, in order that the newly appointed Secretary-General could approve the course of action taken. The withdrawal was confirmed by a letter dated 22 January 2007 which stated that:

> On the instruction of the Secretary-General, you are advised that the reprimand issued to you on 17 January 2007 with respect to procurement matters in UNMIS is being withdrawn and will be removed from your Official Status File, pending further instructions from his office.

22. On 25 June 2007 the Applicant was informed that the Respondent had decided to remove him from his post as Chief Aviation Officer, UNMIS. He requested suspension of action of this decision on 28 June 2007, which was resolved on the following day, 29 June 2007, as a result of an email from the Administrative Law Unit, OHRM, informing the Applicant as follows:

> Following a review of the matter, DPKO has advised that it is no longer proposed to move you from your post which, as you are aware, has been kept for you pending the resolution of your case. [T]he recruitment of a Chief of Operations at the P-5 level for UNMIS … will not affect your post which will continue to be kept for you pending the resolution of your case.

23. In August 2007 the Secretary-General proposed to provide the PTF Report to Member States in full in accordance with OIOS' reporting obligations to the General Assembly, but, because the matter had not yet been fully adjudicated, the Secretary-General agreed to make redactions, as a consequence of which the Applicant was not able to be identified.

24. In December 2007, more than 10 months after the letter formally withdrawing the reprimand, the Applicant's case was referred to the JDC by the ASG/OHRM to "establish the facts and to provide the Secretary-General with advice as to whether misconduct had occurred in the present case and, if so, as to the appropriate disciplinary sanction to be imposed". At or around this time, the Applicant accepted an appointment in Ethiopia with the United Nations.

25. The JDC issued its report in February 2009—over 13 months later. The JDC recommended "that the charges … be dropped, and the decision previously taken by the Secretary-General and conveyed to the staff member on 16 January 2007 be maintained"—that is, that the administrative reprimand be reinstated.

26. About four months later, on 2 June 2009, the Deputy Secretary-General wrote to the Applicant confirming that the Secretary-General had accepted the conclusions and recommendations of the JDC, and had therefore "decided to drop the charges … and to re-instate the reprimand issued to [him] on 16 January 2007". In this letter, amongst other things, the Deputy Secretary-General stated:

> The JDC, noting paragraph 9 of ST/AI/371 on revised disciplinary measures, was of the view that the former Secretary-General's decision to close the case and impose administrative actions was a final and conclusive decision. The JDC considered that to revoke this discretionary decision would seriously impair the credibility of the Office of the Secretary-General and would be a violation of basic principles of due process to which you are entitled. The JDC noted that you had been notified on 16 January 2007 of the Secretary-General's decision and that all administrative action taken against you had been fully implemented.
>
> …
>
> The JDC stated that it could not find any compelling reason to revoke the previous decision. The JDC noted that the Administration had acknowledged that "no new or additional facts were sought or obtained after the reprimand letter was issued".
>
> …
>
> The Secretary-General has examined your case in the light of the JDC's conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General has decided to accept the conclusions and recommendation of the JDC. Accordingly, he has decided to drop the charges against you and to re-instate the reprimand issued to you on 16 January 2007.

27. In April 2009 the Applicant accepted a position in Kenya as Officer-in-Charge of Mission Operations and Plans, African Union Mission in Somalia.

Applicant's submissions

28. The Applicant's main contentions may be summarised as follows:

Reprimand

a. The Applicant presented countervailing circumstances to the PTF, including that: he was not responsible for the Egyptian troop deployment; he was not initially aware of the misuse of the fuel card as it was initiated while he was on annual leave; and control measures had been overlooked during the chaotic start-up stage of the mission. The PTF had not allowed the Applicant to comment on other communications in order that he could explain them, prior to forming its conclusions;

b. A distinction must be drawn between questions of performance, judgement and behaviour, which are essentially matters appropriate to the performance evaluation of a staff member, and questions of misconduct which fall within the category of concrete actions calling for disciplinary measures;

c. Although not defined as a disciplinary measure under [former] staff rule 110.3, a reprimand nevertheless carries with it all the same negative connotations of guilt and embarrassment as a disciplinary penalty and forms part of the staff member's permanent record of service. The jurisprudence of the former UN Administrative Tribunal supports this contention (see e.g. UN Administrative Tribunal Judgement No. 1404, *Coggon* (2008));

d. In reviewing whether administrative action such as a reprimand is warranted, it is appropriate for the Tribunal to evaluate whether the facts have been established and whether they legally amount to inappropriate behaviour. The imposition of the reprimand was based on the untested assessments of the PTF that the Applicant's managerial shortcomings amounted to misconduct, in spite of the fact that there was no evidence of intentional wrongdoing and there was no finding of misconduct on the part of any of his subordinates;

e. The letter of 16 January 2007 containing the original reprimand refers to "permitting subordinate staff in [the Applicant's] direct line of authority to accumulate unauthorized debts". This conclusion is incompatible with the fact

that the Applicant was on leave at the time it occurred and fails to appreciate that the debt was initiated and approved by others. The Respondent has not distinguished this case from the many cases of *ex post facto* approval of contractual undertakings in mission start up operations especially as the procurement rules specifically allow for such exceptions in time-sensitive situations. Finally, the Respondent has not addressed the fact that this was ultimately a cost saving measure for the Organization rather than constituting a reckless disregard of financial consequences;

f. Neither the PTF Report nor the Respondent's allegations have demonstrated wilful or reckless conduct constituting gross negligence or why the Applicant was solely responsible for systemic weaknesses. Absent these characteristics, the Applicant's reprimand appears less like a reasoned decision and more like an unsatisfactory compromise at his expense;

The JDC determination

g. The JDC, by not going into the merits, did not allow the Applicant a chance to explain or respond to the allegations of misconduct. This was particularly critical in that the reprimand was in effect a disguised disciplinary measure, accompanied by a far more sinister decision to remove the Applicant from his post, interfere with his promotion and render him unassigned;

Due process and compensation

h. The Respondent is responsible for the consequences of not only wrongfully charging the Applicant with unfounded charges of misconduct, but also for his treatment over a period of three years while the case was being adjudicated. He should be compensated for delays, as well as the fact he has not been reinstated or assigned to a comparable position after the removal from his UNMIS post, as stated in the letter of reprimand. The Applicant submits he is entitled to clear his record of service and to receive

compensation for the harm done to his career and reputation by the Respondent's actions;

i. The PTF investigators failed to respect his due process rights, never informing him he was the subject of their investigation or allowing him counsel, never providing him with the documentary evidence used in its report, and never allowing him an opportunity to address adverse findings, requiring later corrections and withdrawal of allegations.

Respondent's submissions

29. The Respondent's main contentions may be summarised as follows.

Reprimand

a. The Secretary General has authority to exercise a broad discretion in determining whether a staff member's conduct has met the required standards and, if not, whether a reprimand should be issued. It is not enough at law for the Applicant merely to allege that the response of the Secretary-General in issuing a reprimand was too strong and that either addressing the issue in the context of performance assessment or by oral reprimand was sufficient;

b. In this case, the reprimand was justified. The reprimand letter references the detailed charges brought against the Applicant and the findings of the PTF and specifies the basis for the reprimand. The Applicant's shortcomings included:

i. Failing to take steps to acquaint himself with the arrangements made for the deployment of troops the subject of the Flight Services Contract, despite being Chief Aviation Officer with ultimate responsibility for the troop deployment;

ii. Failing to ensure that all regulations and rules were followed and a competitive procurement exercise undertaken for the Flight Services Contract;

iii. Failing to seek information in relation to the operation for which the Flight Services Contract was used, as well as failing to pay attention to critical information presented to him prior to and during the operation for his consideration and possible action. The Applicant acknowledges that emails were sent to him during June and July 2005 detailing the intended use of the Flight Services Contract, but claimed that he did not open or read them. In June and July 2005 the Applicant was copied on emails relating to the troop deployment arrangements. His response was that did not read or was not aware of the contents of these emails as he received them while on leave, or shortly after his return from leave;

iv. Failing to discuss the use of the Flight Services Contract for fueling with his staff, despite having purportedly had daily meetings with them. The Applicant was copied on a series of emails in June 2005 addressing the extension of credit and the deployment of troops. He was aware of the low limit for the fuel card and his section was the custodian of it. On 15 September 2005 the Applicant sent an email stating that "[u]sing the [fuel] Card was the obviously [*sic*] the option of choice but I had not even thought through the consequences. Please draft a letter under my signature for inclusion at the LCC as I need to take the rap on this". The Applicant conceded that this could be taken to mean that he already knew that the card was being used, but asserted that the use of the past tense was an error made because the email was sent in a rush. The

Applicant also referred to other phrases in this email that may have been interpreted to imply that he did not know all of the details; for example, he wrote "I assume that we have used the card to buy fuel on the Egyptian deployment", and the phrase "not being aware how Air Ops Centre has arranged for services and fuel";

v. Failing to put procedures in place to ensure that the fuel card was used only for its intended purposes and that the relevant monetary limits were not exceeded, which he should have done as Chief Aviation Officer;

c. A reprimand is an administrative measure not a disciplinary measure, as recognised by express provision in the Staff Rules and the jurisprudence of the former Administrative Tribunal. A reprimand does not carry with it the same stigma as a disciplinary measure, but is an appropriate record on a staff member's file where there have been serious shortcomings in conduct;

The JDC determination

d. In its report, the JDC concluded that following the decision to issue the reprimand in January 2007 the case was closed and that there should not be a merits enquiry and the initial reprimand should stand. The JDC declined to review the merits of the matter because it considered that there was no reason for the Secretary-General to re-exercise his discretion in this matter;

Due process and compensation

e. The Applicant had a right to be heard prior to the issuance of the reprimand. There is no dispute between the parties that the Applicant was given an opportunity to respond to the allegations against him. Accordingly, the Applicant's due process rights were fully observed during the

investigation, he had the opportunity to respond to all allegations, he put his case fully in his response to the charges and his comments were considered;

f. There is no legal or factual justification for a hearing on the merits. The Applicant's due process rights were fully observed during the investigation, he had the opportunity to respond to all allegations, he put his case fully in his response to the charges and his comments have been considered. The real issue between the parties is the sanction that should be applied: the Applicant argues for a negative performance appraisal; the Respondent has determined a reprimand is appropriate;

g. The Applicant has admitted that the conduct occurred and his principal argument is that the matter should have been dealt with in the context of performance evaluation. Despite this admission the Applicant contends that the reprimand was "wholly unsupported" and that there was a "lack of clear and convincing evidence". These general contentions are inconsistent with the Applicant's specific previous admissions;

h. The Applicant seeks damages and costs for a breach of "due process and fair treatment". The Applicant has raised various issues relating to due process in previous communications and proceedings, however his principal contention in this case appears to be that he has suffered as a result of "inordinate delays in concluding the case". The audits and investigations undertaken were complex and broad ranging. These enquiries were not restricted to the issue of the misuse of the Flight Services Contract, but covered a broad range of procurement activities in UNMIS and DPKO. There is nothing irregular in the time that was required to complete these exacting enquiries.

Consideration

Scope of review and receivability

30. In ascertaining the nature and scope of the review, the Tribunal will look firstly at the decision to place the Applicant on SLWFP. This decision was reviewed by the Joint Appeals Board ("JAB") which recommended that the Applicant be paid two years' net base salary as compensation with respect to violations relating to the placing of the Applicant on SLWFP, which recommendation the Secretary-General rejected. Although the Applicant made references of a general nature in his pleadings regarding the decision to place him on SLWFP, it is also stated explicitly in his application that this "decision is the subject of a separate application", and accordingly, it is not considered within the scope of this case.

31. The Applicant has challenged two administrative decisions conveyed in the letter of 16 January 2007, namely to reprimand him and to transfer him from UNMIS. (This letter also stated that the Applicant's performance would be "closely monitored", but this aspect has not been challenged.) Under former staff rule 111.2(a), to appeal an administrative decision, a staff member was required to first address a letter to the Secretary-General requesting an administrative review of the decision. In this instance, the Applicant did not have a reasonable time to object to or request administrative review of the reprimand, or other decisions contained in the letter of 16 January 2007, between this date and its withdrawal 6 days later on 22 January 2007.

32. Following the JDC's finding that "the decision … conveyed to [the Applicant] on 16 January 2007 be maintained", the Deputy Secretary-General ultimately accepted this recommendation on 2 June 2009, informing the Applicant that the Respondent had "decided to drop the charges against you and to re-instate the reprimand issued to you on 16 January 2007". Although she did not refer to the other decisions, the Deputy Secretary-General must be taken not only to have affirmed the

reprimand, but also the transfer and "close monitoring of [the Applicant's] performance", as referred to in the original letter of 16 January 2007.

33. The application and subsequent submissions filed before this Tribunal address the Applicant's challenge to the imposition, removal and reinstatement of the reprimand, but also to his removal from his former post. The Applicant seeks to be reinstated in this former post, and to be compensated for the damage to his career. The Respondent has not objected to the receivability of the Applicant's challenges, and the Tribunal finds them all to be receivable.

Withdrawal of reprimand

34. As the JDC panel noted upon completing its report, "[f]ollowing receipt of the PTF report and the Applicant's comments on the allegations, and having reviewed the entire dossier, the former Secretary-General could exercise one of the three courses of action", which were: (1) to close the case, without prejudice to issuing a reprimand or other measure under former staff rule 110.3(b)(i); (2) to refer the case to a JDC; or (3) to summarily dismiss the Applicant. The JDC's analysis accords with sec. 9 of ST/AI/371 (Revised disciplinary measures and procedures) and the Tribunal agrees that the Secretary-General (through the ASG/OHRM), having exercised the first of the available options to close the case, could not then withdraw from this decision and select the second option—to refer the matter to the JDC.

35. Thus, when the matter was referred to the JDC almost 10 months after the reprimand was withdrawn in December 2007, the JDC, more than 13 months later, decided that the decision to close the case and impose administrative action was final and conclusive since the Secretary-General had "exercised and exhausted his discretion". Accordingly, the panel concluded that the case "was not properly before the JDC, and it was not necessary to review the case on the merits". The Tribunal agrees with this and finds that the Respondent's actions in withdrawing the reprimand and referring the matter to the JDC were in breach of the Organisation's rules, as well as general principles of law.

36. Firstly, the doctrine of *functus officio* dictates that a final decision cannot be reopened and that, once the duties and functions of an office are fully discharged, there is no legal competence for reconsideration of the decision by that office. The Tribunal finds that the appointment of a new Secretary-General does not affect the finality of the decision reached by that office, and a change in the office of the Secretary-General does not grant a power to revoke the original exercise of discretion by the office of a former Secretary-General.

37. Furthermore, generally speaking, apart from limited exceptions, an employer may not reopen a matter and is bound by the principle that an employee, once he has been dealt with on charges arising from a particular set of facts, cannot be tried again on new charges arising from the same facts. That is, the rule against double jeopardy, simply stated, is that a staff member may not be subjected twice to investigation, charges and disciplinary or administrative measures arising from the same facts. This argument is particularly cogent in the instant case, since the Administration admitted that "no new or additional facts were sought or obtained after the reprimand letter was issued".

38. Finally, the course of action purported to be followed by the Respondent offends against the rule regarding finality. As stated in *Hashimi* Order No. 93 (NY/2011), the desirability of finality of disputes within the workplace cannot be gainsaid.

39. On the basis of the above, the Tribunal finds that the Respondent's decision to withdraw the reprimand and refer the matter to the JDC was improper and in breach of the Applicant's terms of appointment. It is reasonable to conclude that this has caused the Applicant loss, including in respect of the delays caused.

Substantive validity of the reprimand

40. The Tribunal will now examine whether the Secretary-General properly exercised his discretion to impose a reprimand against the Applicant. The Applicant

says that the discretion was not properly exercised because the sanction of a reprimand was unwarranted and any criticism should have been expressed via the performance management process (that is, as a negative assessment of his performance in his performance evaluation, not as a veiled disciplinary measure). He also says that the countervailing circumstances were not adequately considered.

41. The jurisprudence of the Dispute and Appeals Tribunals makes it clear that the Secretary-General has a discretionary authority in the administration of the affairs of the Organisation which will not lightly be interfered with by the Tribunal. In order for the Tribunal to intervene, what must be shown is a failure of the Secretary-General to exercise this discretionary authority reasonably in accordance with the law, i.e., not in a manner that is illegal, irrational, procedurally defective or where the outcome is disproportionate to what is necessary in the circumstances (see e.g. *Abu Hamda* 2010-UNAT-022, *Sanwidi* 2010-UNAT-084).

Poor performance as misconduct

42. The Applicant admits that his conduct may have given rise to performance-related issues, but not to any misconduct. He argues that there is a distinction between acts or omissions relating to performance and behaviour, which are really matters appropriate for performance evaluation, and those falling within the category of misconduct, which may result in disciplinary measures.

43. Generally speaking, disciplinary action may be taken for reasons related to an employee's conduct or capacity. Issues of capacity may stem from poor or unsatisfactory work performance, or from ill health and injury. Unsatisfactory or poor work performance arising from misconduct (like habitual or wilful neglect of duties), and that caused by circumstances beyond a worker's control (like technological change, illness, incompetence due to lack of skill or training, unsuitability or incompatibility), are treated differently since the culpability of the staff member is different. The former is a disciplinary issue whilst the letter may require evaluation and remedial treatment including counselling, retraining and a reasonable opportunity

to improve before any action is finally taken. If the poor work performance is attributable to misconduct—for example dereliction of duty or wilful negligence—the staff member may then be subject to disciplinary measures, including termination, depending on the severity or degree of misconduct (see also former United Nations Administrative Tribunal Judgment No. 926, *Al Ansari* (1999)).

44. In Judgment No. 744, *Eren* et al. (1995), the former United Nations Administrative Tribunal commented on whether matters of below-standard work performance, as distinct from misconduct that ordinarily raises disciplinary issues, were appropriate matters for referral to the JDC. The former Administrative Tribunal found that "there might be instances when failures in performance are of such extreme dimension as to constitute misconduct for which disciplinary measures would be reasonable". In that case the former Administrative Tribunal found that relevant matters were not taken into account in determining whether the conduct of the Applicants was culpable.

45. This Tribunal agrees that there may be instances where performance failures constitute misconduct and warrant disciplinary measures. However, the sanction justified by the level of poor work performance will be a matter that will depend on the circumstances of each particular case. Factors that may be taken into account include the position occupied by the staff member, his past record, the level of seniority, the length of service, the degree of culpability, the risk to the organisation as a result of the conduct and so on, bearing in mind the need for progressive disciplinary action (see *Yisma* UNDT/2011/061). In general, higher standards of competence and performance are expected of senior managerial employees and the same amount of counselling and sympathetic treatment usually accorded to more junior staff may not apply. While fair warning should be given in such cases where the degree of professional skill required is so high and the consequences of the departure from these standards so serious, one failure to perform in accordance with the standards may, in the appropriate circumstances, be enough to justify disciplinary action, possibly even termination.

46. Unsatisfactory or poor work performance may of course be contributed to or affected by extraneous or countervailing factors. The Applicant argues that his admitted shortcomings should be seen in the light of countervailing circumstances including the misuse of the card whilst he was on leave and the overlooking of control measures during the chaotic start-up stage of the Mission. He also states that the Respondent failed to consider that exceptions are allowed in the procurement rules in such time-sensitive situations. The Tribunal agrees that factors like inadequate resources or organisational problems are to be taken into account as part of a proper investigation and assessment. However, on the agreed facts, and especially in light of the Applicant's admissions regarding his failures of proper managerial oversight, the Tribunal is satisfied that a proper assessment was made and that these countervailing factors were taken into account, the Applicant himself acknowledging that he bore the responsibility to some extent.

47. The Appeals Tribunal has found that the failure of a supervisor to reprimand subordinates upon becoming aware of their cover-up of a malfeasance which resulted in the loss of the Organization's property may amount to dereliction of duty constituting misconduct. Failing to fulfil a proper supervisory role may constitute dereliction of duty warranting disciplinary action, not just administrative action (see *Abu Hamda* 2010-UNAT-022, in which case a written censure was considered appropriate). Whilst the Applicant's acts or omissions did not constitute dereliction of duty as in *Abu Hamda*, it would not seem disproportionate that a lesser sanction was awarded to the Applicant for a lesser degree of supervisory failing.

"Administrative" measures and the nature of their review

48. Former staff rule 110.3(b)(i) specified the power of a supervisory official to reprimand a staff member, and stated expressly that a reprimand is not a disciplinary measure. It is the only reference to a reprimand in the former Staff Rules. Former staff rule 110.3(a)(i), by contrast, contemplated a written censure from the Secretary-General (as opposed to a supervisory official), which is a disciplinary measure—however, this is not the measure that was applied in the present case. The

Organisation had the power to administer the reprimand and it does not appear, nor was it argued, that there was any procedural illegality in this regard (although other procedural complaints of the investigation are discussed above). The Applicant's challenge to the issuance of the reprimand must therefore be seen to be a substantive one. Essentially, then, the Applicant must show that the discretion to impose the reprimand should not have been exercised and that the exercise was therefore irrational, patently unreasonable or disproportionate.

49. The Appeals Tribunal has held that when reviewing a *disciplinary* sanction imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct and whether the sanction is proportionate to the offence (see, e.g., *Masri* 2010-UNAT-098, citing *Haniya* 2010-UNAT-024 and *Maslamani* 2010-UNAT-028).

50. This process has been limited to cases involving disciplinary measures, but the Tribunal finds that it may also be used when considering cases involving other measures referred to by the Respondent as "administrative measures", as provided for in, for example, former staff rule 110.3(b)(i) (or current staff rule 10.2(b)(i)). This is because, before a sanction is imposed, be it administrative or disciplinary, the Organisation must go through a decision-making process which is substantively the same or very similar. That process will involve investigating, establishing the facts and analysing the impugned conduct to determine whether it is misconduct or not, and then exercising discretion to decide whether a measure of one kind or another is warranted.

51. The degree to which the impugned conduct falls below an objective and reasonable standard of conduct will determine the type or range of measures that may be proportionate and reasonable. Behaviour not amounting to "misconduct", but still falling short of proper conduct, may warrant the Secretary-General imposing an administrative measure (for example a reprimand) rather than a disciplinary measure. In many traditions a reprimand or warning is the first step in the progressive stages of

disciplinary measures. In the UN context, a reprimand is not considered to be a disciplinary sanction but may have the character or effect of such a measure. Should this occur, an applicant would be subjected to the effect without the usual protections which come with misconduct-related proceedings, pursuant to the Organisation's internal rules, including ST/AI/371, as amended.

52. For these reasons, the Tribunal finds that, in the circumstances, the Applicant should be entitled to the same kind of review by the Tribunal as he would have received if the measure had been a disciplinary one—that is, the process of review outlined in paragraph 49 above.

53. Accordingly, the Tribunal will consider what facts have been established, either by the parties' agreement or by the Tribunal's determination, in order to assess whether the Applicant's conduct can be said to fall below a standard which is reasonable. Thereafter, it will consider whether the conduct established is of a degree warranting administrative sanction, to determine proportionality and reasonableness.

The Applicant's performance and the review of the reprimand

54. The Respondent's case is that the Organisation suffered loss, primarily in relation to the Flight Services Contract, which resulted, at least in part, from the Applicant's failure to acquaint himself with the plans made by his subordinates to effect the troop deployment, and to ensure that those plans were duly authorised and compliant with the relevant regulations, rules and procedures.

55. It is agreed by the parties that the Applicant entered the Flight Services Contract on behalf of UNMIS in 2004 and that in 2005 the use of this Contract incurred greater expense to the Organisation than it was supposed to, as a result of the use of the fuel card to purchase fuel. The purchase of this fuel was investigated by OIOS, then by the PTF separately (as a part of OIOS), and a report was produced pursuant to which the Applicant was charged with misconduct. The Applicant responded to the charges by letter of 13 October 2006, making admissions in relation to "not having better exercised certain of [his] managerial responsibilities" and

accepting responsibility for "not ensuring that [his] Unit Chief had initiated the correct procedural control measures to monitor expenditure on the [fuel] card". It is clear that the Applicant admitted that his exercise of his managerial functions fell below the expected standard. Indeed, the reprimand that the Applicant received on 16 January 2007 echoed his own admissions, stating that it was made on the basis that the Applicant "did not exercise proper managerial oversight … [and] failed to fulfil [his] managerial and supervisory responsibilities". It is particularly relevant that the Applicant was in a high-level position of responsibility and leadership (see *Sanwidi* 2010-UNAT-084 and discussion above) as Chief Aviation Officer.

56. The Tribunal finds nothing to suggest that the Respondent improperly exercised his discretionary authority in initially issuing the reprimand. The Applicant has not articulated how the decision was capricious or improperly motivated—he has failed to state what should have been taken into account differently by the PTF or the Respondent in making their findings, or what alternate conclusion should have been reached. At the essence of the matter is the fact that the reprimand was based on a failure to fulfil managerial and supervisory responsibilities, which the Applicant, at least to some degree, admitted, and acknowledged that he might have to "take the rap" for. It is not contended that this failure amounted to misconduct, but rather conduct falling short of proper conduct, for which an administrative measure such as a reprimand may be appropriate and proportionate for. The Respondent's actions can therefore not be said to have been irrational in initially imposing the reprimand. Although the Applicant alleged certain procedural failings in the preparation of the PTF Report, the admissions upon which the Tribunal finds the reprimand justified were made by the Applicant himself, and he has not given sufficient specificity regarding these alleged failings so as to justify any other finding in his favour.

57. The Applicant has complained that the Respondent's withdrawal of the reprimand and commencement of the disciplinary process, followed by the subsequent decision to reinstate the reprimand, meant that the Applicant lost the

opportunity to challenge the reprimand itself. The process of judicial review conducted in this Judgment has, however, now remedied that aspect of the complaint.

58. Accordingly, the Tribunal finds that the Respondent validly exercised his discretion in issuing a reprimand against the Applicant.

Substantive validity of transfer

59. The Applicant has maintained throughout the proceedings that his transfer from the UNMIS post constituted a disguised disciplinary measure. The Respondent has failed to respond in a meaningful manner to this argument, and has not sought to adduce evidence or argument justifying the transfer, or to address the related contention that the Applicant's career has been stymied, despite having had an opportunity to do so in the current proceedings.

60. Former staff rule 110.3(b), in subparagraphs (i) to (iii), identifies only three types of non-disciplinary (that is, administrative) measures—being a reprimand, recovery of monies owed to the Organization, and suspension. While a reprimand is an administrative measure contemplated under former staff rule 110.3, the removal of a staff member from her/his post and her/his reassignment is not such a measure.

61. The wording of the penultimate paragraph of the letter of 16 January 2007, which imposed the reprimand, reassignment and close monitoring of performance, makes it clear that these measures were intended to be applied collectively as a sanction. Practically, therefore, and recalling that the Respondent has not sought to justify the transfer on other operational grounds, the Applicant was punished twice, in that he was subjected to a reprimand and a reassignment. The Tribunal finds additional support in the fact that, while the Secretary-General has a power to assign staff to any activities or offices of the United Nations, including pursuant to former staff regulation 1.2(c) and former staff rule 101.2(b), no reference to this power was made in the letter of 16 January 2007, or, indeed, in the current proceedings.

62. In this context, and absent any other justification having been provided, the Tribunal finds that the reassignment was utilised as a disguised disciplinary measure. The Respondent did not have the power under the former Staff Rules to impose this disciplinary measure, and, in any event, did not afford the Applicant the usual protections which constitute the disciplinary process. Therefore, this action was in breach of the Applicant's terms of appointment. Furthermore, the fact that the transfer was mentioned in the Applicant's reprimand will require that the wording of the reprimand be amended.

Conclusion

63. The decision to withdraw the reprimand and refer the matter to the JDC for advice was in breach of the Applicant's terms of appointment.

64. The initial imposition of the reprimand on the Applicant was not an improper exercise of the Secretary-General's discretion. However, in light of the other findings of this Judgment, the wording of the reprimand is inappropriate.

65. The decision to transfer the Applicant from his functions at UNMIS was a disguised disciplinary measure and was in breach of the Applicant's terms of appointment.

Orders

66. The Respondent is to replace the letter of 16 January 2007 with an appropriately worded reprimand, which shall not include a reference to the transfer from UNMIS. Any other records relating to the transfer are likewise to be removed.

67. By 22 July 2011 the parties shall confer on the appropriate sum of monetary compensation to be awarded to the Applicant, which may include compensation for the decisions to transfer him from his functions at UNMIS, and to withdraw the reprimand and refer the matter to the JDC, and the resulting delay.

68. By 29 July 2011 the Applicant shall file and serve a statement confirming whether the issue of compensation has been settled, failing which settlement the Tribunal shall give further directions as necessary.

[*Signed*]
Judge Ebrahim-Carstens

Dated this 21st day of June 2011

Entered in the Register on this 21st day of June 2011

[*Signed*]

Santiago Villalpando, Registrar, New York