



**UNITED NATIONS DISPUTE TRIBUNAL**

**Case No.:** UNDT/NBI/2015/041  
**Before:** Judge Alessandra Greceanu, Duty Judge  
**Registrar:** Hafida Lahiouel  
**Date:** 15 September 2015

**GALLO**

**v**

**SECRETARY-GENERAL OF THE UNITED NATIONS**

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**RESPONDENT'S REPLY**

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**Counsel for the Applicant:**

Paul Harris, SC

**Counsel for the Respondent:**

Bart Willemsen, UNICEF



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### **Introduction**

1. In Judgment No. UNDT/2013/176 (*Postica and Nguyen-Kropp*), Goolam Meeran J ruled on the appeals of two investigators in the Investigations Division of the Office of Internal Oversight Services (ID/OIOS) challenging the decision to investigate them for possible misconduct committed in the context of their investigation of another UN staff member. In his Judgment, Goolam Meeran J mentioned the fact that Mr. Michael Dudley, Deputy Director (ID/OIOS) had altered and withheld photographic evidence at the initial stage of the investigation conducted by the two investigators.
2. Within a month from the issuance of the aforementioned Judgment, the Applicant altered an inspirational quote on a whiteboard standing at the entrance of the OIOS office in New York from “*If the facts don’t fit the theory, change the facts – Albert Einstein*” to “*If the facts don’t fit the theory, change the photos – Michael Dudley.*”
3. On 9 April 2015, the Applicant received a letter from Mr. Jan Eliasson, the Deputy Secretary-General of the United Nations, informing him that the Secretary-General had decided to issue the Applicant a written reprimand. In arriving at this decision, the Secretary-General accepted the recommendation from Mr. Richard Bridle, the former Director, Division of Human Resources, UNICEF, who had assessed the report of the fact-finding panel that had been established under ST/SGB/2008/5 to investigate the Applicant’s actions, and who, on the basis of his assessment, had decided not to pursue the matter under Sections 5 and 6 of ST/AI/371/Amend.1 and had recommended that the Applicant be reprimanded.
4. In his appeal, the Applicant requests the rescission of the decision to find him guilty of misconduct and the decision to issue him a written reprimand.
5. The Applicant’s assertion that he was found guilty of misconduct is incorrect. The letter from the Deputy Secretary-General of the United Nations, which serves as the written reprimand, does not state that the Applicant was found guilty of misconduct and the fact that the former Director, Division of Human Resources, UNICEF had decided not to pursue the matter under Sections 5 and 6 of ST/AI/371/Amend.1 confirms that the Applicant’s actions were not found to amount to misconduct within the meaning of UN Staff Rule 10.1 (a).



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6. As to the issuance of the written reprimand, the Applicant admitted to having altered the inspirational quote and the Respondent respectfully submits that, in these circumstances, the decision to issue the reprimand was a valid exercise of managerial discretion in view of: (i) the Applicant's awareness that Mr. Dudley would see the altered quote and would, or could feel distressed and/or embarrassed as a result; (ii) the Applicant's prior commitment to refrain from confrontational conduct directed at Mr. Dudley; and (iii) the Applicant's decision to circulate his reply to the Under-Secretary-General's (OIOS) decision to establish a fact-finding panel to all staff members in OIOS, in which the Applicant referred to Mr. Dudley in a highly unfavorable manner.

7. If the Tribunal would find that the Application is receivable *ratione materiae*, the Respondent respectfully submits that the Application is without merit, and the Respondent respectfully requests the Tribunal to dismiss the Application in its entirety obviating the need to discuss financial compensation.<sup>1</sup>

### **Relevant Factual Background**

8. On or around 20 December 2013, the Tribunal issued Judgment No. UNDT/2013/176 (*Postica and Nguyen-Kropp*).

9. On 14 January 2014, the Applicant altered an inspirational quote on a whiteboard located in the entrance in the OIOS offices in New York from "*If the facts don't fit the theory, change the facts – Albert Einstein*" to "*If the facts don't fit the theory, change the photos – Michael Dudley.*" On the same date, Mr. Dudley sent an email to Mr. Michael Stefanovic, Director (ID/OIOS) in which he included a photographic image of the altered quote and called it "shocking behavior."

10. On 17 January 2014, Mr. Dan Wilson, at the time Officer-in-Charge of the Proactive Investigation Unit within ID/OIOS, reported the Applicant's actions to Ms. Carman Lapointe, Under-Secretary-General, OIOS. In Mr. Wilson's opinion, the Applicant's actions constituted misconduct and he indicated that he felt compelled to request a formal investigation into the Applicant's actions as a third-party complainant under Section 5.11 of ST/SGB/2008/5. On 31 January 2014, Ms. Lapointe appointed a fact-

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<sup>1</sup> The Respondent submits that, in the event the Tribunal would find in the Applicant's favor, this would not warrant financial compensation.



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finding panel comprised of two staff members in OIOS, Mr. Yee Woo Guo and Mr. William Petersen, to investigate Mr. Wilson's complaint. On the same date, Ms. Lapointe informed the Applicant about her decision to establish a fact-finding panel.

11. On 6 February 2014, the Applicant replied to Ms. Lapointe's communication in which she informed him of her decision to establish a fact-finding panel. The Applicant circulated his communication to all staff members in OIOS. In his communication, the Applicant, *inter alia*, stated:

*"The supreme irony is that the alleged "victim" of this harassment should be Michael Dudley, the undisputed "star" of the UNDT/2013/176 judgment: the man who Counsel for the Respondent fought so valiantly to keep from even being invited to observe the proceedings; the man who admitted there was so much evidence against him he could not defend himself; the man who been publicly acknowledged to have taken retaliation to new and hitherto unimaginable heights, the man whose retaliatory zeal has cost the United Nations at least \$250,000 in unwarranted investigation costs alone, and God alone knows how much more in the cost of litigation since."*

12. In a memorandum dated 9 April 2014, Ms. Lapointe informed Ms. Catherine Pollard, the former Assistant-Secretary-General, Office of Human Resources Management (OHRM) that the fact-finding panel that had been established to investigate Mr. Wilson's complaint had found that the Applicant's actions constitute misconduct (harassment) and that she agreed with the panel's finding.

13. In a memorandum dated 6 November 2014, Mr. Yukio Takasu, Under-Secretary-General for Management, requested Mr. Anthony Lake, UNICEF Executive Director, for his assistance in acting on the fact-finding panel's report and Ms. Lapointe's referral to Ms. Pollard. Mr. Lake subsequently accepted Mr. Takasu's request and the proposed delegation of authority.

14. On 11 February 2015, the former Director, Division of Human Resources, UNICEF informed Mr. Takasu that he had decided not to pursue the matter "on the basis that [the Applicant's] conduct, although in discord with the standards of conduct to be expected from an international civil servant, does not, in the circumstances, amount to misconduct." However, he recommended that the Applicant be issued a written reprimand.



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15. The Applicant separated from the UN Secretariat's service on 16 March 2015.

16. On 9 May 2015, the Applicant received an email from an official within the Office of the Under-Secretary-General for Management, who attached a letter from Mr. Jan Eliasson, Deputy Secretary-General of the United Nations, informing the Applicant that the Secretary-General had decided to issue the Applicant a written reprimand.<sup>2</sup>

### **Receivability**

The Application is irreceivable *ratione materiae* as the Applicant did not request a management evaluation as required under UN Staff Rule 11.2 (a)

17. On 9 April 2015, the Applicant received a letter from Mr. Jan Eliasson, the Deputy Secretary-General of the United Nations, informing him that the Secretary-General had decided to issue the Applicant a written reprimand. The Applicant was informed that, in arriving at this decision, the Secretary-General had accepted the recommendation from Mr. Richard Bridle, then the Director, Division of Human Resources, UNICEF, who had assessed the report of the fact-finding panel established under ST/SGB/2008/5 to investigate the Applicant's actions, and who, on the basis of his assessment, had decided not to pursue the matter under Section 5 of ST/AI/371/Amend.1 ('Revised Disciplinary Measures and Procedures').

18. In his appeal, the Applicant confirms that he did not request a management evaluation of the decision to issue him a written reprimand as this was "[n]ot required."<sup>3</sup>

19. The Respondent respectfully submits that the Applicant's assertion is incorrect.

20. UN Staff Rule 11.2 (a) states that for a staff member to appeal an administrative decision he/she shall – as a first step – request a management evaluation of the same decision.

21. It appears that the Applicant, in support of his assertion that he was not required to request a management evaluation, relies on UN Staff Rule 10.3 (c), which states:

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<sup>2</sup> The Respondent denies all of the Applicant's statements of fact and/or law that are not expressly agreed upon through his Reply.

<sup>3</sup> Application, at p. 3 (Section VI. 'Management evaluation').



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“A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.” (Emphasis added)

22. The Respondent respectfully submits that, in the instant case, the disciplinary process was never initiated and, consequently, it was not completed, a requirement under UN Staff Rule 10.3 (c) to permit an applicant to submit an application to the Tribunal without first requesting a management evaluation.

23. UN Staff Rule 10.3 (a) states:

“[t]he Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred.” (Emphasis added)

24. Upon his review of the fact-finding panel’s report and after having invited the Applicant for his comments on the report, Mr. Richard Bridle, Director, Division of Human Resources, UNICEF, decided not to pursue the matter under Section 5 of ST/AI/371/Amend.1.<sup>4</sup> Mr. Bridle did not, therefore, charge the Applicant, the act that, for all intents and purposes, represents the initiation of the disciplinary process.<sup>5</sup> In this connection, the Respondent notes that, in Judgment No. 2013-UNAT-381 (*Applicant*), the Appeals Tribunal held that the Dispute Tribunal had erred in determining that the applicant’s appeal against the issuance of a reprimand was receivable, as the applicant had failed to request a management evaluation of the decision to issue the reprimand.<sup>6</sup>

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<sup>4</sup> Mr. Bridle, as the Director, Division of Human Resources, UNICEF, was vested with the authority to decide whether the matter should proceed under Section 5 of ST/AI/371/Amend.1 under the agreement between the United Nations Secretariat and UNICEF. The Applicant has challenged the referral to UNICEF (UNDT/NY/2015/014).

<sup>5</sup> See *Akello v Secretary-General of the United Nations*, Judgment No. 2013-UNAT-336, at para. 36. See also *Applicant v Secretary-General of the United Nations*, Judgment No. UNDT/2011/054, at para. 83.

<sup>6</sup> *Applicant v Secretary-General of the United Nations*, Judgment No. 2013-UNAT-381, at para. 35.



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25. Accordingly, the Applicant was required to request a management evaluation of the decision to issue him the written reprimand and his failure to do so renders the Application irreceivable *ratione materiae*.

### **Merits**

26. The Applicant advances a number of arguments in support of his assertion that the ‘decisions’ to find him guilty of misconduct and to issue a written reprimand were unsound.

#### The Applicant was not found guilty of misconduct

27. The Respondent respectfully submits that the Applicant’s assertion that he was found guilty of misconduct is incorrect.

28. The letter from Mr. Eliasson dated 1 April 2015 does not state that the Applicant had been found guilty of misconduct and the fact that the Applicant was not charged with misconduct under Section 6 of ST/AI/371/Amend.1 confirms that his actions did not amount to misconduct as only such a finding is reserved to the officials identified in Section 9 of ST/AI/371/Amend.1<sup>7</sup>

#### The decision to issue the written reprimand was a valid exercise of discretion

29. The written reprimand was issued in view of the fact that: (i) the alteration of the inspirational quote was inappropriate in that it was foreseeable that Mr. Dudley would see the comment and feel distressed and/or embarrassed; (ii) the Applicant had made a prior commitment to refrain from confrontational conduct directed at Mr. Dudley; and (iii) the Applicant circulated his reply to Ms. Lapointe’s decision to establish a fact-finding panel to all staff members of OIOS, a reply in which the Applicant referred to Mr. Dudley in a highly unfavorable manner.

30. Upon receipt of an investigation report such as the fact-finding panel’s report prepared under ST/SGB/2008/5, the Assistant Secretary-General (OHRM) is not required to pursue the matter and there is

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<sup>7</sup> The Respondent notes that, although the reprimand (see its first paragraph) refers to the fact that the fact-finding panel “found” that the Applicant had engaged in “misconduct,” the Applicant was not found to have engaged in misconduct; such a finding requires the prior initiation and completion of a disciplinary process and cannot be made under ST/SGB/2008/5 – the Head of Office under ST/SGB/2008/5 (Section 5.18 (c)) must refer the matter to the Assistant-Secretary-General, OHRM if the conduct in question “amounts to possible misconduct.”



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nothing in the terms of ST/AI/371/Amend.1 that suggests that he/she does not have the authority to issue an oral or written reprimand if the acts and/or omissions of the staff member(s) under assessment warrant such action.

31. In the instant matter, the Applicant was not charged with misconduct.

32. Accordingly, what matters is whether it was reasonable to view the Applicant's actions, in particular his alteration of the inspirational quote and his decision to circulate his reply to Ms. Lapointe's memorandum to all staff members in OIOS including unfavorable comments about Mr. Dudley, as a failure to observe the standards of conducted expected of an international civil servant.

33. The Respondent respectfully submits that this is very much the case, in particular in view of the Applicant's earlier commitment to refrain from further confrontational conduct directed at Mr. Dudley and the Applicant's awareness of the already hostile working environment in ID/OIOS.<sup>8</sup> In this connection, the Respondent notes that he does not argue that the issuance of the written reprimand was the only reasonable conclusion available to the Secretary-General, however, it cannot be contended that the Secretary-General's conclusion that the Applicant's conduct was inappropriate and warranted the issuance of a written reprimand was unreasonable and thus, unlawful.

### **The Applicant's due process concerns are immaterial and without merit**

34. As to the Applicant's due process and/or procedural concerns about the actions undertaken under ST/SGB/2008/5 – without conceding any violations of the right to due process and/or applicable procedure, the Respondent respectfully submits that these concerns are immaterial as the Applicant admitted to have altered the comment and to have circulated his memorandum to all staff members in OIOS, and it cannot be contended that it was unreasonable to issue the Applicant a reprimand for these actions, which is what ultimately occurred.

35. Moreover, the Respondent submits that it was not unreasonable for Ms. Lapointe to establish the fact-finding panel under ST/SGB/2008/5 after determining that the report was made in good faith and that

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<sup>8</sup> Mr. Dudley himself referred to the comment on the whiteboard after the Applicant's alteration as "shocking behavior."





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there were sufficient grounds to establish a fact-finding panel to commence an investigation. It was likewise not unreasonable for the fact-finding panel to take note of the Applicant's actions connected to his alteration of the comment, in particular the Applicant's prior commitment to refrain from improper conduct vis-à-vis Mr. Dudley and the circulation of his email to Ms. Lapointe (in which he included inappropriate comments about Mr. Dudley) to other staff members in OIOS. Moreover, the Applicant had sufficient opportunities to comment on these two elements prior to the issuance of the reprimand.

### The Applicant's actions were not protected under the right to 'freedom of opinion'

36. In support of his assertion that his 'comment' on the whiteboard was protected under the freedom of opinion, the Applicant refers to the 'Joint Declaration on Freedom of Expression' issued on 4 May 2015 by the UN Special Rapporteur on Freedom of Opinion and Expression.

37. Without prejudice to the fact that the Joint Declaration appears to refer – in general – to circumstances other than the Applicant's circumstances (the Respondent notes, in particular, the scope of the Joint Declaration reflected in Article 1), the Respondent has no difficulties to accept that staff members who reveal misconduct, serious maladministration, a breach of a human right, a violation of humanitarian law and/or other threats to the overall public interest, are entitled to protection. However, the Respondent submits that the Applicant did not reveal misconduct or other improper acts and the fact alone that the Applicant refers to his comment on the whiteboard as a "satirical reference" confirms the same.

38. Moreover, as stated in the letter of Mr. Eliasson, the right to freedom of opinion is subject to reasonable restrictions, including the requirement to act in accordance with the United Nations Staff Regulations and Staff Rules, which finds reflection in Article 19 (3) of the International Covenant on Civil and Political Rights:

*"The exercise of the [right to hold opinions without interference] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:  
(a) For respect of the rights or reputation of others; (b) For the protection of*



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*national security or of public order (ordre public), or of public health and morals.”<sup>9</sup>*

39. In view of the fact that: (i) it was foreseeable that the Applicant’s comment on the whiteboard would distress and/or embarrass Mr. Dudley; (ii) the Applicant had made a prior commitment to refrain from inappropriate, or confrontational conduct directed at Mr. Dudley; and (iii) the Applicant’s comments about Mr. Dudley in his email to Ms. Lapointe, on which he copied all staff members in OIOS, were inappropriate, the Applicant cannot claim that his ‘actions’ or ‘opinions’ are immune from reasonable restrictions, including administrative action after determining his conduct was inappropriate, in this case the issuance of a written reprimand.

### **Conclusion and Relief Sought**

40. The Application being irreceivable – as argued in the Respondent’s motion – and/or merit, the Respondent respectfully requests the Tribunal that it be dismissed in its entirety obviating the need to discuss the Applicant’s request for financial compensation.

Respectfully submitted this 15<sup>th</sup> day of September 2015,

A handwritten signature in blue ink, appearing to read 'Bart Willemsen'.

Bart Willemsen  
Counsel for the Respondent

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<sup>9</sup> See also Article 10 (2) of the European Convention on Human Rights, which states that “[t]he exercise of [the freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” (emphasis added)