Case No.:	UNDT/NBI/2009/074
Judgment No.:	UNDT/2012/110
Date:	29 June 2012
Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LEAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGEMENT

Counsel for applicant:
Seth Levine, OSLA

Counsel for respondent:
Robert Nadelson, UNDP

6. In November 2007, Mr Tomaz Vas, a national of Mozambique who was not affiliated to the UN, wrote to the UNDP Mozambique Resident Representative and UN Resident Coordinator (RR/RC) alleging, inter alia, that the Applicant had hired him to work in the UNDSS Field Security Office for a period of two months without a contract and with a promise of permanent employment. On 11 December 2007, the Deputy Resident Representative for Operations (DRRO) reported this allegation. The DRRO also indicated that she had met with the Applicant who confirmed knowing Mr Vas, and allowing him to work with the staff of the office.

7. In February 2008 the Applicant was assigned to Juba, South Sudan.

8. In the same month, during the period 29 February 2008, the Office of Audit and Investigations (OAI) conducted a field investigation in Mozambique. The Applicant was not made aware of the investigation.

9. On 9 May 2008, the Applicant received an email from the OAI advising him that he was the subject of an investigation. This email had apparently been sent to him in February 2008 but was never received by him. The email served to notify the Applicant that he was being investigated for having 'abused [his] authority and misappropriated certain property belonging to UNDSS and UNDP.'[1]

10. By May 2008, the investigation was almost complete. It had in fact been initiated in 2007 and conducted through early February 2008. The Applicant heard rumours from former colleagues in Juba and elsewhere that he was being investigated, but did not receive formal notification himself until May 2008.

11. On 5 June 2008, the Applicant was informed by email that he was to attend UNDP offices in Johannesburg, South Africa for an interview by the Investigators. He was not made aware of his right to bring an observer to the interview.[2]

[1] Applicant's Annex 2.
[2] Applicant's Annex 3.

AGREED FACTS

17. On 21 November 2011, the Respondent filed a Joint Submission on Witnesses and facts as agreed between the Parties and signed by Counsel for both sides. These facts are listed as follows:[7]

General Facts

i. On 28 February 2008, the UNDP Office of Audit and Investigations (OAI) sent the Applicant a Notice of Formal Investigation. A further Notice was sent on 6 May 2008. On 9 May 2008, a third email from OAI with the Notice was sent to the Applicant advising him that he was the subject of an investigation, which the Applicant acknowledges receiving.

ii. On 19 June 2008, Mr Frank Dutton and Mr Alfred Zebi of OAI interviewed the Applicant in Johannesburg, South Africa.

iii. On 2 December 2008, the Legal Support Office/ Bureau of Management (the LSO/BOM) sent the Investigation Report and Supporting Materials to Applicant for his comments on the findings and conclusions, which he received on 16 December 2008. The Applicant provided his response on 10 January 2009.

iv. On 28 April 2009, the Applicant received a Charge Letter dated 24 April 2009, setting out the legal charges. He replied on 8 May 2009.

v. On 28 August 2009, LSO/BOM sent the Applicant a letter from Ms Helen Clark, UNDP Administrator, dated 27 August 2009, informing him that she had concluded that he had engaged in misconduct and that she had decided to impose upon him the sanction of separation from service with payment in lieu of notice but without termination indemnities. The Applicant did not receive this letter until 28 September 2009.

[7] This list of agreed facts mirrors that filed by the Parties on 24 January 2011.

THE CHARGES

18. The charges against the Applicant were framed as follows:

(i) Failing to uphold recruitment procedures and abusing his authority by permitting Mr Vas to work in the UNDSS Field Security Office without a contract;

(ii) Abusing his authority by instructing that workers be locked in a warehouse with no exit or fire escape and where petroleum products were kept;

(iii) Misusing UNDP property by receiving, storing and distributing pornographic material through his UNDP computer and email account.

THE EVIDENCE

The alleged Employment and Installation of Mr Vas in the UNDSS Field Security Office in Maputo

19. Mr Vas had approached the Applicant for a job. He was living in South Africa at the time, but had his family in Mozambique. As there were no posts available at the time, the Applicant kept a copy of Mr Vas' CV.

20. Mr Vas was persistent in pursuing his request for a job and kept calling the Applicant. For his part, the Applicant was of the opinion that Mr Vas would be an asset to the team as he showed genuine interest and spoke several of the locally relevant languages.

21. The Applicant envisaged Mr Vas being part of a special unit created in Mozambique called the Emergency Response Unit (ERU), whose function it was to oversee private security arrangements (firms and guards) that impacted on UNDP properties or installations. The ERU was also used to attend to any accident scene or any scene that would involve the national police and staff members of the UN

(national and international). The Emergency Response Unit was not a UNDP unit *per se*; the cost for the running of the Unit was shared by all the UN Agencies that used its services.

22.

time his subordinate told him that the workers wished to be locked in while they worked to avoid pilfering of the properties in the warehouse, and he agreed.

34. Ms Masaka had asked the Applicant to arrange for certain vehicles to be cleaned and polished in readiness for an auction.

35. The labourers for the job were recruited by someone in ERU, and a private security firm, Alfa Seguranca, was contracted to guard the warehouse.

36. The Applicant visited the warehouse with Ms Masaka, as they discussed the arrangement for getting the cars ready for auction. The Applicant visited the warehouse several times after that visit with Ms Masaka but could not remember when exactly his last visit was.

37. The Applicant described the warehouse as follows:

> The warehouse […] an old structure, but all metal. It's metal beams no. It's metal poles and then covered with corrugated iron sheet, and the walls are about maybe 3 metres high. Then there is a space that has some sort of a mesh, I mean, a net, but it's very thick holes, about 4 centimetres by 4 centimetres, all around the warehouse. And then there is the roof. It has beams and then again corrugated iron sheets covering the roof. And the doors are two metal doors as well, the gates.

38. The Applicant testified that the exit was secured because of concerns for valuables in the warehouse. Neither Ms Masaka nor the Applicant could spare any (UNDSS) staff for the purposes of guarding the premises and the labourers themselves expressed concerns of being harassed over the items in the warehouse by the officers of the security company on patrol there. It was the labourers themselves who suggested that they be locked in "to prevent the guards from coming in."

39. The labourers had expressed these concerns to Mr Pachecho who was with the ERU. Mr Pachecho consulted with the Applicant who gave him the go ahead to lock

the labourers in as requested by them. The Applicant also gave Mr Pachecho money to buy the workers water and food, which he did. At all times while inside the warehouse, the Applicant testified, the workers had contact with Mr Pachecho. He testified also that Mr Pachecho himself made several hourly visits to the warehouse to check on how work was progressing. The workers also had a mobile phone with which they could contact Mr Pachecho if the need arose.

40.

51. The Applicant testified that it was only "much later on" that he "received a pile of documents" containing "a number of things."

APPLICANT'S CASE

52. The Applicant contends that the Impugned Decision is unlawful as it was based on a flawed investigation in which the rights of the Applicant were violated in a

i. failure to observe the obviously forged signature on the statement of the deceased Alfredo Massango or to consider the likelihood of this letter being a forgery, given that in his last weeks Mr. Massango, who was dying from a terminal ailment was not likely to have made such a coherent statement, nor would he have had any reason to do so;[8]

ii. failure to attribute the initials 'FM' to Fernando Maveze, another security guard, when questioning the contents of the alleged statement of Alfredo Massango;

iii. using the Complainant, Mr. Vas, as interpreter when taking the evidence of a security guard at Bilene where the investigators had gone to;

iv. failure to give any consideration to an anonymous letter sent to the Applicant's family (which demonstrates ill-will towards him) whilst the obviously forged letter of Mr. Massango was given significant weight during the investigation;

v. concluding on the flimsiest of evidence that the Applicant was responsible for the theft of a UNDP door;

vi. conducting a fishing expedition rather than properly investigating matters initially brought to their attention for enquiry.

57. As so many of the allegations investigated by the OAI were based on rumours and inconsistent statements by a number of unreliable sources (whose unreliability the Investigators allude to in their report), the failure of the Investigators to consider why the Applicant was being made a target of allegations is also the question of bias.

58. The Applicant submitted that the Investigators did not consider him innocent until proven guilty, as stated in their letter of 26 February 2008.[9] He contended that

[8] *See* Annex 6, pp. 6-7.
[9] Annex 2.

the investigation was, from the outset, a fishing expedition and that the Investigators were intent on seeing that the allegations against the Applicant were upheld.

59. Although the OAI Investigation Guidelines permitted the Applicant to have an observer present at interview with the Investigators, he was not informed of this right;

law. In its unanimous decision the court affirmed the right to legal representation before bodies not classified as courts, about medical and legal regulatory bodies. The Court held, *inter alia*:

> i) the right to confidential legal advice is a right which is protected even where such advice does not bear on any existing or contemplated court proceedings';
>
> ii) legal representation is not restricted to court proceedings;
>
> iii) the principles of fairness should be flexible and be adopted in consideration of the specific circumstances of each case;
>
> iv) where parties to an investigation or dispute are not on equal footing legal representation should be considered; and
>
> v) where there exists a possibility of serious sanctions the issue of fairness is of even greater significance.

65. In *Joplin v Chief Constable of the City of Vancouver* police disciplinary regulations excluding legal representation were held to be *ultra vires*.[13]

66. In *Hendrickson v Independent Chairperson of the Disciplinary Court of Kent Institution* the court determined that although inquisitorial hearings are not an adversarial process they must still be conducted in a fair manner.[14]

67. These authorities go to show, the Appellant contended, that in order for an

72. The entire investigation into the Applicant's conduct derived from a complaint made to UNDP by Mr Vas, who was not an employee of UNDSS/UNDP. The statement he gave to investigators on 24 February[15] had not been open to challenge – neither by the investigators themselves, nor by the Applicant, who never had a chance to cross-examine Mr Vas about his allegations. On the face of it, his statement contained significant errors – such as the assertion that he was 'working' for UNDSS until sometime in October 2007 – which is clearly false. By the Respondent's own admission, Mr Vas could only have been present at the premises from around 10 June

its contents whatsoever.[19] As a result it is utterly unclear how the Investigators came to the conclusion so adamantly stated:

> There was fuel in each vehicle and other machines such as generators and chain saws. It is likely that there were also jerry cans containing fuel.

82.

iii) Storing and distributing pornography on his computer

87. The Applicant did not deny receiving, storing, and passing on pornographic material on his work computer.

88. The Respondent, the Applicant argued, has taken an "unfairly po-faced attitude to the Applicant's interest in pornography, which came from a variety of sources including other staff members of the UN and UNDP who do not appear to have been sanctioned for the same."

89. The Applicant denied knowing that it was against the rules of the Organisation to share this material *via* a work computer and apologised for doing so. The sanction of separation from service was, the Applicant submitted, grossly disproportionate to this offence.

Proportionality of the sanction

90. Notwithstanding the broad discretion of the Administration in deciding on a disciplinary measure, the Applicant contended that the disciplinary measure imposed upon him – separation without notice – was highly disproportionate to the nature and gravity of his alleged misconduct.

91. It was tantamount to a breach of Article 10.3 (b) of the Staff Rules which requires the Administration to ensure that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

92. Even taken at its highest, the nature and gravity of the conduct com

93. The Applicant cited the Secretary-General's submission before the UNDT that in disciplinary cases it had been his practice that

> there is a level of moral turpitude or wrong-doing that must be satisfied before a matter can be considered to constitute misconduct[20]

94. In the light of this assertion by the Respondent, the Applicant submitted that it can only be said that the circumstances of the present case do not constitute misconduct, let alone serious misconduct justifying separation.

95. The Applicant additionally submitted that the evidence did not and does not support a finding of moral turpitude or the *mala fide* intent required. The Applicant

104. The Respondent argued that he exercised police powers over the Applicant, and had no authority to impose restrictions on the Applicant's individual liberty or civil rights. The distinction between criminal and administrative proceedings such as these, the Respondent submitted, was that the Applicant's due process rights must be understood in terms of the relationship of the Applicant as a staff member to his employer. These rights are largely defined by, and must be consistent with, the Staff Regulations and Rules, as well as the policies and procedures promulgated in accordance thereto, which provisions exist specifically to remove staff members and the Organisation from being subject to any national jurisdiction. What applies in criminal proceedings of national jurisdictions is not analogous to the investigative stage of proceedings within the internal justice system of the UN. The Respondent also observed that some of the authorities cited by the Applicant themselves recognize the changing nature of due process rights at different stages of a case.

105. As for the right to remain silent, the Respondent cited staff regulations 1.1 (b) and 1.2(e), pursuant to which the Applicant undertook to regulate his conduct to accord with the interests of the Organization. Such interests clearly include cooperation in investigations of allegations of misconduct. Indeed, staff regulation 1.2 (r) provides explicitly that a staff member must respond fully to requests for information from officials authorised to investigate possible misuse of funds, waste or abuse.

106. There is, therefore, no right to remain silent. Indeed, the Respondent observed that some of the national jurisdictions cited by the Applicant did not themselves recognize a right to remain silent in all circumstances; a notable exception being within the context of self-regulating organizations.

107. On the right to counsel, the Respondent argued that the Applicant is sought to equate not being informed of the right to counsel with a denial of that right. Investigators never denied the Applicant the right to seek legal counsel. The Applicant was only advised in the Notice of Investigation that he did not have the right to the presence of legal counsel when interacting with investigators during any

interviews. It remained open to the Applicant to seek the advice of the Panel of Counsel (as it then was), the Ombudsman, or even inquire from OAI. As an experienced professional staff member with managerial responsibilities, it is reasonable to expect that he knew how to do this.

The Charges

Recruitment of Mr Vas

108. The Respondent contended that the circumstances surrounding the investigation into this allegation did not alter the facts of the matter, which facts the Applicant had admitted to in his comments on the investigation report and in his response to the charge letter and which remained uncontested in his current Application.

109. It is a fact that the Applicant in his capacity as Field Security Adviser instructed staff under his supervision to allow Mr Vas to accompany them on their rounds. It is a fact that the Applicant exercised this authority without any prior recruitment process, procedural requirements or notice to the senior management of the Country Office. It is further a fact that the Applicant's exercise of authority in this regard was neither isolated nor incidental in that Mr Vas accompanied the security staff over a period of some seven weeks, and the situation was the result of the Applicant's own initiative.

110. The only matter in dispute is the interpretation of Mr Vas' functions or status. The Applicant had termed the nature of Mr Vas's status in his email to the DRRO on 15 June 2007, that is, after Mr Vas started work and prior to the start of any investigation, as "...work on a probationary basis." (applicant annex 6, exhibit 30) The Applicant had since disputed this characterisation and termed Mr Vas' functions as `work-shadowing'.

111. It is not readily apparent what the difference between probationary work and work shadowing is. The Applicant said in his email of 15 June 2007 that Mr Vas was working on a probationary basis and that he would like to employ him "formally."

One of the Applicant's subordinates, Mr Pacheco, also recalled that the Applicant, in assigning Mr Pacheco to train Mr Vas, indicated that Mr Vas was on probation.[22] Other staff members under the Applicant's supervision told investigators that the Applicant had introduced Mr Vas to them variously as "a security clerk", "a future security clerk" or as a "member of their staff".[23]

112. However the Applicant later chose to re-characterize Mr Vas' status. Mr Vas had put in a claim for compensation for his time and effort. The Respondent submits that Mr Vas' claim cannot in good faith be ignored and that the matter was under review by the Respondent.

113. The Respondent submitted that it was unclear from the Applicant's own submissions how he, as the supervising manager, would have prevented the recruitment for the vacant post from being unfairly prejudiced in favour of Mr Vas. The Respondent submitted that the Applicant failed to discharge his duties in respect of the recruitment process. This constitutes a clear failure to uphold the standards required of the Applicant as a professional staff member and manager.

114. The Respondent contended that the Applicant's conduct was aggravated by several factors. Firstly, the events occurred in the context of the Applicant's responsibility for overall security in Mozambique. The fact that the Applicant exercised his authority to enable an unknown individual to work in security magnifies the extent of the Applicant's failure to uphold the highest standards. Not only was there the potential risk that Mr Vas might have posed, he was himself at risk. The Respondent would have been liable for any harm suffered by Mr Vas as a consequence of his security "training." Given the experience of the Applicant within the system, he must be expected to have known better.

115. As for the Applicant's contention that he used the word "probation" wrongly as English is not his mother tongue, the Respondent argued that the language

[22] Applicant annex 6, exhibit 36.
[23] Applicant annex 6, exhibits, 16, 3, and 15.

k. misuse of office, abuse of authority.

120. The Respondent submitted that the risk of fire or explosion in an enclosed space with vehicles containing fuel is reasonably foreseeable; although technically diesel is "considered combustible while petrol is flammable."

121. The Respondent submitted that a reasonable person would not lock his or her employees into such a warehouse not only because of this reasonably foreseeable risk of fire or explosion, but also because locking individuals into a warehouse exponentially increases the likelihood that those individuals will be injured or killed in such a fire or explosion.

122. The Applicant's act of instructing his subordinates to lock the workers in a

No. 1103 (2003), the Respondent maintained that the relevant standard in misconduct is the nature of the conduct, not the consequences.

Receipt, storage and distribution of pornography

125. Staff regulation 1.2 (q) requires staff members to use property and assets for official purposes. As the Applicant accepted, the UNDP Policy on use of Information Communication and Technology (ICT) Resources prohibits the use of ICT resources for receipt, storage and transmission of sexually explicit messages and images. The Applicant had an obligation as a staff member to regulate his conduct with the interests of the Organisation only in view.

126. As a threshold matter, it must be pointed out that the Respondent was not interested in the Applicant's enjoyment of pornography on his own equipment and during his own time. The Respondent was however concerned with his use of UNDP equipment and resources for this purpose. What the Applicant terms "po-faced" was in fact an eminently reasonable concern to protect the image and interests of the Organisation. The Respondent certainly had an obligation to ensure that the privileges and immunities enjoyed by the Organisation did not become a means of evading national laws concerning transmission or receipt of sexually explicit material, and the Applicant as a staff member had undertaken a similar obligation.

127. The Respondent found it surprising that the Applicant could possibly not know that the use of official equipment for this purpose was prohibited.

Proportionality of Sanction

128. The Respondent observed that the Applicant had admitted to what he termed "a number of unwise decisions".

129. The `decisions' for which the Applicant was sanctioned consist of three largely unrelated actions. The Applicant had not made one isolated mistake, but rather demonstrated a consistent pattern of behaviour incompatible with the highest standards of efficiency, competence and integrity he was required to uphold as an international civil servant.

130. As a point of law, under staff rule 10.2(a), the failure of a staff member to observe the standards of conduct expected of an international civil servant may amount to misconduct and lead to the imposition of disciplinary measures. The Applicant's behaviour in ignoring procedural requirements and using his authority to endanger human life represented such misconduct.

131. Once misconduct is established, the Respondent has broad discretion in deciding on the appropriate and proportionate disciplinary measure.

132. The Respondent submitted that the Applicant's conduct in any one of the charges could have resulted in the imposition of disciplinary sanctions, and cumulatively they merit a more severe sanction. As relevant precedents, the Respondent notes, for example, that judgments of both the former UN Administrative Tribunal and the International Labour Organization Administrative Tribunal have upheld the imposition of disciplinary sanctions for the use and distribution of pornography alone, including the most severe sanction when accompanied by aggravating factors.[24] In the present case, as the Administrator indicated to the Applicant in communicating her decision, she did consider mitigating factors, such as the absence of physical damage, in deciding on the appropriate sanction, and for this reason the most severe sanction was not imposed.

133. The Respondent submitted that the Applicant's acts of gross negligence or recklessness, such as locking workers into a warehouse for an entire working day, constituted misconduct of such magnitude that the Administrator could reasonably

[24] *See* Judgement No. 1299, Sawhney (2006), *see also* ILOAT Judgement No. 2555 (2006).

decide that she could not entrust the Applicant with responsibilities in the Organisation.

134. The Administrator's discretion on deciding the appropriate disciplinary measure is broad. This point had been consistently recognised by the former UN Administrative Tribunal, as long as the sanction was, inter alia, proportionate, and untainted by bias, prejudice or extraneous factors.[25] Having established the existence of misconduct, the Administrator's decision was a valid exercise of her discretion. It was proportionate to both the gravity and cumulative evidence of the Applicant's recklessness, and it was based on substantial facts to which the Applicant had admitted.

ISSUES AND DELIBERATIONS

135. As most of the facts in this case have been substantially agreed upon between the Parties, the Tribunal is called to determine:

a) If the Applicant's conduct constituted misconduct;

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setting out what could constitute misconduct. The document also serves to define mechanisms which exist within the Organisation for reporting allegations of wrongdoing. It also explains the investigative and disciplinary procedures.

137. Section 3 of the Legal Framework defines misconduct, pursuant to staff rule 101.1, as:

> 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 administrative issuances, or to observe standards of conduct expected of an international civil servant." Such a failure could be deliberate (intentional act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).

138. Article 3 goes on to list the various acts which could constitute misconduct in the following terms:

> Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:
>
> a) Acts or omissions in conflict with the general obligations of staff members set forth in Article I of the Staff Regulations and Rules and administrative issuances; failure to comply with the standards of conduct expected from international civil servants;
>
> b) Unlawful acts (e.g. theft, fraud, possession or sale of illegal substances, smuggling) wherever it occurs, and whether or not the staff member was officially on duty at the time;
>
> c) Assault, harassment, including sexual harassment", or threats to other staff members or third parties;
>
> d) Sexual exploitation and sexual abuse as defined in the Secretary-

g) Action or omission to avoid or deviate from Financial Regulations, Rules and Procedures, including inappropriate use of committing or

Competency Assessment (RCA) in accordance with the appropriate procedure.

The Charges

Storage and distribution of pornographic materials on UNDP official computer

140. The Tribunal notes that the Applicant concedes, in his closing submission, that the distribution and storage of pornographic material using UNDP equipment constitutes misconduct. For the purposes of the Tribunal's deliberations, therefore, the characterisation of this charge is considered settled.

141. The Tribunal is therefore free to examine the other facts of the Applicant which were part of the charges against him.

Locking of workers in the warehouse

142. While the Applicant concedes that the workers assigned to clean the vehicles before the auction were locked in the warehouse under his watch, the record contains varying accounts as to how this actually came to be.

143. The Applicant's own unrebutted testimony, which the Tribunal accepts as credible, is that the workers themselves asked to be locked in. The Applicant concedes he unwisely allowed this locking in.

144. The Respondent's evidence and submissions did not actually address *why* the workers were locked in while they cleaned the vehicles or how the events actually transpired. The Respondent argued that the Applicant's conduct showed such a wanton disregard of UN "principles and policies," and could in many jurisdictions be tantamount to "false imprisonment." The Respondent further added that the conditions in which the workers were made to carry out their task were so unsafe and unsanitary as to pose a threat to their life and safety.

145. The Respondent suggested that the actions of the Applicant were so reckless, and an "abdication of duty", as to merit the charge of misconduct.

146. Mr Curtis, the senior investigator whom the Respondent called as a witness, did not however provide a credible account of the state and contents of the warehouse. When questioned as to the fire-risk, the witness told the court that he could not recall if there were fire extinguishers in the

amount to false imprisonment, it must be shown that the Applicant had the intention to confine them. It must also be shown that the workers were confined against their will and that they were conscious of it or harmed by it.

152. The Tribunal finds the Applicant's conduct in this regard to constitute poor judgment without the slightest hint of malice or intent to harm. It was neither abuse of position nor abuse of authority and therefore did not attain the level of misconduct.

The 'hiring' of Mr Vas

153. The Respondent's principal witness in respect of this charge is Mr Vas, the Complainant himself, who was not called to testify.

154. The Respondent's case rests on the Complainant's statement, which the Respondent seems to have accepted as true at face-value.

155. The Tribunal does not accept the Respondent's theory that Mr Vas was promised a job with UNDSS by the Applicant, nor does the Tribunal accept that the money the Applicant loaned Mr Vas was consideration for the 'work' he was doing with UNDSS. In examining the circumstances under which Mr Vas was allowed by the Applicant to stay on in UNDSS, the Tribunal finds the suggestion that the Applicant sought to circumvent the recruitment process for the purposes of hiring Mr Vas does not stand up to scrutiny.

156. The Tribunal does however find that the conduct of the Applicant showed such poor judgment as to call into question a degree of negligence or recklessness on his part. The Tribunal finds it difficult to imagine a set of circumstances under which a person who has no contractual relationship of any type may be legitimately asked or allowed to "shadow" the work of security officers. Even where the Organisation admits interns and volunteers to learn or work with or without pay within its offices, it provides for the processes for admitting these non-staff personnel. It does not lie within the competence of any manager or other staff member to do so on their own authority as they have none.

investigated for abuse of authority and misappropriation of "certain property belonging to UNDSS and UNDP."

162. While the Respondent insists that the Applicant was informed in a timely manner, he does not dispute that *actual* notice was only received by the Applicant in May 2008. The Applicant bears no fault for the fact that the Notice was not received by the Applicant when it was first sent.

163. In addition to it being late, the Tribunal finds the contents of the Notice of Formal Investigation dated 26 February 2008 scarcely adequate, and certainly does not accord with the letter and spirit of the provisions in Chapter III of the Legal Framework which require the subject to be informed of *the allegations*.

164. The Respondent's bland statement informing the Applicant that he was being investigated for abuse of authority and misappropriation of "certain property belonging to UNDSS and UNDP," tells him little about the allegations and allows no scope for preparation for the interview.

165. The Tribunal must here point out the contradiction in Section 11 of Chapter III. While exhorting the Respondent to ensure that information of the allegation be

167. A careful review of the facts in this case, as narrated above, brings me to the unreserved conclusion that the investigation was hasty and afforded the Applicant little opportunity to prepare for what he was to face in Johannesburg.

168. In listing all the due process requirements which, the Respondent argues, were met, paragraph 24 of the Respondent's closing submissions is notably silent as to the information given to the Applicant in the Notice of Investigation pursuant to Section 1 of Chapter III. This can only be because the Applicant was given information as to the allegations against him.

169. The Tribunal also finds that the Respondent should have acted within the terms and spirit of its own OIA Guidelines and informed the Applicant that he could request the presence of a third party to observe the interview.

Was the sanction proportionate to the offences?

170. With regard to the receiving, storing and distribution of pornographic material on a UNDP official computer which is admitted by the Applicant, it would be enough to deny the staff member an in-grade increment, reprimand him or deny him a month's salary.

171. In *Massah*, on the charge of "computer related misconduct" for the storage and distribution of pornographic material, six (6) other staff members who were found to have engaged in the same misconduct with the Applicant lost steps within their grade, were demoted, denied their within-grade increments for two (2) to three (3) years. The Court held that the sanction of summary dismissal against Applicant to have been disproportionate under the circumstances.[26]

172. The Tribunal is of the view that there was not sufficient evidence to adequately show that the circumstances in which the casual labourers who were cleaning vehicles were locked in amounted to a misconduct. It was at the very worst, very poor judgment on the part of the Applicant. This is because the risk of harm to the

[26] *See* UNDT/2011/218 *Massah v Secretary General* of 29 December 2011.

workers, although shown to be minimized by the workers own request, Mr Pacheco remaining close by and providing them with food and water, was higher when weighed against the risk of theft of the items in the warehouse which was the reason for considering the locking in. The Tribunal is persuaded that the Applicant showed an undue lack of managerial competence allowing the locking in of the workers even where it was at the request of the workers themselves. A reprimand and removal as head of the security unit would have been adequate sanction.

173. Regarding the matter of allowing Mr Vas to remain in the UNDSS premises and to observe how the unit worked or to train for a possible filling of a vacancy within the ERU with no legal capacity to do so, the Applicant had acted so unprofessionally and irresponsibly as to taint the image of the Organisation. This act was so reckless as to amount to misconduct.

174. The Tribunal has found that some of the Applicant's due process rights were not observed in the process of the investigation leading up to the disciplinary proceedings against him. Much as it is not the function of the Tribunal to substitute its judgment with that of the decision maker, it cannot avoid its duty of determining whether the sanction imposed on the Applicant for a proven misconduct is excessive.

175. For this purpose, it is the view and judgment of this Tribunal that a manager or staff member who has exhibited the degree of recklessness and abuse of position as shown by the Applicant in "recruiting" Mr Vas merits the sanction of separation from service.

176. In the instant case, the Applicant was terminated with compensation in lieu of notice but without termination indemnity. The lack of due process shown on the part of the Respondent while investigating the Applicant must necessarily count to mitigate his separation. To this extent, the sanction imposed on the Applicant is not proportionate in the circumstances. The Applicant ought to be terminated with termination indemnity.

CONCLUSION AND FINDINGS

177. Having deliberated on the evidence, the Tribunal's findings are listed as follows:

Due process

178. It is my judgment that the investiga

'Hiring' of Mr Vas

184. The Applicant's conduct on this score, the Tribunal finds, went beyond the scope of unsatisfactory work performance. The Applicant, as a P4 Security Advisor,

(Signed)

Judge Izuako
Dated this 29th day of June 2012

Entered in the Register on this 29th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi