

UNITED NATIONS D

21 August 2010², the Complainant made allegations of abuse of power and harassment against the Applicant on the basis that the Applicant:

- a. intentionally excluded her from the operations of the office;
- b. tried to cause the Complainant to make mistakes so she could blame her for them;
- c. was using the Administrative Officer to harass her;
- d. tried to discredit her among the staff;
- e. violated the code of conduct and fundamental professional ethics of UNHCR by the way she treats the Complainant;
- f. used her driver every weekend but only paid him a pittance and refused to let him take leave; she hit the driver on the shoulder and threw a barbecue grill that hit and injured one of his legs; the driver was obliged to seek treatment at the United Nations clinic and was given three days' sick leave;
- g. intimidated staff in weekly meetings by making threatening remarks;
- h. Attempted to derail the career prospects of another staff member; and
- i. Mismanaged office funds in relation to new office space.

8. In Complaint 2, dated 20 October 2010, the Complainant made allegations of abuse of office, mismanagement and unprofessional conduct against the Applicant on the basis that the Applicant:

- a. refused to let him take leave prior to joining BO Kigali;

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- b. refused to follow procurement rules especially in relation to financial thresholds, requisition of goods and the membership of the Local Committee on Contracts (LCC);
- c. verbally abused him on 18 October 2010;
- d. made racist comments against Kenyans;
- e. intimidated staff in BO Kigali by threatening to fire them;
- f. used abusive language on staff;
- g. created a culture of fear and mistrust in the office;
- h. favored national staff while ignoring their supervisors;
- i. failed to act on complaints in an attempt to protect the staff being complained about;
- j. interfered with his career prospects by telling another United Nations office not to offer him a job;
- k. tried to cause the Complainant to make mistakes so she could blame him for them; and
- l. tried to discredit him among the staff;

9. As a result of the complaints, on 1 December 2010, the IGO established an *ad hoc* inspection mission (Inspection Mission) to examine and report on the overall management of the UNHCR operation in Rwanda and, in particular, the internal management of BO Kigali. The Inspection Mission was led by Mr. Ruven Menikdiwela, the Deputy Director of the Division of International Protection and comprised of Ms. Aicha Limam, the Senior Administrative Officer in the Africa Bureau, and Ms. Patricia Capt, the Executive Assistant to the Inspector-General.

10. The Inspection Mission visited Kigali from 14 – 20 December 2010 and issued its report in January 2011. It looked into several allegations regarding the

working environment and management decisions in BO Kigali and concluded that there was an absence of evidence to support any of the allegations made against the Applicant.

11. In March 2011, the IGO established an Investigation Team, comprised of Ms. Nooriya Koshen, the Chief of the Staff Development and Training Unit of the United Nations Office at Nairobi (SDTU/UNON), and Ms. Vanessa Mattar, UNHCR's Senior Resettlement Officer in Nairobi, to investigate the allegations of harassment and abuse of authority contained in the two complaints received by the IGO on 23 August 2010 and 8 November 2010³.

12. The Investigation Team commenced its work by interviewing one of the Complainants on 24 March 2011. It visited Kigali from 15-19 May 2011 to interview staff that had worked with the Applicant and followed up with telephone interviews upon its return to Nairobi. The Applicant, who was in the United States of America, was interviewed on 31 May 2011 by telephone. The second Complainant was interviewed on 3 June 2011 in Nairobi. In addition to the Applicant and the 2 Complainants, the Investigation Team interviewed 24 witnesses during the course of its investigation. The Investigation Team finalized its investigation report on 18 October 2011 in which it concluded that the Applicant had harassed a number of staff under her supervision and that she had abused her authority based on a number of factors.

13. On 24 May 2012, a letter entitled "Allegations of misconduct" (the charge letter) signed by the then Director of the UNHCR Division of Human Resources Management (DHRM), together with a copy of the investigation report were sent to the Applicant for a response in accordance with ST/AI/371 (Revised disciplinary measures and procedures) and its amendment 1.

14. The Applicant submitted her written response to the allegations of misconduct on 17 July 2012.

15. By a letter dated 26 February 2013, the High Commissioner, Mr. António Guterres, informed the Appl

measures of a written censure and a fine of one month's net base salary. The Director/DHRM, by a letter dated 11 March 2013, reiterated Mr. Guterres' decision to impose disciplinary measures on the Applicant.

16. The Applicant was notified of the High Commissioner's decision on 4 April 2013 and on 23 May 2013; she filed the current Application with the Dispute Tribunal in Nairobi.

Issues

17. The issues the Tribunal will examine in the present matter are as follows⁴:

- a. Whether there were any substantive or procedural irregularities;
- b. Whether the facts on which the disciplinary measures were based have been established;
- c. Whether the established facts legally amount to misconduct under the United Nations Regulations and Rules; and
- d. Whether the disciplinary measures imposed are proportionate to the offence.

Were there were any substantive or procedural irregularities?

Parties' submissions

18. The Applicant submits that there were breaches of due process because:
- a. The Reports of the Inspection Mission and the Investigation Team were diametrically opposed although the same allegations were investigated. The Respondent failed to provide a credible explanation as to why the adverse Investigation Team Report was favored to her detriment. If sufficient attention had been paid to the Inspection Mission Report, which was objective and well-reasoned, as opposed to that of the

⁴ *Mahdi* 2010-UNAT-018; *Haniya* 2010-UNAT-024; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT

Investigation Mission, the Respondent would have reached a different conclusion on the facts.

b. The Respondent exercised his discretion capriciously by failing to place equal or due weight on the credible explanations she offered on the charges.

c. The Respondent failed to pay due or any attention to the gaping irregularities in the conduct of the investigation by the Investigation Team. The Investigation Team placed reliance on matters that were not specifically brought to the attention of the Applicant so as to allow her to exercise her due process rights.

d. The Respondent failed to pay due regard to basic evidentiary rules and rules of natural justice.

e. The Investigation Team failed to draw her specific attention to the “actual” Complainants or what they complained about on the basis of an erroneous understanding of the principle of confidentiality in the face of concrete allegations which formed the basis of disciplinary charges.

f. The Investigation Team took the Complainants’ and witnesses’ statements at face value; failed to evaluate the nature and quality of these statements and their overall relationship to each other; and in some instances,

19. The Respondent contends that the Applicant was afforded due process during the course of the investigation process and thereafter. The Applicant was interviewed during the investigation, informed of the allegations against her, provided with a copy of the draft Investigation Report for her comments, subsequently provided with all the documentary evidence against her and given the opportunity to consult with legal counsel and to submit her response in writing.

a. Provision of the complaints to the Applicant – in accordance with IOM/FOM/054/2005 (Role, function and *modus operandi* of the Inspector General’s Office), the confidentiality of the identity of a complainant shall be safeguarded. Additionally, the Applicant was informed of all the allegations against her and was provided with copies of the witness statements of the two complainants.

b.

provide a detached and objective assessment of the quality of management of UNHCR operations and activities at Headquarters and in the Field. The Respondent asserts that at least half of the Inspection Mission Report related to certain management decisions which are not the subject of the present case. The Respondent concedes that while the remaining part of the Inspection Mission Report entitled “working environment” does have some degree of overlap with the investigation, it does not however consider a number of complaints that were the subject of the Investigation Team Report and for which disciplinary measures were imposed, such as the treatment of the Applicant’s driver and the soliciting of loans. Thus,

34. On the overall impact of the attitude of the Applicant on the operational capacity of BO Kigali, the Inspection Mission concluded as follows:

Possible impact on the operational capacity of the office and well-being of staff: The mission was unable to determine any negative impact of the above on the operational capacity of the office. Complainants or detractors of the Representative appear to be in a minority in CO Kigali, and the operations seem to be running smoothly. In terms of the well-being of the staff, it should be noted that the Representative has made exemplary efforts to build the team spirit and morale of the staff since her arrival in Rwanda. She has established regular ‘happy hours’, staff picnics and staff retreats where she is always present and to which she contributes extensively. She also undertakes regular missions to the Field Offices (more than any previous Representative, according to the field staff) in order to be more connected to the operational realities and to the staff in the field. Finally, she has followed up in detail on the findings of the 2008 Global Staff Survey as it pertained to CO Kigali, notably in terms of addressing local staff concerns in regard to participation in decision-making processes, promotion and information-sharing. Extensive documentation on the foregoing was provided to the mission”.

35. The Inspection Mission finally stated that: “Given the lack of objective evidence to support the allegations of the complainants and the imminent reassignment of [the Applicant], there is little ground to provide recommendations to improve the situation”.

36. The Investigation Team started its investigation on 24 March 2011 and filed its final report on 18 October 2011. It inquired into the following matters: (i) shouting at and insulting behaviour towards staff; (ii) humiliation of staff; (iii) racist remarks about nationalities; (iv) displays

38. The findings of the Investigation

its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality”⁸.

49. In the present matter, when the IGO received the complaints it was perfectly proper and legitimate, in the absence of any improper motive, for the Respondent to initiate an investigation into the management and operation of the Rwanda Country Office. This was done by the establishment of the Inspection Mission, which extensively examined both the working environment and the management of the BO Kigali operation. In the pursuit of its mandate the Inspection Mission accessed a number of documents and interviewed the same witnesses, including the Complainants, as did the Inspection Team.

50. The Tribunal notes that Inspection Mission was tasked with making recommendations in areas “where possible negative impact was determined” during its investigation. The only additional investigation recommended by the Inspection Mission was an OIOS audit into the financial, administrative, protection and programme management of BO Kigali. It did not recommend the initiation of another IGO investigation into the same complaints it had examined. Further, the Inspection Mission recommended that the IGO finalize its ongoing investigations relating to the Kigali operation and its staff that dated back to 2009 and 2010 and to share the findings of the Inspection Mission with the Applicant.

51. Consequently, the Tribunal holds that the Inspection Mission, which was established by the IGO, was in fact the investigation and fact-finding exercise set out in paragraph 1 of ST/AI/371/Amend.1. Thus the Respondent’s next step should have been to follow the procedure set out in paragraph 2 of ST/AI/371/Amend.1 by forwarding the matter to DHRM if he believed that there was sufficient evidence indicating that the Applicant had engaged in wrongdoing that could amount to misconduct. The IGO should not have initiated another investigation.

52. It appears however that the Respondent was dissatisfied with the conclusions of the Inspection Mission and established a second investigation with

⁸ *Nguyen-Kropp & Postica* 2015-UNAT-509. See also *Nwuke* 2010-UNAT-099.

59. The Tribunal is also concerned about how the Investigation Team sought to justify its conclusions that materially departed from those of the Inspection Team. This is what the Investigation Team had to say by way of either comparison of their findings with those of the Inspection Mission or by way of justification.

While the conclusions of this report differ with those of the inspection team, which visited Kigali office in December, this panel believes that this is for several reasons. Firstly, [the Applicant] was still the Representative and a significant intimidatory presence. We note that both complainants advised against an investigation taking place while the Representative was still on board. Given the atmosphere of suspicion and mistrust in the office, it is our view that staff did not speak as openly as they did following her departure. Secondly, the workings of an inspection team and an investigation panel are very different. The Inspection team does not record or take notes of interviews, while the investigation panel is obliged to do so. Interviewees are therefore aware that what they say is on record and it provides some kind of protection, should they be victimized. F-3(d(ti)22(o)4)-368(s)5(o)9(.)-27()-368(I)13

Operation Plan for 2010, and the findings of the 2008 Global Survey.

61. The Tribunal is of the view that it was not within the mandate of the Investigation Team to justify or compare its findings with another fact finding mission that essentially looked into the same issues. The mandate of the Investigation Team was simply to establish the facts and let the appropriate authorities take whatever decision they deemed fit.

62. The Tribunal holds that it was an improper exercise of discretion by the Administration to establish an Investigation Team to investigate the same complaints that had been investigated and reported on by the Inspection Mission.

Were there procedural irregularities in the investigation process?

63. UNHCR's IOM/29/2005 – FOM/29/2005 (UNHCR's policy on harassment, sexual harassment and abuse of authority) states:

42. The goal of an investigation is to find facts which will, for the most part, be obtained by interviewing the victim, the alleged offender and other witnesses as deemed relevant by the investigating body. The facts should establish the time, sequence and nature of the occurrence.

43. Normally, no investigative findings should be reported in an investigation report before the subject of an investigation has been afforded the opportunity to respond to the allegation made against him/her. The subject of the investigation will be afforded such opportunity as soon as possible with due regard to the interests of all parties concerned, the interests of the Office and the integrity of the investigation process.

64. On the issue of the conduct of the investigation, Judge Meeran made the following observation in the case of *Mmata* UNDT/2010/053:

It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.

65. The Applicant's Record of Interview of 31 May 2011 shows that the Investigation Team did not specify to the Applicant the nature of the allegations against her. At the beginning, she was informed generally that the interview was "part of an ongoing exercise to establish facts" and that the result of the fact finding exercise would either be a closure report or a preliminary investigation report on the facts established. She was informed of the confidentiality of the investigation process, the duty of staff members to cooperate with investigations and that fact that she would be provided with a written transcript of the questions and answers to confirm her agreement by signature.

66. The closest the Investigation Team came to apprising the Applicant of the allegations against her was to tell her that: "The team that visited in December was an inspection team which is separate to what we are doing which is an investigation based on complaints and allegations that were made against your management of the office in Kigali". She was not informed that the allegations against her were those of harassment and abuse of authority.

67. The Investigators went on to ask the Applicant very general questions regarding: the ambiance in the office, problems she had had with some of the international staff; advise she had allegedly given to other UNHCR Offices regarding their recruitment of BO Kigali staff members (Mr. Njagi, Ms. Sommet Lange, etc.); her use of pin codes belonging to staff under her supervision; her borrowing of money from some staff under her supervision; her use of staff to run personal errands, including sending the driver to buy pork; the incident of the grill and an injury to the driver; her calling the BO Kigali doctor about sick leave of staff members; whether Mr. Mahmood had fainted during a meeting; whether she had ever brought a witch doctor to the office to drive away bad spirits; whether she had threatened staff with non-renewal of contracts; her making "pejorative" statements about certain nationalities; and whether she ever shouted at and criticized staff.

68. Even if the questions are viewed in the most favorable light, the Tribunal cannot conclude that they were specific and/or comprehensive enough to have put

the Applicant on notice of the actual nature of the allegations contained in the complaints of 23 August 2010 and 8 November 2010. Thus, it stands to reason that since the Applicant was not informed of the precise allegations against her, she was not afforded a proper opportunity to respond as is set out in IOM/29/2005 – FOM/29/2005.

69. There is a minimal requirement of fairness that an investigating panel must exhibit in the conduct of an investigation. This requires a fair and proper questioning of witnesses and the accused staff member; consideration of facts that may tend to inculcate and exculpate the accused staff member; justifying why witnesses as well as the accused staff member are to be believed or not; and justifying its conclusions in a rational manner.

70. The Tribunal has to ask itself whether the manner in which the investigators reached their conclusion constituted gross procedural irregularities. The Tribunal is not here passing value judgments on the inferences or conclusions reached by the investigators as due deference must be paid to the Investigators who saw and questioned the witnesses. The Tribunal has to the duty to look at the approach taken from a procedural standpoint by the Investigation Team in their assessment of the credibility of the witnesses they heard.

71. A perusal of the report of the Investigation Team indicates that the Investigators recited the testimonies of all the witnesses that tended to establish the allegations leveled against the Applicant and came up with general conclusions. The credibility rests on the number of witnesses as opposed to the few who had almost nothing to say against the Applicant. Quantity rather than quality seems to have been the yardstick used by the Investigators.

72. The Investigation Team did not explain how and why it rejected the testimony of the Applicant the more so as the latter had told the Investigators that individuals like Mr. Mahmood, Ms. Sommet-Lange, Ms. BM, and Mr. Njagi were always making statements against Rwandese.

73. The Investigation Team found that the allegations had been made out on the number of testimonies gathered without explaining or discussing how and why

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own

allegations made against her by the witnesses and the findings of the Investigation Team and tries to explain a number of ancillary matters raised in the report.

83. The Tribunal finds that sending the Investigation Team Report to the Applicant was not the same as charging her with misconduct. She was therefore never apprised of the precise charges against her. Thus, this Tribunal, based on the reasoning and conclusions in the *Rangel* decision, also disregards the findings of the Investigation Team.

84. Additionally, the Tribunal finds that the Respondent failed to comply with paragraph 6(b) of ST/AI/371, which states that if the case is to be pursued after an investigation, the staff member will be provided with “a copy of the documentary evidence of the alleged misconduct” and paragraph 48 of IOM/29/2005 – FOM/29/2005, which states that: “All documentary evidence on which the allegations are based will be shared with the staff member”. In this respect, the Tribunal notes that when the Applicant was charged with misconduct, she was not

Conclusion

86. In

Judgment

93. The finding of misconduct against the Applicant is nullified.
94. The decision to impose the disciplinary measures of a written censure and a fine of one month's net base salary on the Applicant is rescinded.
95. The Respondent is ordered to:
- a. Reimburse the Applicant for the fine of one month's net base salary that was deducted from her salary; and
 - b. Remove the written censure from the Applicant's official status file.

(Signed)

Judge Vinod Boolell

Dated this 22nd day of December 2015

Entered in the Register on this 22nd day of December 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi