Introduction

1. The factual background in this case is set out in considerable detail in my principal judgment of 6 January 2010 in which I upheld the applicant's appeal and rescinded a decision of the Under-Secretary-General of the Department for General Assembly and Conference Management (Mr Shaaban). My judgment raised two distinct matters of concern in respect of which I made adverse judgments of Mr Shaaban's conduct. The first of these was the way in which he considered the applicant's complaint about the conduct of a member of an interviewing panel and the second was the way in which he gave evidence in the Tribunal. It went on to state—

> [46] It follows from what I have already said about Mr Shaaban's conduct that the question arises as to whether it should be referred to the Secretary-General for possible action to enforce accountability pursuant to article 10.8 of the Statute of the Tribunal. In fairness such a decision should not be made without hearing from the parties ... It might well be appropriate that Mr Shaaban, whose interests are directly affected, should be separately represented, and I will give favourable consideration to any application made by him to this effect.

2. Having regard to its general importance and art 10.8 of the Statute not having been so far the subject of consideration by the Tribunal, I decided that the Staff Union should also have the opportunity to make submissions on the matter. Article 10.8 is as follows—

> The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

3. Another matter on which I sought the assistance of counsel concerned the form of the order requiring the respondent to arrange to have the applicant's complaint properly considered, having regard to the supercession of ST/AI/371 by ST/SGB/2009/7, in particular, whether it was appropriate to utilise the provisions of sec 2.2 of the former instrument.

on behalf of the Organization. I point this out, not because there is any impropriety in the submission, but to explain its seemingly odd appearance. Should the case be referred, it will be necessary for the Secretary-General to consider it in his capacity of chief executive officer of the Organization and not as its representative.)

7. Thirdly, since it is proposed to appeal my decision to the UN Appeals Tribunal, counsel for the respondent submitted I should defer consideration of referral until after the appeal had been determined since, if it were successful, the question of referral would be moot. It was also submitted that referral of the case did not fetter in any way the Secretary-General's discretion to determine what action should be taken and that it was not inherent or implicit in the Dispute Tribunal's power to refer to require the Secretary-General to inform it as to the action taken pursuant to the referral.

8. Counsel for the respondent also submitted that sec 2 of ST/AI/371 had not been implicitly repealed by ST/SGB/2009/7 and, accordingly, it was appropriate to require the reconsideration of the applicant's complaint in accordance with the procedure mandated by that provision.

9. The applicant made no submissions.

10. On 13 January 2010 an e-mail was sent to Mr Shaaban stating—

> As your interests are directly affected, his Honour, Judge Adams has directed [the Registry] to inform you that if you wish to submit an application to the Tribunal on this matter and/or to be represented during the proceedings, any such application should be made to the UNDT Registry by Wednesday, 20 January 2010.

On 18 January 2010 I was informed, however, by counsel for the respondent—

> The respondent also respectfully informs the Tribunal that Mr Shaaban has been advised not to make any submission on the accountability issue or to take part in the hearing proposed for 1 February 2010.

11. Not surprisingly perhaps, Mr Shaaban was not present either personally or by counsel at the hearing. It appears to have been thought by counsel for the respondent that somehow the information concerning the legal advice given to Mr Shaaban was relevant to the issue whether a referral should be made at all or the question deferred

until after the foreshadowed appeal is determined. It seems to me that it is entirely irrelevant. It would have been appropriate, as a matter of courtesy though not of legal necessity, to have informed the Tribunal of the fact, if it were the fact, that Mr Shaaban declined to take advantage of the opportunity to appear, either personally or by counsel, or to make submissions. Whether this was done pursuant to legal advice or not was immaterial. My direction in relation to his appearance made it clear that it was not mandatory and whether he appeared was a question entirely for him to decide. Be that as it may, the disclosure of the advice tendered to him raised a matter of concern relating to the professional conduct of counsel and the duties of counsel to the Tribunal which, in my view, is important to clarify and which I discuss at the end of this judgment.

12. The hearing was conducted on 3 February 2010. Mr Shaaban was not present either personally or by counsel. The applicant was represented, as was the respondent. Also present, at my direction, was the lawyer from the Office of Legal Affairs who had advised Mr Shaaban not to attend or be represented by counsel. It became apparent that there was a risk, albeit a small one, that Mr Shaaban may not have appreciated that I was concerned with his conduct in relation to both the impugned decision and as a witness. For obvious reasons, I did not wish to question the lawyer (who had given him advice) as to this matter. Accordingly, I gave Mr Shaaban a further opportunity to make a submission (this time, in writing) on the question of referral, bringing specifically to his attention the issue of “referring 7s th3 0 bciym382202

In my view, Mr Shaaban had sufficient particulars to enable him to make an adequate submission on the referral issue. In substance and effect, he has declined to take advantage of the now two opportunities he has had to make that submission. Justice does not require him to be given and I do not intend to give him yet a third opportunity. This litigation must come to an end.

13. The Staff Union informed the Tribunal that it did not wish to be heard on the application of art 10.8. It "agreed", however, that the Tribunal should refer the case to the Secretary-General in accordance with that provision.

Should the case be referred to the Secretary-General?

14. The mere fact that the Secretary-General has power to independently consider whether any staff member should be held accountable for their actions cannot mean that the Tribunal should not exercise its functions under art 10.8 since this would have the consequence that no referral would ever be made and the article is pointless. Nor can the fact that the Secretary-General might in any particular case discover additional evidence that is relevant to the question whether the impugned conduct occurred and, if so, what should be done in respect of it, justify not referring an appropriate case. So far as the tendered e-mail is concerned, it does not suggest in any way that Mr Shaaban either interviewed or sought to interview SA. Nor does it, in the slightest degree, compromise any finding of fact expiath quest[

in character, to the attention of officials charged with considering what action should be taken in respect of that kind of matter, usually the Attorney General and sometimes the Director of Public Prosecutions or similar officer. I do not think that it can be doubted that, even if it were not for art 10.8, it would be proper for a judge of the Tribunal to bring conduct warranting consideration and, possibly, action by the Secretary-General to his or her attention. This would include, but is not limited to, conduct that indicated misconduct or some other inappropriate behaviour. I do not accept the submission made by counsel for the respondent that art 10.8 is limited to those cases in which the Secretary-General might take action pursuant to staff rule 10.1(b) to obtain reimbursement. All staff members of the Organization are ultimately accountable to the Secretary-General for the performance of their duties as well as any other conduct in respect of which either a disciplinary or a non-disciplinary measure may be appropriate. There is nothing in the provision that suggests the "accountability" of the staff member is not to be understood in its ordinary English meaning, let alone limited to financial reimbursement. If this were intended, it would have been a simple matter to indicate so.

16. As to deferring consideration of referral, there may be some cases in which the respondent can appeal in respect of one or other aspect of a judgment of the Tribunal and, in that event, it could be useful or convenient for the Tribunal to defer considering other aspects of the case pending determination of the appeal. I am doubtful that a case can be split in this way. One of the obvious objections to such a procedure is that there might conceivably be two or more appeals in respect of the one case leading to very substantial delays, especially given the time limit for appealing, the automatic stay resulting from an appeal and the fact that the Appeals Tribunal does not sit continuously. Another more fundamental objection is that referral is not dependent upon whether or not the impugned administrative decision is found to be wrong. Of course, if it is not wrong, the question of reimbursement will not arise but, even if the decision be correct or, perhaps, not receivable it might nevertheless be that the evidence in the case will justify referral to the Secretary-General of conduct of the decision-maker that has come to light or, indeed, conduct of someone else that should be brought to the attention of the Secretary-General. As

mere fact that the matter might otherwise come to the attention of and be considered by the Secretary-General or executive head must be irrelevant.

19. The case raises two separate issues, the first and much less serious concerning the way in which Mr Shaaban dealt with the applicant's complaint and the second involves the far more serious question of his conduct before the Tribunal. So far as the first issue is concerned, it is clear that Mr Shaaban is responsible only to the Secretary-General in respect of the exercise of his responsibilities, there being no intermediate supervising official. This would suggest that any consideration at all within the Organization of whether any action should be taken in respect of his conduct should be taken at a high level, possibly even by the Secretary-General personally, since, in the absence of any intervening supervisor, Mr Shaaban as an Under-Secretary-General is, at all events, directly accountable to the Secretary-General in respect of the performance of his duties. This factor mediates in favour of referral. As to its importance, it must be borne in mind that the decision whether to institute a preliminary investigation was the direct responsibility of Mr Shaaban as head of the Department by virtue of the specific provisions of sec 2 of ST/AI/371. To my mind, this strongly suggests that the decision must be regarded as an important one. Such a decision could never be regarded as trivial. Furthermore, Mr Shaaban's conduct was not a genuine attempt to fulfil his responsibilities that happened to be legally flawed and hence require rescission of his decision. Mistaken decisions are part of the human condition and no system of administration can rationally expect every decision to be right, let alone optimal. Mr Shaaban's conduct is described in detail in the principal judgment and does not need to be repeated here. In my view, it raises serious questions about his readiness to take offence and his willingness, if not his ability, to perform his responsibilities when his *amour-propre* has been offended, as to justify referral to the Secretary-General, despite the relative unimportance (compared to his other responsibilities) of the matters disclosed in the applicant's complaint.

20. By far the more troubling question concerns the way in which Mr Shaaban conducted himself before the Tribunal. In my principal judgment, I said—

I regret that I have concluded that Mr Shaaban is an unreliable witness in respect of every important issue of fact that is not independently corroborated, although I do not go so far, I should say in fairness, as to conclude that he was actively dishonest. Having paid close attention to his testimony at the time and carefully reread the transcript I must

action and making the appropriate decisions. Of course, I know nothing of the actual situation so far as Mr Shaaban and the Secretary-General are concerned: these comments are designed to elucidate the nature of the Secretary-General's responsibilities.

22. Before giving evidence to the Tribunal, Mr Shaaban undertook in solemn

fairness are sufficiently satisfied if (as here) he or she is given an opportunity to contend in the Tribunal that no referral should occur and, in the Chapter X proceedings, to bring any new matter into account.

Contempt

27. Given my findings in respect of Mr Shaaban's evidence, the question arises whether he should be dealt with for contempt pursuant to the inherent jurisdiction of the Tribunal. In the result, I have decided not to institute such proceedings. Because of the importance of this question, however, it is desirable that I should explain why. The first matter of importance, of course, is whether the Tribunal has the power to deal with relevant wrongdoing by contempt, although jurisdiction to do so is not explicitly conferred by its Statute. This question has been considered by several

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evidence at all is. It is unnecessary to enter into the accident of history that made perjury a crime *sui generis*, which reflected the peculiar English attitude about the taking of an oath. There can be no question that attempting to influence a witness to lie is a contempt (see *Vujin*) and I do not see a substantial difference between the wrongdoing involved in this misconduct and the act of lying itself. To my mind, the giving of untrue testimony, indifferent as to whether it is true or not, is substantially the same. It is conduct calculated to obstruct, prejudice or abuse the administration of justice by the Tribunal. In the Tribunal, a witness solemnly undertakes to tell the truth, the whole truth and nothing but the truth. In my view, the wilful breach of this undertaking is a contempt of the Tribunal.

34. It follows from possession of the jurisdiction to deal with a staff member for contempt that the Tribunal must have the power to punish where that contempt is found. This jurisdiction is not related to, nor is it concerned with, that exercised by the Secretary-General under Chapter X of ST/SGB/2009/7 for misconduct, although there can be no doubt (as I have already suggested) that wilful interference with or obstruction of the processes of the Tribunal, will also amount to misconduct and, in many cases, serious misconduct.

35. Before the Tribunal could deal with a staff member by way of contempt, it would be necessary to charge him or her with contempt and hold a hearing to determine the facts. It is

approval of the General Assembly. I am hesitant to adopt a procedure *ad hoc*

merely a list of disciplinary and non-disciplinary measures and says nothing about

43. Under art 10.3, the Secretary-General *may* consider imposing a disciplinary or non-disciplinary measure on the staff member (ie, institute a "disciplinary process"), where the investigation merely *indicates* that misconduct *may* have occurred. The use of the italicised words suggests an inappropriate provisionality that expresses not only a formula for uncertainty but confers a discretion which is so indeterminate as to encourage arbitrary and capricious decision-making. I think that one would be driven to imply the requirement of first finding that the misconduct actually rather than possibly occurred, because of the necessary logic of the process to a lawyer at least, though perhaps not to management, but it is a surprising and regrettable oversight that there is no explicit provision in this regard though, perhaps, rule 10.1(a) might be called in aid.

44. Moreover, the process by which such a finding would be made is not provided for, except the requirement of an investigation. What are the responsibilities of the Secretary-General in relation to the investigation – is he bound by the findings of primary fact, the inferences drawn by the investigators, their findings of law or their views of the proper, useful or convenient scope of the investigation? Nor is there an explicit obligation to document the process by which the Secretary-General reaches his or her conclusion (though this, too, might be implied). Although the staff member must be given the opportunity to respond to the charges, there is no express requirement that the response should be taken into account, nor what should happen if new facts are disclosed. Is the applicant entitled to see the report, interview the witnesses or request the investigators to obtain other information (and, if not, why not)? Nor does the rule contemplate, at least explicitly, that neither a disciplinary nor a non-disciplinary measure might be imposed. Even the right of appeal to the Tribunal is confined to the imposition of the disciplinary or non-disciplinary

table by counsel for the respondent that the administrative instruction designed to provide for the relevant procedural steps *is still being drafted* although the new rule has been in operation since 1 July 2009, and in contemplation for some years before that. Good intentions, though no doubt better than bad ones, are without legal significance.

46. Moreover, whether a subordinate instrument is legally capable of qualifying the unqualified powers conferred by a superior instrument is somewhat doubtful although it may be that by practice in the UN the administrative instruction is a legally binding expression of the mode by which the Secretary-General intends to exercise the discretions reposed in him or

investigative process. The problem here is that the preliminary investigation provided for in sec 2 of ST/AI/371 is mandatory whilst a discretionary procedure (on the hypothesis that one were instituted) could not be. Thus, the only candidate for possible survival is the commencement of the investigative process by a determination that "there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed", disregarding the fact that the only investigative process triggered by this finding is a preliminary one and meaning "investigative process" in its widest sense.

49. The most obvious difference between the two regimes for instituting an investigation (disregarding the difference between a preliminary investigation which, in certain events, leads to a proceeding before a hopefully independent tribunal and a final investigation with no such interposition) is that the older is objective and mandatory and the later discretionary and permissive. This is such a substantial difference as to lead to the necessary implication that the former process is repealed. Taking a broader view, the requirement for "reason to believe etc" is so much an integral part, not only of the scheme in sec 2, but of the entire scheme of the administrative instruction that it cannot survive alone. Accordingly, I conclude that the whole of ST/AI/371 has been implicitly repealed by ST/SGB/2009/7 as necessarily inconsistent with the latter instrument.

50. The requirement in sec 2 that there be "reason to believe" that relevant conduct occurred triggered only a preliminary investigation. The matter then went through a procedure which, summary dismissal aside, resulted in an independent assessment by the JDC, if it were decided to proceed against the staff member. Even though the JDC was able only to advise, the hearing before the JDC was a very substantial right since it involved an independent and hopefully critical assessment of the investigation and the report and, if the JDC thought it appropriate, gave a staff member an opportunity personally or through counsel to test the evidence, request other witnesses be called, present other evidence and to testify. The removal of this process is obviously of the greatest significance from the sta

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personal conduct in giving evidence. In respect of the potential referral, his interest as to *both* categories of conduct was a *personal* one since the referral involved his personal and not official accountability. This was all the more obvious, of course, in the case of his evidence. A witness in the Tribunal gives evidence in a *personal* capacity, although he or she might be an official of the Organization, and it matters not whether the official conduct of that witness is in question or the witness is simply disclosing relevant facts. The obligation to tell the truth, the whole truth and nothing but the truth is a *personal*, not an official, obligation although it is also a contractual obligation, breach of which may well constitute misconduct within the legal instruments embodied in the contract of employment.

54. The function of the Office of Legal Affairs with respect to advising the Secretary-General and other officials of the Organization does not comprehend the giving of legal advice in respect of their personal interests, but only in respect of their official duties, rights and obligations. The

Informing the Tribunal on outcome of referral

56. As has been mentioned, the decision of the Secretary-General as to what action he is to take on the referral is a matter for him, although, of course, it must be made properly, and for the purposes for which his authority is conferred. His discretion cannot be capriciously or arbitrarily exercised. In respect of a referral in the ordinary course, the Tribunal has no interest in the outcome and the matter not only can but should be left to Secretary-General to act appropriately. The referral in respect of Mr Shaaban's evidence is not a referral in the ordinary course but concerns conduct which undermines the integrity of the internal justice system and the processes of the Tribunal itself. As such, it is a mal has6(the i4 2e i4 2e nal ie)]rnot s no in

3. The case is referred to the Secretary-General under article 10.8 of the Statute of the Tribunal for the purpose of considering—

(a) what action should be taken in respect of the conduct of Mr Shaaban in dealing with the complaints made by the applicant; and

(b) what action should be taken in respect of the conduct of Mr Shaaban in giving evidence to the Tribunal.

(*Signed*)

Judge Michael Adams

Dated this 22nd day of February 2010

Entered in the Register on this 22nd day of February 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York