Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2009/85
Judgment No.:	UNDT/2010/058
Date:	7 April 2010
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

MOLARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Edward P. Flaherty

Counsel for respondent:
Kong Leong Toh, UNOPS

Introduction

1. On 15 October 2009, through her counsel, the Applicant applied to the United Nations Dispute Tribunal challenging an administrative decision in the form of a disciplinary measure, viz her separation from service as of 20 August 2009 with notice and separation indemnity.

2. The Applicant sought:

a) Immediate reinstatement with retroactive effect;

b) US$ 500,000 in damages for moral injury;

c) Interest of 8% per annum on all such sums as the Tribunal might decide to award her;

d) US$ 25,000 for attorneys' fees incurred;

e) Such other relief as the Tribunal might deem fair.

Facts

3. The Applicant entered the service of the United Nations Office for Project Support (UNOPS) in Copenhagen, Denmark, on 1 July 2007 as an L-5 Senior Procurement Specialist on a one-year technical assistance project contract (200 series under the Staff Rules then in force).

4. On 27 June 2008, the Applicant submitted to the Danish Ministry of Foreign Affairs, through UNOPS, a number of cash-till receipts and printouts relating to purchases including food made in August 2007, December 2007 and February 2008, with a view to the reimbursement of value-added tax (VAT) to which her diplomatic status entitled her. By signing the reimbursement request form, the Applicant certified that the items purchased had been bought for official reasons or for her personal use.

5. On 10 July 2008, the Ministry asked UNOPS to have the Applicant submit her bank statements for the months of August 2007, December 2007 and February 2008. The Applicant refused to supply her bank statements and asked for the Ministry to send her back, with a written explanation, the receipts that were causing a problem. After several exchanges of e-mails between UNOPS and the Applicant and between UNOPS and the Ministry,

the Ministry indicated on 11 July 2008 that it needed the Applicant's bank statements for an audit to combat fraud.

6. By e-mail dated 12 July 2008, the Applicant, through UNOPS, requested the Ministry to return to her the receipts in connection with which a bank statement was to be furnished, explaining that she needed time because she and her husband had several bank accounts and cards, and she needed to cross-check with payments made to her housekeeper.

7. On 14 July 2008, the Ministry informed UNOPS that the problematic receipts related to purchases of food at two supermarkets, Netto and SuperBest. That same day, UNOPS passed the information on to the Applicant, who again asked for the receipts to be returned to her. UNOPS replied that she did not need the receipts: all she needed to do was look in her bank statements for payments to Netto and SuperBest. The Applicant insisted on the return of the receipts, explaining that she needed not only to find payments to Netto and SuperBest but also to check when she had paid her housekeeper sums of money back in cash.

8. On 15 July 2008, the Ministry sent UNOPS copies of the contested Netto and SuperBest receipts, which UNOPS forwarded to the Applicant.

9. By e-mail dated 19 August 2008 addressed to UNOPS, the Applicant explained that because of her busy schedule she relied a good deal on other people to help her with household tasks, and the Netto and SuperBest receipts she had submitted for reimbursement were not related to purchases made with her bank card but to shopping done for her by third parties, whom she had repaid in cash. As evidence she submitted a statement from her bank about cash withdrawals from her account, in August 2007, December 2007 and February 2008, of amounts larger than those covered by the receipts. She added that she was unable to provide further information or spend any more time on the matter; if the Ministry was not satisfied with her explanations it should ignore the receipts in question.

10. In a second e-mail addressed to UNOPS on 20 August 2008, the Applicant added, for the Ministry’s benefit, that she had misunderstood the rules on VAT reimbursement and now realised that VAT could not be

reclaimed on purchases made on her behalf by people who did not have diplomatic status. She asked for the Netto and SuperBest receipts to be removed from her application for reimbursement dated 27 June 2008.

11. At a meeting on 17 September 2008, the Chief of Protocol at the Danish Ministry of Foreign Affairs handed the Executive Director of UNOPS a memorandum, "Pro memoria", expressing the Ministry's concerns over a number of receipts submitted by the Applicant in support of requests for reimbursement of VAT. The memorandum emphasised the unusual aspects of the Applicant's behaviour, the volume of purchases made, and the fact that several different bank cards had been used for payment.

12. On 24 September 2008, the Executive Director of UNOPS decided to establish a panel to conduct a preliminary inquiry into allegations of professional misconduct on the part of the Applicant pursuant to UNOPS/ADM/97/01-A, "Disciplinary and other measures relating to misconduct of staff while in the service of UNOPS".

13. The Applicant was notified that same day of the composition of the panel investigating her requests for reimbursement of VAT, and was invited to meet the panel on 26 September 2008.

14. The panel delivered its report to the Executive Director of UNOPS on 8 October 2008. Its conclusions included the following:

> (a) The 42 receipts and cash-till printouts submitted by the Applicant for reimbursement of VAT came from two supermarkets, Netto and SuperBest, in the same district of Copenhagen. Three of the 42 purchases had been paid for in cash; the other 39 had been settled using 39 different bank cards. One of those 39 transactions had been cancelled. All the purchases had been made over very short periods in August 2007, December 2007 and February 2008; for example, 13 purchases had been made on 20 February 2008 between 12.37 p.m. and 5.57 p.m. in the same supermarket. There were marks on some of the receipts suggesting that they had been walked on, and others were very wrinkled;

(b) The items purchased were basic foodstuffs such as milk, bread, fruit and vegetables. Nine different bank cards had been used on a single day to buy a total of 19 litres of milk of seven different brands and four different levels of fat content, for example;

(c) At her meeting with the panel, the Applicant claimed that the shopping had been done for her by other people (family members, friends and others) for social gatherings at her home. Despite several requests from the panel and assurances about the use to which the information would be put, the Applicant nevertheless refused to indicate who had attended those gatherings or who owned the 39 bank cards, invoking supposed legal constraints;

(d) The kinds and quantities of items purchased suggested everyday shopping; they did not fit the notion of purchases made by guests for social gatherings, as the Applicant claimed;

(e) The suggestion that the purchases had been made for her by the Applicant's friends and family was not plausible, given the facts as described above and the Applicant's failure to produce evidence or credible explanations;

(f) The suggestion that the purchases had been made by the Applicant's friends and family for themselves was not plausible, either, given that the 39 purchases had been made with 39 different bank cards at the same places and over a very short period of time;

(g) The only plausible explanation, given the large number of bank cards used, the facts as described above and the Applicant's failure to produce evidence to the contrary or credible explanations, was that the purchases had been made, on their own account, by persons unknown to the Applicant.

15. By e-mail dated 15 November 2008, the Executive Director of UNOPS notified the Applicant of the charges of professional misconduct levelled against her, namely that she had not abided by the standards of conduct expected of an international civil servant in submitting for

reimbursement of VAT, on 27 June 2008, receipts for purchases which she had not made or asked others to make for her, and had thus attempted fraud.

16. On 10 December 2008, the Applicant submitted a memorandum responding to the charges of professional misconduct. She denied any offence and complained of many violations of her right to due process. She also submitted:

> (a) A statement dated 2 December 2008 from a renter of stereo equipment attesting to the fact that the Applicant had rented such equipment around the periods when she was supposed to have hosted social gatherings;
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> (b) Statements dated 8 December 2008 from a Danish accountant to the effect that: (i) the food mentioned on the receipts submitted by the Applicant could have been bought for celebratory dinners and other social gatherings, and (ii) the rules governing reimbursement of VAT did not forbid a diplomat to ask others to do shopping on his/her behalf;
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> (c) Legal opinions dated 9 December from a Danish attorney to the effect that: (i) the rules governing reimbursement of VAT did not forbid a diplomat to ask others to do shopping on his/her behalf, and (ii) sensitive personal information such as the numbers of bank cards or accounts and the names of people attending gatherings of friends could not be divulged without objective reason and the consent of the individuals concerned.

17. On 2 January 2009, the General Counsel, UNOPS, informed the Secretary of the joint Disciplinary Committee (DC) for UNOPS, the United Nations Development Programme (UNDP) and the United Nations Fund for Population Activities (UNFPA) in New York that it was the intention of UNOPS to refer the Applicant's case to DC. He asked how, practically, that should be done.

18. By memorandum dated 13 January 2009, the Executive Director of UNOPS formally referred the Applicant's case to DC. Pointing out that there appeared to be enough evidence to warrant summary dismissal (so that

referral to DC was not required), he explained that he had decided to refer the matter to DC nonetheless, in part so as to allow the Applicant to reconsider her decision not to disclose certain information that it would have been in her interests to divulge.

19. On 19 January 2009, DC acknowledged receipt of the case file and notified the Respondent that a copy would be transmitted to the Applicant pursuant to the rules in force.

20. On 19 February 2009, counsel for the Applicant wrote to the General Counsel, UNOPS, asking for the charges against her to be withdrawn on the grounds that the responsibility lay with the Danish judicial authorities, not DC, to determine whether the Applicant had broken Danish law.

21. On 13 March 2009, the General Counsel, UNOPS, replied to counsel for the Applicant that it was not necessary for UNOPS or DC to pronounce on the question whether the Applicant had broken Danish law; the question was whether the Applicant was guilty of professional misconduct within the meaning of administrative instruction ST/AI/371 and, in particular, whether she had made a false declaration in connection with a United Nations benefit and whether her conduct brought discredit upon the United Nations. The General Counsel reiterated that the Applicant's refusal to furnish testimony from people who had supposedly made purchases on her behalf lent little credibility to her explanations.

22. On 30 March 2009, the Applicant submitted her response to DC. She denied any offence and complained of numerous violations of her right to due process.

23. By e-mail dated 24 April 2009, the General Counsel, UNOPS, informed the Applicant that UNOPS was prepared to interview, in strict confidence, the people who had supposedly made purchases on her behalf and would undertake not to disclose their identities or the information they divulged to the Danish authorities. He encouraged the Applicant to disclose the identities of the people concerned, in her own interests; otherwise he would have to continue with the proceedings instituted before DC.

24. By e-mail dated 28 April 2009, the Applicant replied to the General Counsel, UNOPS, regretting that he had not taken up some matters that she had previously raised, complaining of violations of her right to due process and indicating that she had decided to await the outcome of the disciplinary proceedings.

25. On 18 May 2009, the Respondent submitted to DC his rejoinder to the Applicant's response, making it clear that the charge against the Applicant was not that she had broken Danish law but that she had submitted cash-till printouts that she knew were not hers and did not belong to anyone who had shopped for her or on her behalf, falsely certifying that they entitled her to reimbursement of VAT by the Danish authorities.

26. The exchange of memoranda then continued as follows: repeat of earlier statement by the Applicant, 1 June 2009; comments by the Respondent, 4 June 2009; observations by the Applicant, 8 June 2009; further comments by the Respondent, 9 June 2009; and further observations by the Applicant, 10 June 2009.

27. On 25 June 2009, DC delivered its report to the Executive Director of UNOPS. It concluded unanimously that:

> (a) the Applicant had been afforded due process;
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> (b) the Administration had made a *prima facie* case of misconduct against the Applicant;
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> (c) there was evidence showing that the Applicant had falsely certified store receipts as being eligible for tax reimbursement. The evidence also went to show that the Applicant's conduct fell short of the standard of integrity expected of an international civil servant;
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> (d) the Applicant failed to provide countervailing evidence to disprove the charges;
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> (e) the Applicant's wrongdoing was serious, and warranted a disciplinary measure.

DC unanimously recommended separation of the Applicant from service with one month's notice and payment of termination indemnity.

28. At a meeting on 7 July 2009, the Executive Director of UNOPS is said to have informed the Applicant of the DC recommendation and offered her an opportunity to escape the disciplinary measure if she would disclose the names and bank-card numbers of the people who had supposedly made purchases on her behalf. The Applicant is said to have requested, and the Executive Director to have refused to give her, a full, dated and signed copy of the memorandum "Pro memoria" submitted by the Danish Ministry of Foreign Affairs to UNOPS in September 2008 and a copy of the minute of the meeting between the Ministry and the Executive Director held on 17 September 2008.

29. On 16 July 2009, the Applicant informed UNOPS that, given the lack of clarity regarding the legal framework of the investigation and the disciplinary proceedings, she was unable to disclose the names and bank-card numbers requested.

30. By letter dated 17 July 2009, the Executive Director of UNOPS transmitted to the Applicant a copy of the DC report and told her that he had decided to accept the recommendation to separate her from service with one month's notice and payment of termination indemnity.

31. By e-mail dated 15 October 2009, the Applicant, through counsel, filed an application before UNDT challenging the aforementioned disciplinary measure and requesting an extension of the deadlines - which the Tribunal granted - to enable her to submit an application in good and due form.

32. On 6 November 2009, counsel for the Applicant submitted an application in good and due form.

33. On 18 January 2010, having sought and obtained from the Tribunal an extension of the deadlines, the Respondent submitted his reply to the application.

34. On 19 February 2010, having sought and obtained from the Tribunal an extension of the deadlines, counsel for the Applicant submitted observations on the Respondent's reply. He also forwarded to the Tribunal 16 statements from "friends and colleagues" of the Applicant attesting to

having done shopping for her for social gatherings; the names and signatures of the individuals concerned had, however, been redacted, and before disclosing them the Applicant demanded assurances from the Tribunal that they would not be divulged to UNOPS or the Danish authorities.

35. That same day the Tribunal Registrar notified the parties that the judge dealing with the case had decided to conduct a hearing, in French, on 24 March 2010.

36. By letter dated 26 February 2010, counsel for the Applicant objected to the holding of the hearing in French on the grounds that assessments of the credibility of the Applicant, who would testify in English, would be adversely affected. Counsel also asked the Tribunal for assurances that the identities of those who had made statements in support of the Applicant would be protected, and for discovery of a number of documents including a full, dated and signed copy of the memorandum "Pro Memoria" submitted by the Danish Ministry of Foreign Affairs to UNOPS in September 2008, and a copy of the minute of the 17 September 2008 meeting between the Ministry and the Executive Director of UNOPS.

37. By letter dated 1 March 2010, the Tribunal Registrar notified the Applicant that the judge had decided to maintain a hearing in French, and not to order discovery of the documents requested. The Tribunal reminded the Applicant that the onus was on her to furnish proof of what she alleged, including evidence that she regarded as confidential; it would be up to the Tribunal to determine whether the evidence submitted should remain confidential.

38. On 12 March 2010, counsel for the Applicant forwarded to the Tribunal statements, this time not redacted, by the 16 individuals who attested to doing shopping for the Applicant for social gatherings. Three of the statements had been notarized, viz. those of the Applicant's husband and two friends who had paid cash for their purchases. The Applicant requested the Tribunal to consider those attestations in camera, or to disclose them to the Respondent only subject to strict confidentiality.

39. By letter dated 17 March 2010, the Tribunal asked the Applicant to provide copies of the bank cards (or bank statements indicating the bank card numbers) used by third parties to make purchases on her behalf. It also notified her of its decision not to disclose the attestations to the Respondent, at least for the time being.

40. On 23 March, in response to the above request, counsel for the Applicant submitted to the Tribunal: (i) a notarized statement by the Applicant's mother-in-law attesting to having done some shopping for the Applicant on 15 December 2007, and copies of her bank card and the related receipt and cash-till printout submitted by the Applicant to the Ministry; and (ii) a bank statement belonging to the Applicant's husband confirming an outlay made on 24 August 2007, and the related receipt and cash-till printout. The Applicant repeated her request to the Tribunal to consider those documents in camera or to disclose them to the Respondent only subject to strict confidentiality. In that letter, counsel also drew the Tribunal's attention to a statement made by the Respondent in his response dated 18 January 2010, namely that he was prepared to withdraw the decision at issue if two of the Applicant's supposed friends would appear in person to back up her story.

41. On 24 March 2010, the Tribunal held a hearing which was attended in person by counsel for the Applicant, the Applicant, and counsel for the Respondent. During the hearing, the Respondent indicated that he was ready to reverse his decision provided that he could talk to at least two of the Applicant's supposed friends, and was prepared to divulge no information about the identities of those individuals to the Danish authorities. The judge told the Respondent that the proofs of payment furnished by the Applicant related to one purchase by her husband and another by her mother-in-law. The Respondent indicated that that was not sufficient for him to reverse his decision. The Applicant indicated that she had no further information to disclose about the individuals who had supposedly done shopping for her. The hearing proceeded to consider the parties' contentions.

Parties' contentions

42. The Applicant's contentions are:

a. That the conduct for which she was separated did not constitute professional misconduct;

b. That the Respondent had not proved her guilt beyond reasonable doubt, and the decision at issue was therefore null and void;

c. That the Respondent had not given her the benefit of the doubt during the course of the proceedings;

d. That the decision to separate her from service was tainted by such factual errors, mistaken conclusions and errors of law as to justify granting the Applicant all her pleas;

e. That the disciplinary measure imposed upon her was grossly disproportionate to the misconduct alleged (assuming that the act alleged had been proven beyond all reasonable doubt, which was not the case):

f. That the Respondent had not produced the full text of the memorandum submitted in September 2008 by the Danish Ministry of Foreign Affairs to UNOPS, or the minute of the meeting between the Ministry and the Executive Director of UNOPS. The Respondent had also made a number of misrepresentations during the internal proceedings. In so doing, he had gravely infringed the Applicant's right to defend herself, and that in itself justified the rescission of the decision at issue;

g. That the decision to separate the Applicant from service was taken on instructions from the Danish Government, which had unlawfully intervened and interfered with the disciplinary proceedings, thus rendering the decision null and void.

43. The Respondent's contentions are:

a. The charge against the Applicant is not that she broke Danish law on VAT reimbursement but that she submitted receipts and cash-

till printouts which she knew did not belong to her or to individuals who had done shopping for her; and that she untruthfully certified that those receipts and printouts entitled her to reimbursement of VAT. In so doing, she was guilty of professional misconduct within the meaning of administrative instruction ST/AI/371;

b. Given the evidence to hand, the Administration has established a presumption of misconduct on the part of the Applicant. Established jurisprudence holds that the Administration is not required to prove a staff member guilty beyond reasonable doubt, merely to furnish evidence from which it would be reasonable to deduce that misconduct has occurred. Once *prima facie* misconduct is established, the onus is on the staff member to establish his or her innocence by furnishing evidence of his/her own or a satisfactory explanation;

c. In the event, the Applicant's explanations that 39 different people had gone shopping for her (and 15 of them had gone, on the same day, to the same Copenhagen supermarket when there are dozens of supermarkets in the city, and then that 19 litres of milk had been purchased for one social gathering) are simply not credible. Besides this the Applicant, without valid motive and despite repeated assurances from the Respondent that the information would be used in confidence, has refused to divulge the names of the people who supposedly did shopping for her;

d. The decision to separate the applicant from service is not tainted by factual errors, mistaken conclusions or errors of law;

e. The disciplinary measure is not disproportionate to the misconduct in question. Moreover, the United Nations Administrative Tribunal has constantly reaffirmed that the Secretary-General has broad discretion in disciplinary matters;

f. On 15 November 2008 the Respondent forwarded to the Applicant the memorandum submitted to UNOPS in September 2008 by the Danish Ministry of Foreign Affairs. But in any event, that

memorandum and the minute of the meeting between the Ministry and the Executive Director, UNOPS, are not evidence in this case and do not have to be forwarded to the Applicant;

g. The Danish Government was not involved in the disciplinary proceedings.

Considerations

Applicable law, regulations and judgments

44. Chapter X of the Staff Regulations states that the Secretary-General can impose disciplinary measures on any staff member in the event of professional misconduct.

45. Chapter X of the old Staff Rules, which applied at the time when the Applicant submitted the impugned reimbursement claim, defines unsatisfactory conduct leading to disciplinary proceedings and measures 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 relevant administrative issuances or to observe the standards of conduct expected of an international civil servant". It also gives a list of disciplinary measures which the Secretary-General can legally impose on any staff member. The measure imposed on the Applicant appears in that list.

46. Administrative instruction ST/AI/371 of 2 August 1991, "Revised Disciplinary Measures and Procedures", offers guidelines on the application of Chapter X of the Staff Rules then in force. Paragraph 2 of the instruction gives examples of conduct that may give rise to disciplinary measures, such as "misrepresentation or false certification in connection with any United Nations claim or benefit", or "acts or behaviour that would discredit the United Nations".

47. Circular UNOPS/ADM/97/01-A of 22 April 1997, "Disciplinary and other measures relating to misconduct of staff while in the service of UNOPS", also provides guidance on the application of Chapter X of the Staff Rules then in force.

48. Last, the rules of procedure of the UNDP/UNFPA/UNOPS Disciplinary Committee establish the procedure for referral of a disciplinary case to that Committee.

Regularity of proceedings

49. The Tribunal must begin by considering the Applicant's allegations that the investigation procedure and disciplinary proceedings were tainted with irregularities.

50. First, the Applicant claims that the Administration did not respect the Diciplinary Committee's rules of procedure, in particular article 2.1, on two counts: (i) in failing to refer her case to the Committee within one month of receiving her memorandum responding to the charge of professional misconduct; and (ii) inasmuch as the party referring the case to the Committee was the Executive Director of UNOPS, not the General Counsel.

51. While it has been shown that the Applicant's case was referred to the Disciplinary Committee three days later than the one-month deadline provided for in the Committee's rules of procedure, and that the referral was made by the hierarchical superior of the General Counsel, UNOPS, namely the Executive Director of UNOPS, not the General Counsel himself, the Tribunal considers that these facts can in no wise be regarded as material failings in procedure that encroached upon the Applicant's right to a defence or, in consequence, as liable to render the decision at issue unlawful.

52. The Applicant also contends that UNOPS provided her with certain documents relevant to the case only after she had responded to the charges against her and her case had been referred to the Disciplinary Committee. In the absence of clearer indications by the Applicant as to the nature of the documents concerned, the Tribunal cannot pronounce on the alleged procedural flaw.

53. The Applicant further complains that the Respondent never produced the full text of the memorandum "Pro Memoria" submitted by the Danish Ministry of Foreign Affairs to UNOPS in September 2008, or a copy of the minute of the meeting between the Ministry and the Executive Director of

UNOPS, thereby depriving the Applicant of her right to defend herself. The Tribunal observes that the Respondent did give the Applicant a copy of the memorandum on 15 November 2008. As regards the minute of the meeting, the Tribunal is of the opinion that this was of no value to the Applicant in defending herself against the charges she faced. The Tribunal therefore considers that the Applicant had at her disposal all material documents and all the information she needed to prepare her defence.

54. The Applicant contends, moreover, that UNOPS did not notify her of the charges against her before referring the case to the Disciplinary Committee, and modified those charges during the disciplinary proceedings. The facts of the case show the following. On 15 November 2008, the Executive Director of UNOPS told the Applicant what charge was being laid against her. On 13 March 2009, in an e-mail to the person then serving as counsel for the Applicant, the General Counsel, UNOPS, provided further information about the nature of the charges levelled against her. Lastly, on 18 May 2009, in his rejoinder to the Applicant's response to the Disciplinary Committee, the General Counsel, UNOPS, reformulated the charges.

55. Nevertheless, the Tribunal is of the opinion that the slight variations in the formulation of the charges did not deny the Applicant the fundamental right to defend herself. The Applicant had certainly been informed what charge was being laid against her – that she had submitted for reimbursement of VAT receipts for purchases made neither by her nor on her behalf – before the case was referred to the Disciplinary Committee. That point had been sufficiently clearly worded by the Administration from the outset, and it did not vary during the course of the proceedings.

56. Another irregularity brought up by the Applicant concerns the fact that UNOPS reopened the investigation into her in order to consider further allegations, and this is supposedly contrary to UNOPS/ADM/97/01-A. The Tribunal rejects this contention: the Administration cannot ignore fresh facts, whether inculpatory or exculpatory, that come to light after an investigation on the grounds that the investigation is closed. Besides, the

Tribunal finds no explicit or implicit prohibition of this kind in the circular cited.

The onus of proof in disciplinary cases

57. There is consistent jurisprudence from the former United Nations Administrative Tribunal (UNAT) on the question of the onus of proof in disciplinary cases.

58. UNAT held on many occasions that the Respondent is not required to prove beyond reasonable doubt that misconduct has occurred; on the other hand, the onus is on the Respondent to produce sufficient evidence to sustain his conclusions, in other words to establish sufficient facts to permit a reasonable deduction that the law has been broken. Once the Administration has assembled enough evidence to sustain the conclusion that misconduct has occurred, it is up to the staff member to furnish evidence to the contrary or offer a satisfactory explanation of the conduct at issue. (See for example UNAT judgments No. 479, Caine (1990); No. 484, Omosola (1990); No. 850, Patel (1997); No. 1022, Araim (2001); and No. 1050, Ogalle (2002)).

59. This Tribunal has also ruled several times on disciplinary measures applied to staff members. (See for example judgments UNDT/2009/006, Manokhin; UNDT/2009/009, Kouka; UNDT/2010/024, Diakite; UNDT/2010/034, Cabrera & Streb; UNDT/2010/036, Sanwidi; UNDT/2010/041, Liyanarachchige; and UNDT/2010/052, Lutta).

60. Most of these judgments rely on UNAT jurisprudence. Several invoke the principles set forth by UNAT on the questions of the onus of proof and the degree of proof required. Thus the Tribunal has ruled that, in disciplinary matters, the Administration is not required to prove its case beyond reasonable doubt. (See Diakite, Liyanarachchige and Lutta).

61. In the present case, and in the light of the foregoing, the Tribunal sees no reason to depart either from the jurisprudence of the former UNAT or from its own, as outlined above. Hence it rejects the Applicant's contention that the Respondent was under an obligation to prove her guilt beyond all reasonable doubt.

Relevance and legal designation of the Applicant's conduct

62. It is not contested that on 27 June 2008 the Applicant submitted to the Danish Ministry of Foreign Affairs, through UNOPS, for reimbursement of VAT in accordance with her diplomatic status, items including 42 receipts for food purchased in August 2007, December 2007 and February 2008. Neither is it contested that the 42 receipts in question came from two supermarkets in the same district of Copenhagen; nor that three of the purchases were paid for in cash, and the 39 others, with 39 different bank cards; nor that all the purchases were made in short spans of time in August 2007, December 2007 and February 2008 - for instance, 13 purchases paid for with 13 different bank cards at the same supermarket on the same day; nor yet that the purchases were of basic groceries such as milk, bread, fruit and vegetables – including, for instance, a total of 19 litres of milk bought with nine separate bank cards on a single day

63. While the Applicant contends that the purchases at issue were made by third parties on her behalf, the Respondent contends that her explanations are not credible, and stresses that the Applicant has always refused to provide any evidence, such as the identities of those third parties, in support of those explanations.

64. The Applicant has indeed steadfastly refused, during the investigation, during and after the disciplinary proceedings, and even before the Tribunal, to furnish such evidence.

65. After the investigation, during which the Applicant refused to identify the owners of the 39 bank cards used to do shopping on her behalf, the Respondent repeatedly urged her, at different stages of the proceedings, to furnish this crucial evidence, in exchange for which he offered to abandon the proceedings or rescind the decision at issue. For instance: on 24 April 2009, during the disciplinary proceedings, in an e-mail from the General Counsel; on 7 July 2009, after the Disciplinary Committee had recommended separation of the Applicant from service, during a meeting with the Executive Director of UNOPS; on 18 January 2010, in the Respondent's reply to the application; and even at the Tribunal hearing on

24 March 2010. Each time, UNOPS offered the Applicant assurances about the uses to which the information would be put. The Respondent cannot, therefore, be reproached with having judged the Applicant hastily, far less, as she claims, with not having given her the benefit of the doubt.

66. The Tribunal also gave the Applicant an opportunity to furnish evidence of her good faith by disclosing the identities of the third parties who had allegedly gone shopping on her behalf and providing copies of their bank cards for comparison with the receipts submitted. Sixteen attestations were submitted, but copies of the bank cards and bank statements were not, apart from those of the Applicant's husband and mother-in-law. But the fact that two of the purchases under consideration were indeed made by members of the Applicant's family certainly does not establish that the remaining 40 purchases were made by third parties on the Applicant's behalf.

67. As part of her explanation for her repeated refusals to disclose the identities of the third parties who allegedly went shopping for her, the Applicant cited fears on the part of the individuals concerned that they might face prosecution in Denmark, and the inadequate safeguards against such an eventuality offered by UNOPS. There is no need to go into these contentions: the Tribunal observes that the Applicant did eventually reveal to it the names of 16 of the individuals concerned but did not, as requested, furnish copies of their bank cards except in the cases of her husband and her mother-in-law. At the hearing, she merely indicated that the individuals concerned were not prepared to make that kind of information available. The Tribunal finds it hard to credit that friends who were prepared to go shopping for the Applicant on dates and in places that she stipulated should be reluctant to testify in her favour, even though her career was at stake and her very integrity was under challenge, while they could hardly be seriously blamed by anyone for going shopping for a friend.

68. There are, hence, grounds for finding that the Applicant wilfully refused to produce, or was unable to produce at the Tribunal the only evidence that might have cast doubt upon her fraudulent intent.

69. Furthermore, a detailed consideration of the purchases at issue shows that the Applicant's defence is inconsistent.

70. The Applicant contends that it is normal for a number of purchases to be made on the same days in the same shops, that being an essential condition for being able to claim reimbursement of VAT. Her claims thus imply that she asked 42 people at least, and 42 separate individuals agreed, to go shopping for her on dates and in shops that she stipulated, solely in order to enable her to gain the equivalent of a few hundred dollars or euros. If her claims are to be believed, for instance, she persuaded six friends or acquaintances to go shopping for her at the same supermarket on Friday, 15 February 2008, and then another thirteen to do so five days later, on Wednesday, 20 February 2008; these nineteen individuals supposedly all did their shopping between 10.15 a.m. and 5.22 p.m., in the first six cases, and between 12.37 and 3 57 p.m. in the case of the other thirteen – at times, in other words, when most people are at work.

71. Despite the Applicant's protestations at the hearing and elsewhere, the Tribunal also finds it impossible, in view of the sorts and quantities of food bought, to believe that the purchases at issue were made for parties or social gatherings. On 20 February 2008, for example, seven of the thirteen individuals referred to above bought a total of 19 litres of milk; six bought rye bread, four bought white bread; four bought grapes, four bought apples, three bought tomatoes, and so forth. The statement by an accountant, produced by the Applicant, to the effect that the food mentioned on the cash-till printouts at issue "could" have been bought for celebratory dinners and other social gatherings in no wise supports the Applicant's claims.

72. In the light of the above, the Tribunal considers that the cash-till printouts and receipts which the Applicant submitted to the Danish authorities through UNOPS for reimbursement of VAT cannot relate to shopping done by third parties on her behalf; it therefore finds that the facts on the basis of which the Applicant was punished are established.

73. The Tribunal considers that the Applicant's behaviour amounts to professional misconduct within the meaning of the Staff Rules in force at the time.

74. Here the Applicant contends that the Respondent misidentified the offence she was charged with, and misapplied administrative instruction ST/AI/371 by accusing her of making a "misrepresentation or false certification in connection with any United Nations claim or benefit". The Applicant argues that reimbursement of VAT is a privilege granted by the host country, not the Organization. ST/AI/371 cannot, therefore, apply in her case, and since the Danish authorities have not seen fit to bring proceedings against her, UNOPS has no standing to bring disciplinary proceedings.

75. The Tribunal rejects such contentions as baseless. It is manifest that the Applicant's privilege - being able to claim reimbursement of VAT - stemmed directly from her status as a staff member of the United Nations. Under section 20 of the Convention on the Privileges and Immunities of the United Nations, such privileges are granted to certain staff "solely in the interests of the United Nations, and not for their personal benefit". By virtue of section 21 of the Convention, moreover, the United Nations is required to cooperate at all times with the competent authorities of Member States in order to prevent any abuse to which such privileges might give rise.

76. Hence it follows not only that UNOPS had ample grounds to bring disciplinary proceedings against the Applicant, given the charges against her, but also that the Danish Government was entitled to call UNOPS to account over the matter. Thus the Tribunal also rejects the Applicant's contention that the Danish Government intervened and interfered unlawfully in the disciplinary proceedings. And no evidence has been produced in support of the claim that the decision to separate the Applicant from service was taken pursuant to instructions from the Danish Government.

Proportionality of the penalty

77. Article 10.2 of the Staff Regulations, which states that "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory", gives the Secretary-General extensive

discretion in determining an appropriate penalty. The Tribunal now has to consider whether the disciplinary measure imposed by UNOPS was disproportionate to the offence committed.

78. In this case, the Applicant's procurement responsibilities and senior rank, which allowed her to enjoy the diplomatic status and privileges reserved to certain staff, demanded particularly judicious, carefully considered conduct. Moreover, the charges levelled against her, namely attempted fraud, aggravated by unacceptable reluctance to cooperate fully with the Danish authorities in July and August 2008, were clearly of a nature to tarnish the image of UNOPS in the eyes of the host country. For these reasons, the Respondent had ample grounds for considering that the Applicant's offence was incompatible with her continued employment by the Organization.

79. Even supposing that the Applicant had been able to demonstrate the truth of her claims to the Tribunal, her persistent refusal to provide the Danish Ministry of Foreign Affairs and UNOPS with evidence of her innocence that she alone could obtain was in itself sufficient for the Organization to lose confidence in her and, thus, for her service with the Organization to be brought to an end.

80. Considering the circumstances as a whole, the Tribunal thus finds that the penalty imposed upon the Applicant is not at all disproportionate to the gravity of the offence with which she was charged.

Conclusion

81. In view of the foregoing, the Tribunal DECIDES: The application is rejected in its entirety.

(*signed*)

Judge Jean-François Cousin

Dated this 7th day of April 2010

Entered in the Register on this 7th day of April 2010

(*signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva