UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/019
Judgment No.: UNDT/2021/154
Date: 16 December 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

ROLLI

v.

SECRETARY-GENERAL
OF THE WORLD METEOROLOGICAL
ORGANIZATION

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Daniel Trup, WMO

Introduction

1. The Applicant, a former Director of Resource Management with the World Meteorological Organization ("WMO"), contests the administrative decision of the Secretary-General of WMO to summarily dismiss him (the termination letter of 9 May 2018).

2. The Respondent contends that the application is without merits.

3. For the reasons set out below, the Tribunal grants the application on its merits and decides that the issue of relief is to be determined in a subsequent judgment.

Procedural history

4. By statement of appeal dated 7 June 2018 to the Joint Appeals Board of WMO ("JAB"), the Applicant initially appealed the contested decision.

5. On 12 February 2019, the JAB issued its report in which it recommended the WMO Secretary-General to uphold the dismissal decision, which he did on 14 February 2019.

6. On 15 April 2019, the Applicant filed an appeal to the Appeals Tribunal of the contested decision.

7. On 25 October 2019, the Appeals Tribunal issued Judgment No. 2019-UNAT-952 by which it remanded the case to the JAB.

8. On 7 February 2020, WMO submitted the former JAB case record concerning the present case to the Geneva Registry of the Dispute Tribunal for the adjudication of the matter.

9. On 30 April 2021, the case was transferred from the Dispute Tribunal's Registry in Geneva to the one in New York.

10. On 25 May 2021, the case was assigned to the undersigned Judge.

Facts

11. In the following, in order to provide context for the present Judgment, the Tribunal has summarized, as relevant, the list of agreed facts, which the parties presented in their jointly-signed statement dated 15 October 2021. Where needed, further information has been added, which either stems from the documents on record or the Dispute Tribunal's judgment in *Abalos* et al. UNDT/2021/138, which contained relevant information regarding the governance structure of WMO.

12. The Applicant worked for WMO for almost five years before his summary dismissal and never received a negative performance evaluation.

13. During the period from February 2017 to May 2018, some work-related disagreements ensued between the Applicant and the WMO Secretary-General, which concerned WMO's administration of its early retirement and voluntary separation incentive programme ("ERP/VSP").

14. Two audit reports were issued on this matter. At the request of the WMO Secretary-General in February 2018, the Internal Office of Oversight ("IOO") issued the first report in March 2018. The second report of April 2018 was made by the External Auditors of WMO and subsequently submitted to the 17th Session in June 2018 of the Executive Council of WMO by the WMO Secretary-General. In the internal hierarchy of the Organization, it is noted that the Executive Council is superior to the WMO Secretary-General (see *Abalos* et al. UNDT/2021/138).

15. On 4 May 2018, the WMO Secretary-General wrote to the Applicant expressing "displeasure" about an email, which he had sent to the Audit and Oversight Committee (an oversight body mandated by the WMO Executive Council) regarding IOO's March 2018 report. The WMO Secretary-General stated that the Applicant's email had been sent without prior consultation with him or any of the

other Executive Management members, that the Applicant had willfully bypassed the WMO Secretariat's chain of command, and that his actions had undermined the WMO Secretary-General's authority and damaged the interests of the Organization.

16. On 9 May 2018, the Applicant was notified that his appointment would be terminated. The reasons for the termination were set out in the Secretary-General's letter of 9 May 2018 ("the termination letter").

Consideration

Remand from the Appeals Tribunal

17. In *Rolli* 2019-UNAT-952 (para. 33), the Appeals Tribunal held that "this appeal cannot be determined without additional fact-finding that may require oral testimony in relation to several material issues". The Applicant's appeal to the JAB therefore had to "be reconsidered and re-determined by a neutral process that produces a record of decision and a written decision including a statement of the relevant facts, the relevant law and reasons for the decision". The Appeals Tribunal "proposed" to remand the case to JAB, highlighting that the findings had to be "substantiated on proper evidence (including where necessary oral testimony) and be set out in a written decision determining the ultimate issue, as contemplated in Article 2(10) of the Statute of the Appeals Tribunal read with Article 2 of the agreement".

18. Since the issuance of *Rolli* 2019-UNAT-952, WMO has decided to abolish the JAB and submit itself to the jurisdiction of the Dispute Tribunal. When the present case was assigned to this Tribunal, the parties were therefore requested to file revised submissions in conformity with Practice Direction No. 4 on filing of applications and replies (as revised on 1 July 2014).

19. In *Rolli* 2019-UNAT-952, the Appeals Tribunal also directed the JAB to "make findings" on a number "issues and questions" (see para. 34). The Appeals Tribunal thereby intended to ensure that the case is given the adequate attention and

scrutiny that must be expected by an independent and impartial judicial mechanism. These directions were, however, not addressed to the Dispute Tribunal, which per definition constitutes such a mechanism. Consequently, as the primary fact-finder according to the Appeals Tribunal's consistent jurisprudence (see, for instance, *Gehr* 2012-UNAT-234, *Turkey* 2019-UNAT-955 and *Robinson* 2020-UNAT-1040), the Tribunal is not bound by these directions, but will, as appropriate, let itself be guided by them.

The scope of the present judgment

20. In the Applicant's 15 October 2021 submission, he noted that his case is "twofold". He explained that, on the one hand, "the absence of an investigation, interview with the Applicant, opportunity to respond to allegations of misconduct etc. represent such fundamental breaches of due process that the summary dismissal decision cannot be found to have been taken on a proper basis and is vitiated". He submitted that "these breaches of due process are evident on the papers and do not require that witness evidence be heard in order to adjudicate this element of the case". This led him to state that "[s]hould the Tribunal agree that these due process violations are so grave as to render the decision unlawful then the Applicant would state no oral hearing is necessary".

21. In response, the Respondent noted that the Applicant "essentially directed the Tribunal to consider these issues as a preliminary matter before considering whether a trial should take place". He therefore sought "permission from the Tribunal to adduce submissions to respond directly to the issues of due process".

22. As also reflected in Order No. 88 (NY/2021) dated 24 September 2021, the Tribunal agreed, in Order No. 95 (NY/2021) dated 21 October 2021, with the parties that, in essence, the Applicant contends that the contested decision is unlawful on two basic grounds, namely (a) that the decision was vitiated by various major due process irregularities and (b) that the factual and legal grounds for the contested decision were not properly established.

23. The Tribunal further agreed with the Respondent, as stated in the jointly-signed statement, that "the established framework for reviewing decisions regarding misconduct should apply". According to the Respondent, this meant that the judicial test should be: "a. Whether the facts on which the sanction is based have been established; b. Whether the established facts qualify as misconduct; and c. Whether the sanction is proportionate to the offence" (see, for instance, *Turkey* 2019-UNAT-955).

24. In addition to these three points, in Order No. 95 (NY/2021), the Tribunal noted that as a fourth prong of the judicial test, the Appeals Tribunal has held that the Dispute Tribunal is to examine "whether the staff member's due process rights were respected" (see para. 28 in *Siddiqi* 2019-UNAT-913, affirmed in, for instance, *Nadasan* 2019-UNAT-918).

25. Accordingly, for the sake of judicial economy and efficiency, in Order No. 95 (NY/2021), the Tribunal ordered the parties to file closing arguments on the limited issue of due process. The Tribunal would thereafter review whether any, or the accumulation of, the alleged irregularities were of such character that it/they would render the contested decision unlawful and lead to its recission. Regarding the Applicant's request for additional written documentation, the Tribunal noted that the Respondent effectively had stated that all relevant documentation was already on file. By allowing the Respondent to file a closing statement in response to the Applicant's closing statement, the Tribunal also granted the Respondent's request to file submissions directly on the relevant issue of due process.

26. In Order No. 95 (NY/2021), the Tribunal therefore held that if it were to answer the above question in the affirmative, it would issue a judgment with reasons thereon and not examine the other prongs of the judicial test. The Tribunal would thereafter allow the parties to file submissions on the question of relief in light of the Tribunal's judgment.

27. On the contrary, should the Tribunal find that no due process irregularity occurred or none were so grave that they substantively impacted the contested decision, the Tribunal would issue an order thereon and proceed with its review of whether the factual and legal grounds of the contested decision had been appropriately established. As the Applicant's request for a hearing was only related to this latter issue, this request would also only be considered if the Tribunal were to proceed to this review.

The relevant legal WMO framework

28. In the termination letter dated 9 May 2018, the WMO Secretary-General informed the Applicant of the contested administrative decision and that his employment was terminated "with immediate effect due to serious misconduct". As legal basis, the WMO Secretary-General, however, only referred to former WMO staff regulations 1.1 and 1.2, but neither of these provisions granted the WMO Secretary-General any authority to summarily dismiss a WMO staff member. Instead, they stipulated some of the basic duties and obligations of WMO staff members.

29. In line herewith, in the Respondent's closing statement, reference is instead made to former WMO staff regulation 10.1, which provides that the WMO Secretary-General may "impose disciplinary measures on staff members whose conduct is unsatisfactory" and "summarily dismiss a member of the staff for serious misconduct". The Tribunal therefore assumes that this provision constituted the correct legal basis for the contested administrative decision.

30. In previous submissions, the Respondent also argued that the case was not disciplinary in nature with reference to WMO staff rule 1101.1(b). The Tribunal, however, notes that in the Respondent's closing statement, he does not reiterate this, but instead refers to the relevant process as a disciplinary process and the summarily dismissal as a disciplinary measure. The Tribunal agrees with this last analysis and, in any event, is convinced that the present concerns a disciplinary matter.

The Tribunal's limited scope of review in disciplinary cases

31. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

32. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a 'merit-based review, but a judicial review'" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

33. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

The Appeals Tribunal's jurisprudence on due process rights in a disciplinary process

34. The Tribunal agrees with the parties that the Appeals Tribunal has held that certain minimum standards inherently apply to a disciplinary process even if not explicitly stated in the relevant legal framework. In *Abu Osba* 2020-UNAT-1061, the Appeals Tribunal, for instance, held that "[a]lthough the [United Nations Relief and Works Agency for Palestine Refugees] Staff Rule does not specifically outline the requirements for due process in disciplinary cases, the common law requirements of due process in such instances should apply" (para. 68).

35. Certain minimum standards and principles for due process with relevance to the present case have already been affirmed by the Appeals Tribunal:

a. Prior to taking any administrative decision imposing a disciplinary sanction, the subject shall be given "adequate notice of the allegations" (see *Abu Osba*, para. 68, as well as, for instance, *Leal* 2013-UNAT-337, para. 24; *Rangel* 2015-UNAT-535, paras. 72 and 75; *Muindi* 2017-UNAT-782, paras. 52-53; Elobaid 2018-UNAT-822, para. 28; *Sall* 2018-UNAT-889, para. 36);

b. Also, the subject shall have "the opportunity to respond to those allegations" before then (see *Abu Osba*, para. 68 as read together with *Elobaid* 2018-UNAT-822, para. 28, as well as, for instance, *Leal* 2013-UNAT-337; para. 24; *Sall* 2018-UNAT-889, para. 36);

c. The subject shall further have "the right to seek legal advice if requested" during the disciplinary process (see *Abu Osba*, para. 68);

d. "[A]ccess to justice is a norm of customary international law" (see *Mindua* 2019-UNAT-921, para. 27). A derivative right is that if an administrative and/or disciplinary sanction is imposed against a staff member, then s/he must be specifically informed of the correct legal basis therefor in the contested administrative decision. In line herewith, the subject must be fully apprised of the allegation(s) and facts underpinning each of the

> disciplinary sanction(s). Without such information, the subject will not be able to adequately ascertain the legal and factual background for the imposed disciplinary and/or administrative sanction(s) and appropriately defend her/his position within the internal justice system (similarly, see *Muindi* 2017-UNAT-782, para. 54). Such error(s) may cause unnecessary uncertainty and delays.

Was the Applicant properly afforded the procedural safeguards relevant to a disciplinary case?

36. The Applicant, in essence, submits that no disciplinary process whatsoever took place and that he was therefore afforded no due process rights.

37. The Respondent admits that albeit not spelled out in the applicable legal framework of WMO, due process standards indeed did apply to the disciplinary process of the Applicant. He argues, however, that the Applicant was effectively afforded all such procedural rights. In this regard, in the Tribunal's review of the present case, it must "adopt a separate two-tiered approach in reviewing any allegations of due process violations with respect to the Applicant's actions vis-à-vis the award of *ex-gratia* payments [in connection with WMO's early retirement and voluntary separation incentive programme] and the Applicant's contact with the Audit and Oversight Committee". Specifically, the Tribunal should "firstly determine the extent of the due process violation, if any, with respect to each act of misconduct and then assess whether such violations would have adversely impacted the outcome of the decision".

38. The Tribunal notes that in the 9 May 2018 termination letter, the WMO Secretary-General first refers to the 3 May 2018 email, which the Applicant sent to "the members of the Audit [and Oversight] Committee" regarding the March 2018 audit report of the Internal Office of Oversight. The WMO Secretary-General found that this email was "an inappropriate attempt from [the Applicant's] side to have the private audience of the Audit [and Oversight] Committee to ventilate [his]

disagreement with the Executive Management". The WMO Secretary-General further held that this was "clearly … unacceptable behavior".

39. Subsequently in the termination letter, the WMO Secretary-General, however, also refers to the Applicant's involvement in WMO's administration of the ERP/VSP as "willful transgressions". Based thereon, the WMO Secretary-General found that the Applicant was "in serious breach of the WMO Financial Regulations, the Staff Regulations and the WMO Code of Ethics".

40. Accordingly, the Tribunal finds that, as argued by the Respondent, the WMO Secretary-General indeed based his administrative decision to summarily dismiss the Applicant on two separate alleged counts of misconduct, namely (a) his 3 May 2018 email to the Audit and Oversight Committee and (b) his involvement in the administration of the ERP/VSP.

41. In the following the Tribunal will therefore assess the different processes leading up to these two counts of alleged misconduct, as well as whether the subsequent contested administrative decision was adequately reasoned.

The Applicant's involvement in WMO's administration of the ERP/VSP

42. While the Applicant essentially submits that no disciplinary process was conducted at all, the Respondent argues that the IOO audit effectively superseded the need for any disciplinary investigation into the Applicant's alleged misconduct and also satisfied all his due process rights. The Respondent submissions may be summarized as follows (references to annexes and footnotes omitted):

> a. "[T]he basis of the disciplinary process in relation to the *ex-gratia* payments was predicated on an audit investigation and associated documentary evidence uncovered by the Internal Oversight Office (IOO) and generated by the Applicant";

b. "The process of audit investigation undertaken by IOO, upon the instruction of the Secretary-General, revealed the extent to which departing staff members had been paid three-months' salary, despite having served their respective notice periods. In undertaking this activity, the audit investigation had: [i] Reviewed the ERP/VSP and the payments made under the programme to ascertain their compliance with the applicable rules and procedure and their financial impact … [ii] Reviewed the documents provided by the Human Resources Division and summary information submitted to Executive Management and President as well as the payment information provided from Finance … [iii] Sought information and comments from the Applicant both in person and in writing …";

c. In March 2018 audit report, IOO "identified that: [i] The Applicant had consented to the payment of three-months' salary to departing staff members, even when they served out their notice period … [ii] The worksheet that was approved by the Secretary-General during the meeting dated 3 July 2017 did not reference that all departing staff members would receive payment in-lieu of notice and/or receive other financial sums … [iii] The Applicant had submitted a list of extra benefits for staff members to the President on 9th February 2018 and that it did not include the monetary benefits of CHF 129,689 given to [Mr. EC (name redacted)] … [iv] A list of additional payments that were paid to departing staff members differed substantially in terms of what the Applicant had previously presented to the Secretary-General on 3 July 20178, 31 January 20189 and 9 February 2018 …";

d. In particular, the IOO report "uncovered that: [i] The number of departing staff members that benefited from the additional payments amounted to 14 and not 5 as presented by the Applicant to the President on 9 February 2018; and [ii] The monetary value of the overpayment made to staff members amounted to CHF 734,000, well in excess of the amount presented

by the Applicant in the presentation he had made to the President on 9 February 2018";

e. The Tribunal should therefore consider that: "[i] … An [independent] investigation was carried out by IOO with respect to the ERP/VSP process. IOO is tasked as an independent entity of WMO to carry out all allegations or presumptions of fraud, waste, mismanagement or misconduct ... As referenced in the [Dispute Tribunal] case of *Borhom* [UNDT/2011/067], any investigation must be conducted by a neutral body free from bias and with an established mandate to conduct such reviews … IOO is such a body within the context of WMO. [ii] The Applicant was aware of the investigation in relation to the ERP/VSP: The Applicant was aware of the substance of the investigation both in meetings he had regarding the ERP/VSP and the notice of the investigation he received; [iii] The Applicant had taken part in the investigative process: The Applicant had been involved in the audit investigation and had the opportunity to respond to the findings of the IOO report before it was published … Indeed, it was the Applicant's misguided belief that his comments had not been considered by IOO that led him to contact the [Audit and Oversight Committee], the subject of the second act of misconduct; [iv] The Applicant was given the opportunity to present all his evidence to IOO: It should be noted that [Ms. B (name redacted)] along with the Applicant submitted joint observations on the IOO report before publication … and [v] The Applicant was given the opportunity to challenge the outcome of the disciplinary process: The Applicant, through the appeal process, retained the opportunity to challenge the evidence upon which the sanction was based … and to 'face his accusers'".

43. The Tribunal primarily observes that, as a matter of principle, an audit and an investigation cannot be regarded as the same type of review, because they have different objectives and are conducted by different categories of professionals (auditors vis-à-vis investigators).

44. The General Assembly, for instance, in res/48/218 B (Review of the efficiency of the administrative and financial functioning of the United Nations) dated 12 August 1994, when establishing the mandate of the Office of Internal Oversight Services ("OIOS"), specifically distinguishes between an "audit" and an "investigation" in preambular para. 5.

45. In line herewith, OIOS's "functions" in the two areas are also described differently (see sec. 5(c)(ii) and (iv), respectively):

> Internal audit
>
> The Office shall, in accordance with the relevant provisions of the Financial Regulations and Rules of the United Nations examine, review and appraise the use of financial resources of the United Nations in order to guarantee the implementation of programmes and legislative mandates, ascertain compliance of programme managers with the financial and administrative regulations and rules, as well as with the approved recommendations of external oversight bodies, undertake management audits, reviews and surveys to improve the structure of the Organization and its responsiveness to the requirements of programmes and legislative mandates, and monitor the effectiveness of the systems of internal control of the Organization
>
> …
>
> Investigation
>
> The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken

46. In addition, the Tribunal takes note that the Institute of Internal Auditing's definition of "internal auditing", which has been adopted by OIOS, is that this is "an independent, objective assurance and consulting activity designed to add value and improve an organization's operations" and that "helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes" (see, for instance, OIOS's Internal Manual dated March 2017, p. 6).

47. Investigation, on the other hand, is "[a] legally based and analytical process designed to gather information in order to determine whether wrongdoing occurred and, if so, the persons or entities responsible" (see, for instance, OIOS's Investigations Manual dated January 2015, p. 2).

48. As such, an audit therefore has a broader system-wide focus than an investigation and does not entail an assessment of individual responsibility for any alleged subjective wrongdoing. An audit therefore cannot substitute the need for an investigation in a disciplinary process, also because a staff member interviewed in an audit cannot be expected to be afforded the necessary procedural due process safeguards, including those outlined in para. 35(a)-(c).

49. In the present case, the following question is therefore whether, despite being labeled as an audit, the IOO review by its objective and/or execution, nevertheless had the character of a disciplinary investigation and granted the Applicant the needed due process rights.

50. The Tribunal observes that in the IOO audit report, it was stated, as relevant to the present case, that IOO had been engaged by the WMO Secretary-General in order to "review the Early Retirement and Voluntary Separation Incentive Programmes (ERP &VSP) and the payments made under the programme, and ascertain the compliance with the applicable rules and procedures and their financial impact". It therefore follows that nothing was stated that could be interpreted as that the objective of the audit was to specifically investigate the Applicant for possible misconduct in this regard. Rather, the objective was, as relevant to the present case, a general assessment of the WMO's administration of the ERP/VSP.

51. As for the execution of the audit, IOO's findings are in line with the relevant objective of the report. While in the Executive Summary, it is stated that the ERP/VSP had been administered "inconsistent" with the WMO financial rules and the *ex-gratia* payments were considered "not admissible", no individual responsibility and/or liability is identified anywhere, including with regard to the Applicant. In

addition, nowhere else in the report is it explicitly stated that contributes any wrongdoings specifically to the Applicant.

52. Furthermore, the Respondent's factual submission that the Applicant, in fact, made a statement to the IOO is not relevant, because the Respondent has not demonstrated that IOO made the Applicant aware that he was under scrutiny for possible misconduct. The Applicant was therefore not able to comment on this allegation and appropriately tailor his response thereto in order to defend himself. Also, he was evidently not offered the opportunity to be represented by a lawyer.

53. From this follows that the IOO audit, indeed, did not have the character of a disciplinary investigation into any possible wrongdoing(s), including misconduct, of the Applicant. Rather, as argued by the Applicant, it appears that no disciplinary process whatsoever was undertaken.

54. Consequently, the Applicant was not afforded any of the mandatory procedural safeguards outlined in para. 35(a)-(c) above, namely (a) the right to be advised of the allegation of misconduct, (b) the right to comment thereupon, and (c) the right to be represented be a lawyer before the decision on misconduct was made and the disciplinary sanction imposed.

The Applicant's 3 May 2018 email to the Audit and Oversight Committee

55. The Respondent, in essence, submits that, with reference to the Appeals Tribunal's judgment in *Ainte* 2013-UNAT-388, no additional investigation was required to establish the misconduct because the material facts were not in dispute. The WMO Secretary-General had accordingly already refused the Applicant's request to contact the Audit and Oversight Committee, and since "it was the Applicant who proceeded to initiate such contact, there remains little scope for further information or documentation on this matter for the decision maker, the Secretary-General, to render a determination". The Applicant's need for a due process was therefore "rendered moot".

56. The Tribunal notes that the Respondent by his submissions, in effect, admits that the Applicant was not afforded any disciplinary process whatsoever regarding the allegation of misconduct related to his 3 May 2018 email to the Audit and Oversight Committee. This also only makes sense, since the IOO audit report was dated March 2018 and the email was only sent two months later—the audit therefore could not cure any due process deficiencies.

57. Also, the Tribunal finds that the mandatory procedural safeguards cannot be rendered "moot" in the manner suggested by the Respondent. The situation is that before the WMO Secretary-General imposed the disciplinary sanction against the Applicant, the latter was never informed of the allegation of misconduct and, accordingly, not provided an opportunity to comment thereon in order to defend himself or be represented by a lawyer. These rights cannot be waived by the Applicant by admitting to having sent the 3 May 2018 email to the Audit and Oversight Committee. What is at stake is instead the appropriateness of the WMO Secretary-General deciding to summarily dismiss the Applicant without having as much as granted him a chance to defend and explain himself.

58. Accordingly, also in this instance, the Tribunal finds that the Applicant was not afforded any of the obligatory procedural safeguards set out in para. 35(a)-(c) above.

Was the contested administrative decision adequately reasoned?

59. The Tribunal notes that in the contested administrative decision dated 9 May 2018 by which the Applicant was summarily dismissed, as explained above, the WMO Secretary-General did not state that the legal basis for doing so was former WMO staff regulation 10.1 as he only referred to the former WMO staff regulations 1.1 and 1.2. This information was only provided in the Respondent's closing statement.

60. Also, the WMO Secretary-General did not specify what the exact reason(s) was/were for summarily dismissing the Applicant, namely whether this was because (a) his 3 May 2018 email to the Audit and Oversight Committee, (b) his involvement in the ERP/VSP, or (c) a combination of the two counts of alleged misconduct.

61. The Tribunal therefore finds that the contested administrative decision was not properly reasoned, which by itself as matter of access to justice, constitutes a due process infringement as per para. 35(d) above.

Did the procedural irregularities make a difference to the outcome of the case (the "no difference" rule)?

The jurisprudence of the Appeals Tribunal

62. The Appeals Tribunal has, at several instances, affirmed the so-called "no difference" principle. It therefrom follows that only procedural irregularities that impacted the contested administrative decision can render it unlawful (see, for instance, *Kallon* 2017-UNAT-742, *Allen* 2019-UNAT-951, *Ladu* 2019-UNAT-956 and *Thiombiano* 2020-UNAT-978).

63. The Applicant, in essence, submits that the identified procedural irregularities were so grave that they indeed affected the contested administrative decision.

64. The Respondent contends, with regard to the Applicant's involvement in the ERP/VSP that, with reference to *Kallon*, "any additional hearing would have been 'utterly useless' since the substantive elements of the Applicant's actions had already been affirmed by both the evidence presented by IOO and the knowledge the [WMO] Secretary-General retained as the principal decision maker in this case".

65. Based thereon, the Respondent argues that "[w]hilst the Applicant may contest the evidence, there is little in terms of due process that would have affected the outcome or would have been persuasive upon the [WMO] Secretary-General, who

had both the intimate knowledge of the facts and the evidence of an IOO audit investigation".

66. Concerning the 3 May 2018 email, the Respondent submits that the Applicant has failed "to identify a step that could have been taken in terms of collecting any evidence with respect to a conversation that took place privately between the Secretary-General and the Applicant himself". It was the WMO Secretary-General, who "had intimate knowledge of the discussions that took place on 20 April 2018", and no "additional investigative step could therefore reasonably be forthcoming in circumstances where the issues in dispute take place during a private meeting between the Applicant and the Secretary-General".

67. The Respondent further contends that for the WMO Secretary-General to "have initiated a separate investigation into facts that took place in a private meeting would have been to place form over substance". Any "investigation would not have resulted in any further information but rather would have led to unnecessary delay and would have deprived the [WMO] Secretary-General of the authority to dismiss a staff member, who not only violated the ethical codes of conduct but also directly contravened an express prohibition". In "those circumstances any alleged due process violations would have made no difference to the decision of the Secretary-General", and with reference to the Dispute Tribunal's judgment in *Coleman* 2021/UNDT/016, "not every irregularity in itself will necessarily lead to vacating an administrative decision".

68. The Tribunal disagrees with the Respondent. The situation as it stands is that the WMO Secretary-General took the contested administrative decision to summarily dismiss the Applicant without any type of forewarning and, as a result, no process whatsoever was undertaken leading up to this decision.

69. Unless a possible disciplinary process was only intended as a charade, before deciding on how to react to the two alleged counts of misconduct, the WMO Secretary-General could not have known what the Applicant would have responded,

had he been granted his basic due process rights to be presented with the allegations of misconduct and then allowed to comment thereupon, in particular if also represented by a competent legal counsel. Subsequently, it would have been impossible for the WMO Secretary-General to have known in advance what his final decision would have been in light of the Applicant's response to the misconduct allegations.

70. Also, not before the instant judicial proceedings did the Respondent present the WMO Secretary-General's justifications for not launching a disciplinary process against the Applicant. These late explanations, however, do not cure the related irregularities retrospectively. Basically, the disallowed procedural safeguards are of such fundamental importance to a disciplinary process that they cannot be unilaterally waived by the decision-maker at her/his own discretion.

71. Accordingly, even in consideration of the "no difference" principle, the Tribunal finds that the contested administrative decision was unlawful.

Conclusion

72. It is DECIDED that:

a. The contested administrative decision is unlawful;

b. By **4:00 p.m. on Thursday, 6 January 2022**, the Applicant is to file his closing statement on relief, which is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

c. By **4:00 p.m. on Thursday, 20 January 2022**, the Respondent is to file his closing statement responding to the Applicant's closing statement at a maximum length of five pages, using Times New Roman, font 12 and 1.5 line spacing;

d. **4:00 p.m. on Tuesday, 25 January 2022**, the Applicant may file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages, using Times New Roman, font 12 and 1.5 line spacing. It must be solely based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

e. Unless otherwise ordered, on receipt of the latest of the aforementioned statements or at the expiration of the provided time limits, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

(Signed)

Judge Joelle Adda

Dated this 16th day of December 2021

Entered in the Register on this 16th day of December 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York