Introduction

1. This is a consolidated Judgment on two cases filed by investigators of the Investigations Division in the Office of Internal Oversight Services ("OIOS") in the UN Secretariat. Ms. Ai Loan Nguyen-Kropp (P-3 level investigator) and her supervisor, Mr. Florin Postica (P-5 level investigator) filed separate applications contesting, in essence, the same administrative decision made in April 2010 to investigate them.

2. Ms. Nguyen-Kropp filed her application (Case No. UNDT/NY/2010/107) on 28 December 2010. She identified the contested administrative decisions as: (a) the "conduct [of] a secret and retaliatory investigation" against her and, (b) the denial of her request to be granted "an appropriate transfer or paid administrative leave". On 5 January 2011, she submitted an amendment to her application in which she added new facts in support of her initial application stating that by memorandum dated 30 December 2010 from Ms. Angela Kane, the then Under-Secretary-General ("USG"), Department of Management ("DM"), she was placed under formal investigation. The Applicant received this memorandum by email of 4 January 2011 from the USG/DM's office. By Order No. 19 (NY/2011), dated 26 January 2011, the Tribunal (Judge Ebrahim-Carstens) allowed Ms. Nguyen-Kropp to amend her application by including the additional facts. However, the Tribunal ordered that the Applicant was not permitted to amend her application to challenge any other separate administrative decision which ought to be subject to separate proceedings. The Tribunal also extended the time for the Respondent's reply to 12 February 2011.

3. By reply dated 11 February 2011, the Respondent submitted that Ms. Nguyen-Kropp's application was not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal and contended, in regard to the initiation of an investigation against Ms. Nguyen-Kropp, that her appeal was time-barred and that

it did not concern a contestable administrative decision. The Respondent stated that the claim in relation to the alleged denial of her request to be granted an appropriate transfer or paid administrative leave was moot as the Applicant had been granted appropriate interim relief.

4. Mr. Postica filed his application (Case No. UNDT/NY/2011/004) on 12 January 2011 and identified the contested decision as the decision to commence what he described as "a secret and retaliatory investigation" against him.

5. By reply filed on 13 February 2011, the Respondent submitted that Mr. Postica's application was not receivable

> her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

11. Consistent with these principles and judicial guidance by the Appeals Tribunal, it was necessary, given the issues and the volume of documents presented, for this Tribunal to hold a series of case management discussions to avoid any confusion, and to define the issues with precision. During the 7 October 2013 case management discussion it was agreed that the issues for determination by the Tribunal are as follows:

a. Whether Ms. Ahlenius, USG/OIOS at the time, had sufficient reason to believe that the Applicants may have committed misconduct justifying an investigation and whether her decision was supported by the documents. The Applicants believed that her decision to commence the investigation was retaliatory because they had made certain allegations of impropriety on the part of Mr. Michael Dudley, then Officer-in-Charge of ID/OIOS;

b. Whether the manner in which Ms. Angela Kane, USG/DM, and those acting on her behalf, sought the service of external investigators caused them reputational damage;

c. Whether there was disparity and inconsistency of treatment as between the Applicants and the way in which Mr. Dudley had been treated in relation to the allegations of misconduct made against him.

12. At the hearing held from 21 to 25 October 2013, the Tribunal had cause to remind the parties that the issues are as defined above. Evidence was given by the Applicants as well as the witnesses for the Respondent, namely Ms. Inga-Britt

14. At the end of the hearing, the Tribunal acceded to the request for final closing submissions to be sent in writing. A schedule was agreed for filing submissions to ensure simultaneous exchange and an opportunity for each party to comment on the other party's submissions.

15. In their closing statement, Counsel for the Applicants sets out the sequence of events which aims at demonstrating retaliation and improper motives against them.

16. In her closing statement, Counsel for the Respondent submitted that the Applicants had failed to set out the facts that they proposed to rely upon to prove retaliation and improper motives and that this placed the Respondent at a disadvantage. She also asserted, in essence, that any statements made by the Applicants during the hearings as well as any documentary evidence not agreed upon by the Respondent should not be used by the Tribunal. Counsel for the Respondent submitted that should the Tribunal wish to use such evidence, the Tribunal should hold a further hearing on this matter to permit the Respondent to provide submissions and further evidence. Finally the Respondent submitted that since "testimony is coloured by the deliverer's point of view", the best evidence available is that of contemporaneous documentary evidence.

17. This submission does not find favour with the Tribunal. First, it is not clear to the Tribunal why Counsel for the Respondent considered that the authors' point of view may not similarly colour the contemporaneous documents. Second, this submission defeats one of the fundamental purposes of a hearing where both documentary evidence and witness testimony may be tested and challenged before being assessed and evaluated. This is of particular importance in cases like the present involving alleged misconduct and/or retaliation. Counsel for the Respondent had ample opportunity during the cross-examination of the Applicants to challenge their evidence and to call witnesses in rebuttal.

18. The facts provided below draw, where relevant, from the facts agreed upon by the parties in their joint submission of 16 August 2013, the documentary evidence submitted by the parties, and the testimony of the witnesses who appeared before the Tribunal, including that of the Applicants.

Facts

19. There are two issues which are central to the determination of the question whether the decisions taken by the Administration were in breach of the Applicants' contracts of employment. First was a "Note to File" dated 29 October 2009 sent to Ms. Ahlenius, signed by Mr. Postica and co-authored by Ms. Nguyen-Kropp, recommending that action be taken in relation to Mr. Dudley's handling of evidence in two cases involving the Medical Services Division of the United Nations Secretariat. The second issue concerns detrimental action taken against the Applicants' as a direct consequence of the review/investigation into their concerns expressed in the Note of 29 October 2009. The Tribunal sets out a brief account of relevant and significant events as they unfolded over a course of time. These provide a basis and context for factua

30. On 1 May 2009, Ms. Ahlenius responded that the standard procedure on closing a case should be followed and queried "if and how such a request should be submitted [to OLA]. Could you please send me the 'old' request and the response that we received at the time by OLA".

31. There followed email exchanges between Mr. Dudley, Ms. Ahlenius and Mr. Postica regarding the investigation of case no. ID/0052/09 and in particular the question whether as investigating officers the Applicants were provided with all the information initially provided to Mr. Dudley by Ms. X. There was also an issue regarding the informant's credibility and whether she had misled the investigators and manipulated the information, giving rise to a wholly misleading article in "Inner City Press". As a continuation of the email exchange, by email dated 13 May 2009, Mr. Postica requested Mr. Dudley to provide him with Ms. X's original emails and photographs. In this email, Mr. Postica stated that his view was that Ms. X had "reported her issues to [Mr. Dudley] with a malicious intent" and that she had "provided [Mr. Dudley] with selected pictures of the … log book only because she knew that if she had given [Mr. Dudley] complete pictures … there would [have been] no investigation and no case". Mr. Postica concluded that "henb2eD.0Dat e case

34. By email dated 19 May 2009, Mr. Dudley forwarded a message sent by Ms. X by which she made her initial complaint in January 2009. The same day, he confirmed by a note to file that the photos he had attached to his note to file were true copies of the photographs provided to him by Ms. X.

35. Later that day, Mr. Postica informed Mr. Dudley that the photographs attached to the 26 January 2009 intake note to file and 19 May 2009 note to file were not the same in that there had been an alteration to the pictures attached to the 26 January 2009 note. Specifically, the pictures attached to the May 2009 amended intake note to file were more numerous and lacked the graphics and annotations included in the January 2009 intake note.

36. On 20 May 2009, Mr. Dudley stated that he had placed red-lines around certain information highlighted by Ms. X on the photographs she provided when she first made her complaint in January 2009 and that any questions regarding the evidence should be addressed to Ms. X.

June 2009

37. On 22 May 2009 and 3 June 2009, the Applicants prepared draft addenda to the closure report for case no. ID/0052/09. On 24 June 2009, Ms. X's interview record of 2 February 2009 was modified (the modified version was uploaded to Citrix on 6 November 2009).

July 2009

38. On 2 July 2009, the Applicants interviewed Ms. X with respect to case no. ID/0234/09. Ms. X stated that she had given a great number of pictures to Mr. Dudley and that these photographs had not been shown to her during the 2 February 2009 interview. She added that she had dozens of other pictures as well as a video-recording of the narcotics log.

39. By email of 22 July 2009 to PPS, Mr. Postica indicated that PPS had included factual inaccuracies in the draft reports concerning Ms. X.

40. By email of 23 July 2009, Mr. Dudley asked if the investigation was completed. Mr. Postica indicated that completion was subject to getting the "missing emails". In response Mr. Dudley asked: "Are you still going on about the message she sent me when she first called? I cannot see how this pertains to the contraventions you are now investigating unless you are investigating my role". In response, Mr. Postica stated: "As professional investigators, we must be able to clearly explain in the report what evidence she provided to us, when and how. … I trust you would agree that this is very basic investigative procedure, and is particularly important because I cannot otherwise safely conclude (or rule out) malicious reporting on her part … I did [ask Ms. X for copies of her photographs], and although she provided some, she is apparently unable to find the remaining and critical ones that you said—and she confirmed—she sent to you. I otherwise take note of your close interest and involvement in this case, since its inception. But we still must follow proper investigative standards. And these standards require to have in the case file, to use and to assess the (any) initial probative material (particularly digital pictures that were subsequently edited by you) transmitted by (any) complainant. Finally, nobody is investigating you, at least not to my knowledge and not on this issue". Mr. Dudley and Mr. Postica also exchanged comments on whether Mr. Dudley modified the photographs sent to him by Ms. X.

41. By email dated 28 July 2009, Mr. Postica raised with Ms. Ahlenius the issue of the photographs first provided by Ms. X to Mr. Dudley as being necessary to finalize the investigation. Mr. Postica added that the need to obtain the original photographs was particularly important given that Mr. Dudley has edited some of these original pictures after they were given to him.

42. By email dated 28 July 2009, Mr. Postica reiterated the need for the original photographs provided by Ms. X to Mr. Dudley as well as other exchanges of information between Mr. Dudley and Ms. X.

August 2009

43. By email dated 4 August 2009, Ms. Ahlenius confirmed that the documents submitted by Ms. X to Mr. Dudley should be part of the investigation file and that, if need be, Mr. Dudley should have his old emails restored.

44. Various draft reports of a further closure report/addendum to the investigation report were prepared by the Applicants from early August 2009 in case no. ID/0052/09.
43.

being investigated. The Note recommended that appropriate action be taken and suggested a number of questions to be addressed.

November 2009

52. On 6 November 2009, Ms. X's interview record, together with the bulk of documents related to case no. ID/0234/09, was uploaded in Citrix.

53. By email dated 9 November 2009, Mr. Postica informed Ms. Schultz, the Head of PPS, that the draft investigation report dated 6 November 2009 for case no. ID/0234/09, recommending closing the case, was ready for review in Citrix. He commented to PPS that the investigation

the [draft] investigation report". Ms. Ahlenius instructed PPS to "seek further clarifications and explanations both from [Mr. Postica] and [Mr. Dudley] during [her] review". By email also dated 8 December 2009, Ms. Schultz, the Head of PPS, requested Ms. Beverly Mulley, one of PPS investigators, to undertake the assessment of the Note to File dated 29 October 2009 as she was scheduled to go on leave.

57. By email of 8 December 2009 to Ms. Ahlenius and copied to Ms. Schultz, Mr. Dudley requested that the Note to File from Mr. Postica be removed from Citrix.

58. The next day, the Head of PPS went to Ms. Ahlenius to request that the Note to File be removed from Citrix because it could be disclosed to the United Nations Appeals Tribunal as "supporting documentation" in any future appeal of a decision to impose a disciplinary measure in connection with Ms. X matters. Ms. Ahlenius accepted that the Note to File be taken out of the case file in Citrix as it was not relevant to the second Ms. X matter.

59. By email of 10 December 2009, PPS requested Mr. Dudley's comments on the Note to File, in accordance with the instruction in Ms. Ahlenius' email of 8 December 2009. However, contrary to Ms. Ahlenius' instruction, the Applicants were not provided with a similar opportunity to comment.

60. On 14 December 2009, Mr. Dudley provided his comments to PPS. By email exchange dated 10 and 15 December 2009, Ms. Mulley sought and obtained advice from the Office of Human Resources Management ("OHRM") regarding the use of confidential/privileged material obtained during investigations.

61. By email dated 16 December 2009, the Information Technology ("IT") team in OIOS determined, upon Ms. Mulley's request, that Ms. X's interview of 2 February 2009 in case no. ID/0052/09 had been last modified on 3 February 2009 and had been placed in Citrix on 17 February 2009. It was also determined that

Ms. X's interview in respect of case no. ID/0234/09 was placed in Citrix on 6 November 2009.

January 2010

62. On 14 January 2010, Mr. Postica noted that the investigation details as amended by PPS were not correct as they mentioned that OIOS had received seven photographs from Ms. X when in fact OIOS had received a total of 10 photographs from Ms. X through Mr. Dudley. Mr. Postica indicated that this controversial issue should not have been reviewed by PPS but reviewed by OHRM.

63. The next day, Ms. Ahlenius requested "hard copies which very clearly show [her] where the investigations team differs from the PPS and where there is a disagreement between the two on presentation of facts and conclusions".

64. On 15 January 2010, Mr. Postica moved to another non-UN Secretariat job in Europe, with the European Anti-Fraud Office ("OLAF").

65. The same day, Mr. Postica wrote to the USG/OIOS office to complain that Ms. Nguyen-Kropp was being retaliated against by the Acting Director by his lowering of her ePAS report.

66. On 19 January 2010, on instruction from Mr. Dudley, Ms. Nguyen-Kropp was asked to vacate her desk in an office and move to a cubicle. By email of the same day, Mr. Postica complained to Ms. Ahlenius' office that this removal was retaliatory in nature. At the hearing, Ms. Nguyen-Kropp's unchallenged evidence was that the desk she had been requested

70. The document also makes proposed policy development changes regarding the intake, interview methodology and file management practices adopted in the cases which were reviewed. PPS states that the intake procedures were developed and implemented as a result of the creation of the Intake Committee in April 2009. PPS also notes that a detailed procedure regarding "Interviews" has been promulgated to all ID/OIOS staff and compliance is mandatory. As a result of this assessment, it is proposed that additional issues be inserted into the procedure, including certification of audio transcripts of taped interviews and the requirement for all interviewees (i

> Therefore I believe it is now time to send the findings and the conclusions of your review to [Mr. Postica] for his comments. It seems to me that he should be provided with all material we have, ie a copy of the binder that you have prepared. It seems fair to give him 2 weeks for his review. I also believe it is appropriate that you submit the conclusions to him for his review.

75. The Tribunal notes that the allegations contained in the Note to File dated 29 October 2009 were prepared by both Applicants albeit the note was signed by Mr. Postica. In any event, PPS did not comply with the instruction to seek comments from the Applicants and stated during the hearing that they considered the instruction of the USG/OIOS to be "optional" or not necessary. This raises a significant question regarding the legitimacy of any belief as to the possible culpability of the Applicants when they were not afforded the due process right to explain the anomalies and apparent procedural errors in their conduct of the investigations of cases no. ID/0052/09 and ID/0234/09.

76. By email exchange dated 23 and 24 March 2010, PPS requested the OIOS IT focal point to restrict access to Citrix folders for cases no. ID/0052/09 and ID/0234/09 and asked why documents in Citrix folder for case no. ID/0052/09 were shown as being created on 11 March 2010 and about the details of two documents that had been missing from case no. ID/0052/09 but reappeared on 11 March 2010. The response from the IT focal point was that "the creation date" in Citrix merely reflects when the documents were last uploaded into Citrix.

77. By email of 25 March 2010, PPS sent to the USG/OIOS two notes on the outcome of its review of the note to file of 29 October 2009. In the first note, PPS indicated that the alleged claims of misconduct against the Acting Director of ID/OIOS were not substantiated.

78. In the second note of 25 March 2010, PPS alleged, without asking the Applicants to explain, possible misconduct by them with regard to what they

described as "significant procedural and investigative irregularities" in Ms. X matters. PPS made the following findings:

> a. There are two versions of the same interview record of Ms. X dated 2 February 2009 "in the respective case folders 0052/09 and 0234/09";
>
> b. "Most of the interview records in case 0052/09 were amended after PPS had completed its quality assurance review. Significantly, the documents had text added, and the initial versions were removed from Citrix and substituted with the later version. These measures draw negative inferences about the veracity of the records and the investigators' actions which may adversely impact on the integrity of cases 0052/09 and 0234/09";
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> c. "Some witness statements in case 0052/09 were signed more than eight months after the interview took place, and well after the case was closed";
>
> d. "The document registers in both cases 0052/09 and 0234/09 have incorrect dates as to when specific documents were placed into Citrix, which undermine the integrity of the case management system and questions the motives of the concerned investigator/s";
>
> e. "The overall pattern of conduct by [the Applicants] regarding the procedural and investigative irregularities identified above demonstrates actions which may constitute possible misconduct".

79. PPS recommended in that second note that "this matter be addressed in the first instance to an external consultant for an independent fact finding inquiry to be conducted" and suggested the World Bank as an appropriate entity to identify an independent investigator to assist with this inquiry. PPS also stated: "Importantly, we believe that the claims of possible misconduct against [the Applicants] should be forwarded to [Mr. Dudley] as soon as possible as the Officer-in-Charge of

the Investigations Division". No explanation has been offered as to why they considered it appropriate to adopt this course of action bearing in mind that they had just concluded their investigation/review of the Applicants' allegations against Mr. Dudley, which resulted in exonerating him and pointing the finger of suspicion towards the Applicants.

80. By email dated 29 March 2010, PPS was informed of a meeting with Ms. Ahlenius to be held the next day in order to discuss the notes. By email of 30 March 2010 to Ms. Ahlenius, Ms. Schultz wrote "[f]urther to our discussion, kindly find proposed language for the email informing Mr. Postica of the outcome of his complaint against [Mr. Dudley]" and a draft of a closure letter to Mr. Dudley.

81. By email dated 31 March 2010, PPS provided a draft of the communication to Ms. Ahlenius about the investigation into possible misconduct by the Applicants. In response, by email dated 31 March 2010, Ms. Ahlenius indicated there was "no rush" and "we should carefully consider words". Ms. Ahlenius also asked PPS to consider if the alleged misconduct "had any influence on the conclusions in Cases No. 0234/09 or 0052/09".

April 2010

82. On 1 April 2010, Mr. Postica's ePAS reports for the cycles of 2008–2009 and 2009–2010 were signed off by Mr. Dudley who, unlike in previous years, lowered significantly his performance evaluation. Further, Mr. Dudley included a negative comment in Ms. Nguyen-Kropp's ePAS report. The Applicants were distressed and regarded these adverse ratings and comments as being retaliatory following the note to file of 29 October 2009.

83. By a note dated 9 April 2010, finalized with the assistance of PPS, Ms. Ahlenius requested the then USG/DM, Ms. Angela Kane, to investigate a report of possible misconduct against the Applicants with respect to their work on Ms. X

May 2010

86. By email of 5 May 2010, PPS provided input to a draft note from Ms. Ahlenius, the USG/OIOS. The next day, Ms. Ahlenius indicated in a note that there were sufficient grounds for proceeding with an investigation and that the matter had been referred to OUSG/DM "for administering a fact finding investigation on behalf of [USG/OIOS'] office". The USG/OIOS indicated that once the investigation was completed, OIOS would be deciding on whether appropriate action should be taken under ST/AI/371.

87. By note of 6 May 2010, Ms. Ahlenius responded to Ms. Kane's memorandum of 29 April 2010 and stated as follows:

> 4. In light of the findings of PPS, I wish to submit this matter to the Department of Management recommending a preliminary fact-finding inquiry pursuant to ST/AI/371. Due to the nature of the matters raised by PPS, any inquiry should be conducted by an external independent expert with the requisite technical investigative background. I have with been provided with a possible focal point to assist in the identification of this expert …
>
> 5. It should be noted that OLAF cannot be a proper venue in this case because of the close affiliation with OLAF by one of the investigators in question.

88. With effect from May 2010, Ms. Nguyen-Kropp went on special leave without pay due to a family emergency. Her leave was subsequently extended until 17 September 2010, due to a death in her immediate family.

June 2010

89. On 10 June 2010, Mr. Mario Baez, Chief, Policy and Oversight Coordination Services, OUSG/DM, sent a summary of three cases for which the UN was requesting the assistance of OLAF, without including the names of the persons to be investigated. During the hearing, Mr. Baez indicated that he had approached OLAF despite being aware that Ms. Ahlenius had cautioned Ms. Kane against approaching

OLAF in view of its affiliation with Mr. Postica. He testified that he had approached OLAF because DM was already discussing the investigation of other cases with them. By email dated 25 June 2010, OLAF indicated its willingness to undertake the investigation and requested the submission of the material

90. On 28 June 2010, Ms. Kane made a formal request for assistance to OLAF and, the next day, Mr. Baez requested OLAF to give priority to the case of "tampering of investigation". The Tribunal notes that it is highly questionable whether such a description of the alleged wrongdoing on the part of the Applicants was appropriate. On 30 June 2010, Mr. Baez sent the documentation to OLAF. By email of the same day, Mr. Baez noted that OLAF may not be the appropriate entity to undertake this investigation "because of the close affiliation of OLAF with one of the investigators in this case" and that

the European Bank for Reconstruction and Development ("ERBD") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") to explore the possibility of their undertaking the i

of opinion which does not mean that the decisions by Ms. Ahlenius and Ms. Kane were an improper exercise of their prerogative as managers. The Tribunal provided the Respondent with the opportunity of calling Ms. Lapointe to rebut the evidence given by the Applicants. This opportunity was not taken.

b. Was the decision to investigate the Applicants' conduct proper or tainted by improper motives, namely retaliation or the intent to taint the reputation of the Applicants so that their allegations of wrongdoing against the Mr. Dudley would not be believed?

c. Did the manner in which Ms. Kane, USG/DM, and those acting on her behalf sought the services of external investigators cause the Applicants reputational damage?

d. If it did, what was the extent of this damage?

e. Was there a disparity and inconsistency in the manner in which the allegations against Mr. Dudley were treated compared to the allegations against the Applicants?

undertake a preliminary investigation. Misconduct is defined in staff

PPS stated that the lack of compliance by the Applicants in relation to certain investigative procedures showed that the procedures should be amended to include new steps such as certification of audio-transcripts of taped interviews and the requirement that all interviewees be provided with the opportunity to review and sign their statement. PPS also stated that clear case management file procedures and instructions were needed and that PPS would commence the drafting of this procedure as a priority. It should also be

Whether due process rights were respected during the preliminary investigation

115. As the United Nations Appeals Tribunal stated in

Whether the decision to conduct the preliminary investigation was retaliatory

119. The Respondent did not submit a reply on the merits of the allegation of retaliatory motive. However, it was submitted by the Respondent in the joint submission and in a footnote to Counsel's closing statement that the UN policy on retaliation, ST/SGB/2005/21, does not apply outside of the context of actions taken by the Ethics Office. In the joint submission, Counsel for the Respondent stated:

> The Respondent is unclear as to what the Tribunal intended in relation to the request for identification of the "protected act" given that this is a concept the Respondent understands to be applicable to the retaliatory policy set out in ST/SGB/2005/21 (Protection against retaliation or reporting misconduct and for cooperating with duly authorized audits or investigations). In the context of the present cases, the Respondent maintains that the only possible "protected act" of the Applicant under the policy was the Note to File dated 29 October 2009. With regard to the consideration of the actions of the USG/OIOS and OUSG/DM, the Respondent's position is that independent of the Organization's policy on retaliation, there is no manifest relevance of the concept of a protected act and the need for a nexus between that protected act and the "retaliatory action". Accordingly, the Respondent submits there is no need to identify the protected act in the matter before the Tribunal.

120. The Applicants allege that retaliation was the true reason or improper motive underlying the decision to conduct a "secret" investigation against them in denial of due process and in callous disregard of the reputational damage that would inevitably be caused to them.

121. As stated in its preamble, Secretary-General's Bulletin ST/SGB/2005/21 was promulgated by the Secretary-General for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigation, and in accordance with para. 161(d) of General Assembly resolution 60/1.

122. Section 1.4 of the Bulletin provides a definition of retaliation, as follows:

indirect interest in the matter or because the retaliatory act may have been procured by a person who has power or influence over the decision maker. Any other interpretation that would permit the Administration to evade the protection afforded to employees by claiming that the causal link between the report and the person making the adverse decision is not direct would completely undermine the effectiveness of the prohibition against retaliation and could rarely if ever be proven.

Whether there was retaliatory intent: the law applied to the facts

135. The fact that the Applicants made, in effect, a complaint of evidence tampering against the Acting Director falls squarely within the scope of protected

Division and obscuring what appeared to be an ulterior motive on the part of Ms. X who may have acted in bad faith.

b. The testimonies of the Special Assistant to the then USG/OIOS and Mr. Postica reveal that shortly after the complaint against him was made, Mr. Dudley threatened Ms. Ahlenius to report her to the United States permanent mission to the United Nations and the Secretary-General for incompetence were she not to "protect" him. The Head of PPS testified that she was also aware of this fact at the relevant time;

c. Mr. Dudley requested that Ms. Nguyen-Kropp move from her office and be placed in an open space under the pretext that another colleague needed the office desk. This desk in Ms. Nguyen-Kropp's former office remained unoccupied for eight months;

d. Shortly thereafter, Ms. Ahlenius requested Ms. Schultz, Head of PPS, a unit directly supervised by Mr. Dudley, to review the complaint against Mr. Dudley;

e. PPS sought the views of Mr. Dudley when reviewing the complaint against him and the review resulted in a 16-page memorandum, three pages of which contain a cursory review of the conduct of the Acting Director, exonerating him of any misconduct, and 12 pages containing a catalogue of errors in investigative procedures by the Applicants as if they were the subject of the investigation rather the complainants or informants. Many of these alleged shortcomings would ,or should, have been picked up during the quality assurance review, for instance unsigned witness statements or what appeared to be editorial or text changes. PPS acknowledged in the memorandum that the errors showed the need to clarify procedures, in particular case management file procedures;

f. Upon review of the memorandum from PPS, Ms. Ahlenius' instruction was that the views of the Applicants be sought before any further step was taken. PPS failed to comply with this instruction, stating at the hearing that the USG/OIOS instruction was "optional" and that obtaining the views of the Applicants regarding the errors identified was not necessary since an investigation would take place and at that point they would be given an opportunity to explain;

g. At the end of the UN performance evaluation period in 2010, the Applicants' performance evaluation was drastically downgraded from previous years by Mr. Dudley, by way of rating for Mr. Postica (in reports for cycles ending in 2008 and 2009) and by way of adverse comments for Ms. Nguyen-Kropp. The Respondent did not provide an explanation or justification for this;n or 4 TD1 Tw[(justevide an exD.0006 Tc-.0031 Tw[(justif)3.6(ication f)3.6(.6

138. The Administration has not demonstrated by clear and convincing evidence that the actions taken by it would have been the same absent the complaint of 29 October 2009. In fact, the complaint against the Applicants was the direct result of the review of the 29 October 2009 complaint. It is difficult to find a more direct causal link between a protected activity and an adverse action. In addition, the nature of the complaint against the Applicants should have rung alarm bells. The violations identified were alleged to have been in breach of the Investigations Manual, and PPS stated that the errors identified showed that investigation and case management file procedures should be clarified or re-written. In addition, non-conformity with provisions in a manual or a document that was not a properly promulgated administrative issuance, be it regarding investigation or hiring procedures, normally raises managerial rather misconduct issues unless it is persistent or negligent.

139. The fact that a relatively greater number of individuals acting on behalf of the Administration participated in the adverse action against the Applicants does not mean that the decision cannot be tainted by improper motive. As mentioned above, retaliation as a motive generally eludes precise identification and is often subtle or

> performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.
>
> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.
>
> 7. The Dispute Tribunal shall not award exemplary or punitive damages.
>
> 8. 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.

145. The Statute of the Tribunal is silent on the issue of damages except to specifically exclude the award of exemplary or punitive damages and to limit compensation, both pecuniary and non-pecuniary, to a maximum of two years' salary unless the case is exceptional.

146. It is well-established jurisprudence, both of the Dispute and Appeals Tribunals, that once the Tribunal has made a determination of liability against the Organization, the applicable principle in determining entitlement to compensation is that the applicant be placed, as far as money can do so, in the same position she or he would have been had the contractual obligation been complied with (*Warren* 2010-UNAT-059). Compensation cannot be awarded where no harm has been suffered. Accordingly, it is for the Applicants to prove that the breaches of contract caused loss or injury (*Sina* 2010-UNAT-094; *Antaki* 2010-UNAT-095).

compensation in the amount of two years' salary for emotional distress suffered and for damage to their professional reputation.

151. The Tribunal considers that an award for moral damage does not justify a link to the staff member's grade or status. Instead, a principled approach should be adopted in that an assessment should first be made of the extent of the damage suffered, then a monetary value should be placed on the harm without regard to the status of the individual.

152. The Tribunal endorses the finding in the judgment of the Dispute Tribunal for the United Nations Relief and Works Agency ("UNRWA), *Abdel Khaleq* UNRWA/DT/2013/022, at para. 84, that assessment of whether moral damage should be awarded should take the following steps:

> a. There should be a finding as to whether or not the Applicant did in fact suffer such damage;
>
> b. If he did not, there would be no basis for such an award;
>
> c. If he did, it will be important for the Tribunal to make a factual determination of the level of damage, bearing in mind that feelings of upset, stress, anxiety, psychological damage and all such components that either singly or cumulatively make up what has been referred to as "moral damages" are at varying levels of severity. At one end of the continuum lies

e. Where the unlawful act was performed maliciously or was high-handed and without due regard for the legitimate concerns and feelings of the staff member, it is bound to have aggravated the feelings of distress and will accordingly attract a higher award;

f. The Tribunal has to take account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly, the Tribunal has to bear in mind the principle of appropriateness and proportionality;

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

153. The Tribunal is persuaded by the evidence presented by the Applicants during the hearing regarding the moral injury and reputational damage suffered as a result of the decision to investigate them and, more importantly, by the manner in which the Office of the USG/DM trawled amongst the small band of professional investigators in international organizations to identify an investigator.

154. The Applicants had a right under their contract of employment to have their complaint against the Acting Director fairly considered. This did not occur. Moreover, their complaint against the Acting Director resulted in a complaint against them, questioning their competence and professionalism and suggesting that these alleged shortcomings amounted to misconduct. These matters comprise a substantial breach of the Respondent's contractual obligations towards the Applicants and caused them substantial damage requiring compensatory payment of an amount sufficient to vindicate the Applicants' rights and demonstrate that the decision to investigate them for possible misconduct was not only unjustified but tainted by retaliatory intent and breach of due process.

Nations (dated 23 August 2013)). Thus, the amount of USD17,000 is a useful reference point when assessing compensation for non-pecuniary harm, considering, of course, that in any particular case the circumstances may justify a higher or lower award.

159. The Tribunal finds, on the evidence before it, that both Ms. Nguyen-Kropp and Mr. Postica suffered non-pecuniary loss (moral damage) of a high order, far in excess of the median sum of USD17,000. There were a number of aggravating factors, as explained above, including the manner in which both Applicants were treated throughout the relevant period of time up to the official notification of clearance, which was delayed by six months, and the fact that senior managers who were directly involved in the decision-making process failed in their duty to uphold UN policies and safeguard the integrity of its oversight framework and commitment to accountability and responsibility.

160. The Tribunal notes, in this regard, the International Civil Service Commission's 2001 Standards of Conduct for the International Civil Service, para. 19 of which states that "[i]t must be the duty of international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions".

161. The factual circumstances in these cases are, of course, quite particular. In determining the appropriate amount of compensation for non-pecuniary harm in these cases, the Tribunal considered the judgments of the United Nations Appeals Tribunal which involved a significant degree of non-pecuniary harm attracting high awards similar in scale: see, e.g., *Chen* 2011-UNAT-107 (affirming the award of six months' net base salary at the P-4 level for non-pecuniary harm); *Appellant* 2011-UNAT-143 (affirming the award of USD40,000 for emotional distress); *Cabrera*

2012-UNAT-215 (reducing the award for non-pecuniary harm to 10 months' net base pay); *Abubakr* 2012-UNAT-272 (reducing the award for non-pecuniary harm from USD40,000 to USD25,000); *Goodwin* 2013-UNAT-346 (affirming the award of USD30,000 for non-pecuniary harm); and *Appleton* 2013-UNAT-347 (affirming the award of USD30,000 for emotional distress).

162. Having considered the overall circumstances in this case, this Tribunal finds that the award of USD40,000 to each Applicant is the appropriate sum of compensation under the head of non-pecuniary loss. All other claims for relief are rejected.

Conclusion

163. The Tribunal finds that the decision that there was "reason to believe" that misconduct may have occurred was manifestly unreasonable and unlawful. The Tribunal finds that the manner in which, and the process whereby, the subsequent preliminary investigation was embarked upon and effected were procedurally flawed and marred by due process breaches and retaliatory intent. The decision-makers paid scant regard to the risk of reputational damage to the Applicants and failed to have full regard to the principles and imperatives of the UN's oversight policy.

164. The Applicants are entitled to an effective remedy as compensation for the damage inflicted upon them in the course of their upholding the Organization's policy on protection against retaliation.

Orders

165. The Tribunal awards the followings sums, in order to place the Applicants in the position they would have been had the contested decisions not been taken:

a. USD10,000 to each Applicant as a contribution towards the economic loss suffered by each Applicant in the form of legal costs. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment;

b. USD40,000 to each Applicant for the non-pecuniary loss (moral damages) suffered. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

166. All other claims are rejected.

(*Signed*)

Judge Goolam Meeran

Dated this 20th day of December 2013

Entered in the Register on this 20th day of December 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York