

# **INVESTIGATION AND DISCIPLINARY PROCEDURES – LAW AND PRACTICE IN THE ILOAT**

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**By Renuka Dhinakaran**

**Dhinakaran International Law Consultancy, The Hague**

**[www.internationallawconsultant.com](http://www.internationallawconsultant.com)**

**[renukadhinakaran@gmail.com](mailto:renukadhinakaran@gmail.com)**



**Dhinakaran**  
**INTERNATIONAL LAW CONSULTANCY**

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**INVESTIGATION PROCEDURES IN INTERNATIONAL ORGANIZATIONS**  
**AGAINST STAFF MEMBERS**

**I. How and by whom can an investigation be launched? What is required to bring a complaint or initiate an investigation?**

1. An investigation against a staff member can be launched under the following circumstances, viz.,
  - i. a complaint is filed by another staff member (Example: harassment or sexual harassment),
  - ii. discrepancies are identified by a department or division of the organization (Example: Salaries and Emoluments division – for claims regarding travel reimbursement or the Human Resources division – for wrongful time allotments),
  - iii. at the initiative of the Executive Head of the Organization or an Executive with delegated authority or
  - iv. by an Investigation Unit or OIT/Internal Audit (where it is provided for in the relevant internal laws of the organization).
2. A complaint is filed by another staff member: The most common issue under this category is can a person who is not a victim file a harassment complaint on behalf of such victim? There is no specific answer to this in the jurisprudence. However, most harassment directives or instructions are drafted in such a manner that only the alleged victim can file a complaint. Just as the organizations argue that there can be no representative actions or class actions and that the internal justice systems are meant for individual appeals, it can be argued that the harassment complaints can also only be filed by the alleged victim in question.
3. There is no particular threshold for filing a complaint by a staff member. What is required is that the complaint should be filed in good faith and without any intention to harm the subject of the complaint or the interests of the organization. It is also important that the complainant has done a basic due diligence so as to not file a reckless or baseless complaint.
4. Discrepancies are identified by a department or division of the organization: When a department identifies discrepancies, whether it can launch the investigation on its own would depend on the internal laws of the organization. Generally speaking, the matter should be referred to the Investigation Unit/Ethics Office/OIG/Internal Audit Division for a preliminary evaluation. It is always essential that the staff member in question is contacted to clear any misunderstandings, unless serious fraud is doubted and there is a possibility of tampering with evidence. The bar for this is very high though and the burden is on the organization.
5. At the initiative of the Executive Head of the Organization or an Executive with delegated authority, for example, the Director General or Head of HR receives a non-

specific complaint regarding a particular situation and a general investigation is launched)

6. By the Investigation Unit or OIT/Internal Audit: An IU can launch an investigation on its own only if there is a specific provision to this effect in the internal laws. If the internal laws list the conditions under which it can be launched, these conditions have to be strictly met. Nevertheless, there has to be a basis for launching the investigation, which must be made available to the staff member at the appropriate time.
7. The question of whether an anonymous complaint can be the basis of an investigation is a difficult to answer. The Tribunal states that even if there are confidentiality provisions, the subject of an investigation is entitled to know his or her accuser and confront them as part of a disciplinary proceeding. This rule will be difficult to enforce if an investigation is launched on the basis of an anonymous complaint.

Note: The initiation of an investigation is not, *per se*, a contestable decision (**Judgment 3236**).

## II. Investigators – Role, conflict of interests

### Role of investigators

8. The role of investigators is to establish facts. Investigators are required to presume that an accused staff member is innocent. Investigators should abide by the internal laws of the organization – including its staff regulations and rules, investigation guidelines/manual/directive, as well as the Uniform Principles and Guidelines for Investigations.
9. The role and the function of an investigation panel was stated clearly by the Tribunal in **Judgments 2475 and 2771**, where it held as follows:

“The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the *‘investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made’*. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.”

10. *The role of investigators is to ascertain whether the claims made in a complaint are verifiably true and establish all relevant facts. It is not to determine whether the facts, as established, constitute misconduct or not. It is not to determine the guilt or innocence of an accused staff member. The latter is the task of a disciplinary committee or panel.* In **Judgment 3848 (Consideration 5)**, the Tribunal held as follows:

“[T]here is nothing in the record indicating if or when the Director General determined that the serious misconduct had been established beyond a reasonable doubt. If he did rely on the conclusion reached in the Investigation Report, that reliance was misplaced. Such a conclusion was clearly beyond the scope of the Investigation Team’s mandate and Terms of Reference that were limited to fact-finding. [...] This was the expression of an opinion that does not belong in a fact-finding report, was highly prejudicial to the complainant and undermines the fairness of the reporting.”

11. This distinction is usually lost on most investigators and investigation reports invariably contain statements regarding the guilt or innocence of a staff member. These should be vehemently opposed, as it may result in an adversarial proceeding being commenced without presumption of innocence, which is a grave violation of the staff member’s due process rights.

12. In **Judgment 3892**, the Tribunal concurred with a statement in the internal laws of an organization which provided that the investigator must approach the matter with an open mind as allegations “are simply claims which will be investigated by interviewing witnesses, establishing facts, and gathering any evidence”. The UN Tribunal’s jurisprudence also underlined at Consideration 39 of **UNDT Judgment No.: UNDT/2014/025** that “an investigator must be neutral, without bias and must approach each case from the standpoint of a presumption of innocence of the subject of the investigation.” The language used by the investigators during the investigation proceedings should be that of allegations to be proven and not of foregone conclusions (**Judgment 274**).

#### Conflict of interest

13. Prior to the commencement of investigation, an investigator has the obligation to disclose any real or apparent conflict of interest with the potential subject and recuse himself or herself. The names of the investigators ought to be disclosed to the subject at the time of notification of investigation. The staff member has the right to make any valid objection to the choice of the investigator, in particular any possible conflict of interest which would justify the investigator’s disqualification (**Judgment 3447, Consideration 5**). Staff members are advised to consider the investigators’ details carefully and record their objections and requests for recusal as early as possible. In case the investigators or the organization refuse such request, an appeal against the decision may be made. However, it is not very likely to succeed as the

Tribunal states that the commencement of an investigation is not cause of action to file a complaint. However, this can be a valid ground for appeal. In **Judgment 3922**, the Tribunal held that an organization has the duty to provide a valid explanation to a staff member's objections to the choice of investigators and a simple expression of confidence is not sufficient.

14. It is also important to note that any person related to the alleged misconduct – for instance, the alleged victim of misconduct or the complainant – should not be allowed to participate in any part of the investigation or any process connected with the investigation. This would be a serious conflict of interest which will vitiate the entire process and render it void *ab initio*.

15. In **Judgment 3958**, The Tribunal expressed in detail as follows:

*“In the present case, there is a conflict of interest on the part of the President. It stems from the fact that the alleged serious misconduct, with which the complainant was charged, might reasonably be thought to have offended the President specifically, directly and individually. This situation, by itself, casts doubts on the President’s impartiality. Considering the whole situation, a reasonable person would think that the President would not bring a detached, impartial mind to the issues involved. The argument raised by the President in his opinion to the Council (CA/C 6/15), quoted above, namely that pursuant to the applicable rules the President was acting within his competence and had the power and duty to take all necessary steps to ensure the smooth functioning of the Office, is immaterial. The question of a conflict of interest only arises if the official is competent. Accordingly, the question of competency is not an answer to a charge of a conflict of interest. Hence, the Administrative Council erred in not finding that the President had a conflict of interest in the matter. In this situation, in accordance with the provisions in force, the Administrative Council should have sent the matter back to the next most senior official to exercise authority instead of the President, who was precluded from exercising authority because of his conflict of interest (see Judgement 2892, under 11).”*

16. In **Judgment 3862**, the Tribunal held that once a conflict is disclosed remedial action must be taken by *“persons in authority to offset the effect or possible effect of bias created by the conflict. That might include the review or revision of decisions taken by a conflicted staff member or the allocation of tasks to a staff member who was not conflicted.”* Persons in positions of authority including supervisors should counsel staff members about how best to manage and deal with a conflict of interest.

### Bad faith

17. A simple allegation of bad faith on the investigators' part, without cogent explanations or proof may not be sufficient though. The ILOAT repeatedly states that bad faith

must be proven and cannot be presumed (see, for example, **Judgments 2472** and **1775**. If there is any evidence to suggest that the investigators failed to obtain, refused to accept or ignored relevant evidence, took account of irrelevant evidence or misconstrued the evidence upon which the subject acted, it would be in support of proving bad faith (**Judgment 2771**).

### External investigators

18. External investigators may be appointed under three circumstances – one – when there is a conflict of interest (such as an investigation against a staff member in the investigation division or in respect of a complaint against the executive head); two – when the internal laws provide for it under certain circumstances and those circumstances are met and three – at the request of a staff member. External investigators should be informed by the organization of all relevant internal laws and investigation guidelines. In **UNDT Judgment No.: UNDT/2012/154**, the UNDT noted that the influence of external investigators was undue and held that the Organisation had a duty to ensure strict compliance with its internal regulations. Liaison with the organization is restricted to ensuring compliance with the internal regulations. Organizations should refrain from providing excessive legal advice to the external investigators, so as to not bias the process.
19. Referral to external investigators should be notified to the subject either at the time of notification of allegations or if done at a later date, as soon as the decision is made. Staff members are requested to obtain a ToR for the external investigators, if there is one, and ensure that their acts are within the tasks described in the ToR.

### **III. Time of notification of allegations - When should the subject of an investigation be notified?**

20. The latest point of notification is prior to the commencement of an interview with the subject of an investigation. This is the one point on which the internal laws of most IOs and the jurisprudence of the UN and ILO Tribunals concur. That is – before or as soon as a staff member enters a room for an interview with investigators, he or she must be presented with a written notice of allegations. In other words, a staff member cannot be told after various inquiries are made and preliminary conclusions arrived that there are allegations against him or her. That is a due process violation (**Judgment 3200**).
21. The earliest point of notification is the most controversial and least clear issue. In **Judgment 2475**, the ILOAT indicated that the moment enquiries are begun in respect of a staff member, he should have been notified; that the staff member was entitled to know that he was being investigated, should know which witnesses are being interviewed and be able to test the evidence. However, it has lately moved away from this line of jurisprudence on this matter.

22. In **Judgment 2065 (Consideration 11)**, the Tribunal held as follows:

*“The Tribunal considers that informing a person in advance that an investigation into certain allegations will be undertaken is not a requisite element of due process. Although notification prior to the start of an investigation may well be the preferred course of action, in certain circumstances alerting an individual to the fact that an investigation is to be undertaken may well compromise the investigation. As well, it may be through a routine review or audit that irregularities are encountered. It is once irregularities have been identified that the individual must be informed of the allegations of irregularities with sufficient precision to enable him to respond adequately; he should then be given an opportunity to respond, in particular to defend himself against the allegations, and to make such further response as the circumstances require prior to any conclusions being reached.”*

23. In **Judgment 3200**, the Tribunal elaborated a bit on this issue. Although it was based on the organization’s internal laws, its principles can be extrapolated generally. “[i]t is required that the subject of the allegations should be informed of the allegations prior to being interviewed. This allows the investigators some latitude as to when this occurs. The timing of this notification will be influenced by, amongst other things, fairness to the subject and the need to protect the integrity of the investigation. Usually, in an interview, the accused will be invited to name witnesses and indicate evidence to support the accused’s version of events. It will often be fair to the accused to give notice of the allegations some time before the interview, perhaps even days, so that the accused has an opportunity to gather their thoughts about who might give evidence on the accused’s behalf and, in appropriate cases, identify documents which might assist the accused’s defence. Yet, such notice might be inappropriate if it compromised the integrity of the investigation, **but that is likely not to be the norm**. However, what is clear is that this step of informing the accused of the allegations should occur before the interview.”

24. The internal laws of most organizations have similar provisions, along with the fact that another staff member can accompany as an observer. In the least, to prepare for the interview and to choose an appropriate observer, sufficient notice will be required. If a staff member is called for an interview at extremely short notice, objection should be registered right away and a request for postponement should be recorded.

#### **IV. Content of notification of allegations**

25. A staff member must be informed of the allegations of irregularities with sufficient precision to enable him or her to respond adequately (**Judgment No. 2605, Consideration 11**), as well as the name of the accuser(s).

26. Generally speaking, the name of an accuser ought to be revealed in the notice of allegations. It is contrary to due process to require an accused staff member to answer

unsubstantiated allegations made by unknown persons (**Judgment No. 2014, Consideration 17(d)**).

27. In order to understand what the allegations are, how to respond and frame a defence, an accused would need to be told who had made the allegations. The identity of the accuser is a significant piece of information necessary to inform the accused of the factual context in which the accused's alleged conduct was said to have occurred. The obligation to inform the accused of the allegations includes an obligation to identify the accuser as part of the factual matrix of what constitutes "the allegation" (**Judgment No. 3200, Consideration 9**).
28. Any restriction in the internal laws regarding confidentiality of an accuser's name must be interpreted in a manner consistent with the fundamental right of due process to know the name of the accuser, except in those circumstances where revealing the identity of the accuser could undermine the integrity of the investigation. The burden of proof rests with the organization in this respect. (**Judgment 3200, Consideration 11**). Charges cannot be brought against a staff member based on an investigation which was conducted without disclosing the accuser's name (**Judgment 2014, Consideration 17d**).

## V. Interview of the accused staff member

29. A staff member should receive sufficient notice before being called into an interview. At the start of the interview, he or she should know the names of the accusers, the allegations against him or her clearly. He or she should be allowed to present his or her side of the facts, submit evidence and provide a list of witnesses to be interviewed (preferably with clear reasons).
- i. Right against self-incrimination
30. The internal laws of most international organizations provide that staff members shall be obliged to co-operate fully with an investigation. This obligation includes being available for interviews, providing all information which may reasonably have a bearing on the case and answering all pertinent questions. It may also include the requirement to provide access to all relevant records, including those stored electronically.
31. These laws do not distinguish between the subject of an investigation and other staff members vis-à-vis this obligation. If we were to consider the example of an employee who is first interviewed as a "witness" and later as a "subject", we would naturally have to conclude that the absence of a privilege against self-incrimination automatically places the employee at a huge disadvantage, violating his/her rights to due process and defense.

32. As a result, the subject of an investigation is either forced to admit facts which will potentially establish misconduct, thereby effectively pleading guilty (as opposed to the Tribunal's consistent jurisprudence, including in Judgment Nos. 2475 and 2771 mentioned above, that a subject is presumed innocent until proven guilty) or commit potential perjury. If the subject does not cooperate with the investigation, he or she may become liable to disciplinary measures.
33. Therefore, these laws, when applied to an accused staff member, is in violation of the right against "self-incrimination" which is a fundamental human right. The ILOAT has held that international organizations are bound by fundamental legal principles and general principles of law. Yet, it has not yet ruled that the right against self-incrimination is included in this. However, it can be argued that this insistence on cooperation at all costs is incompatible with the Tribunal's jurisprudence of presumption of innocence until proven guilty.
34. Since there is limited jurisprudence on this exact question/right in the ILOAT, it is helpful to look at what the former UNAT held, in properly applying due process principles in Judgment No. 1246, as follows: the **former UNAT, in its Judgment N°. 1246** stated unequivocally that:
- "V. In conclusion, the Tribunal is of the opinion that the assurances of due process and fairness [...] mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees. Moreover, the Tribunal finds that *there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, sine processu.*" (emphasis added)
35. Even if an organization does not subscribe to the jurisdiction of the UNAT, absent a direct contradictory case on point from the ILOAT (of which the author is unaware) a relevant and pertinent UNAT judgment should and will be given deference by the ILOAT and is persuasive authority for the proposition asserted.

ii. Right to legal representation

36. An accused staff member is free to seek legal advice from a lawyer or an attorney (**Judgment 3236**). However, whether he or she may be allowed to accompany and represent the staff member during an investigation (and interview) is not clear. If it is allowed in the internal laws of an organization, then the answer is yes.
37. However, the internal laws of most international organizations do not allow for such representation. The ILOAT has not addressed this question directly – at least not in the context of an investigative proceedings. In fact, the ILOAT makes a distinction

between the standard of due process to be observed at an investigative stage as opposed to a disciplinary stage. The standard is much higher in the latter, as it is an adversarial proceeding while the former is merely a fact finding process. So, as long as the accused staff member is presented with all the evidence and is allowed to comment on it (with external legal advice, if necessary and possible), the ILOAT finds this to be sufficient for fulfilling the due process rights at an investigative stage.

38. Investigators are often advised by and have access to the lawyers of the organization regularly. The subject of an investigation, on the other hand, has to do everything that is asked of him or her by the investigators, with no lawyer allowed to represent him or her, or face disciplinary measures for "non-cooperation". This is in violation of the principle of equality of arms.

39. Thus the accused has to choose between Scylla and Charibdis. All of this happens in a context where the investigators are invariably under the authority of the party accusing him and/or the party that will mete out the punishment, through a process in which the accused will not be involved throughout, of which he has little knowledge, and without legal representation.

40. Most international organizations argue that the right to legal representation at the disciplinary stage off-sets the lack of legal representation at the investigation stage is therefore illogical and without basis in any general principle of law. Any inadvertent error or waiver of rights committed by the subject during the investigation stage, due to lack of legal representation, cannot be corrected at the disciplinary stage.

41. The **former UNAT, in Judgment No. 1058 of 2002**, held as follows:

"The Tribunal does not agree with the position ... that the lack of due process during the period leading to the decision of summary dismissal was 'cured' by the 'full due process' the Applicant received in the [Joint Disciplinary Committee] proceedings. This is one of those cases where *the lack of due process at an early stage has an inevitable direct impact on the decisions in the following stages.*"

42. On this basis, it is important to request for legal representation at an early stage. The accused staff member should list the number of legal difficulties in defending himself or herself and how due process rights are affected. In the least, this will help build a case of procedural violations.

43. As for the question of legal costs, international organisations do not *per se* have a duty to provide any form of legal aid for the subject of an investigation (except in the UN system, where OSLA is obliged to help a staff member). This places staff members at a significant disadvantage and breaches the principle of equality of arms. The ILOAT system simply provides for moral damages where a staff member impacted by an investigation wins before the Tribunal but it is usually too little and too late. The best

options would be to consult the legal insurer, if the staff member has one or the staff association/union.

iii. Right to be accompanied

44. As a general rule, a staff member can be accompanied by a current (or in some instances former) staff member to an interview. This person is usually only allowed to attend as an “observer” and not advise or participate in the interview in any manner. Unfortunately, in **Judgment 3852**, the Tribunal held that if the internal laws provide that an accompanying staff member cannot talk or advise during the interview, then they cannot and that it is valid. There are certain unofficial manners through which this can be overcome though. It is also possible that the observer may have certain relevant information regarding the questions asked. It would be advisable to note these down and at the end of the interview, point out that the observer wishes to be heard as a witness. The observer should endeavour to make clear minutes of the interview (as opposed to an analysis), so as to be able to compare it with the investigators’ minutes or audio recordings.

45. There are no special provisions for being accompanied by a special emotional support person. Usually, the accompanying staff member fulfils this role. However, if the accused staff member has special medical issues, then a request can be made that he or she be accompanied by a treating physician or, in the least, that the Office doctor should be in standby. If the staff member is sick, then the advice would be to not attend the interview until he or she is cleared to be fit for service. If a staff member is not fit to resume service, he or she is not fit to be interviewed for an investigation.

iv. Right to an interpreter

46. An interview as part of an investigation is usually required to be conducted in one of the official languages of the organization in which the staff member is fluent. If the investigation involves documents in a language that the staff member is not fluent (and knowledge of the said language is not required for his or her post/job description), then the staff member is entitled to a translation to a language of choice (official language). If the interview is to be conducted in a language that the staff member is not fluent, request for an interpreter should be made. Continuing to conduct such an interview without an interpreter will be in violation of the staff member’s due process rights.

v. Preparation for and attending an interview – Dos and Don’ts

47. **Prior to the interview**, please go through the notice of allegations if it has been given to you. Go through every allegation or charge carefully. Start gathering any evidence you have – email correspondence, memoranda, bills/invoices, proof of payment/receipt, any documentation (paper or electronic) to negate the allegations.

Prepare a list of potential witnesses. Analyze whether each witness will help your case or harm and in case of doubt, do not include the name. Prepare a list of possible questions which may be asked. Use the assistance of a staff representative or legal advisor, if possible. Read and make a print out of all the relevant internal laws regarding the allegations, as well as a copy of the Investigation Guidelines applicable to your organization. Make sure to know what your rights are and what the investigators can and cannot do.

#### **48. During the interview:**

*Before the tape recorder is switched on:*

- Do not state anything relevant to the case or even personal information before the tape recorder is switched on.
- DO NOT say anything, as there is always a chance that it might be misinterpreted.
- 

*After the tape is switched on:*

- Wait for the first question to be asked.
- Listen to the questions carefully. Take a few seconds to let it sink in. Then, before answering the question, state clearly that you deny all allegations against. Then, answer as clearly and concisely as you possibly can. If necessary, write down every question before you provide an answer.
- Do not volunteer any information, unless you have brought any clear supporting evidence with you which has been cleared by your legal advisor.
- Answer only the questions which you are asked.
- Remember to be consistent.
- If you want to be sure, you can write down the answers you give, so as to ensure consistency.
- If the investigators ask for evidence: If a staff member is not asked to bring any evidence of anything, then he or she has to simply state that time is needed to procure such evidence and should request a clear list. If you have brought any clear supporting evidence with you which has been cleared by your legal advisor, please provide it at the appropriate time.

*After the tape is switched off:*

- Try not to stay behind for long.
- Leave as soon as possible. Do not mention anything, related or unrelated.

## **VI. Witness Interviews**

49. As stated earlier, witness interviews shall not commence prior to notification of the accused staff member. The accused staff member can (and should) present a list of witnesses that he or she wish to be heard by the investigators (preferably with clear reasons). These witnesses should be interviewed by the investigators and failure to interview without valid justifications can be used to contest the results of the

investigation on the grounds of mistake of fact/failure to take into account all relevant facts as well as the bias of investigators.

50. Investigators have discretion in questioning witnesses and there is no rule in requiring standardised questions. However, questions cannot be leading and must be within a range of reasonable correctness (**Judgment 3200**).

51. Should the accused staff member be present when a witness is interviewed?

There is no established rule for questioning of witnesses or the recording of such questioning. The ILOAT originally held (in **Judgments 999 & 1133**) that an accused staff member must be present when a witness is being questioned or interviewed. However, this has changed over time (see **Judgment 2771 and 3682** for example). The Tribunal now interprets these judgments to mean that evidence cannot be taken from one party without the other's knowledge. In other words, all witnesses who were interviewed must be disclosed to the accused staff member and there must be a written record of the interviews – if the organization wishes to rely on these interviews to make a decision against the accused staff member. Potential biases of witnesses have to be evaluated properly and a failure to do so would result in tainting the investigation (**Judgment 3200**).

52. Should there be an audio recording of a witness interview?

If the internal laws provide for an audio recording of witnesses to be made, there has to be an audio recording and the accused staff member is entitled to hear this before a final investigation report is made.

53. Should there be a written transcript of the interview and if yes, should it provided in full to the accused staff member?

The Tribunal is not very clear on this issue. It has accepted certain cases where the organizations have not had a written transcript of the interview(3200). However, in other cases, it has held that there must at least be a summary of interviews with witnesses and this ought to be provided to the accused staff member (2771).

54. It would be advisable for staff members who have been notified of an investigation against them to request that all witness interviews be recorded (by audio) and written transcripts be produced. This is in line with the Tribunal's critical jurisprudence regarding due process during investigations as held in **Judgment 2475**: "investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made". After all, it would not be possible to test the evidence if it is not documented in the first place. However, in **Judgments 3682 and 3927** the Tribunal held that

summaries of witness testimonies shall be sufficient and entire transcripts are not needed. This appears to be a one-off judgment and should not be relied upon heavily.

## **VII. Evidence gathering and admissibility**

55. Gathering of evidence is the primary task of an investigator or investigation team. Investigations must be conducted in a manner that is designed to ascertain all relevant facts. Evidence gathering is therefore a crucial and essential part of an investigation. According to the Uniform Guidelines on Investigations, evidence gathering includes collection and analysis of documentary, video, audio, photographic, and electronic information or other material, interviews of witnesses. Investigators are required to gather inculpatory as well as exculpatory evidence. Omission to investigate exculpatory evidence (especially if it is provided by the subject) can be used to disqualify the investigation or, in the least, prove the bias of the investigators.

### i. Evidence gathering at the preliminary evaluation stage

56. Most international organizations require that a complaint is subject to a preliminary evaluation to determine whether there is a need for a full investigation. The question of whether a subject should be informed about this is tricky to answer. The ILOAT states that preliminary evaluations shall be restricted to going through the complaint and assessing its allegations – to see whether the complaint has been made within the applicable time limits, falls within the investigators’ jurisdiction or authority, and whether, if proven, the allegations will amount to misconduct. A minimum amount of document analysis – that is any documents attached to the complaint is permissible. If the preliminary evaluation shows that there is no need for a full investigation, then the Tribunal finds it acceptable if a subject is not notified. However, if there is going to be any kind of inquiry – whether calling for documents from another department or talking to witnesses – then the subject has to be notified immediately prior to the commencement of these activities. Any documentary or witness testimony obtained at the “preliminary evaluation stage” without the subject being notified shall be inadmissible.

### ii. Evidence gathering at the investigation stage

57. Broadly speaking, there are four types of evidence gathering: 1) Obtaining documents or electronic evidence organization 2) Obtaining evidence from the subject’s work computer and e-mails 3) Obtaining evidence through witness testimonies of staff members of the organization 4) Obtaining evidence from third parties. The 3rd point has already been covered, so the other three will be covered here

a. Obtaining documents or electronic evidence from the organization

58. Any documents on record with the organization (i.e., official memoranda, files, reports, etc.) should be obtained through a written notification to the official who is in charge of those documents. In any case, the gathering of such evidence should be done without harming the good name of the subject of the investigation. Neither the fact that a staff member is being investigated nor the details of such investigation should be shared with any person to whom a request for documentation or evidence is made. Breach of the subject's right to confidentiality is cause for damages, although whether it will void the investigative findings is not a surety.

- *Confidential documents – Right to privacy and Privileged information*

59. Should these documents relate to a staff member's health or medical files, they cannot be shared with the investigators without the subject's consent. In **Judgment 2271**, the Tribunal held that the confidential nature of medical information concerning the state of health of staff members constitutes a key element of their right to privacy. It is no doubt both necessary and legitimate for an international organisation, like any employer, to investigate requests for sick leave, to examine medical certificates and to have the health of its staff members checked by appropriate means. Such information should be gathered and processed on a fully confidential basis, however, and should never be communicated to third parties without the explicit consent of the person concerned. This includes internal bodies of an international organization (meaning investigators as well). The fact that the members of these bodies are bound by an obligation of confidentiality does not mean that information covered by medical secrecy can be disclosed to them without the consent of the persons concerned.

60. Any legal advice that is sought and/or obtained is *prima facie* privileged unless this privilege has been waived. Discussions of advisory bodies and committees are privileged and confidential information – their reports are not necessarily so (**Judgment 3290**).

- *Surveillance footage*

61. In **Judgment 3872**, the Tribunal held that an international organization is entitled to implement appropriate security measures to secure its property. The Tribunal stated that it was satisfied that the organization in question had every authority to conduct the surveillance at the subject facilities in order to address the incidence of missing items from its property.

- *Hearsay evidence*

62. Hearsay evidence will not necessarily be deemed inadmissible so long as it is of probative value. In **Judgment 2771**, the Tribunal held that it may here be noted that

hearsay evidence is not necessarily inadmissible. The question is always one of its probative value.

*b. Obtaining evidence from the subject's work computer and e-mails*

63. This is increasingly becoming a problematic issue in several international organizations. Unless there are clear internal laws regarding the seizure and search of work computers, the Tribunal's jurisprudence has to form the basis. A staff member's laptop or work computer has to be taken with his or her knowledge, but not necessarily their consent – as it is the property of the organization. In **Judgment No. 2741**, the Tribunal stated that a staff member's work computer may be confiscated only if there are no other means to obtain the information contained therein. It must be done in the presence of the staff member or his/her representatives. Where the staff member's presence is not possible (say, due to sick leave) or in case of an emergency, it has to be done in the presence of an objective third party (such as a Notary) and all hardware noted carefully so as to prevent any tampering with the computer equipment (or dissemination of any personal information).
64. However, the Tribunal has distinguished this judgment now and the current position, as expressed in **Judgment 3852** is as follows:
- (i) If the computer, scanner or any electronic device is the property of an international organization,
  - (ii) the staff member in question has been notified of the allegations and investigation against him or her
  - (iii) the staff member has been given an opportunity to copy personal files from work computer and
  - (iv) the staff member is allowed to comment on the forensic examination report of the computer, investigators can perform a search and seizure. The staff member's presence during such forensic examination is required only if the internal laws of the organization require it.
65. It can be argued that this case was decided so because the relevant organization had its staff members to acknowledge a disclaimer prior to logging in to their work computers, by which they agreed to authorized use only and to system monitoring. If an organization does not have this disclaimer, the search and seizure can be questioned – however, if the work computer belongs to the organization, then it will still retain the power to obtain the said computer. It can still be argued that if a staff member is on sick leave, his or her work computer shall not be seized and searched without following the provisions laid down in Judgment 2741.
66. However, this is much harder after In **Judgment 3875 (Consideration 5)** was issued, where it was held as follows:
- “The Tribunal held that an investigation aimed at identifying the perpetrator of an undisputed incident of computer hacking has no chance of success unless rigorous

protective measures are taken immediately, as a first step, in order to put an end to the damage caused by this unlawful action. The evidence in the file shows, firstly, that the conduct of the investigators towards an employee whom they could objectively regard as the prime suspect did not go beyond what was necessary in the circumstances. Had they not seized all the data in his possession, and had he not been removed temporarily from his workplace, it would have been easy for him, if he was the guilty party, to erase any data which might have proved that he was implicated in the hacking which formed the subject of the investigation.”

67. Nevertheless, when a search and seizure notice is received, staff members are requested to make a full copy of the hard drive on their computer, copy and delete all personal files on the computer. Staff members are also advised to routinely clear their search histories, especially involving personal information. When a work computer is handed over to the investigators, staff members should be requested to make a full inventory of the hardware and obtain signature from the person(s) taking it from him or her.

*c. Obtaining evidence from third parties*

68. If the organisation consults a third party to obtain information in respect of an investigation against a staff member, it must ensure it does so in manner that does not impair the dignity and reputation of the affected staff member. In **Judgment 2396 (Consideration 4)**, the Tribunal held that “Any administrative or disciplinary body of an organisation which consults a third party to obtain information concerning the professional behaviour of one of its staff members must naturally avoid impairing the latter's dignity and reputation. In the first place, it absolutely must ensure that the presumption of his innocence is maintained, and if its action is such as to breach the presumption of innocence or the fundamental rights of the staff member, making that action confidential is of no avail.”

### **VIII. Right of the accused to test, review and respond to evidence**

69. A staff member under investigation is entitled to all evidence on which the organisation intends to base its decision against them and such evidence cannot be withheld under normal circumstances on grounds of confidentiality. This includes interviews or summaries of interviews as well as copies of the investigation report. Furthermore, staff members are entitled to confront their accusers (as explained above). A staff member must be afforded ample opportunity to comment on the evidence and put forward his or her point of view. This right, however, does not necessarily extend to a person who is the reporter of misconduct and not the accused.
70. The Tribunal has consistently held that even at an investigative stage, a staff member has the right to view, contest and respond to evidence prior to the completion of the investigation. As the ILOAT held in **Judgment 2771**, “[...] it is necessary that there

be a fair investigation, in the sense described in **Judgment 2475**, and that there be an opportunity to answer the evidence and the charges.”

71. This can (and should) be done in three stages. One – before the interview, when the accused staff member can submit clear responses during the interview. This is highly unlikely as organizations do not have a duty to share evidence before the interview. Two – after the interview, when the accused staff member can evaluate the evidence and provide rebuttals with supporting evidence, to be included in the investigation report. Three – by way of a draft investigation report, which the subject can comment on prior to its finalization. This has been held by the Tribunal to now be a requirement in **Judgments 3287 and 3831** that *due process requires that the subject of an investigation is entitled to comment on an investigation report in order to respond to the allegations against her or him.*
72. However, the general practice among international organizations is that the subject of an investigation is not provided an opportunity to examine the evidence in his or her matter until a disciplinary proceeding is initiated. A summary of findings alone is provided, on which he or she may comment but not on the evidence. A summary of "findings" is useless without the evidence on which those findings are said to be based, as context as well as content are crucial. The investigation report is "finalized", therefore, without any proper evidentiary rebuttal from the subject. This is in violation of the staff member's right to test the evidence put against him or her and to answer the charge made.
73. This is also problematic on several other counts – it leaves the staff member with very limited time to review the report prior to a disciplinary hearing. Furthermore, if the organization decides to not initiate a disciplinary procedure, then the staff member is never allowed to test the investigation process whatsoever. A staff member who has been subject to an investigation is entitled to know what transpired during an investigation process, whether or not it leads to filing of charges against him or her. Even if charges were not to be filed at the end of a particular investigation. There is no right for a falsely accused staff member to complain against any staff member who has filed a malicious complaint.
74. In certain decisions (such as **Judgment 3295**), the Tribunal held that not providing an investigation report until disciplinary proceedings were commenced was lawful as the staff member had enough chance to test the evidence during an adversarial proceeding. As stated earlier, there is recent jurisprudence which states otherwise and it is better rely on them. This departure in the Tribunal's decision does not sit well with its overall jurisprudence. As the UNAT held, in **Judgment 1058**, the lack of due process at an early stage has an inevitable direct impact on the decisions in the following stages.
75. The accused staff member's comments should be included either directly or as an annex to the investigation report. A disciplinary committee should be able to see both

sides of the story at the commencement of an adversarial proceeding. Failing to do so would affect the presumption of innocence and might require the subject to prove his or her innocence as opposed to the organization proving his or her guilt. When the investigators refuse to include an accused staff member's comments and change their report, there has to be a clear explanation as to why those comments were not included and legitimate reasons have to be provided. Failure to do so would taint the investigation as well as any decision made on the basis of such a flawed investigation.

76. Therefore, an accused staff member is advised to cite the above-mentioned jurisprudence and request a copy of the investigation report for comments before it is finalized. Staff members are advised to pay attention the following matters while preparing their comments:

- Identify and list the procedural violations committed by the investigators, if any
- Deny any and all allegations of wrongdoing
- Check if the evidence is properly reflected in the report or if it is presented out of context, crucial evidence has not been included or witness biases have not been evaluated
- Check if all witnesses you listed are included and if not, whether there are valid reasons for such non-inclusion
- Check your interview transcripts and point out the errors to be corrected. If the investigators refuse to correct them, submit this as an addendum to your comments on the investigation report, so as to set the record straight.
- Check if the burden and standard of proof has been properly applied
- Check if the investigators have exceeded their role, i.e., whether they have merely established the facts in question or have also analysed whether the facts, as established, amounted to misconduct. The latter is the job of a disciplinary committee as part of an adversarial proceeding and an investigation team performing this is a patent violation of a staff member's due process rights.

## **IX. Time limits for investigations**

77. There are two kinds of time limits – time limits for filing complaints and time limits for completing the investigation. Where the internal laws of an organization provides for certain time limits within which complaints are to be filed, these have to be complied with. Investigators should not continue investigating a complaint that was filed outside the relevant time limits. This should become evident in the preliminary evaluation. Where there are no time limits for filing a complaint, care must be paid to ensure that matters which are alleged to have occurred a long time ago are not investigated without compelling reasons. This is so because the passage of time erodes the quality of evidence and the memories of witnesses, if any, thereby rendering the due process rights of the subject vulnerable.

78. As for time limits for the investigation itself, if the internal laws require the completion of an investigation within a mandatory time limit, it has to be followed (in

accordance with the *tu patere legem* principle), unless there are valid justifications – such as the sickness of the subject, delays due to act of god. Where there are no time limits for investigations, reliance has to be placed on the Tribunal's jurisprudence, which is easier said than done.

79. The Tribunal's only consistent statement in this respect is that an investigation must be conducted and concluded within a reasonable time and without undue delays. As to what constitutes reasonable time, there is no set formula but it would depend on the complexity of the case, number of allegations of misconduct, number of subjects involved, number of witnesses to be interviewed, volume of documentation or evidence to be analysed and the co-operation of the subject of the investigation. In **Judgment 3831**, a 25 month period of investigation was found to be valid by the Tribunal on the ground that it was an extremely complex case involving several subjects, difficulty in gathering witness testimony and the voluminous documentation to be processed. In **Judgment 3447**, the Tribunal found that harassment cases in particular should be treated as quickly and efficiently as possible, in order to protect staff members from unnecessary suffering, but attention must also be paid to thoroughness and procedure (see Judgment 2642, under 8). In the present case, the Tribunal is of the opinion that nine months to complete a harassment investigation is by no means excessive considering the length of the grievance itself and the over 300 annexes attached to be considered."

## **X. Investigation Report**

80. An investigation report is drawn up at the conclusion of an investigation. As stated earlier, most organizations require that a draft investigation report be provided to the subject for comments and then a final report should be prepared – either including the comments or containing reasons for their non-inclusion and annexing them to the report separately.

81. An investigation report should establish all relevant facts. The content of the report depends on what is required in the organization's specific internal laws or the terms of reference of the investigators. However, generally speaking, it should include all details about the complaint (and complainant), investigative methodology adopted, list of witnesses interviewed, list of documents and evidence collected, to be followed by an analysis of the evidence to arrive at **factual** conclusions. This analysis will reflect whether the investigators have discharged the burden of proof and what standard of proof has been applied. Equally important is for an investigation report to contain both inculpatory as well as exculpatory evidence.

82. In **Judgment 3927**, the Tribunal stated that an organization cannot rely on confidentiality and refrain from providing the investigation report to the subject. While the deliberations of investigators may be confidential, the consequent reports cannot be confidential if they are meant to be relied on in adversarial proceedings.

This leaves open the question of whether an investigation report need not be shared if there is going to be no disciplinary proceeding.

i. Disclosure of evidence and witness testimonies

83. There are two distinct phases of burden (and standard of proof) – the investigative stage and the disciplinary stage. At both stages, the burden of proof is the same – beyond reasonable doubt. The difference is as to which aspect that burden has to be discharged. At the investigative stage, the burden is with respect to establishing the facts – that is the investigators have to establish that certain facts did or did not happen. At the disciplinary stage the burden is with respect to proving whether the facts, as established, constitute misconduct.
84. According to **Judgment 3863**, the case law of the Tribunal establishes that, as a general rule, a staff member must have access to all evidence on which the authority bases (or intends to base) its decision against her or him. Under normal circumstances, such evidence cannot be withheld on grounds of confidentiality (see Judgment 2700, consideration 6, cited recently in Judgments 3688, 3613, 3586, 3490, 3380, 3347, 3290, 3285, 3272 and 3264, for example). The complainant is also entitled to have an opportunity to test the evidence and produce evidence to the contrary (see, for example, Judgment 2786, consideration 13). In **Judgment 2229**, the Tribunal held that "In accordance with the principles relating to the protection of information, staff members are entitled, even outside the context of a dispute, to have access to significant information concerning them which is in the possession of the administration [...] This applies a fortiori in the context of a procedure in which such information is used to support a decision affecting a staff member." It did state, however, that there are exceptions to this rule.
85. In **Judgment 3640 (and 3732)** the Tribunal held that as is expressly indicated by the use of the terms "as a general rule" and "under normal circumstances" in the above excerpts of judgments, the case law in question does allow some exceptions to the principle which it establishes. The Tribunal considers it both necessary and possible to achieve a reasonable balance between maintaining the strict confidentiality of certain information and safeguarding the due process rights of a staff member.
86. According to this balance, where certain testimony or other materials which are deemed confidential to protect third parties (such as whistle blowers, complainants of sexual harassment), they need not be forwarded to the accused official, but she or he must nevertheless be informed of the content of these documents in order to have all the information which she or he needs to defend herself or himself fully in these proceedings. The Tribunal states it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof (see Judgment 2771, under 18).

87. Where the internal laws of an organization require that an investigation report should contain all information gathered during an investigation, witness testimonies should be attached in full. Where there is no such law, they should still be provided, unless there is any prohibition in respect of such disclosure. In such circumstances, in the least, summaries of those testimonies should be provided. Non-disclosure is also permissible when criminal proceedings are pending before national authorities (**Judgment 3862**).

ii. Burden of proof

88. The burden of proof in investigations is on the organization. In **Judgment 3880**, the Tribunal held that it is “well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct [...] (Judgment 3649, under 14). It is also well established that a staff member accused of misconduct is presumed to be innocent (Judgment 2879, under 11) and is to be given the benefit of the doubt (Judgment 2849, under 16).

iii. Shift in the burden of proof

89. While the burden of proof rests with the organization, it can (and will) shift to the subject of an investigation under certain circumstances. For instance, where the prima facie evidence is overwhelming and there is no innocent explanation for it, the burden shifts to the subject of an investigation to disprove the evidence and establish his or her innocence. This is almost always restricted to cases involving fraud, corruption or manipulation. In **Judgment 3297**, the Tribunal held that while the organization had the burden of proof, it is important to note that after it presented its “prima facie case” the complainant “failed to adduce any evidence tending to rebut it” (see **Judgment 1828**, under 11). The Tribunal was of the opinion that the evidence presented by the organization, taken altogether, cannot be ignored. “Those circumstances point convincingly to guilt and there is no credible innocent explanation for them. Further, the explanation offered by the complainant is implausible to a degree and is simply incompatible with the circumstances put in evidence by the Organization” (see **Judgment 2231**, under 5).

90. In cases of harassment, the burden of proof is on the person making the complaint – at the investigative stage.

iv. Standard of proof

91. The standard of proof in investigations (and disciplinary cases) is beyond reasonable doubt. As to how this is to be determined varies based on the nature of allegations. For allegations involving fraud, the Tribunal will not require absolute proof, which it considers as being almost impossible to provide on such a matter. As long as there is a set of precise and concurring presumptions of the complainant’s guilt” the

investigation will have met the standard of proof (Judgments **3297, 3964 3757 and 1384**). For allegations regarding corruption (Judgment 3757), the Tribunal has found that adducing material evidence is especially difficult in cases of corruption or market manipulation where nothing is put in writing by either party and everything often takes place without the involvement of third persons who might be called as witnesses. A staff member who is accused of such dealings is certainly entitled to due process offering him every opportunity to defend his interests, and the burden of proof always falls upon the Administration. However, the latter's investigation will not be required to culminate in the establishment of absolute proof. All that is needed is a set of precise and concurring presumptions removing any reasonable doubt that the acts in question actually took place (see Judgments 1384, **3137** and 3297).

92. In all other cases, the standard of proof is beyond reasonable doubt – the “set of precise and concurring presumptions” do not apply. As the Tribunal summarized its jurisprudence in **Judgment 3880**, it is “well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed” (Judgment 3649, under 14). It is also well established that a staff member accused of misconduct is presumed to be innocent (Judgment 2879, under 11) and is to be given the benefit of the doubt (Judgment 2849, under 16).

## **XI. Confidentiality**

93. Investigative procedures are confidential. In **Judgment 3964**, it was revealed that potential witnesses from the IU had been provided with a copy of the complainant's rejoinder. The Tribunal held that irrespective of how this happened, the organization was responsible for this action. It held that the subject's confidentiality was not preserved. However, it only awarded moral damages as the individuals to whom the material was sent were themselves bound to keep it confidential. This was also held previously in **Judgment 3487**. Investigation reports and related evidence shall not be disclosed to anyone who is not entitled to receive them (**Judgment 2371**).

94. Confidentiality during investigations cannot be imposed unless this is strictly required. Two purposes may legitimize confidentiality:

- The first is to protect the accused, since he is presumed innocent. In this respect, the obligation of confidentiality applies to the investigators, not the investigated.
- The second is to protect the integrity of the investigation, namely to ensure that potential witnesses are not intimidated or unfairly influenced and, in some cases, to ensure that the accused or his accomplices do not destroy evidence.

95. The internal laws of most organizations require that the subject of an investigation should maintain the investigation's confidentiality. This does not extend to the subject's legal advisor/lawyer, chosen staff member/staff representative who assists

through the investigation, medical professionals and immediate family. However, whether simply disclosing the existence of an investigation (by the subject) constitutes a breach of confidentiality is an open question, one which the Tribunal has not yet addressed directly. Nevertheless, under certain circumstances, such disclosure should be permissible. For instance, when a staff representative is investigated in respect of allegations regarding his or her staff representative activities, he or she should be allowed to disclose it to the respective constituents.

## **XII. Suspension pending investigation**

96. Suspension of the subject of an investigation pending its completion is permissible under certain circumstances. The Tribunal's recent jurisprudence states that a suspension decision must be contested immediately and not as part of the final decision at the end of the investigation or disciplinary procedure. In **Judgments 3971 and 3958**, the Tribunal held that the suspension decision, by itself, has an immediate, material, legal, and adverse effect on the person concerned, and is not subsumed under the final decision taken at the conclusion of any disciplinary proceedings. Consequently, it cannot be considered a mere step leading to the final decision taken at the conclusion of the proceedings and, according to the Tribunal's case law, must be challenged by itself and not as a part of the final decision (see **Judgments 1927, 2365, and 3035**).
97. According to the Tribunal's case law (summarized in **Judgment 3037**), suspension is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see **Judgments 1927**, under 5, and **2365**, under 4(a)). Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality. A measure of suspension should not be ordered except in cases of serious misconduct. If the preliminary information in the executive head's possession brings to light credible evidence that serious misconduct could be ascribed to the subject or that the subject could interfere with the integrity of the investigation, a measure of suspension can be ordered. The duration of suspension is a matter of proportionality.
98. Suspension is not a sanction but a measure of interim precaution (**Judgment 3502**). However, suspension without pay is a sanction and essentially a disciplinary measure. Imposition of such sanction without sufficient due process protections will be void *ab initio*.
99. Suspension pending investigation necessitates the completion of such investigation swiftly, so as to not prolong the suspension unnecessarily. In **Judgment 2698**, the Tribunal held as follows:

“The complainant was notified of a number of serious charges against him and was informed that he would be suspended from duty with pay until the end of the investigation into the charges. The Director General did not [...] implement the Appeal Board's recommendation that he should conclude with all due speed the investigation into the allegations of serious misconduct against the complainant and should take a decision within a reasonable time. In fact he did not conduct the investigation with the dispatch required by the Tribunal's case law and by the circumstances of the case, and he thus caused an unjustified delay in the handling of the case. The explanations given by the Organization in its submissions are irrelevant, particularly because they do not indicate that the completion of the investigation was delayed through any fault on the part of the complainant. *By prolonging an essentially temporary measure beyond a reasonable time, without any valid grounds, thereby placing the complainant in a situation of uncertainty as to his further career, the Organization caused him moral injury [...].*”

100. A suspension decision can be reviewed only on limited grounds and will be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see **Judgment 2698** and the case law cited therein). Staff members are therefore advised to appeal a suspension decision on the specific grounds listed above, so as to secure their rights.

The Tribunal held that "[T]he right to be heard must be respected in an especially rigorous manner in disciplinary proceedings." - **Judgment 2899** (Consideration 30)

### **XIII. Time of Notification of Disciplinary Charges**

101. The leading decision on the issue of notification of charges – both with respect to the timing as well as the content, is **Judgment 2496** (Consideration 6), where the Tribunal held as follows:

*"A decision as serious as one imposing a disciplinary measure will be lawful only provided that the rights of the staff members concerned to a fully adversarial procedure have been scrupulously respected. Charges must be precisely worded and notified sufficiently early to enable the staff member concerned to defend his case, particularly by establishing evidence and gathering testimonies which he believes are likely to refute the charges in the eyes of the disciplinary body and of the deciding authority, according to the nature of the charges against him."*

102. The Tribunal has consistently held that a staff member accused of misconduct should be provided with precisely worded allegations and all supporting evidence relied upon by the Administration in its attempt to prove the allegations in a timely

manner. Notification of charges is absolutely essential to initiate an adversarial disciplinary proceeding even if the staff member in question has allegedly “confessed” (say, for instance, during an investigation) to the allegations imputed to him or her. In **Judgment 3364**, the Tribunal held that the fact that the complainant admitted the truth of the facts imputed to him did not dispense it from the obligation to draw up the investigative report and charges provided for in the relevant provisions. A “transcript of the interview” cannot take the place of such a report, said the Tribunal. In the absence of the necessary report, the Tribunal held that the disciplinary procedure was not properly instituted and could not therefore take its course in conformity with the applicable law.

103. The Tribunal has not stated what exactly is the proper duration of time which constitutes sufficient notice. Generally speaking, the minimum duration provided for in the internal laws of an international organization should be observed, based on the *patere legem* principle.
104. Where there is no such time period provided, deference must be given to the number of allegations, amount of evidence to be studied and the time required to gather rebuttal evidence and testimonies so as to determine the appropriate notification period. The Tribunal has repeatedly held that if the proceedings are to be properly adversarial, he must be free to give his own version of the facts, refute that evidence, adduce his own, take part in the discussion of it, and at least once crossquestion the expert and other witnesses. See, for example, **Judgments 512 [...] under 5; 907 [...] under 4; 999 [...] under 5; 1082 [...] under 18; 1133 [...] under 7; 1212 [...] under 3; 1228 [...] under 4; 1251 [...] under 8; 1384 [...] under 5, 10 and 15; 1395 [...] under 6; 1484 [...] under 7 and 8.**
105. Therefore, the time of notification should take into account all these factors. In **Judgment 2496**, the Tribunal held that less than a week’s notification to defend oneself was not sufficient, even if the staff member knew that he or she was going to be charged with misconduct (based on unauthorized absence on a strike day, in that case, for instance).
106. However, more recently, the Tribunal has had to address another issue: what happens when a new charge of misconduct arises as part of the disciplinary proceedings themselves? Say, for instance, a charge of breach of confidentiality of the disciplinary proceedings? In **Judgment 3971**, the Tribunal held that the Disciplinary Committee has the prerogative to immediately address something which occurs during the proceedings, in the interest of procedural efficiency. It held that as the staff member was given the opportunity to comment on the alleged breach of confidentiality, the principle of due process was respected and that the staff member had adequate time to prepare his defence. Thus, it appears that even if a charge related to a disciplinary proceeding can be added at a later stage, the staff member in question should be given adequate time to prepare his or her defence.

**107.** Finally, when the internal laws are drafted in such a manner as to stated that a staff member must be given “no less than” \_\_\_ working days to submit his or her defense, it ne necessarily implies that there is discretion to afford a longer duration for the staff member to submit his or her defence, especially considering the decisions of the Tribunal cited above. Therefore, in a case involving extensive documentation and evidence, staff members are advised to seek postponement of submission of defense.

#### **XIV. Content of Notification of disciplinary charges – Disclosure of evidence**

**108.** In **Judgment 1661 (Consideration 3)**, the Tribunal held that a staff member must be informed of the “charges and evidence”. Charges must be precisely worded and supported by evidence (**Judgment 2496**, cited above), which is to be attached to the charges memorandum/disciplinary report. Disciplinary allegations may not be incorporated by reference. They must be made clearly and concisely to know the case a staff member is to meet.

**109.** A charges memorandum/disciplinary report should be accompanied by ALL the documents relied upon by the Administration in its attempt to prove the allegations against a staff member. Therefore, an investigation report is to be included with such a notification. As a corollary, the investigation report must be included in **full**, i.e., with all the witness testimonies and evidence relied upon to prepare the said report. It is acceptable, according to the Tribunal, to include summaries of witness interviews rather than verbatim transcripts (**Judgment 2771**).

**110.** In **Judgment 3347**, the Tribunal held as follows:

"It is well settled that a staff member must have access to all evidence upon which a decision concerning that staff member is based. As the Tribunal observed in Judgment 3264, under consideration 15: "It is well established in the Tribunal's case law that a 'staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him'. Additionally '[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality' (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23)" (emphasis added).

**111.** Most recently, in **Judgment No. 3688** (citing its previous cases), the Tribunal held as follows:

"The Tribunal has consistently stated, in Judgment 2700, under 6, and Judgment 3295, under 13, for example, that a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. According to this principle, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher

interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its Defendants."

112. In fact, in **Judgment No. 2899 (Consideration 3)**, the Tribunal went so far as to state that "By [...] basing his decision on an essential document without having given the person concerned an opportunity to refute its content, the competent authority breached the right to be heard which every staff member possesses and his decision was thus tainted by a major procedural flaw (in this connection, see for example Judgments 69, under 2, and 1881, under 18 to 20)."

113. The right of disclosure is available to a staff member even in the absence of explicit text in the internal laws of the organization (**Judgment 2475, Consideration 20**). Therefore, the failure to disclose the documents on which the decisions to initiate disciplinary proceedings against a staff member were made is patently unlawful.

## **XV. Legal Representation**

114. There is very little jurisprudence on the question of right to legal representation during a disciplinary proceeding *per se*. Generally speaking, when the internal laws of an organization provide that a staff member may be represented by his or her person of choice, an external lawyer may be engaged for legal representation. If the relevant provisions state that a staff member may be assisted by a current or former staff member, it would still be possible to engage an external lawyer for legal advice but not for legal representation.

115. The Tribunal has addressed the question of right to legal representation in internal appeal proceedings and it might be possible to extrapolate it to disciplinary matters. Unfortunately, this is not particularly helpful, owing to a regressive and literal attitude adopted by the Tribunal. In **Judgment 995**, the Tribunal held that the the head of the an organization was correct to dismiss a staff member's appeal as irreceivable because it bore the signature of a lawyer rather than that of the staff member himself.

116. In **Judgment 2660 (Consideration 8)**, the Tribunal accepted the organization's response that an Internal Appeals Committee should not have admitted a rejoinder filed by a lawyer and not the staff member who was the appellant. Fortunately, the appeal had been filed by the staff member himself and all relevant documents for the case were contained therein – so the Tribunal held that this "procedural error" did not vitiate the Appeals Committee's recommendation. The Tribunal seemed to accept the Organization's submissions, which were as follows:

*"The Organisation considers that the Rule restricting those who can assist with an internal complaint does not violate the complainant's right to defence. It is a general norm, included in the Regulations and Rules of many UN organisations, that a party*

*may be represented in proceedings in a judicial or quasi-judicial forum only by persons who are allowed to play a role as a representative. The Organisation adds that its relevant Rule does not violate any rights of defence, particularly since there is a large pool of persons from which to select a representative, and that there is no mitigating reason for a differential application of the Rule in the complainant's case."*

117. This is problematic for several reasons. First – right to legal representation is a part of the right to fair trial and defense, which is a fundamental right under all international and regional human rights instruments. The Redesign Panel for Reform of the UN Internal Justice System held that right to legal representation formed an integral part of the right to fair trial. The Tribunal's jurisprudence and the internal laws of most international organizations are therefore in violation of what has essentially become an *ius cogens* norm. Second – it is clearly in violation of the principle of equality of arms. The Administration is represented by legal officers – who are essentially in-house counsel and the staff member should therefore be allowed to be represented by a lawyer as well. Failure to do so results in the upper hand of one party being represented by lawyers and the others represented by regular staff members who, even with experience in such matters, cannot take the place of a qualified lawyer. Third - this attacks the core of the right to defence, which the Tribunal has repeatedly held as being absolutely essential for an adversarial proceeding.

## **XVI. Examination of evidence and Rebuttal**

118. In **Judgment 2786 (Consideration 13)**, the Tribunal held It has been consistently held by the Tribunal that an employee of an international organisation has a right to be heard in disciplinary proceedings and, as said in Judgment 203, that 'right includes inter alia the opportunity to participate in the examination of the evidence'. As that judgment makes clear, that is so even 'in the absence of any explicit text'. (**Judgment 2475, Consideration 20**). Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary.

119. In **Judgment 1133 (Consideration 7)**, a staff member was charged with serious misconduct and an inquiry was held to which he was not invited to give evidence. The Tribunal held that the failure of the organization to afford the staff member an opportunity to be present at the personnel department's taking of statements and to put questions to the witnesses amounts to breach of due process.

120. What exactly constitutes an examination of evidence is not as straight forward as one would hope it to be. As stated earlier, while the Tribunal states that a staff member is entitled to know of all the evidence relied upon to charge him or her, there are certain exceptions and in some cases summaries of witness testimonies are sufficient as opposed to full transcripts.

121. Likewise, what constitutes offering an opportunity to rebut the evidence and submit a staff member's own case is also unclear. In some cases, the Tribunal has held that this should include cross-examination of witnesses and an oral hearing to present the staff member's case. In **Judgment 3295 (Consideration 11)**, the Tribunal held that *if the proceedings are to be properly adversarial, a staff member must be free to give his own version of the facts, refute that evidence, adduce his own, take part in the discussion of it, and at least once cross question the expert and other witnesses.*
122. In **Judgment 3108 (Consideration 9)**, the Tribunal held as follows:
- “An internal appellate body is the primary fact-finding body in the internal appeals process. It is the body that sees and hears the witnesses and must assess the reliability of the evidence adduced. *A full appreciation of the evidence can only occur in circumstances where individuals whose interests may have been adversely affected have an opportunity not only to be present to hear the evidence but also to test the evidence through cross-examination.* As the Tribunal stated in Judgment 2513, under 11, “in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies such as the JAB must strictly observe the rules of due process and natural justice and [...] those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence”
123. However, this is not always upheld consistently. For instance, in **Judgment 3184 (Consideration 11)**, the Tribunal held that the staff member was given the opportunity to state his case in writing (and orally) and present his response to the charges and witness testimonies and this was sufficient. A cross examination was not held to be necessary to maintain due process.
124. Likewise, in **Judgment 2946 (Consideration 24)**, when an appeals body conducted interviews in his absence and afforded him no opportunity to question witnesses with respect to their statements, the Tribunal held that the nature of the evidence relied upon by the staff member was such that no different result would have been reached if the due process rules had been observed.
125. Even more problematic is at what stage this rebuttal opportunity should be provided. Generally speaking, it has to be before the imposition of a disciplinary measure. However, recently, in **Judgment 3083 (Consideration 6)**, the Tribunal held – with respect to a staff member's complaint that he had had insufficient time to gather evidence and statements, this must be considered in the light of the subsequent appeal proceedings in which he had ample time to gather and provide additional evidence and, in fact, did so. This decision appears to be a one-off diversion and should not be relied upon. The fundamental right of being accorded an opportunity to examine all the evidence relied upon by an administration to bring charges, gather rebuttal

evidence and present one's case should be respected prior to the imposition of a disciplinary measure.

## **XVII. Disciplinary body**

### **i. Composition**

126. In **Judgment 2940 (Consideration 3b)**, the Tribunal held that "[I]n accordance with the right to due process, which calls for transparent procedures, a staff member is entitled to be apprised of all items of information material to the outcome of his or her claims. *The composition of an advisory body is one such item, since the identity of its members might have a bearing on the reasoning behind and credibility of the body's recommendation or opinion. The staff member is therefore at least entitled to comment on its composition* (see Judgment 2767, under 7(a))."

127. While this case related to an appeals procedure and not a disciplinary procedure *per se*, the Tribunal's statements were in respect of "an advisory body" and can therefore be extrapolated to a disciplinary committee. This has been reaffirmed by the Tribunal in **Judgment 1763**, where a complainant's objection to the composition of a disciplinary committee was allowed by the Tribunal.

128. Therefore, it can be stated with reasonable certainty that an accused staff member has the right to be informed of the composition of a disciplinary committee and be accorded the opportunity to object to any member(s). This leaves open the question of what are the grounds for such objection, when should they be made and who has the power to rule on these objections.

129. Generally speaking, a disciplinary committee should be composed in accordance with the internal laws of the organization. Staff members should therefore be advised to check whether all relevant internal laws have been followed properly. Where there are specific procedures to be followed prior to the appointment of the Chairperson of a disciplinary committee (such as consultation with the staff committee), staff members are advised to check this as well, as an improper appointment of a chairperson could vitiate the proceedings (although not necessarily render the evidence gathered inadmissible (**Judgment 1977, Consideration 6**)).

130. Staff members are to be reminded that the internal laws do not constitute an exhaustive source to determine what disqualifies an individual from being appointed to an advisory body. The Tribunal's jurisprudence should also be complied with. In **Judgment 3184 (Consideration 6)**, the Tribunal held as follows:

"The Tribunal considers that the specific rule relating to disqualification of members of the Appeals Committee stated in Manual paragraph 331.2.31 is not a complete and exhaustive statement of the circumstances in which a member is disqualified from

hearing an appeal. The fundamental function of the internal appeal procedure, which is “an important safeguard of staff rights and social harmony” (see Judgment 1317, under 31), requires that “*the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise. [...] (see Judgment 2671, under 11). If a member of the Appeals Committee had already expressed a concluded view on the merits of an appeal and was later appointed to a new Appeals Committee to express an opinion on the same merits in a later appeal, their impartiality and objectivity could be questioned.*”

131. This principle has been upheld by the Tribunal with respect to disciplinary proceedings also. For instance, in **Judgment 1763 (Consideration 17)**, the Tribunal was faced with a situation where the Director of the Division of Personnel was required under the organization’s internal laws to be the chairman of the disciplinary board, but was also the head of the department conducting the investigation which led to the disciplinary procedure. Under such circumstances, the Tribunal held that it gave rise to a situation in which there was a grave danger of an actual breach of procedural fairness. The Tribunal held that the Director had to refrain from personal involvement in the investigation and that *he cannot be both judge and policeman*, which constituted a serious breach of due process.

132. Therefore, even if the internal laws require a particular official to be part of a disciplinary body, staff members should object and request their recusal if they had played a part in the investigation leading to the disciplinary procedure or have a real or apparent conflict of interest. While conflict of interest need not be established with absolute certainty and a reasonable suspicion of impartiality is enough (see the section under “Investigations” above), bias needs to be established with evidence. Stating that someone was below or above a staff member hierarchically has not been held by the Tribunal to be sufficient to constitute bias, for instance (**Judgment 3422**).

133. Staff members should submit any objections they may have to the composition of the disciplinary body within the relevant deadlines in the internal laws and where there are no specific deadlines, within a reasonable time before the disciplinary hearing. These objections must be made even in respect of deputy or alternate members. In **Judgment 3888 (Consideration 24)**, the Tribunal held as follows:

“The complainant objects to two deputy members participating in the disciplinary proceedings in place of two members who were not available for the rescheduled hearing date. The Tribunal notes that the complainant was notified on 3 February 2014 of the composition of the Disciplinary Committee, including of the names of the Chairman, the four members, and the four deputy members. She had five days from that notification to object to any of the members or deputy members in accordance with Article 98(5) of the Service Regulations, which provides, in relevant part, that “[w]ithin five days of the drawing of lots for forming the Disciplinary Committee, the

employee concerned may make objection in respect of any of its members other than the Chairman". *As she did not object to the deputy members at that time, she was time-barred from objecting to their participation at the later date when she was informed that they would attend the hearing in place of the two unavailable members.*"

134. Any changes to the composition of the disciplinary committee should be made known to the staff member well in advance. Failure to do so would be a due process violation. In **Judgment 3158 (Consideration 4)**, the Tribunal held as follows:

"[T]he complainant only became aware of the substitution of one of the members of the Internal Appeals Committee (which occurred after the hearings) when he received a copy of the Internal Appeals Committee's opinion. For the sake of transparency and due process, the complainant should have been informed at the time of the substitution so that he could exercise his right to contest the composition. The fact that the alternate member voted in the complainant's favour does not redeem that flaw. Moreover, the alternate member did not attend and participate in the hearing, whereas his participation could have changed or influenced the Internal Appeals Committee's final opinion."

135. Finally, whether a disciplinary committee was properly constituted or not is not one for itself to decide, but for the final decision maker (and later, the Tribunal). What the disciplinary body has to do is to record the objections made by a staff member, take a position on such objections by either continuing to act or changing its course of action. In **Judgment 1977 (Consideration 6)**, the Tribunal held as follows:

"The complainant asserts that the Ad Hoc Panel failed to give reasons for its opinion because it did not give a reasoned reply to his assertion that it had been improperly constituted. The argument is ill conceived. The obligation of a disciplinary body to give reasons for its opinions is limited to the disciplinary matters remitted to it. The reason is so that the person subjected to a disciplinary measure may know why a penalty is being imposed upon him and may, if he thinks appropriate, appeal against the decision. But an administrative body, such as the Ad Hoc Panel, has no power and hence no obligation to decide in any definitive way upon its own remit. Of course, it must listen attentively to any objections that are made to the effect that it is exceeding or is about to exceed its powers and must take a position on such objections by either continuing to act or changing its course of action. But in the final analysis, the decision as to whether such a body is acting within its powers or beyond them must lie elsewhere and a person in the complainant's position suffers no prejudice from its failure to give reasons for declining to accede to his objections."

This is problematic on account of the fact that a disciplinary body can continue without recusing any of its contested members without providing any reason. That the Tribunal can correct it at the appellate stage cannot undo the prejudice it would have caused the staff member already. Besides, this is also in contrast with the conflict of

interest rules laid down by the Tribunal and its recurring principle that every decision must be motivated and substantiated with valid reasons. It is therefore recommended that staff member request express decisions from a disciplinary body, with reasons, for any of their objections to the constitution of the said body (which they should endeavour to justify as specifically as possible).

ii. Procedure and Report

136. A disciplinary body should scrupulously follow the procedures laid down by the internal laws of the organization. While it has to respect the time limits mentioned for the said procedure, if any, it cannot ignore the circumstances of an accused staff member entirely. In **Judgment 2424 (Consideration 5)**, the Tribunal held as follows:

"[T]he Joint Committee [...] refused the complainant's request to reschedule her hearing, yet her request for postponement was justified by the fact that she was declared unfit for work and that the date of the hearing was so close (she was summoned on 4 July in the afternoon for a hearing to be held on 7 July) that it did not leave her time either to prepare her defence properly or to be assisted by a counsel of her own choosing. The Tribunal rejects the reasons given for the refusal to reschedule the hearing, which were that, since the complainant had already been heard by the Joint Committee during the procedure relating to the conversion of appointments, and since the members of the Joint Committee for Disputes considered that the case file provided them with sufficient information, a hearing before the latter Committee was unnecessary. But considering that it was the Joint Committee for Disputes itself which took the initiative of summoning the complainant to a hearing, it could hardly have deemed that hearing to be «unnecessary»."

137. In the context of a disciplinary procedure, the Tribunal held in **Judgments 3887 and 3972** that when a staff member is sick, then subjecting them to a disciplinary procedure without a proper medical examination (especially if the allegations can be explained by the staff member's mental illness, if any) shall be a grave error of law.

138. These two decisions are also important with respect to the discretionary powers of a disciplinary body. If the internal laws of an organization provide that a disciplinary body may seek for further information or order an inquiry, failure to use such power when appropriate shall also constitute a mistake of law. This is required by the principles of due process and the duty of care. Staff members are advised to use any provision in the relevant internal laws which accord discretionary powers to disciplinary bodies to obtain any information or assert any right they believe they need or have.

139. Several aspects of a disciplinary body's procedure are covered in the issues discussed above under the title of right of defence (such as examination of evidence

and rebuttal, hearings, etc). With respect to these matters, there is a question of who issues these procedural decisions – is it the disciplinary body as a whole or the chairperson of the body? This would depend, to a great extent, on the internal laws of the organization. If the laws state that the chair of a disciplinary body shall only vote in case of a tie, then it implies that all members are to be involved in all decisions – including procedural questions, i.e., which evidence is to be disclosed, which evidence is admissible, whether a postponement request should be allowed, etc. In such cases, where the chairperson has acted unilaterally and without the voting of other members, this would be a due process violation.

140. A disciplinary body's report should be drawn up listing the facts and submissions presented by both parties. It should be noted that simply recording the facts submitted by the Administration is not the same as confirming them as having been established (**Judgment 1251**) and a decision maker should draw no inference from such record. It should contain a comprehensive and thoughtful consideration of the evidence and applicable principles. Its conclusions should be rational and balanced, for the Tribunal to accord the normal deference that it does to reports to advisory bodies (**Judgment 3068**).

141. Furthermore, a disciplinary body's report cannot be drawn up without all members of the body meet and minutes of the meeting have been concomitantly drawn up. As the Tribunal held in **Judgment 2288 (Consideration 7)**, "The Tribunal considers that the safeguard available to international civil servants in the form of the *mandatory consultation of an advisory body prior to any disciplinary measure cannot legally speaking be said to be complied with unless that body has held an official meeting, the matter has been discussed among the members and minutes of the meeting have been concomitantly drawn up*. In the present case, the complainant was denied an essential safeguard owing to the individual consultation of the Joint Advisory Committee members by the Director of [the Human Resources Management Department] and the disregard for the procedure established in the Staff Rules."

142. Therefore, staff members should be advised to request and obtain the minutes of a disciplinary hearing, so as to verify whether it was made prior to the issuance of the disciplinary body's recommendation. If the record shows that an opinion was drawn up before the members could verify the minutes of the hearing, the recommendation shall be considered flawed.

143. As for the official certification of the report of a disciplinary body, in Judgment 1763 (Consideration 13), the Tribunal held as follows:

"[W]ith respect to the complainant's submission that the Disciplinary Board's report is not valid because it is not dated, signed or otherwise authenticated, the 'report' is actually a summary record of the Board's meetings. There is no evidence whatsoever to indicate that the record is not an accurate summary of the Board's views, and it was clearly adopted by the Board, as well as the [Organisation], as representing them. The

substance of the summary record clearly indicates the conclusion of the Board. There is thus no irregularity in the form of the report."

144. This is problematic as there is no empirical way for a staff member to authenticate the veracity of a document of this nature. Staff members should be advised to check the veracity of any document provided to them in a disciplinary context, by way of a request to the Administration to confirm their authenticity. They are also advised to compare their own notes from a hearing and point out inconsistencies, if any, to show bad faith (or in the least, impropriety) on the part of the organization.

## **XVIII. Disciplinary measure**

145. The imposition of a disciplinary measure should be preceded by not just an adversarial proceeding but also an analysis of the proportionate measure for the allegations of misconduct (should the deciding authority consider them to have been proven). Mitigating factors ought to be taken into account as well prior to such a decision.

### **i. Principle of Proportionality**

146. The existence of a range of penalties and a proper consideration of the proportionate penalty have been considered by the Tribunal as constituting safeguards for the protection of a staff member's rights. As the Tribunal held as early as in **Judgment No. 210 (Consideration 4)**, provisions such as in the ServRegs provide "for a range of penalties and the principle of proportionality will ensure that extreme penalties, such as summary dismissal, are applied only to the gravest cases" (see also **Judgment No. 3099, consideration 15**). In **Judgments 937 and 2656**, the Tribunal held that when determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account and, in the case of dismissal, the closest scrutiny is necessary.

147. This implies, at the outset, that all the range of penalties provided for under the internal laws should have been considered by the decision maker. In **Judgment 2944 (Consideration 50)**, the Tribunal held that disciplinary measure must not be "manifestly out of proportion" to the misconduct.

148. As the Tribunal held in **Judgment No. 3602 (Consideration 22)**, "[T]he Tribunal has stated, in Judgment 210, for example, that even in a case in which serious misconduct is alleged, staff rules provide a wide range of penalties and it is therefore necessary to apply the principle of proportionality to ensure that the extreme penalty of summary dismissal is applied only in the gravest cases. Thus the following was stated in Judgment 210, under 6:

*“[W]hen these mitigating factors are put into the scale together with the lack of any corrupt motive and the complainant’s previous good record, they cause the sentence of summary dismissal to appear out of all proportion to the degree of misbehaviour in this case.”*

149. Proportionality depends, naturally, on the nature of the (proven) allegations).

A charge of breach of confidentiality will differ from a charge of fraud, once proven, to determine the proportionate measure. For instance, in **Judgment No. 1608**, where the complainant had disclosed information obtained by virtue of being a staff committee member to an internal organ of the Organization, the appropriate sanction in the Tribunal's opinion was a reprimand. However, in **Judgment 3944**, when the complainant was found to be engaged in repeated fraudulent practices over several months, in view of the seriousness of this offence, the Tribunal found that his dismissal could not be deemed disproportionate. Continuous acts of misconduct, especially after repeated warnings, could necessitate an increased disciplinary measure (**Judgment 3649**).

150. As for summary dismissal, the Tribunal has held that it would be valid for a single act of an egregious nature (**Judgment 1878**) or continued performance of acts of a less serious nature (**Judgment 2719**). The number of times an act or omission was performed shall not alone be determinative for a disciplinary measure, even one of summary dismissal.

**151.** Lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature (**Judgments 203, 1445 and 2656**).

ii. Mitigating Factors

152. One of the key elements in determining proportionality is whether mitigating factors were taken into account. Even in cases where misconduct was proven beyond a reasonable doubt, the Tribunal has pointed out that mitigating factors must be taken into consideration prior to arriving at a proportionate sanction. As the Tribunal held in **Judgment No. 3099 (Consideration 15)**, relating to a staff member's failure to disclose the recording of an investigation interview and providing it to the staff union, mitigating factors had to be taken into account (as it did in **Judgment No. 210** in not upholding the subject dismissal therein) and held that the said act did not constitute an offence grave enough to impose the harshest sanction of summary dismissal. It therefore quashed the application of the extreme penalty of dismissal without indemnities. In **Judgment No. 3620** cited above, the Tribunal held that the failure of an Organization to take into consideration the health condition of a staff member (vis-à-vis the alleged misconduct in question – in that case) was in violation

of the principle of proportionality and that summary dismissal was a disproportionate sanction (in that case, which involved actual physical violence).

iii. Final disciplinary measure

153. Where a disciplinary measure recommends a particular measure and the executive head of an organization imposes a different one or disagrees with its findings (of not guilty, for instance), he or she is obliged to substantiate the reason for the final disciplinary measure to be imposed. In **Judgment 3964**, the Tribunal held as follows:

“The overarching legal principles in a case such as the present have recently been discussed by the Tribunal in **Judgment 3862, consideration 20**. The Tribunal observed: “the executive head of an international organisation is not bound to follow the recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached.”

**XIX. Burden and Standard of Proof**

154. The burden of proof rests on the organisation and must be established before a disciplinary measure can be imposed (most recently in **Judgment 3880**). A staff member is presumed to be innocent and must be given the benefit of the doubt. They are not legally required to disprove the charges against them. The standard of proof for allegations of misconduct is beyond reasonable doubt. The application of the wrong standard of proof will constitute an error of law and, on this basis alone, an impugned decision can be set aside. Importantly, **each** element of the alleged misconduct must be proven beyond reasonable doubt (**Judgment 3880, Consideration 9 and 10**). Finally, it is important to note that the beyond reasonable doubt standard of proof is not subject to an organization’s internal laws but that it is applied by the Tribunal as a fundamental principle of administrative law.

155. In **Judgment 3725**, the Tribunal held that it is well established in the case law that where misconduct is denied, the burden falls upon the Organization to prove misconduct beyond a reasonable doubt and the staff member is to be given the benefit of the doubt (see, for example, Judgment 2879, under 11).

156. As held by the Tribunal in **Judgment 3880 (Consideration 8)**, “It is “well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed” (Judgment 3649, under 14). It is also well established that a staff member accused of misconduct is presumed to be innocent (Judgment 2879, under 11) and is to be given the benefit of the doubt (Judgment 2849, under 16).” In **Judgment 3875**

**(Consideration 8) and Judgment 3862 (Consideration 20)**, the Tribunal held that in disciplinary matters, the burden of proof lies with the employer, which must demonstrate that the employee did indeed engage in the conduct of which she or he is accused, prior to the imposition of a disciplinary measure.

157. The burden of proof, while always resting with the organization, will shift to a staff member, when the facts or circumstances point convincingly to guilt and there is no credible explanation. In **Judgment 3297 (Consideration 8)**, the Tribunal held that the “circumstances point convincingly to guilt and there is no credible innocent explanation for them. Further, the explanation offered by the complainant is implausible to a degree and is simply incompatible with the circumstances put in evidence by the Organization (see Judgment 2231, under 5).”

158. The standard of proof is, always, beyond reasonable doubt. In its early jurisprudence, the Tribunal was more stringent with respect to standard of proof. For instance, in **Judgment 969 (Consideration 16)**, the Tribunal held as follows:

159. “[I]t is common ground that the burden of proof rests on the organization. *By declining to admit the charges, as she was entitled to do, the complainant required the organization to prove its case; and although the proceedings are not criminal the seriousness of the charges and the concomitant penalty demand that before there can be a finding against the complainant the charges must be proved beyond reasonable doubt.*

160. This has been reaffirmed by the Tribunal in various decisions. In **Judgment No. 2786** (Consideration 9; reiterated in **Judgment No. 2879**), the Tribunal categorically and unconditionally held that “*in the case of misconduct the standard of proof is beyond a reasonable doubt.*”

161. There are two ways to establish misconduct beyond reasonable doubt – through absolute proof or through a set of precise and concurring presumptions of the staff member’s guilt. The latter is mostly restricted to cases involving fraud and misrepresentation. With respect to allegations of fraud or similar conduct, the Tribunal has stated that to determine whether a finding of guilt beyond reasonable doubt could have been made, it will not require absolute proof which is almost impossible to provide but rather a set of precise and concurring presumptions of the complainant’s guilt.

162. In **Judgment 3964 (Consideration 10)**, the Tribunal held that “*In cases of found misconduct based on allegations of fraud resulting in dismissal, the Tribunal has adopted the approach, in order to determine whether a finding of guilt beyond a reasonable doubt could have been made, that it “will not require absolute proof, which is almost impossible to provide on such a matter [involving allegations of fraud or similar conduct]. It will dismiss the complaint if there is a set of precise and*

*concurring presumptions of the complainant's guilt" (Judgment 3297, consideration 8, and, also more recently, Judgment 3757, consideration 6)."*

163. It should be noted that even in fraud cases, the manner of proof cannot be "sufficient evidence", but "set of precise and concurring presumptions of the staff member's guilt".

164. In **Judgment 3852 (Consideration 8)**, the Tribunal held that where the evidence against a staff member has been proven beyond a reasonable doubt, there was no necessity for an admission of guilt to find the staff member guilty.

165. In **Judgment 3875 (Consideration 8)**, the Tribunal held that if the facts are disputed and there is no persuasive material evidence, the facts of the dispute must be appraised on the basis of conclusive circumstantial evidence. Thus, the facts may be held to be established when a set of precise presumptions and concurring circumstantial evidence enable the decision-making authority to conclude beyond reasonable doubt that the person concerned is guilty."

i. Standard of proof and disciplinary measure

166. There are two distinct parts of a disciplinary process. First, there is the finding of misconduct -which must be proven beyond reasonable doubt and, second, there is the subsequent imposition of an appropriate sanction of the misconduct – these should not be concluded (**Judgment 3880**).

167. The standard of proof only relates to the first part of the misconduct process and remains the same regardless of the severity of the alleged misconduct, but may vary based on its nature (i.e., fraud or non-fraud related case). Once misconduct is established beyond reasonable doubt, an organisation has the discretion to choose the disciplinary measure. While this measure is to be subject to the rule of proportionality, the sanction or measure to be imposed will not determine the standard of proof.

ii. Burden of proof – Harassment, Prejudice, Bad Faith and Retaliation

168. When a staff member alleges prejudice or bad faith – either against a member of a disciplinary board or a decision making authority, he or she has the burden of proving the same. The Tribunal has held that while evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the staff member, who has the burden of proving his or her allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal (**Judgment 3912, Consideration 7**, citing **Judgment 1775**). Mere suspicion and unsupported allegations are clearly not enough, the less so where, especially when the actions of the organization are shown to have a verifiable objective justification."

169. Furthermore, in **Judgment 3902 (Consideration 11)**, “[A] steady line of precedent has it that “bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose” (see Judgment 2800, under 21, cited in Judgment 3154, under 7; see also Judgment 3407, under 15).”

170. Likewise, in **Judgment 3443 (Consideration 6)**, the Tribunal held that the staff member bears the burden of proving that he or she was a victim of retaliation or unequal treatment.

171. Finally, it is well settled that “an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, and that an accumulation of events over time may be cited to support an allegation of harassment” (**Judgments 3297 and 2100**).

iii. Analysing the burden and standard of proof - role of the Tribunal

172. As for the role of the Tribunal itself, as held in **Judgment 3862 (Consideration 20)**, “[I]t is equally well settled that the ‘Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond reasonable doubt could properly have been made by the primary trier of fact’ (see Judgment 2699, consideration 9).”

173. In **Judgment 3875**, the Tribunal held that when a complaint is filed seeking the setting aside of a disciplinary measure or a dismissal ordered at the end of disciplinary proceedings, it is not the Tribunal’s role to reweigh the evidence collected by an investigative body, the members of which have already appraised this evidence, or in particular the reliability of the testimony of persons whom they have directly heard (see, in particular, Judgment 3757, under 6). This is all the more true when the evidence to be appraised comprises extremely complex technical elements such as those inherent to a process of computer hacking of the kind observed in this case. What is essential is that any person under investigation has ample opportunity to adduce and refute evidence, which has manifestly been the case here.

174. This workshop does not focus on the appeals before the Tribunals (although all the cases referred to herein, in relation to disciplinary matters, are such appeals). However, it is important to note that a disciplinary measure is a discretionary decision and the Tribunal will review such decisions only on limited grounds – for instance, mistake of fact, mistake of law, overlooking of essential facts, drawing of mistaken conclusions or procedural violations. Staff members are therefore advised to address their complaint based on these grounds, with sufficient justification. It should not be the staff member’s aim to prove that he or she is innocent – the Tribunal will not issue

such a ruling – but to prove that that based on the evidence available on record, no proper evaluation could have led to a finding of guilt.

175. Staff members advised to document every due process violation and establish them with evidence. Where bias or prejudice is contended, staff members are advised to focus on concrete examples to establish the same and not generic statements. Staff members are advised to focus on the standard of proof right from the investigative stage and insist on it clearly at the disciplinary stage – that the evidence available does not discharge the organization’s burden of proof beyond reasonable doubt and he or she should therefore be given the benefit of doubt, and a finding of not guilty.