**118th Session** **Judgment No. 3348**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M.-K. A. against the World Meteorological Organization (WMO) on 8 November 2011 and corrected on 12 December 2011, WMO's reply of 15 March 2012, the complainant's rejoinder of 18 June and WMO's surrejoinder of 18 September 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined WMO in December 2006 as an Information Technology Assistant in the Helpdesk Unit of the Information Technology Division (ITD). In January 2008 he was assigned the responsibility of maintaining the MaxiTime records of ITD staff. MaxiTime is WMO's electronic system for recording working hours. Staff are expected to record arrival in the office and departure from it, as well as the start and conclusion of lunch breaks.

In August 2010 the Internal Oversight Office (IOO) alerted the Chief of ITD to possible manipulations by the complainant of the data

recorded in MaxiTime. On 6 September 2010 the Chief of ITD issued an instruction to all ITD staff, prohibiting any correction or modification to the daily clocking data without his prior authorisation. On 2 November 2010 the complainant was interviewed by the IOO and two days later, on 4 November, he provided his written comments on the minutes of that interview. On 9 November 2010 the IOO submitted to the Secretary-General, under cover of a confidential memorandum copied to the Director of the Resource Management Department (REM), its report entitled "Fact Finding – Unauthorised Changes to the MaxiTime System". Noting the discrepancies recorded in MaxiTime and MaxiTalk, WMO's electronic system recording access to the Organization's premises from the exterior, the IOO concluded that the complainant had manipulated in his favour the MaxiTime data as well as the MaxiTime records, which are used as the basis for granting overtime, and had thereby obtained financial benefits. It also concluded that, contrary to his supervisor's instruction, he had continued to change his records without the latter's approval and that he had also made a false representation to have his changes approved on two days. Noting that these actions could constitute serious misconduct, it recommended that the matter be further pursued through relevant administrative channels. On 17 November 2010 the Director of REM wrote to the complainant on behalf of the Secretary-General to notify him of the conclusions of the IOO report. While acknowledging that payment of overtime was dependent on pre-approval and subject to separate time-sheets that did not rely on MaxiTime, he warned the complainant of a potential charge of misconduct and invited him to provide comments in writing by 26 November. The complainant did so on 23 November 2010. He explained that he had been recruited for a programming post and that he never should have ended up managing MaxiTime. While admitting that he might have been careless with his clocking, he denied that this was intentional and emphasised that he had only once claimed compensation for the additional hours worked and had thus not taken advantage of the hours recorded in MaxiTime.

By a memorandum of 2 December 2010 he was informed of the Secretary-General's decision to establish a Joint Disciplinary

Committee (JDC) to advise him on the disciplinary case against him. Attached to the memorandum was a document entitled "Charges against [the complainant]". It stated that the complainant was "charged of having fraudulently and over a sustained period of time manipulated the recording of his presence in the office in his favour" and that by extending his recorded presence in the office, he had accumulated considerable overtime during 2009, resulting in the payment of 31,322 Swiss francs. On 6 December 2010 the Secretary of the JDC sent a copy of the IOO report to the complainant and invited him to provide his written comments both on the report and on the official charges contained in the memorandum of 2 December 2010. The complainant did so on 14 December 2010. He recognised that he had been negligent in clocking regularly but he strongly denied any intention to defraud or deceive WMO. He reiterated that he had not drawn any financial advantage from the data recorded in MaxiTime and he asserted that the element of fraudulent intent had not been established. The JDC issued its report on 17 December 2010. Emphasizing that the complainant had been placed in a position of trust, it concluded that the charges attached to the memorandum of 2 December 2010 had been substantiated and it recommended dismissal as the appropriate and commensurate disciplinary action.

By a letter of 14 January 2011 the Secretary-General informed the complainant of his decision to accept the JDC's recommendation. The letter also served as notification of the complainant's dismissal for misconduct effective 17 January 2011. The complainant appealed against that decision. In its report of 28 July 2011, the Joint Appeals Board (JAB) found that the charges brought against the complainant were ambiguous and at times contradictory, and that proof beyond reasonable doubt had not been established for a quantifiable financial loss to WMO that amounted to fraud. It also found that the complainant had not been given the opportunity to be heard by the JDC and that dismissal appeared to be disproportionate. It recommended that the case be reopened. Further to the Secretary-General's request, the JDC reconvened. On 12 August 2011 it submitted to the Secretary-General a second report, in which it briefly reviewed the issues raised by the JAB. By a letter of 16 August 2011,

the Secretary-General informed the complainant that he had decided to maintain his initial decision of dismissal for misconduct. That is the impugned decision.

B. The complainant contends that the decision to dismiss him for misconduct is tainted with several flaws. He argues, in particular, that the disciplinary proceedings were conducted in contravention to due process and the appearance of integrity, since neither his right to confront his accusers nor his right to be heard and to respond to the charges levied against him were respected. He was never properly informed of the exact charges retained against him, because the documents summarising them were vague and contained several contradictions. Moreover, rather than proving his guilt, WMO required him to prove his innocence, thereby failing to respect the presumption of innocence.

The complainant also contends that the conduct on which the impugned decision was based has not been proven beyond reasonable doubt. Indeed, WMO failed to show that he was placed in a position of trust – the function of MaxiTime administrator does not, in his view, require a high level of trust – that he violated the Standing Instructions, or that he ever benefited from the adjustments in MaxiTime. He rejects as overreaching the conclusion that his alleged "insubordination" for not adhering to his supervisor's instruction of 6 September 2010 justified summary dismissal and he argues that as a result of that conclusion he was denied the benefit of the doubt. He considers his alleged incapacity to explain the discrepancies between MaxiTime and MaxiTalk irrelevant, given that it is for WMO to prove the alleged misconduct. He notes that he never obtained any financial compensation or credit for his extra hours of work, which far exceeded any gain he allegedly sought for himself through the adjustment of his MaxiTime records.

In addition, the complainant asserts that the sanction of summary dismissal was disproportionate, firstly, because the alleged misconduct related to a secondary and non-official role assumed by him and, secondly, because it had no impact on his performance as

regards his primary duties and he cannot thus be considered unfit for employment with WMO as an Information Technology Assistant. In fact, his performance appraisal reports invariably underlined his "high degree of professional competence" and his "willingness to put in extra hours". He adds that WMO's failure to consider the mitigating circumstances in his favour, such as his lack of training on MaxiTime, the absence of intent to commit fraud and the absence of any financial benefit from the alleged adjustments, make his dismissal all the more severe.

In the complainant's view, the disciplinary proceedings were tainted with bias and prejudice. The JDC's prejudice, in particular, was evidenced by the false and unfounded statements made in the document entitled "Charges against [the complainant]", especially the statement that he had benefited financially from the adjustments made on his MaxiTime records. The complainant also argues that the decision to dismiss him was contrary to the principle of equal treatment, given that two other staff members were investigated on the basis of similar allegations but no disciplinary measure was taken against them. He emphasises that the Secretary-General's discretion is not absolute and he contends that, by ignoring the JAB's findings, the latter overstepped the boundaries of what is reasonable, rational and fair. Consequently, the dismissal decision, which caused him great material and moral injury, is arbitrary and discriminatory.

The complainant requests that the impugned decision be set aside and that he be reinstated in his old post or a commensurate post at WMO with retroactive effect. He also requests that he be paid the salary, allowances, emoluments and benefits, including pension contributions and step increases, to which he would have been entitled at grade G.5, from 17 January 2011 through the date of reinstatement. He claims moral damages in the sum of 300,000 Swiss francs, exemplary damages in the sum of 150,000 francs, reimbursement of legal fees and costs, and such other relief as the Tribunal determines just, necessary and equitable. He seeks interest at the rate of 8 per cent per annum on all amounts awarded through the date that all sums due are actually paid. He asks the Tribunal to order WMO to produce any

document that may be relevant to the impugned decision, the proceedings before the JDC and the JAB, and his employment with WMO. He also asks the Tribunal to hold a public hearing and to summon as witnesses the individuals identified in his brief.

C. In its reply WMO expresses scepticism as to whether the complaint was filed within the prescribed time limits. It therefore asks the Registrar of the Tribunal to provide it with proof of the date on which the corrected complaint was filed in order for it to fully assess whether it is receivable.

On the merits, it submits that the impugned decision was lawful and that the complainant's rights were respected at all times. It notes that there was no individual accuser in the proceedings against the complainant. In any event, the rules do not foresee the cross-examination of witnesses and the WMO Code of Ethics provides for the protection of whistle-blowers. It adds that the complainant had several opportunities to submit his comments disproving the charges against him and it emphasises in that regard that both his comments on the summary of the IOO report and his response to the Director of REM were duly considered by the JDC. It asserts that the charges retained against him were precisely worded and were also notified to him sufficiently early so as to enable him to defend his case. Contrary to his assertion, the JDC did not rely on possible financial damage to WMO in formulating its recommendation. Before any disciplinary proceedings were initiated, he was offered on at least three occasions the opportunity to explain the irregularities that had been clearly established, but he was unable to do so in a credible manner.

According to WMO, the evidence gathered and the complainant's inability to provide convincing explanations were sufficient to establish the charge of misconduct beyond reasonable doubt. As a staff member placed in a position of trust, the complainant was bound by a duty of integrity envisaged in the WMO Code of Ethics. However, his conduct was in clear breach of that duty as well as the Standing Instructions and the instruction issued by the Chief of ITD.

Contrary to what he may claim, he was given the benefit of the doubt from the earliest stages in the process, when he was granted every opportunity to explain the discrepancies between MaxiTime and MaxiTalk. Although he denies having drawn any benefit, he did actually benefit from his modifications in MaxiTime because for a period of five months he created a record of longer working hours than those suggested by his recorded arrival time in MaxiTalk.

WMO asserts that dismissal was an appropriate and commensurate disciplinary measure. Indeed, the role of MaxiTime administrator for ITD was clearly part of the complainant's job within WMO and it was held by him in an official capacity. Even though it might have represented a relatively small part of his duties, it was an important role which required a high degree of trust and integrity. As the JDC was persuaded that there was fraudulent manipulation by the complainant and that this justified the disciplinary measure of dismissal, the issue for WMO was not the complainant's technical ability to fulfil his duties but his lack of integrity.

In WMO's opinion, the complainant has failed to adduce evidence of prejudice or bias on the part of the JDC and has also failed to prove his allegation of unequal treatment – the analysis of the data in MaxiTime and MaxiTalk respectively showed a reasonable correlation of the times recorded as far as the other two staff members were concerned, neither of which was a MaxiTime administrator with access to the system. It contends that, as there was no specific recommendation by the JAB, it was fully within the Secretary-General's discretion to deal with the matter as he considered appropriate. WMO invites the Tribunal to dismiss the complaint on all counts as well as the relief sought.

D. In his rejoinder the complainant submits that both the complaint and the corrected complaint were filed in a timely manner and in accordance with the instructions given by the Registrar of the Tribunal. On the merits, he explains that he did not understand that the instruction issued by the Chief of ITD was also addressed to

MaxiTime administrators, such as himself. He asserts that his alleged actions clearly do not fall under the standard definition of fraud and that summary dismissal was therefore disproportionate.

E. In its surrejoinder WMO contends that the complainant falsified the dates indicated on the performance appraisal reports which he submitted to the Tribunal together with his complaint.

## CONSIDERATIONS

1. The complainant commenced working with WMO on 18 December 2006. He was summarily dismissed on 14 January 2011, a decision affirmed by the Secretary-General on 16 August 2011 after an internal appeal. The decision of 16 August 2011 is the impugned decision.

2. The background leading to the complainant's dismissal can be summarised in the following way. Some matters of detail are discussed later when considering the specific issues raised by the complainant and WMO. The complainant was initially engaged in a G.5 position as an Information Technology Assistant working in the ITD Helpdesk Unit. One of the tasks he agreed to perform from January 2008, though not part of his duties at the time of his initial engagement, was to maintain the MaxiTime records for the ITD staff of WMO. MaxiTime was a computerised attendance system used to record the attendance at work of staff of WMO. This system facilitated the recording of hours worked per week. The staff of WMO were entitled to work flexible working hours though the nominal working week was 40 hours. A member of staff could nonetheless work less than 40 hours in any given week and make up the time subsequently. Equally a member of staff could work more than 40 hours in any given week and work fewer hours subsequently. The maximum balance that could be carried through at any time was ten hours. When sufficient additional hours had been accumulated they could be used to take a half-day of compensatory leave, up to a

maximum of nine times a year. The system was based on an electronic time-recording system in which staff members could use a personal card to activate magnetic card readers located by elevators and stairs on every floor of WMO's premises. This system enabled staff to record, electronically, when they commenced and finished work. The complainant was, in maintaining the MaxiTime records, in a position to alter or adjust the times recorded by the electronic time-recording system and thus create a different commencing or finishing time for ITD staff members.

3. In 2010, suspicions arose within WMO that unauthorised changes were being made to the time-keeping system. This led to a fact-finding review undertaken by the IOO of WMO. That review eventually led to the IOO focusing on the conduct of the complainant. On 30 August 2010 the complainant's responsible supervisor, the Chief of ITD, was informed by IOO of the possible manipulation of the time-recording system by the complainant. On 6 September 2010 the Chief of ITD issued an e-mail to all ITD staff saying, amongst other things, that with immediate effect "[a]ny requests for corrections and modifications of clocking must be discussed with your direct supervisor, and signed by both staff member and his/her supervisor" and that "[t]he requests for modifications will be submitted to [the Chief of] ITD for final clearance/approval. Clocking updates will be authorised only by [the Chief of] ITD".

4. The investigation by IOO culminated in a meeting with the complainant on 2 November 2010 and the preparation of minutes of the meeting that were sent to the complainant on 3 November 2010 for comment. The complainant provided comment and corrections the following day. The IOO finalised its report of 15 pages on 9 November 2010. The report's conclusions were:

"• [the complainant] manipulated the MaxiTime data in his favour;

- MaxiTime records used as the basis to grant overtime were similarly manipulated (he thus obtained financial benefits from these changes); and

- [the complainant] continued to change his records without authority even after the [Chief of] ITD's clear instructions to seek the latter's approval; and
- [the complainant] made a false representation to get his changes approved on two days."

This passage was followed by a conclusion to the effect that the IOO believed that in doing so, the complainant had violated the Staff Regulations and the Code of Ethics of WMO. The report observed that these actions may constitute serious misconduct and, lastly, that further administrative action should be taken, including recovery action, as appropriate. The Director of IOO sent a copy of the report to the Secretary-General (copied to the Director of REM) with commentary in a memorandum dated 9 November 2010.

5. On 17 November 2010 the Director of REM wrote to the complainant on behalf of the Secretary-General. The Director of REM noted he had been provided with the IOO report and that the complainant's conduct could be deemed misconduct and may lead to a disciplinary measure taken against him. He also noted some of the conclusions of the IOO and commented on the conduct of the complainant. The letter concluded by saying that it served as notification to the complainant of a potential charge of misconduct that may lead to disciplinary measures as outlined in Staff Rule 1101.1. It invited the complainant to provide comment no later than 26 November 2010 after which the Director of REM would consider whether or not to refer the matter to a JDC. The complainant responded in a letter dated 23 November 2010.

6. On 2 December 2010, the complainant was sent a memorandum from Ms G. in her capacity as the secretary of the JDC. She informed the complainant that such a committee had been formed, its composition and that "the presentation of the Administration's case against [him was] contained in the attached document". The attached document was headed "Charges against [the complainant]". It commenced with a sentence that "[t]he complainant is charged of having fraudulently and over a sustained period of time manipulated

the recording of his presence in the office in his favour". The attached document then set out facts and commentary relating to this charge.

The commentary included the following:

> "The gravity of the fraudulent recording is considered in the context of the following additional circumstances.
>
> […]
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> Third, it is likely that by extending the recording of his presence in the office, [the complainant] maintained a leave balance of 60 days as of 31 December 2009 and recorded considerable overtime during 2009, resulting in the payment of CHF 31,322, by far the largest overtime payment of any IT staff.
>
> The time recording in the case of [the complainant] has financial implications. It is noted that data of the manipulation is limited to the morning period for the duration of 6 May to 29 October 2010. Data records of garage entry are kept for this period and data on exiting the garage are not recorded. Due to the limitation of the data availability, the documentation points to a recording of unsubstantiated 28.6 hours on the basis of 32 entries as indicated in Annex A of the IOO report. With an hourly rate for a G.5 of CHF 135 (including standard salary, pension contribution, common staff costs), the total cost amounts to CHF 3,618."

7. It is convenient, at this point, to mention one matter raised in the pleas. In his rejoinder, the complainant addresses the question of what is meant by fraud. He contends that the standard definition of fraud is: wrongful or criminal deception intended to result in financial or personal gain; or a person or thing intended to deceive others, typically by unjustifiably claiming or being credited with accomplishments or qualities. WMO takes issue with this definition and refers to a definition of fraud from the Black's Law Dictionary: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort but in some cases (especially where the conduct is wilful) it may be a crime."

In Judgment 1828, considerations 10-12, which has been cited in Judgments 1925, consideration 6, and 2038, consideration 16, fraud is treated as deception intended to result in financial gain. What is important, for present purposes, is that the charges themselves link the

complainant's conduct of manipulating the records with him obtaining a financial benefit. This involves an allegation of fraud involving deception to secure financial gain and in the remainder of these reasons, the word fraud is used with this meaning.

8. On 6 December 2010 Ms G. sent the complainant another memorandum. She noted that the JDC had met that day and that it had requested her to provide the complainant with the IOO report. She did so in the memorandum and invited the complainant to provide written comments to her by 14 December 2010 on the report, the official administrative charges contained in the memorandum of 2 December 2010 and any other comments on the case. The memorandum noted that the JDC had a copy of the complainant's letter of 23 November 2010. The complainant provided comments in a four-page attachment to a memorandum dated 14 December 2010. The JDC provided its report in a document dated 17 December 2010. It noted that the complainant admitted or did not dispute that he had made 306 adjustments to his own flexi-time record during the period January 2009 to August 2010 and that he continued to make interventions to his time records without heeding the instructions of his supervisor of 6 September 2010. The report then, comparatively briefly, described how the complainant had been in a position of trust and there was no evidence that the adjustments had been substantiated by documented evidence of validations by the supervisor and subsequent recording, all of which was a requirement of the Standing Instructions. The report also described how the complainant had failed to follow the instruction of 6 September 2010 and this constituted insubordination. The report noted there were over 30 occasions in a five-month period where there was a discrepancy between the time of entry (as recorded on the MaxiTalk system) and the times entered manually by the complainant on the MaxiTime records and observed that the complainant's explanations for those discrepancies were not credible. The report concluded that the charges attached to the 2 December 2010 memorandum had been substantiated and recommended dismissal as the "appropriate and commensurate disciplinary action".

9. On 14 January 2011 the Secretary-General wrote to the complainant dismissing him effective 17 January 2011. The letter enclosed the JDC report and contained a summary of the specific factual findings the JDC had made. The Secretary-General said that: "Based on the above-mentioned [JDC] report, I hereby inform you that I have decided to accept the recommendation of the Committee" to dismiss the complainant as the appropriate and commensurate disciplinary action.

10. The complainant lodged an internal appeal to the WMO JAB. The JAB reported on 28 July 2011. The report noted that the complainant challenged his summary dismissal and did so with six arguments. The JAB summarised the arguments as firstly, the decision of dismissal was flawed by serious procedural irregularities, secondly, that WMO failed to prove the alleged conduct on which the dismissal was based, thirdly, summary dismissal was disproportionate to the alleged conduct, fourthly, the dismissal process was tainted with bias and prejudice against the complainant, fifthly, the decision of dismissal breached the principle of equal treatment and, sixthly, WMO's dismissal decision caused the complainant compensable injury. It should be noted, at this point, that each of these six arguments are the arguments advanced by the complainant in his brief in this Tribunal together with an additional argument that the Secretary-General's discretion to dismiss was not absolute.

11. The JAB concluded that the first, second and third arguments had been made out in various ways but the fourth and fifth had not, while the sixth raised issues beyond its terms of reference. After its analysis of the arguments, the JAB set out its findings under a heading "Findings of the Board". They were:

> "17. The charges brought against the [complainant] were ambiguous and at times self-contradictory. Proof beyond reasonable doubt has not been submitted in particular for a quantifiable financial loss to the Organisation that could be concluded as fraud.
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> 18. The [complainant] has not been given the opportunity to be heard by the JDC.

19. The dismissal appears disproportionate in relation to the proven charges against the [complainant].

20. The Board sees merit re-opening the case at the JDC."

Immediately following these findings the JAB set out its recommendation, namely that: "Based on its in-depth discussions and resulting observations and findings, the Joint Appeals Board recommends re-opening the case against [the complainant]". On 12 August 2011 the chair of the JDC wrote to the Secretary-General noting that he had requested that the JDC reconvene to review issues raised by the JAB. The memorandum also noted that the JDC had been reconvened on 9 August 2011 and had provided a report dated 12 August 2011, which was attached to the memorandum. In that report the JDC observed that it had reconvened to review issues raised by the JAB. The JDC report dealt with these issues under three headings. The first heading was "the proven quantifiable financial loss to the Organisation that could be concluded as fraud", the second was "whether the decision of dismissal was disproportionate to the proven misconduct" and the third was "the lack of opportunity for the [complainant] to be heard by the JDC".

12. On 16 August 2011, the Secretary-General wrote to the complainant. The letter said (omitting formal parts):

"Reference is made to your appeal dated 7 April 2011 to the Joint Appeals Board (JAB) requesting that the decision of your dismissal be set aside. The JAB duly considered your appeal and reported to me its conclusions to (*sic*) on 28 July 2011. I attach herewith a copy of the JAB report for your reference.

Subsequent to this report and the recommendations contained therein, further clarifications were sought from the Joint Disciplinary Committee (JDC), which reconvened at my request on 9 April 2011. A copy of the JDC report of this meeting is also attached.

In due consideration of both reports, this is to inform you that I maintain the decision that was communicated to you in my letter dated 14 January 2011, which was to accept the JDC recommendation which proposed that the commensurate disciplinary action is dismissal."

13. It is convenient to commence the Tribunal's consideration of the arguments of the parties with the specific argument advanced

by the complainant under the general heading "The Secretary-General's discretion is not absolute". The argument was that the Secretary-General failed to explain why he had departed from the recommendation of the JAB. This submission was made in the more general context of a submission criticising the process whereby a request was made to the JDC to review its earlier findings and the quite predictable, so it was submitted, approach taken by the JDC to adhere to its earlier recommendation. Moreover this specific argument of the complainant raises, indirectly, other issues of substance addressed in his brief.

14. It is important, in this context, to focus on substance over form. In its report of 28 July 2011, the recommendation of the JAB was reopening of the case against the complainant by the JDC. This, in fact, happened and did so at the request of the Secretary-General. So, literally, the JAB's recommendation was given effect to by the Secretary-General. However the recommendation of the JAB had been preceded by a number of findings. One was that the original charge against the complainant involved an allegation of fraud that had not been established, on the evidence, beyond reasonable doubt and the charges were, in any event, ambiguous and self-contradictory. Another was that the complainant had not been given an opportunity to be heard by the JDC. That finding was made against a background in which the JAB had observed that the complainant had not been "given the opportunity to defend himself in person during sessions of the JDC". It is tolerably clear that this was a reference to the failure of the JDC to hear from the complainant an oral explanation of his defence rather than deciding the matter, as it did, on the papers including the complainant's written accounts by way of defence. Yet another of the findings was that the summary dismissal was a disproportionate response to the charged conduct given the inadequate evidence to support the charge. This was particularly so, as the JAB observed, because the duties associated with managing MaxiTime were not duties in the complainant's job description nor were they duties of the job description for which he had been initially employed.

15. In its original report of 17 December 2010, the JDC concluded that the charges attached to the memorandum of 2 December 2010 were substantiated. However, those charges quite clearly and expressly involved an allegation of fraud. If the JDC had, by that conclusion, been suggesting that it was satisfied that the complainant had engaged in fraud, it singularly failed to explain how it had reached that conclusion. If this be so, it is entirely unacceptable for a disciplinary committee to reach this conclusion without explaining the basis on which it was reached. Alternatively, if the JDC was intending to say, in saying that the "charges […] are substantiated", that the essential facts alleged in the charges had been established except for the facts suggesting the complainant had fraudulently obtained a financial benefit, then the JDC was being careless in its choice of language. Such carelessness is entirely inappropriate given the gravity of the allegations being made against the complainant. It is true that the JDC focused on the complainant having held a position of trust and having breached that trust. However that is an allegation different from an allegation of fraud.

16. Of some importance is the fact that when the Secretary-General made his initial decision on 14 January 2011 to dismiss the complainant, he had both the JDC and the IOO reports, which he had earlier been sent. It is entirely conceivable that he understood the conclusion of the JDC as involving an acceptance that the charges, alleging fraud, had been made out.

17. Perhaps an explanation for the change in focus from fraud to a less serious allegation of breach in trust lies in the fact that in the original IOO report of November 2010, under the heading "Analysis" and subheading "Fraud Triangle – Motive, Rationalisation and Opportunity", the IOO concluded that the complainant's capacity to change his own MaxiTime records provided ample opportunity for fraud and that the complainant had been reimbursed in 2009 the amount of 16,485 Swiss francs for overtime. Moreover this fact (reimbursement for overtime), it was observed by the IOO, provided a strong motive for fraud. Indeed the IOO's conclusions included that

the complainant manipulated the MaxiTime data in his favour and the records used to grant overtime were similarly manipulated and, as the IOO suggested the complainant obtained financial benefits by way of overtime payments from these changes. The IOO was plainly advocating an allegation and, potentially, a finding that the complainant had engaged in fraud. However there was an acceptance, no later than 17 November 2010 (as manifest in the letter from the Director of REM of that date to the complainant) and most likely after the IOO report (but a matter adverted to by the complainant in his response of 4 November 2010 to the minutes of the meeting with the IOO of 2 November 2010), that the payment of overtime was dependent on pre-approval and subject to separate time-sheets that did not rely on the MaxiTime system to substantiate them.

18. Thus the factual foundation for the allegation of fraud, at least in so far as it was based on payments of overtime, did not exist at the time the charges were laid. Notwithstanding that, the charges were couched in terms of fraud and the JDC did not, in its report of 17 December 2010, expressly address the allegation of fraud, let alone renounce it, but rather avoided the issue by focusing on breach of trust. The Tribunal should, at this point, note that it is conceivable that in some other way, the complainant gained some benefit from the conduct that ultimately he did not seriously or at least convincingly contest, including altering his own records without approval after the memorandum of 6 September 2010 expressly saying that should not occur. However that is not, for present purposes, to the point. The JDC took a position in its report on 17 December 2010 and, not unsurprisingly, adhered to that position in its report of 12 August 2011. The JDC did so in circumstances where the JAB exposed in its report the absence of evidence of fraud or rather the absence of evidence that established beyond reasonable doubt that the complainant had engaged in fraud. The JDC did not confront the challenge created by the JAB report that the conclusion in its earlier report that the charges had been substantiated, was wrong. Rather it focused on a conclusion, open on the evidence, that the complainant's conduct had involved a breach of trust. But the ongoing consideration

of the conduct of the complainant, by various people and bodies is likely to have been coloured by the initial allegation of fraud and the failure of the JDC to renounce the allegation or, if there was fraud other than in relation to overtime payments, expose the facts on which such a conclusion might be based.

19. In addition the JDC also did not address the conclusion of the JAB that: "[a] statement that the [complainant was] unfit to work for WMO was not corroborated by hard evidence, as the additional responsibility given to the [complainant], which was of [an] administrative nature, did not fall within the call of his duties or job description. These duties were in addition to the original terms of reference for which [the complainant] had been employed." The approach of the JDC in its 12 August 2011 report was to say that the disciplinary measures other than dismissal contemplated in the Staff Rules (written censure, suspension without pay or demotion to a lower grade) gave an opportunity to re-establish trust; it felt these measures constituted an unacceptable risk to the organisation given the fact that the complainant could not continue to perform his duties without continued access to WMO systems and records of a personal and sensitive nature throughout WMO. Apart from accessing MaxiTime records, the JDC does not say what information might be accessed which would continue the difficultly they advert in the report. It is instructive to note that the only "position of trust" relied on by the JDC in its 17 December 2010 report arose from the maintenance of the time records of the complainant's division. If that is what the JDC continued to rely on, it did not address the point made by the JAB. If it was relying on some wider access to confidential information, it does not explain what information and in what context.

20. The Tribunal returns to the complainant's argument that the Secretary-General failed to explain in his letter of 16 August 2011 the reasons for departing from the recommendation of the JAB. The Tribunal agrees that he did not explain the departure as a matter of substance. It is true that the Secretary-General took steps to reopen the complainant's case before the JDC that involved literal acceptance of

the JAB's recommendation. But then the result, the reopening, was a flawed process as discussed in the preceding considerations. What the Secretary-General failed to do in the impugned decision was to explain why he accepted the conclusion of the JDC in the face of the legitimate and reasoned conclusions of the JAB which made it extremely difficult, if not impossible, without explanation to adhere to the JDC's recommendation to dismiss the complainant. This is basis enough to set aside the Secretary-General's decision. While the judgments of the Tribunal which establish the need for the ultimate decision-maker to explain why they refuse to follow a favourable recommendation of an internal appeal body (see for example Judgment 3161, consideration 7) do not address a case on all fours as the present, the principle nonetheless has application in this matter. The Secretary-General should have, but did not, explain in the impugned decision, why he rejected the substance of the JAB's conclusions.

21. On this basis alone, the complainant is entitled to an order setting aside the decision to dismiss him. However he is also entitled to an order reinstating him to the position he held prior to his dismissal and compensation for loss of income, though adjusted by any income he may have received in the intervening period. Even though there was a breach of trust by the complainant, it has not been proved by WMO that the breach involved fraud (indeed in its submissions to the Tribunal it eschewed any allegation of fraud). The conduct which constituted that breach was in the complainant undertaking duties which were not a part of the duties for which he was initially employed and which, on the evidence before the Tribunal, are not duties it is essential that he continues to perform even though they have, since 2008, been referred to in the complainant's forward job plans and annual appraisals. While the complainant engaged in conduct which was entirely unacceptable, his dismissal occurred in circumstances where the process by which dismissal was adjudged the appropriate remedy was flawed and the Secretary-General failed to give an adequate explanation for the ultimate decision to affirm the dismissal in the face of the reasons

of the JAB. In these circumstances the complainant is also entitled to moral damages which the Tribunal assesses in the sum of 20,000 Swiss francs. By ordering the complainant's reinstatement, the Tribunal is not intending to preclude the imposition of an appropriate disciplinary measure on the complainant, as proposed by the JAB.

22. The Tribunal does not propose to order the production of documents requested by the complainant's legal representative nor is it appropriate, in the circumstances, to order an oral hearing as requested by the complainant. Facts sufficient to dispose of the complaint can be gleaned from the pleadings and accompanying documents.

## DECISION

For the above reasons,

1. The impugned decision of 16 August 2011 is set aside.
2. The Tribunal orders that the complainant be reinstated to the former position he held at the time of his dismissal.
3. The complainant shall be paid the salary and other emoluments that he would have been paid between the time of his dismissal and the time of his reinstatement, less any amounts he has, in that time, received by way of salary and emoluments from any other employment.
4. WMO shall pay the complainant 20,000 Swiss francs as moral damages.
5. WMO shall pay the complainant 7,000 Swiss francs in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ