112th Session **Judgment No. 3083**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. U. against the United Nations Industrial Development Organization (UNIDO) on 17 July 2009 and corrected on 9 September, UNIDO's reply dated 24 December 2009, the complainant's rejoinder of 9 April 2010, the Organization's surrejoinder of 19 July, the complainant's additional submissions of 19 August and UNIDO's final comments dated 7 December 2010;

Considering Article II, paragraph 5, 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, a Nigerian national born in 1970, joined UNIDO in 1996. In October 2004 he was assigned as Project Manager of the Guinea Current Large Marine Ecosystem (GCLME) project, a multi-funded project for which UNIDO serves as one of the executing agencies, and in mid-2005 he was designated Allotment Holder for that project.

On 13 October 2007 he received a phone call from the Director of the Office of Internal Oversight Services (IOS). He was told that his office had been locked and he was asked to appear for an interview the

following day in connection with allegations of wrongdoing in the implementation of the GCLME project. At the interview of 14 October the complainant was informed that an investigation had been initiated into the GCLME project. Documents and files were removed from the project assistant's office and later that day a copy was made of the hard drive of the complainant's computer. On 14 December 2007 the complainant was replaced as Allotment Holder for the GCLME project.

On 18 January 2008 the Director of the Human Resource Management Branch (PSM/HRM) handed the complainant a memorandum of the same date, in which the findings of the IOS investigation were summarised as follows: the complainant had engaged in outside activity as Managing Director of company X, the sole distributor of products of company Y which had done business with the GCLME project worth over 225,000 United States dollars; he had an undisclosed family relationship with Mr C. I., the Regional Director of the GCLME project, and he had been a member of the committee that had interviewed candidates for that post; he had signed a procurement action for the recruitment of his brother-in-law as project assistant; he had invited his brother to participate in a GCLME workshop and, in a recent bidding, had identified the company for which the latter worked as the only one technically acceptable to be awarded a contract; and he had violated the Financial Regulations and Rules and UNIDO's Procurement Manual. He was requested to provide his response by 22 January and he was told that he could be accompanied by a staff member or a staff representative at a meeting with the Director of PSM/HRM scheduled for 23 January. In his response of 22 January and during the subsequent interview with the Director of PSM/HRM the complainant contested the IOS findings and denied any deliberate action to circumvent the Financial Rules or UNIDO's Procurement Manual, as well as any impropriety on his part. By a memorandum of 25 January he submitted additional documentation.

In response to a request from the Director of PSM/HRM for clarification on some of the findings of the investigation, IOS conducted further enquiries and reported on 31 January that it had

found on the hard drive of the complainant's computer four letters on the letterhead of company X, which were signed by the complainant as Managing Director and which instructed a bank in Nigeria with regard to some of the company's banking transactions. Although the complainant was not officially listed as Managing Director of company X in the records submitted by the Nigerian Corporate Affairs Commission, IOS had obtained information from a bank employee that he was the sole signatory on the company's account held in that bank. In addition, IOS had discovered a handwritten note from the complainant authorising company Z to charge his personal credit card for orders made by company X and it had also found that there had been a recent change in the website of company X. By a memorandum of 4 February 2008 the Director of PSM/HRM communicated to the Director-General HRM's conclusions on the findings of the IOS investigation and recommended that the complainant be summarily dismissed for serious misconduct. By a handwritten note of 6 February the Director-General approved that recommendation. On 8 February the complainant attended a meeting with the Director-General and other senior officials. He was then given a week to review the evidence against him – he was granted access to the GCLME project files on 11 February – and to provide additional explanations. He submitted a statement on 15 February, followed by an e-mail to the Director-General on 16 February.

By a letter of 22 February 2008 the complainant was informed that, following a review of the findings made by IOS, the Director-General had decided to dismiss him summarily for lack of integrity and other serious misconduct. His dismissal would take effect on 24 February and the findings on which it was based were: (i) that he had not disclosed a conflict of interest regarding companies X and Y; (ii) that he had not disclosed a conflict of interest regarding the recruitment of his brother-in-law; (iii) that he had not disclosed a conflict of interest regarding his brother's participation in a GCLME workshop, the awarding of a contract to the company for which the latter worked and the choice of that company in a

recent bidding as being the only technically acceptable one; and (iv) that he had violated the Financial Regulations and Rules and UNIDO's Procurement Manual by certifying at least 103 procurement actions under 20,000 dollars each to multiple vendors, by splitting procurement actions for the same goods and services supplied by the same vendor into separate transactions amounting to less than 20,000 dollars each, by repeatedly exceeding the Contracts or Procurement Committee's[*] limit for purchases from the same vendor and by failing to detect irregular bidding documents. On 18 March 2008 the complainant filed an appeal with the Joint Appeals Board contesting the decision of dismissal and on 4 April he submitted his statement of appeal. He subsequently requested a waiver of the proceedings before the Board; this request was not granted but the Board was asked to consider the appeal expeditiously. In its report of 21 April 2009 the Board dismissed all the points raised by the complainant in his appeal. By a letter of 6 May 2009 the complainant was informed that the Director-General had decided to endorse the Board's conclusion and to maintain his initial decision. That is the impugned decision.

B. The complainant argues that the impugned decision is tainted with abuse of authority and failure to afford him due process. He asserts that the Director-General failed to abide by the applicable rules, which authorise summary dismissal only in cases where the misconduct is patent and the interest of the service requires immediate and final separation. Oral testimony and documentary evidence, which was material for the preparation of his defence, was relied upon by the Administration without being disclosed to him. He was not afforded a fully adversarial procedure, nor was he given sufficient time to gather evidence in support of his defence, and the presumption of innocence was not maintained throughout the procedure leading to his dismissal. In addition, the internal appeal process was flawed because the Joint

[*] Referred to as "the Contracts Committee" until October 2006 and "the Procurement Committee" thereafter.

Appeals Board made several errors of fact and of law. In particular, it failed to make an independent assessment of the charges raised against him and to determine whether they had actually been proved by the Administration, which bore the burden of proof. Moreover, it did not examine whether his alleged misconduct was patent and such that it required immediate and final separation, nor whether the Director-General properly exercised his discretion in imposing the harshest disciplinary measure. According to the complainant, the Joint Appeals Board wrongly considered as admissible evidence which had not been shared with him and which was only introduced by the defendant during the appeal process, and it also refused to afford him a hearing in order to assess his credibility. In his view, the sanction imposed upon him was out of proportion to the alleged offence and he reproaches the Organization for failing to take into account his excellent performance record and other mitigating circumstances.

The complainant contends that the charges upon which the impugned decision is based have not been proven beyond a reasonable doubt and cannot therefore be sustained. With regard to his alleged conflict of interest with companies X and Y, he explains that, as a friend of the Managing Director of company X, he did allow him to use his credit card in December 2006 in order to facilitate a transaction with company Z, but since company X had not submitted any bid with the GCLME project since 2004, there was no conflict of interest involved. He asserts that he had never seen the four letters on the letterhead of company X, which must have been copied inadvertently onto the hard drive of his computer, and his signature on them had been "cut and paste[d]" without his knowledge by the Managing Director of company X for the purpose of finalising the transaction with company Z. As regards the alleged conflict of interest in respect of the recruitment of his brother-in-law, he points out that there is no rule prohibiting the appointment of in-laws and that, in any event, he had no role in the selection process but simply approved the procurement action for the appointment, which was in effect a formality. He adds that UNIDO project officials involved in the selection process were duly informed. On the alleged conflict of

interest regarding his brother's participation in a GCLME workshop, he submits that his brother was a well-qualified expert on the subject of the workshop and that UNIDO project officials had been given advance notice. As to his brother's role allegedly in a company which had submitted bids for GCLME contracts, he explains that the entity in question, BDCP, is in fact a non-governmental organisation and that his brother maintained a "cursory relation" with it, which did not amount to employment.

Concerning the alleged violation of the Financial Regulations and Rules and UNIDO's Procurement Manual, the complainant argues that he merely exercised the discretion granted to him under the applicable rules, namely to award contracts without inviting bids or calling for proposals, because the exigencies of the GCLME project did not permit delay. He contends that most procurement actions below 20,000 dollars involved the purchase of services for over 40 meetings and workshops, which took place over a period of two and a half years and the particulars of which could not always be finalised in advance. In some cases, up to three procurement actions involving similar goods or services were authorised in order to overcome the unavailability of the required funds on one budget line, since formal budget revision would have been time-consuming and not in the interest of efficient project implementation. No single procurement action exceeded the amount of 70,000 dollars or 70,000 euros after October 2006, i.e. the limits beyond which approval by the Procurement Committee is required, and in only three cases was the aggregate value of actions involving the same supplier in excess of those limits. These actions did not, however, constitute a series of related acquisitions warranting approval by the Procurement Committee. There was no failure to detect irregular bidding documents and it was the responsibility of the Financial Services Branch, which constantly monitored all acquisitions, to alert him when the set limits were exceeded. Contrary to the assurances he was given by the Director-General at the meeting of 8 February 2008, the charges of alleged conflict of interest involving family members and that concerning irregular bidding documents were never dropped.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement. He claims material damages in an amount equivalent to what he would have earned, including salary, allowances, emoluments, pension benefits and other entitlements, if his contract had not been terminated, from the date of his dismissal until the date of his reinstatement, together with interest. He also claims moral damages and costs for the internal appeal and the proceedings before the Tribunal.

C. In its reply UNIDO submits that the complainant has failed to provide adequate explanations for the findings of the IOS investigation and that his replies are unsubstantiated and unconvincing. Indeed, he provided no details of how the four letters, which together with the credit card authorisation constitute the main evidence for the finding of a conflict of interest with companies X and Y, found their way onto the hard drive of his computer, nor how his signature was obtained by the Managing Director of company X. In fact, the four letters had titles similar in format and style to other documents found on the complainant's hard drive and a forensic analysis revealed that they were all authored by the complainant, that they originated within UNIDO and that they were created from the same document modified each time. Similarly, the complainant failed to explain why the credit card authorisation, being a personal favour, was made to company X and not to his friend, the Managing Director of that company, and why it was general in nature and not limited to one particular purchase or amount. Moreover, the IOS investigation revealed that companies X and Y were in the same business, had the same address and enjoyed close business relations, which included joint bids for large contracts. Concerning the conflict of interest involving family members, the defendant points out that by signing the procurement action authorising the recruitment of his brother-in-law, without having previously disclosed to his superiors his relationship with the latter, the complainant violated the Standards of Conduct for the International Civil Service, which require advance disclosure of any actual or perceived conflict of interest. Likewise, his brother's participation in a

GCLME workshop as well as his employment by BDCP, which was doing business with the GCLME project, involved an apparent conflict of interest calling for advance disclosure, which the complainant failed to do.

With regard to the finding of a breach of the Financial Regulations and Rules and UNIDO's Procurement Manual, the Organization rejects the contention that the rules granted the complainant the discretion to split procurement actions for the same goods and services from the same vendor or that the exigencies of the GCLME project justified such splitting. In reality, all meetings and workshops were included in the yearly programme of work and hence activities and expenditures could have been planned and forecast in advance. It maintains that in six cases the complainant exceeded the prescribed limits on procurement actions involving a single supplier thereby repeatedly bypassing the Procurement Committee, and that he also failed to detect irregular bidding documents. It denies that the Director-General ever promised him that the findings of conflict of interest involving family members would not be pursued and points out that the complainant cannot evade his responsibility by arguing that the Financial Services Branch could track procurement actions on a continuing basis.

According to the Organization, the findings of the IOS investigation have been proven beyond a reasonable doubt and therefore the Director-General did not exceed his authority in applying the sanction of summary dismissal. In addition, there was no breach of due process. The complainant was offered several opportunities to respond to the findings both orally and in writing and the presumption of innocence was fully respected. He was given access to all relevant documentation before the final decision was taken and he also had the opportunity to challenge the evidence during the internal appeal process. Moreover, the Joint Appeals Board duly examined each of his arguments and claims before dismissing them and it made express findings of fact substantiating its conclusions. It was entitled to decide whether or not it was necessary to grant him a hearing, and its decision on the issue involved no error. The defendant considers that the nature and the number of findings against the complainant

warranted summary dismissal and indicates that, as a result of his and other officials' misconduct, the Organization had to pay to the GCLME project the amount of 528,500 dollars.

D. In his rejoinder the complainant presses his pleas. He objects in the strongest terms to the assertion that his actions caused the Organization financial loss and points out that the defendant has failed to provide any evidence in that respect. He reproaches UNIDO for introducing new evidence at this stage in the process and contests the credibility of the forensic evidence submitted with its reply. He explains that he honestly believed that his brother was not an employee of BDCP, an entity that had done business with the GCLME project.

E. In its surrejoinder UNIDO produces a memorandum dated 24 November 2009 from the Director of the Financial Services Branch attesting that the amount of 528,500 dollars was indeed paid to the GCLME project. It asserts its right to present new forensic evidence in rebuttal of the complainant's representations. It otherwise maintains its position in full.

F. In his additional submissions the complainant categorically refutes the assertion that he caused financial loss to the Organization and invites the Tribunal to reject it and to disregard any evidence introduced in that respect.

G. In its final comments the Organization stands by its assertion and notes that it merely exercised its right of reply in producing the memorandum of 24 November 2009.

CONSIDERATIONS

1. The complainant challenges a decision of the Director-General of 6 May 2009 rejecting his appeal against his summary dismissal on 22 February 2008. At the time of his dismissal the complainant was Project Manager of the Guinea Current Large Marine Ecosystem (GCLME) project. He had also been the project's Allotment Holder from July or August 2005 until replaced on

14 December 2007. His summary dismissal was based on four findings made following an investigation initiated by the Office of Internal Oversight Services (IOS). Those findings were:

(i) failure to disclose a conflict of interest with respect to two companies with which the GCLME project did business in 2004 and 2006-2007;

(ii) failure to disclose a conflict of interest with regard to the recruitment of his brother-in-law as project assistant for the GCLME project;

(iii) failure to disclose a conflict of interest with regard to the participation of his brother in a GCLME workshop at the project's expense and with regard to a company for which his brother worked, that company having been awarded a contract and its bid for another project having been found by the complainant to be "the only technically acceptable one";

(iv) breach of UNIDO Financial Regulations and Rules by splitting procurement of the same goods and services from the same vendor into separate transactions of less than 20,000 United States dollars, by having repeatedly exceeded the Procurement Committee limit for purchases from the same vendor and by failing to detect and verify irregularities in bidding documents.

2. The complainant contends that he was denied due process in the procedure leading to his summary dismissal in that the presumption of innocence was not maintained, he was not afforded a full adversarial procedure, regard was had to material that was not provided to him and he was not given sufficient time to answer the case against him. Further, he argues that the report of the Joint Appeals Board which rejected the arguments he put in his internal

appeal is flawed in that the Board failed to make an independent assessment of the evidence, erred in finding that he had been provided with all relevant evidence before he was dismissed and allowed oral testimony which had not previously been disclosed to him. He also claims that the Board should have interviewed him. He adds that it failed to consider whether the misconduct in question was such as to permit the Director-General to dismiss him summarily and that it erred in its analysis of the question whether the penalty of summary dismissal was proportionate. Lastly, and consistent with his argument that he should have been interviewed by the Joint Appeals Board, the complainant seeks an oral hearing in which to give evidence. That application is dismissed. If the Joint Appeals Board should have interviewed the complainant, the proper course is to remit the matter for rehearing and reconsideration by the Board in the light of the complainant's evidence. If it was not necessary for the Board to interview the complainant, there is no necessity in this case for the Tribunal to receive evidence from him.

3. Before turning to the procedure leading to the complainant's dismissal, it is relevant to note that aspects of it were essentially investigative. As set out in Judgment 2475, under 7, an investigation must be conducted in such a way as to ensure that there is an opportunity for the staff member concerned to test the evidence and answer the charge made. In the case of summary dismissal, the decision-maker must be satisfied to the requisite standard that misconduct has occurred as charged and, also, that the misconduct is such as to justify summary dismissal. However, as pointed out in Judgment 2771, under 18, with respect to a similar procedure employed in relation to a charge of misconduct based on harassment and sexual harassment of a subordinate, due process can be ensured by a process that does not necessarily involve being present when statements are taken, having the opportunity to cross-examine or being able to object to the statement at that stage. In other words, it is not always necessary that there be a full adversarial process at the investigative stage. Moreover, where the question is whether there has

been a full adversarial process, it is relevant to have regard to the subsequent appeal process to ascertain whether "the process, viewed in its entirety [is] one that satisfie[s] the requirements of due process".

4. As already indicated, IOS initiated an investigation into the GCLME project. On 13 October 2007 the Director of IOS contacted the complainant, who was responsible for the disbursement of project funds, and informed him that his office had been locked and that he was required to attend an interview the next day when IOS removed documents and files from the office of his assistant and copied the hard drive of the complainant's computer. On 18 January 2008 the complainant met with the Director of the Human Resource Management Branch (PSM/HRM) who provided him with a memorandum setting out five "findings" made by IOS together with supporting documents. Those "findings" were more extensive in two respects than those that led to his summary dismissal. First, there was a "finding" of engaging in outside activity as the Managing Director of a company (company X) which was the sole distributor of products of another company (company Y) which did business with the GCLME project, being the same companies referred to in the first finding of conflict of interest upon which the decision of summary dismissal was based. Second, there was a "finding" as to an "undisclosed familial relationship" with Mr C. I. who had been recruited as the Regional Director of the GCLME project following an interview by a committee that included the complainant. The complainant was asked to provide a response by 22 January 2008. He was also informed that he could bring a staff member or staff representative to a meeting with the Director of PSM/HRM on 23 January.

5. The complainant met with the Director of PSM/HRM on 23 January and was accompanied by the President of the UNIDO Staff Council. He gave his account and/or explanation of the various matters referred to in the memorandum of 18 January, denying, amongst other things, that he was the Managing Director

of company X and, also, denying that he was related to Mr C. I. A record was made of this meeting and later signed by the complainant.

6. The Director of PSM/HRM submitted a recommendation for the complainant's summary dismissal to the Director-General on 4 February 2008 based on the "findings" set out in the memorandum of 18 January. On 6 February the Director-General signed a note approving that recommendation. However, there was a meeting between the complainant and the Director-General on 8 February at which the former was invited to provide further explanations. At that meeting, the complainant also complained of the limited time he had been given to make his response and the limited access he had had to files. He was given a further week within which to respond and was given access to GCLME files on 11 February. He submitted a further statement on 15 February and a lengthy e-mail on 16 February. Having regard to the extension of time granted to the complainant to make further submissions and the provision of the GCLME documents, there is no substance to the argument that he was not given sufficient time to answer the charges. So far as concerns the claim that the complainant 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. Accordingly, this argument is also rejected.

7. There is a dispute as to what occurred at the meeting of 8 February. The complainant submits that he was then told that the charges relating to family relationships would not be pursued. However, there is no evidence to support this claim, which is denied by UNIDO. In the circumstances, that claim is rejected.

Further, the complainant contends by reference to the note signed by the Director-General on 6 February that the latter had already decided upon his summary dismissal. Presumably, it is on this basis that it is argued that the presumption of innocence was not maintained throughout the procedure leading to his summary dismissal. It may be

that a previous indication of an intention to take a particular decision or the maintenance of an earlier decision even though additional arguments and/or evidence have been provided will indicate that the decision-maker did not properly evaluate the evidence or failed to take account of all relevant facts. In the present case, however, the Director-General received additional explanations and further submissions on 8 and 15 February respectively and then reduced the first charge from one of being engaged in outside activities to a charge of failure to disclose conflicts of interest and, also, dropped the second charge relating to Mr C. I. Given these changes to what was proposed in the note of 6 February, it is not established that the Director-General did not fully consider the arguments and evidence adduced by the complainant. Similarly, it is not established that he did not properly evaluate all the available material. Accordingly, the argument that the presumption of innocence was not maintained must also be rejected.

8. The complainant also contends that he was denied due process in the procedure leading to his summary dismissal in that he was not provided with certain evidence relating to the first charge of misconduct, namely having an undisclosed conflict of interest with two named companies. It will be remembered that, initially, the charge was one of engaging in external activity by being the Managing Director of company X. The complainant denied this at the meeting of 23 January and suggested that enquiries be conducted with the Nigerian Corporate Affairs Commission. IOS was then asked to conduct further enquiries and reported on 31 January that the complainant was not recorded as Managing Director of company X at the Nigerian Corporate Affairs Commission but that someone at the bank that held the account of company X had confirmed that he was the sole signatory to its account. IOS also reported that there had been some recent change to the website of company X. The complainant only became aware of this information in the course of the internal appeal proceedings. It is not clear that the Director-General had regard to this material in relation to the finding of undisclosed conflicts of interest. No mention is made of it in the memorandum of 4 February

from the Director of PSM/HRM to the Director-General and there is no evidence that it was ever passed to him. Before dealing further with this issue, however, it is convenient to consider the evidence relating to the first charge of failing to disclose a conflict of interest with companies X and Y.

9. IOS found four letters on the letterhead of company X on the hard drive of the complainant's computer. Those letters bearing the complainant's signature as Managing Director instructed a bank in Nigeria with respect to certain of the company's banking transactions. IOS also found an authorisation dated 1 December 2006 and signed by the complainant to a company (company Z) authorising it to charge his credit card for "orders made by [company X]". The complainant acknowledged that it was his signature on the four letters but claimed, in effect, that they had been fabricated by someone who had "cut and past[ed]" his signature on them and that they got into his computer when that person gave him some photographs which were downloaded to his computer. However, he admitted that he allowed a personal friend who "owned" company X to use his credit card to do business with company Z. He pointed out that it was not company Z that had done business with the GCLME project but company Y. The evidence was that company Y had done over 225,000 dollars worth of business with the GCLME project in 2006 and 2007 and that it had the same address as company X and had a business relationship with it. Even if no regard is had to the four letters found on the hard drive of the complainant's computer, the evidence was sufficient to establish a close relationship between the complainant and company X and, by association, with company Y. Assuming that the Director-General had regard to the information that the complainant was the sole signatory on the bank account of company X, it was open to the complainant to submit to the Joint Appeals Board that that evidence should be disregarded. However and even if disregarded, the remaining evidence is more than sufficient to establish a close relationship with both companies. This notwithstanding, the complainant seeks to avoid a finding of failure to disclose a conflict of interest by pointing out that he authorised the use of his credit card by company X two years after

that company did business with the GCLME project. That is not the issue. The issue is whether he had a close association with the "owner" of company X in 2004. The complainant has provided no evidence that the relationship was of recent origin. Indeed, it is unlikely that he would allow his credit card to be used by someone with whom he did not have a long-standing relationship. The complainant also contends that exculpatory evidence was kept from him in that he was not informed that a search of the records of the Nigerian Corporate Affairs Commission did not reveal him to be Managing Director of company X. The relevant finding was not that he was Managing Director but that he had an undisclosed conflict of interest. Accordingly, that argument has no substance. It follows that the first finding of conflict of interest must stand.

10. The second finding in the Director-General's decision of 22 February 2008 relates to the complainant's brother-in-law. It is not disputed that the complainant signed the procurement action authorising the appointment of his brother-in-law as project assistant for the GCLME project without disclosing their relationship. In this regard, the Standards of Conduct for the International Civil Service provide that international civil servants "should avoid assisting private bodies or persons in their dealings with their organization where this might lead to actual or perceived preferential treatment" and they "should […] voluntarily disclose in advance possible conflicts of interest that arise in the course of carrying out their duties". The complainant argues that "should" is aspirational in nature and not mandatory. This argument must be rejected. Thus, even though there is no rule against the employment of relatives and even if, as the complainant contends, his only role was to sign the procurement action after the selection by others of his brother-in-law as project assistant, the complainant was in breach of the requirement for advance disclosure.

11. The complainant contends that the evidence was insufficient to sustain the third finding of undisclosed conflict of interest relating to his brother. It is not disputed that the complainant invited his brother to

a project workshop at its expense without informing his supervisor. He claims that he gave notice of his intention to do so to project staff. However, as UNIDO points out, informing project staff in the field, to whom the complainant did not report and who were in no position to question his actions, did not constitute disclosure as required by the Standards of Conduct for the International Civil Service.

The second aspect of this third finding relates to the relationship of the complainant's brother with an entity named BDCP whose bid the complainant had found to be "the only technically acceptable [one]". The complainant admits that his brother maintained a "cursory relationship" with BDCP, using it as a "forwarding address when applying for travel grants/sponsorships/fellowships" but states that he did not know that his brother was employed by that entity. Further, he argues that the evidence is not sufficient to establish that he was so employed. The evidence is that the complainant had previously identified his brother as O. U. and admitted when meeting the Director of PSM/HRM on 23 January 2008 that O. U. and S. U. were the same person, his brother. When submitting its bid, BDCP identified its accountant as S. O. and provided certain particulars which coincided with those of the complainant's brother, including date of birth and mobile telephone number. Moreover, the complainant had earlier described his brother as a BDCP economist. It was open to the Director-General and the Joint Appeals Board, in the absence of evidence or other explanation from the complainant, to reject these similarities as mere coincidence and to be satisfied to the requisite degree that the complainant's brother was employed by BDCP and that the complainant knew that to be so.

12. Before turning to the fourth finding in the Director-General's decision of 22 February 2008, it is convenient to refer to the relevant financial rules. Until August 2006, Financial Rule 112.1 provided that any official who took action contrary to those Rules could be held personally responsible and financially liable for the consequences. Since then, Rule 101.1.2 of the Financial Regulations and Rules has relevantly provided:

> "All UNIDO staff members are obliged to comply with the Financial Regulations and Rules [...]. Any staff member who contravenes the Financial Regulations or Rules [...] may be held personally accountable and financially liable for his or her action [...]."

Until August 2006, Financial Rule 109.18 provided that "[e]xcept as provided in rule 109.19, contracts [...] sh[ould] be awarded after the conducting of formal competitive bidding or the calling for competitive proposals". At the relevant time, Financial Rule 109.19 allowed for exceptions for commitments of less than 20,000 dollars "after an assessment of competitive quotations" and, also, where the "exigency of the activity [...] d[id] not permit the delay attendant upon the issue of invitations to bid or calls for proposals". No relevant change was effected thereafter. And until August 2006, Financial Rule 109.17(a)(i) relevantly provided that proposed contracts that involved "commitments to a single contractor in respect of a single requisition or a series of related requisitions totalling […] 70,000 [United States dollars] or more" were to be referred to the Contracts Committee. As from September 2006, that Committee was renamed the Procurement Committee and, thereafter, it was required to review "a series of requisitions, totalling […] 70,000 [euros] or more in a 12-month period commencing on the date of the award of the initial contract".

13. It is not disputed regarding the fourth finding that, as Allotment Holder, the complainant was entitled to authorise contracts worth less than 20,000 dollars provided that he received competitive quotations and/or that he could authorise contracts above that amount if the exigencies did not permit of delay. Nor is it disputed that, if there was a series of contracts of related requisitions for 70,000 dollars or, after August 2006, for more than 70,000 euros in a 12-month period, he was obliged to refer them to the Procurement Committee. Further, it is not denied that, by 103 separate procurement actions involving amounts of less than 20,000 dollars, the complainant, in fact, awarded more than one contract to the same company for goods or services of the same nature in which the aggregate amount exceeded 20,000 dollars. However, he claims that he was acting within his discretion in that the exigencies did not permit of delay.

In this regard, he points out that many of the procurement actions related to interpreter, catering and transport services in support of 43 meetings or workshops held over a period of two and a half years and that dates for these events could not always be settled in advance. As to three procurement actions involving procurement of similar goods and services from the same supplier at or about the same time, the complainant says this was done because of the "unavailability of the required funds [...] on one budget line or project". UNIDO accepts that there may have been occasions when separate procurement contracts were issued because of difficulties in preparing budget revisions but argues that this does not explain the large number of separate transactions.

14. The complainant's argument, in essence, is that because of the exigencies that arose from time to time, he engaged in separate procurement actions with the same vendor for the same or similar goods or services, the last or the last ones of which brought the total worth of those contracts to more than 20,000 dollars. Where, as here, a person relies on an exception to escape liability, it is for that person to establish that his actions fell within the exception. The relevant exception in this case is that the "exigency [did] not permit [of] delay". The delay in question is that involved in "the issue of invitations to bid or calls for proposals". Neither the unavailability of funds in one budget line nor the need to prepare budget revisions establish that the exigencies did not permit of the delay involved in calling for bids or proposals. Although the fact that, over a period of two and a half years, there were 43 meetings for which dates could not always be settled in advance may give rise to an inference that, at least in some cases, the exigencies did not permit of delay, it falls far short of establishing that each and every one of the transactions resulting in contracts totalling more than 20,000 dollars or, even, a significant number of them, resulted from the exigencies of the situation. Moreover, the complainant received competitive quotes for most of the transactions in question but failed to offer any explanation for

awarding contracts to the same vendor even though the total exceeded 20,000 dollars. As the complainant failed to establish that his actions fell within the relevant exception, it was open to the Director-General and the Joint Appeals Board to be satisfied to the requisite degree that the complainant had split procurement actions for the same goods or services from the same vendor into separate transactions of less than 20,000 dollars. And as the Financial Rules were clear as to the limits of the complainant's authority as Allotment Holder, it was open to them to be satisfied to the requisite degree that he had done so for the purpose of circumventing the Financial Rules. It is not to the point, even if it were the fact, that the transactions could be tracked and monitored on the computer software used by UNIDO. The Financial Rules have at all times made it clear that staff members are personally responsible for their observance. Nor is it correct, as the complainant contends, that failure to comply with the Rules is simply a "performance issue". Even in the absence of fraud or other dishonesty, systematic action taken for the purpose of circumventing the Financial Rules by a person whose function it is to authorise the expenditure of the funds of an international organisation constitutes serious misconduct.

15. The second aspect of the fourth finding by the Director-General in his decision of 22 February 2008 relates to the limit of 70,000 dollars or, after August 2006, 70,000 euros beyond which it was necessary to refer related requisitions to the Contracts or Procurement Committee. It is not denied that in three cases those limits were exceeded. However, the complainant argues that they were not exceeded in the other three cases raised against him. In at least one of the latter three cases, the complainant is clearly wrong in that he has failed to aggregate contracts assigned to different project budgets. In the main, the complainant contends that UNIDO has failed to prove that the requisitions were "related". This argument must be rejected. In each case, the contracts were with the same vendor for the supply of goods or services of the same description. In these circumstances, it was open to the Director-General and the Joint Appeals Board to be satisfied to the requisite degree that the complainant had authorised

related contracts and that, in at least four cases, the relevant limit was exceeded. It is unnecessary to decide whether the relevant limit was exceeded in the other two cases. The Director-General's finding was that the complainant had "repeatedly exceeded" the relevant limit – a finding that is amply supported by the four cases in which the limit was clearly exceeded. Further, it is no answer that the complainant relied on the Financial Services Branch to alert him when limits were reached. Once the limits were reached, it was too late to rectify the situation. Moreover, and as already indicated in relation to the splitting of contracts below 20,000 dollars, the Financial Rules made it clear that the complainant had a personal obligation to ensure that he complied with them.

16. The third aspect of the fourth finding by the Director-General in his decision of 22 February 2008 relates to irregular bidding documents. In one case, the irregularity concerns a document showing a date in January 2006, rather than January 2007. Clearly, this may have been an innocent oversight. The other claimed irregularities relate to the letterheads of two companies that appear to have similar fonts and to bidding documents that failed to disclose a telephone number or, sometimes, an address. There is no evidence that the documents or bids were not genuine. In these circumstances, it is to be concluded that this aspect of the fourth finding has not been established to the requisite degree.

17. It is convenient at this stage to consider the complainant's argument that he was denied due process in the proceedings before the Joint Appeals Board. Primarily, the complainant contends that the Board failed to assess whether there was sufficient relevant and admissible evidence to prove each and every charge beyond a reasonable doubt. It is correct, as the complainant submits, that there is no detailed analysis of the evidence. However and as already indicated, the evidence is sufficient to establish all but one aspect of the findings made by the Director-General on 22 February 2008. It is also argued that the Board failed to address specific arguments with respect to the finding of a conflict of interest in relation to company X. Again, that is

correct but as the complainant's arguments do not lead to a different conclusion from that reached by the Board, nothing turns on this argument. Nor does anything turn on the complainant's argument with respect to the Board's finding relating to the evidence obtained by IOS concerning the bank account of company X. As already explained, even if that evidence is excluded, the finding with respect to companies X and Y must stand.

18. The complainant also argues that the Joint Appeals Board erred in holding that he had not been denied due process by the withholding of certain evidence from him prior to his summary dismissal. The evidence in question is the memorandum of 4 February 2008 from the Director of PSM/HRM to the Director-General recommending the complainant's summary dismissal and the evidence subsequently obtained by IOS that the complainant was not listed as Managing Director of company X with the Nigerian Corporate Affairs Commission but was the sole signatory to its bank account. As already explained, the question of due process has to be considered in the light of the subsequent appeal process. The complainant was free to make whatever submissions he wished with respect to that evidence in his appeal, including that the evidence subsequently obtained by IOS should be disregarded. But even if disregarded, there was ample evidence to support the finding to which that evidence related. He also complains of hearsay evidence admitted by the Joint Appeals Board. As already noted, the complainant, himself, produced evidence in the proceedings before the Board. That evidence included a written statement from a person identified as the Managing Director of company Y in which that person stated that he did not know the complainant. That person was later interviewed by persons from IOS. He then denied that he was associated with company X and repeated that he did not know the complainant. When questioned further, he said he was lying to the IOS team. This evidence, which was introduced in reply to the statement produced by the complainant before the Joint Appeals Board, was admissible as to the credit of the person concerned. That being so, its admission did not involve a denial of due process.

19. The complainant's final argument with respect to the proceedings before the Joint Appeals Board concerns its failure to interview the complainant even though he asked to be heard. The evidence against the complainant consisted of the documents on which the findings were based and written statements provided by IOS, including its statement with respect to its enquiries relating to company X. The complainant was free to challenge the evidence and, also, to provide written statements from himself and others in answer to the claims made against him. He does not identify any particular aspect or aspects with respect to which he would have wished to give evidence before the Board or would now wish to give evidence before the Tribunal. In these circumstances, the failure of the Joint Appeals Board to interview the complainant cannot be held to constitute a denial of due process. And that being so, the application for an oral hearing is dismissed.

20. The complainant makes two further arguments, namely, that there are mitigating or other factors that would warrant a less severe sanction than summary dismissal and that summary dismissal was disproportionate to the findings made by the Director-General. In this context, it is appropriate to note that the Director-General's decision of 6 May 2009 must be set aside to the extent that it upheld the finding with respect to irregular bidding documents. So far as concerns the factors which, it is said, would warrant a lesser penalty, the Tribunal sees no merit in the argument that the complainant's previous excellent record should have been taken into account or that regard should have been had to the subsequent action of the Administration to introduce procurement training or the fact that his actions had been approved by his supervisors. Moreover, and even when regard is had to the fact that the finding with respect to irregular bidding documents must be set aside, it cannot be said either that the Director-General should have taken some less drastic course or that summary dismissal was disproportionate. The complainant was in a position of trust and charged with the responsibility of disbursing large sums of money. Failure to observe the Financial Regulations and Rules entailed risk to the GCLME project and to the reputation of UNIDO and, necessarily

involved a serious breach of trust. However, because the finding with respect to irregular bidding documents must be set aside, the matter must be remitted to the Director-General to consider afresh whether the complainant should be summarily dismissed or some other sanction imposed.

21. This is not a case that warrants an award of costs.

DECISION

For the above reasons,

1. The Director-General's decision of 6 May 2009 is set aside to the extent that it upheld his earlier finding that the complainant failed to detect and verify irregularities in bidding documents.
2. The matter is remitted to the Director-General to determine whether to uphold his decision to dismiss the complainant summarily or to take some other course.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet