B.

v.

FAO

137th Session **Judgment No. 4770**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. B. against the Food and Agriculture Organization of the United Nations (FAO) on 5 January 2021 and corrected on 29 January, the FAO's reply of 21 May 2021, the complainant's rejoinder of 24 August 2021, the FAO's surrejoinder of 12 November 2021, the complainant's additional submissions of 13 January 2022 and the FAO's final comments of 11 March 2022;

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 may be summed up as follows:

The complainant challenges the decision to dismiss him for misconduct.

The complainant joined the FAO in 1992. At the material time, he held the grade P-5 position of Commissary Manager, to which he had been assigned in September 2013. The Commissary was essentially a store selling duty-free goods to staff members. It had two salesrooms, one on the FAO's premises, the other on the premises of the World Food Programme (WFP), and the complainant was responsible for both. In September 2015, he was informed that the WFP salesroom, which had been closed for renovation works, would reopen at the beginning of November 2015, a few months earlier than anticipated. Amongst

other things, new refrigerators for displaying fresh and frozen foods needed to be sourced, because the old ones could not be reused. A tender process was initially envisaged but, in the event, an agreement was reached with one of the Commissary's existing suppliers of fresh foods ("company S") whereby the refrigerators were provided by company S under a "free loan" arrangement. No formal contract covering the loan of these refrigerators was drawn up.

Less than two years later, in May 2017, the FAO unexpectedly announced the closure of the Commissary. When the suppliers were notified of this decision, company S claimed 15,000 euros in compensation from the FAO on the basis that it had expected to recoup its investment in the refrigerators over a period of five to six years. It asserted that the refrigerators had been custom-built to specifications provided directly to the manufacturer by the FAO itself, and that it would not be able to reuse them in another location. The FAO subsequently decided to negotiate a settlement with company S concerning this claim.

In October 2017, after the Commissary had closed, a special review of the FAO Commissary was conducted by an external firm of auditors ("the external auditors") at the request of the Office of the Inspector General (OIG). Its purpose was "to assess the adequacy of Commissary management and business practices in the period 2014–2017". One of the issues that came under scrutiny was the "free loan" arrangement with company S. The findings made by the external auditors prompted OIG to initiate another investigation focusing specifically on the actions of the complainant. OIG issued an investigation report in February 2018 in which it concluded that the complainant had abused his authority and committed gross negligence by failing to formalise the terms of the agreement with company S, and that he had failed to supervise and guide his subordinates appropriately.

On the basis of these findings, disciplinary proceedings were initiated against the complainant. By a memorandum of 12 February 2018, to which a copy of the OIG investigation report was attached, he was charged with misconduct and was informed that the Organization proposed to impose the disciplinary measure of dismissal. The complainant submitted his response to the charges on 23 February 2018, rejecting

them as unfounded. However, his explanations were not accepted and by a memorandum of 26 February, he was informed that he was dismissed for misconduct with immediate effect pursuant to paragraph 330.2.4 of the FAO Manual. He would receive compensation in lieu of one month's notice, but no termination indemnity would be paid. In addition, the funds claimed by company S would be recovered.

On 25 April 2018, the complainant lodged an appeal with the Director-General, challenging the decision to dismiss him. This appeal was rejected by a letter of 25 June 2018. On 30 July 2018, he filed an appeal with the Appeals Committee, which issued its report on 30 March 2020. The Committee found that the loan agreement ought to have been formalised in writing but that it was difficult to regard the complainant as solely to blame. In particular, it considered that the findings of the external auditors' report concerning his work environment ought to have been taken into account when assessing his conduct. The Committee therefore recommended that the proportionality of the disciplinary measure be reassessed. However, in a decision of 13 October 2020, the Director-General rejected that recommendation and dismissed the appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement in the grade and step he would have been granted in April 2018, with retroactive payment of all salaries, benefits, entitlements, pension contributions and leave credits, plus interest at the rate of 5 per cent per annum. Alternatively, should reinstatement not be ordered, he seeks an award of material damages in the amount of 830,000 euros, from which any other income since the date of his separation should be deducted. He also claims the payment of his full pension contributions from March 2018 until the mandatory date of separation; moral damages in the amount of 500,000 euros; costs; reimbursement of medical expenses totalling 6,275 euros; interest at the rate of 5 per cent per annum on all sums awarded; and such other relief as the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant applies for oral proceedings. He does not list witnesses. The Tribunal observes that the parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request for oral proceedings is rejected.

2. The following discussion proceeds against the background already set out in the facts described above. The complainant contests the disciplinary sanction of dismissal for misconduct which was imposed on him, based on an assessment of his conduct as tainted by abuse of authority and gross negligence. The 26 February 2018 disciplinary decision was grounded on three counts and concluded:

> "[I]t is established beyond reasonable doubt that:
>
> • [The complainant] abused [his] authority by entering into a loan arrangement, or allowing it to be entered into, with [company S] in violation of Manual Section 330.1.52(b).
>
> • [He] knowingly, or recklessly, failed to formalize the terms of the arrangement in writing, raising the possibility of exposing [the] FAO to the jurisdiction of national courts for allegedly breaching the arrangement, amounting to gross negligence as understood in Administrative Circular 2016/23.
>
> • [He] failed to discharge [his] duty as a P-5 manager to guide and supervise [his] subordinates appropriately and to adhere to the standards expected from a senior officer."

The disciplinary decision also emphasised the complainant's obligation to be fully aware of, and ensure compliance with, the fundamental principles governing procurement.

The complainant contends, in brief, that: (i) the investigation by the Office of the Inspector General (OIG) and the disciplinary proceedings were flawed, (ii) his behaviour did not amount to an abuse of authority and gross negligence, and (iii) the sanction was disproportionate.

3. In his first plea, the complainant contends that OIG's investigation was tainted by procedural violations and breaches of due process. He advances a number of arguments, which may be summarized as follows:

(i) insufficient notice of the allegations and investigation;

(ii) lack of notification of the investigation conducted by the external auditors;

(iii) failure to disclose the complete investigation file;

(iv) failure to provide sufficient details of the allegations against him;

(v) breach of the right to test all the evidence;

(vi) breach of the presumption of innocence;

(vii) failure to take into account all facts and submissions; and

(viii) OIG overstepped its role.

4. In the submission that he was not given sufficient notice of the allegations and investigation, the complainant contends that company S had approached the FAO in May 2017 seeking compensation for the refrigerators. Instead of informing the complainant at the time that it was making enquiries into this, the FAO delayed notifying him of the investigation until 19 December 2017, and interviewed him immediately, that same day, without giving him sufficient time to understand the charges against him or to access legal advice.

To address this issue, it is useful to quote the applicable rules. The Revised Guidelines for Internal Administrative Investigations by the Office of the Inspector General ("the Investigation Guidelines"), published in Administrative Circular 2017/03 of 15 February 2017, relevantly stated:

– during the preliminary review conducted by OIG, "the potential subject of an investigation is not notified of either the decision to initiate a preliminary review or of the allegations involved unless OIG determines that it is necessary under the circumstances, or it is required by a specific rule applicable to the type of investigation in question" (paragraph 22); and

– the subject of the investigation is notified of the nature of the allegations against them "as soon as reasonably practicable, and in all cases before the subject is interviewed" (paragraph 28).

In light of paragraph 22, the complainant was not entitled to be notified of the preliminary review, but only to be notified of the allegations against him. Therefore, the plea that OIG's investigation was flawed because he was not informed of company S's claim until December 2017, is unfounded. As to the submission that the complainant was interviewed the same day on which he was notified of the allegations against him, the Tribunal notes that paragraph 28 of the Investigation Guidelines only requires that the subjects of investigations be notified of the allegations against them before being interviewed. Paragraph 28 does not establish a minimum waiting period between the notification of the allegations and the interview of the subject of the investigation. As a rule, it is sufficient that the accused be informed of the allegations prior to being interviewed (see Judgments 4106, consideration 9, and 3200, consideration 9). Moreover, in the circumstances of the case, the fact that the complainant was interviewed on the day on which he was notified of the charges against him, did not hinder his understanding of the charges. Indeed, he had already been interviewed by OIG prior to 19 December 2017, and in particular on 29 November 2017, as a witness. Since the 29 November 2017 interview indicated that the complainant's conduct might not have been in conformity with the FAO's rules, OIG prepared the notice of investigation. In addition, during his interview with OIG and during the disciplinary proceedings, the complainant had ample opportunity to comment and provide evidence.

5. The allegations mentioned in consideration 3 above, under (ii), (iii), and (iv), partially overlap and will, thus, be examined together.

In the allegation that he was not notified of the external auditors' investigation, the complainant contends that he was initially informed that they would be conducting an external audit of the Commissary. However, they were in fact conducting an investigation into his alleged misconduct prior to OIG's investigation and he was not informed of

this. Moreover, he was not provided with the external auditors' report and related documents, despite their being relied upon in OIG's investigation report and the Appeals Committee's recommendation. In addition, the appointment of an external investigator for a preliminary investigation is not provided for in the applicable rules.

In the allegation of failure to disclose the complete investigation file, the complainant contends that he was not provided with the preliminary investigation report issued by the external auditors when he was notified of the charges against him following OIG's report. Nor was he provided with it during the internal appeal proceedings. This constituted a breach of due process.

In the allegation of failure to provide sufficient details of the allegations against him, the complainant pleads that the notification of investigation did not indicate how he had come to be the subject of an investigation, in other words, whether there was a formal complaint against him. This was a further breach of due process.

The Tribunal notes that the external auditors were lawfully appointed in compliance with paragraph 5 of the Charter for the Office of the Inspector General (Manual Section 107 – Appendix A). They were appointed to support OIG in order to conduct an audit related to the operation of the Commissary as a whole, in the framework of a "special review of the FAO Commissary", and not in order to specifically investigate the complainant's conduct. Therefore, the complainant was not entitled to be informed of the external auditors' ongoing audit. The fact that OIG's investigation against the complainant was prompted by the report provided by the external auditors did not affect the lawfulness of the investigation, as, pursuant to the relevant rules, an investigation may lawfully be prompted by any kind of information submitted or known to OIG. Indeed:

– according to paragraph 7 of the Investigation Guidelines, "[a] complaint is any allegation, claim, concern or information submitted or known to OIG, indicating possible unsatisfactory conduct by FAO personnel"; and

– pursuant to paragraph 19 of those same Guidelines, "OIG may also initiate a preliminary review based on indicators of unsatisfactory conduct that it identifies in the course of its internal audits or other work it carries out under its mandate".

Furthermore, the Organization received a claim submitted by company S and such a claim fell within the definition of "complaint" for the purpose of paragraph 7 of the Investigation Guidelines.

The complainant had no right to be provided with a copy of the external auditors' report, either during the investigation or during the disciplinary procedure. On the one hand, pursuant to paragraph 29 of the Investigation Guidelines, "[d]uring an investigation, the subject is not entitled to the name of any complainant or other source of information". On the other hand, all the elements upon which OIG relied were contained in OIG's report and its attachments, which were fully disclosed to the complainant. In any event, the Organization also disclosed the external auditors' report by appending it to its reply before the Tribunal and the complainant took the opportunity to comment on it in his rejoinder and in his further written submissions.

6. In the allegation of breach of the right to test all the evidence, the complainant contends that during the investigation he was denied the right to put questions to the witnesses or to cross-examine them. He cites Judgment 2475 to support the view that this was a breach of due process.

The Tribunal recalls that according to its case law:

> "The general requirement with respect to due process in relation to an investigation [...] is as set out in Judgment 2475, namely, that the 'investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made'. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.
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> [...]

> The complainant points to cases in which the Tribunal observed that the complainant had not been present when statements were taken and not given the opportunity to cross-examine witnesses (for example, Judgments 999 and 2475), to object to evidence (for example, Judgment 2468) or to have a verbatim record of the evidence (for example, Judgment 1384). These are matters that, in the cases concerned, would have ensured that the requirements of due process were satisfied. However, they are not the only means by which due process can be ensured. In the present case, the complainant was informed of the precise allegations made against him by his subordinate, and provided with the summaries of the witnesses' testimonies relied upon by the Investigation Panel, even if not verbatim records. He was able to and did point out [...] inconsistencies in the evidence, its apparent weaknesses and other matters that bore upon its relevance and probative value, before the finding of unsatisfactory conduct was made [...] In this way, the complainant was able to confront and test the evidence against him, even though he was not present when statements were made and [was] not able to cross-examine the witnesses who made them. Moreover, the complainant had and exercised a right of appeal to the Appeals Committee. There is no suggestion that he was in any way circumscribed in the way his appeal was conducted. Accordingly, the process, viewed in its entirety [...], was one that satisfied the requirements of due process."

(See Judgments 4615, consideration 20, and 2771, considerations 15 and 18.)

The Tribunal notes that the FAO rules applicable in the present case did not confer on the subject of an investigation the right to cross-examine witnesses (see Manual Section 330.3, Investigation Guidelines, paragraphs 47-48). According to the Tribunal's case law, the cross-examination of witnesses is not a requirement for the lawfulness of the investigation and the disciplinary proceedings, provided that due process be ensured by other means. In the present case, the Tribunal is satisfied that due process was respected, despite the fact that the complainant had no opportunity to cross-examine the witnesses. Indeed, he was informed of the precise allegations made against him and was provided with the verbatim records of the statements of the witnesses. He was thus able to confront and test the evidence, even though he was not present when the statements were made and was not able to cross-examine the witnesses who made them. Moreover, the investigation relied not only on the statements rendered by three witnesses, but also on documentary evidence.

7. In the allegation of breach of the presumption of innocence the complainant contends that OIG's investigators automatically assumed that company S's claim against the FAO was well-founded. By basing the investigation on that erroneous assumption, they violated the presumption of innocence. Also, they never sought information from the complainant when company S's claim was first received, but only informed him when he became the subject of an investigation. The Tribunal notes that neither OIG's conclusions nor the charges set out in the disciplinary decision were based on the fact that company S's claim was well-founded. The issue was rather that the conduct of the complainant towards company S, namely allowing an unwritten agreement whose terms and conditions remained unclear, exposed the Organization to the risk of litigation initiated by a private company. In this framework, it is irrelevant whether company S's claim was well-founded. Regardless of the possible outcome of that claim if the FAO had actually become involved in litigation before a court, the lack of a written agreement exposed the Organization to potential litigation. There needed to have been at least clear terms and conditions agreed upon, including a proviso concerning the FAO's immunity from local jurisdiction and the modalities of dispute settlements, in order to avoid such a risk.

8. In the allegation of failure to take into account all facts and submissions, the complainant observes that the Appeals Committee found that the investigation failed to take into account the complainant's work environment as described in the external auditors' report. Moreover, documentary evidence provided by the complainant, and the oral evidence of the witnesses, were not adequately taken into account.

The Tribunal notes that the Appeals Committee's reasoning regarding the Organization's failure to take into account the complainant's work environment, as described in the external auditors' report, is concerned only with the proportionality of the sanction and not also with the finding of misconduct. Therefore, this issue will be addressed by the Tribunal later, with reference to the plea regarding the sanction applied to the complainant. In any case, the Tribunal notes that the complainant has not established how the work environment, as described in the

external auditors' report, might have impeded the Organization from taking disciplinary action or from considering his behaviour as misconduct. Moreover, the Tribunal is satisfied that all the evidence provided by the complainant and the witnesses has been duly considered by the Organization.

9. In the allegation that OIG overstepped its role, the complainant contends that OIG's role is to ascertain facts in an objective manner, not to determine whether misconduct had been committed, as occurred in this case. He asserts that the investigators failed to compile an accurate report taking into account all relevant information. This, he says, is evidenced by the unusually short period in which OIG's report was compiled. In his view, the Appeals Committee erred in finding that the OIG investigation complied with the internal rules.

The Tribunal notes that, pursuant to the Investigation Guidelines, "[u]pon completion of an investigation, OIG prepares a report summarizing its findings including the evidence collected and factual conclusions". In the present case, the OIG report contained its conclusions and the recommendation that "appropriate disciplinary action be taken", without proposing any specific sanction. Therefore, OIG did not overstep its role. The OIG report cannot be considered inaccurate. As to the allegation that the inaccuracy of the report is proven by the short period OIG took to prepare it, the Tribunal notes that the complainant was notified of the investigation on 19 December 2017, whilst the investigation report was issued on 12 February 2018. This time span cannot be considered too short, or shorter than what "is normal at FAO", as the complainant contends. The Tribunal recalls that pursuant to paragraph 30 of the Investigation Guidelines, "[f]ull investigations will be completed in the least amount of time reasonably practicable, and normally within 120 working days of notification to the subject of the investigation". Therefore, compliance with the rule that the investigation must be completed promptly, within the least amount of time possible, cannot be considered as a flaw in the process, as the complainant submits. In conclusion, the complainant's first plea is unfounded.

10. In his second plea, the complainant contends that the disciplinary proceedings were flawed by breach of due process and failure to observe applicable rules. His arguments may be summed up as follows.

(i) The disciplinary proceedings were not properly adversarial. The complainant was not given an opportunity to cross-examine the witnesses, despite the evidence clearly showing discrepancies in the testimonies. The memorandum imposing the disciplinary sanction merely relied on the conclusion reached in OIG's report. There was no indication as to whether or when the decision-making authority determined that serious misconduct had been established beyond reasonable doubt. His detailed response to the proposed disciplinary measure could not have been properly considered in less than eight working hours.

(ii) The 26 February 2018 disciplinary decision was perfunctory and tainted with errors of law. This decision did not apply the correct standard of proof, reversed the burden of proof, did not consider mitigating factors, and glossed over the fundamental requirement of proportionality.

The Tribunal notes that some of the allegations summarized in (i) reiterate, with regard to the disciplinary proceedings, arguments which have been already advanced against the investigation, and the Tribunal considers them unfounded based on the same grounds set out in consideration 6 above. The remaining allegation summarized in (i), namely that the 26 February 2018 decision was taken after only three calendar days and only one working day after the complainant had submitted his comments on 23 February 2018, does not establish a legal flaw in the process, as no rules provided for a minimum waiting period prior to which the disciplinary decision could not be issued. Moreover, the fact that the disciplinary decision was adopted soon after the complainant submitted his comments, does not entail, by itself, that the decision was perfunctory and disregarded his arguments.

As to the allegations summarized in (ii), the Tribunal notes that such allegations are reiterated and developed in the complainant's fourth, fifth, and sixth pleas. For the sake of brevity and clarity, the Tribunal will address them later.

11. In his third plea, the complainant contends that the allegations of misconduct were not established and, in any case, his conduct did not amount to misconduct, let alone to serious misconduct. He asserts that the disciplinary decision, the Appeals Committee's recommendation, and the final decision were all tainted by errors of fact and law. His numerous arguments may be summed up as follows.

(i) The Appeals Committee and the FAO erred in finding that the complainant failed to conclude a written agreement.

He contends that the arrangement with company S can only be construed as a "free loan" arrangement; there was no binding contract between the Commissary and company S. As is clear from the witness interviews, it had been the practice of the Commissary for several decades to conclude verbal agreements for "free loans" with suppliers. The Division Director never disputed this practice. Contrary to the findings of the Appeals Committee and the impugned decision, there were no written rules or procedures requiring that all "free loan" agreements be formalised in writing. To ground these arguments, the complainant relies on Manual Section 503.10.1. The complainant emphasizes that he had tried to implement a written procedure, but did not gain the support of upper management. Although the Appeals Committee found that the failure to conclude a written agreement caused confusion, it did not say that this constituted serious misconduct. The contention that the failure to conclude a written loan agreement potentially waived the FAO's privileges and immunities is an error of law and fact, as recognised by the Appeals Committee.

(ii) The FAO erred in finding that the agreement with company S created a financial expectation on the part of company S and corresponding obligations for the FAO.

No binding contract was concluded that created any expectations or corresponding obligations, as is also demonstrated by the delivery note issued by company S, referring to *"comodato d'uso"*. The Commissary never asked company S to "purchase refrigerators for it", as alleged by the FAO. The terms of the "free loan" arrangement were clear: company S would voluntarily provide the refrigerators free of charge, to be returned to them in the event that the Commissary no longer

required them or was no longer conducting business with company S. This arrangement was not unusual and was in line with the established practice of the Commissary, as acknowledged in OIG's report. It is incorrect to say that the refrigerators were custom-made for the Commissary. They were standard models and the use of external compressors was a standard configuration. OIG's report was factually incorrect.

(iii) The FAO erred in finding that he abused his authority and acted outside the scope of his delegated power.

The disciplinary decision and the impugned decision wrongly claimed that his actions were negligent and an abuse of authority because he did not obtain the approval of the Director of the Administrative Services Division (CSA) for the "free loan" arrangement; this fails to recognise that the "free loan" arrangement fell within the scope of his delegated authority. The complainant nevertheless informed the Director, CSA, that the refrigerators could be obtained through a supplier's voluntary contribution, and the Director, CSA raised no concerns.

(iv) The Appeals Committee and the FAO erred in claiming that he failed to properly manage and supervise the Commissary.

All his actions were carried out in the best interests of the Organization. The Appeals Committee and the impugned decision did not give adequate consideration to the responsibilities of the various Commissary units and line managers. The complainant did not seek to transfer responsibility to them, but wished to explain how the Commissary operated on a day-to-day basis. The Appeals Committee drew a mistaken conclusion when it did not recommend dismissing the disciplinary action after finding that he could not be held solely responsible for the management of the entire Commissary.

(v) The finding that Manual Section 503 was breached was incorrect.

Due to the quasi-commercial nature of the Commissary, the asset management procedure under Manual Section 503 had never been applied to it. This long-standing practice was never disputed by the FAO during his time in office. No equipment provided by suppliers on

"free loan" was included in the Commissary's financial statements, as these items were not considered to be assets of the Commissary.

(vi) The alleged actions should have been treated as a performance issue, not a disciplinary matter.

Treating his unsatisfactory performance as misconduct constituted a gross error of law and abuse of power by the FAO. The complainant's actions never amounted to misconduct.

12. It is appropriate to quote the relevant rules upon which the Tribunal will mainly rely in order to address the complainant's third plea.

Manual Section 503 governs "Asset Management" and makes reference, inter alia, to "borrowed property", "donated property", "leased property", and "right to use property". Having regard to the agreement stipulated between the Commissary and company S, identified as a "free loan" (the English translation for the contract named *"comodato d'uso"* or *"comodato gratuito"* under Italian civil law), it is appropriate to make reference to "borrowed property" as defined and described in Manual Section 503.

According to Manual Section 503.2.1, "borrowed property" is "real or personal property [...] that is leased at no charge or for a nominal fee by the Organization from a third party and which must be returned to the third party at the end of the lease term".

According to Manual Section 503.10.1:

> "Borrowed property [...] includes property of a third party that FAO can use at no cost on a temporary basis and which must be returned to the lender at some point in the future. Specific approval from the Responsible Officer of the duty station or department is required to accept and/or use borrowed property.
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> The borrowing/lending agreement may be verbal or in writing. All such agreements, whether verbal or written and regardless of the duration of the agreement, must be reported to CSF [Director, Finance Division].
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> [...] Such property may not be recorded in the Official records of the Organization."

The principles and detailed rules regarding the procurement of goods, works, and services are established in Manual Section 502. For the purposes of the present complaint, it is sufficient to mention:

– Section 502.1.4.1.2: "The principal objective of the Organization's procurement activities is the timely acquisition of goods, works and services in a fair, competitive and transparent manner [...]";
– Section 502.5.5: "Maintenance of Transparency. Personnel involved in a procurement action have an obligation to protect the integrity of the procurement activity by maintaining the transparency of the procurement process. Maintenance of transparency includes the following: [...]; (b) maintain sufficient, relevant and authoritative documentation demonstrating compliance with procurement rules as set forth in this Manual Section and any other applicable guidelines; (c) retain for the period provided for by relevant records management procedures the documentation mentioned in (b) above in a manner that is readily available for review by the Organization's duly appointed auditing and evaluation bodies";
– Section 502.2.1: "Contractual Instrument. Any legally binding written document setting forth the obligations of the Organization and the Vendor and the agreed terms and conditions for the performance of such obligations. Contractual Instruments used by the Organization include but are not limited to Contracts, Framework Agreements and Purchase Orders";
– Section 502.19.4: "A Purchase Order is a legally binding contract between the Organization and a Vendor. A Purchase Order is generally used for the procurement of goods including any works and services incidental to their supply".

It is also appropriate to recall the Tribunal's well-settled case law on disciplinary decisions. Such decisions fall within the discretionary authority of an international organization, and are subject to limited review. The Tribunal must determine whether or not a discretionary decision was taken with authority, was in regular form, whether the correct procedure was followed and, as regards its legality under the organization's own rules, whether the organization's decision was based on an error of law or fact, or whether essential facts had not been

taken into consideration, or again, whether conclusions which are clearly false had been drawn from the documents in the dossier, or finally, whether there was a misuse of authority. Additionally, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see Judgment 4579, consideration 4, and the case law quoted therein).

13. Firstly, the Tribunal will establish whether the Organization's finding that the agreement between the Commissary and company S had to be construed as an oral binding contract was correct. Then, the Tribunal will assess the lawfulness of the Organization's finding that such agreement was reached in violation of the FAO's rules, and that the complainant committed misconduct by allowing it.

The complainant contends that a "free loan" was agreed between the Commissary and company S, and that this agreement was not legally binding and was consistent with previous and undisputed practice.

It is appropriate to clarify that the expression "free loan" appears in the evidence in the file and in the parties' submissions as the translation of the Italian words *"comodato d'uso"* or *"comodato gratuito"*, which is a contract governed by the Italian civil code. The delivery document, written in Italian, issued by company S when the refrigerators were delivered at the premises of the World Food Programme (WFP), used the expression *"comodato d'uso"*.

The issue of whether the *"comodato d'uso"* is a binding contract under Italian law is irrelevant, because the complainant, in his capacity as Commissary Manager at the FAO, could not rely on Italian law. He was bound to comply with the FAO's rules governing asset management and the procurement of goods. Therefore, the agreement between the Commissary and company S must be construed in light of the FAO's rules and not in light of Italian law.

The evidence in the file shows that there was no written contract. This does not entail that there was no binding contract at all. The statements of the witnesses and, above all, the email exchanges on one hand, among the Commissary's staff and on the other hand, between

the Commissary's staff, company S and the manufacturer of the refrigerators ("company C") reveal that:

(i) for the furnishing of the WFP's new salesroom, the Commissary needed three refrigerators, namely two positive-temperature ones (fridges) and a negative-temperature one (freezer), with specific technical requirements having regard to the space available and to the WFP's environmental policy, according to which the three units should have external compressors to be placed outside the salesroom;

(ii) the Commissary initially started a tender procedure in compliance with procurement rules, but, at a certain point in the process, apparently due to time shortage and the reduction in revenue, it decided to explore an alternative solution, that is, to acquire the refrigerators on a "free loan" basis from vendors which, at the relevant time, were the main suppliers of goods for the FAO's and the WFP's duty-free shops in Rome;

(iii) thus, according to a witness account, three suppliers were consulted, but only one, company S, was willing to provide the Commissary with "free" refrigerators;

(iv) the Commissary entered into an effective negotiation with company S, which included market research of the refrigerators that might meet the requirements established by the Commissary; the research was conducted directly by the Commissary (namely by a staff member with the appropriate qualifications), and, as a result, the Commissary selected three refrigerators produced by company C;

(v) company C was directly contacted by the Commissary, and only later agreed that it would sell the refrigerators to company S and, in turn, company S would supply them to the Commissary on the basis of an agreement between the Commissary and company S;

(vi) following a meeting with a representative of company S on 18 September 2015, the complainant sent an email that same day to company S, attaching the plan of the salesroom, showing the space available and the maximum dimensions of the refrigerators,

and requesting desired specifications such as a preference for a particular colour;

(vii) the salesroom needed some remodelling and electrical work in order to install the refrigerators;

(viii) during the time needed for the production of the refrigerators, company S delivered other temporary refrigerators.

In light of this evidence, the conclusion reached by the Organization, that the agreement between the Commissary and company S was a legally binding contract, is convincing and correct, and the fact that company S "voluntarily" agreed – as contended by the complainant – did not imply that there was no legal obligation. Company S did not spontaneously offer to buy refrigerators in the interest of the Organization. It was solicited to do so, and, for this purpose, it entered into a negotiation with the Commissary.

14. There is no need to dwell at length on the nature of this contract, and, specifically, on whether it was a "free loan". The evidence in the file, namely the statements of the witnesses and the exchange of emails, reveals beyond reasonable doubt that the deal, far from being a "free loan", was that company S would be *de facto* compensated by the opportunity to increase the quantity of goods it supplied to the FAO and the WFP for a time span of around four to five years. The witnesses admitted that the idea was, from the very outset, to incentivise company S to provide the refrigerators for free, on the understanding that company S would continue to supply goods for a number of years and increase the quantity to be supplied. In any event, irrespective of the content of the witnesses' statements, there is also the email dated 17 September 2015, sent by Mr S., the Commissary Information Technology Officer, to some staff of the Commissary, including the complainant. This email summarized the discussion which occurred during a preparatory meeting held in the Commissary that same day, in view of a meeting scheduled for the following day with company S. The 17 September 2015 email stated: "[a] meeting will be held tomorrow with [company S] on the possibility of getting a negative refrigeration unit (freezer) from them, and if possible, also a

positive one in return for a guarantee that we will host their products for a number of years". This email was reviewed and approved by the complainant. Moreover, when the salesroom was closed, company S complained, alleging that it had expected to recoup its investment for the refrigerators by supplying goods for a number of years. Therefore, the Tribunal is satisfied that the "loan" of the refrigerators was not "free", and that such a loan, in the intention of the parties, was not an independent contract, but rather, an ancillary proviso to the agreement for the supply of goods already in force between the Commissary and company S. At least, according to the intention of the parties, there was a direct causal link between the "free loan" and the agreement for the supply of goods. In this vein, the Organization's finding that the agreement should have been in writing, is correct. The negotiation of such an agreement should have been consistent with the principles and rules enshrined in Manual Section 502, recalled in consideration 12 above. Leaving aside the rules regarding the criteria for selecting vendors, at the very least a written documentation of the agreement was required. Indeed:

– the principle of transparency required the Commissary to maintain sufficient, relevant, and authoritative documentation demonstrating compliance with the procurement rules, so that such documentation could be readily available for review by the Organization, if necessary;
– the loan should have been agreed upon by using a "contractual instrument", namely "a legally binding written document".

In his rejoinder, the complainant affirms that the "basic procurement principles" are "nothing but an empty litany" as they were, allegedly, "never applied to the Commissary". In his further submissions, the complainant adds that the reference to Manual Section 502, made by the Organization in its surrejoinder before the Tribunal, is a "new claim" against him. Neither contention is tenable. Firstly, it is appropriate to recall that the Organization charged the complainant with the violation of the principles governing procurement from the outset of the process, in the initial disciplinary decision. This decision, in the relevant part, read: "you were, or should have been, aware that the acceptance of what

may be characterized as a contribution or donation is inconsistent with standard procurement rules, because this [could result] in, or be perceived to result in, interference with the independence and transparency of procurement processes. As Commissary Manager, it was your obligation to be fully aware of, and ensure compliance with the fundamental principles governing procurement". The impugned decision, in turn, reiterated that the loan "arrangement was invalid under the rules of the Organization. It violated established procurement principles which require appropriate documentation and transparency". Thus, the reference to Manual Section 502 made by the Organization in its surrejoinder before the Tribunal, is not a new claim against the complainant.

Secondly, Manual Section 502 did not exempt the Commissary from the obligation to observe the principles and procedures concerning the procurement of goods, works, and services. Even if it were proven that the Commissary never complied with the abovementioned Section 502, this would not justify the complainant's conduct but would rather be an aggravating factor, in view of his position as Commissary Manager. Treating the basic procurement principles as "an empty litany" would be a blatant disregard of the rules, inconsistent with the high standard of conduct required of an international civil servant.

Even if the Tribunal were to accept the complainant's reconstruction of the agreement as a "free loan", such an agreement would not be consistent with the applicable rules. The Tribunal accepts the complainant's contention that the rules governing "borrowed property" also allow verbal agreements (see Manual Section 503.10.1). However, this has no bearing on the lawfulness of the disciplinary decision and of the impugned decision. What the Organization essentially criticised the complainant for was the lack of clear and unambiguous terms and conditions of the agreement – irrespective of it being a verbal contract or a written one – and the fact that the loan agreement was not approved by the responsible officer and was not reported to the Director, Finance Division, as required by Manual Section 503.10.1. The Tribunal does not accept the complainant's additional contention that the asset management procedure under

Manual Section 503 had never been applied to the Commissary, due to its quasi-commercial nature. There is no such exemption in the applicable rules. The contention that no equipment provided on "free loan" need be included in the Commissary's financial statements, is irrelevant, as Manual Section 503.10.1 establishes that borrowed property may not be recorded in the official records of the Organization, and the fact that the refrigerators were not recorded is not at stake in the present case.

The complainant relies on an alleged previous undisputed practice based on which the suppliers of goods also provided the FAO and the WFP with various display items aimed at hosting the goods, for example shelves, showcases, and even freezers. The Tribunal notes that the witnesses have made reference to such a practice, recalling in particular specific cases in which vertical and horizontal freezers were given or loaned to the Organization by suppliers in order to preserve and advertise the ice-creams that they supplied to the Commissary. Firstly, it must be recalled that, according to the Tribunal's case law, a practice cannot become legally binding where, as in the present case, it contravenes specific rules which are already in force (see, for example, Judgment 4555, consideration 11, and the case law cited therein). In any event, irrespective of this case law, in the present case the previous practice concerned a different factual situation. It referred to standardized items of low economic value, already in the possession of the suppliers, which could be easily installed, removed, and reused in other locations. In the present case, the three refrigerators were not already owned by company S, but were bought for this purpose, following the specifications requested by the Commissary, and required installation. Their value was not low. They cost in total 20,000 euros, plus VAT, and additional expenditure was incurred for their installation. The Tribunal accepts the complainant's contention that the refrigerators could not be considered "custom-made" in the technical sense, because they were available on the market and were not specifically produced for a single customer. Nonetheless, the refrigerators were chosen by the Commissary for its needs, were bought from a third party, other than the Commissary and the supplier of goods, and were not standardized items offered by a supplier of goods in order to preserve and advertise its goods. To this

extent, the supply of the refrigerators may be considered customized, even if the refrigerators were not custom-made. Furthermore, the significant economic value of the refrigerators (20,000 euros) entailed that the vendor expected to recoup its investment, by increasing its supply of goods to the Organization, over the years. Such arrangement *de facto* committed the Organization to an agreement with company S as a supplier for a number of years, thereby subverting future procurement decisions. Moreover, the complainant's statement that he relied on a previous practice is inconsistent with the content of two emails which he sent on 10 February 2015 and on 9 April 2015 to Ms L.P. (in the Legal Office) and which he has appended to his rejoinder. In these emails, he mentioned the possibility that the Commissary's investments for the salesroom could be partially financed by the contributions of the Commissary's commercial partners, "in line with common commercial practice". In the first of these emails, he added: "I would be grateful if you could advise if you see any problem with the above initiative". In the second one, he solicited a response. These emails show that the complainant was aware that the financing of the investment by the commercial partners was not tantamount to the mere supply of display items, and thus, he sought legal advice. At most, such an external financing was in line "with common commercial practice", that is to say a practice external to the FAO, not an existing practice within the FAO. Therefore, the Tribunal considers the Organization's conclusion, that the agreement at stake was unusual, to be reasonable and acceptable.

15. The complainant contends that he did not need to seek the approval of the Director, CSA, because the "free loan" fell within the scope of his delegated authority and, in any event, he obtained an implied approval.

It is unnecessary to quote the rules governing delegated authority enshrined in Manual Section 502, because in the present case the scope of the complainant's delegated authority was specifically clarified in two emails sent by the Director, CSA, to the complainant on 27 July 2015 and on 31 July, concerning the procedure for purchase order approval. The first email read: "the limit of [...] 100,000 [United States dollars] is a cumulative one with the same supplier during the course of the year".

The second email read: "all purchase orders over [...] 100,000 [euros] are sent to [the Assistant Director-General, Corporate Services Department (ADG, CS)] for approval [...] Orders which are divided for purposes of delivery to different addresses (FAO/WFP) should be referred to ADG, CS, if their total value exceeds [...] 100,000 [euros]". By the 31 July 2015 email, the complainant was also required to send a monthly written report to the Assistant Director-General, CS, on all Commissary issues, including a list of all orders placed. This would be followed by a meeting "to discuss any issues".

The Tribunal notes that the complainant had a delegated authority only with regard to purchase orders, that is, the supply of standard goods. Therefore, if the "free loan" were to be considered a contract independent from the agreement for the supply of goods already stipulated between the Commissary and company S, it was outside the scope of the delegated authority, and fell under Manual Section 503.10.1, previously stated, which required a specific approval. Alternatively, if the "free loan" were to be construed either as an ancillary proviso to the main agreement for the supply of goods, or as a contract causally linked to the latter, the complainant has not established that the cumulative value of the agreement did not exceed the limit of 100,000 euros per year.

Furthermore, the complainant has not established that the "free loan" was, in any event, implicitly approved by the Director, CSA. The evidence in the file shows the following.

(i) In an email sent on 7 November 2014, the complainant informed the Director, CSA, of the possibility of "external financing from our main commercial partners" but he did not specify the modalities of such financing.

(ii) The Director, CSA, replied by email on 8 November 2014 by merely saying "we will discuss this on Monday".

(iii) In an email sent by the complainant on 28 November 2014 to certain staff at the Commissary, he informed them that he had obtained preliminary approval from the Director, CSA.

(iv) The complainant sent two further emails, on 10 February 2015 and on 9 April 2015, to Ms L.P. (in the Legal Office), in which he mentioned the possibility that the Commissary's investments for the salesroom might be partially financed by the contributions of the Commissary's commercial partners. In the first of these emails, he sought legal advice by saying: "I would be grateful if you could advise if you see any problem with the above initiative". In the second one, he solicited a response.

(v) The two replies to these two emails, provided by the complainant before the Tribunal, were merely interlocutory and contained no legal advice on the feasibility of this arrangement.

The Tribunal notes that the email exchanges with the Director, CSA, and with staff date back to November 2014, long before the Assistant Director-General, CS, established, in July 2015, the monthly reporting regime for the complainant, and long before the refrigerator agreement was finalized, presumably in September 2015. In addition, Ms T.P., who was Director, CSA, in 2014, had already left the Organization when the arrangement with company S was finalized in late 2015. The more recent email exchange, which occurred between February and April 2015, evidences that until that date no approval existed and the complainant was seeking legal advice. These elements refute the assumption of "implied consent" from the complainant's supervisor Ms T.P. or from another supervisor. In conclusion, there is no evidence of when and/or how approval was given.

16. As to the contention that the Organization did not take into account the duties and responsibilities of the various Commissary units and line managers, suffice it to recall that the complainant was the Commissary Manager. In this capacity, he was responsible for all the contracts and agreements, however categorised, even those that were negotiated and stipulated by other officers in the Commissary. The complainant had a duty to supervise the activities of the staff and ensure that agreements and contracts were consistent with the rules concerning the procurement of goods and asset management. In addition, the evidence in the file shows that it was the complainant who envisaged

the idea of a "free loan", and that he was the decision-maker in the entire process leading to the loan arrangement. He was the author of a number of emails and was the addressee, or at least was informed, of all the email exchanges among the Commissary's staff, company S, and company C. The possibility that other staff might also be responsible for the violation of the rules, at most would entail that the Organization should also have considered taking disciplinary action against those staff members, but does not imply that the Organization should not have taken disciplinary action against the complainant. The fact that the operation of the Commissary was affected by long-standing, widespread shortcomings, irregularities, and practices inconsistent with the rules, in any event, did not justify the complainant's conduct, as he was responsible for the lawful operation of the Commissary. In this perspective, it is immaterial that the complainant had tried to implement a written procedure, but to no avail. Indeed, he proposed to introduce a standardized supply contract template meant to replace the practice of purchase orders. The purchase orders were, in any event, a written procedure, allowed by Manual Section 502. Therefore, irrespective of the adoption of a standardized contract form, the complainant was already in a position to follow a written procedure in order to negotiate and stipulate a "free loan".

17. The complainant's argument concerning the lack of risk for the FAO's privileges and immunities is related to the kind of disciplinary sanction chosen and will be addressed by the Tribunal in this ambit.

18. The complainant's contention that his case involved, at most, a performance issue, and that the Organization wrongly treated unsatisfactory performance as misconduct, is not supported by the relevant rules. Pursuant to Manual Section 330, Staff Regulation 301.10.2, and Staff Rule 303.0.1, the Director-General may impose disciplinary measures, including dismissal for misconduct, on staff members whose conduct is unsatisfactory. According to Staff Rule 330.1.51, "unsatisfactory conduct on the part of a staff member is conduct which is incompatible with the staff member's undertaken or implied obligation to the Organization or failure to comply with the requirements of Article I of

the Staff Regulations". In addition, unsatisfactory performance may ground separation from service, pursuant to Staff Regulation 301.9.1. In a case where a staff member had been dismissed for unsuitability, the Tribunal, after noting that, according to the relevant provisions, the termination of a contract could be grounded both on dismissal as a disciplinary sanction (following a disciplinary procedure for misconduct) and on professional unsuitability, found that even though "misconduct and professional unsuitability may sometimes overlap, the organisation does not have an unfettered discretionary power to choose the procedure it prefers on a case-by-case basis. Whenever an official's conduct amounts potentially to misconduct, the proper procedure to be followed is the disciplinary one, since misconduct must be first proven beyond reasonable doubt. Since a specific disciplinary procedure exists, which is adversarial in nature and therefore better safeguards the right of defence of the official involved, it is this procedure that must be followed whenever unsuitability involves serious misconduct which could lead to dismissal" (see Judgment 4583, consideration 4). Likewise, in the present case, since the complainant's actions could constitute misconduct, the proper procedure to be followed was the disciplinary one, which best safeguarded his right of defence, even though his conduct could also be regarded as showing unsatisfactory performance. In conclusion, the complainant's third plea is unfounded.

19. In his fourth plea, the complainant argues that the FAO failed to discharge its burden of proof and applied the wrong standard of proof. He alleges that, according to the Tribunal's case law, each of the elements of the alleged misconduct must be proven beyond reasonable doubt. The requisite standard of proof was not applied in this case. In addition, by "assuming the truth of untested and unproven evidence", the FAO reversed the burden of proof and required him to prove his innocence. The Tribunal recalls that according to its well-settled case law concerning the standard of proof in cases of misconduct, the burden of proof rests on an organization. An organization has to prove allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be imposed (see Judgment 4364, consideration 10, and the case law cited therein). In the present case, in light of the Tribunal's

considerations on the complainant's third plea, expressed above, the Tribunal is satisfied that the Organization proved all elements of the complainant's misconduct beyond reasonable doubt. Namely, there is evidence beyond reasonable doubt that the complainant allowed a verbal contract between the Commissary and a vendor, the terms and conditions of which remained ambiguous, in breach of the applicable rules regarding the procurement of goods and asset management, and in so doing exposed the Organization to the risk of litigation. There is also evidence beyond reasonable doubt that this agreement was not approved by the complainant's supervisor and that the complainant was the official with primary responsibility for ensuring compliance of contracts, purchase orders, or any agreements with the applicable Staff Regulations and Rules, irrespective of the possible responsibility of other staff members. In conclusion, the Tribunal finds that it was open to the Organization to be satisfied, having regard to the evidence before it, that the alleged misconduct was proven to the required standard. Thus, this plea is unfounded.

20. The complainant's fifth and sixth pleas are concerned with the proportionality of the sanction and will be addressed together. In his fifth plea, the complainant argues that the FAO erred in failing to accept the Appeals Committee's recommendation to reassess the proportionality of the disciplinary measure. He contends that the Appeals Committee noted that it was particularly important to review the proportionality of the challenged decision given the severity of the disciplinary measure imposed. Despite the Appeals Committee's findings concerning the failure to take into account the complainant's work environment, the impugned decision simply maintained that there were no mitigating factors. The impugned decision did not adequately explain why the Appeals Committee's recommendation was not followed. In his sixth plea, the complainant alleges the violation of the principle of proportionality and the failure to take into account mitigating factors. He notes that the sanction of dismissal coupled with personal liability for any future loss that might be incurred was manifestly out of proportion to the gravity of the actions of which he was accused. In his case, many mitigating circumstances were ignored.

The Tribunal's well-settled case law has it that the choice of the appropriate disciplinary measure falls within the discretion of an organization, provided that the discretion be exercised in observance of the rule of law, particularly the principle of proportionality (see Judgments 4660, consideration 16, 4504, consideration 11, 4247, consideration 7, 3640, consideration 29, and 1984, consideration 7). In reviewing the proportionality of a sanction, the Tribunal cannot substitute its evaluation for that of the disciplinary authority, and it limits itself to assessing whether the decision falls within the range of acceptability (see Judgment 4504, consideration 11).

In the present case, pursuant to Staff Rule 330.2.41(a), "[d]ismissal for misconduct is a termination for unsatisfactory conduct that has jeopardized, or would be likely to jeopardize, the reputation of the Organization and its staff". Since, as assessed by the Tribunal above, the Organization lawfully considered that the complainant's behaviour was tainted by abuse of authority and by gross negligence, and that such conduct could negatively affect the reputation of the Organization, the chosen sanction was one which clearly could be applied in the circumstances of this case.

The decision not to recognize the existence of any extenuating factors also fell within the discretion of the Organization, and the exercise of such discretion, in the present case, was not affected by errors of fact or law, or by disregard of essential facts. In the final decision, the Director-General explained why he maintained the sanction issued by the initial disciplinary decision and did not endorse the Appeals Committee's recommendation to review the sanction. In so doing, he complied with the Tribunal's case law according to which, if the ultimate decision-maker rejects the conclusions and recommendations of the internal appeal body, the decision-maker is obliged to provide adequate reasons (see Judgment 3208, consideration 11, and the case law cited therein). The Tribunal is satisfied that the arguments given by the Director-General for not endorsing the Appeals Committee's recommendation were adequate.

Firstly, the final decision correctly reiterated that the lack of a written contract, and, in any case, of clear and documented terms and conditions, including a written proviso establishing the means for the resolution of disputes, exposed the Organization to the risk of litigation before a national court. On the limited material before the Tribunal, the position adopted by the Organization appears to be correct.

As the Organization points out before the Tribunal, "immunity is not impunity". Thus, the Organization, in order to protect its reputation, was not in a position to bluntly deny the supplier's claim, in a situation where the supplier had delivered valuable items (three refrigerators), for which it had not been paid, and the nature of the Commissary's obligation towards the supplier was unclear due to the absence of a written agreement.

Secondly, the elements resulting from the external auditors' report regarding the work environment and the operation of the Commissary could not be considered as a mitigating factor, as the complainant was the senior staff member in charge of the Commissary.

Thirdly, the complainant's previous period of unblemished service with the FAO was not, by itself, a mitigating factor (see Judgment 3083, consideration 20), even though in some cases it can be (see Judgment 4457, consideration 20).

Fourthly, the alleged fact that the complainant was an engineer and, at the material time, had held the post of Commissary Manager for too short a period, does not imply that he was not experienced enough in the area of procurement. He had acquired such expertise in his former position, and he himself states that he was well aware of procurement and contracting procedures. He declared in his interview with OIG that:

– he had held the grade P-5 since 2005;
– prior to his appointment as Commissary Manager, he had encumbered the position of Chief of Infrastructure and Facilities Management Service from 2005 to November 2013;

– he was "familiar" with the "procurement rules", and "having managed contracts and tenders for decades, together with the procurement service", he considered himself to be "pretty expert about procurement".

In his capacity as Commissary Manager, he even proposed to introduce a new standardized contract form. Thus, he could not have been unaware of the existence of Manual Section 502, he should not have disregarded the written rules and he should not have followed a disputed practice. The alleged fact that he was not supported in his new post as Commissary Manager is unproven. He was in a position to communicate with his supervisors, and to seek advice from the Legal Office (as he did, for example, in February and April 2015), and, at the material time, he had been encumbering the position of Commissary Manager for approximately two years.

Fifthly, the fact that at the relevant time he was the sitting President of the Association of Professionals in FAO ("AP-in-FAO") Staff Representative Body (SRB) is not by itself a mitigating factor. Nor has the complainant established that the disciplinary sanction was tainted by bias and prejudice against him due to his role as the President of a SRB. Suffice it to recall that, according to the Tribunal's well-settled case law, the burden of proof with regard to allegations of bias and prejudice lies with the party making such allegations (see Judgment 4010, consideration 9). Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve complainants, who bear the burden of proving their allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as in the present case, the actions of the Organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgment 3912, consideration 13).

Lastly, the allegation of disparity of treatment, based on a list of other staff members sanctioned with dismissal, is unsubstantiated, as the complainant has not established that his conduct was less serious than the misconduct of other staff members issued with the same sanction.

In conclusion, all the alleged mitigating factors were considered by the Organization, but they were deemed insufficient to counterbalance the seriousness of the complainant's misconduct. The complainant:

– breached his "duty to ensure that any transactions entered into in the name of the Organization were consistent with its rules, principles and standards and were properly documented"; and
– exposed the Organization, to not only litigation and financial risk, but also, and even more importantly, to reputational risk and caused an irreversible breach of trust.

21. In his seventh plea, the complainant alleges that various errors in the Appeals Committee's report rendered it and the impugned decision unlawful. He points out that the Appeals Committee's statement, repeated in the impugned decision, that the case law on which he relied did not seem to be applicable, is entirely unsubstantiated. That case law should have been properly considered. Also, the Appeals Committee failed to consider all of the arguments he raised, thereby denying him the right to a proper internal appeal. It also denied him due process by refusing to disclose the external auditors' report. The Tribunal is satisfied that the Appeals Committee properly considered the complainant's arguments. Possible sporadic inconsistencies or omissions in the Appeals Committee's reasoning have no bearing on the outcome of the process. The preceding analysis has been undertaken to answer the complainant's pleas. However, it cannot be assumed that issues such as these are justiciable before the Tribunal. As to the disclosure of the external auditors' report, the Tribunal has already found that such disclosure was unnecessary and that, in any event, the report has been disclosed by the Organization by appending it to its reply. Thus, the complainant has had the opportunity to comment on it before the Tribunal, and he did.

22. In his eighth plea, the complainant complains about the consequences of the disciplinary measure on his pension entitlements, which were unlawful and amounted to unjust enrichment. The Tribunal notes that this issue was resolved in his favour in the course of the proceedings, as he acknowledges in his rejoinder, and it is, thus, moot.

23. In conclusion, the complainant's pleas are unfounded, except his eighth plea, which is moot. Consequently, his claims are rejected, and his complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER