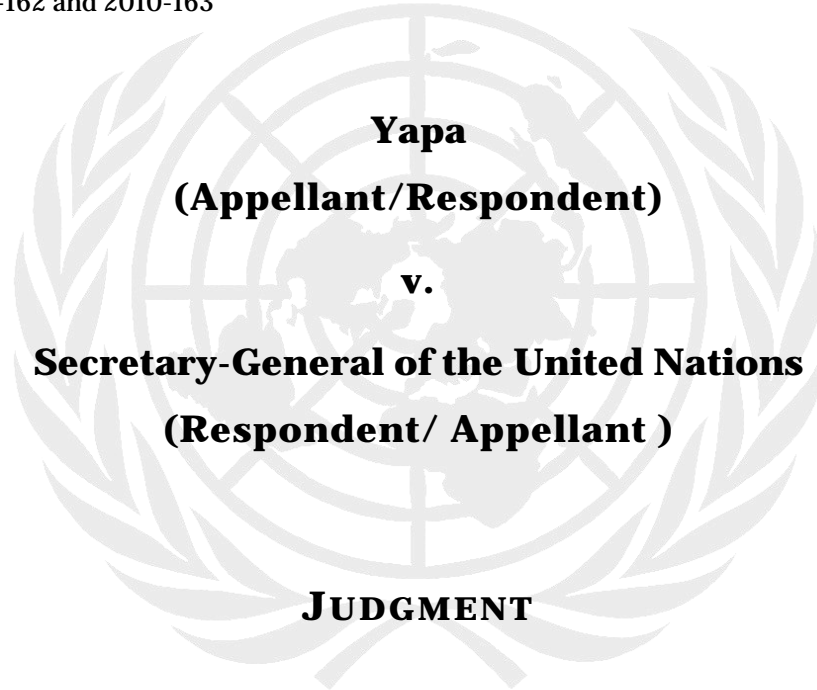




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case Nos. 2010-162 and 2010-163



**Yapa
(Appellant/Respondent)**

v.

**Secretary-General of the United Nations
(Respondent/ Appellant)**

JUDGMENT

Before:	Judge Jean Courtial, Presiding Judge Mark P Painter Judge Inés Weinberg de Roca
Judgment No.:	2011-UNAT-168
Date:	21 October 2011
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Laurent Hirsch

Counsel for Appellant/Respondent: Phyllis Hwang/Stéphanie Cartier

JUDGE JEAN COURTIAL, Presiding.

Synopsis

1. The general legal principle that a sanction may not be imposed on any person unless expressly provided for by a rule in force on the date of the facts held against that person must be respected, in disciplinary matters, within the internal legal framework of the United Nations. In considering that a ban on promotion for a specified duration was a sanction distinct from that of a demotion by one grade, and that the former had been illegally imposed on a staff member because it was not expressly provided for by the Staff Rules in force on the date of the facts held against the said staff member, the United Nations Dispute Tribunal neither inaccurately represented the facts nor committed an error of law.

2. In considering the facts, for a security officer, to first attempt to cheat on an examination, regardless of its nature, and then to refuse to cooperate with a preliminary investigation, constituted professional misconduct and were therefore grounds for disciplinary action, and that the sanctions of written censure and demotion by one grade were not disproportionate to the seriousness of the misconduct, the Dispute Tribunal neither inaccurately represented the facts nor committed an error of law.

3. However, in ordering the Organization to award the staff member in question compensation for damages without him establishing that he suffered any harm, the Dispute Tribunal did not provide a legal basis for its decision. Its judgment on that point is reversed.

Facts and procedure

4. Mr. Rohita Yapa has worked at the United Nations Office at Geneva (UNOG) since 1991. In 2006, the year during which the incident giving rise to the disciplinary proceedings against him took place, he was serving as a security officer at the G-3 level.

5. On 7 December 2006, Mr. Yapa took a French written examination for promotion to the G-4 level. Before the examination began, the staff member responsible for monitoring the exam noticed that the candidate had kept on his desk a sheet of paper with

samples of briefings in French. After having Mr. Yapa sign the sheet in question, the invigilator remove it and allowed him to participate in the examination process.

6. After the invigilator reported the incident, a legal officer from the Office of Human Resources Management contacted Mr. Yapa on 3 April 2007 to obtain his version of the facts. Despite several e-mail exchanges in which he was reminded that he had a duty to cooperate with the administrative investigation, Mr. Yapa refused to discuss the incident or to participate in the investigation.

7. On 20 April 2007, Mr. Yapa was informed by the Office of Human Resources Management (OHRM) that he was charged with attempting to cheat on an examination offered by the Administration and of refusing to cooperate in the investigation. On 10 August 2007, the case was referred to the Joint Disciplinary Committee (JDC).

8. On 28 February 2008, the JDC submitted a report in which it concluded that Mr. Yapa had indeed attempted to cheat and had refused to cooperate with the investigation, but nevertheless recommended that he should only receive a written censure. The Secretary-General followed this recommendation only in part. On 10 April 2008, he imposed on Mr. Yapa, in addition to a written censure, a demotion by one grade without the possibility of promotion for two years.

9. Mr. Yapa appealed this decision before the former United Nations Administrative Tribunal. The case was transferred to the UNDT, which issued its judgment on 24 September 2010. The Tribunal found that the proper disciplinary procedure had been followed, that the facts had been established before the JDC, that they constituted professional misconduct and that the sanctions of written censure and a demotion by one grade were not disproportionate to that misconduct. However, the Tribunal considered that the two-year ban on promotion constituted a separate sanction, which was not provided for in the rules then in force, and was therefore illegal. It rescinded that sanction and ordered the Organization to pay Mr. Yapa the sum of 1,000 Swiss francs in compensation for the damage suffered as a result of its imposition. The Tribunal rejected all of Mr. Yapa's other requests.

10. Both Mr. Yapa and the Secretary-General have appealed the judgment in as far as it is unfavourable to them.

Submissions**From the Secretary-General, Appellant (Case No. 2010-162)**

11. The Secretary-General submits that the Dispute Tribunal erred on a question of law in concluding that demotion without the possibility of promotion for two years constitutes two separate sanctions, namely that of demotion and that of a two-year ban on promotion, and that the latter is not provided for in rule 110.3(a) of the former Staff Rules. A time limit on the sanction of demotion cannot be viewed as separate from the demotion itself. It is an element necessarily envisaged within the scope of rule 110.3(a).

12. The Secretary-General further argues that the Dispute Tribunal disregarded the jurisprudence of the former United Nations Administrative Tribunal in its Judgment No. 1090, *Berg* (2003), which provides an interpretation of provision 110.3(a) of the former Staff Rules as part of the legal framework within which the contested disciplinary measure was imposed and gives a legal basis for a two-year ban on promotion. The former Administrative Tribunal concluded that a sanction that was not limited in time was disproportionate and illegal. Subsequent, practice has been to set such a time limit.

13. With regard to the compensation in the amount of 1,000 Swiss francs that the Dispute Tribunal awarded to Mr. Yapa, the Secretary-General submits at the outset that the decision is based on an error of law regarding the illegal nature of the ban on promotion for two years. He further notes that the Dispute Tribunal judge himself recognized that, even if the contested measure had not been imposed, the staff member's chances of obtaining a promotion would have been very slim. The Dispute Tribunal's decision to award him compensation, the purpose of which was to repair damage, has no legal basis as no actual damage was suffered.

From Mr. Yapa, Respondent

14. Mr. Yapa notes that the issue of the legality of the two-year ban on promotion was raised by the Dispute Tribunal on its own motion. He defers to the expertise of the Appeals Tribunal on this point. He simply notes that a ban on promotion prevents the staff member from availing himself of any potential opportunity to obtain such a promotion during the period in question. A mere demotion is therefore preferable for the staff member. He argues that the compensation awarded to him repairs the damage he

suffered as a result of the two-year ban on promotion, which reduced the opportunities available to him.

From Mr. Yapa, Appellant (Case No. 2010-163)

15. Firstly, with regard to the accusation of cheating, by ignoring the analysis and the findings of the JDC, namely, that the staff member's improper behaviour during the French examination must be put into perspective, the Dispute Tribunal violated the applicable rules.

16. The Dispute Tribunal portrayed the facts inaccurately in concluding that the attempt to cheat constituted professional misconduct without finding out whether the examination in question was, in fact, covered by the rules. Furthermore, the act held against the staff member was not committed while performing his duties as a security officer. The sanction is disproportionate; a simple warning would have sufficed in such circumstances.

17. With regard to the staff member's refusal to cooperate with the administrative investigation, Mr. Yapa maintains that by holding him responsible for failing to cooperate, even though such an obligation would have undermined his right not to incriminate himself as guaranteed by the fifth amendment of the Constitution of the United States of America and recognized by the European Convention on Human Rights, the Dispute Tribunal erred on a question of law. Furthermore, the position of the Dispute Tribunal disregards administrative instruction ST/AI/371, which does not oblige staff members to cooperate in a preliminary investigation. Lastly, in this particular case, the staff member had not been informed of the facts held against him, he had not refused outright to answer the questions put to him and the person who had contacted him was not an independent investigator. The Dispute Tribunal disregarded the applicable rules and assessed the facts wrongly.

18. In addition, the Dispute Tribunal inaccurately represented the facts in considering that the refusal to respond for a brief period of time constituted professional misconduct; such refusal could only be viewed as negligence. Mr. Yapa therefore argues that the Dispute Tribunal committed an error in approving a sanction that was disproportionate to the harmless nature of such an act.

19. Lastly, Mr. Yapa contends that the Dispute Tribunal violated his rights by refusing to hear the testimony of an ambassador, which would have allowed him to demonstrate his honesty and his loyalty to the Organization.

From the Secretary-General, Respondent

20. The Secretary-General notes that the Appellant repeated before the appeals judge most of the arguments he had submitted to the judge of the Dispute Tribunal. The Secretary-General maintains that the Dispute Tribunal rightly considered that the Secretary-General, in the exercise of his discretion, might arrive at a conclusion different from that of the JDC and that a security officer's attempt to cheat on an examination demonstrated an intention to cheat and constituted professional misconduct.

21. The Secretary-General also argues that the Dispute Tribunal rightly considered that the Appellant had a duty to cooperate with the preliminary investigation in accordance with rule 104.4 of the former Staff Rules, in force at the time, and correctly assessed the facts in concluding that the refusal of the staff member, a security officer, to answer the questions put to him was tantamount to a refusal to cooperate.

22. The Secretary-General further argues that Mr. Yapa was not required to be informed, during the preliminary investigation, of what were only suspicions at the time and that, once the disciplinary proceedings had been initiated, he had been regularly informed of the facts held against him.

23. The Secretary-General maintains that the Dispute Tribunal rightly considered that the allegations amounted to professional misconduct and that the sanctions of written censure and demotion were proportionate to the seriousness of these acts. The contested judgment is consistent with the jurisprudence of the Appeals Tribunal with regard to the conduct of security officers.¹

24. With regard to the proceedings conducted before the Dispute Tribunal, the Respondent observes that the statute of the Tribunal gives it discretionary authority to hear witnesses but does not compel it to do so if deemed unnecessary.

¹*Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024.

Considerations

25. The two applications appeal the same judgment. They have been consolidated so that they may be disposed of in a single judgment.

With regard to the two-year ban on promotion

26. The Secretary-General has imposed on the staff member a written censure and a demotion by one grade. He added to the latter measure a two-year ban on promotion. As noted by the Dispute Tribunal, rule 110.3(a) of the former Staff Rules lists the sanctions that could be imposed on a staff member as at the time of the facts held against him. That list included written censure and demotion, but not a ban on promotion for a specified duration.

27. The Dispute Tribunal did not commit an error of law in considering that within the internal legal framework of the United Nations, the general legal principle that a sanction may not be imposed on any person unless expressly provided for by a rule in force on the date of the facts held against that person must be respected in disciplinary matters.

28. The Secretary-General nevertheless contends that the Dispute Tribunal erred on a question of law in finding that the demotion for a period of two years was not provided for by provision 110.3(a) of the former Staff Rules. The Secretary-General argues that a demotion for a period of two years is nonetheless a demotion, that is, a single sanction that is envisaged by the aforementioned provision. The Secretary-General adds that the Administration followed the interpretation provided by the jurisprudence of the former United Nations Administrative Tribunal in Judgment No. 1090, *Berg*, which, according to him, has been incorporated into the rules applicable to decisions taken by the Administration.

29. We note that the sanction imposed on the staff member, and thus the one on which the Dispute Tribunal ruled, is not a demotion limited to two years, but rather a demotion of unspecified duration combined with a two-year ban on promotion. That is not the same thing. A demotion limited to a specified period of time is rescinded at the end of that period. The staff member is automatically upgraded to his or her former grade. In addition, there is nothing to prevent him or her from being promoted in the interim. In the case of a ban on promotion for a specified period of time, the staff

member cannot be promoted during that period and has no right to be upgraded to his or her former grade at the end of that period. It follows that a ban on promotion for a specified duration constitutes a sanction that is different from a demotion. Moreover, this sanction is not mentioned in rule 110.3(a).

30. In Judgments No. 1090, *Berg* (para. VII) of 2003 and No. 1391, *Tagle* (para. X) of 2008, the former United Nations Administrative Tribunal referred only to a demotion that was limited in time. While it did refer to the disciplinary penalty of demotion by one grade for a period of five years with no possibility of promotion in Judgment No. 1439, *Kannan* (para. X), of 2009, it departed from its own jurisprudence by disregarding the aforementioned general legal principle. That departure must be regarded, in context, as a simple error by the former Administrative Tribunal rather than as a reasoned interpretation of provision 110.3(a), which would not, in any event, be binding on the Dispute Tribunal.

31. It follows from the foregoing that the Dispute Tribunal did not err on a question of law in finding that the sanction of a two-year ban on promotion lacked a legal basis.

With regard to the written censure and demotion

32. In the first instance, this Court finds that the Dispute Tribunal did not commit an error in procedure such as to affect the contested decision. Contrary to the staff member's submissions, it is clear from the contested decision that the Dispute Tribunal considered the report of the JDC, whose recommendations were not binding on either the Secretary-General or the Tribunal. The staff member cannot reasonably criticize the judge of the Dispute Tribunal for having considered that the sanctions imposed on him were legally justified simply because they were not recommended by the JDC. Furthermore, it is clear from article 9, paragraph 2, of the statute of the Dispute Tribunal and article 17, paragraph 6, of its rules of procedure, that it is for the Tribunal to decide whether anyone's presence at oral proceedings is required. In the present case, the Dispute Tribunal decided that even though the Applicant had requested that certain witnesses should be heard, it was not necessary to satisfy this request since the parties could give full explanations in writing and that it was not necessary to hear witnesses. While the staff member asserts in general terms that the testimony of an ambassador would have affirmed his honesty, that eminent person was not a direct witness to the facts held

against the staff member. The argument that the Dispute Tribunal disregarded the “procedural rights of the Appellant” by refusing to hear testimony of his moral standards, which could just as well have been submitted in writing, can only be dismissed.

33. With regard to the facts held against him, the staff member contests the Dispute Tribunal’s conclusion that, first, the facts constitute professional misconduct subject to disciplinary sanctions and, second, the sanctions imposed by the Secretary-General, limited to the written censure and the demotion by one grade, are not disproportionate to the seriousness of the acts in question.

34. As for the accusation of cheating, this Court fully supports the findings of the Dispute Tribunal as set out in paragraph 66 of its judgment, namely, that “the fact that a staff member attempts to cheat on an exam, even if the latter is not important for his or her career, is a serious act which points to a certain lack of integrity, especially for a security officer”. The Dispute Tribunal did not err on a question of law in concluding that for a security officer — who is expected, in accordance with regulation 1.2 of the Staff Regulations, to uphold the highest standards of integrity, particularly probity, honesty and truthfulness — to attempt to cheat constitutes professional misconduct.

35. As for his refusal to cooperate in the preliminary investigation, as set out in rule 104.4, then in force, a staff member may at any time be required by the Secretary-General to supply information concerning facts relevant to his or her integrity, conduct and service as a staff member. This provision, which does not seem incompatible with a fundamental rule or principle of international law applicable to staff members of the Organization, was applicable to Mr. Yapa.

36. This Court finds that the Dispute Tribunal did not commit an error resulting in a manifestly unreasonable decision by finding that the sanctions imposed on this staff member were not disproportionate to the nature and seriousness of his misconduct.

With regard to the compensation in the amount of 1,000 Swiss francs

37. In the contested decision, the Dispute Tribunal found that, especially given the misconduct of the staff member, his chances of obtaining a promotion in less than two years starting from the date of his demotion were very slim.

38. This Court recalls that the Organization can only be ordered to pay compensation to a staff member if he or she has suffered a direct and certain injury. In the present case, even if his chances of obtaining a promotion were not non-existent, Mr. Yapa has not demonstrated that such harm occurred. Consequently, the judgment of the Dispute Tribunal ordering the Organization to pay Mr. Yapa the sum of 1,000 Swiss francs in compensation must therefore be rescinded.

Judgment

39. The judgment of the Dispute Tribunal is rescinded only insofar as it ordered the Organization to pay Mr. Yapa compensation in the amount of 1,000 Swiss francs, with interest. All the other claims made in the appeals by the Secretary-General and Mr. Yapa, respectively, are rejected.

Original and authoritative version: French

Dated this 21st day of October 2011 in New York, United States.

(Signed)

(Signed)

(Signed)

Judge Courtial, Presiding

Judge Painter

Judge Weinberg de Roca

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar