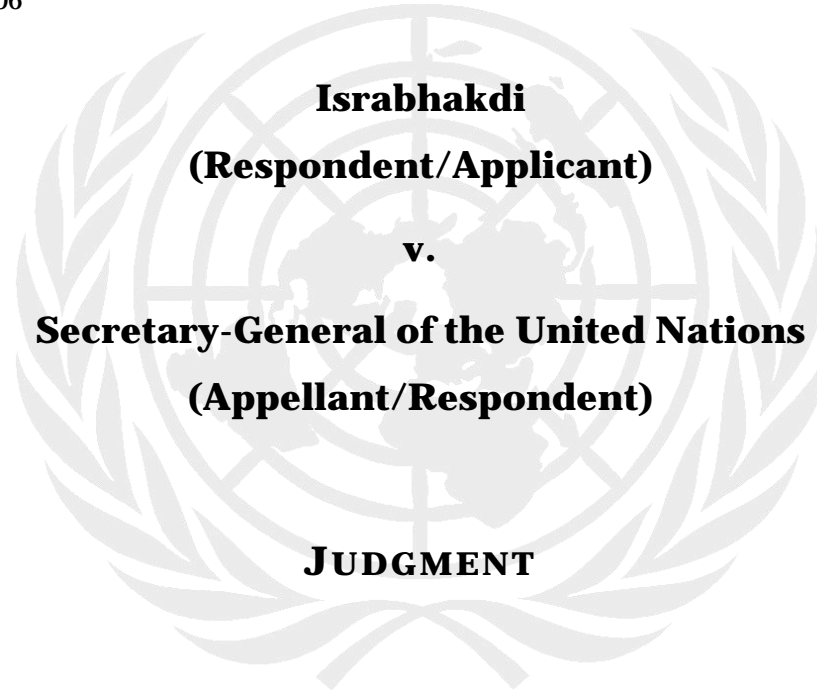




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2012-306



**Israbhakdi
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Inés Weinberg de Roca
Judge Richard Lussick

Judgment No.: 2012-UNAT-277

Date: 1 November 2012

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Miles Hastie

Counsel for Appellant/Respondent: Phyllis Hwang/Zarqaa Chohan

JUDGE LUIS MARÍA SIMÓN, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/010 issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 18 January 2012. The Secretary-General filed his appeal on 16 March 2012, and Mr. Oot Israbhadki answered on 28 May 2012.

Synopsis

2. It is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting directly from the illegality on a cause-effect lien. If these other two elements of the notion of responsibility are not established, only the illegality can be declared but compensation cannot be awarded.

3. The Tribunal reiterated its jurisprudence that not every illegality will necessarily lead to an award of compensation.

4. In the present case, at the time the staff member resigned, he had been found guilty of serious misconduct, able to qualify him as a non-trustworthy employee, he had been subject to a written censure and to the main sanction of a demotion. Under those circumstances, the attention to the normal course of facts and its consequences would lead to the conclusion that the decision to resign was voluntarily adopted faced with the difficult situation at work caused by the staff member himself. The censure and demotion were lawful, irrespective of the fact that the ban on promotion was illegal and set aside by the Administration after Mr. Israbhadki's resignation.

5. In that scenario, the Tribunal did not consider it reasonable to sustain that the resignation was caused directly and exclusively by the ban on promotion, as required to award compensation. A conclusion in the latter sense needed the support of strict evidence that was not provided by the claimant. Therefore, the award of compensation was vacated.

Facts and Procedure

6. Mr. Israbhakdi joined the United Nations in Geneva in 1976 as a computer clerk at the G-3 level. At the time of the contested decision, January 2011, Mr. Israbhakdi held a P-3 post of Web Systems Expert.

7. In early June 2008, during a team meeting, the then Officer-in-Charge, Information Technology Services Section (ITS) at UNCTAD informed all ITS staff members, including Mr. Israbhakdi, that due to a deterioration of security of the UNCTAD e-mail system, they would no longer allow to administer and access UNCTAD user mailboxes as of 30 May 2008.

8. On 25 June 2008, Mr. Israbhakdi logged into the UNCTAD e-mail system as an e-mail administrator, which gave him access to all UNCTAD e-mail user accounts. He accessed the e-mail account of the Special Assistant to the Secretary-General of UNCTAD and made a copy of the account onto his own computer's hard-drive, thereby avoiding the mailbox's security features. He then read e-mails marked as confidential. He was not aware that he was reading e-mails that the system automatically generated return receipts, which thereby alerted the Special Assistant that confidential e-mails were being read by Mr. Israbhakdi. Mr. Israbhakdi initially denied accessing the Special Assistant's mailbox. However, after he was shown the return receipts, he admitted that he had accessed the mailbox.

9. The day of the incident, the Special Assistant filed a complaint against Mr. Israbhakdi. The following day, Mr. Israbhakdi sent a written apology to the Special Assistant, explaining that he had been depressed for two months and was only trying to get information on the selection of the new Chief of ITS. On 1 July 2008, Mr. Israbhakdi was transferred from ITS to the Web Management Unit.

10. On 1 July 2008, a fact-finding panel was established to conduct an investigation into the incident which issued its report on 13 October 2008. On 13 March 2009, following a request from UNCTAD, the United Nations Office in Geneva (UNOG) issued a Technical Report. Based on a forensic examination, it inter alia found that Mr. Israbhakdi's computer had been "cleaned" of evidence before being seized for examination.

11. Following the receipt of Mr. Israbhakdi's comments on both reports, the Chief of Human Resources at UNOG referred the case to the Assistant Secretary-General for Human Resources Management. By memorandum dated 30 July 2010, the Assistant Secretary-General charged

Mr. Israbhakdi with misconduct, specifically with “[k]nowingly and willfully accessing the electronic mailbox of the Special Assistant, without authorization; [f]ailing to follow the instructions of the ITS Officer-in-Charge that he was no longer allowed to administer and access UNCTAD user mailboxes as of 30 May 2008; and [f]ailing to cooperate with the investigation by attempting to ‘clean’ his computer thereby destroying evidence”. On behalf of the Secretary-General, the Under-Secretary-General for Management imposed the disciplinary measures of a written censure, and demotion by one grade, with a three-year ban on promotion. The decision was communicated to Mr. Israbhakdi on 11 January 2011.

12. On 15 April 2011, Mr. Israbhakdi filed an application before the UNDT, challenging the disciplinary measures imposed on him. Over the course of the proceedings, Mr. Israbhakdi resigned, effective 30 September 2011. On 5 December 2011, following the issuance of Judgment No. 2011-UNAT-168 of the Appeals Tribunal in *Yapa v. Secretary-General of the United Nations*, the Assistant Secretary-General for Human Resources Management informed Mr. Israbhakdi that the disciplinary measures imposed against him had been modified to a written censure and a demotion of one grade.

13. On 18 January 2012, the UNDT issued its Judgment on Mr. Israbhakdi’s application, Judgment No. UNDT/2012/010. The UNDT found that the decision to demote Mr. Israbhakdi did not exceed the Administration’s discretionary power and rejected Mr. Israbhakdi’s contention that the disciplinary measure was disproportionate. The UNDT concluded that the unlawful three-year ban caused Mr. Israbhakdi additional anxiety and frustration and influenced his decision to resign. It awarded compensation in the amount of USD 10,000 for harm related to the imposition of the three-year ban on promotion.

Secretary-General’s Appeal

14. The Secretary-General submits that the UNDT erred in fact in concluding that the three-year ban on promotion “influenced” Mr. Israbhakdi’s decision to resign. He submits that it was evident in light of the *Yapa* case that Mr. Israbhakdi would not have been promoted again, and that he therefore suffered no loss by the promotion-bar. He further submits that, contrary to Mr. Israbhakdi’s assertion, Mr. Israbhakdi in fact profited from retiring early; and that Mr. Israbhakdi was inconsistent in claiming loss from the promotion-bar.

15. The Secretary-General submits that the UNDT erred in law and exceeded its competence in awarding compensation where no evidence had been adduced to establish any financial losses as a result of the three-year ban on promotion. Given Mr. Israbhakdi's misconduct, the chances of being promoted during the period of February 2011 to August 2015 were very slim. Further, in order to demonstrate any financial losses from the three-year ban, which was rescinded after 11 months, he would have had to demonstrate that there were positions advertised during the period from February to December 2011 for which he would have had a strong chance of being selected. Mr. Israbhakdi has failed to provide any evidence to that effect and it would have been unlikely that he would have been immediately promoted in the 11 months following his demotion.

16. The Secretary-General submits that the UNDT erred in law and exceeded its competence in awarding compensation where Mr. Israbhakdi provided no evidence that he suffered moral damages as a result of the three-year ban. In his submissions to the UNDT and during the oral hearing, Mr. Israbhakdi never claimed that he had suffered moral damages. Also, he could not have suffered moral damages because he was unaware of the illegality of the measure. If Mr. Israbhakdi suffered anxiety and frustration from the promotion, it was in fact a result of his unrealistic expectations of a promotion. The Secretary-General requests that the Appeals Tribunal vacate the compensation awarded by the UNDT.

Mr. Israbhakdi's Answer

17. Mr. Israbhakdi submits that the Secretary-General does not point to any substantial evidence in the record reflecting a factual misapprehension by the judge, which would require a variation or reversal of the UNDT Judgment.

18. Mr. Israbhakdi submits that the Secretary-General did not demonstrate that the UNDT erred in fact resulting in a manifestly unreasonable decision. There was sufficient evidence to demonstrate that the demotion-ban influenced Mr. Israbhakdi's decision to resign. The UNDT's finding that the promotion ban influenced his resignation is the only reasonable conclusion.

19. Mr. Israbhakdi submits that the argument that Mr. Israbhakdi resigned to increase his income is erroneous. The losses caused by the immediate retirement were substantial, even accounting for a pension reduction.

20. Mr. Israbhakdi rejects the Secretary-General's contention that he suffered no loss by the promotion-ban because it was unlikely that he would have been promoted shortly after a demotion. In order to demonstrate "direct and certain injury", Mr. Israbhakdi needs to demonstrate a loss of opportunity; he does not need to prove that this opportunity was certain to materialize into a particular benefit. It is not a case of a procedural error that may or may not have affected a promotion process. It is one where the Administration barred any promotion. If there had not been a significant chance of re-promotion, the Administration did not need to impose that measure.

21. Mr. Israbhakdi submits that the UNDT was not unreasonable in finding that non-pecuniary damages were proven. The UNDT drew reasonable inferences from Mr. Israbhakdi's frustrations. He did not need to be aware of the illegality of the measure in order to suffer frustration and anxiety. Also, even if Mr. Israbhakdi did have excessively optimistic expectations, this could not eliminate the liability of the Organization, as this would make proven pecuniary damages a precondition to non-pecuniary damages.

22. Mr. Israbhakdi submits that compensation in the amount of USD 10,000 was not unprincipled, based on factual error or disproportionate. He requests that the UNDT Judgment be upheld and that the appeal be dismissed.

Considerations

23. This Court holds that the UNDT erred on a question of fact by finding that the three-year ban on promotion "influenced" Mr. Israbhakdi's decision to resign. At the time of his resignation, Mr. Israbhakdi had been subject to a triple disciplinary sanction: a written censure, a demotion by one grade and a three-year ban on promotion, which were under challenge before the UNDT. Three months after Mr. Israbhakdi's resignation, the Administration revoked the third part of the sanction, acting in line with the Appeals Tribunal's jurisprudence¹ concerning the illegality of that measure because it was not provided for in the former Staff Rules applicable at the time .

24. However, that modification of the imposed measures did not entail a significant change in the staff member's situation: he had been found guilty of serious misconduct, able to qualify him as a non-trustworthy employee, he had been subject to a written censure and to the main

¹ *Yapa v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-168.

sanction of a demotion. Under those circumstances, the attention to the normal course of facts and its consequences would lead to the conclusion that the decision to resign was voluntarily adopted faced with the difficult situation at work caused by the staff member himself, which included measures legally imposed in their main part. In that scenario, we do not consider it reasonable to sustain that the resignation was caused directly and exclusively by the ban on promotion, as required to award compensation. A conclusion in the latter sense needed the support of strict evidence that was not provided by the claimant. It is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If these other two elements of the notion of responsibility are not justified, only the illegality can be declared but compensation cannot be awarded.

25. As stated by this Tribunal in *Wu*,² not every illegality will necessarily lead to an award of compensation, so we differ from the UNDT's determination on this matter.

26. The conclusion about the lack of evidence of the necessary causal link between the ban on promotion, which lasted eleven months, and Mr. Israbhakdi's resignation, leads to vacating the award of compensation for financial losses granted by the UNDT. In the present case, any financial loss Mr. Israbhakdi may have suffered appears to be generated by the lawful demotion (first) or the voluntary resignation (later) and there are no grounds for compensating what was not caused by the Administration's illegal ban on promotion.

27. A similar conclusion can be reached while examining the award of compensation for moral damages. This Tribunal holds that all the consequences and alleged injuries suffered by the staff member in the present case were caused by Mr. Israbhakdi's overall situation and status at the time of his sanction and resignation, and not by the illegal ban on promotion. Therefore, the illegal behaviour of the staff member stands as the main cause of his alleged injuries and the Administration is not bound to award him any kind of compensation.

² *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

Judgment

28. The appeal is allowed and the compensation awarded by the UNDT is vacated.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Lussick

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar