Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

ISRABHAKDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Cristiano Papile, ALS/OHRM, UN Secretariat
Myriam Foucher, UNOG

Introduction

1. On 15 April 2011, the Applicant, a staff member of the United Nations Conference on Trade and Development ("UNCTAD"), filed an application with the Dispute Tribunal against the decision dated 10 January 2011 to impose on him the disciplinary measures of a written censure and demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

2. The Applicant requests the Tribunal to impose a lesser sanction. He also requests compensation for the illegal deferment of eligibility for consideration for promotion.

Facts

Applicant's professional background

3. The Applicant entered the service of the United Nations in Geneva as a computer clerk at level G-3 in 1976. In April 1990, after rising through the ranks within the General Service category, he was appointed in the Professional category as a Programmer/Analyst at level L-3. On 1 October 1996, he resumed duties at level G-6 within UNCTAD. From July 2000 to December 2002, he was seconded to the International Computing Center, where he was appointed at level P-3. He subsequently resumed duties at UNCTAD at level G-6 and in April 2003 he was granted an appointment at level L-3 as an Expert in Information Systems. At the time the contested disciplinary measure was imposed, in January 2011, the Applicant held a fixed-term appointment as a Web Systems Expert at level P-3. On 29 July 2011, he tendered his resignation with effect from 30 September 2011. He would have reached the mandatory retirement age in August 2015.

Alleged misconduct, fact-finding and disciplinary proceedings

4. In early June 2008, during a team meeting, the then Officer-in-Charge, Information Technology Section ("ITS"), at UNCTAD reportedly informed all ITS staff members, including the Applicant, that due to a deterioration of security

of the UNCTAD email system, they were no longer allowed to administer and access UNCTAD user mailboxes as of 30 May 2008.

5. On 25 June 2008, the Special Assistant to the Secretary-General of UNCTAD ("the Special Assistant") received four "return receipts" emails from a user logged onto the system under the Applicant's name. The Special Assistant called the Applicant and asked him about these "return receipts" emails. The latter denied accessing the Special Assistant's mailbox and reading his emails. At the Special Assistant's request, the Applicant immediately went to his office and was shown the "return receipts" emails with his name on them. The Applicant then admitted accessing the Special Assistant's emails. The latter asked the Applicant to leave his office and to send a written apology and also informed him that he would file a complaint.

6. On the same day, the Special Assistant filed a complaint against the Applicant for having deliberately accessed his emails without authorization.

7. By email dated 26 June 2008, the Applicant sent a written apology to the Special Assistant for what he described as a "big mistake". He explained that he had been depressed for two months and was only trying to get information on the selection of the new Chief of ITS.

8. Following the incident, on 1 July 2008, the Applicant was transferred from ITS to the Web Management Unit.

9. On 1 September 2008, UNCTAD established a fact-finding panel to conduct an investigation into the incident.

10. The fact-finding panel issued an Investigation Report on 13 October 2008. During his interview with the panel, the Applicant explained that in order to access the Special Assistant's emails, he had logged onto the system using an email administrator ID, which gave him full access to all mailboxes of all users in UNCTAD at the time. He then accessed the Special Assistant's mailbox, made a copy of it onto the hard drive of his computer and browsed and opened the copied

emails in the "inbox", "all documents" and "sent" windows for about 15 minutes without realizing that automatic "return receipts" were being sent by the system.

11. With respect to possible motives for his actions, the Investigation Report noted that, during his interview, the Applicant recognized that his actions were unacceptable and unforgivable. He explained that he was under mental and emotional distress for a long time including due to lack of professional prospects for promotion and low staff morale in the section. He further explained that, added to the pressure, some of his colleagues in ITS had asked him for information on the selection process of the future Chief of ITS. According to him, this pressure led him to search for information in the Special Assistant's mailbox regarding the atmosphere in ITS and the selection process for the new Chief. The panel also noted that during his interview, the Applicant showed signs of mental anxiety and deep emotional distress, which led it to recommend that the Applicant be provided with psychological support.

12. With respect to the email messages that the Applicant read, the Report stated that none of the four messages that triggered "return receipts" concerned either ITS or the selection process for the new Chief. These messages were also clearly identified as "confidential". The Applicant explained to the panel that he used the "preview pane" to scroll though the Special Assistant's emails and that he read many other emails that did not trigger "return receipts" because they were incoming correspondence or had been sent without the "return receipt" option. The Applicant further told the panel that this was the first time he read his colleagues' emails, that he acted alone and that he assumed full responsibility for his actions.

13. By memorandum dated 18 November 2008, UNCTAD sought the assistance of the United Nations Office at Geneva ("UNOG") in conducting an independent forensic examination of the Applicant's computer.

14. According to the Technical Report which was issued on 13 March 2009 by the Information and Communication Technology Service of UNOG, a complete analysis was carried out on the Applicant's computer for any signs of Lotus Notes related files. Based on a forensic examination, the Technical Report found, *inter*

alia, that the Applicant's computer had been "cleaned" of evidence before being seized for examination.

15. By memorandum dated 30 March 2009 from the Chief, Human Resources Management Service, UNOG, the Applicant was provided with a copy of both reports and asked to provide comments, which he did on 20 April 2009, expressing his "sincere regret for [his] momentary lapse of professional ethics".

16. By memorandum dated 17 July 2009, the Chief of Human Resources at UNOG referred the Applicant's case to the Assistant Secretary-General for Human Resources Management. The Applicant was informed accordingly on 20 July 2009.

17. A year later, by memorandum dated 30 July 2010, the Assistant Secretary-General for Human Resources Management charged the Applicant with misconduct, specifically with:

> a. Knowingly and willfully accessing the electronic mailbox of the Special Assistant, without authorization;
>
> b. Failing 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
>
> c. Failing to cooperate with the investigation by attempting to "clean" his computer thereby destroying evidence.

The above conduct, if established, was said to be in breach of former staff regulations 1.2(b), 1.2(f) and 1.2(q) (ST/SGB/2008/4), as well sections 3.1, 5.1(c) and 5.1(e) of ST/SGB/2004/15 (Use of information and communication technology resources and data).

18. The Applicant responded to the charges by email dated 30 August 2010. While he admitted to the first charge, which he described as "an unfortunate exception" in an "unblemished record" and "a sad regretful momentary lapse of [his] own morals and good judgment", he denied the second and third charges.

19. By letter dated 11 January 2011, which the Applicant says he received on 1 February, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Under-Secretary-General for Management, on behalf of the Secretary-General, had concluded that there was sufficient evidence that he had engaged in the misconduct alleged in the first and second charges and that this amounted to a violation of former staff regulations 1.2(b), 1.2(f) and 1.2(q), as well as a violation of sections 3.1, 5.1(c) and 5.1(e) of ST/SGB/2004/15. She informed the Applicant that, accordingly, the Under-Secretary-General for Management had decided to impose disciplinary measures of a written censure and demotion of one grade with deferment, for three years, of eligibility for consideration for promotion, in accordance with staff rules 10.2(a)(i) and (vii). She added that in deciding what sanction to impose, the Under-Secretary-General for Management, on behalf of the Secretary-General, had taken into account his length of satisfactory service with the Organization, his cooperation with investigators and his prompt admission to the charges against him.

Dispute Tribunal's proceedings

20. The Applicant filed the present application on 15 April 2011 and the Respondent served his reply on 18 May.

21. The Applicant submitted observations on 17 June 2011 and requested the production of documents as follows: (i) A directive issued by the Office of Human Resources Management on the methodology for implementation of the measure of demotion; and, (ii) Any documents, papers, memos or notes taken by the Respondent in arriving at the decision to impose the disciplinary measure of demotion, which clearly set out the specific objective(s) to be attained by the imposition of the said measure, as well as any documents which contain calculations made by the Respondent of the impact of this measure together with an assessment showing that the impact would not be more excessive or more drastic than necessary for obtaining them.

22. On 29 July 2011, the Applicant tendered his resignation with effect from 30 September and took early retirement.

23. By Order No. 164 (GVA/2011) of 29 September 2011, the Tribunal gave the Applicant the opportunity to make additional submissions, which he did on 10 October 2011. He reiterated his request for production of documents.

24. By Order No. 172 (GVA/2011) of 14 October 2011, the Tribunal instructed the Respondent to produce: (i) Any directives, guidelines or instructions outlining the procedure which must be followed in implementing the disciplinary measure of demotion, as well as (ii) Any documents, papers, memorandums or notes taken or produced by the Respondent and his representatives in arriving at the decision to impose on the Applicant the disciplinary measure of demotion with a three-year ban on promotion. Furthermore, noting that the sanction of demotion with deferment, for a specified period, of eligibility for consideration for promotion, was not listed in staff rule 110.3(a), which applied at the time of the facts held against the Applicant, and relying on the Dispute Tribunal's findings in *Yapa* UNDT/2010/169, the Tribunal ordered the Respondent to file comments on the issue of the legality of the three-year ban on promotion imposed on the Applicant.

25. On 21 October 2011, in response to Order No. 172 (GVA/2011), the Respondent filed under seal a memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management, entitled "Recommendation to impose disciplinary measures …" concerning the Applicant's case. On the issue of the three-year ban on promotion imposed on the Applicant, the Respondent submitted in essence that it was legal even though there was no written rule providing for such a disciplinary measure at the time of the alleged misconduct.

26. On the same day, the Appeals Tribunal announced decisions in a number of cases. According to the oral announcement, it affirmed the Dispute Tribunal's ruling in *Yapa* that the two-year ban on promotion imposed on the staff member was illegally applied in view of the general principle of law that there shall be no punishment without a rule foreseeing it explicitly at the time of the facts held against an individual.

27. By Order No. 182 (GVA/2011) of 25 October 2011, the Tribunal rejected the Respondent's motion for confidentiality of the memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management and shared it with the Applicant.

28. On 2 November 2011, the Applicant filed comments on the above-mentioned memorandum.

29. Also on 2 November 2011, the Respondent filed a motion for leave to file further submissions. He noted that the oral announcement made by the Appeals Tribunal in *Yapa* suggested that its decision in that case may materially affect the submissions filed by the Respondent in response to Order No. 172 (GVA/2011). The Respondent thus applied for leave to submit, within one week of the official publication of the Appeals Tribunal's judgment in *Yapa*—the date of which was unknown—further submissions on the issue of the legality of the three-year ban on promotion imposed on the Applicant.

30. By Order No. 188 (GVA/2011) of 2 November 2011, the Tribunal gave the Applicant one week to submit reasoned objections, if any, to the Respondent's motion for leave.

31. On 4 November 2011, the Applicant indicated that he had no objections to the Respondent's motion for leave. He noted however that this was no basis for postponing the hearing on the merits, which he requested the Tribunal to hold before 2 December, due to his unavailability from 4 December 2011 to 20 February 2012.

32. A hearing was held on 23 November 2011, which was attended by the Applicant and his Counsel in person. Counsel for the Respondent participated by video-conference from New York. At the hearing, the Respondent was granted two weeks following the issuance of the Appeals Tribunal's judgment in *Yapa* to file additional submissions, and the Applicant was granted two weeks to file observations on the Respondent's additional submissions.

33. On 2 December 2011, the Appeals Tribunal issued *Yapa* 2011-UNAT-168, dated 21 October 2011.

34. By letter dated 5 December 2011, the Assistant Secretary-General for Human Resources Management informed the Applicant that in light of the Appeals Tribunal's findings in *Yapa* and the circumstance that at the time of the facts held against him, "the Staff Rules did not provide for the stipulation of a period of ineligibility for promotion", the disciplinary measure imposed on him had been modified to a written censure and demotion of one grade.

35. On 15 December 2011, the Respondent filed additional submissions on the applicability of *Yapa* to the present case and provided a copy of the above-mentioned letter. On 12 January 2012, the Applicant filed observations.

Parties' submissions

36. The Applicant's principal contentions are:

a. The Secretary-General committed an error in law in the sanction imposed in that it was disproportionate to the offence committed by the Applicant, and the Respondent did not take into account several attenuating factors, mentioned below, thereby abusing his discretion. Because the Applicant was at the last step but one of the P-3 level, because of the structure of the salary scale and because of the Applicant's proximity to his mandatory age of retirement—all factors which the Respondent ignored—the disciplinary measure of demotion has disproportionate financial consequences in terms of net salary, post adjustment, pension and other entitlements. The sanction is "unnecessarily harsh" and "flagrantly arbitrary", to quote the Appeals Tribunal in *Sanwidi* 2010-UNAT-084, in light of the offence committed. It is also inequitable since its financial impact is far in excess of that which would occur in the case of other staff members in different grades/steps within the salary scale for staff in the Professional and higher categories, another factor not taken into account by the Respondent;

Impact on salary and post adjustment

b. A demotion should result in a loss of one grade with a concomitant loss of salary on the order of the value of two steps. The Applicant was demoted from level P-3 step 14 to P-2 step 12, the top step in the P-2 salary scale, and his net salary was reduced from USD78,960 to 64,097, that is approximately the salary at level P-3 step 4, which in effect represents a loss of 10 steps. The financial loss suffered by the Applicant is more than five times the value of two steps, which would normally have been expected. Compounded with the Geneva post adjustment rate, the Applicant's loss of income amounts to nearly USD29,700 per annum or 18.8% of his net base salary;

c. This amplification of the financial impact of a demotion in the Applicant's case results from the structure of the salary scale and the fact that the Applicant was at the high end of the P-3 scale. For example, the demotion of a staff member at level P-3 step 6 would also result in the staff member being placed at level P-2 step 12 but the loss of net salary would only amount to USD3,203 per annum or 4.8%. As another example, the demotion of a Director at level D-2 step 6 would result in the staff member being placed at level D-1 step 9, with a loss of net base salary amounting to USD4,462 per annum or 3.6%;

d. These examples not only demonstrate that the financial impact of demotion on the Applicant is disproportionate to the offence. They further show that the methodology used to implement a demotion could be deemed inequitable as regards staff in the upper range of the P-3 level in general and is excessively harsh in the Applicant's case;

Impact on future step increments

e. Since upon demotion the Applicant was placed at the top step of the P-2 salary scale, had he remained in service, he would not have benefitted from any step increments until such time as he would have been promoted again. Furthermore, as he had been barred from consideration

for promotion for three years, that is, until February 2014, it was highly unlikely that he would have been promoted before reaching the mandatory age of retirement in August 2015. His salary would therefore almost certainly have been frozen at its current level until retirement, which amounted to the *de facto* imposition of two additional disciplinary measures, that of deferment of eligibility for salary increment under staff rule 10.2(a)(iii) and that of loss of steps in grade in staff rule 10.2(a)(ii);

f. A staff member who, upon demotion, is placed at a step other than the top step of the lower grade will benefit from subsequent salary increments. This again demonstrates the disproportionality of the sanction, the inequitable nature of the modality used to implement the demotion and the excessively harsh impact on the Applicant;

Impact on future promotion prospects

g. The measure imposed includes deferment for three years of eligibility for consideration for promotion, that is, until February 2014. Because the Applicant would have reached the mandatory age of retirement only 19 months later, it was highly unlikely that he would have had a serious chance of being selected for a promotion. Even if the Applicant had been promoted after February 2014, he would only have been promoted to level P-3 step 6, that is, eight steps below his level before demotion. The impact of the demotion would not be so harsh on staff members under other circumstances;

Impact on repatriation grant and pension benefits

h. By retiring at level P-2 step 12, he will lose over USD7,200 in repatriation grant. Further, the Applicant’s demotion only a few years before his mandatory retirement will continue to inflict significant financial loss even after his separation from service upon retirement since he will loose nearly USD18,000 per annum in pension;

Other mitigating factors

i. Other mitigating factors were not given appropriate weight, including: (i) The act of misconduct was a sad regretful momentary lapse of good judgment; (ii) It was undertaken under "extreme mental pressure"; (iii) The Applicant took responsibility for his conduct, issued an apology and cooperated fully with the investigation; (iv) There was no measurable or financial loss to the Organization and the Applicant did not derive any personal benefit from the act; (v) The Applicant has been an exemplary employee for over 34 years; (vi) The wrongdoing did not affect the reputation and image of the United Nations;

j. In addition, similar conduct has resulted in a significantly lesser sanction in *Deriche* UNDT/2011/056, where the Applicant was only imposed the sanctions of a written censure and loss of two steps;

Second charge

k. The second charge, to wit, that he failed 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, is unfounded. No evidence has been presented supporting the statement that the Applicant was "informed" or "instructed" in "early June" of a communication from the Officer-in-Charge, ITS, restricting staff access to UNCTAD user mailboxes retroactively as of 30 May 2008. Furthermore, the fact-finding panel established that a few days after the drastic measure withdrawing access rights to all staff, some staff including the Applicant had to be given additional rights and in fact he and one other staff member still had access to the Lotus Notes generic administrator account. The panel even established that the Applicant was identified as a user having rights to execute codes and commands on the mailboxes via the Lotus Notes clients;

l. The Applicant was not provided any corresponding annexes to the Investigation Report in support of this charge. Furthermore, the additional

evidence that the Respondent obtained from UNOG in December 2010 was not shared with the Applicant and he had no opportunity to comment on it. This constitutes a violation of his due process rights;

Three-year ban on promotion

m. In view of the Applicant's resignation at the end of September 2011, the subsequent decision to reverse the three-year ban on promotion is inconsequential. The Applicant suffered actual prejudice as a direct result of the unlawful decision. First, he would have had over a five-year period, instead of two, to benefit from a promotion before his retirement. Second, the type of misconduct committed by the Applicant is not one that could have definitely barred him from ever receiving a promotion; the Applicant had 34 years of commendable service and unlike *Yapa* took immediate responsibility for his actions and apologized; he had a significant chance of receiving a promotion had he been eligible to apply. Third, one of the critical elements which led the Applicant to resign is that he knew he could not be promoted for three years and he preferred to resign over withstanding the emotional and financial burden associated with the additional sanction.

37. The Respondent's principal contentions are:

a. The facts on which the disciplinary measures are based have been established by way of investigations, including the fact that a meeting was held around 30 May 2008 during which all ITS staff members, including the Applicant, were informed that they were no longer allowed to administer and access UNCTAD user mailboxes;

b. The established facts amount to misconduct;

c. The disciplinary measures imposed are proportionate to the offence. The Applicant, as an IT specialist, occupied a position of trust and responsibility and therefore a high standard of conduct and integrity was expected from him. His status and functions should be regarded as

aggravating factors. Some elements were nevertheless considered as mitigating factors when deciding what sanction to impose, namely the Applicant's length of satisfactory service, his cooperation with investigators and prompt admission to the charges against him;

d. Despite the reversal of a portion of the disciplinary measure, i.e., the three-year ban on promotion, in light of the Appeals Tribunal's findings in *Yapa*, compensation is not warranted because the Applicant did not suffer direct and certain prejudice as a result of the imposition of the ban on promotion. First, there is no evidence that the ban on promotion resulted in any actual loss of promotion to the Applicant. Second, there is no evidence that it impacted, to a measurable degree, the Applicant's decision to tender his resignation.

Consideration

38. The Applicant contests the decision dated 10 January 2011 and notified by the Assistant Secretary-General for Human Resources Management to impose on him the disciplinary measure of demotion of one grade with deferment, for three years, of eligibility for consideration for promotion.

39. It is worth recalling that on 5 December 2011, after the Dispute Tribunal had raised on its own motion the issue of the legality the three-year ban on promotion and in light of the subsequent findings by the Appeals Tribunal in *Yapa* 2011-UNAT-168, the Respondent reversed that portion of the disciplinary measure.

40. While the Applicant admits to the first charge against him, to wit, knowingly and willfully accessing the electronic mailbox of a colleague without authorization, he refutes the second charge—failing 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.

41. As far as the first charge is concerned, it is not contested that the acts of which the Applicant is accused and to which he admits amount to misconduct.

This aspect of the case is thus not subject to judicial review. Suffice it to recall that the Applicant violated the following rules:

Former staff regulation 1.2(b), (f) and (q):

> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;
> …
> (f) [Staff members] … shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations …
> …
> (q) Staff members shall only use the property and assets of the Organization for official purposes and shall exercise reasonable care when utilizing such property and assets;

Secretary-General's bulletin ST/SGB/2004/15 (Use of information and communication technology resources and data):

> **Official use**
> 3.1 Authorized users shall ensure that their use of ICT resources and ICT data is consistent with their obligations as staff members or such other obligations as may apply to them, as the case may be.
> …
> **Prohibited activities**
> 5.1 Users of ICT resources and ICT data shall not engage in any of the following actions:
> …
> (c) Knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and obligations of staff members;
> …
> (e) Knowingly accessing, without authorization, ICT data or the whole or any part of an ICT resource, including electromagnetic transmissions;

42. The Tribunal considers that the issues before it are as follows:

> 1) Whether the disciplinary measure of demotion of one grade was disproportionate to the admitted offence;

2) Whether the Applicant's denial of the second charge and his allegations of due process violations in respect of this charge have a bearing on this case;

3) Whether the Applicant suffered any prejudice as a result of the unlawful three-year ban on promotion, and if so, what is the appropriate compensation.

43. Regarding the first issue, the Appeals Tribunal recognizes the wide discretion of the Secretary-General in imposing disciplinary measures and repeatedly held that in assessing whether sufficient grounds exist for it to interfere in the disciplinary measure taken, the Tribunal must consider, among other issues, whether the measure applied is disproportionate to the offence (see *Mahdi* 2010-UNAT-018, *Abu-Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024).

44. In *Sanwidi* 2010-UNAT-084, the Appeals Tribunal further held:

> 39. In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.
>
> 40. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the

> role of the Tribunal to substitute its own decision for that of the Secretary-General.
> …
> 42. … As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

45. In *Cabrera* 2010-UNAT-089, the Appeals Tribunal also stated:

> Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.

46. In the present case, the Tribunal finds that the decision to demote the Applicant did not exceed the Respondent's discretionary power.

47. On 21 October 2011, further to the Tribunal's Order No. 172 (GVA/2011), the Respondent disclosed a memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management, entitled "Recommendation to impose disciplinary measures: Mr. [Applicant's first name and last name], Web System Expert, UNCTAD". This memorandum consists of a detailed 13-page analysis of the case and sets out, *inter alia*, the reasons for recommending the disciplinary measures that were eventually imposed on the Applicant.

48. The Applicant's main contention is that the disciplinary measure of demotion has disproportionate financial consequences in terms of net salary, post adjustment, pension and other entitlements, and is inequitable since its financial

impact is far in excess of that which would occur in the case of other staff members in different grades and steps.

49. While it is true that the financial impact of the demotion is particularly harsh on the Applicant, it must be noted that given the structure of the salary scale, in approximately 50% of the cases, a demotion would result in a loss of salary greater than the value of two steps. Similarly, a promotion will result, for a staff member with little seniority in his or her grade, in a salary gain of more than the two steps required. Accordingly, it cannot be held as the Applicant does that a demotion should result in a loss of one grade with a concomitant loss of salary on the order of the value of two steps.

50. Furthermore, the Tribunal cannot ignore the severity of the Applicant's misconduct who, by virtue of his position and responsibilities, was vested with trust. The fact that the financial impact of the demotion on the Applicant is not considered in the analysis contained in the memorandum of 10 January 2011 is not dispositive. As held by Counsel for the Respondent at the hearing, a demotion is not a purely financial disciplinary measure, unlike a fine or loss of steps. It also carries a stigma and a loss of responsibilities which, in the Tribunal's view, the Respondent was justified in imposing on the Applicant.

51. As held by the Appeals Tribunal, due deference must be shown to the Secretary-General's choice of the appropriate disciplinary measure. In the case at hand, the Tribunal considers that it was not presented with arguments that would warrant interfering with the Secretary-General's discretion. Accordingly, the Applicant's claim that the disciplinary measure of demotion was disproportionate is dismissed.

52. The Applicant refutes the second charge, to wit, that he failed 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.

53. In view of its finding that the misconduct to which the Applicant admitted was serious enough to justify a demotion, the Tribunal considers that the issue of whether the second charge is sufficiently established has become moot. If the

disciplinary measure is justified with respect to the established facts or, like in the case at hand, admitted facts in relation to a certain charge, it is not necessary to determine whether additional charges are also established.

54. The Applicant further claims that he was not provided with the evidence in support of this charge, which is a violation of his due process rights.

55. Annexed to the memorandum dated 10 January 2011 from the Assistant Secretary-General for Human Resources Management to the Under-Secretary-General for Management (see para. 47 above) was a written testimony dated 20 December 2010 provided by the ITS Officer-in-Charge in support of the second charge. This information was only disclosed to the Applicant pursuant to the Tribunal's Order No. 182 (GVA/2011) of 25 October 2011.

56. It appears clearly from the memorandum of 10 January 2011 (see paragraphs 6, 7, 33 and 34) that the Respondent relied on this new evidence to arrive at the conclusion that the second charge was sufficiently established. This evidence, however, was never disclosed to the Applicant before the contested disciplinary measure was imposed on him.

57. This constitutes a violation of the Applicant's due process rights.

58. However, as the Appeals Tribunal held in *Antaki* 2010-UNAT-095, "[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages" (see also *Wu* 2010-UNAT-042, *Kasyanov* 2010-UNAT-076).

59. In the case at hand, having stated that the second charge is irrelevant for the assessment of the disciplinary measure (see para. 53), the Tribunal finds that the Applicant did not suffer any harm as a result of the above-mentioned violation and therefore does not award any compensation.

60. Regarding the third issue—whether the Applicant suffered any prejudice as a result of the unlawful three-year ban on promotion, and if so, what is the appropriate compensation—in its Order No. 172 (GVA/2011) of 14 October 2011, the Tribunal raised on its own motion the issue of the legality of the three-year

ban on promotion. Initially, the Respondent maintained that this portion of the sanction was legal even though there was no written rule providing for such a disciplinary measure at the time of the alleged misconduct.

61. However, in *Yapa* 2011-UNAT-168, which was issued on 2 December 2011 and which raised a similar issue, the Appeals Tribunal held:

> 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.

62. The Respondent subsequently decided to reverse the three-year ban on promotion imposed on the Applicant and notified him accordingly on 5 December 2011.

63. It remains to be decided whether the Applicant suffered any prejudice as a result of the unlawful disciplinary measure.

64. In *Yapa*, the Appeals Tribunal recalled 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. It rescinded the award by the Dispute Tribunal of CHF1,000 to Mr. Yapa on the ground that the latter had not demonstrated that he had suffered any harm as a result of the unlawful ban on promotion.

65. In the present case, however, the Tribunal is persuaded that the three-year ban on promotion caused the Applicant additional anxiety and frustration and influenced his decision to resign.

66. The Applicant explained in his application the negative impact of the ban on promotion both on his promotion prospects, considering that he would be eligible again for promotion only 19 months before reaching retirement, and on his pension. In his submission of 10 October 2011, the Applicant also pointed to

"frustration and lack of job satisfaction" to explain his decision to resign; it seems obvious that the lack of job satisfaction could only be compounded by the lack of promotion prospects resulting from the unlawful ban. In his observations of 12 January 2012, the Applicant further states that one of the critical elements which led him to resign is that "he knew he could not be promoted for at least a three-year period, and he preferred to resign over withstanding the emotional and financial burden associated with that additional sanction".

67. The fact that the Respondent decided to reverse that portion of the disciplinary measure, 11 months after it was imposed and subsequent to the Applicant's resignation, is certainly insufficient to repair the harm done. In the circumstances of the case, the Tribunal assesses the appropriate compensation at USD10,000.

Conclusion

68. In view of the foregoing, the Tribunal DECIDES:

a. The Applicant is awarded compensation in the amount of USD10,000;

b. The compensation set in sub-paragraph (a) shall bear interest at the US Prime Rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days from the date this Judgment becomes executable;

c. All other pleas are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 18th day of January 2012

Entered in the Register on this 18th day of January 2012

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry