UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/031
Judgment No.: UNDT/2013/164
Date: 9 December 2013
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

COBARRUBIAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Antonio Bautista, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. By the application filed with the Dispute Tribunal on 20 April 2011, the Applicant is seeking the rescission of the decision to separate him from service, with compensation in lieu of notice and without termination indemnities, following conduct that was determined not to be in accordance with the provisions of the ST/SGB/2004/15 (Use of information and communication technology resources and data), reinstatement in service and compensation for lost salaries and moral damages. The Respondent's reply was filed on 20 May 2011.

Background

2. On 21 August 2012, the Tribunal issued Order No. 171 (NY/2012), directing the parties to submit a consolidated list of agreed facts and legal issues, identifying, where applicable, the issues, facts or statements on which they disagreed. While the parties could not come to an agreement as to the legal issues in the present case, on 17 September 2012 they provided the Tribunal with a detailed list of agreed facts.

3. For the purpose of efficiency, the Tribunal, unless indicated otherwise, reproduces the relevant agreed upon facts below:

> i. On or about 7 May 2008, the Investigations Division, Office of Internal Oversight Services (ID/OIOS) obtained information indicating "possible misconduct" by the Applicant. The information suggested that he "may have misused the information and communication technology ["ICT"] resources and data of the Organization". ID/OIOS initiated an investigation into claims that the Applicant had received e-mail messages containing images with pornographic or sexual content from United Nations colleagues, using his official United Nations Lotus Notes e-mail account.
>
> ii. As part of the investigation, ID/OIOS investigators conducted a review of the Applicant's UN e-mail account. The review indicated that the Applicant had received, on his UN e-mail account, 359 e-mails containing materials that were pornographic or sexual in nature.

iii. The ID/OIOS review also indicated that the Applicant had moved 264 of the e-mails containing pornographic or sexual materials from his e-mail inbox into eight user-created folders.

iv. The ID/OIOS review further indicated that, on at least two occasions, the Applicant used his United Nations e-mail account to forward e-mails that were pornographic or sexual in content to his personal e-mail address.

v. By e-mail dated 3 April 2009, ID/OIOS invited the Applicant to attend an interview. In the e-mail, among other things, the ID/OIOS investigator stated: "I need to interview you as a staff member who is implicated as the subject of a case that is being investigated by this Office". The Applicant's position is that the e-mail did not specify that OIOS had obtained information indicating "possible misconduct" by the Applicant. The Respondent's position is that the e-mail clearly identified the Applicant as the subject of an investigation.

vi. On 15 April 2009, ID/OIOS interviewed the Applicant.

   i. The Applicant's position is that, at the outset of his interview, he was not categorically informed that OIOS had obtained information indicating "possible conduct" by the Applicant. The Respondent's position is that, through the email dated 3 April 2009, the Applicant had already been informed that he was the subject of an investigation.

   ii. During his interview, the Applicant admitted that he had received e-mails containing pornographic or sexual material on his UN e-mail account and that he had forwarded e-mails containing pornographic or sexual material from his UN e-mail account to his personal e-mail account.

   iii. The Applicant also stated that he had created sub-folders in his UN e-mail account, in which he had placed the e-mails in question, "just for fun, storing them and looking at them" … "to view before work or at a dull moment to glance at it".

   iv. The Applicant stated that he did not report that pornographic e-mails were being sent to him because he believed "that it was not hurting anyone".

   v. At the conclusion of the interview, the Applicant was asked whether he had any complaints about the manner in which the interview was conducted and how he was treated by investigators. He stated that he had "no complaints" and that the interview was "pretty pleasant".

vi. The Applicant signed and dated his interview statement to certify its accuracy.

…

vii. Prior to the finalization of the investigation report, ID/OIOS invited the Applicant to comment on the draft investigative details. On 8 July 2009, the Applicant provided his comments. In his comments, the Applicant stated, among other things, that:

1. "First, I note that – as stated in paragraph 1 of the draft investigation details – OIOS obtained information on 7 May 2008 indicating possible misconduct and that it was then reported that I may have misused the information and communication resources of the United Nations. I therefore believe it would have been fair had OIOS advised me as to the purpose and meaning of the interview as then I could have consulted with a legal or staff representative prior to this interview as it may now turn out that the report will serve as a pretext for potential disciplinary proceedings, which was not clear to me as that stage."

2. "Furthermore, in light of the jurisprudence of the United Nations Administrative Tribunal, I also believe that OIOS should have indicated that I could have had a legal representative present at the interview. I remember asking for this but the investigators informed that there was no need for a legal representative."

…

3. The "investigators were very professional and always gave [him] sufficient time to respond or provided clarification when a question was not clear to [him]" and that he "would like to thank the investigators for being so professional as [he] felt very embarrassed during the interview about what happened".

viii. On 15 July 2009, ID/OIOS issued its investigation report concerning the Applicant.

ix. By memorandum dated 13 January 2010, the Applicant was alleged to have engaged in misconduct. Specifically, he was charged with:

1. "the improper use of the property of the United Nations, whereby [he] received over a period of time pornographic materials on the United Nations computer system"; and

2. "failing to fulfill [his] obligation under the UN ICT Policy to promptly report those violations of the bulletin of which

> [he] became aware to the appropriate United Nations authority, in that [he] did not report inappropriate emails attaching materials that were pornographic or sexual in nature that were received by [him] over a period of time from United Nations colleagues".

x. By memorandum dated 30 July 2010, the Applicant provided his comments on the allegations. He "accept[ed] that [his] conduct was not in accordance with the provisions of the Bulletin". However, he argued that he "never saved any of these emails on [his] computer and [he] also never archived these emails". He also stated that, as to "any other bizarre or vulgar images", he deleted them "immediately" as he "found them disgusting and offensive".

xi. By letter dated 4 April 2011, the Applicant was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had concluded that there was "sufficient credible evidence that, using the Organization's ICT resources, [he] misused [his] UN Lotus Notes email account by receiving and storing emails containing pornographic, violent and otherwise inappropriate material, that [he] failed to report that other staff members were misusing their UN Lotus Notes email accounts, and that [his] actions amounted to misconduct in violation of former staff regulations 1.2(b), (f) and (q), and ST/SGB/2004/15". The Applicant was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had decided to impose upon him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity.

4. The case was allocated to the undersigned judge on 5 May 2013.

5. The parties agreed, as part of their joint submission in response to Order No. 171 (NY/2012), that an oral hearing was not necessary. Consequently, the Tribunal determined that the case could be decided on the papers before it.

6. On 27 September 2013, in response to Order No. 226 (NY/2013), dated 12 September 2013, the parties filed their closing submissions.

Parties submissions

7. The Applicant's principal contentions can be summarized as follows:

a. The impugned decision is premised on the erroneous conclusion that not reporting another staff member's illegal activity amounts to misconduct;

b. The impugned decision is premised on the erroneous conclusion that "storage" of inappropriate materials is an aggravating element and that the Applicant engaged in such storage;

c. The denial of the Applicant's right to counsel during the investigation interview conducted by OIOS constitutes a substantial violation of his due process rights;

d. No consideration was given to mitigating circumstances and the impugned decision was disproportionate in relation to the established misconduct.

8. The Respondent submits that the Secretary-General's decision in the present matter was fair and reasonable and requests that the application be rejected in its entirety.

Consideration

Receivability

9. The present case meets all of the receivability requirements identified in art. 8 of the Dispute Tribunal's Statute.

Applicable law

10. ST/SGB/2004/15 (Use of information and communication technology resources data) states:

> **Section 2**
>
> **Conditions applicable to use of ICT resources and ICT data**
>
> (a) Use of ICT resources and ICT data shall in all cases be in accordance with the provisions set out in this bulletin and such other administrative issuances as may apply to them;
>
> (b) Authorized users shall promptly report to the appropriate United Nations authority any violation of the provisions of this bulletin of which they become aware.
>
> …
>
> **Section 4**
>
> **Limited personal use**
>
> 4.1 Authorized users shall be permitted limited personal use of ICT resources, provided such use:
>
> (a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);
>
> (b) Would not reasonably be expected to compromise the interests or the reputation of the Organization;
>
> …
>
> (f) Does not interfere with the activities or operations of the Organization or adversely affect the performance of ICT resources.
>
> …
>
> **Section 5**
>
> **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 resource or ICT data in a manner contrary to the rights and obligations of staff members.

11. Staff regulation 1.2 of ST/SGB/2008/4, dated 1 January 2008, states:

(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.

…

(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.

12. Staff Rules (ST/SGB/2009/7) state the following with regard to misconduct:

Rule 10.1

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

…

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

Scope of the review

13. As stated in *Yapa* UNDT/2010/169, when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

14. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service.

15. The International Labor Organization ("ILO") Convention on termination of employment (Convention No. C158) (1982), which is applicable to all branches of economic activity and to all employed persons (art. 2), states in art. 9.2:

> In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation … shall provide for one or the other or both of the following possibilities:
>
> (a) the burden of proving the existence of valid reason for the termination … shall rest on the employer
>
> (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for termination having regard to the evidence provided by the parties and according to procedures … and practice.

16. Similarly to the principle of the burden proof in disciplinary cases in the ILO Convention No. C158, the Tribunal, in *Hallal* UNDT/2011/046, held that:

> 30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

17. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal decided that it is not sufficient for an Applicant to allege procedural flaws in the disciplinary process. Rather, the Applicant must demonstrate that these flaws affected her/his rights.

18. The Tribunal will analyze the Applicant's contentions regarding the regularity of the procedure, the facts and the evidence in relation to each of the allegations, and finally the proportionality of the disciplinary sanction.

Regularity of the procedure

19. The Applicant submits that his due process rights were breached during the OIOS investigative process due to him not having counsel present during the interview and as a result of the over one-and-a-half year delay between the date on which he was charged with misconduct and the date upon which he was notified of the applicable sanctions. The Tribunal therefore needs to consider whether there were any procedural irregularities leading to the application of the contested disciplinary sanctions.

20. The purpose of OIOS is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to the Office of Human Resources Management ("OHRM") being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect the staff member's rights, including the due process rights.

21. The fundamental human right to defend oneself and present evidence in support of one's defense is proclaimed by art. 14 of the International Covenant on Civil and Political Rights, a general legal instrument on human rights, and is also mirrored in the regional instrument of the European Convention on Human Rights (art. 6). The right of a staff member to defend himself or herself in person or to be assisted by a lawyer is a fundamental human right. Consequently, once a staff member becomes aware of the charges held against him or her, the staff member has the right to defend himself or herself in person or to be assisted by a lawyer. A staff member who decides after being informed of his or her right to defend himself or herself in person is required to do so diligently (with caution and care) and will not be able to complain of the fact that he or she did not defend himself or herself competently or that he or she was not assisted by counsel.

22. A review of the evidence indicates that the Applicant was made aware of the allegations that served as a basis for the investigation at the initiation of the interview. The Applicant was further informed that the investigation process is confidential and "if an investigative report is prepared [he] will be provided with the opportunity to review the factual details and provide clarification or correction of any errors before finalization of the report". The Applicant fully cooperated with the investigation and answered all the questions put forward to him during the interview. Upon the completion of the interview, which was conducted in a fair and impartial manner, the Applicant stated that there were no other relevant issues that he wished to address and that he did not have any complaints as to the manner in which the interview was conducted or the way he was treated by the investigators. The Applicant further proposed that the staff member who had sent him the emails be interviewed.

23. In *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once a staff member has become the target of an investigation he or she should be accorded certain basic due process rights.

24. In previous cases this Tribunal (Judge Greceanu) affirmed a staff member's right to defend themselves or to be assisted by a counsel during the preliminary investigation stage. However, in *Powell* 2013-UNAT-295, the Appeals Tribunal held that "during the preliminary investigation stage, only limited due process rights apply". Further, in *Akello* 2013-UNAT-336 it was further held that "the UNDT erred in law in concluding that there was a right to be apprised of the assistance of counsel during the investigation stage". Consequently, in light of the Appeals Tribunal's recent jurisprudence, the Tribunal finds that the alleged denial of the Applicant's request to be assisted by counsel during the investigation did not represent a breach of his due process rights and is to be rejected.

25. With regard to the length of the disciplinary process, as stated in *Mokbel* UNDT/2012/061, "[d]ecisions on disciplinary matters, particularly relating to allegations of serious misconduct, must be taken within a reasonable time". It is the responsibility of the Organization to conduct disciplinary matters in a timely manner to avoid a breach of the staff member's rights.

26. As was reflected in para. 46 of the Respondent's reply dated 20 May 2011, and as also reflected in *Makwaka* UNDT/2013/002, *Austin* UNDT/2013/080 and *Conti* UNDT/2013/081, representatives from OSLA, including the Applicant's counsel, and the Respondent met "from mid-2009 until the end of 2010" and discussed the appropriate sanction to be applied in relation to pending cases before OHRM involving the misuse of ICT resources. Upon the conclusion of these discussions, the Respondent sanctioned the Applicant in April 2011.

27. Taking into consideration the time period between the conclusion of the discussions between OHRM and OSLA and the application of a sanction against the Applicant, the Tribunal finds the Respondent acted within a reasonable amount of time when sanctioning the Applicant in April 2011 and the Applicant's allegation that his due process rights were breached as a result of the delays in concluding the disciplinary proceedings is to be rejected.

Use of ICT resources and the failure to report other colleagues

28. The Applicant submits that seeing that he was not aware of ST/SGB/2004/15, he cannot be held responsible for not following some of the provisions contained therein. The Applicant further states that "it cannot reasonably be accepted that a failure of a staff member to report potential misconduct of a colleagues will, in itself, amount to misconduct for which disciplinary measures may be imposed".

29. During the course of the investigation conducted by OIOS, and as part of his submissions, the Applicant recognized that he received "emails that contained images, some with pornographic content".

30. In his comments on OIOS' 7 August 2009 report, the Applicant recognized that he received a number of emails containing pornographic images. However, he stated that he was not aware of his obligation to report violations of ST/SGB/2004/15 by other staff members who he knew were also sending and receiving such messages. He accepted that such a conduct was not in accordance with the provisions of the bulletin.

31. The Applicant further recognized during his interview that shortly after he received a few emails from his colleague and friend, Mr. MA, he became an active member of a network of pornographic emails recipients and he willingly received, requested, stored and forwarded such emails using the ICT.

32. In light of the Applicant's recognition of the facts, the Tribunal considers that the Respondent correctly determined that the Applicant received, forwarded and stored pornographic materials on his computer in different folders and that he failed to report staff members who were also partaking in these exchanges.

33. The Tribunal will analyze whether, as determined by the Respondent, these facts constituted misconduct. The existence of misconduct is determined by the following cumulative conditions:

a. The *objective element* which consists of either:

i. an illegal act (when the staff member takes an action which violates a negative obligation);

ii. an omission (when the staff member fails to take a positive action); or

iii. mixture of both which negatively affects other staff members, including the working relationships and/or the order and discipline in the workplace.

b. The *subjective element* which consists of the negative mental attitude of the subject/staff member who commits an act of indiscipline either intentionally or by negligence.

c. The *causal link* between the illegal act/omission and the harmful result.

d. The *negative effect* on labour relations, order and discipline in the workplace.

34. With regard to the use of ICT resources, sec. 4.1(a) of ST/SGB/2004/15 states that pornography is "*among* the uses which would clearly not meet [the highest] standard" of "conduct for international civil servants" (emphasis added). This section should not be read as providing an exhaustive list of any and all of the actions which could be considered as constituting prohibitive usage of the ICT resources in breach of the applicable rules. Section 4.1(a) of ST/SGB/2004/15 states that such activities, include the "use of ICT resources for purposes of obtaining or distributing pornography", do not meet the standard of an international civil servant, and would therefore result in a breach of the staff rules. Similarly, staff rule 10.1 states that a staff member's failure to comply with his or her obligations, including the United

Nations Staff Regulations and Rules, may amount to unsatisfactory conduct and result in the imposition of disciplinary measures for misconduct.

35. The duty to report any such violations is reflected in specific administrative issuances, including, for example, sec. 2(b) of ST/SGB/2004/15, which imposes a clear and specific obligation on staff members to report any violation of that bulletin of which they become aware. In *Ishak* UNDT/2009/072, the Tribunal held that "[i]t is clear that the applicant has a right and a duty to report to his management any misconduct that comes to his notice".

36. In *Diagne et al.* 2010-UNAT-067, the Appeals Tribunal, in affirming the judgment of the Dispute Tribunal, stated that "ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules". Consequently, the Applicant's submission that he was not aware of some of the applicable regulations and rules bears no relevance as to whether he could be charged as having breached the said regulations and rules and cannot be considered a mitigating circumstance.

37. The Tribunal considers that the Applicant should have reasonably been aware that his behavior was immoral. By virtue of the relations of subordinations that characterize social relations in the workplace, the employee must observe not only general contractual obligations, the staff regulations and rules, but also general principles of a moral conduct. Even if there is no evidence that the Applicant's performance was affected, the Applicant's actions of receiving, storing and forwarding pornographic materials to other staff members is a behavior which affected the working environment. Consequently, the Tribunal finds that the Respondent correctly determined that the Applicant committed misconduct and his behavior breached the mandatory legal provisions.

38. The Applicant's grounds of appeal that "the impugned decision is premised on the erroneous conclusion[s] that not reporting other staff member amounts to

misconduct [and] that 'storage' of inappropriate materials is an aggravating element and that [he] engaged in such 'storage'" are to be rejected.

Proportionality of the sanction

39. The decision as to whether or not to impose a disciplinary measure falls within the discretion of the Organization and the Tribunal will review whether the actual disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities imposed on the Applicant was proportionate.

40. The Tribunal considers that an employee's disciplinary liability has a contractual nature. It consists of a constraint applied by the employer, mainly physical or moral, and exercises both sanctioning and preventive (educational) functions.

41. The necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct.

42. The individualization of a sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

43. Staff rule 10.3(b) states that one of the rights afforded to staff members during the disciplinary process is that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction

was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

44. The Tribunal considers that the rule reflects not only the staff member's right to a proportionate sanction, but also the criteria used for the individualization of the sanction. Further, the nature of the sanction is related to the finding of conduct which is in breach of the applicable rules.

45. The "gravity of misconduct" is related to the subjective element of misconduct (guilt) and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability.

46. In order to appreciate the gravity of a staff member's misconduct, all of the existing circumstances that surround the contested behaviour, which are of equal importance, have to be considered and analyzed in conjunction with one another, namely: the exonerating, aggravating and mitigating circumstances.

47. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

48. As stated by in *Yisma* UNDT/2011/061:

> Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances

> is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

49. The sanctions which can be applied to the Applicant in the present case are listed under staff rule 10.2. They are listed from the lesser sanction to the most severe and generally they must be applied gradually based on the particularities of each individual case:

> **Rule 10.2**
>
> **Disciplinary measures**
>
> (a) Disciplinary measures may take one or more of the following forms only:
>
> (i) Written censure;
>
> (ii) Loss of one or more steps in grade;
>
> (iii) Deferment, for a specified period, of eligibility for salary increment;
>
> (iv) Suspension without pay for a specified period;
>
> (v) Fine;
>
> (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
>
> (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
>
> (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
>
> (ix) Dismissal.

50. The consequences of the misconduct, previous behaviour, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

51. As the Tribunal held in *Galbraith* UNDT/2013/102:

> 79. The Tribunal notes that Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".
>
> 80. Staff regulation 9.3 and staff rule 9.6(c) contain the following provision: "the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the reasons (grounds) listed".
>
> 81. The Tribunal considers that the above-mentioned legal provisions applicable in the present case reflect the staff member's right to be informed about the reason and the explanation for it and the Secretary-General correlative obligation to give the reason and the explanation for the termination.

52. The present disciplinary decision is a termination decision which therefore must include the legal reason and the explanation for it. The Tribunal considers that the analysis of the exonerating, aggravating and mitigating circumstances are part of the mandatory justification (explanation) of the disciplinary decision in relation to the staff member's right to a proportionate sanction.

53. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to asses where to pitch the appropriate sanction. Consequently, in the absence of such an analysis or in cases where these circumstances where partially observed by the Organization, the Tribunal has to determine the relevance of any circumstances which may have been ignored previously.

54. The Tribunal will further analyze if in the present case the sanction applied is in line with the ones applied in similar cases by the Secretary-General as results from the Secretary-General's 2010–2012 reports on disciplinary cases as well as the Tribunal's relevant jurisprudence.

55. ST/IC/2009/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), dated 19 August 2009, states:

> **Computer-related misconduct**
>
> 40. A staff member regularly sent, received and stored large quantities of pornographic material using the Organization's information and communications technology resources, and distributed this material to a large mailing list of United Nations colleagues.
>
> *Disposition:* summary dismissal.
>
> 41. A staff member knowingly and wilfully received, downloaded and stored pornographic materials on the United Nations computer system.
>
> *Disposition:* written censure and a fine of three months' net base salary after waiver of referral to a Joint Disciplinary Committee.
>
> 42. A staff member used his United Nations computer to store pornographic material, which was found in his trash bin after deletion.

56. ST/IC/2010/26 (Practice of the Secretary General in disciplinary matters and possible criminal behavior, 1 July 2009 to June 2010) states:

> **Computer- related misconduct**
>
> 23. A staff member received, stored and distributed e-mails containing pornographic material using the Organization's ICT resources
>
> *Disposition*; censure and demotion of one grade with deferment for three years of eligibility for consideration for promotion
>
> 24. A staff member improperly stored and transmitted pornographic material on the Organization's ICT resources
>
> *Disposition*: loss of two steps within grade and a two year deferral of within grade salary increment

57. ST/IC/2011/20 (Practice of the Secretary-General in disciplinary matters and possible criminal behaviour, 1 July 2010 to 30 June 2011), dated 27 July 2011, states:

Computer-related misconduct

28. Three staff members received and distributed pornographic materials, including child pornography, using their official Lotus Notes e-mail accounts.

Disposition: dismissal.

29. Two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

30. Thirty-two staff members received and distributed a relatively small number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure.

31. Eight staff members received e-mails, distributed and stored a relatively large number of e-mails containing pornography using their official Lotus Notes e-mail accounts.

Disposition: censure, loss of two steps within grade and two years deferral of consideration for promotion.

32. Staff member [identified as being the Applicant in the present case] received, failed to report and stored at least 246 e-mails in 8 user-created folders containing pornography and other inappropriate images.

Disposition: separation from service with compensation in lieu of notice and without termination indemnity.

33. A staff member knowingly and wilfully accessed the electronic mailbox of another staff member, without authorization.

Disposition: demotion of one grade, with deferment, for three years, of eligibility for consideration for promotion, and censure.

58. ST/IC/2012/19 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2011 to 30 June 2012), dated 6 September 2012, states:

Misuse of information and communications technology resources

50. A staff member received e-mails containing pornographic material on United Nations e-mail on at least 20 occasions; failed to report to the proper authority the receipt of the e-mails from other United Nations staff members and sent e-mails containing

> pornographic material using United Nations e-mail on at least 130 occasions.
>
> *Disposition*: censure and loss of two steps in grade with deferment, for two years, of eligibility for salary increment.
>
> 51. A staff member received e-mails containing pornographic material, on United Nations e-mail on at least 24 occasions; failed to report to the proper authority the receipt of the e-mails from other United Nations staff members and sent e-mails containing pornographic material using United Nations e-mail on at least 24 occasions.
>
> *Disposition*: censure.

59. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offences, in general, the penalty should be comparable.

60. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138,

> 31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [see *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022]
>
> 32. … A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

61. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however, identify the following aggravating and mitigating circumstances.

Aggravating circumstances

62. The Applicant stated in his interview that he started receiving pornographic emails in 2004 during business hours, with most of them coming from Mr. MA. He further stated that instead of deleting them and asking his colleague to stop sending them, he stored them in special folders. In 2006 and 2007, he joined some Yahoo distributing groups, focusing on pornography, using his United Nations Lotus

Notes email account. The review of the Applicant's United Nations email account conducted by OIOS identified that he received 359 emails containing materials that were pornographic or sexual in nature and that 264 emails were stored in eight user-created folders. As discussed *supra*, the Applicant also stated that he was aware that other colleagues were involved in similar activities.

Mitigating circumstances

63. The Applicant joined the United Nations in October 1987, he was a devoted staff member for 23 years and this is the first time he committed misconduct. Before 7 May 2008, the Applicant, who had a permanent contract, was never investigated and no administrative or disciplinary sanctions were previously imposed on him.

64. The Applicant mentioned in his interview that most of the emails were sent to the Applicant by a colleague—Mr. MA—whom the Applicant knew ever since joining the Organization in 1987. Furthermore, the Applicant's father became Mr. MA's godfather at his wedding and Mr. MA's son is the Applicant's godson. The Applicant further explained during his interview that he would give access to his work computer to Mr. MA for work purposes as he "takes care of matters whilst I am on vacation. Certain emergencies to retrieve documents". He further explained that he "gave him [his] password to access documents required by [his Chief]". The Tribunal considers that this close relationship represented a moral impediment for the Applicant to report his colleague and friend for violations of sec. 2(b) of ST/SGB/2004/15.

65. The Applicant was sincere, he cooperated with the investigators, he recognized the facts and he declared that he would accept any sanction with exception of the "harshest penalty".

66. In the comments provided in response to OIOS' 7 August 2009 report, and in his response to allegations of misconduct from 30 July 2010, he admitted receiving and forwarding a substantial number of email messages containing pornographic

images using his United Nations Lotus Notes email account and moving them into various folders he had specially created to store these messages. He also admitted that he accidentally registered his United Nations Lotus Notes email account with online groups that distributed pornography. The Applicant accepted that such a conduct was prohibited though he mentioned that at the relevant time he was not aware of the existence of ST/SGB/2004/15 regarding the use of ICT resources though he should still have realized that these emails were inappropriate. The Applicant expressed that he deeply regretted his behaviour and offered his sincere apologies to the Organization. He was not placed on administrative leave during the investigation and disciplinary process and he continued working for the Organization on the same post until he was separated in April 2011. There is no evidence that during his long career his service was unsatisfactory or that after 15 April 2009 he continued with any prohibited conduct.

67. The Tribunal considers that the relation of trust between the employer and the Applicant was not irremediably affected since he continued working for the Organization for approximately another three years period between the initiation of the investigation and the application of the sanction.

68. Regarding the Applicant's computer usage, including receiving 359 emails and storing 264 emails in user-created folders in his United Nations Lotus Notes email account, and his failure to report the violations of ST/SGB/2004/15, the Tribunal finds that it was correctly established that the Applicant's behavior constituted misconduct, but the disciplinary sanction applied to him is disproportionate, as results from the analysis from the above mentioned bulletins.

69. Also, in other similar cases before the Tribunal, staff members who received, stored and/or forwarded pornographic emails to their colleagues, the sanctions applied were lower than the sanction applied to the Applicant in the present case.

70. For example in *Bridgeman* UNDT/2011/018 and UNDT/2011/145, the charge of misuse of the United Nations ICT resources was established in relation to a staff

member who had saved and viewed pornographic materials on his office computer. The investigation report indicated that 82 sexually explicit multimedia files, including pornographic movies were stored on his hard drive and network storage resources and that he used his email account to send sexually explicit material to another colleague. The Joint Disciplinary Committee panel recommended the sanction of a written censure for not observing the provisions of ST/SGB/2004/15, but the disciplinary penalty applied to the staff member was harsher: a loss of two steps in grade and a two year deferment of within grade salary increments. The Tribunal found that the sanction applied in that case was disproportionate, the decision was rescinded and the alternative sanction of a written censure was agreed to by the parties.

71. In *Makwaka*, the staff member was sanctioned with a written censure and a demotion of one grade with deferment for three years of his eligibility for consideration for promotion, whereas in *Austin* and *Conti* the staff members were sanctioned with written censure, a loss of two steps in grade and a deferral for two years of their eligibility for salary increment. In these cases, the sanctions were applied between January–April 2010 for broadly similar offences as in the present case and the proportionality of the sanctions was not contested by either of the staff members.

72. In *Yisma* UNDT/2011/061, the Tribunal observed that "a disciplinary measure should not be a knee-jerk reaction and there is much to be said for the corrective nature of progressive discipline".

73. The Tribunal finds the individualization of the sanction was based on an incorrect evaluation of the relevant circumstances of the case, including the mitigating ones which are not mentioned or discussed in the contested decision and the Applicant's right to a proportionate sanction was breached.

74. After reviewing all the facts and circumstances, including the mitigating circumstances and the sanctions applied in similar cases, the Tribunal considers that it was correctly established that the Applicant's behavior constituted misconduct but

that the contested decision is unlawful because the sanction applied to the Applicant—separation from service with compensation in lieu and without termination indemnities—is too harsh in comparison with the gravity of the misconduct.

75. In conclusion the Applicant's grounds of appeal that "no consideration was given to the mitigating circumstances and the impugned decision was disproportionate to the established misconduct" is legally correct because the Applicant's right to a proportionate sanction was breached.

Relief: reinstatement and compensation

76. The Statute of the Dispute Tribunal states:

> **Article 10**
>
> …
>
> 5. As part of its judgement, the Dispute Tribunal may order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

77. The Tribunal considers that art. 10 includes two types of legal remedies:

- 10(a) refers to the rescission of the contested decision or specific performance and to a compensation that the Respondent may elect to pay as an alternative to the rescission. The compensation which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission or

> specific performance ordered and the compensation. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it because the legal provision uses the expression "[t]he tribunal shall determine an amount of compensation".

- 10(b) refers to a compensation.

78. The Tribunal considers that the compensation established in accordance with art. 10.5(a), which is mandatory and directly related to the rescission of the decision, is distinct and separate from the compensation which may be ordered based on art. 10.5(b).

79. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately "shall normally not exceed the equivalent of two years net base salary of the applicant", respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

80. When the Tribunal considers an appeal against a disciplinary decision, the Tribunal can decide to :

a. Confirm the decision.

b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or

c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case the Tribunal considers that it is not directly applying the sanction but is partially modifying the contested decision by replacing, according with

the law, the applied sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct.

d. Set an amount of compensation in accordance with art. 10(b).

81. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescinding of the contested decision represents a legal remedy decided by the Tribunal.

82. The Organization's failure to comply with all the requirements of a legal termination causes a prejudice to the staff member since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his reinstatement into service with compensation for the lost salaries (restitution *in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

83. A severe disciplinary sanction like a separation from service is a work-related event which generates a certain emotional distress. This legal remedy generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction and consequently will consist of a partial compensation.

84. When an applicant requests her/his reinstatement and compensation for moral damages s/he must bring evidence that the moral damages produced by the decision cannot be entirely covered by the rescission and reinstatement.

85. The Tribunal considers that in cases where the disciplinary sanction of separation from service or dismissal is replaced with a lower sanction and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision

86. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages produced by the rescinded decision

87. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. According with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Further, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example if during the proceeding in front of the Tribunal the staff member reached the retirement age, is since deceased or her/his contract expired during the judicial proceedings.

88. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

89. In *Mmatta* 2010-UNAT-092 , the Appeal Tribunal stated:

> Compensation could include compensation for loss of earnings up to the date of reinstatement , as was ordered in the case on appeal, and if not reinstated, then an amount determined by the [Dispute Tribunal] to

compensate for loss of earnings in lieu of reinstatement up to the date of judgment

90. In the present case the Applicant expressly requested his reinstatement as part of his appeal and the contested decision concerns a separation from service. The Applicant previously had a permanent appointment as an administrative assistant in the Custodian and Contractual Unit, Department of Management, at the G-6 grade, step X and there is no evidence that he cannot be reinstated.

91. In light of the above-mentioned consideration that the decision is too harsh, the Tribunal decides that the impugned decision is to be rescinded and the Applicant is to be reinstated in his previous function of Administrative Assistant, into the Custodian and Contractual Unit, Department of Management, with retroactive effect from 4 April 2011. The disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnities is to be replaced with the sanctions of a written censure and a demotion of one grade, from grade G-6 step X to G-5 step X with deferment for three years of eligibility for consideration for promotion starting from 4 April 2011 until 4 April 2014.

92. The Tribunal considers this remedy as being *per se* a fair and sufficient remedy for the moral prejudice caused to him as a result of the disproportionality of the disciplinary measure imposed by the contested sanction. The Applicant failed to submit evidence that would show that he suffered a moral prejudice as result of the contested decision which cannot be covered by the legal remedy of rescission and reinstatement.

93. The Respondent is to pay the Applicant a partial compensation for his loss of earnings accordingly to grade G-5 step X retroactively from the date of his separation (4 April 2011) until the day of his effective reinstatement.

94. In *Fayek* UNDT/2010/194 (appeal withdrawn) the Tribunal held that in assessing compensation only reasonable assumptions can be allowed and a staff member cannot have an unqualified legitimate expectation to work in any

organization until his/her retirement. The Tribunal considers the Applicant's request to receive compensation for his unlawful termination until the date on which he would have reached the mandatory age of retirement, respective for 16 years, to be unreasonable.

Alternative to rescission

95. According to art. 10.5(a) from the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, as well as its order that the Applicant be reinstated together with a partial compensation for the damages produced, the Tribunal must set also an amount of compensation that the Respondent may elect to pay as an alternative to the Applicant's reinstatement, subject to art 10.5(b). From the interpretation of the two paragraphs of art.10.5 results that compensation to be awarded as an alternative to the reinstatement of a staff member shall not normally exceed the equivalent of two years' net base salary. However, a higher compensation may be ordered by the Tribunal in exceptional cases.

96. In *Cohen* 2011-UNAT-131, the Appeals Tribunal recalled that in cases where the Dispute Tribunal rescinds an illegal decision to dismiss a staff member, the Administration "must both reinstate the staff member and pay compensation for loss of salaries and entitlements". The Appeals Tribunal further held that

> if, in lieu of execution of the judgment the Administration elects to pay compensation in addition to the compensation which the Tribunal ordered it to pay for the damage suffered by the Applicant, that election may, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of Article 10.5(b) of the Statute of the [Dispute Tribunal]. … [In such a situation], the option given to the Administration … to pay compensation in lieu of a specific [performance] … should not render ineffective the right … to an effective remedy.

97. As was stated above, the Tribunal considers that in cases where it decides to rescind a decision and order the reinstatement requested by the Applicant, as a general rule, the principal legal remedy is the reinstatement of the applicant and

the award of partial compensation for the lost earnings retroactive to the date of separation until the date of the effective reinstatement. The Tribunal considers that the legal alternative of paying compensation afforded to the Respondent replaces the principal remedy of reinstating the Applicant with a payment. To be a real and equitable reparatory measure, such an alternative remedy must include two components: a payment equivalent to the emotional distress which would be covered and remedied by the reinstatement itself; and, a payment equal to the amount of the partial compensation established for the material damages awarded to the Applicant.

98. In *Mmatta* UNDT/2010/053, the Tribunal rescinded the administrative decision and ordered the Respondent to "reinstate the Applicant and to make good of his lost earnings from the date of his separation from service to the date of his reinstatement". The Respondent was furthered ordered that "in the event the reinstatement is not possible, to compensate the Applicant for loss of earnings from the date of his separation from service to the date of [the] judgment…".

99. In *Mmata* 2010-UNAT-092, the Appeal Tribunal underlined that "[i]n the instant case the judgment was obtained only after seven months and so the length of time to obtain judgment from the [Dispute Tribunal] was not a reason for justifying higher compensation for the loss of income to the date of judgment. … There may be cases that take longer to be heard by the [Dispute Tribunal], which may provide a reason justifying compensation beyond the two year limit".

100. The Tribunal notes that the period from the date of separation from service to the date of this judgment is almost two years and eight months (April 2011–December 2013). The Tribunal also notes that the Applicant exercised his legal right to appeal the disciplinary decision and he filed the appeal on 20 April 2011. The Applicant is entitled to an equitable alternative compensation, and in respect of the principles of free access to justice and equity, in the present case, the Tribunal will set an alternative compensation beyond the two years limit as the Tribunal

considers that it meets the requirements for an exception under art 10.5(b) from the Dispute Tribunal's Statute.

101. In light of the particular circumstances of the present case, namely that the Applicant worked for the Organization for 23 years, that he had a permanent appointment before his separation from service and has three children, two of them disabled, the amount of compensation to be awarded as an alternative to reinstatement is to be: USD5,000 for the emotional distress suffered by the Applicant (this amount would be otherwise covered by the Applicant's actual reinstatement) and two years and eight months (the time period between his separation and the present judgment), net base salary at the G-5 Grade X level as a reasonable equivalent payment for the material damages produced by the rescinded decision, in accordance with the principle established in *Warren* 2010-UNAT-090.

Conclusion

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

a. The contested decision from 4 April 2011 is rescinded, the Respondent is ordered to reinstate the Applicant in his previous function of Administrative Assistant, into the Custodian and Contractual Unit, Department of Management, with retroactive effect from 4 April 2011 and it is considered that until the date of this judgment he remained lawfully in the service of the Organization.

b. The disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnities applied to him is replaced with the sanctions of a written censure, demotion of one grade from grade G-6 step X to G-5 step X with deferment for three years of his eligibility for consideration for promotion starting from 4 April 2011 until 4 April 2014.

c. The Respondent is ordered to pay the Applicant partial compensation for loss of earnings according to grade G-5 step 10 retroactively from the date of his separation—4 April 2011—until the day of his effective reinstatement.

d. In the event that the Respondent decides not to reinstate the Applicant, he is ordered to compensate him in the amount of USD5,000 and two years and eight months' net base salary as a reasonable equivalent payment for the damages produced by the rescinded decision, according to grade G-5 step 10 at the rate in the effect on the date of the Applicant's separation from service on 4 April 2011.

103. The Tribunal orders that references relating to the Applicant's previous sanction—separation from service—are to be removed from his official status file and replaced by references to the lesser sanctions ordered in the present judgment: written censure, demotion of one grade from grade G-6 step X to G-5 step X with

deferment for three years of eligibility for consideration for promotion starting from 4 April 2011 until 4 April 2014.

104. These amounts are to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Alessandra Greceanu

Dated this 9th day of December 2013

Entered in the Register on this 9th day of December 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York