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 communicati thd li theTw [

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.

> [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 2011, 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

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 criminal 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

(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/2008/1, 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 with 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;

16. Similarly to the principle of the burden of 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, *Muthi* (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

19.

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 prohibited 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

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 type and the degree 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 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 appointm

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 the 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, posted 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

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 actions were inappropriate. The Applicant

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".

- x 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 is not directly applying the sanction but is partially modifying the contested decision by replacing, according with

84. When an applicant requests her/his rescission and 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 demotion of one grade, from grade G-6 step X to G-5 step X with deferment for the 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 mo

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

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 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 bil4he o7.1301 Tc .1786of 9or consideln Tw [(TD .6r thrTw [(tof b(4 A130i3 [(tiv

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

104.