



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

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

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

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

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 It rescinded that sanction and ordered the Organization to pay Mr.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

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

T

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

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

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

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

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

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

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

From the Secretary-General, Respondent

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

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

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

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

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

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

THE UNITED NATIONS APPEALS TRIBUNAL

THE

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

Judgment

39. The judgment of the Dispute Tribunal is rescinded only insofar as it ordered the Organization to pay Mr. Yapa compensation in