



THE UNITED NATIONS APPEALS

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2012-UNAT-277

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

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

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

Secretary-General’s Appeal

14. The Secretary-General submits that the UNDT erred in fact in concluding that the three-year ban on promotion “influenced” Mr. Israbhakdi’s decision to resign. He submits that it was 12.

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

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

Mr. Israbhakdi's Answer

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

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

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

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

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

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

Considerations

23. This Court holds that the UNDT erred on a question of fact by finding that the three-year ban on promotion "influenced" Mr. Israbhakdi's decision to resign. At the time of his resignation, /MCID 8 BDC /

THE UNITED NATIONS A

Judgment

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

Original and Authoritative Version: English

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

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Lussick

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

(Signed)

Weicheng Lin, Registrar