



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

IBRAHIM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Didier Sepho

Counsel for Respondent:

Cristiano Papile, ALS/OHRM, UN Secretariat

Susan Maddox, ALS/OHRM, UN Secretariat

TABLE OF CONTENTS

Introduction..... 3

Procedural background..... 3

Agreed facts 7

Applicant’s submissions 18

Whether the facts were established and amounted to misconduct..... 18

Proportionality..... 21

Procedure..... 22

Respondent’s submissions 22

Whether the facts were established and amounted to misconduct..... 22

Proportionality..... 23

Procedure..... 24

Applicable law 25

Consideration 25

Scope of judicial review 25

Whether the facts were established..... 26

 Officer Lim’s evidence 26

 Applicant’s evidence..... 27

 Conclusions..... 29

Whether the facts amount to misconduct 31

Proportionality..... 31

Whether proper procedures were followed..... 32

 Applicant’s evidence..... 32

 Sgt. Bramwell’s evidence 33

 Officer James’ evidence..... 34

 Inspector Lyttle’s evidence 35

 Conclusion 35

Relief..... 36

General principles 36

Pecuniary loss..... 36

Non-pecuniary loss 37

Observations 38

Orders 39

Introduction

1. On 16 October 2015, the Applicant, a former Security Sergeant at the S-4 level in the Department of Safety and Security (“DSS”), filed an application contesting the decision to impose on him the disciplinary measure of dismissal, following a finding that he “took, without authorization, a bottle of wine belonging to a third party”. The Applicant challenges both the substantive and procedural elements of his dismissal and seeks rescission of the contested decision, immediate reinstatement with retroactive payment of salary, or compensation in the amount of two years’ net base salary, plus all entitlements together with compensation for moral injury.

2. Due to the extensive detail of facts and issues, this Judgment contains a table of contents as an *aide mémoire*.

Procedural background

3. On 6 November 2015, the Respondent filed his reply, contending, *inter alia*, that the facts upon which the disciplinary measure was imposed were established by clear and convincing evidence; thus, the measure of dismissal was proportionate. To prove the facts in issue in this case, the Respondent relied primarily upon video footage of the alleged incident, together with written statements supplemented by oral testimony. The Respondent subsequently submitted through the Tribunal’s eFiling system, known as Court Case Management System (“CCMS”), three closed-circuit television (“CCTV”) video clips relating to “the relevant portions of the CCTV footage”. In an email to the Registry dated 11 November 2015, the Respondent further explained that, “[u]nfortunately, due to technical constraints in the video software, the clips do not show the timestamp corresponding to the footage. The timestamp is only available if the original footage is viewed directly through the CCTV video player

that was previously uploaded”. The Respondent therefore also uploaded an explanatory note indicating the time periods covered by each of the clips.

4. On 16 November 2015, the Applicant filed a “Motion not to admit CCTV footage filed by Respondent and to remove it from CCMS”.

5. By Order No. 300 (NY/2015) dated 3 December 2015, the Tribunal directed that the case join the queue of pending cases awaiting assignment to a Judge. The Tribunal further ordered that the Applicant’s motion for exclusion of evidence would be decided by the Judge assigned to the case.

6. On 14 January 2016, the Applicant’s Counsel sent an email to the New York Registry, inquiring where this case was in the queue of pending case, and when it would be assigned to a Judge.

7. On 15 January 2016, the New York Registry replied to Counsel for the Applicant, stating that, at the time, there were 45 cases older than the present case pending before the Tribunal in New York. Counsel for the Applicant was also asked to confirm whether he had full access to the CCTV footage uploaded in CCMS.

8. On 27 January 2016, the Applicant’s Counsel informed the New York Registry by email that he was unable to “access the three video clips (marked Clip 1, Clip 2 and Clip 3) uploaded by Respondent in CCMS”.

9. In the period of January–February 2016, the CCMS support team provided assistance to the Applicant’s Counsel in accessing the CCTV footage filed in CCMS.

10. On 14 March 2016, Counsel for the Applicant sent an email to the New York Registry confirming that he “was able to properly extract and view the CCTV footage”.

11. On 9 May 2016, the present case was assigned to the undersigned Judge.
12. By Order No. 111 (NY/2016) dated 11 May 2016, the Tribunal ordered the parties to file, by 14 June 2016, a joint submission setting out: lists of agreed legal issues and facts; a joint proposal for dates for a hearing on the merits; a list of witnesses; brief statements of evidence each party intends to elicit from their proposed witnesses; and an agreed bundle of documents. The parties were also ordered to attend a Case Management Discussion (“CMD”) on 16 June 2016.
13. By Order No. 135 (NY/2016) dated 7 June 2016, the Tribunal informed the parties that, due to unforeseen circumstances, it would be unable to hold the CMD on 16 June 2016, as scheduled by Order No. 111 (NY/2016). The Tribunal therefore vacated the date of 16 June 2016 for a CMD, and ordered the parties to attend a CMD on 30 June 2016.
14. On 13 June 2016, the parties filed a joint request for extension of time, stating that they “have engaged in efforts to agree on a joint submission [as per Order No. 111 (NY/2016)] but do not anticipate that they will have finalized the submission by 14 June 2016”. The parties requested an extension of time until 28 June 2016 to file the jointly-signed submission.
15. By Order No. 139 (NY/2016) dated 13 June 2016, the Tribunal granted, in part, the joint request for an extension of time, and directed that the joint submission under Order No. 111 (NY/2016) be filed by 24 June 2016.
16. On 24 June 2016, the parties filed the joint submission in response to Orders No. 111 and 139 (NY/2016), providing a list of agreed facts and legal issues, brief statements of evidence for proposed witnesses, and an agreed bundle of documents to be relied upon at the hearing.
17. Pursuant to Order No. 135 (NY/2016), the CMD took place as scheduled at 11 a.m. on 30 June 2016. It was attended in person by Counsel for

the Applicant (Mr. Didier Sepho), Counsel for the Respondent (Mr. Cristiano Papile), and the Applicant.

18. On 11 July 2016, the Tribunal issued Order No. 164 (NY/2016), directing that the matter be heard in full and declining the Applicant's motion, made at the CMD on 30 June 2016, to firstly consider and rule only on the Administration's compliance with his due process rights during the investigation. In view of the Applicant's withdrawal of the motion not to admit the CCTV footage, the Tribunal granted leave for the introduction of the footage at the hearing together with all relevant evidence, noting, however, that this did not mean that "the Applicant agrees with the inferences or conclusions that the Respondent draws from that video material. It will be for the Tribunal to consider the evidence presented by the parties and draw its own conclusions". The parties were also directed to file a joint submission proposing agreed dates for a hearing in October 2016, and ensuring availability of witnesses.

19. The matter was heard on 7 and 10 October 2016. The agreed facts and brief statements of evidence were expanded upon by the following individuals who gave *viva voce* evidence before the Tribunal:

- a. The Applicant (testified on 7 October 2016);
- b. Sergeant Eric Bramwell, Special Investigations Unit (testified on 7 October 2016);
- c. Senior Security Officer Lenworth James (testified on 10 October 2016);
- d. Inspector Albert Lyttle (testified on 10 October 2016); and
- e. Officer Garneth Lim (testified on 10 October 2016).

20. At the hearing, Counsel for the Respondent produced and reviewed portions of the CCTV footage and put questions to the Applicant with reference to the footage.

21. At the conclusion of the hearing, both Counsel made oral closing submissions.

Agreed facts

22. On 24 June 2016, the parties filed a joint submission with the following agreed facts. The agreed facts are generally consistent with the written record and the oral evidence in this case. The facts, as agreed by the parties, are as follows:

III. AGREED FACTS

... On 5 September 1989, the Applicant commenced employment with the Organization. At the time of his dismissal, he held a permanent appointment and performed the function of Security Sergeant, at the S-4 level, in the Department of Safety and Security (DSS).

... At approximately 10:45 a.m. on 24 December 2014, an intern deposited a bottle of wine for safekeeping with a Security Officer in the North Screening Building of the Secretariat. The bottle of wine was inside an aqua-coloured plastic bag. A yellow property tag was affixed to the outside of the bag and the intern was given a matching property tag. The bag with the wine was placed on a counter in an area known as the “Holding Area”, located at the rear of the North Screening Building. Both property tags bore the intern’s name and the date, and described the contents of the bag as “wine”.

... From approximately 12:00 p.m. until 1:00 p.m. on 24 December 2014, the Applicant was on “relief duty” in the North Screening Building to relieve [Lieutenant] Johnson during the latter’s lunch break. After his relief duty, the Applicant left the premises to attend a medical appointment.

... At approximately 3:45 p.m. on 24 December 2014, the intern returned to the North Screening Building to collect her bottle of wine. The aqua-coloured bag was found in an overhead

cabinet in the Holding Area. The yellow property tag matching the intern's was affixed to the exterior of the bag. However, the bag contained a bottle of beer instead of a bottle of wine. The wine was never recovered.

... The same day, the Special Investigations Unit (SIU) of the Department of Safety and Security opened an investigation into the incident.

... On 26 December 2014, Mr. Lenworth James, Senior Security Officer, SIU, obtained CCTV footage of the Holding Area on the day in question. Prior to interviewing the Applicant, Mr. James reviewed the CCTV footage. Mr. James also prepared a memorandum, dated 8 January [2015], to Mr. Michael Browne, then Chief ad interim, Security and Safety Service, describing what he observed in the CCTV footage. The 8 January [2015] memorandum includes Mr. James' observation that the Applicant removed a bottle of wine from the aqua coloured bag and replaced it with a bottle of beer.

... In the morning of 5 January 2015, Mr. James contacted the Applicant to request a statement from him with respect to his relief duty on 24 December 2014.

... At 11:44 a.m. on 5 January 2015, the Applicant responded to Mr. James by email, stating as follows:

Dear SS/O James,

This is to confirm that at approximately 1200 hours to 1300 hours, on Wednesday 24th December 2014, the writer was dispatch to the North Screening Building ... to relive LT, Johnson, L. The writer conduct[ed] an inspection of the Post and all was in order, due to a doctor apt was scheduled in that day the writer left the post at 1300 hours. The writer arrived at the Post at 1200 h and walk[ed] the[re] and outside the post and back to the post ... when I get back a call came from [Lieutenant] Johnson for me to ta[ke] of[f] to my [appointment]. Everything it se[emed] to be normal and operational at this time, it was very qui[e]te and nothing was observed by the writer within the Post.”

... On 8 January 2015, Mr. James and Mr. Eric Bramwell, Sergeant, SIU, interviewed the Applicant. The interview may be summarized as follows:

(a) The Applicant was not shown any CCTV footage.

(b) The Applicant was told that he would be asked “questions in relation to a missing item from the North Screening Building on 24 December 2014”.

(c) The Applicant confirmed that he was on duty on 24 December 2014 and that he worked in the North Screening Building for about one hour on relief duty.

(d) When asked whether he was made aware of any item or packages that had been left for safekeeping, he replied, “No.”

(e) When asked whether, when he relieved Mr. Johnson, he observed “any items or packages on the counter in the rear of the screening building”, he replied, “No. I relieved him at front of the screening building.”

(f) When asked whether he visited the back of the screening building, he replied, “Yes. I do not remember when but I walked back and forth.”

(g) When asked if he recalled if anyone, including security officers, visited the rear of the building during his presence, he stated, “I recall I was there talking to [a Security Officer].”

(h) When asked whether he saw anyone remove any items or packages from the counter while he was in the rear of the screening building, he stated, “No.”

(i) When asked whether he noticed a bottle of wine in the Holding Area, he stated, “No. I don’t recall.”

(j) At the end of his interview, the Applicant stated, “I would like also to state that the Filipino officer, officer Van de Reep and officer Walla who were on duty that day and they constantly visited the office Holding Area for various reasons as there is a bathroom, the computer, a coat hanger that they all utilize.”

(k) The Applicant signed a written summary of the interview.

... On 20 March 2015, Mr. Bramwell and Mr. Albert Lyttle, Inspector, SIU, conducted a second interview of the Applicant. The interview may be summarized as follows:

(a) The Applicant was shown CCTV footage of the Holding Area, covering the time period 11:49 a.m. to 12:50 p.m. This was not the full length of the video footage uploaded by the Respondent with his Reply.

(b) The Applicant identified himself in the CCTV footage.

(c) He noted that three other security officers were also visible in the video footage.

(d) He asked whether there was another person in the Holding Area, as he saw a piece of paper moving in the corner of the footage at 12:08 p.m.

(e) He mentioned that he thought there was a party that day.

(f) He noted that the CCTV footage showed that a cake was on the desk and that a Security Officer ate some.

(g) He requested to be shown the entire video footage from the time he arrived in the North Screening Building until the time he left.

(h) He stated that “if proper relief [i.e., handover] was conducted we would not be looking at the video”. He stated Mr. Johnson “was [his] relief” but “was not there when [the Applicant] left”.

(i) The Applicant signed a written summary of the interview.

... On 9 April 2015, Mr. Bramwell and Mr. Lyttle conducted a third interview of the Applicant. The interview may be summarized as follows:

(a) The Applicant was told that he would be asked “follow-up questions in relation to the missing bottle of red wine from the North Screening Building on 24 December 2014”.

(b) The Applicant was shown a clip of the CCTV footage he had previously been shown during his interview on 20 March 2015. This was not the full length of the video footage uploaded by the Respondent with his Reply.

(c) The Applicant identified himself in the CCTV footage.

(d) When asked whether he recognized the aqua-coloured bag on the counter, he replied, “Yes”.

(e) When asked whether he noticed a yellow receipt (property tag) attached to the bag, he replied, “No”.

(f) When asked whether he removed the yellow receipt (property tag) from the bag, he replied, “I don’t recall that”.

(g) When asked whether he opened the aqua-coloured bag, he replied, “I could not recall opening it. It was not locked to be open”.

(h) When asked whether he removed anything from the aqua-coloured bag, he replied, “I removed the bag from the counter to the upper level of the cabinet”.

(i) When asked whether he recognized the bottle of red wine inside the bag, he replied, “There was a bottle. I don’t recognize the colour”.

(j) When asked whether he removed the bottle of red wine from the aqua-coloured bag, he replied, “I said I removed the bag from the counter to the upper cabinet”.

(k) When asked whether he removed anything from the overhead cabinet, he replied, “I believe the same bottle. This bottle was being moved back and forth I think”.

(l) When asked whether he placed anything inside the aqua-coloured bag”, he replied, “No, I placed the bottle in the aqua coloured bag to the overhead cabinet”.

(m) When asked whether he removed anything from the aqua-coloured bag and placed it in a winter coat, he replied, “No”.

(n) When asked whether he removed a coat from the back of a chair and placed it on the back of the chair that he was sitting on, he replied, “No, I only move[d] my coat at the end of my relief hour to leave the tent”.

(o) When asked whether he wished to add anything further, he replied, “1 – I never received any item from the OIC [Officer-in-Charge] of the Post [i.e., Mr. Johnson] that was for safekeeping. 2 – When my one hour relief finished the OIC [i.e., Mr. Johnson] never came back to take over the Post. I was relieved by a phone call received by Officer Claudio telling me that, ‘there is a phone call for you’. When I received the phone call, that was the OIC of the Post [i.e., Mr. Johnson] telling me to take off. There was never a designated area for lost and found or items confiscated from visitors to be kept. The place where I was sitting on the 24

December where the incident happened there is a table and four chairs where officers hang out during their break and next to it there is a coat rack where they hang their coat and in the back there is a bathroom where the officers go back and forth all eight hours not just the forty five minutes that I was there. Not to mention there was a cake for a birthday on the counter on that day. It is shown clearly in the same footage where officer Van de Reep was sitting and having a piece of it. Officer Lim also came and she took a piece of the same cake.”

(p) The Applicant signed a written summary of the interview.

... On 10 April 2015, the SIU finalized its investigation report.

... By memorandum dated 17 April 2015, the Under-Secretary-General for Safety and Security referred the investigation report to the Office of Human Resources Management (OHRM) for appropriate action (the “referral memorandum”).

... By memorandum dated 5 May 2015, OHRM requested the Applicant to respond to formal allegations of misconduct under ST/AI/371 (Revised disciplinary measures and procedures), as amended (the “allegations memorandum”). The specific allegation against the Applicant was that, “on 24 December 2014, [he] engaged in misconduct by taking, without authorization, a bottle of wine belonging to a third party”. The Applicant was informed that, if established, his conduct would constitute a violation of Staff Regulation 1.2(b) and of the Security and Safety Service’s standard operating procedures (SOPs). He was provided with a copy of the investigation report and all annexes thereto, including the full length of the CCTV footage. He was requested to provide his comments within two weeks of his receipt of the allegations memorandum, but was informed that he could request an extension of time. He was also informed that he could avail himself of the assistance of the Office of Staff Legal Assistance (OSLA), or any other counsel at his own expense.

... Together with the allegations memorandum, OHRM provided the Applicant with a copy of the referral memorandum, the investigation report and all supporting documentation. OHRM also provided the Applicant with a copy of the entire CCTV footage; the specialized video player software to view the footage; and three shorter extracts from the footage that could be viewed without the specialized software, covering the time periods 11:49

a.m. to 11:57 a.m.; 12:17 p.m. to 12:19 p.m.; and 12:49 p.m. to 12:51 p.m. on 24 December 2014. The Applicant was informed that the supporting evidence included the plastic bag itself, which he could view by making arrangements with OHRM.

... On 8 May 2015, OSLA requested, on the Applicant's behalf, an extension of time until 10 June 2015 to respond to the allegations of misconduct. The request was granted.

... On 20 May 2015, the Applicant submitted comments on the allegations of misconduct. Among other things, the Applicant stated that:

(a) He had "never taken, stolen, concealed, opened, consumed or otherwise taken control and carried with [him] any wine bottle on 24/12/2014 in or out of the UN premises" and, more specifically, had not placed the bottle "in the jacket on the chair". He was "totally innocent of the charges laid against [him] concerning this wine bottle".

(b) His answers to the questions put to him during the interviews on 20 March and 8 April 2015 "were based on very limited portions of [the] CCTV footage [of] the Holding Area, none of which indicated that [he] was holding the bottle and hiding it in the jacket". Moreover, he had not been provided with "all the CCTV footage from all other cameras filming different angles in the Holding Area, which would clearly have confirmed that [he] never put in the jacket any wine bottle".

(c) The investigation targeted him and was biased against him. In support of this assertion, the Applicant stated that investigators failed to interview "12 other persons who had entered and left the Holding Area on 24/12/2014".

(d) Contrary to the allegations memorandum, it was "by no means apparent anywhere from the video footage shown to [him]" (emphasis in original) that he had engaged in the alleged conduct. Rather, the facts set out in the allegations memorandum were "personal and speculative opinions".

... By e-mail dated 21 May 2015, OHRM informed the Applicant that, on the basis of his comments, it had requested DSS to: (a) confirm whether there were other CCTV cameras installed in the North Screening Building that would have captured different angles of the Holding Area; and (b) if so, indicate whether the footage from any such cameras was reviewed in the context of

the investigation. OHRM informed the Applicant that, in response, DSS had stated as follows:

Sgt. Ibrahim's assertion is incorrect. Please refer to the below photos of the area in question. While there are indeed multiple cameras installed in the Screening Building, at the time of the incident, only one was actually focused on the Holding Area (location of interest). In February of this year (2015) long after the incident had occurred, an additional camera was installed to monitor a Safe that is in the same Holding Area. The cameras in the Screening Building are dedicated to capture specific activities, such as X-ray processing and bag/package checks, to facilitate the capture of full face images of all persons entering the premises, and of course the Holding Area. The camera dedicated to the Holding Area, was the only one reviewed, because it held the sole recording of the transactions and sequence of events that occurred in the Holding Area.

... OHRM also sent the Applicant photographs provided by DSS to support its response. OHRM requested the Applicant to submit any further comments on the matter by 29 May 2015.

... By e-mail dated 25 May 2015, the Applicant provided further comments. His comments may be summarized as follows:

(a) The Applicant reiterated his denial of the allegations against him.

(b) There were some 22 CCTV cameras installed in the North Screening Building, of which two were located at the end of the building closest to the Holding Area and were specifically focused on the Holding Area. The Applicant stated that investigators had only reviewed the footage from one of those two cameras. He stated that the second camera "would have captured different angles of the Holding Area". To support his assertion, the Applicant provided a photograph of the Holding Area, showing the location of the camera that he alleged would have captured different angles of the Holding Area.

(c) The Applicant had served DSS for more than 25 years, [both as] a Sergeant and Team Leader and, as recently as May 2015, had received a performance evaluation of "frequently

exceeding performance expectations” for the 2014–2015 performance cycle.

... By e-mail dated 27 May 2015, OHRM informed the Applicant that, on the basis of his comments, it had requested DSS to provide additional information regarding whether the camera depicted in the photograph that the Applicant had provided on 25 May 2015 was installed at the time of the alleged incident and, if so, which area(s) of the North Screening Building it would have recorded. OHRM informed the Applicant that, in its response, DSS had stated as follows:

One of the security benefits of using the type of ‘domed camera’ installation in areas such as our Screening Buildings is that individuals, including those who may be conducting hostile surveillance on our facilities, cannot tell where these cameras are focused. The orientation of these cameras is not information that is readily available. Sgt. Ibrahim would have had to get this information from someone in the Security Operations Center, who in turn would have to be authorized to provide any such information, even to another member of the Service.

Sgt. Ibrahim, obviously seeing the camera hanging in the vicinity, and unable to determine what it is pointing at, has made an erroneous assumption. This is the exact deterrent effect that is expected.

This particular camera is a fixed camera; meaning it does not pan, tilt, or zoom (PTZ). Or, more clearly stated, it cannot be moved remotely from the Security Operations Center to focus on anything other than its fixed area of reference.

Please refer to the below photos, which were taken by Sgt. Bramwell, OIC Special Investigations Unit. Photo #1, shows the camera to which Sgt. Ibrahim refers, and it is indeed in the vicinity of the ‘Holding Area.’ However, please refer to the Photo #2, which is the narrow field of view being recorded by this particular camera.

As indicated in my earlier email, the cameras in the Screening Building are specifically positioned for different functions. This particular camera is

meant to solely capture access to a restroom area in the Screening Building that is used as a weapons clearing area for Law Enforcement officers who are not allowed to take firearms on to the premises. A firearm storage box is also kept in the room, hence the abundance of caution as to who goes in and out of that room.

This particular camera was installed and went online prior to the start of the last General Debate of the General Assembly (69th Session). As stated, it cannot be adjusted without special permission from the Chief of Service, and there is no report or evidence to suggest that its focus was readjusted since it went online.

... OHRM also sent the Applicant photographs provided by DSS to support its response. OHRM requested the Applicant to submit any further comments on the matter by 4 June 2015.

... By e-mails dated 29 May 2015 and 1 June 2015, the Applicant provided further comments. His comments may be summarized as follows:

(a) He had not engaged in the alleged conduct.

(b) Despite DSS' indication that there was only one camera that had filmed the incident, the investigation was "incomplete in terms of reviewing all relevant CCTV camera records". Investigators had "failed to provide [the Applicant] with any CCTV footages from that second CCTV camera that [he] provided a photo of, or from any other camera in the Screening Area filming different angles of the Holding Area".

(c) The investigation was incomplete because investigators had not "contact[ed] all witnesses" and because it did not represent "a balanced and objective picture of all the facts". The Applicant argued that there was no "corroborated evidence of any incident where [he] would have put in the jacket wine bottle" (emphasis in original). He claimed that he had been "unfairly and without any evidence targeted in this investigation by the investigation report and by DSS investigators, without any benefit of the doubt", which was "indicative of bias against [him] and contrary to all UN policies and standards".

... By letter dated 24 July 2015, the Applicant was informed that the Under-Secretary-General for Management had concluded

that the allegations were established by clear and convincing evidence, and had decided to dismiss him from service in accordance with Staff Rule 10.2(a)(ix). The letter was delivered to the Applicant on 27 July 2015.

23. The letter of 24 July 2015, sanctioning and dismissing the Applicant, stated *inter alia* (emphasis added):

By memorandum dated 5 May 2015, it was alleged that, on 24 December 2014, *you took, without authorization, a bottle of wine belonging to a third party.*

...

For the foregoing reasons, the Under-Secretary-General for Management has concluded that *it is established, by clear and convincing evidence, that, on 24 December 2014, you took, without authorization, a bottle of wine belonging to a third party.* The Under-Secretary-General for Management has further concluded that, through your actions, you failed to “uphold the highest standards of ... integrity”, in violation of Staff Regulation 1.2(b). Furthermore, you failed to “conduct [yourself] in a manner that exemplifies the highest ideals of the Organization”, contrary to the provisions of paragraph 20.02 of the Security and Safety Service’s SOPs, and failed to “remain alert, engaged and professional” while on duty, contrary to the provisions of paragraph 20.03 of the Security and Safety Service’s SOPs.

The Under-Secretary-General for Management further concluded that your procedural fairness rights were respected throughout the investigation and disciplinary process.

In determining the appropriate disciplinary measure, the Under-Secretary-General for Management has had regard to the Organization’s past practice in similar cases, as well as the specific circumstances of this case and aggravating and mitigating considerations. Among other things, the Under-Secretary-General for Management has noted the following considerations:

(a) *Theft* constitutes a serious lapse of integrity. A single instance of such conduct generally results in the irreparable breach of the trust placed in a staff member by the Secretary-General, thereby severing the possibility of a continued employment relationship. As such, cases of theft and similar conduct consistently attract sanctions at the strictest end of the spectrum.

(b) Your actions are aggravated by the fact that, as a Security Sergeant, you held a position of heightened trust and authority. The responsibility of security officers to act with the utmost integrity, especially as concerns the protection of life and property, particularly when such property has been entrusted to the Security and Safety Service for safekeeping, cannot be overstated. For a staff member with a supervisory role, such as yours, such expectations can only be heightened. Your actions were a direct abuse of the trust placed in you. In this respect, it bears noting that you had access to the Holding Area by virtue of your functions as a DSS staff member.

(c) While it was noted that you have served the Organization satisfactorily for more than 25 years, taking into account the seriousness of your conduct and the aggravating factors noted above, the Under-Secretary-General for Management did not consider that this period of service served to mitigate the otherwise applicable sanction.

On the basis of your conduct, and having taken into account the principles of consistency and proportionality, as well as aggravating and mitigating considerations, the Under-Secretary-General for Management has decided to impose on you the disciplinary measure of dismissal, in accordance with Staff Rule 10.2(a)(ix). Your dismissal will take effect on the date of your receipt of this letter.

Applicant's submissions

24. The Applicant's submissions may be summarized as follows:

Whether the facts were established and amounted to misconduct

a. The facts in question have not been established. The Respondent failed to establish by clear and convincing evidence that the Applicant engaged in misconduct by taking the bottle of wine of a third party without authorization. The following is of relevance:

i. Firstly, the inference applied by the Respondent is based upon the premise that Applicant "turned his back to

the CCTV camera”. There are several cameras in the North Screening Building. The Respondent could have produced the footage of any of these cameras to support its allegations, if such allegations were true. Instead, the Respondent purposefully relies and speculates on an inconclusive excerpt of the CCTV footage. The Respondent did not establish the alleged facts that the Applicant removed the bottle of wine from the aqua-colored bag by clear and convincing evidence;

- ii. Secondly, the Respondent infers that the Applicant removed the bottle of wine from the aqua-colored bag on the assumption that such bag could not contain both the bottle of wine and a bottle of beer and that Applicant could not have “wrapped the top of the aqua-colored bag downward in the manner in which (he) did”. These were mere speculations from Respondent;
- iii. Thirdly, the record shows that the Respondent failed to establish by clear and convincing evidence that Applicant allegedly carried the bottle of wine out of the Holding Area, which is a critical element of Respondent’s allegations of theft. In fact, the Respondent’s allegations varied from alleging that the Applicant concealed the bottle of wine “in a jacket he had just placed next to him” to alleging that the Applicant “removed the wine bottle from the bag and placed it inside the jacket that was hanging on the chair opposite the aqua-coloured bag or in something else next to the jacket”. Such variation clearly shows that the Respondent speculated about the Applicant’s liability

instead of conducting a thorough investigation. In fact, the Respondent failed to identify the owner of the jacket that the Applicant allegedly used to conceal the bottle of wine. The Respondent briefly interviewed two officers about that jacket and did not investigate further. Also, the Respondent did not review the footage from surveillance cameras located outside the Holding Area in order to establish that the Applicant actually carried the bottle out. Instead, the Respondent merely inferred from the absence of such bottle that the Applicant took it;

- iv. Fourthly, the Respondent also alleges that the Applicant took the bottle of wine because the aqua-colored bag was found in the overhead cabinets in the Holding Area with a bottle of beer inside at approximately 3:50 p.m. on 24 December 2014 and that the CCTV footage establishes that Applicant placed the bag in such overhead cabinets at approximately 12:18 p.m. However, not only the Respondent does not prove by clear and convincing evidence that the Applicant removed the bottle of wine from the bag, but also it does not prove he was the last individual to handle the aqua-colored bag until it was found and taken by Security Officer Van de Reep at or about 3:50 p.m. The Respondent does not produce, or refers to, the CCTV footage of the Holding Area from the time Applicant placed the bag with its content in the Holding Area until such bag was retrieved from the overhead cabinet by Security Officer Van de Reep. Consequently, the Respondent does not prove by clear and convincing

evidence that at the time Applicant placed the bag in the overhead compartment, such bag did not contain the bottle of wine. Therefore, since the facts are not established, it is requested that the Tribunal rescind Respondent's administrative decision;

Proportionality

b. The Respondent's decision is manifestly disproportionate to the alleged misconduct. The Respondent must take into account mitigating circumstances. The stolen bottle of wine was not an asset of the Organization and, if the facts are established, the theft would constitute the Applicant's unique act of misconduct during a stellar career of more than 25 years at the service of the Organization. The Applicant underlines that he served the Organization remarkably for a long period of time and was not convicted of any misconduct during his career. On the contrary, the Applicant, a skilled Security Sergeant, risked his life for the Organization and received many praises for his good services. During his service, the Applicant protected the property of the Organization and the life of dignitaries such as current and former United Nations Secretary-Generals, heads of states and ambassadors. Consequently, had the Respondent proved the Applicant's alleged misconduct, it would constitute an isolated incident that could not outweigh his praiseworthy career. The Applicant underlines that in a similar case, a Security Sergeant was not sanctioned with the same severity by Respondent (see *Austin* UNDT/2013/080). Hence, Applicant concludes that the decision to dismiss him is manifestly disproportionate to the theft alleged. In light of the above-mentioned mitigating circumstances and the jurisprudence of the Dispute Tribunal and the Appeals Tribunal, the decision to dismiss

Applicant is manifestly disproportionate. Such decision constitutes, in fact, an abuse of discretionary authority;

Procedure

c. The procedure followed was irregular. Given the information available to the investigators already by the time of the first interview on 8 January 2015, the Applicant should have been granted full due process during that interview. The Applicant should have been identified in writing as the alleged wrongdoer and given the opportunity to respond to those allegations. He should have been provided with a copy of the documentary evidence of the alleged misconduct and notified of his right to seek legal assistance. The interviews conducted with the Applicant and the review of the CCTV footage during the second and third interview were in violation of his due process rights and “the unique purpose of such confrontation was to elicit a confession or admission from Applicant”. These procedural violations could not have been cured by the due process rights afforded to him on 5 May 2015.

Respondent’s submissions

25. The Respondent’s submissions may be summarized as follows:

Whether the facts were established and amounted to misconduct

a. The facts on which the disciplinary measure was based are established by clear and convincing evidence. The CCTV footage conclusively established that the Applicant engaged in the alleged conduct. The Applicant was video recorded: (a) examining the plastic bag and its contents; (b) removing the wine bottle from inside the bag; and (c) replacing it with a bottle of beer. The CCTV footage further establishes

that the Applicant acted deliberately and with full knowledge of his actions. The Applicant claims that the CCTV footage does not show him removing the bottle of wine from the plastic bag. Indeed, at the very moment that the Applicant removed the bottle of wine from the bag (11:54 a.m.), the CCTV camera's view was obstructed by the Applicant's body. However, the Respondent submits that it can be easily inferred, from the CCTV footage, that the Applicant removed the bottle of wine from the bag;

b. By taking a bottle of wine belonging to a third party, the Applicant failed to "uphold the highest standards of ... integrity", in violation of staff regulation 1.2(b). Furthermore, the Applicant failed to act in accordance with the Security and Safety Service's Standard Operating Procedures;

Proportionality

c. The disciplinary measure of dismissal was proportionate to the Applicant's actions. Theft constitutes a serious lapse of integrity. A single instance of such conduct generally results in the irreparable breach of the trust placed in a staff member by the Secretary-General, thereby severing the possibility of a continued employment relationship. Indeed, cases of theft and similar conduct consistently attract sanctions at the strictest end of the spectrum. The Applicant's actions were aggravated by the fact that, as a Security Sergeant, he held a position of heightened trust and authority. His actions were a direct abuse of the trust placed in him;

d. The Under-Secretary-General for Management noted that the Applicant had served the Organization satisfactorily for more than 25 years. However, taking into account the seriousness of his conduct it

was not considered that this period of service served to mitigate the otherwise applicable sanction. Similarly, the fact that the Applicant may have received positive performance evaluations does not detract from the conclusive evidence that he engaged in misconduct, and does not constitute a mitigating factor. An excellent service record does not entitle a staff member to commit serious misconduct;

Procedure

e. The Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process. The Applicant was thrice interviewed by investigators in connection with the investigation into his suspected conduct. During his interviews, he was shown relevant parts of the CCTV footage of the incident and was specifically invited to comment on his actions as shown therein. In the allegations memorandum, the Applicant was informed of the allegations against him. He was provided with copies of all relevant documentary evidence, as well as with copies of the full CCTV footage of the event. The Applicant was informed of his right to seek the assistance of counsel and was given the opportunity to comment on the allegations against him. The Applicant was granted an extension of time to submit his comments on the allegations. The Applicant submitted comments on the allegations. His comments were fully considered and, on their basis, additional input was twice sought from DSS on two occasions. On each occasion, the additional information obtained from DSS was shared with the Applicant and he was afforded further time to comment on it. The Applicant's further comments were considered. The Applicant was fully informed of the reasons for his dismissal. Further, although during the interviews the Applicant was shown the relevant portions of the interviews, he suffered no prejudice as he was provided with the full length of the CCTV footage at the time he

was sent the memorandum of 5 May 2015, containing the allegations of misconduct.

Applicable law

26. Staff rule 10.2(a) states:

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.

Consideration

Scope of judicial review

27. When considering appeals against the imposition of disciplinary measures for misconduct, the Tribunal must examine whether the procedure followed is regular, whether the facts in question have been established, whether these facts

constitute misconduct, and whether the sanction imposed is proportionate to the misconduct committed (see *Mahdi* 2010-UNAT-018; *Sanwidi* 2010-UNAT-084; *Masri* 2010-UNAT-098). The Appeals Tribunal has reiterated in a number of judgments that due deference is to be afforded to the decision of the decision-maker and that it is not the role of the Dispute Tribunal to substitute a decision that it may have otherwise made, had it been in the shoes of the decision-maker (*Doleh* 2010-UNAT-025; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523; *Ogorodnikov* 2015-UNAT-549).

Whether the facts were established

28. As the Appeals Tribunal stated at para. 17 of *Liyanarachchige* 2010-UNAT-087,

In a system of administration of justice governed by law, the presumption of innocence should be respected. Consequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.

29. When termination is a possible outcome, there should be sufficient proof, and misconduct must be established by clear and convincing evidence, which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable (*Molari* 2011-UNAT-164).

Officer Lim's evidence

30. Security Officer Lim testified that, on 24 December 2014, she took over the post at 9:30 a.m. Officer Lim confirmed that, prior to the wine bottle being left in the storage area, she had seen a beer bottle in the same area, which had remained uncollected for a long time. On that Christmas Eve, she was delegated the task of logging prohibited items into a log book. These items would generally

be later collected by the owners. Uncollected items would be placed in the cabinet. She spoke with the intern, who deposited a bottle of wine for safekeeping. Officer Lim accepted the wine bottle in a plastic bag, prepared two stickers, and placed one of them on the plastic bag and gave the other one to the intern. Officer Lim testified that, when she left the wine bottle on the desk, it was wrapped tightly inside a plastic bag. She also logged the item in the log book. Lt. Johnson, who was seated in the area, was informed thereof.

Applicant's evidence

31. The Applicant testified that he worked for the United Nations for more than 25 years. His functions included some of the most sensitive assignments, including providing close protection to high level dignitaries. He recalled that he was a survivor of the Baghdad bombings, that he had been assigned to Afghanistan, that his assignments took him to the Congo and Haiti, including during the 2010 earthquake. He recounted several other dangerous and highly sensitive operations he had been involved in. When it was put to him that he was simply doing his job, the Applicant appeared visibly traumatized and became extremely emotional, such that the court had to take a brief adjournment.

32. The Applicant testified that, on 24 December 2014, he was supposed to relieve Lt. Johnson for his one-hour lunch break. When the Applicant arrived at the post, Lt. Johnson rushed out because he was meeting someone outside for Christmas lunch. Therefore, no proper hand-over took place, in particular, the Applicant was not informed of any objects that were confiscated, left behind, or handed in by outside visitors. He did, however, notice a plastic bag, although he had not been informed of its contents. The Applicant acknowledged that he “manipulated” the plastic bag, because he felt that its presence on the security supervisor’s counter was “suspicious”. The Applicant explained that the desk should have only the computer and the printer, and nothing else. The Applicant testified that, when he opened the plastic bag and saw that it contained a bottle of

wine, he reached and opened the overhead compartment above the desk. He found that the top shelf contained a bottle of beer. The Applicant testified that he then put the bottle of beer in the same plastic bag as the bottle of wine, and put the plastic bag containing both the beer bottle and the wine bottle in the overhead compartment. The Applicant testified that he left the post at approximately 12:50 p.m., following an instruction that he should take off as Lt. Johnson had telephoned another officer to inform that he had been delayed and that the Applicant should leave. Therefore, no proper hand-over took place at the end of the relief either. He testified that, after he left the post, he went directly to the armory to surrender his gun, and that therefore he could not have concealed a bottle of wine.

33. The Applicant testified that the first time he had learned about the missing wine bottle was on 5 January 2015. The Applicant stated that he had no explanation for the missing bottle of wine, but his view was that the investigators failed to explore and follow-up on other leads. In particular, no other footage of the surrounding areas was examined to look at the movements of other people in the area, and at least 12 witnesses who entered and left the holding area at the material time were not interviewed. He said no action was taken regarding the improper hand-over prior to and following his relief of Lt. Johnson's shift, nor regarding the birthday party.

34. When asked why he did not mention placing the beer bottle in the bag during his first interview, the Applicant explained that such was his recollection at the time, as the interviews took place over the course of several months after the wine had disappeared. He answered the questions to the best of his knowledge.

Conclusions

35. The Applicant was charged with taking, “without authorization, a bottle of wine belonging to a third party”. The letter of 24 July 2015 also specifically referred to “theft”, noting that “[t]heft constitutes a serious lapse of integrity”. *Black’s Law Dictionary* (West Publishing Co., 1990, 6th ed.) defines “theft” as

[a] popular name for larceny. The act of stealing. The taking of property without the owner’s consent. *People v. Sims*, 29 Ill. App. 3d 815, 331 N.E.2d 178, 179. The fraudulent taking of personal property belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

36. The Applicant, however, says that he has never taken, stolen, concealed, opened, consumed or carried the wine bottle in and out of the United Nations premises.

37. Having reviewed the circumstances of this case and the parties’ submissions, the Tribunal finds that there is no direct evidence that the Applicant “took” or stole the wine bottle, let alone appropriated it for his own use or benefit. The case against the Applicant was based on the CCTV footage and inferences drawn by the investigators. However, on the Respondent’s own submissions, the video footage is inconclusive on the alleged “taking” of the bottle.

38. On the day of the incident, the Applicant left the screening facility at approximately 1 p.m. The intern returned to pick up her wine bottle at 3:45 p.m., which is when it came to light that the bottle was missing. Therefore, for approximately two hours, the fact that the bottle was missing was unknown. Thus, there was a delay of two to three hours between the Applicant’s departure from the desk area and the discovery that the bottle was missing. The Applicant testified that there was much toing and froing in the area, there was a table and four chairs where security officers hung out, and where a birthday cake was being

consumed. There is no chain of evidence from the moment the Applicant left the holding area until the aqua colored bag was found by Security Officer Van de Reep at 3.30 p.m. It is possible that it went missing sometime between 1 p.m. and 3:45 p.m., after the Applicant's departure. It is unclear who had access to the area in that time period. The Applicant's inability to explain what happened to the wine bottle should not be viewed as a factor pointing to his guilt; if he did not steal the bottle, he would naturally not know what had happened to it.

39. In the absence of direct evidence, the Tribunal finds that other possibilities of what may have happened with the bottle were not fully explored by the investigators. Even if the Tribunal were to accept that the Applicant moved the wine bottle outside the plastic bag—which the Applicant denies—it is unclear whether he indeed secreted it anywhere, or carried it outside the security holding area with him, let alone stole it or even intended to steal it. In fact, even the Respondent's witnesses acknowledged that no intent was proven on the Applicant's part to steal the wine bottle (testimony of Officer James).

40. In conclusion, no evidence has been offered to the Tribunal that the Applicant took and carried the bottle outside the area and, moreover, stole or acted with the intent to steal it. These claims remain a conjecture, and do not take into account or explore other explanations of what may have happened. The Tribunal finds that the facts in this case have not been established to the required standard, that is, the alleged misconduct has not been established by clear and convincing evidence. All factors considered, the Tribunal does not find that the Administration has established by clear and convincing evidence that the Applicant "took" the wine bottle, let alone stole it or acted with the intent to steal it by converting it to his own use or benefit.

Whether the facts amount to misconduct

41. The Respondent's case was based on inconclusive evidence linked together by certain inferences and assumptions, without other possible explanations having been given due weight and consideration. As the facts have not been established, the Applicant's actions cannot be classified as misconduct.

Proportionality

42. The jurisprudence on proportionality of disciplinary measures is well-settled. The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary. Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure. However, it is not the role of the Dispute Tribunal to second-guess the correctness of the choice made by the Secretary-General among the various reasonable courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. (See *Doleh* 2010-UNAT-025; *Aqel* 2010-UNAT-040; *Sanwidi* 2010-UNAT-084; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523; *Ogorodnikov* 2015-UNAT-549.)

43. As was noted in *Yisma* UNDT/2011/061, disciplinary cases tend to be very fact-specific and the Tribunal must exercise caution in extracting general principles concerning proportionality of disciplinary measures from the types of measures imposed in other cases, as each case has its own unique facts and features.

44. The Tribunal finds that, given that the facts have not been established by clear and convincing evidence, it follows that no disciplinary measures should have been applied to the Applicant.

Whether proper procedures were followed

45. The Applicant was interviewed three times—on 8 January, 20 March, and 9 April 2015.

Applicant's evidence

46. The Applicant testified that, in 2007, he was the subject of a disciplinary process and suspended for 18 months on full pay. The allegations in that case were also based on video evidence and were proved unsubstantiated. He received a formal apology from the Deputy Secretary-General. He stated that some of the individuals involved in that investigation are the very same persons who were involved in the investigation of the incident of 24 December 2014.

47. The Applicant testified that, when he was asked to review and sign copies of his interview records, he did not think the matter was serious, particularly at the early stages of the investigation. He stated that he did not read them carefully and did not take the matter seriously at that time, as it seemed like a mere formality. He testified that, during the first interview, all persons present were laughing at the absurdity of the situation, seeing it as a mere formality since it concerned a bottle of wine valued at USD19, and the Applicant “didn’t even bother to read what [he] saw”.

48. The Applicant’s evidence is that he felt that the matter was serious enough to inquire, before the second interview, whether he should have a lawyer present. The Applicant explained that he realized at that time that something was amiss but he answered questions and reviewed and signed the records of interviews as failure to do so and to assist the designated investigator would be deemed uncooperative and result in measures as stated on the statement form. He said he made the statements to deny walking away with a bottle of wine.

Sgt. Bramwell's evidence

49. Sgt. Bramwell testified that, at the time of the incident, he was on annual leave. He returned to the office on Monday, 5 January 2015, and reviewed the CCTV footage on the same day. Sgt. Bramwell testified that, having reviewed the footage, he formed the view that the Applicant had moved the wine bottle.

50. Sgt. Bramwell testified that he took notes on his laptop during the interviews, and that he gave them to the Applicant for his review. Sgt. Bramwell testified that he had informed the Applicant that he could make any changes he wanted to the notes. The Applicant reviewed the notes for each of the three interviews and signed off on them, confirming their accuracy. Sgt. Bramwell explained that he did not show the CCTV footage to the Applicant during the first interview because the rules do not require that this be done. However, he showed the relevant portions of the CCTV footage during the second interview. Sgt. Bramwell explained that, since the Applicant did not mention the wine bottle during the first interview, Sgt. Bramwell considered it necessary to show him the CCTV footage. However, the Tribunal notes that the first statement requested from the Applicant was very general "with respect to his relief duty on 24 December 2014". It was only at the second interview that the Applicant was informed again in very general terms that he would be asked about "a missing item". Sgt. Bramwell explained that he conducted the third interview to give the Applicant the opportunity to explain what happened to the wine bottle. During the third interview, he was shown the same footage.

51. Sgt. Bramwell explained that, although in his view the CCTV footage showed the Applicant moving the wine bottle, he considered it necessary to interview the Applicant three times because he did not know what the Applicant might have done with the bottle, and he wanted to hear what the Applicant had to say in this regard. He explained that he considered this to be in the Applicant's interests, and he wanted to give him a fair opportunity to provide his explanations.

Sgt. Bramwell commented that he may have been assuming something and he could be wrong. When asked why the proceedings dragged on for four months, Sgt. Bramwell testified that he wanted to find out what the Applicant did with the wine bottle but he never found out what happened to the bottle. Sgt. Bramwell felt that, although he was persuaded from the CCTV footage that the Applicant had removed the bottle of wine, he wanted to find out what happened to it, in particular, what was the intent behind the Applicant moving it.

52. Sgt. Bramwell explained that Officer James was not present in the second interview because, having considered the rank structure and that Officer James was junior to the Applicant, Sgt. Bramwell had decided that it would be best if someone more senior was interviewing the Applicant.

53. Sgt. Bramwell explained that the Applicant's answers did not make much sense to him. The Applicant was talking about the cake, a party, that there was no proper hand-over, etc., but he never explained what happened to the wine bottle.

Officer James' evidence

54. Officer James testified that, having reviewed the CCTV footage, he reached the conclusion that Applicant had handled the bag that contained the wine bottle. Although Officer James testified that, based on the footage, the Applicant appears to have removed the wine bottle from the plastic bag, in Officer James' view, this did not necessarily mean that the Applicant stole the wine bottle, which is why the interviews were carried out. Officer James testified that, during the interviews, Sgt. Bramwell asked questions. Both Sgt. Bramwell and Officer James took notes. The Applicant reviewed the statement before signing. Officer James testified that there were no other cameras showing the same area, accordingly, there was no other footage to request or review. Officer James could not reach a conclusion on the Applicant's intent after the interview. However,

the Applicant provided statements that appeared in contradiction to the CCTV footage and that raised doubts regarding his credibility.

Inspector Lyttle's evidence

55. Inspector Lyttle's evidence was consistent with the evidence of Officer James and Sgt. Bramwell. He testified that he was made aware of the matter by Sgt. Bramwell, and reviewed the CCTV footage shortly thereafter. He stated that it was clear to him what had happened from the CCTV footage. Inspector Lyttle stated that he was expecting some explanation but the Applicant did not offer one, which was surprising.

Conclusion

56. The fact that the Applicant was interviewed three times does not, in and of itself, constitute a procedural violation. Nevertheless, once a case has been made out, a staff member should be charged instantly with sufficient particulars thereof. However, given that the CCTV footage was inconclusive, it is perhaps understandable that the investigators sought to clarify matters with the Applicant. During the investigation, the Applicant was informed of the allegations against him and was provided with the opportunity to review and sign off on the records of interviews and, during his second and third interview, reviewed portions of the CCTV footage which the Administration relied upon. He was also provided with the full CCTV footage on 5 May 2015, prior to the conclusion of the disciplinary process, and had the opportunity to review it and provide his comments. The Tribunal does not find that this case was marred by significant procedural irregularities or improper influence such as to constitute a lack of due process resulting in illegality or warranting compensation.

Relief

57. The Applicant seeks rescission of the contested decision with retroactive payment of salary or, alternatively, compensation in the amount of two years' net base salary plus all entitlements, as well as compensation for moral injury in the amount of three months' net base salary. The Applicant also requested post-judgment interest and pre-judgment interest, with interest accruing from the date each salary payment would have been made, compounded semi-annually.

General principles

58. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may *only* order one or both of the following ... (a) [r]escission ... [or] (b) [c]ompensation for harm, *supported by evidence*" (emphasis added). (See also *Antaki* 2010-UNAT-095, stating that "compensation may only be awarded if it has been established that the staff member actually suffered damage.")

Pecuniary loss

59. Both the Dispute Tribunal and the Appeals Tribunal have said that there is a duty to mitigate losses and the Tribunal should take into account the staff member's earnings, if any, during the relevant period of time for the purpose of calculating compensation (see, e.g., *Tolstopiatov* UNDT/2011/012; *Mmata* 2010-UNAT-092).

60. The Applicant testified that he was negatively affected by the allegations, the investigation, and the resulting decision. The Applicant testified that he felt devastated and betrayed by his Section and the Organization. The Applicant also testified that the dismissal affected him economically as he lost a source of

income and medical insurance, which he also used to provide insurance coverage for members of his family. He has to some extent rehabilitated himself economically but the Applicant testified that, although he has sporadic employment, it, however, does not provide for a source of income comparable to what he had with the United Nations.

61. The Applicant's earnings are irregular and not comparable to his earnings with the Organization. The point of mitigation was not pressed by the Respondent and, on the evidence before it, the Tribunal finds that Applicant's earnings during the relevant time period were so minimal that they can be disregarded for the purposes of compensation.

62. The Tribunal notes that, during the investigation and the disciplinary process, the Applicant continued to receive salary.

63. In view of the above, the Tribunal sets the amount of compensation to be paid as an alternative to the rescission of the contested decision and reinstatement at two years' net base salary.

Non-pecuniary loss

64. The Appeals Tribunal has consistently held that, as a general principle of compensation, moral damages may not be awarded without specific evidence supporting the claim for such relief (*Kozlov and Romadanov* 2012-UNAT-228; *Hasan* 2015-UNAT-541).

65. In his application, the Applicant sought compensation for moral injury caused by the contested decision. He testified that he suffered a mini-stroke and had to go to the emergency room ("ER") on two occasions shortly after his dismissal. He was dismissed on 27 July 2015 and, on 4 August 2015, had to be taken to a hospital. He was sent home with medicine and one day later he had

a mini-stroke and went back to hospital and stayed there in ER for two days. His testimony was that this was a direct consequence of his dismissal. The Applicant filed medical records to the effect that he experienced health-related issues as a result of his dismissal. He was also particularly stressed as one family member has had medical complications since birth and the Applicant was unable to pay for his medical treatment for some months.

66. The Applicant's credentials and impressive professional history in the security industry is a matter of unchallenged record. There can be no solace for the loss of secure regular employment in an Organization in which he served for over 25 years, with a clean record. Although the Applicant has found some vindication by way of this judgment, this matter weighs on him heavily as was evident by his demeanor and distress during the proceedings.

67. Having considered the evidence in this case and the jurisprudence of the Appeals Tribunal on issues of relief, the Tribunal finds that the present case satisfies the requirements for an award of compensation for moral injury.

68. The Tribunal awards the Applicant USD30,000 for emotional distress resulting from the unlawful dismissal from service.

Observations

69. The Tribunal commends the parties for preparing thorough, composite and helpful joint submissions in a rather complex matter. Clear and concise pleadings and joint submissions on agreed and disputed facts and legal issues, as well as the preparedness of Counsel, go a long way in expediting proceedings and assisting the Tribunal.

Orders

70. The decision to dismiss the Applicant is rescinded and the Applicant shall be reinstated in service retroactively from the date of dismissal. Alternatively, the Respondent may elect to pay the Applicant compensation in the amount of two years' net base salary.

71. The Applicant is awarded the sum of USD30,000 as compensation for emotional distress.

72. The aforementioned amounts shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Ebrahim-Carstens

Dated this 30th day of November 2016

Entered in the Register on this 30th day of November 2016

(Signed)

Hafida Lahiouel, Registrar, New York