

**Administrative Tribunal**

Distr.: Limited
31 January 2006
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1261

Case No. 1336

Respondent: The Secretary-General of
the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-
President; Ms. Brigitte Stern;

Whereas at the request of a former staff member of the United Nations, the
President of the Tribunal, with the agreement of the Respondent, granted an extension
of the time limit for filing an application with the Tribunal until 10 July 2003 and twice
thereafter until 10 January 2004;

Whereas, on 10 January 2004, the Applicant filed an Application requesting
the Tribunal, *inter alia*:

“ ...

- (a) To ask the Respondent to produce all documents relating to the present case, including previously classified or undisclosed documents;
- (b) To ask the Respondent to produce full official transcripts of the oral hearings held by the Joint Disciplinary Committee [(JDC)] ... on 7 and 12 December 2001 and 25 January 2002;
- (c) To ask the Respondent to instruct [Mona Lisa], staff member, Joint Inspection Unit (JIU), United Nations Office at Geneva (UNOG), to produce the two e-mail messages she addressed to the Applicant on 1st February 1999;
- (d) To hold oral proceedings ... to allow the Applicant to call and examine witnesses;

- (e) To order the Respondent to rescind his decision of 17 December 2002 to impose upon the Applicant the sanction of written censure for misconduct and to remove all references to such censure from the Applicant's Official Status file and all other files of the Organization;
- ...
- (t) To order the Respondent to pay to the Applicant the equivalent of 72 months' net base salary or US\$ 500,000, whichever is higher, as compensation for the moral and material damages he sustained ...;
- (u) To order the Respondent to pay to the Applicant additional compensation not [less than] the equivalent of 36 months' net base salary or US\$ 250,000, whichever is higher, in concept of exemplary and punitive damages ...; and
- (v) To draw to the attention of the Respondent staff rule 112.3, on *Financial Responsibility*"

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 June 2004 and periodically thereafter until 28 February 2005;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas the Applicant filed Written Observations on 15 July 2005;

Whereas, on 31 October 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

“Staff Member’s Professional Record

... The [Applicant] entered the service of the United Nations on 11 October 1969 for a probationary period of two years, as a translator/trainee, at the P-2/3 level, in the Office of Conference Services ... New York. He was granted a permanent appointment at the P-3 level on 1 October 1971.

....

[At the time which gave rise to the events of this case, the Applicant was serving as a Senior Research Officer at the P-5 level with the JIU in Geneva.]

... Having reached the age of retirement at the end of October 2001, the [Applicant] was granted an extension of three months and effectively left on 31 January 2002.

Summary of Facts

... A technical examination of the [Applicant's Personal Computer (PC)] revealed that in December 1998, his PC accessed the [e-mail] account of the Executive Secretary of the JIU.

... On 26 March 1999, a connection to the [e-mail] of the Executive Secretary ... from the computer of one of the JIU inspectors ... was made, while the latter was on leave.

... On 1, 8, 15, 17, and 21 June 1999, e-mails from the ... e-mail account *monalisaw69@hotmail.com* containing comments intimating a close personal relationship were sent, in the name of a Secretary of the JIU [Mona Lisa] to the ... Executive Secretary ...

... On 24 June 1999 ... the above-mentioned Secretary denied 'any knowledge of the existence of this commercial account, or of [their] transmissions'.

... The same day, the [Applicant] made a connection to his [e-mail] account from the computer of another JIU staff member ... in the presence of the latter.

... By memorandum dated 1 July 1999, the Executive Secretary ... requested the Chief, Security and Safety Section [(SSS)], to undertake an investigation concerning 'an alleged misuse of e-mail services with alleged malicious purposes'.

... On 2 and 6 July 1999, e-mails with sexual connotation were sent or forwarded from the ... mailbox of the Executive Secretary ... to the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women. [The latter] met with the Executive Secretary ... on 7 July 1999 and brought the messages to his attention.

... On 8 July 1999, the Executive Secretary ... notified the Chief, [SSS] about these new facts and asked that they be included in the ongoing investigation. The same day, another e-mail was sent from the ... mailbox of the Executive Secretary ... to the above-mentioned Adviser [and to other high-ranking female staff members.] On the same day [SSS] asked the Chief, Electronic Services Section (ESS), to undertake an investigation concerning the complaint dated 1 July 1999 by the Executive Secretary ... related to the improper use of the *monalisa* hotmail account. A fifth and last e-mail of the same nature was sent on 9 July 1999 to the same 3 staff members.

... Through a subsequent technical examination of the [Applicant's] PC ... it was ascertained that on 9 and 15 July 1999, his PC had accessed the ... mailbox of the Executive Secretary ...

...

... In the course of the technical investigation, it was decided that all Internet traffic of all computers of the JIU would be monitored. This monitoring went into effect on 20 July 1999.

...

... On 22 and 28 July 1999, the *monalisa* hotmail account was accessed from the [Applicant's] personal computer.

...

... [Following a request by the Chief, SSS] on 9 August 1999, the [Applicant's] computer was seized.

... On 10 August 1999, the [Applicant] was [interviewed] by the investigator: he denied any knowledge of the existence of the *monalisa* hotmail account and of the content of the improper e-mail messages. He also asserted that he had no information ... with regard to the ongoing investigation.

...

[On 31 August 1999, ESS submitted its report, confirming that on 22 July, the Applicant's PC was used 'to log into the Microsoft hotmail.com as *e-z ...@hotmail .com* and as *monalisaw69@hotmail.com*'. No evidence had been found indicating that it was Applicant himself who accessed the Executive-Secretary's computer.]

...

... On 28 September 1999, the [Applicant] was [interviewed] for the second time by the investigator and was informed about the result of the investigation. ...

...

... By memorandum dated 30 September 1999, the Chief, [SSS] informed the Executive Secretary ... that 'a staff member's computer and a JIU Inspector's computer [have] been used by an unknown person to access [his] e-mail account using [his] password'. ...

... On 5 October 1999, in relation with the *monalisa* hotmail investigation, the [Applicant] was informed about the results of the investigation with regard to the Internet connections from his PC on 22 and 28 July 1999. He was also asked if he was the author of these connections.

...

... On 8 December 1999, [SSS] communicated [to the Executive Secretary the] investigation report concerning the improper use of the e-mail address *monalisaw69@hotmail.com* and the sending of inappropriate e-mail messages ...

... On 21 December 1999, [SSS] transmitted [to the Executive Secretary another] investigation report related to the improper sending of pornographic drawings to top-ranking civil servants in New York under the guise of [his] e-mail address ...

...

... By memorandum dated 12 February 2000 ... the Executive Secretary ... requested the Director, Division of Administration, UNOG, to undertake ... disciplinary action against the [Applicant] for 'misuse of e-mail services with alleged malicious and perverse intent', and to 'recommend that the Secretary-General summarily dismiss [the Applicant] ... as the only disciplinary measure under staff rule 110.3 commensurable with this intolerable conduct'.

... By memorandum dated 8 March 2000, the Executive Secretary ... reiterated his previous request and provided his own comments 'on the process

and outcome of this investigation and more confidential background information’.

... By another memorandum dated 8 March 2000, he also expressed his ‘dissatisfaction and disappointment with the contents and professional quality of the technical report’ ...

...

... On 22 January 2001, the Director, Division of Administration, UNOG, submitted to the review of the Assistant-Secretary-General, [Office of Human Resources Management (OHRM)] ... the preliminary investigation reports on the case.

... By memorandum dated 11 May 2001, ... OHRM informed the [Applicant] about the allegations of misconduct contained in the preliminary investigation conducted by [SSS] and ESS, UNOG, from July 1999 to February 2000. [He was charged with] ‘violating the standards of conduct expected of staff members of the United Nations and with violation of staff regulation 1.2(q) and staff rules 101.2 (d) and (e)’ ...

...

... On 31 May 2001, the [Applicant] submitted comments on the allegations of misconduct against him ...

... By letter dated 24 July 2001, [the] Human Resources Management Service, Geneva, informed the [Applicant] that ‘having reviewed the entire dossier, and in accordance with paragraphs 9 (b) and 10 of [administrative instruction ST/AI/371 entitled “Revised Disciplinary Measures and Procedures” dated 2 August 1991] and staff rule 110.4 ... the Assistant-Secretary-General for Human Resources Management [had] decided to refer [the] case to the [JDC] for advice’.

On 21 March 2002, the JDC in Geneva submitted its report. Its conclusion and recommendation read, in part, as follows:

“Conclusion and Recommendation

89. The Panel **considers**, given the formulation of [the] charge [of ‘unauthorized entry into the personal computer of his supervisor ... which facilitated access to his e-mail and sending or forwarding documents in [the] name [of his supervisor]’ ... that the charge was not receivable.

90. Concerning the [charge that the Appellant accessed a commercial e-mail account and transmitted inappropriate messages containing sexual innuendos, purportedly from ... a staff member in his unit, to his supervisor], the Panel **concludes** that with regard to the first part – access ‘a commercial e-mail account’- the staff member has failed to comply with his obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules, in particular its regulation 1.2 *concerning basic rights and obligations of staff*, and to observe the standards of conduct of an international civil servant. It however **finds** that there is not enough evidence in support of the second part of the allegation –transmission of ‘inappropriate messages containing sexual innuendos, purportedly from ... a staff member in his unit, to [his] supervisor’.

91. The Panel finally **deems** that insufficient proof [has] been put forward in support of the [third] charge [namely the transmission of offensive and pornographic material ostensibly from the e-mail address of the Applicant's supervisor to three female senior staff members in New York.]

92. The Panel therefore finds that ...

- a. There is evidence that the [Applicant] is responsible for impersonation of another staff member of his unit, and therefore of harassment and threat in the sense of Paragraph 2(d) of ST/AI/371;
- b. There is evidence that the [Applicant] misused the United Nations equipment, in the sense of paragraph 2(e) of ST/AI/371.

93. ... [T]he Panel **considers** that the explanations provided, especially on the connection of his computer to the hotmail account *monalisaw69@hotmail.com* immediately after having entered his own hotmail account, are not convincing and do not exonerate the [Applicant].

94. In view of the above, the Panel **concludes** that the [Applicant] has engaged in misconduct for which disciplinary measures must be imposed.

95. Therefore the Panel **recommends** to the Secretary-General that a written censure be addressed to the [Applicant], that he not be re-hired under any kind of contract, and that the written censure as well as a copy of this report be included in his Official Status file ... Furthermore, the Panel also recommends that OHRM should inform any Office indicating an interest in recruiting him, about the censure and the report.

Special remarks

96. Notwithstanding the conclusions reached in the present case, the Panel wishes to draw the attention of the Secretary-General [to] the following points:

- a. The Panel noted that ... rather than let the investigation take a normal course, the Executive Secretary intervened at different levels and on many occasions in its handling. ...
- b. The Panel would also like to emphasize the imperative need for clear guidelines for the procedures to be followed in the conduct of any investigation that may result in a case being presented to the [JDC], particularly one that concerns the rapidly evolving field of information technology. ... Above all, the inherent rights of staff members who are being investigated must be given due respect and the staff members themselves must be given due process.
- c. Furthermore, the Panel wishes to lay emphasis on the urgent need for better guidelines on the use of Information Technology for the staff-at-large. ...
- d. It would also like to recall that the JIU inspectors, although they are not staff members, have an obligation to cooperate with bodies of the internal administration of justice of the United Nations. ...

- e. Finally, the Panel strongly emphasizes that the Secretariat shall continuously make every possible effort to drastically shorten the period of time between the investigation and the presentation of a case to the JDC. ...”

On 17 December 2002, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

“The Secretary-General agrees with the JDC's findings and conclusions and he further considers that your conduct in accessing another staff member's commercial e-mail account and impersonating her fell short of the standards of conduct expected of an international civil servant and amounted to misconduct within the meaning of staff rule 110.1. The Secretary-General has therefore decided to accept the JDC's unanimous recommendation to impose upon you a written censure. This letter constitutes the written censure and a copy of it will be placed in your official status file. OHRM will also be requested to inform any office that might be interested in recruiting you of the JDC report and this decision.”

On 10 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The investigation conducted by SSS was substantively and procedurally flawed and, as a consequence, violated the Applicant's rights of due process and fair treatment.
2. The Executive Secretary's interference in the investigation was improper, represented a conflict of interest and influenced the course of the investigation and the subsequent disciplinary proceedings.
3. The Administration presented charges against the Applicant on the basis of false, inadequate or dubious evidence.
4. There were undue delays in adjudicating the Applicant's case.
5. The JDC failed to accord the Applicant due process and fair treatment and made serious errors of law in its consideration of the charges, as well as in its findings, conclusions and recommendations. Furthermore, the JDC exceeded its powers in recommending a sanction not foreseen in the Staff Regulations and Rules.
6. The Respondent exceeded his discretionary powers in accepting the JDC's recommendation.

Whereas the Respondent's principal contentions are:

1. The Applicant's rights were not violated in the investigation of the case.
2. The JDC's findings were reasonable in view of the facts before it.
3. The imposition of the disciplinary measure against the Applicant was a proper exercise of the Secretary-General's discretionary authority.

The Tribunal, having deliberated from 31 October to 23 November 2005, now pronounces the following Judgement:

I. This case involves the use of the Internet for the purposes of sending e-mails which are pornographic or sexual in content. The Applicant is appealing to the Tribunal against the decision by the Administration dated 17 December 2002 which imposed upon him a written censure and the recommendation that the censure and the report of the Joint Disciplinary Committee (JDC) be placed in his official status file and moreover any office indicating an interest in recruiting him should be informed.

II. The Tribunal does not consider it necessary to obtain any other documents beyond the numerous reports, records of investigations and summaries of interviews contained in the dossier and also considers there to be no use in holding a hearing, after so much time has passed since the events and given the acute information technology problems involved about which countless reports had been drawn up.

III. Three charges were made against the Applicant, as noted in the Joint Disciplinary Committee report dated 21 March 2002:

“the staff member would have particularly

- a. made “unauthorized entry into the personal computer of his supervisor ... which facilitated gaining access to his e-mail and sending or forwarding documents in [the] name [of his supervisor]”;
- b. accessed “a commercial e-mail account and [transmitted] inappropriate messages containing sexual innuendoes, purportedly from ... a staff member in his unit, to [his supervisor]”;
- c. transmitted “e-mail messages containing offensive and pornographic material ostensibly from the e-mail address of [his supervisor] to three female senior staff members in New York”.

The second charge concerned more specifically e-mails which the Applicant was said to have sent to the Executive Secretary of the Joint Inspection Unit (JIU), presenting them as though they had been sent by a certain Mona Lisa, who was a

secretary in that department; according to the same Joint Inspection Unit report, “[o]n 1, 8, 15, 17, and 21 June 1999, e-mails from the commercial e-mail account *monalisaw69@hotmail.com* containing comments intimating a close personal relationship, were sent, in the name of a secretary of the Joint Inspection Unit (JIU) ... to the staff member’s supervisor ..., Executive Secretary of the ... JIU”.

The third charge concerns a series of e-mails sent from the computer of the Executive Secretary to three female senior staff members, all working in the field of promotion of women, described by the Executive Secretary as “three prominent high-level [United Nations] female officials very involved in the efforts to achieve gender equality and improve the situation of women in [the] Secretariat” :

“On 2 and 6 July 1999, e-mails with sexual connotation were sent or forwarded from the ... mailbox of the Executive Secretary of the JIU to the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women ...

On 8 July 1999 ... another e-mail was sent from the ... mailbox of the Executive Secretary of the JIU to the above-mentioned Adviser’s ... mailbox, to the Chief, Decolonization Unit, Department of Political Affairs and member of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and to the Chief, Office of the Under-Secretary-General for Management ... A fifth and last e-mail of the same nature was sent on 9 July 1999 to the same 3 staff members”.

The Executive Secretary, from whose computer the e-mails had been transmitted — and this event is not contested — denied being the author of these messages, and accused the Applicant of having sent them by fraudulent use of his computer.

IV. It is useful here to recall the conclusions reached by the Joint Disciplinary Committee. It considered that the first charge against the Applicant was not receivable. As for the second charge, the Joint Disciplinary Committee indicates that there is not enough technical evidence to confirm that the Applicant accessed the account *monalisaw69@hotmail.com* on the days when the disputed messages were sent. On the dates when log-ons by the Applicant's computer would have appeared to have been detected, no disputed e-mail had been sent. The JDC therefore deemed that there was insufficient evidence that it was the Applicant who sent the disputed e-mails from the account *monalisaw69@hotmail.com*, but considered that he should be censured for accessing a commercial e-mail account, which largely invalidates the second charge, since the charge against the Applicant of sending the disputed e-mails had been withdrawn. The only element of it retained was that the Applicant, by accessing *monalisa69*, had committed an act of "impersonation of another staff member". As for the third charge, the JDC deemed that insufficient proofs had been put forward that it was the Applicant who had used the Executive Secretary's computer to send pornographic messages to three female staff members in New York.

The only charge which ultimately remained was that of the "impersonation" and harassment of another staff member, of which the Applicant had not been accused; to that the Joint Disciplinary Committee adds in its conclusion a charge of misuse of the Organization's equipment, another charge which had never been levelled at the Applicant as such:

"The Panel therefore finds that the following elements constituting misconduct are reunited in the present case:

- a. There is evidence that the staff member is responsible for impersonation of another staff member of his unit, and therefore of harassment and threat in the sense of paragraph 2(d) of ST/AI/371;
- b. There is evidence that the staff member misused the United Nations equipment, in the sense of paragraph 2(e) of ST/AI/371".

And on the basis of these charges, the JDC recommended that disciplinary measures be imposed upon the Applicant:

"Therefore the Panel **recommends** to the Secretary-General that a written censure be addressed to the former staff member, that he not be re-hired under any kind of contract, and that the written censure as well as a copy of this report be included in his Official Status file (OSF). Furthermore, the Panel also

recommends that OHRM should inform any Office indicating an interest in recruiting him, about the censure and the report”.

In the letter dated 17 December 2002, the Applicant is informed “(t)he Secretary-General has therefore decided to accept the JDC’s unanimous recommendation to impose upon you a written censure. This letter constitutes the written censure and a copy of it will be placed in your official status file. OHRM will also be requested to inform any office that might be interested in recruiting you of the JDC report and this decision”.

V. It is also important, in the view of the Tribunal, to note at this stage some of the remarks which the JDC deemed necessary to add at the end of its report, which stress some of the unclear or questionable aspects of the procedure followed or some improvements which could be implemented in order to make that procedure more transparent:

- intervention by the Executive Secretary in the course of the investigation:

“[R]ather than let the investigation take a normal course, the Executive Secretary intervened at different levels and on many occasions in its handling. The Panel noted that it was the Executive Secretary, rather than an independent party, who received the reports from the Security and Safety Section and the Electronic Services Section. The Panel believes that a party independent of the administrative unit in which the alleged offence occurred should be named to head the investigation in order to maintain complete impartiality and to avoid any appearance of interference or conflict of interest.

- the critical need to speed up procedures:

“Finally, the Panel strongly emphasizes that the Secretariat shall continuously make every possible effort to drastically shorten the period of time between the investigation and the presentation of a case to the JDC. It wishes to outline that — for technical reasons — this is of utmost importance in cases that touch upon Information Technology. At the same time, this request applies on a more global basis to all cases, as staff members under disciplinary procedure may suffer from such long delays. Another justification for this request is the fact that the staff-at-large will lose confidence in the effectiveness, efficiency and transparency of the internal administration of justice if such delays occur”.

VI. Having taken careful note of the arguments and conclusions put forward by the Joint Disciplinary Committee, the Tribunal must assess on the one hand the way the JDC established the facts and the conclusions which it has drawn from these, and on

the other the appropriateness of the disciplinary measure taken against the Applicant.

VII. In the case of the fact-finding carried out by the JDC, the Tribunal recalls that it often operates on facts as found by the JDC, even though in some circumstances the Tribunal may reassess for itself the facts upon which the case is based:

“... the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal’s deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases.” (See Judgement No. 1009, *Makil*, para. IV)

VIII. The Tribunal does not deem it necessary to question the statements of fact established by the JDC, which led it to consider that there was insufficient evidence of the accusations against the Applicant, but it does consider it necessary to re-examine the conclusions drawn from those facts and to review the basis upon which the disciplinary measure was determined.

IX. Firstly, the Tribunal confirms, on the basis of the contents of the file, the conclusions of the JDC concerning the first and second charges, namely that the Applicant cannot be accused of having broken into the computer of the Executive Secretary and having sent e-mails of a pornographic or sexual nature from that computer to New York.

X. As for the third charge, the Tribunal accepts the findings of the Joint Disciplinary Committee, based on the information technology investigations which showed that the Applicant’s computer was logged on twice to the account

monalisaw69. The only facts to have been proved are the following: on 22 July 1999, at 18.48 hours, the IP address of the Applicant's computer logged on to the Hotmail site on [e-z... 's] account, which is the private account of the Applicant, and then at 18.50 hours Hotmail was logged on to, also from the Applicant's computer's IP address, on the account of *monalisaw69*; on 29 July, from 19.03 to 19.09 hours, the Applicant admits to having been logged on to his [e-z...] account from the IP address of his computer, after which a connection was made between 19.09.05 hours and 19.10.31 hours to the account of *monalisaw69* from the IP address of the Applicant's computer. It so happens that even though it has been accepted that these facts are proven, no e-mail of a pornographic nature or with sexual connotations was sent on either of these dates. Moreover, as the JDC pointed out, it is important to make "a clear distinction between the computer that accesses the mailbox and the person who uses this computer. It particularly brought to the fore the intrinsic risk of investigating into any case dealing with Information Technology". This distinction is also made in the report on the technical aspects of the investigation dated 31 August 1999 in which, while recognizing that connections to "*monalisaw69*" had been made from the Applicant's computer, the investigator added that "anyone who has access to [his] PC and his access rights can use his ID and associated facilities". Thirdly, the Tribunal considers that the JDC cannot on the basis of these indications confirm the accusation that the Applicant had used the name of a female staff member, because such an accusation would imply that it was he who had set up the Hotmail account in question. This was something that had never been proven, and which there had been no attempt even to verify. The Tribunal does not understand why those carrying out the investigation had not sought to determine who had set up the *monalisaw69@hotmail.com* account, which would have made it easier to understand what had happened. The investigators themselves recognized this point, having mentioned the possibility of obtaining just such information during the questioning of Mona Lisa:

"the United Nations [Headquarters] in New York may seek a Court decision to request the Hotmail Administrators to disclose the origin of the "*monalisaw69@hotmail.com*". Once the author is identified, it would not be possible for that person to back down".

This same possibility was put to the Applicant during an interview on 5 October 1999, when he was informed that "application could be made to the competent authorities for Hotmail to reveal the identity of the subscriber with that address and

the IP number of his computer, along with the content of all the messages that had passed through that particular account”. Such an application could have made it possible to establish the facts rather than entertaining unverified suspicions, but it was never carried out.

The only thing to have been confirmed is that either the Applicant, or someone who had his password for the [e-z...] account also had the password for the *monalisaw69* account as well. However, given the fact that according to the investigation reports it was shown that the staff members of the Joint Inspection Unit shared a certain number of Hotmail e-mail accounts, these circumstances could not lead to any reliable conclusion, and certainly not to the incrimination of the staff member. The Tribunal notes in fact that in the first technical investigation, reported on during the meeting on 23 July 1999, it states that seven staff members, including the Applicant, used the site *www.hotmail.com*:

“these 7 staff members use and share all the same private e-mail accounts, and sent each other or exchanged photographs or images pornographic in nature. They all know the passwords for these private accounts, which are: Indiablanca — Vilaplana — Photo 51 — Movie 100 — Indionegro — Victoramor — Powerfrau. *It is not therefore possible to know who is doing what exactly on each of these accounts*” (Tribunal’s emphasis).

There is nothing in the facts that would preclude *monalisaw69@hotmail.com* from also being one of these shared accounts. There is in any case nothing to link it to the Applicant apart from the fact that this account was logged on to twice from his computer. However, given the fact that Internet use was at the very least unregulated in the JIU service, a more thorough investigation should have been conducted before determining who, among all the staff members who were online, was the guilty party!

XI. With nothing proven, not even the charge of “impersonation”, it becomes clear that the sanction was not justified. The Tribunal, for its part, is extremely surprised at the Joint Disciplinary Committee’s recommendations, which are not commensurate with the charges which remain but are more appropriate to the initial accusations, even though these have not been proven and seem simply to have remained as part of the background to the decision to give a written censure as punishment. In other words, the Tribunal considers it not possible to decide to issue a written censure on the basis of the remaining charges. If a sanction was imposed,

it would then be appropriate to consider why this should be so, taking into account all the material in the file.

XII. It should be pointed out that the Tribunal cannot accept here the argument of the Respondent where it is claimed that the evidence of the investigation not being biased lies in the fact that the JDC retained no more than one part of one of the three charges:

“Indeed, the JDC relied mainly on evidence from the technical analysis of computer records, and thus found insufficient evidence to sustain two of the initial charges, which it dismissed, and it concluded there was only enough evidence to sustain only part of the third charge. This demonstrates that the disciplinary measure imposed on the Applicant was based only on facts that were clearly established during the disciplinary proceedings, rather than on prejudice”.

The Tribunal in fact considers that the Respondent does not follow its reasoning to the logical conclusion and does not take into account the charges retained and the sanction issued.

XIII. The Tribunal, after having considered the report of the Joint Disciplinary Committee and examined all the evidence and reports of the investigations provided in the file, concludes that the Applicant was not given that right to a fair hearing which is the prerogative of a staff member of the Organization does have the right to, when accused of misconduct in carrying out his official duties. No specific evidence was provided which could serve as the basis for recognizing the Applicant guilty of the actions of which he stands accused. It is true that strange things were going on in the JIU: it is, for instance, somewhat astonishing to read in the Security and Safety Section report dated 28 July 1999 that an average of 30 pornographic photographs per day were being exchanged on one of the Hotmail accounts shared by the members of the service in question! The Tribunal is not asserting that the Applicant did not carry out the alleged actions, but there is nothing in the file to substantiate them with even a minimum of credibility. If disciplinary sanctions are applied against staff members of the Organization, it can only be on the basis of substantiated guilt, not on the basis of assumptions that are being directed from behind the scenes. If there has to be a sanction, then misconduct also has to be proven by means of an investigation that is sound and objective. In this case, the Tribunal considers that the investigative process which took place in order to try and

shed some light on the events that caused this incident was anything but sound and objective. Putting aside the role played in the investigation by one of the people directly involved in the events and himself a potential suspect, the Executive Secretary, the Tribunal wishes to stress that even the very restricted charge which was retained cannot be considered proven.

XIV. Firstly, the Tribunal takes note of the Applicant's allegation that "(i)nstead of conducting an independent, objective investigation, the [Security Section] established a joint team under [the Executive Secretary]'s leadership to seek evidence against five 'suspects' named by him including the Applicant". The Tribunal is forced to note with concern the confirmation of these allegations by the JDC in the comments which the latter deemed necessary to make on the subject of intervention in the investigatory process by the Executive Secretary, whose hostility to the Applicant was a matter of common knowledge, as paragraph V recalls. One example of the ambiguous role played by the Executive Secretary is the fact that it was he who authorized the taking into custody of the Applicant's computer on 5 August 1999 when the latter was away in London. It also seems surprising that the Executive Secretary was not questioned by the investigators, even though it had been established that the e-mails which were sexual and pornographic in nature had been sent from HIS computer. Such things do not support the idea of procedures being followed in a proper and objective manner; on the contrary they would suggest that the investigation was a biased one.

XV. It should also be noted in this context, while on the subject of whether the procedures followed were biased against the Applicant, that the Executive Secretary had not shrunk from suggesting in a confidential memorandum to the Director, Division of Administration, UNOG, that he be summarily dismissed, the most serious disciplinary measure available, before the investigation was even completed, based on an "initial investigation", then demanded the Applicant's dismissal, then demanded "a full investigation". This is clearly putting the cart before the horse, to announce the sanction before finding out who is guilty:

"Since the *initial investigation* and fact-finding envisaged in Chapter II of administrative instruction ST/AI/371 of 2 August 1991 has been carried out and, *in my opinion*, the evidence clearly indicates that misconduct has occurred, its seriousness warrants immediate separation from service, I strongly recommend that Secretary-General *summarily dismiss [the Applicant]*,

in accordance with paragraph 9 (c) of the above mentioned Instruction, as the only disciplinary measure under staff rule 110.3 commensurable with this intolerable conduct.

...

I am convinced that *whoever* has been sending these messages under <monalisaw69@hotmail.com> entertains malicious, perverse, ill purposes to hurt both [Mona Lisa], assuming that she is not the author, and me, and, therefore, deserves to be punished. *The author*, in my opinion, knows very well JIU staff movements and my working relationship with [Mona Lisa].

Therefore, I officially requesting [sic] you to take the necessary steps to make a full investigation on this case with an *aim at detecting the author* of the series of e-mail messages. During the investigation process I may provide more confidential background information on *potential suspects*. I have attached copies of all referred e-mail messages for easy reference” (Tribunal’s emphasis).

The Tribunal notes that the Executive Secretary had recommended as far back as early 2000 — even as he requested that an investigation be undertaken to identify the guilty party — the dismissal of the Applicant, whom he therefore considered implicitly guilty even before his guilt could be determined by an inquiry. The Tribunal notes, however, that the competent authorities were rightly very reluctant to take such a measure and had drawn attention to the need to follow procedures. Following an investigation, the Office of Internal Oversight Services (OIOS) confirmed that there was no evidence that the Applicant was guilty. Indeed, a letter from the Chief of OHRM dated 1 December 2000 addressed to the Assistant Secretary-General of OHRM stated that the OIOS investigation confirmed that no charge could be levelled against the Applicant. It strikes the Tribunal as curious, in the light of the above, that OHRM initiated disciplinary proceedings. In a letter dated 22 January 2001, OHRM initiated disciplinary proceedings against the Applicant, stating that “we consider that the preliminary investigation indicates that the allegations of misconduct against [the Applicant] are well founded and that disciplinary proceedings should be pursued”.

XVI. The Tribunal finds, in the light of the foregoing, that the investigation conducted by JIU was tainted owing to the interference of the Executive Secretary, the fact that the disciplinary proceedings had not only been initiated in the absence of evidence but had been based on such a tainted investigation. It is the Tribunal’s view that the disciplinary proceedings had been based on flimsy evidence. The Tribunal therefore finds that the Applicant was denied due process in the

disciplinary action taken against him. It is the view of the Tribunal that the type of conduct which gave rise to this case is certainly more akin to schoolboy pranks, something not to be expected from the Joint Inspection Unit; it should, however, have been addressed through internal regulations and appropriate supervision of the staff members and should in no way have led to disciplinary action with the resulting waste of time for all the parties involved and frustration for the staff member being investigated.

XVII. The disciplinary proceedings were also tainted by a lack of due process, with the Applicant's rights not being fully respected. For example, there was a "secret file" which was disclosed to the Applicant only the day before the completion of the disciplinary proceedings. The protracted nature of the investigation was a further denial of due process in this case. Indeed, the Applicant was informed of the charges against him only on 9 May 2001, while the investigation had been launched on 1 July 1999. Concerning these procedural violations, the Tribunal reiterated its established position in Judgement No. 1246 (2005), paras. IV and V, where it held:

"[A]s soon as the Applicant was identified as a possible wrongdoer, he should have been accorded due process, which includes being notified of the allegations in writing, provided with all documentary evidence ... In conclusion, the Tribunal is of the opinion that the assurances of due process and fairness ... mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees."

XVIII. In conclusion, the Tribunal finds that by basing its ruling on a biased and incomplete reading of the investigation report, the Joint Disciplinary Committee recommended a sanction that is unrelated to the proven facts. Furthermore, the Tribunal finds the statement that information relating to the sanction should be disclosed to potential employers of the Applicant rather peculiar.

XIX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to rescind his decision of 17 December 2002 to impose a written censure on the Applicant, request that such censure be included in his Official Status File and request OHRM to inform any office that might be interested in recruiting him of the JDC report and that decision;

2. Sets the compensation payable to the Applicant, should the Secretary-General decide within 30 days following the distribution of this judgement in the interest of the United Nations not to take any further action on this matter, at six months' net base salary at the rate in effect at the date of judgement with interest payable at 8 per cent per annum as from 90 days from the date of distribution of this judgement until payment is effected;
3. Orders the Respondent to pay to the Applicant as compensation for the violation of his right to fair disciplinary proceedings a sum equivalent to two months' net base salary at the rate in effect at the date of judgement, with interest payable at 8 per cent per annum as from 90 days from the date of distribution of this judgement until payment is effected; and
4. Rejects all other pleas.

(Signatures)

Julio Barboza
President, presiding

Spyridon Flogaitis
Vice-President

Brigitte Stern
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary
