K.

v.

ITU

138th Session **Judgment No. 4832**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs E.-J. K. against the International Telecommunication Union (ITU) on 3 November 2021, ITU's reply of 17 January 2022, corrected on 24 January, the complainant's rejoinder of 28 February 2022 and ITU's surrejoinder dated 31 May 2022;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to impose on her the disciplinary sanction of demotion by two grades.

The complainant joined ITU in April 2000, as Senior Advisor for Asia and the Pacific, at grade P.5, in Bangkok, Thailand. In October 2005, she was promoted to the D.1 level as Head/Regional Director for Asia and the Pacific Regional Office, still in Bangkok, with a continuing contract from 19 August 2009. In February 2014, she was transferred to the position of Chief of the Innovation and Partnership Department at Headquarters in Geneva, Switzerland. In July 2019, she was appointed as Chief ad interim of the Digital Knowledge Hub Department.

Following allegations from an anonymous whistleblower of fraudulent practices by a P.3 staff member of the Asia and the Pacific Regional Office, Mr A. – who had been a direct subordinate of the complainant – the Secretary-General instructed the Internal Audit Unit (IAU) to conduct an investigation. In its report, dated 28 May 2018, the IAU found that Mr A. had engaged in a large-scale fraud between 2010 and 2017. ITU initiated a disciplinary procedure against him, which ended with his dismissal effective 31 January 2019.

In view of the scale of the fraud, a second investigation was subsequently launched in September 2019, with the aim of ascertaining whether other staff members bore any responsibility. It was conducted by an external investigator and covered several staff members and former staff members, including the complainant as Regional Director of the Bangkok Office until her transfer to Headquarters. An investigation report was issued on 24 January 2020, in which it was concluded that the complainant was not aware of her subordinate's fraudulent activities but failed to properly supervise him, and that the identified failings, which included the complainant's conduct, amounted to "individual and systemic shortcomings within the ITU's operations (often categorised by a managerial complacency) as well as dereliction of management responsibilities at certain times (resulting in a neglect of duty)". The report was shared with the complainant, who submitted her comments on 18 March 2020.

On 10 June 2020, the complainant was informed that, in light of the external investigator's findings, and having reviewed her comments, the Secretary-General had decided to initiate disciplinary proceedings against her, in accordance with Chapter X of the Staff Regulations and Staff Rules, on the grounds that her failure to put in place effective management controls and to properly supervise the activities of Mr A. amounted to a dereliction of her responsibilities and, as such, a form of negligence. The Secretary-General considered that her conduct, if established, would amount to serious misconduct.

A disciplinary chamber was constituted from among the members of the Joint Advisory Committee (JAC) to review and advise the Secretary-General on the matter. The complainant was interviewed

several times and had the opportunity to submit written comments. In its report of 21 August 2020, the Disciplinary Chamber considered that misconduct was not established and concluded that there was "no ground for a disciplinary sanction to be applied" to the complainant.

Considering that the JAC's Disciplinary Chamber had reached conclusions that were contrary to those of the external investigator, the Secretary-General requested the Legal Advisor to carry out a thorough review of the Disciplinary Chamber's report. The Legal Advisor transmitted his analysis to the Secretary-General on 24 November 2020, in which he detected several errors of fact in the subject report, concluded that three of the six allegations of misconduct were established and assessed demotion as the most appropriate sanction to be imposed on the complainant.

By letter of 7 December 2020, the Secretary-General endorsed the Legal Advisor's analysis and decided to impose on the complainant a disciplinary sanction of demotion by two grades, that is from D.1 to P.4, with immediate effect. She was informed that she would be placed on special leave with full salary until a suitable position at the P.4 level would be identified for her reassignment.

On 28 December 2020, the complainant requested the Secretary-General to reconsider his decision and sought clarifications. Her request was rejected on 11 February 2021. On 15 March 2021, she lodged an appeal with the Appeal Board seeking, among other things, the setting aside of the demotion decision with all legal consequences flowing therefrom, her reinstatement to her former D.1 position, compensation in an amount of no less than 500,000 Swiss francs, a written apology, and a new investigation to find whether ITU was "misled and/or misrepresented" during the process.

In its report of 20 August 2021, the Appeal Board concluded that the investigations undertaken by ITU to establish whether there was any dereliction of management responsibilities in the supervision of Mr A. were lawful and justified and that the complainant failed to effectively supervise and monitor the activities of her subordinate and thereby bore a degree of responsibility in the fraud case. Taking into account mitigating factors, such as the serious systemic shortcomings in the

mechanisms in place within ITU and the complainant's positive performance appraisals, it considered that demotion by two grades was too severe a sanction. It recommended that the Secretary-General should reconsider this sanction and request the JAC's Disciplinary Chamber to re-evaluate the case and advise on the appropriate disciplinary measure to be taken.

By letter of 3 September 2021, the complainant was notified of the Secretary-General's decision to reject her appeal and maintain his decision of demotion by two grades. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision with all legal consequences flowing therefrom, to find that she committed no misconduct, let alone "serious misconduct", and that she has neither behaved negligently nor wilfully and recklessly. She also requests the Tribunal to order the withdrawal of any document from her personal file reflecting the present procedure and to reinstate her with immediate effect in her former position with full retroactive effect. She seeks the award of moral, exemplary, and punitive damages in an amount of no less than 1,000,000 Swiss francs, as well as no less than 15,000 francs in costs for the internal appeal proceedings and the proceedings before the Tribunal. She further requests that all amounts bear interest at the rate of 5 per cent per annum from 7 December 2020 until the date of payment. Finally, she seeks an order that "individuals concerned including the Elected Official(s) and the former staff, who maliciously initiated and decided the unlawful disciplinary sanction" reimburse ITU for any amounts that the Tribunal may order it to pay in the final judgment.

ITU requests the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant impugns the decision of the Secretary-General of 3 September 2021 rejecting her internal appeal and maintaining his prior decision of 7 December 2020 to impose on her a disciplinary sanction of demotion by two grades (from grade D.1 to grade P.4). The genesis of the complaint is a significant fraud of a direct

subordinate of the complainant exposed in early 2018 to ITU by an external anonymous whistleblower. The large-scale fraud, which led to the dismissal of the fraudster, continued undetected for seven years, from 2010 to 2017.

ITU has acknowledged that systemic weaknesses and insufficiencies in terms of procedure precipitated the fraud, the largest ever detected in the organization. Internal and external investigations revealed that the fraudulent scheme was extensive, well hidden, and difficult to detect. Even though it had been established that the complainant was not aware of and did not support, cover up or participate in the fraud, disciplinary measures were taken by ITU against her on the basis that she had failed to properly deploy reasonable oversight and supervision measures with respect to the activities of the fraudster during the years she was working as his direct supervisor in the position of Head/Regional Director for Asia and the Pacific Regional Office, in Bangkok, Thailand, namely from August 2009 to February 2014.

2. Before considering the complainant's request to set aside the impugned decision on procedural and substantive grounds, two preliminary procedural matters must be addressed.

First, the complainant requested that oral proceedings be held. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and of the relevant evidence. That request is therefore rejected.

Second, the claim for relief listed under (i) in the complainant's complaint form, namely "[t]o order individuals concerned including the Elected Official(s) and the former staff, who maliciously initiated and decided the unlawful disciplinary sanction, to reimburse [...] ITU any amounts that the Tribunal will order [...] ITU to pay to the [c]omplainant in the final judgment", must be rejected as outside the Tribunal's competence. The complainant misunderstands and misconceives the role of the Tribunal in this regard. It is not for the Tribunal to issue orders of the nature sought against individuals who are not parties to the pending dispute.

3. To start with, it is convenient to recall the Tribunal's well-settled case law on disciplinary decisions. In Judgment 4745, consideration 5, the Tribunal aptly wrote the following in this regard:

> "[Disciplinary] decisions fall within the discretionary authority of an international organization and are subject to limited review. The Tribunal must determine whether or not a discretionary decision was taken with authority, was in regular form, whether the correct procedure was followed and, as regards its legality under the organization's own rules, whether the organization's decision was based on an error of law or fact, or whether essential facts had not been taken into consideration, or whether conclusions which are clearly false had been drawn from the documents in the file, or finally, whether there was a misuse of authority. Additionally, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see, for example, Judgment 4579, consideration 4, and the case law cited therein)."

(See also Judgment 4764, consideration 8.)

4. Among the many pleas entered by the complainant in support of her complaint, there are four which, since they relate to procedural errors or errors of law, fall within the limited scope of the Tribunal's power of review defined above and are decisive for the outcome of this dispute. These pleas pertain to the breach of the complainant's due process rights, to the lack of sufficient motivation of the impugned decision, to an error of law in the assessment of the alleged serious misconduct and gross negligence findings, and to a lack of proportionality of the sanction imposed.

5. With respect to the first plea of the complainant regarding due process, the record indicates that the impugned decision of the Secretary-General of 3 September 2021 and his prior decision of 7 December 2020 have in common the following circumstance: they both departed from an unanimous opinion of an internal advisory body of the organization, that is, for the impugned decision, the opinion of three members of the Appeal Board of 20 August 2021, and for the 7 December 2020 decision, the opinion of five members of the Disciplinary Chamber of the Joint Advisory Committee (JAC) of 21 August 2020.

For a proper understanding of the plea of the complainant pertaining to a breach of her due process rights, it is useful to briefly summarise the key steps that led to the disciplinary sanction imposed upon her as a result of these two decisions.

6. At the outset, it is the investigation conducted by the Internal Audit Unit (IAU), whose findings are contained in its report of 28 May 2018, that documented and explained the fraudulent scheme at the centre of the current dispute. It revealed notably that there were more than three hundred transactions initiated by the fraudster with suspicious vendors during the years 2010 to 2017. The total amount of these transactions was in excess of 3,000,000 Swiss francs. In terms of distribution over the years, the tables and charts contained in this report showed that approximately 29 per cent of this amount concerned transactions that took place during the years 2010 to 2013, while approximately 71 per cent related to the years 2014 to 2017.

7. In the further investigation report that followed on 24 January 2020, the external investigator was asked to investigate whether there were: "(i) any systemic or individual shortcomings; and/or (ii) any dereliction of management responsibilities in the oversight and supervision of the Bangkok Office's activities in connection with the fraud case". In his conclusion, the external investigator found that "there were both individual and systemic shortcomings within the ITU's operations (often categorised by a managerial complacency) as well as dereliction of management responsibilities at certain times (resulting in a neglect of duty) in relation to both Regional Directors, [...] and it was those parties' collective failings that enabled [the fraudster] to successfully operate his fraudulent scheme over such a long period of time".

The external investigator added that, despite the identified failings, he was satisfied that none of the individuals, departments and divisions were aware of the fraudulent scheme, noting that the scheme made discovery of the fraud difficult "because [the] fraudulent expert and [the] fraudulent employee were working together". The external investigator went on to state, however, that, notwithstanding the difficulties in discovering the fraud, "had all parties fully complied with their duties,

the fraud [was] likely to have been discovered earlier which would have prevented its perpetuation". The Tribunal observes that, in so stating, the external investigator did not identify precisely the parties that he was referring to nor the impact of each one's compliance with their duties on the likeness of an earlier discovery of the fraud.

The external investigator continued by stating that the failings identified in his report, coupled with the circumstances of the case, resulted in an environment in which the fraudster was able to grow his fraudulent scheme effectively and undetected. Among three factors that he identified, he noted that there was an inherent absence of leadership and effective management by both Regional Directors of the Bangkok Office, which included the complainant, as well as a failure to properly supervise the fraudster.

The Tribunal observes that, in this external investigation report, there is no mention of serious misconduct or gross negligence attributable to the complainant.

8. Given the conclusions and findings contained in the investigation report of 24 January 2020, the Secretary-General wrote to the complainant on 21 February 2020 to notify her of this report and ask for her comments thereon before deciding on the further actions to be taken. In that letter, the Secretary-General wrote that, after a very careful examination of this report, he was of the view that:

> "[...] (i) [the complainant's] lack of management and (ii) established 'failure to properly supervise and an absence of effective management and implementation of monitoring procedures' to safeguard and guarantee the adequate use of ITU resources, contributed to the facilitation of the fraud. [Her] performance [was] not consistent with the standards expected from a senior manager at a D.1 level and would amount to serious misconduct." (Emphasis added.)

9. Afterwards, on 10 June 2020, the Secretary-General sent to the complainant a notification of disciplinary action where he stated, in support of what he presented as the findings of the 24 January 2020 report, that she had allowed the fraudster "to operate in a context of inexistent or lax controls and to benefit from 'excessive delegation,

effectively operating unchecked'". In support of this assertion, the Secretary-General referred to six counts of improper conduct, that he detailed as follows:

> "a. On the level of information sharing and follow up of the substantive activities of your supervisee, you acknowledged difficulties in discussing with him, and you were not copied in relevant exchanges of [the fraudster] with internal or external counterparts.
>
> b. While [the fraudster] was abnormally often absent from office – even accounting for his many official missions and visits – you did not take measures to address this issue.
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> c. Projects were developed/handled by [the fraudster] without proper involvement, in fact, routinely bypassing, you.
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> d. You signed off tens of [Special Service Agreement (SSA)] contracts that later turned out to be fraudulent and it does not appear that you conducted or put in place adequate checks in this respect at the Bangkok Office level, even regarding consultants that were hired multiple times.
>
> e. A rental agreement of an office at the [National Broadcasting and Telecommunications Commission] building was negotiated and set up still during your tenure and you were not even aware that a rent was to be paid for this office space.
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> f. You did not seek to know how the Bangkok [O]ffice activities were organized, to the extent that you were not even aware that ITU was financing the costs of a number of events and often hiring private companies for these tasks."

10. The Secretary-General went on to state to the complainant that she had failed to put in place effective management controls and did not properly supervise the activities of the fraudster, and that such conduct, if established, would amount to serious misconduct. The Secretary-General explained his understanding of serious misconduct in the following terms:

> "Regardless of the applicability to this particular case of Service Order No. 19/09 [containing ITU's Policy against fraud, corruption and other proscribed practices] – which, as you noted, was indeed issued in 2019 – any staff member has a duty to discharge his or her functions with due care and diligence. You failed to uphold this obligation, since your functions as Regional Director from 2006 to 2013 clearly included managerial and supervisory responsibilities vis-a-vis the staff of the Bangkok Office [...] and, yet, you failed to overview your team's actions and to take reasonable

> measures to ensure compliance with the required standards. This amounted to a dereliction of your responsibilities, which is a form of negligence. It is widely recognized that severe or reckless negligence may amount to serious misconduct [...], and in your case, your behaviour reached this level of seriousness, considering, *inter alia*, that:
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> a. As the Regional Director, you held a senior level post – at the D.1 grade – and, in terms of structure, you were the head of the Office, hence, the officer responsible for its overall functioning[.]
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> b. The Bangkok Office had a small team, with very limited personnel to supervise, and even fewer regular staff members. In addition, you were the immediate supervisor of the Project Officer (P.3) position and, unlike other senior managers, served in the same duty station as [the fraudster]. In other words, as Regional Director, you were particularly well placed to have a complete understanding of his professional activities. Also, as emphasized in your comments, you had set up or reviewed the internal workflows and processes under which [the fraudster] operated.
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> c. The Bangkok fraud persisted for years and took many forms (companies with a clear conflict of interests being hired to organize events, billing for false events, unnecessary payment of an office rent, repeated recruitment of SSAs experts later assigned to tasks other than those officially stated, payment of undue entitlements), and ITU has sustained considerable harm as a result, with financial losses estimated in millions of dollars, serious reputational damage to the Bangkok Office and to the [ITU] as a whole, and compromised trust by membership, donors and partners." (Emphasis added.)

11. It is by reason of this notification of disciplinary action that, in accordance with the Staff Regulations and Staff Rules of the organization, a disciplinary chamber of the JAC was set up to advise the Secretary-General on a possible sanction against the complainant for "shortcomings as well as dereliction of management responsibilities in the oversight and supervision of the Bangkok Office [...] activities in connection with the fraud case". In its report of 21 August 2020, the Disciplinary Chamber analysed the six counts listed in the Secretary-General's notification of disciplinary action of 10 June 2020 and found that the alleged misconduct was not established based on the six issues identified. It thus recommended to the Secretary-General that there was "no ground for a disciplinary sanction to be applied" to the complainant. The Tribunal observes that, in this report, the five members of the

Disciplinary Chamber indicated that they held close to ten meetings, interviewed the complainant and considered a large number of documents that were listed in the report.

12. Upon receipt of the Disciplinary Chamber's report, the Secretary-General asked the Legal Advisor to make a thorough analysis of the report. That led to the legal analysis of 23 November 2020, transmitted to the Secretary-General on 24 November, based on which the Secretary-General notified the complainant of the disciplinary measure that he had decided to impose upon her on 7 December 2020. The Secretary-General considered that this legal analysis was necessary in view of what he regarded as discrepancies in the findings of the external investigation and those of the Disciplinary Chamber, even though their respective mandates were different from the outset. The Tribunal notices that, in this legal analysis, the Legal Advisor made reference to the circumstance that the complainant had allegedly been charged with "gross misconduct in relation to her duty to supervise/ overs[ee] the work of [the fraudster]" and to the six counts discussed above.

The legal analysis made an evidence assessment of these six specific counts and found that three of them, namely counts a.), b.) and d.), should in fact be discarded as not supported by conclusive evidence, as not constituting by themself an indication of lack of communication with the fraudster or as falling short of demonstrating that the complainant had failed to reasonably scrutinize the competency of the fraudster. The Legal Advisor found, however, that, with respect to the other three counts, he was reaching a different conclusion than that of the Disciplinary Chamber.

With respect to count c.), he notably indicated the following:

> "27. Concerning her involvement in projects, it is apparent that, rather than proper oversight – which entails contrasting such information and some degree of analytical verification – [the complainant] carried a mere follow up of developments based on the information that [the fraudster] provided."

With respect to counts e.) and f.), he concluded that, in his view, it was established that, despite knowing about the existence of a project office outside of the Bangkok Office premises, the complainant had recklessly failed to conduct even minimal checks in this regard, and that, contrary to the findings of the Disciplinary Chamber, the events organised through private companies discussed under count f.) took place, for some of them, while she still was Regional Director. Considering his analysis, the Legal Advisor found that there were grounds to conclude the following:

> "54. [The complainant]'s level of involvement in the [Bangkok Office] activities was insufficient. Evidence indicates that [she] relied on [the fraudster]'s information on project-related developments with little or no further verification on the information received from [the fraudster]. This cannot be said to amount to effective supervision. [The complainant]'s management appears to have focused on growth of [the Bangkok Office]'s portfolio, while neglecting the oversight dimension. Oversight comes down, precisely, to monitoring and checks aimed at ensuring propriety and compliance with the required standards (crucial, for obvious reasons, areas generating expenses (such as, procurement and recruitment..).
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> 55. Considering that [the complainant]'s duties as Regional Director were eminently managerial, with supervision as a core function expressly specified in terms of her [j]ob [d]escription [...], failure to adequately supervise and oversight amounts to a dereliction of her professional responsibilities. Given the seniority of [the complainant] (D.1) and her position as both the [H]ead of the [O]ffice and [the fraudster]'s first supervisor, as well as the gravity and the serious impact of [the fraudster]'s [...] fraud for ITU, this failure raises to the level of gross negligence, and constitutes serious misconduct." (Emphasis added.)

13. The Legal Advisor concluded that, given some mitigating circumstances that he identified, and stressing the exemplary cooperation of the complainant in the investigation and disciplinary proceedings, a sanction of demotion appeared more appropriate and more adapted than dismissal to the conduct at issue, which was a failure to properly supervise a staff member of her team. He emphasised that no precedent could be found of a demotion by two or more grades and that it was appropriate to bear in mind that, for the complainant, a

demotion by more than one grade would entail additional consequences since it would imply the loss of her diplomatic status.

14. In the notification of the disciplinary measure of 7 December 2020 that followed this legal analysis from the Legal Advisor, the Secretary-General notably wrote the following with respect to what he understood amounted to serious misconduct to justify his decision to impose on her a sanction of demotion by two grades:

> "Considering that your duties as Regional Director were eminently managerial, with supervision expressly specified as one of the core functions in your [j]ob [d]escription, [...] failure to adequately supervise and oversight amounts to a dereliction of your professional responsibilities. Given your seniority (D.1) and your position as both the [H]ead of the [O]ffice and [the fraudster]'s first supervisor, as well as the gravity and serious impact of [the fraudster]'s fraud for ITU, such failure raises to the level of **gross negligence** and constitutes serious misconduct." (Original emphasis, underlining added.)
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> "In light of all the above, the Secretary-General has decided to apply the disciplinary sanction of **demotion by two grades.** This measure is deemed proportionate to the established misconduct in your case; additionally, it appears adapted to the nature of the offence, given that your failure concerns your ability to supervise and oversight at a senior level." (Original emphasis.)

15. On 28 December 2020, the complainant requested the Secretary-General to reconsider his decision and sought clarifications. On 11 February 2021, the Deputy Chief of the Human Resources Management Department notified the complainant that, while recognizing that out of the six counts discussed before, only counts c.), e.) and f.) were considered proven by the organization, the Secretary-General was nevertheless denying her request for reconsideration of the decision of 7 December 2020 and that this contested decision was maintained.

16. Following the internal appeal lodged by the complainant in contestation of this decision, the Appeal Board issued its report on 20 August 2021 after having received extensive written pleadings and having held a total of sixteen meetings. In that report, the Appeal Board summarised the Secretary-General's position, emphasizing in particular

that the latter had expressed that the complainant "ha[d] been held to account, not for the fraud, but for her demonstrated lack of meaningful supervision of the [Bangkok Office] staff who carried out the fraudulent activities for years" and that the complainant's responsibility "[did] not lay on the fact that she did not detect irregularities, but that she did not deploy reasonable efforts to prevent a foreseeable risk", such that her management of the Bangkok Office did have an impact on the fraudster's ability and readiness to engage in fraudulent activities.

In the conclusion section of its report, the Appeal Board maintained that the complainant was not aware of the fraudulent activities during her mandate as Regional Director of the Bangkok Office and did not participate, support or cover the fraud case, while showing full cooperation during the investigation process. Yet, the Appeal Board found that the complainant and her successors failed to effectively supervise and monitor the activities of the staff behind the fraud scheme, as explicitly stated in their job description, and thereby bore a degree of responsibility in the fraud case. It found, however, that the disciplinary sanction of demotion by two grades was too severe and that it was appropriate to recommend to the Secretary-General to reconsider the disciplinary sanction and request the Disciplinary Chamber of the JAC to re-evaluate the case and advise on the appropriate disciplinary measure to be taken in light of the elements provided in the Legal Advisor's analysis and in the conclusions of its 20 August 2021 report.

The Tribunal notes that the Appeal Board's report made no reference to the notions of gross negligence or serious misconduct.

17. Finally, in the impugned decision of 3 September 2021, where the Secretary-General notified the complainant of the Appeal Board's report of 20 August 2021, he indicated that, after careful examination, he "remain[ed] of the view that [her] behaviour amount[ed] to serious misconduct and that the sanction imposed as a consequence, while severe, was proportionate to its seriousness". He referred to the mitigating circumstances detailed in his 7 December 2020 notification to explain that these were taken into account in determining the sanction of demotion by two grades. He stated that he found no grounds to

reconsider the disciplinary sanction applied and that extensive explanations as to why the Disciplinary Chamber's recommendation was set aside had been provided to her in his prior decision of 7 December 2020, as well as further details during the internal appeal process.

18. The first plea of the complainant pertaining to the breach of her due process rights revolves around these various steps taken by the organization to impose the sanction of demotion by two grades. In this regard, the complainant contends that ITU notably added steps, that is, the legal analysis by the Legal Advisor, not contemplated by its own internal rules and in which her right of defence and her due process rights were simply ignored.

19. Chapter X of the ITU Staff Regulations and Staff Rules includes the provisions pertaining to disciplinary measures.

Staff Regulation 10.1 provides that a staff member who is deemed to be guilty of misconduct (*"faute"* in the French version) may incur sanctions and that the Secretary-General may dismiss a staff member for serious misconduct (*"faute grave"* in the French version).

Staff Rule 10.1.1 refers to misconduct as follows:

> "Failure by a staff member to comply with his or her obligations under the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of Regulation 10.1, leading to disciplinary proceedings and disciplinary measures for misconduct."

Serious misconduct is not defined in the Staff Regulations or in the Staff Rules.

20. With regard to sanctions, demotion to a lower grade is listed as the penultimate sanction – in ascending order of severity – that could be imposed on a staff member before the very last one, being dismissal. Staff Rule 10.1.2 indicates that all sanctions, except the first two (verbal reprimands and written censures), shall be applied by the Secretary-General after referring the matter for advice to the JAC.

In terms of the imposition of a disciplinary sanction other than a verbal reprimand or a written censure, the provisions of the Staff Regulations and Staff Rules pertaining to disciplinary measures make no reference to any other step besides the necessity of referring the matter to the JAC for advice before the taking of the decision by the Secretary-General.

In addition, Staff Regulation 10.2 provides that no disciplinary action is to be taken until the staff member concerned has been given an opportunity to present her or his defence, and Staff Rule 10.2.1 provides that no disciplinary action shall be taken unless the staff member concerned has been notified in writing of the allegations against her or him and has been given a reasonable opportunity to respond, also in writing, to those allegations.

21. That being said, the Tribunal observes the following regarding the due process rights and the right of defence of the complainant. First, the legal analysis of the Legal Advisor was not shared with the complainant or the Disciplinary Chamber before the decision was taken by the Secretary-General on 7 December 2020. Second, this legal analysis included a review of new invoices and financial records from departments or units that were allegedly discovered by an investigation of some of the internal records of ITU after the Disciplinary Chamber had submitted its report and with respect to which the complainant was not asked to comment or answer. Third, this analysis found that three of the six counts of improper conduct mentioned in the Secretary-General's letter of 10 June 2020 were unsubstantiated. The remaining three focused on an insufficient involvement of the complainant in the Bangkok Office activities, her unawareness of the rental by the fraudster of office space for a project office, and her unawareness of the organization of events through private companies.

22. This legal analysis conducted by the Legal Advisor amounted to another layer of investigation in the disciplinary process that was not contemplated in the applicable Staff Regulations and Staff Rules and that was unilaterally introduced by the Secretary-General because of

what he perceived as the differences between the recommendation of the JAC's Disciplinary Chamber and the earlier recommendation and findings of the external investigator. But the mandate of the external investigator was very different than what was required of the Disciplinary Chamber. The focus of the external investigation report was indeed much broader than what was analysed by the Disciplinary Chamber.

23. In addition, a cursory review of the legal analysis, as well as of the disciplinary measure of 7 December 2020 of the Secretary-General, indicates that, in the process that was followed, new evidence gathered and analysed by the Legal Advisor was not presented to nor reviewed by the Disciplinary Chamber. That new evidence was not shared either with the complainant during the disciplinary process nor was she given the opportunity to clarify or answer to this new evidence.

24. The Tribunal cannot follow ITU in its argument that, despite this, the legal analysis of the Legal Advisor merely amounted to the kind of analysis that the Secretary-General was expected to do following the receipt of the report of the Disciplinary Chamber. To the contrary, the record shows that this legal analysis went beyond a mere review of the Disciplinary Chamber's report. It amounted to an additional investigation into some factual evidence, and it was done through a process that ended up disregarding the right of defence and the due process rights contemplated by the organization in Chapter X of its Staff Regulations and Staff Rules.

25. In its reply, the organization indeed confirmed that, as part of this legal analysis, verifications were made by the Legal Advisor with the Financial Resources Management Department and invoices and other evidence were requested from the ITU's repository of bills system for 2013. This clearly constituted the obtaining of additional evidence through an investigative process about facts that were allegedly in contradiction with the findings of the Disciplinary Chamber and without the complainant being told about it or even asked to comment before a final decision was made. And yet, this evidence proved to be

essential to the findings of the Legal Advisor with regard to counts e.) and f.) mentioned before.

26. It is indeed telling to observe that, before the Appeal Board, the complainant was notably able to provide her answers and comments on this new evidence and, while this advisory body concluded that the complainant bore a degree of responsibility in the fraud case, it never qualified such as amounting to misconduct, let alone gross negligence or serious misconduct, adding moreover that the disciplinary sanction imposed was too severe.

27. Firm and constant precedent of the Tribunal has it that, before adopting a disciplinary measure, an international organization must give the staff member concerned the opportunity to defend herself or himself in adversarial proceedings (see, for example, Judgment 3875, consideration 3).

28. This principle is particularly important during the investigative stage of disciplinary proceedings as the Tribunal recalled it in the following terms in Judgment 4011, consideration 9:

> "The basic applicable principles regarding the right to due process at the investigative stage of disciplinary proceedings were stated by the Tribunal as follows in Judgment 2771, consideration 15:
>
> 'The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the 'investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made'. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475 and that there be an opportunity to answer the evidence and the charges.'"

Of course, due process must also be observed at all other stages of disciplinary proceedings. Accordingly, the following was stated in Judgment 2786, consideration 13:

> "Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary. The right to make a defence is necessarily a right to defend oneself before an adverse decision is made, whether by a disciplinary body or the deciding authority (see Judgment 2496, under 7)."

(See also Judgment 4343, consideration 13.)

29. The addition of another layer of investigation in the disciplinary process, not contemplated by the internal rules of the organization, which may have, as it did, set aside the findings of the advisory body provided for in these rules, coupled with the absence of sharing with the complainant of the new evidence gathered during this process before a final decision on the disciplinary measure imposed was reached, amounted to gross procedural irregularities that violated the complainant's right of defence and entitlement to due process.

The first plea of the complainant is well founded.

30. The second plea of the complainant pertains to the insufficient motivation of the impugned decision pursuant to which the Secretary-General did not follow the recommendation of the Appeal Board.

31. In Judgment 3969, consideration 10, referring to Judgment 3862, consideration 20, the Tribunal recalled the overarching legal principles that apply in terms of motivation of a decision when the executive head of an organization elects not to follow the recommendation of an internal advisory body:

"[...]

> 'The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached. In addition, according to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). [...]'

> These observations, as they relate to reports and conclusions of internal appeal bodies, are equally applicable to reports and opinions of a Disciplinary Committee." (Emphasis added.)

32. The constant case law of the Tribunal confirms that an organization must provide a proper and clear motivation when it does not follow the opinion and recommendation of an internal appeal body to the detriment of the employee concerned (see, for example, Judgment 4062, consideration 3, and the case law cited therein). In Judgment 3161, consideration 7, the Tribunal recalled that it is necessary for the executive head of an organization to explain the basis on which she or he arrived at a different conclusion than that of the internal advisory body. In this regard, it is not enough to simply identify flaws in the reasoning or procedures of the advisory body, but reasons must be provided for the opposite conclusion reached by the executive head.

33. In the impugned decision, the Secretary-General offered no explanation to support his conclusion that he was maintaining a demotion by two grades notwithstanding the recommendation of the Appeal Board to refer the matter for re-evaluation to the JAC's Disciplinary Chamber. Besides stating that this was his conclusion that such sanction was proportionate and appropriate under the circumstances, no more reasons were offered. This fell short of the requirements of the Tribunal's case law that indicates that a complainant must be made aware of this motivation in order to be able to conduct herself or himself accordingly and properly respond (see, for example, Judgment 1817, consideration 6).

The second plea of the complainant is also well founded.

34. In her third plea, the complainant submits that the determination made by the organization to the effect that she committed serious misconduct and gross negligence is not established and amounts to an error of law.

35. In the present case, the legal position taken by the organization in the notification of the disciplinary measure of 7 December 2020 and in the impugned decision of 3 September 2021 suffers no ambiguity. In both decisions, the Secretary-General made it clear that the disciplinary measure of demotion by two grades was taken as a result of the failure of the complainant to adequately supervise and oversee the staff member who committed the fraud, which amounted to a dereliction of her professional responsibilities. And given her seniority and position as Head of the Bangkok Office at the relevant time and direct supervisor of the fraudster and considering the gravity and serious impact of the fraud for ITU, this failure rose to the level of gross negligence and constituted serious misconduct. For the Secretary-General, it was therefore clear that the behaviour of the complainant amounted to serious misconduct.

36. Established precedent in the Tribunal's case law has it that a staff member's right to due process entails that the organization has an obligation to prove the misconduct complained of beyond reasonable doubt. This serves a purpose peculiar to the law of the international civil service and involves the recognition that often disciplinary proceedings can have severe consequences for the staff member concerned. In this regard, a staff member is to be given the benefit of the doubt (see, for example, Judgments 4697, consideration 12, and 4491, consideration 19). In this respect, in Judgment 4047, consideration 6, the Tribunal recalled that it is equally well settled that it will not engage in a determination as to whether the burden of proof has been met, instead, it will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact (see also Judgments 4764, consideration 13, 4697, consideration 22, and 4364, consideration 10).

37. As noted earlier, while the Staff Regulations and Staff Rules define what amounts to misconduct under Staff Rule 10.1.1, they do not specify or define what amounts to serious misconduct. There is, however, no doubt that, from a juridical standpoint, misconduct and

serious misconduct (in the French version, *"faute"* and *"faute grave"*) do not have the same meaning.

38. In its submissions, the organization has not pointed to any definition of serious misconduct short of arguing that, in its view, the complainant's conduct even amounted to the equivalent of gross negligence. Also, it has not pointed to any jurisprudence of the Tribunal that establishes conduct of the type in question in these proceedings is serious misconduct or gross negligence. It is not disputed though that misconduct is quite different from serious misconduct and, here, the contention of the organization against the complainant is not that she committed misconduct but that she rather committed serious misconduct.

39. That being so, the Tribunal considers that ITU has manifestly failed to provide evidence establishing beyond reasonable doubt that the complainant committed serious misconduct or gross negligence in the present situation. The record indeed easily supports the conclusion that a finding of guilt beyond reasonable doubt with regard to an allegation of serious misconduct could not have been made properly by a primary trier of fact. To equate, as ITU did, the failures identified both in the notification of the disciplinary measure and in the impugned decision to a serious misconduct or a gross negligence was an error of law.

40. In this regard, the Tribunal considers it sufficient to note from the record the following in support of the conclusion that a finding of serious misconduct beyond reasonable doubt was not open to the Secretary-General in the circumstances:

– It was established that the complainant was not involved, was not aware, did not support and did not try to cover in any way the fraud or the fraudulent scheme put in place by the fraudster.

– This fraudulent scheme remained undetected for more than seven years until information provided by an external anonymous whistleblower led the organization to conduct the necessary internal audit to find out about its existence.
– The IAU established that more than 70 per cent of the suspicious transactions that were part of the fraudulent scheme took place during the years where the complainant was not the supervisor of the fraudster anymore.
– No evidence supported the assertion that better supervision by the complainant could have allowed the fraud to be detected. At best, assuming a number of other factors besides proper supervision by the complainant, the external investigator simply affirmed that it may have likely allowed the fraud to be detected earlier than when it ended up being established.
– While the organization submitted before the Appeal Board that the complainant could have prevented a foreseeable risk, no evidence established what was the foreseeable risk that the complainant should have been conscientious about, nor in which way and on what basis such a risk could be qualified as foreseeable.

41. In its submissions before the Tribunal, ITU surprisingly stated that the Appeal Board rendered its report on 20 August 2021 "concluding that there was gross negligence, which amounted to serious misconduct and warranted the issuance of a disciplinary sanction". On the face of the report, that is not true.

The organization also stated in its pleadings that one of the key but incorrect conclusions of the Disciplinary Chamber was that the fraudulent activities at issue had taken place after the complainant's time as Regional Director of the Bangkok Office whereas it was rather clear from the report filed in this regard by this advisory body, when it referred to the fact that the case documents concerned events that occurred after the complainant's time, was referring only to count f.) of the list of improper conducts identified by the Secretary-General in support of his decision to initiate disciplinary proceedings against the complainant in the notification of 10 June 2020.

42. Indeed, out of the six counts then identified as conduct that, if established, would amount to serious misconduct, even the Legal Advisor in his legal analysis, as well as the Secretary-General in his decision of 7 December 2020, recognised that three, namely the counts identified as a.), b.) and d.), were not established and supported by sufficient evidence. As for the remaining three, with respect to item c.), what the Legal Advisor and the Secretary-General wrote in this regard indicated that, in their view, it was at best "apparent" that, instead of proper oversight of the project identified under that count, the complainant had carried out a mere follow up of the developments based on the information provided by the fraudster, which clearly did not amount to evidence beyond reasonable doubt that this was a situation of serious misconduct on the part of the complainant.

43. For the only two remaining counts that pertained to, for one, the project office and, for the other, the events organised through private companies, even if they were retained as misconduct established against the complainant, they did not amount to either gross negligence or serious misconduct. Suffice it to note in this regard that, despite its thorough analysis, the Appeal Board in its report, while recognising that the complainant bore some responsibility in this regard, not only never characterised such as gross negligence or serious misconduct, but even refrained from characterising the conduct as misconduct.

44. The Tribunal observes further that neither the external investigator, nor the Disciplinary Chamber, nor the Appeal Board characterised, in any of their reports or analysis, the conduct of the complainant as a serious misconduct despite their extensive inquiries, the number of interviews they had conducted and the extensive documentation that they had analysed. In this regard, while the Legal Advisor and the Secretary-General opined, for their part, that the failure of the complainant to adequately supervise and oversee the work of the fraudster amounted to a dereliction of her professional responsibilities, it remains that, if dereliction may constitute negligence, it does not amount *per se* to either gross negligence or serious misconduct.

45. In essence, the only reason offered by ITU to support its conclusion that the failure of the complainant to adequately supervise and oversee the fraudster rose to the level of gross negligence and constituted serious misconduct was based on two factors only: on the one hand, the seniority of the complainant, her grade D.1, and her position as Head of the Bangkok Office and direct supervisor of the fraudster and, on the other hand, the gravity and serious impact of the fraud upon the organization. The Tribunal disagrees that those two elements suffice to characterise the conduct as serious misconduct or gross negligence. ITU does not indeed identify any support whatsoever for this assertion. It certainly is insufficient to reach the level of evidence beyond reasonable doubt that a serious misconduct was established.

46. It follows from the above that, on the facts of this case and considering the conduct identified by the organization in support of the disciplinary measure imposed on the complainant, a finding of serious misconduct established beyond reasonable doubt was clearly not open to any primary trier of fact on the record as it stands. The contrary conclusion reached by ITU was an error in law.

The third plea of the complainant is therefore well founded too.

47. In support of her fourth plea, the complainant maintains that the organization furthermore ignored the principle of proportionality when it decided to impose a disciplinary sanction of demotion by two grades upon her.

The Tribunal has often recalled that, while a disciplinary authority within an international organization has a discretion to choose the disciplinary measure imposed on a staff member for misconduct, the decision must always respect the principle of proportionality (see, for example, Judgment 3640, consideration 29). In Judgment 4697, consideration 24, referring to its prior Judgment 4504, consideration 11, the Tribunal indeed observed that lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure

even though the decision in that regard is discretionary in nature (see also Judgment 4745, consideration 11).

48. In the present case, the Secretary-General had the ability to apply a large range of disciplinary sanctions in situations of alleged misconduct pursuant to Staff Rule 10.1.2. These sanctions had to be commensurate with the facts established and had to take into account the potentially significant consequences for the complainant depending on the severity of the penalty or measure chosen. Here, even though the Secretary-General was told by the Legal Advisor that there were no examples within the organization of a demotion by two or more grades, and that a demotion of the complainant from grade D.1 to grade P.4 would entail, as part of the consequences, the loss of her diplomatic status, the Secretary-General still elected to choose such a demotion by two grades without offering any explanation that showed that he indeed examined these issues in any way whatsoever.

49. In a situation where the misconduct that formed the basis of the disciplinary sanction was, in the end, as properly noted by the Appeal Board, a failure to supervise a staff member, a demotion by two grades clearly lacked proportionality when balanced against the drastic consequences that a demotion by two grades entailed for the complainant, notably in a situation where, after close to 20 years within the organization, a demotion by two grades meant for her going back to a grade even lower than the one she held when she started at ITU in 2000. That demotion was moreover for an indefinite period of time and was thus punishing her up to the end of her career at ITU given her age and seniority, in a situation where the record was absolutely clear that she had no participation, no involvement and no benefit in the fraudulent scheme that remained undetected for everyone within the organization for more than seven years up until an external anonymous whistleblower warned ITU.

50. The Tribunal considers that, in the present case, the Secretary-General could not, without breaching the principle of proportionality, impose on the complainant the sanction of demotion by two grades.

This was an error of law and it amounted to an irregularity that vitiated the impugned decision, as well as the prior decision of 7 December 2020.

The fourth plea of the complainant is founded as well.

51. It follows from the foregoing that, in view of these four major irregularities, the Secretary-General's decision of 3 September 2021, as well as his prior decision of 7 December 2020, were unlawful and must be set aside, without there being any need to rule on the other pleas raised in the complaint.

52. Accordingly, as the Appeal Board correctly recommended in its report, the matter should be sent back to the Disciplinary Chamber of the JAC for reconsideration of the disciplinary sanction and re-evaluation of the case in light of the elements provided in the legal analysis of the Legal Advisor of 23 November 2020 and the conclusions contained in the Appeal Board's report of 20 August 2021.

Given that the matter is remitted to the Disciplinary Chamber of the JAC for reconsideration, the request that any document reflecting the present procedure be withdrawn from the complainant's personal file is denied at this juncture.

53. The organization shall in the meantime reinstate immediately the complainant in her former position at the D.1 level (and shielding the present incumbent), or, if that is no longer possible, in another post at the D.1 level, with full retroactive effect, including payment of all salary, benefits, step increments, pension contributions, entitlements and all other emoluments that she would have received, from the effective date of her demotion through the date of her reinstatement, as compensation for the material damage caused to her by the two decisions. The sums payable to the complainant for each monthly remuneration shall bear interest at the rate of 5 per cent per annum from the date when they fell due until the date when they are paid.

54. The complainant also claims an award of no less than 1,000,000 Swiss francs in moral, exemplary, and punitive damages. She alleges in essence that this is to compensate her "moral injury, dishonor, enormous humiliations and inconveniences, and financial loss [...] for the irreparable damage done to her long-standing career with commitment to [...] ITU" as a result of her being wrongfully accused and found culpable of serious misconduct and gross negligence and of being wrongfully demoted by two grades for an indefinite period. In her internal appeal, the amount of her claim in this regard stood at no less than 500,000 Swiss francs.

55. Before anything else, the Tribunal finds it necessary to mention that claiming amounts of this magnitude does not serve, assist or help the credibility of the requests submitted. The Tribunal observes as well that the complainant does not substantiate in any way how the amounts claimed are divided between moral damages, on the one hand, and punitive damages, on the other hand.

56. Bearing that in mind, it is convenient to recall that the Tribunal's established case law relevantly states that any complainant seeking compensation for either material or moral damages must always provide evidence of the injury suffered, of the alleged unlawful act, and of the causal link between the unlawful act and the injury (see, for example, Judgments 4158, consideration 4, 3778, consideration 4, 2471, consideration 5, and 1942, consideration 6), and that it is the complainant who bears the burden of proof in this respect (see Judgments 4158, consideration 4, 4157, consideration 7, and 4156, consideration 5). It is convenient for the Tribunal to recall as well that punitive damages are only awarded in exceptional circumstances (see, for example, Judgment 4659, consideration 14).

57. In the present case, given notably the extensive internal audit and external investigation conducted over long periods of time and the findings of the internal advisory bodies on the disciplinary measures imposed, the Tribunal considers that exceptional circumstances are not

evident and that it is therefore inappropriate to award punitive damages to the complainant.

58. With respect to moral damages, the complainant provided substantiated arguments in support of her claim and the Tribunal is satisfied that she undoubtedly suffered considerable moral injury as a result of the decisions that are set aside because of the procedural errors and errors of law discussed above.

59. In her pleadings, the complainant emphasized especially that the demotion by two grades, at the pinnacle of her career, was sufficient to demonstrate the obvious harm caused to her, both as a professional and as a human being. She also stressed the humiliation she felt in front of all ITU colleagues of being deprived of the tasks and responsibilities related to a D.1 position. She finally pointed to the impact that the unlawful procedure and disciplinary measure imposed on her had on the development of her career in terms of future promotions or work opportunities.

60. In view of all the circumstances of this case, the Tribunal considers that this moral injury will be fairly redressed by awarding the complainant compensation in the amount of 50,000 Swiss francs.

61. Finally, regarding costs, the entitlement of the complainant should be fixed at an amount of 10,000 Swiss francs. The Tribunal considers however that there are no grounds for awarding costs in respect of the internal appeal proceedings. Precedents have it that such costs may only be awarded under exceptional circumstances (see, for example, Judgments 4515, consideration 12, and 4157, consideration 14), which were not demonstrated in the present case.

DECISION

For the above reasons,

1. The impugned decision of the Secretary-General dated 3 September 2021 and his prior decision dated 7 December 2020 are set aside.

2. The matter is remitted to ITU in accordance with what is stated in consideration 52 of this judgment.

3. ITU shall reinstate the complainant in her former position at the D.1 level, or, if that is no longer possible, in another post at the D.1 level, and award her material damages in accordance with what is stated at consideration 53 of this judgment.

4. ITU shall also pay the complainant moral damages in the amount of 50,000 Swiss francs.

5. It shall furthermore pay the complainant costs in the amount of 10,000 Swiss francs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Clément Gascon, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

CLÉMENT GASCON

HONGYU SHEN

MIRKA DREGER