



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-510

**Cobarrubias
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Rosalyn Chapman Judge Mary Faherty
Case No:	2014-582
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Antonio Bautista
Counsel for Appellant/Respondent:	Amy Wood

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/164, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 9 December 2013 in the case of *Cobarrubias v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 4 February 2014 and Mr. Reynaldo Cobarrubias answered on 7 March 2014.

Facts and Procedure

2. The following facts are uncontested:¹

... On or about 7 May 2008, the Investigations Division, Office of Internal Oversight Services (ID/OIOS) obtained information indicating “possible misconduct” by the Applicant. The information suggested that he “may have misused the information and communication technology [“ICT”] resources and data of the Organization”. ID/OIOS initiated an investigation into claims that the Applicant had received e-mail messages containing images with pornographic or sexual content from United Nations colleagues, using his official United Nations Lotus Notes e-mail account.

... As part of the investigation, ID/OIOS investigators conducted a review of the Applicant’s UN e-mail account. The review indicated that the Applicant had received, on his UN e-mail account, 359 e-mails containing materials that were pornographic or sexual in nature.

... The ID/OIOS review also indicated that the Applicant had moved 264 of the e-mails containing pornographic or sexual materials from his e-mail inbox into eight user-created folders.

... The ID/OIOS review further indicated that, on at least two occasions, the Applicant used his United Nations e-mail account to forward e-mails that were pornographic or sexual in content to his personal e-mail address.

... By e-mail dated 3 April 2009, ID/OIOS invited the Applicant to attend an interview. In the e-mail, among other things, the ID/OIOS investigator stated: “I need to interview you as a staff member who is implicated as the subject of a case that is being investigated by this Office”. The Applicant’s position is that the e-mail did not specify that OIOS had obtained information indicating “possible misconduct” by the Applicant. The Respondent’s position is that the e-mail clearly identified the Applicant as the subject of an investigation.

¹ Impugned Judgment, para. 3.

... On 15 April 2009, ID/OIOS interviewed the Applicant.

... The Applicant's position is that, at the outset of his interview, he was not categorically informed that OIOS had obtained information indicating "possible conduct" [sic] by the Applicant. The Respondent's position is that, through the email dated 3 April 2009, the Applicant had already been informed that he was the subject of an investigation.

... During his interview, the Applicant admitted that he had received e-mails containing pornographic or sexual material on his UN e-mail account and that he had forwarded e-mails containing pornographic or sexual material from his UN e-mail account to his personal e-mail account.

... The Applicant also stated that he had created sub-folders in his UN e-mail account, in which he had placed the e-mails in question, "just for fun, storing them and looking at them" ... "to view before work or at a dull moment to glance at it".

... The Applicant stated that he did not report that pornographic e-mails were being sent to him because he believed "that it was not hurting anyone".

... At the conclusion of the interview, the Applicant was asked whether he had any complaints about the manner in which the interview was conducted and how he was treated by investigators. He stated that he had "no complaints" and that the interview was "pretty pleasant".

... The Applicant signed and dated his interview statement to certify its accuracy.

...

... Prior to the finalization of the investigation report, ID/OIOS invited the Applicant to comment on the draft investigative details. On 8 July 2009, the Applicant provided his comments. In his comments, the Applicant stated, among other things, that:

... "First, I note that – as stated in paragraph 1 of the draft investigation details – OIOS obtained information on 7 May 2008 indicating possible misconduct and that it was then reported that I may have misused the information and communication resources of the United Nations. I therefore believe it would have been fair had OIOS advised me as to the purpose and meaning of the interview as then I could have consulted with a legal or staff representative prior to this interview as it may now turn out that the report will serve as a pretext for potential disciplinary proceedings, which was not clear to me a[t] that stage."

... "Furthermore, in light of the jurisprudence of the United Nations Administrative Tribunal, I also believe that OIOS should have indicated that I could have had a legal representative present at the interview. I remember asking

for this but the investigators informed that there was no need for a legal representative.”

...

... The “investigators were very professional and always gave [him] sufficient time to respond or provided clarification when a question was not clear to [him]” and that he “would like to thank the investigators for being so professional as [he] felt very embarrassed during the interview about what happened”.²

... On 15 July 2009, ID/OIOS issued its investigation report concerning the Applicant.

... By memorandum dated 13 January 2010, the Applicant was alleged to have engaged in misconduct. Specifically, he was charged with:

... “the improper use of the property of the United Nations, whereby [he] received over a period of time pornographic materials on the United Nations computer system”; and

... “failing to fulfill [his] obligation under the UN ICT Policy to promptly report those violations of the bulletin of which [he] became aware to the appropriate United Nations authority, in that [he] did not report inappropriate emails attaching materials that were pornographic or sexual in nature that were received by [him] over a period of time from United Nations colleagues”.

... By memorandum dated 30 July 2010, the Applicant provided his comments on the allegations. He “accept[ed] that [his] conduct was not in accordance with the provisions of the Bulletin”. However, he argued that he “never saved any of these emails on [his] computer and [he] also never archived these emails”. He also stated that, as to “any other bizarre or vulgar images”, he deleted them “immediately” as he “found them disgusting and offensive”.

... By letter dated 4 April 2011, the Applicant was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had concluded that there was “sufficient credible evidence that, using the Organization’s ICT resources, [he] misused [his] UN Lotus Notes email account by receiving and storing emails containing pornographic, violent and otherwise inappropriate material, that [he] failed to report that other staff members were misusing their UN Lotus Notes email accounts, and that [his] actions amounted to misconduct in violation of former staff regulations 1.2(b), (f) and (q), and ST/SGB/2004/15”. The Applicant was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had decided to impose upon him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity.

² Square brackets in original.

3. On 9 December 2013, the UNDT rendered Judgment No. UNDT/2013/164, finding that the alleged facts had been established and amounted to misconduct by Mr. Cobarrubias. The UNDT further found that Mr. Cobarrubias' due process rights during the investigative process had been respected. However, the UNDT concluded that the disciplinary sanction of separation with compensation in lieu of notice, and without termination indemnity, was disproportionate to Mr. Cobarrubias' level of misconduct. Accordingly, the UNDT ordered the rescission of the contested decision, Mr. Cobarrubias' reinstatement in his previous position with retroactive effect from 4 April 2011 and the imposition of the lesser sanction of written censure and demotion by one grade with deferment for three years of eligibility for consideration for promotion starting the date of his separation, i.e. 4 April 2011. The UNDT further ordered payment of partial compensation for loss of earnings retroactively from the date of his separation until the date of his effective reinstatement. Alternatively, in lieu of rescission, the UNDT awarded compensation in the amount of USD 5,000 and two years and eight months' net base salary. Finally, the UNDT ordered that references to the previous sanction be removed from Mr. Cobarrubias' official status file and replaced by the lesser sanction set out above.

Submissions

The Secretary-General's Appeal

4. The UNDT exceeded its competence and erred in law by finding that the sanction imposed on Mr. Cobarrubias was disproportionate. The UNDT failed to apply the test of determining whether the sanction was "absurd" or "flagrantly arbitrary" and instead concluded that the sanction was "too harsh in comparison with the gravity of the misconduct", thereby effectively substituting its own discretion for that of the Secretary-General. The Secretary-General properly exercised his discretion in separating "a staff member who admitted to flagrantly viewing pornography during work hours on a daily basis over a period of four years and whose primary explanation for his conduct was that he had not been aware of the [United Nations] ICT Policy".

5. The UNDT erred in law and fact in comparing the present case to other UNDT cases involving the disciplining of staff members receiving pornographic materials and in concluding that the sanction was disproportionate on this basis. The UNDT primarily looked at the level of the sanction without looking at the quantity of the pornographic materials,

the frequency with which the staff member received, viewed or sent the materials, and the level of involvement of the staff member in engaging with the pornographic material.

6. The UNDT erred in concluding that the Administration failed to consider relevant mitigating circumstances raised by Mr. Cobarrubias, namely his claims that he had been unaware of the ICT Policy and that his due process rights were violated because he was not afforded a right to assistance of counsel during the investigation. The Administration fully considered these mitigating factors, but correctly decided that they did not offset the gravity of his misconduct such that a lesser sanction would be warranted.

7. In addition, the UNDT erred in finding that three other factors constituted mitigating circumstances. First, Mr. Cobarrubias' past service record was not a mitigating factor under the circumstances of the case. Staff members are expected to abide by the Organization's regulations and core principles and the fact that Mr. Cobarrubias had done so for a number of years before engaging in misconduct does not lessen the gravity of his actions. Second, the personal relationship with his colleague Mr. A is irrelevant. Staff members have the duty to report any violations of the ICT Policy and this obligation does not exempt staff members from reporting individuals with whom they have a close personal relationship. Third, Mr. Cobarrubias' continued employment with the Organization following the initiation of the investigation is in accordance with the Organization's legal framework and does not constitute a mitigating circumstance.

8. The UNDT erred in law and exceeded its competence in setting the award of compensation. The decision to separate Mr. Cobarrubias from service was lawful and accordingly, the remedies awarded by the UNDT are legally unsustainable. In the alternative, it is argued that the UNDT erred in law and exceeded its competence when it relied on *Mmata* in finding that the present case was "exceptional" such as to warrant compensation exceeding two years' net base salary.³ In *Mmata*, the Appeals Tribunal expressly held that the length of time to obtain a judgment from the UNDT was "not a reason for justifying higher compensation for the loss of income to the date of the Judgment". Rather, it awarded compensation exceeding two years' net base salary due to the "egregious wrongful dismissal" and bad faith of the Organization. In contrast to *Mmata*, there was no finding by the UNDT

³ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

of egregious conduct on the part of the Organization. Finally, the UNDT also erred in law by awarding moral damages where Mr. Cobarrubias provided no evidence of moral harm.

9. The Secretary-General requests that the Appeals Tribunal uphold the decision to separate Mr. Cobarrubias from service and vacate the award of compensation, as well as the other remedies ordered by the UNDT.

Mr. Cobarrubias' Answer

10. The UNDT correctly held that the sanction imposed on Mr. Cobarrubias was disproportionate to the gravity of the misconduct. The UNDT appropriately compared his case with relevant UNDT cases and correctly concluded that, in comparison, the sanction was “too harsh”. The sanction applied was “inconsistent and a stark deviation from the pattern in the decision-making of the Secretary-General”.

11. The UNDT did not err in concluding that the Administration failed to appropriately consider mitigating circumstances. The memorandum communicating the impugned decision showed no reference to any of the mitigating circumstances even though the issues of due process and the Administration’s failure to properly disseminate the Organization’s ICT Policy were addressed in that decision.

12. The UNDT did not err in law or exceed its competence in setting the award of compensation in the present case.

13. The Secretary-General has taken the Appeals Tribunal’s holding in *Mmata* out of context. The Appeals Tribunal did not only expressly preclude the length of time to obtain a judgment from the UNDT as a reason for justifying a higher compensation, but positively held that there may be cases where it may be a justification for a higher compensation. It was precisely on this basis that the UNDT set an alternative compensation beyond two years.

14. Mr. Cobarrubias asks that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment in its entirety.

Considerations

15. The ID/OIOS investigators conducted a review of Mr. Cobarrubias' work e-mail account. The review indicated that Mr. Cobarrubias had received, on his work e-mail account, 359 e-mails containing materials that were pornographic or sexual in nature. The ID/OIOS review also indicated that he had moved 264 of the e-mails containing pornographic or sexual materials from his e-mail inbox into eight user-created folders. The ID/OIOS review further indicated that, on at least two occasions, Mr. Cobarrubias used his United Nations e-mail account to forward e-mails that were pornographic or sexual in content to his personal e-mail address.

16. Mr. Cobarrubias was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had decided to impose upon him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity.

17. The Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence in substituting its own judgment for that of the Secretary-General concerning the evaluation of facts and the appropriate disciplinary action.

18. On 9 December 2013, the UNDT rendered Judgment No. UNDT/2013/164, finding the alleged facts had been established and amounted to misconduct. The UNDT further found that Mr. Cobarrubias' due process rights during the investigation had been respected. However, the UNDT concluded that the disciplinary sanction of separation with compensation in lieu of notice, and without termination indemnity, was disproportionate and substituted the sanction.

19. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the

Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.⁴

20. Whilst the sanction ultimately imposed upon Mr. Cobarrubias could be considered harsh, it was not unreasonable, absurd or disproportionate. As such, the Appeals Tribunal finds that it was a reasonable exercise of the Administration's broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNDT thus erred in finding the sanction disproportionate and in substituting its opinion for that of the Administration.⁵

21. In the instant case, the UNDT conducted a merit-based review and substituted its own decision for that of the Secretary-General.

Judgment

22. For the foregoing reasons, the UNDT Judgment is vacated in its entirety.

⁴ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

⁵ *Cf. Koutang v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-374, para. 30.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar