



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

Case No. 2010-078



Before:	Judge Sophia Adinyira, Presiding Judge Kamaljit Singh Garewal Judge Rose Boyko
Judgment No.:	2010-UNAT-080
Date:	29 October 2010
Registrar:	Weicheng Lin

Counsel for Appellant:	Bart Willemsen
Counsel for Respondent:	Phyllis Hwang

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Brian Streb (Streb) was summarily dismissed for serious misconduct for accepting lavish hospitality from a vendor's representative. He appeals from a Judgment of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) which affirms the decision of the Secretary-General of the United Nations.
2. We find that the UNDT applied the appropriate principles in considering whether or not a case of serious misconduct was established and if so, whether the sanction of summary dismissal was appropriate.
3. Though the misconduct was based on a single incident, it would have been inappropriate for the Secretary General to take the view that, as long as there was no evidence that Streb's impartiality had actually been compromised, he did not commit misconduct or serious misconduct. Any such view would ignore the importance that must be attached to ensuring public confidence in the integrity of the United Nations Procurement Division.
4. Streb has not been able to satisfy this Tribunal of the existence of any mitigating factors for us to conclude that the summary dismissal was disproportionate to the offence.
5. In view of the serious nature of the misconduct established, we find that the sanction of summary dismissal imposed on Streb by the Secretary-General was proportionate to the offence.
6. We find no merit in the appeal. The appeal is dismissed.

Facts and Procedure

7. Streb entered the service of the United Nations on 5 October 1981 as a security officer at the S-1 level. By 1 April 2004, he had progressed to the P-4 level in the Procurement Division. At the time of the incident leading to his dismissal, Streb was the Team Leader of the Communications and Information Technology Support Team within the Field Procurement Section. Streb directly supervised Walter Cabrera (Cabrera) who was a

Procurement Officer in the Communications and Information Technology Support Team within the Field Procurement Section.

8. The summary dismissal was related to a single incident of lavish hospitality totaling USD 6, 000 received by Streb and Cabrera from Nishan Kohli (Kohli), a United Nations vendor, that took place in August or September 2002 but went unreported until 2007.

9. In 2006 the Procurement Task Force (PTF) of the Office of Internal Oversight Services (OIOS) investigated the award of telecommunication contracts to an Indian company, the Telecommunications Consultants of India Ltd. (TCIL) as well as Thunderbird Industries LLC (Thunderbird).

10. In the context of the investigations, the PTF looked into the relationship between the Procurement Section, Kohli, and the companies associated with him and his father (TCIL and Thunderbird). Streb was interviewed on eight occasions but he never mentioned the incident of lavish hospitality. Cabrera was interviewed on three occasions and similarly failed to report the incident.

11. The PTF investigations led to the criminal prosecution and subsequent conviction of a senior United Nations procurement official, Sanjaya Bahel (Bahel), in a U.S. federal district court.

12. It was during the criminal proceedings against Bahel that Kohli as a prosecution witness mentioned the entertainment he had provided to two United Nations staff members.

13. The two United Nations staff members were subsequently identified as Streb and Cabrera. Streb explained to the PTF that he withheld the information on his socializing with Kohli because he did not wish to “disclose matters of private conduct in [his] past that could prove personally embarrassing”.

14. The PTF conducted further investigations in May 2007. On 20 June 2007, the PTF issued a report concerning the conduct of Streb and Cabrera during the 2002 incident.

15. The PTF investigation found that in or about August or September 2002, Streb and Cabrera met Kohli at a bar; after consuming large quantities of alcohol the three proceeded by taxi to an adult entertainment club where Kohli paid for alcoholic drinks and lap dances;

after which the three went to the W Hotel in midtown Manhattan where Kohli got them more alcoholic drinks and a suite and they were joined by women; Streb left the suite after 15 to 30 minutes while Cabrera remained; Kohli paid for all expenses associated with the visit to the hotel, including escorts and alcohol, which, according to Kohli's testimony in the Bahel trial, amounted to approximately USD 6,000; that neither Streb nor Cabrera had reported the incident; and finally that Streb had failed to take any action concerning Cabrera or advise the latter in spite of his supervisory role.

16. On 28 June 2007, the Office of Human Resources Management (OHRM) notified Streb of the charges of misconduct, and provided Streb with the PTF report. Streb submitted his observations on the charges and the PTF report on 30 July 2007. On 8 November 2007, Streb was informed that he was summarily dismissed for serious misconduct, with immediate effect.

17. On 7 January 2008, Streb filed a request with the Joint Disciplinary Committee (JDC) to review his summary dismissal. Both parties filed written submissions in 2008, a hearing was held before the JDC and the JDC issued its report on the case. At the time that the JDC was abolished on 30 June 2009, the Secretary-General had not taken a decision on the recommendations of the JDC. The case was then transferred to the Dispute Tribunal following the abolition of the JDC. The UNDT decided that it would not consider the JDC report, but it would consider all the documents that were before the JDC. The documents examined by the UNDT included the PTF Report of 20 June 2007; the memorandum dated 28 June 2007 to Streb from OHRM notifying him of the charges of misconduct; the comments of Streb on the charges of misconduct and Streb's request for review of his summary dismissal to the JDC. The UNDT also decided to join the cases of Streb and Cabrera and issue a single judgment for both cases.

18. On 25 February 2010, the UNDT issued its Judgment. It found that the summary dismissal of Streb was justified and proportionate.¹

¹ *Cabrera and Streb v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/034.

Submissions

Streb's Appeal

19. Streb submits that the UNDT erred in law in considering and making a pronouncement on the alleged "failure to report". Streb observes that the charges of misconduct do not include the allegation that Streb "failed to report" the alleged lavish hospitality.

20. Streb further claims that the UNDT erred in fact in concluding that evidence as to the vendors' representative's motive was elicited during the criminal trial. The trial record solely reflects, without any significant details, the sequence of events that transpired during the material evening. The trial record does not include any reference to the vendors' representative's motive.

21. Streb alleges that the UNDT erred in fact and law in arriving at its finding of a potential or actual conflict of interest. The record does not include evidence that Streb did not feel "comfortable" disclosing the event to any other person, nor was Streb cross-examined on this matter by counsel for the Secretary-General during the proceedings before the JDC Panel, which was part of the record considered by the UNDT.

22. The UNDT further erred in concluding and taking into consideration that Streb did not cooperate with the PTF investigation. The finding that Streb did not "volunteer" particular information does not warrant a finding that Streb did not "respond fully" to a request for information. In addition, Staff Regulation 1.2(r) requires that staff members respond fully to requests for information regarding "the possible misuse of funds, waste or abuse". There is no such allegation made in the instant proceedings. In paragraph 33 of the Judgment, the UNDT finds that "[the applicants] had a duty at the time to make the PTF aware of the events in question so as to enable the PTF to obtain further information regarding the vendors' representative's activities". The UNDT failed to stipulate the legal basis for this "duty".

23. The UNDT erred in fact in concluding that there could be no doubt in the mind of any reasonable observer that the vendors' representative was interested in trying to secure benefits and advantages for himself and his companies from the United Nations Procurement Division. Streb had no professional dealings with the representative at the

relevant time and therefore no potential to influence any procurement of contracts in favor of any of the represented vendors. Furthermore, the evening encounter was not pre-arranged.

24. The UNDT failed to properly take into consideration the permissive culture at the material time. It is in evidence and not in dispute that at the material time there was a permissive culture of receiving hospitality albeit within boundaries.

25. The UNDT erred in law in failing to adequately motivate its conclusion that the contested decision was disproportionate. Similarly, the UNDT erred in fact and law in determining that the sanction was proportionate.

26. The UNDT erred in fact and law in accepting without evidentiary basis that the Secretary-General had taken into consideration the mitigating circumstances.

27. Streb requests that this Tribunal find that the UNDT committed both errors of law and fact, which vitiate its findings and therefore its conclusion, which relied upon those cumulative findings, and that the sanction imposed of summary dismissal was wholly disproportionate. Streb asks that he be (i) retroactively reinstated; (ii) that he be compensated in the amount of two years net base salary for moral damages; and (iii) that all adverse information be expunged from his Official Status File.

Secretary-General's Answer

28. The Secretary-General submits that the UNDT correctly upheld the Secretary-General's decision to summarily dismiss Streb. In the present case, the facts upon which the disciplinary measure was based were clearly established. The interview records of Streb and Cabrera on 24 May 2007 establish that they had accepted lavish hospitality from Kohli. The acceptance of such lavish hospitality not only violated the Staff Regulations and Rules and the Procurement Division's "Guidelines on Acceptance of Gifts and Hospitality by the Procurement Division Staff", but was particularly egregious in view of the nature of such hospitality; as such, Streb's conduct legally amounted to serious misconduct. The disciplinary procedures leading to the summary dismissal of Streb were conducted in full respect of the due process rights of Streb. Finally, in view of the serious nature of the misconduct established, the sanction of summary dismissal was proportionate to the offence.

29. The Secretary-General further submits that Streb has not identified any error of law or fact made by the UNDT that would require a reversal of its decision to uphold his summary dismissal.

30. Contrary to Streb's assertion, the charges of misconduct did include an allegation that he had failed to report to the Organization his acceptance of "lavish hospitality" from Kohli, and he did have an opportunity to respond to such an allegation. Streb was aware that one of the charges of misconduct against him related to his failure to report his acceptance of "lavish hospitality" from Kohli to the Organization, and he responded at length to this issue in both his comments on the charges, dated 30 July 2007, and his request for review of his summary dismissal to the JDC.

31. The UNDT had basis to draw conclusions about Kohli's motives in providing "lavish hospitality" to Streb and other officials of the United Nations Procurement Division. In his testimony, Kohli confirmed that he supplied Bahel with cash, airplane tickets and other benefits to secure an advantage for the companies that Kohli represented in the United Nations' procurement process. When questioned as to whether Kohli provided benefits to other United Nations employees, other than Bahel, Kohli discussed his evening with Streb and Cabrera. The UNDT therefore had a reasonable contextual basis to conclude that such benefits were provided to Streb and Cabrera for the same reason that Kohli provided benefits to Bahel, namely, to secure an advantage for the companies he represented in the procurement process.

32. The UNDT did not err on a question of fact and law when it determined that Streb was "not comfortable" discussing his receipt of "lavish hospitality" from Kohli. Streb's assertion is contradicted by his own statements. In his response to the charges of misconduct, Streb explained that he did not disclose his night out with Kohli as follows: "I am certainly not obliged to use an interview to disclose matters of private conduct in my past that could prove personally embarrassing."

33. The UNDT did not err in law in concluding that Streb did not cooperate with the PTF. Streb was never specifically asked by the PTF whether he had accepted "lavish hospitality" from Kohli. However, during the 19 April 2006 interview regarding the relationship between the Kohlis and the United Nations Procurement Division, Streb provided information about his own contacts with the elder Kohli and discussed the frequency with which the Kohlis

visited Bahel. This was so in spite of the fact that specific questions regarding such contacts and visits had not been posed to Streb.

34. The Judgment shows that the UNDT considered the permissive culture at the time that Streb accepted “lavish hospitality” from Kohli. The UNDT was at all times mindful that a culture of permitting the acceptance of hospitality from vendors prevailed in the Procurement Division at the relevant time. Specifically, the UNDT noted that “[t]here was within the Procurement Division a culture of acceptance of modest hospitality from vendors”. It then proceeded to raise the question of “whether the conduct in which these applicants engaged went beyond the limit of that permissive culture”.

35. The UNDT provided a rationale as to why the sanction of summary dismissal was proportionate and the Secretary-General and the UNDT considered the mitigating circumstances presented by Streb. The acceptance by a procurement official of “lavish hospitality” from a vendor’s representative constitutes serious misconduct in and of itself. The UNDT enumerated the additional factors in the case that aggravated the gravity of Streb’s misconduct. Moreover, the Secretary-General’s response to the JDC, dated 14 February 2008, contains an extensive discussion regarding Streb’s comments and mitigating circumstances. Further, in its judgment, the UNDT examined at length Streb’s assertions that his behavior should be viewed in the context of the permissive culture that prevailed in the Procurement Division at the time, that the 2002 incident was a private matter and that there was no evidence that it undermined his objectivity in the treatment of vendors.

36. The Secretary-General requests this Tribunal to dismiss the appeal in its entirety.

Considerations

37. Streb submits extensively that the UNDT erred in fact and in law in its considerations.

38. But we find that the UNDT adequately applied the appropriate principles set out in the former Administrative Tribunal Judgment No. 1391 (2008) in considering whether or not a case of serious misconduct had been established and if so, whether the sanction of summary dismissal was appropriate.

39. It was in evidence that at the material time there was a permissive culture in the Procurement Division of receiving hospitality although within boundaries. It was obvious that in this instance the boundaries were crossed.

40. The fact that Streb and Cabrera accepted lavish hospitality from Kohli was a clear violation of the Procurement Division's "Guidelines on Acceptance of Gifts and Hospitality by the Procurement Division Staff" (rev. 1) of 18 January 2001, which reads in portions as follows:

It is an overriding importance that staff members acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as to show favorable treatment to an individual or entity by accepting gifts and hospitality or other similar considerations.

41. Though the misconduct was based on a single incident, we agree with the UNDT which found:

[I]t would have been inappropriate if the Secretary General were to have taken the view that so long as there was no evidence of the applicants' impartiality actually being compromised they would not have committed misconduct or serious misconduct. Any such construction ignores the importance that must properly be attached to ensuring public confidence in the integrity of the UN Procurement Division.²

42. In any event, we find that the facts on the basis of which Streb was summarily dismissed for serious misconduct were clearly established, and that there were no procedural irregularities in the disciplinary proceedings.³

43. Moreover, Streb has not been able to satisfy this Tribunal of the existence of any mitigating factors to enable us to conclude that the summary dismissal was disproportionate to the offence.

44. In view of the serious nature of the misconduct established, we find that the sanction of summary dismissal imposed on Streb by the Secretary-General was proportionate to the offence.

45. For the foregoing reasons, we find no merit in this appeal.

² *Cabrera and Streb v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/034, para. 39.

³ Cf. *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028; UNAT Judgment No. 941, *Kiwanuka* (1999).

Judgment

46. The appeal is dismissed. The Judgment of the UNDT is affirmed.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Boyko

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar