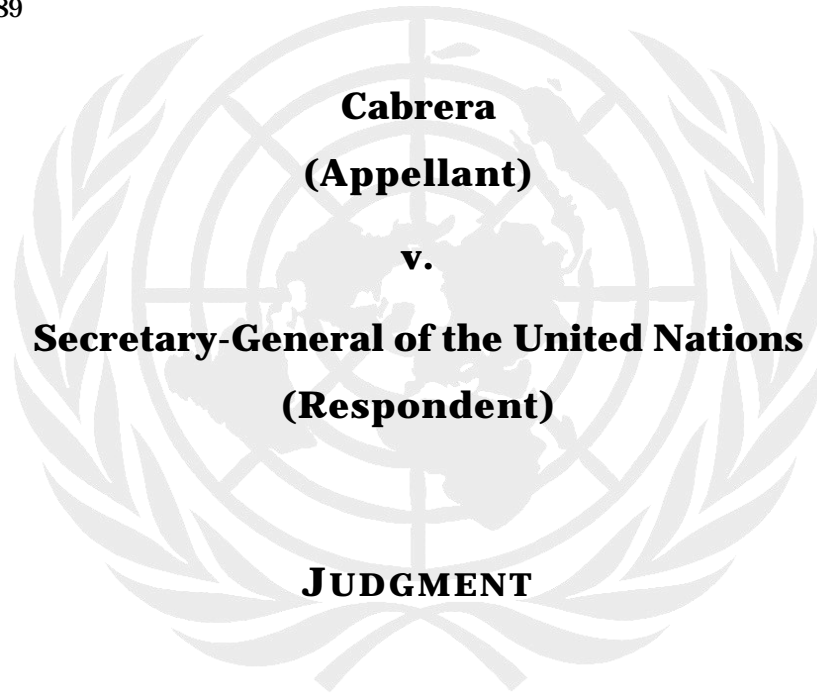




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-089



Before: Judge Mark P. Painter, Presiding
Judge Jean Courtial
Judge Inés Weinberg de Roca

Judgment No.: 2010-UNAT-089

Date: 29 October 2010

Registrar: Weicheng Lin

Counsel for Appellant: Edwin Nhliziyo

Counsel for Respondent: John Stompor

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. A night of drinking, lap dances, prostitutes, and other such entertainment, paid for by a United Nations vendor, led, five years later when it was discovered, to appellant Walter Cabrera's (Cabrera) summary dismissal. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found, and we agree, that: Cabrera was properly subjected to a disciplinary hearing; the disciplinary procedures operated fairly; Cabrera substantially admitted the allegations; in accepting hospitality from the vendors' representative Cabrera put at risk the reputation and standing of the United Nations Procurement Division; there was sufficient material before the Secretary-General, after a fair and impartial investigation, and having regard to Cabrera's long service record, to reach a finding of serious misconduct; and Cabrera was given a full opportunity to put forward arguments, comments, submissions and mitigation before a decision was taken as to the appropriate sanction.

2. Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.

Facts and Procedure

3. Cabrera joined the United Nations in 1979 as a General Service staff member with the Economic Commission for Latin America and the Caribbean (ECLAC). By 2001, he had progressed to the P-3 level in the Procurement Service. At the time of the incident leading to his dismissal, Cabrera was a Procurement Officer in the Communications and Information Technology Support Team within the Field Procurement Section. Cabrera was under the direct supervision of Brian Streb (Streb), Team Leader of the Communications and Information Technology Support Team.

4. The summary dismissal was related to a single incident of "lavish hospitality" totalling USD 6,000 received by Cabrera and Streb from Nishan Kohli (Kohli), a

United Nations vendor, which took place in August or September of 2002 but went unreported until 2007.

5. 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).

6. 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). Cabrera was interviewed on three occasions but he never mentioned the incident of lavish hospitality in 2002. Streb was interviewed on eight occasions and similarly failed to report the incident.

7. 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.

8. 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. The two United Nations staff members were later identified as Cabrera and Streb.

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

10. The PTF investigation found that in or about August or September 2002, Cabrera and Streb 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 at the Bahel trial, amounted to approximately USD 6,000; and that neither Cabrera nor Streb had reported the incident.

11. On 28 June 2007, the Office of Human Resources Management (OHRM) notified Cabrera of the charges of misconduct, and provided him with the PTF report. Cabrera submitted his observations on the charges and the PTF report on 13 July 2007. By letter dated 8 November 2007, Cabrera was informed that he was summarily dismissed for serious misconduct, effective immediately.

12. On 8 January 2008, Cabrera 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 UNDT 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 Cabrera from OHRM notifying him of the charges of misconduct; the comments of Cabrera on the charges of misconduct and Cabrera's request for review of his summary dismissal to the JDC. The UNDT also decided to join the cases of Cabrera and Streb and issue a single judgment for both cases.

13. On 25 February 2010, the UNDT issued Judgment No. UNDT/2010/034 in which Meeran, J. found that the summary dismissal of Cabrera was justified and proportionate.

Submissions

Cabrera's Appeal

14. Cabrera submits that the UNDT failed to properly consider that the Procurement Division's Guidelines allowed the acceptance of "modest hospitality" at the time when Cabrera accepted "lavish hospitality" from Kohli. The UNDT Judge committed a number of factual errors by selectively quoting from the Gift and Hospitality Guidelines to make his point. Although the Judge noted the existence in the UN of a culture of "acceptance of modest hospitality from vendors", this statement failed to underscore the reality that the rules allowed accepting modest hospitality from vendors. While the Judge correctly pointed out that the policy of "zero-tolerance" for the acceptance of any hospitality was not in place

2002 when the incident took place, this fact is used against Cabrera. There is no evidence that the two procurement officers in this case had any knowledge of Bahel's criminal acts.

15. Cabrera further submits that the UNDT erred in finding that Kohli's motive in providing "lavish hospitality" to Cabrera was to gain commercial advantage for the companies he represented. Cabrera submits that it is a well documented reality in United Nations procurement circles that vendors can offer hospitality and in some cases lavish hospitality without any intention to bribe. The events of the evening started out as a simple get together meeting for drinks after work, but soon got out of hand as the evening progressed and alcohol took over. The Judge has indicated repeatedly during this case that there was no evidence that Cabrera had conferred any benefits on the two vendor companies or any other company.

16. Cabrera alleges that the UNDT erred on a question of law in determining that his summary dismissal was a proportionate sanction. The Secretary-General violated the equality of treatment standard as articulated by the former Administrative Tribunal in UNAT Judgment No. 1011, *Iddi* (2001).

17. Cabrera finally submits that the Secretary-General by his acknowledgement had allowed extraneous factors to enter into his decision, confirming that an improper motive or wrongful purpose were factors in imposing the harshest penalty possible. This was in clear violation of the former Administrative Tribunal's Judgment No. 941, *Kiwanuka* (1999), in a case that did not involve fraud or mens rea to commit an offence. Cabrera submits that the UNDT erred in finding that it was appropriate for the Secretary-General to consider the views of the Member States in relation to the present case. In the dissenting view of the former Administrative Tribunal in UNAT Judgment No. 1310 (2007), a case where there was no mens rea to commit an offence, it was pointed out that "termination for misconduct or serious misconduct is almost exclusively imposed upon staff members who have committed—or attempted to commit—fraud, rather than for matters of poor performance which amounted to misconduct." Cabrera draws the attention of this Tribunal to the need for equality of treatment in disciplinary matters as established by *Iddi*.

Secretary-General's Answer

18. The Secretary-General submits that the UNDT correctly upheld the Secretary-General's decision to summarily dismiss Cabrera. In the present case, the facts upon which the disciplinary measure was based were clearly established. The interview records of Cabrera and Streb 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 the hospitality; as such, Cabrera's conduct legally amounted to serious misconduct. The disciplinary procedures leading to Cabrera's summary dismissal were conducted with full respect for his due process rights and there was no procedural irregularity. Finally, in view of the serious nature of the misconduct established, the sanction of summary dismissal was proportionate to the offence.

19. The Judgment itself contradicts Cabrera's assertions that the UNDT failed to properly consider that the Procurement Division's Guidelines allowed the acceptance of "modest hospitality" at the time when Cabrera accepted "lavish hospitality" from Kohli. The UNDT considered the complete text of the Guidelines, which were submitted by the Secretary-General to the JDC, and were part of the written record before the UNDT. It is evident from the Judgment that the UNDT was at all times mindful that acceptance of "modest hospitality" was allowed in certain circumstances under the Guidelines. Moreover, in reaching its findings, the UNDT was careful to note that Cabrera admitted that the hospitality he accepted "was excessive in that it was outside the range of what was permissible, even during that period prior to the adoption of the policy of zero-tolerance."

20. The Secretary-General argues that the UNDT did not err in finding that Kohli's motive in providing "lavish hospitality" to Cabrera was to gain commercial advantage for the companies he represented. In his testimony, Kohli confirmed he supplied Bahel with benefits to secure an advantage for the companies that he represented in the United Nations procurement process. When questioned as to whether he had provided benefits to other United Nations employees other than Bahel, Kohli described the evening he spent with two United Nations procurement officials in 2002 during which he paid for the taxi fares, alcoholic drinks, lap dances, female escorts, and hotel expenses. These two United Nations officials were Cabrera and Streb.

21. The UNDT did not err on a question of law in determining that the summary dismissal of Cabrera was a proportionate sanction. *Iddi* can be distinguished from the present case. Unlike the staff member in *Iddi*, Cabrera's conduct at issue was related to his work for the United Nations. Cabrera cites the dissenting opinion in the former Administrative Tribunal's UNAT Judgment No. 1310 to support his argument that only cases of fraud normally lead to summary dismissal or separation from service. But Cabrera's argument is contradicted by the Judgment itself in that case. The Secretary-General further submits that the UNDT's determination that the sanction of summary dismissal was proportionate in the present case is consistent with the Appeals Tribunal's Judgment in *Maslamani*,¹ in that Cabrera's misconduct is comparable in severity to the misconduct examined by this Tribunal in that case.

22. The UNDT correctly held that it was appropriate for the Secretary-General to consider the views of Member States in relation to the present case. First, the UNDT did not find that the Secretary-General was unduly influenced by the Member States. Second, Cabrera fails to meet his burden of proving his allegations of improper motive and wrongful purpose. In the present case, Cabrera offers no evidence in support of his serious allegation.

23. Cabrera's request for an order directing the Secretary-General to release the JDC report to him is not in accordance with the Statute of the Appeals Tribunal (Statute). The Statute does not provide a right for Cabrera to request the release of documents to him. Rather, it provides that, when certain requirements are met, the Appeals Tribunal may order the production of documents so that it may receive them as additional evidence. In the present case, Cabrera has failed to provide any legal arguments in support of a request pursuant to Articles 2(5) and 8(1) of the Statute. Moreover, the JDC report is not relevant to this case because it played no role in the Secretary-General's decision to summarily dismiss Cabrera for serious misconduct. Furthermore, Cabrera, having previously agreed that the JDC report would not form part of the material before the UNDT, is estopped from raising the issue before the Appeals Tribunal.

24. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety.

¹ *Maslamani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-028.

Considerations

25. The UNDT found that Cabrera's summary dismissal was justified and proportionate. We have no need to discuss these standards here, as another panel of this Tribunal has done so in the *Sanwidi* Judgment,² also decided this date, with which we fully agree.

26. The UNDT found, and we agree, that: Cabrera was properly subjected to a disciplinary hearing; the disciplinary procedures operated fairly; Cabrera disclosed his part in the events in question at a time when he had no option but to do so; he did not report the fact that he had received lavish hospitality from a United Nations vendor; Cabrera substantially admitted the allegations—the minor discrepancies were not determinative; in accepting hospitality from the vendors' representative Cabrera put at risk the reputation and standing of the United Nations Procurement Division; legitimate concern and criticism by Member States were not irrelevant; there was sufficient material before the Secretary-General, after a fair and impartial investigation, and having regard to Cabrera's long service record, to reach a finding of serious misconduct; Cabrera was given a full opportunity to put forward arguments, comments, submissions and mitigation before a decision was taken as to the appropriate sanction.

27. Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences. The UNDT refused to substitute its judgment in this case, and this Tribunal must be deferential not only to the Secretary-General, but also to that Tribunal, which is charged with finding facts.

² *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

Judgment

28. We affirm the judgment of the UNDT.

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

Original and authoritative version: English

(Signed)

Judge Painter, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Weinberg de Roca

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

(Signed)

Weicheng Lin, Registrar