



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

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Judgment No. 2017-UNAT-776

**Ibrahim**  
**(Respondent/Appellant on Cross-Appeal)**  
**v.**  
**Secretary-General of the United Nations**  
**(Appellant/Respondent on Cross-Appeal)**

**JUDGMENT**

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**Before:** Judge Martha Halfeld, Presiding  
Judge Richard Lussick  
Judge Sabine Knierim

**Case No.:** 2017-1057

**Date:** 14 July 2017

**Registrar:** Weicheng Lin

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**Counsel for Mr. Ibrahim:** Didier Sepho

**Counsel for Secretary-General:** Amy Wood

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/210, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 30 November 2016, in the case of *Ibrahim v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 30 January 2017, and Mr. Gamal Ibrahim filed his answer and a cross-appeal on 31 March 2017. The Secretary-General filed the answer to the cross-appeal on 2 June 2017.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... On 5 September 1989, the Applicant commenced employment with the Organization. At the time of his dismissal, he held a permanent appointment and performed the function of Security Sergeant, at the S-4 level, in the Department of Safety and Security (DSS).

... At approximately 10:45 a.m. on 24 December 2014, an intern deposited a bottle of wine for safekeeping with a Security Officer in the North Screening Building of the Secretariat. The bottle of wine was inside an aqua-coloured plastic bag. A yellow property tag was affixed to the outside of the bag and the intern was given a matching property tag. The bag with the wine was placed on a counter in an area known as the "Holding Area", located at the rear of the North Screening Building. Both property tags bore the intern's name and the date, and described the contents of the bag as "wine".

... From approximately 12:00 p.m. until 1:00 p.m. on 24 December 2014, the Applicant was on "relief duty" in the North Screening Building to relieve [Lieutenant] Johnson during the latter's lunch break. After his relief duty, the Applicant left the premises to attend a medical appointment.

... At approximately 3:45 p.m. on 24 December 2014, the intern returned to the North Screening Building to collect her bottle of wine. The aqua-coloured bag was found in an overhead cabinet in the Holding Area. The yellow property tag matching the intern's was affixed to the exterior of the bag. However, the bag contained a bottle of beer instead of a bottle of wine. The wine was never recovered.

... The same day, the Special Investigations Unit (SIU) of the Department of Safety and Security opened an investigation into the incident.

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<sup>1</sup> Impugned Judgment, paras. 22-23.

... On 26 December 2014, Mr. Lenworth James, Senior Security Officer, SIU, obtained CCTV footage of the Holding Area on the day in question. Prior to interviewing the Applicant, Mr. James reviewed the CCTV footage. Mr. James also prepared a memorandum, dated 8 January [2015], to Mr. Michael Browne, then Chief ad interim, Security and Safety Service, describing what he observed in the CCTV footage. The 8 January [2015] memorandum includes Mr. James' observation that the Applicant removed a bottle of wine from the aqua coloured bag and replaced it with a bottle of beer.

... In the morning of 5 January 2015, Mr. James contacted the Applicant to request a statement from him with respect to his relief duty on 24 December 2014.

... At 11:44 a.m. on 5 January 2015, the Applicant responded to Mr. James by email, stating as follows:

Dear SS/O James,

This is to confirm that at approximately 1200 hours to 1300 hours, on Wednesday 24th December 2014, the writer was dispatch to the North Screening Building ... to reli[e]ve LT, Johnson, L. The writer conduct[ed] an inspection of the Post and all was in order, due to a doctor apt was scheduled in that day the writer left the post at 1300 hours. The writer arrived at the Post at 1200 h and walk[ed] the[re] and outside the post and back to the post ... when I get back a call came from [Lieutenant] Johnson for me to ta[ke] of[f] to my [appointment]. Everything it se[emed] to be normal and operational at this time, it was very qui[e]t[...] and nothing was observed by the writer within the Post.”

... On 8 January 2015, Mr. James and Mr. Eric Bramwell, Sergeant, SIU, interviewed the Applicant. The interview may be summarized as follows:

- (a) The Applicant was not shown any CCTV footage.
- (b) The Applicant was told that he would be asked “questions in relation to a missing item from the North Screening Building on 24 December 2014”.
- (c) The Applicant confirmed that he was on duty on 24 December 2014 and that he worked in the North Screening Building for about one hour on relief duty.
- (d) When asked whether he was made aware of any item or packages that had been left for safekeeping, he replied, “No.”
- (e) When asked whether, when he relieved Mr. Johnson, he observed “any items or packages on the counter in the rear of the screening building”, he replied, “No. I relieved him at front of the screening building.”
- (f) When asked whether he visited the back of the screening building, he replied, “Yes. I do not remember when but I walked back and forth.”

(g) When asked if he recalled if anyone, including security officers, visited the rear of the building during his presence, he stated, "I recall I was there talking to [a Security Officer]."

(h) When asked whether he saw anyone remove any items or packages from the counter while he was in the rear of the screening building, he stated, "No."

(i) When asked whether he noticed a bottle of wine in the Holding Area, he stated, "No. I don't recall."

(j) At the end of his interview, the Applicant stated, "I would like also to state that the Filipino officer, officer Van de Reep and officer Walla who were on duty that day and they constantly visited the office Holding Area for various reasons as there is bathroom, the computer, a coat hanger that they all utilize."

(k) The Applicant signed a written summary of the interview.

... On 20 March 2015, Mr. Bramwell and Mr. Albert Lyttle, Inspector, SIU, conducted a second interview of the Applicant. The interview may be summarized as follows:

(a) The Applicant was shown CCTV footage of the Holding Area, covering the time period 11:49 a.m. to 12:50 p.m. This was not the full length of the video footage uploaded by the Respondent with his Reply.

(b) The Applicant identified himself in the CCTV footage.

(c) He noted that three other security officers were also visible in the video footage.

(d) He asked whether there was another person in the Holding Area, as he saw a piece of paper moving in the corner of the footage at 12:08 p.m.

(e) He mentioned that he thought there was a party that day.

(f) He noted that the CCTV footage showed that a cake was on the desk and that a Security Officer ate some.

(g) He requested to be shown the entire video footage from the time he arrived in the North Screening Building until the time he left.

(h) He stated that "if proper relief [i.e., handover] was conducted we would not be looking at the video". He stated Mr. Johnson "was [his] relief" but "was not there when [the Applicant] left".

(i) The Applicant signed a written summary of the interview.

... On 9 April 2015, Mr. Bramwell and Mr. Lyttle conducted a third interview of the Applicant. The interview may be summarized as follows:

- (a) The Applicant was told that he would be asked “follow-up questions in relation to the missing bottle of red wine from the North Screening Building on 24 December 2014”.
- (b) The Applicant was shown a clip of the CCTV footage he had previously been shown during his interview on 20 March 2015. This was not the full length of the video footage uploaded by the Respondent with his Reply.
- (c) The Applicant identified himself in the CCTV footage.
- (d) When asked whether he recognized the aquacoloured bag on the counter, he replied, “Yes”.
- (e) When asked whether he noticed a yellow receipt (property tag) attached to the bag, he replied, “No”.
- (f) When asked whether he removed the yellow receipt (property tag) from the bag, he replied, “I don’t recall that”.
- (g) When asked whether he opened the aqua-coloured bag, he replied, “I could not recall opening it. It was not locked to be open”.
- (h) When asked whether he removed anything from the aqua-coloured bag, he replied, “I removed the bag from the counter to the upper level of the cabinet”.
- (i) When asked whether he recognized the bottle of red wine inside the bag, he replied, “There was a bottle. I don’t recognize the colour”.
- (j) When asked whether he removed the bottle of red wine from the aqua-coloured bag, he replied, “I said I removed the bag from the counter to the upper cabinet”.
- (k) When asked whether he removed anything from the overhead cabinet, he replied, “I believe the same bottle. This bottle was being moved back and forth I think”.
- (l) When asked whether he placed anything inside the aqua-coloured bag”, he replied, “No, I placed the bottle in the aqua coloured bag to the overhead cabinet”.
- (m) When asked whether he removed anything from the aqua-coloured bag and placed it in a winter coat, he replied, “No”.
- (n) When asked whether he removed a coat from the back of a chair and placed it on the back of the chair that he was sitting on, he replied, “No, I only move[d] my coat at the end of my relief hour to leave the tent”.
- (o) When asked whether he wished to add anything further, he replied, “1 – I never received any item from the OIC [Officer-in-Charge] of the Post [i.e., Mr. Johnson] that was for safekeeping. 2 – When my one hour relief

finished the OIC [i.e., Mr. Johnson] never came back to take over the Post. I was relieved by a phone call received by Officer Claudio telling me that, 'there is a phone call for you'. When I received the phone call, that was the OIC of the Post [i.e., Mr. Johnson] telling me to take off. There was never a designated area for lost and found or items confiscated from visitors to be kept. The place where I was sitting on the 24 December where the incident happened there is a table and four chairs where officers hang out during their break and next to it there is a coat rack where they hang their coat and in the back there is a bathroom where the officers go back and forth all eight hours not just the forty five minutes that I was there. Not to mention there was a cake for a birthday on the counter on that day. It is shown clearly in the same footage where [O]fficer Van de Reep was sitting and having a piece of it. Officer Lim also came and she took a piece of the same cake."

(p) The Applicant signed a written summary of the interview.

... On 10 April 2015, the SIU finalized its investigation report.

... By memorandum dated 17 April 2015, the Under- Secretary-General for Safety and Security referred the investigation report to the Office of Human Resources Management (OHRM) for appropriate action (the "referral memorandum").

... By memorandum dated 5 May 2015, OHRM requested the Applicant to respond to formal allegations of misconduct under ST/AI/371 (Revised disciplinary measures and procedures), as amended (the "allegations memorandum"). The specific allegation against the Applicant was that, "on 24 December 2014, [he] engaged in misconduct by taking, without authorization, a bottle of wine belonging to a third party". The Applicant was informed that, if established, his conduct would constitute a violation of Staff Regulation 1.2(b) and of the Security and Safety Service's standard operating procedures (SOPs). He was provided with a copy of the investigation report and all annexes thereto, including the full length of the CCTV footage. He was requested to provide his comments within two weeks of his receipt of the allegations memorandum, but was informed that he could request an extension of time. He was also informed that he could avail himself of the assistance of the Office of Staff Legal Assistance (OSLA), or any other counsel at his own expense.

... Together with the allegations memorandum, OHRM provided the Applicant with a copy of the referral memorandum, the investigation report and all supporting documentation. OHRM also provided the Applicant with a copy of the entire CCTV footage; the specialized video player software to view the footage; and three shorter extracts from the footage that could be viewed without the specialized software, covering the time periods 11:49 a.m. to 11:57 a.m.; 12:17 p.m. to 12:19 p.m.; and 12:49 p.m. to 12:51 p.m. on 24 December 2014. The Applicant was informed that the supporting evidence included the plastic bag itself, which he could view by making arrangements with OHRM.

... On 8 May 2015, OSLA requested, on the Applicant's behalf, an extension of time until 10 June 2015 to respond to the allegations of misconduct. The request was granted.

... On 20 May 2015, the Applicant submitted comments on the allegations of misconduct. Among other things, the Applicant stated that:

(a) He had "never taken, stolen, concealed, opened, consumed or otherwise taken control and carried with [him] any wine bottle on 24/12/2014 in or out of the UN premises" and, more specifically, had not placed the bottle "in the jacket on the chair". He was "totally innocent of the charges laid against [him] concerning this wine bottle".

(b) His answers to the questions put to him during the interviews on 20 March and 8 April 2015 "were based on very limited portions of [the] CCTV footage [of] the Holding Area, none of which indicated that [he] was holding the bottle and hiding it in the jacket". Moreover, he had not been provided with "all the CCTV footage from all other cameras filming different angles in the Holding Area, which would clearly have confirmed that [he] never put in the jacket any wine bottle".

(c) The investigation targeted him and was biased against him. In support of this assertion, the Applicant stated that investigators failed to interview "12 other persons who had entered and left the Holding Area on 24/12/2014".

(d) Contrary to the allegations memorandum, it was "by no means apparent anywhere from the video footage shown to [him]" (emphasis in original) that he had engaged in the alleged conduct. Rather, the facts set out in the allegations memorandum were "personal and speculative opinions".

... By e-mail dated 21 May 2015, OHRM informed the Applicant that, on the basis of his comments, it had requested DSS to: (a) confirm whether there were other CCTV cameras installed in the North Screening Building that would have captured different angles of the Holding Area; and (b) if so, indicate whether the footage from any such cameras was reviewed in the context of the investigation. OHRM informed the Applicant that, in response, DSS had stated as follows:

Sgt. Ibrahim's assertion is incorrect. Please refer to the below photos of the area in question. While there are indeed multiple cameras installed in the Screening Building, at the time of the incident, only one was actually focused on the Holding Area (location of interest). In February of this year (2015) long after the incident had occurred, an additional camera was installed to monitor a Safe that is in the same Holding Area. The cameras in the Screening Building are dedicated to capture specific activities, such as X-ray processing and bag/package checks, to facilitate the capture of full face images of all persons entering the premises, and of course the Holding Area. The camera

dedicated to the Holding Area, was the only one reviewed, because it held the sole recording of the transactions and sequence of events that occurred in the Holding Area.

... OHRM also sent the Applicant photographs provided by DSS to support its response. OHRM requested the Applicant to submit any further comments on the matter by 29 May 2015.

... By e-mail dated 25 May 2015, the Applicant provided further comments. His comments may be summarized as follows:

(a) The Applicant reiterated his denial of the allegations against him.

(b) There were some 22 CCTV cameras installed in the North Screening Building, of which two were located at the end of the building closest to the Holding Area and were specifically focused on the Holding Area. The Applicant stated that investigators had only reviewed the footage from one of those two cameras. He stated that the second camera “would have captured different angles of the Holding Area”. To support his assertion, the Applicant provided a photograph of the Holding Area, showing the location of the camera that he alleged would have captured different angles of the Holding Area.

(c) The Applicant had served DSS for more than 25 years, [both as] a Sergeant and Team Leader and, as recently as May 2015, had received a performance evaluation of “frequently exceeding performance expectations” for the 2014–2015 performance cycle.

... By e-mail dated 27 May 2015, OHRM informed the Applicant that, on the basis of his comments, it had requested DSS to provide additional information regarding whether the camera depicted in the photograph that the Applicant had provided on 25 May 2015 was installed at the time of the alleged incident and, if so, which area(s) of the North Screening Building it would have recorded. OHRM informed the Applicant that, in its response, DSS had stated as follows:

One of the security benefits of using the type of ‘domed camera’ installation in areas such as our Screening Buildings is that individuals, including those who may be conducting hostile surveillance on our facilities, cannot tell where these cameras are focused. The orientation of these cameras is not information that is readily available. Sgt. Ibrahim would have had to get this information from someone in the Security Operations Center, who in-turn would have to be authorized to provide any such information, even to another member of the Service.

Sgt. Ibrahim, obviously seeing the camera hanging in the vicinity, and unable to determine what it is pointing at, has made an erroneous assumption. This is the exact deterrent effect that is expected.

This particular camera is a fixed camera; meaning it does not pan, tilt, or zoom (PTZ). Or, more clearly stated, it cannot be moved remotely from the Security Operations Center to focus on anything other than its fixed area of reference.

Please refer to the below photos, which were taken by Sgt. Bramwell, OIC Special Investigations Unit. Photo #1, shows the camera to which Sgt. Ibrahim refers, and it is indeed in the vicinity of the 'Holding Area.' However, please refer to the Photo #2, which is the narrow field of view being recorded by this particular camera.

As indicated in my earlier email, the cameras in the Screening Building are specifically positioned for different functions. This particular camera is meant to solely capture access to a restroom area in the Screening Building that is used as a weapons clearing area for Law Enforcement officers who are not allowed to take firearms on to the premises. A firearm storage box is also kept in the room, hence the abundance of caution as to who goes in and out of that room.

This particular camera was installed and went online prior to the start of the last General Debate of the General Assembly (69th Session). As stated, it cannot be adjusted without special permission from the Chief of Service, and there is no report or evidence to suggest that its focus was readjusted since it went online.

... OHRM also sent the Applicant photographs provided by DSS to support its response. OHRM requested the Applicant to submit any further comments on the matter by 4 June 2015.

... By e-mails dated 29 May 2015 and 1 June 2015, the Applicant provided further comments. His comments may be summarized as follows:

- (a) He had not engaged in the alleged conduct.
- (b) Despite DSS' indication that there was only one camera that had filmed the incident, the investigation was "incomplete in terms of reviewing all relevant CCTV camera records". Investigators had "failed to provide [the Applicant] with any CCTV footages from that second CCTV camera that [he] provided a photo of, or from any other camera in the Screening Area filming different angles of the Holding Area".
- (c) The investigation was incomplete because investigators had not "contact[ed] all witnesses" and because it did not represent "a balanced and objective picture of all the facts". The Applicant argued that there was no "corroborated evidence of any incident where [he] would have put in the jacket wine bottle" [...]. He claimed that he had been "unfairly and without any evidence targeted in this investigation by the investigation report and by

DSS investigators, without any benefit of the doubt”, which was “indicative of bias against [him] and contrary to all [United Nations] policies and standards”.

... By letter dated 24 July 2015, the Applicant was informed that the Under-Secretary-General for Management had concluded that the allegations were established by clear and convincing evidence, and had decided to dismiss him from service in accordance with Staff Rule 10.2(a)(ix). The letter was delivered to the Applicant on 27 July 2015.

... The letter of 24 July 2015, sanctioning and dismissing the Applicant, stated *inter alia* (emphasis added):

By memorandum dated 5 May 2015, it was alleged that, on 24 December 2014, *you took, without authorization, a bottle of wine belonging to a third party.*

...

For the foregoing reasons, the Under-Secretary-General for Management has concluded that *it is established, by clear and convincing evidence, that, on 24 December 2014, you took, without authorization, a bottle of wine belonging to a third party.* The Under-Secretary-General for Management has further concluded that, through your actions, you failed to “uphold the highest standards of ... integrity”, in violation of Staff Regulation 1.2(b). Furthermore, you failed to “conduct [yourself] in a manner that exemplifies the highest ideals of the Organization”, contrary to the provisions of paragraph 20.02 of the Security and Safety Service’s [Standard Operating Procedures (SOPs)], and failed to “remain alert, engaged and professional” while on duty, contrary to the provisions of paragraph 20.03 of the Security and Safety Service’s SOPs.

The Under-Secretary-General for Management further concluded that your procedural fairness rights were respected throughout the investigation and disciplinary process.

In determining the appropriate disciplinary measure, the Under-Secretary-General for Management has had regard to the Organization’s past practice in similar cases, as well as the specific circumstances of this case and aggravating and mitigating considerations. Among other things, the Under-Secretary-General for Management has noted the following considerations:

(a) *Theft* constitutes a serious lapse of integrity. A single instance of such conduct generally results in the irreparable breach of the trust placed in a staff member by the Secretary-General, thereby severing the possibility of

a continued employment relationship. As such, cases of theft and similar conduct consistently attract sanctions at the strictest end of the spectrum.

(b) Your actions are aggravated by the fact that, as a Security Sergeant, you held a position of heightened trust and authority. The responsibility of security officers to act with the utmost integrity, especially as concerns the protection of life and property, particularly when such property has been entrusted to the Security and Safety Service for safekeeping, cannot be overstated. For a staff member with a supervisory role, such as yours, such expectations can only be heightened. Your actions were a direct abuse of the trust placed in you. In this respect, it bears noting that you had access to the Holding Area by virtue of your functions as a DSS staff member.

(c) While it was noted that you have served the Organization satisfactorily for more than 25 years, taking into account the seriousness of your conduct and the aggravating factors noted above, the Under-Secretary-General for Management did not consider that this period of service served to mitigate the otherwise applicable sanction.

On the basis of your conduct, and having taken into account the principles of consistency and proportionality, as well as aggravating and mitigating considerations, the Under-Secretary-General for Management has decided to impose on you the disciplinary measure of dismissal, in accordance with Staff Rule 10.2(a)(ix). Your dismissal will take effect on the date of your receipt of this letter.

3. On 30 November 2016, the UNDT issued its Judgment, pursuant to which it held that the alleged misconduct had not been established by clear and convincing evidence; and, as the facts had not been established, Mr. Ibrahim's actions could not be classified as misconduct. It also held that there had not been any significant procedural irregularities or improper influence such as to constitute a lack of due process resulting in illegality or warranting compensation. The UNDT ordered rescission of the dismissal decision with retroactive reinstatement from the date of dismissal and in-lieu compensation in the amount of two years' net base salary. The UNDT also awarded USD 30,000 as compensation for emotional distress.

4. As noted above, the Secretary-General filed the appeal on 30 January 2017, and Mr. Ibrahim filed his answer and a cross-appeal on 31 March 2017. The Secretary-General filed the answer to the cross-appeal on 2 June 2017.

## Submissions

### The Secretary-General's Appeal

5. The UNDT erred when it held that the Secretary-General's decision to dismiss Mr. Ibrahim from service was unlawful. Although it correctly cited the standard of judicial review and also correctly found that the investigation had not been tainted by "procedural irregularities or improper influence", the UNDT exceeded its competence and erred on a question of law by conducting a *de novo* investigation of the allegations of misconduct. Specifically, the UNDT erred when it drew its own conclusions regarding the "chain of evidence". It further erred when it held that the facts had not been established to the requisite standard of proof because the investigation had failed, in its view, to "take into account or explore other explanations of what may have happened".<sup>2</sup> The UNDT also took into consideration factors that were irrelevant to the determination of the lawfulness of the dismissal decision (e.g., Mr. Ibrahim's service record).

6. The UNDT erred in law applying the requisite standard of proof. It erroneously found that the charge of misconduct had not been established because there was "no direct evidence that [Mr. Ibrahim] ... stole the wine bottle"<sup>3</sup> and because the Administration had not proved intent associated with the common law crime of "theft". In so holding, the UNDT departed from established jurisprudence providing that principles of criminal law do not apply to disciplinary cases. Contrary to the UNDT's reasoning, there is no requirement that the elements of an allegation of misconduct must be proven by "direct evidence"; rather, it is sufficient in disciplinary matters that the evidence sustains a reasonable inference that misconduct occurred.

7. While the UNDT has broad discretion in its assessment of evidence before it, the UNDT made no finding regarding the inconsistencies in Mr. Ibrahim's testimony which contradicted the record. Applying the correct standard of proof—namely, that the truth of the facts was highly probable—there was significant evidence on which to base a "reasonable inference" that Mr. Ibrahim engaged in the acts underlying the charge of misconduct. It thus was reasonable for the Administration to have determined that it was "highly probable" that Mr. Ibrahim had taken the property entrusted to the DSS's care without permission. The Secretary-General's decision to separate Mr. Ibrahim from service for misconduct therefore was lawful. It was not obviously absurd or flagrantly arbitrary, which are the only grounds that would warrant reversal.

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<sup>2</sup> *Ibid.*, para. 39.

<sup>3</sup> *Ibid.*, para. 35.

8. The Secretary-General respectfully requests that the Appeals Tribunal (i) vacate the impugned Judgment, except with respect to the finding that the investigation was not vitiated by procedural error or improper motive, and (ii) uphold the decision to dismiss Mr. Ibrahim from service for having committed serious misconduct.

**Mr. Ibrahim's Answer**

9. Contrary to the Secretary-General's submissions, the UNDT did not err in law or fact or exceed its competence when conducting its judicial review, nor did it substitute itself for the Administration and conduct a *de novo* investigation. Instead, it properly considered the evidence and correctly concluded on the totality of the evidence that the Secretary-General's allegations were not established by clear and convincing evidence but, rather, that they resulted from inferences and speculations. In reaching its decision it noted the Administration's own admission that the CCTV footage was inconclusive of the alleged "taking" of the wine bottle. The Secretary-General cannot now assert on appeal that it was conclusive of the "taking", nor can it merely repeat arguments that did not succeed before the UNDT.

10. The Appeals Tribunal has held that neither preponderance of evidence nor an inference amounts to clear and convincing evidence. As the UNDT correctly found, the Administration used an inference and conjecture to draw the conclusion that Mr. Ibrahim "took" the wine bottle. The dismissal letter itself stated (emphasis added) that "it could be *inferred from [Mr. Ibrahim's] movements*" that Mr. Ibrahim removed the wine bottle from the bag. It is mere conjecture to conclude that because the bottle was not seen again in the CCTV footage it was "highly probable" that Mr. Ibrahim had taken it. The Secretary-General fails to mention that it did not provide video of the time period following Mr. Ibrahim's placement of the bag in the cabinet until its return to the intern. As the UNDT correctly found, absent such evidence, the Administration could not assume that the bag had not been manipulated by someone else during that time.

11. The Secretary-General's other claims are without merit. The UNDT did not consider Mr. Ibrahim's record of service when determining the lawfulness of the decision; rather, the UNDT took this into account only when awarding compensation for moral injury. The UNDT's discussion of "theft" and intent were in response to the dismissal letter's language. There was no reversible error by the UNDT in its assessment of the evidence, including the alleged inconsistencies in Mr. Ibrahim's testimony. In any event, these considerations are irrelevant

because the Administration failed to establish the “taking” of the bottle by clear and convincing evidence, which is his onus to prove.

12. Mr. Ibrahim respectfully requests the appeal be dismissed in its entirety.

**Mr. Ibrahim’s Cross-Appeal**

13. The UNDT erred when it held that proper procedures were followed. Although formal allegations against Mr. Ibrahim were issued only on 5 May 2015, the record shows that he had been identified as the wrongdoer by the end of December 2014. As he was interviewed as such without having been apprised of the allegations against him, he was not given the opportunity to respond to the allegations at that time and, thus, was denied due process.

14. Mr. Ibrahim requests that the Appeals Tribunal reverse the UNDT’s error in this regard, by finding that the investigation was vitiated by procedural error, and award him compensation for the violation of his due process rights.

**The Secretary-General’s Answer to the Cross-Appeal**

15. The UNDT made no reversible error when it concluded that the investigation had not been marred by procedural irregularities. It is well established that due process rights are limited during the preliminary stage of an investigation. Mr. Ibrahim was provided with sufficient detail to understand the concerns regarding his conduct and to respond to them during the early stage of the investigation. Once charged, he was duly informed of the charges and of his rights. There is no evidence to support a finding that the process was vitiated by procedural error.

16. The Secretary-General requests that the cross-appeal be dismissed in its entirety.

**Considerations**

17. The UNDT found that the alleged misconduct had not been established by clear and convincing evidence, as “there is no direct evidence that Mr. Ibrahim took or stole the wine bottle, let alone appropriated it for his own use or benefit”<sup>4</sup> and that the decision was based on CCTV footage and inferences drawn by the investigators.

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<sup>4</sup> *Ibid.*, para. 37.

18. The UNDT also found that the Administration had failed to “explore other explanations of what may have happened”,<sup>5</sup> since “it was unclear whether he indeed secreted [the wine bottle] anywhere, or carried it outside the security holding area with him, let alone stole it or even intended to steal it”.<sup>6</sup>

19. Even though the Dispute Tribunal appeared to assume the possibility that Mr. Ibrahim had removed the bottle of wine from the plastic bag,<sup>7</sup> it recalled that Mr. Ibrahim denied it.

20. The UNDT took two main lines of argument to reach its conclusion:

- 1) There is no direct evidence of the removal of the bottle of wine (intentionally or not); and,
- 2) the Administration did not take into account or explore other explanations of what may have happened.

21. This is a very sensitive case. Mr. Ibrahim worked for the United Nations for more than 27 years. He travelled with high-level authorities, he is a survivor of the Baghdad bombings, and worked in Afghanistan, the Congo and Haiti. He was responsible for particularly dangerous assignments serving the United Nations, frequently putting his life at risk for the service, with no unbecoming conduct during his professional life and with satisfactory or good performance and reviews. The Appeals Tribunal notes that however spotless and noble a professional’s past may be, a staff member can still be sanctioned in the case of misconduct.

#### *The Cross-Appeal*

22. The cross-appeal challenges the impugned Judgment in its finding that the investigation was not tainted by significant procedural irregularities or improper influence such as to constitute a lack of due process resulting in illegality or warranting compensation.

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<sup>5</sup> *Ibid.*, para. 40.

<sup>6</sup> *Ibid.*, para. 39.

<sup>7</sup> *Ibid.*

23. Mr. Ibrahim, in his cross-appeal, contends that the Administration did not follow proper procedure when it interviewed him in January 2015 and thereafter because he was not apprised of the charges when interviewed; he was only apprised of the charges against him on 5 May 2015, when the formal allegations were issued, despite their existence since December 2014 when the record shows he had been identified as the wrongdoer.

24. Mr. Ibrahim was first contacted on 5 January 2015, when he was asked to send a statement regarding his relief duty on 24 December 2014, which he did by e-mail. He was subsequently interviewed on 8 January 2015, after the SIU had already viewed the CCTV footage and made, in its memorandum of the same date, the observation that Mr. Ibrahim “removed a bottle of wine from the aqua coloured bag and replaced it with a bottle of beer”.<sup>8</sup>

25. Mr. Ibrahim knew that this first interview was related to a missing item. When asked whether he had observed any item or packages that had been left for safekeeping, he answered “no” and when asked about a missing bottle, he stated that he could not recall.<sup>9</sup> He was, from this first interview onwards, aware of the matter of a missing item being investigated, so much so that “he felt the matter was serious enough to inquire, before the second interview, whether he should have a lawyer present”.<sup>10</sup>

26. During the interviews held on 20 March 2015 and 9 April 2015, Mr. Ibrahim was shown the video footage of the supervisor area covering the whole time when he was on relief duty. The investigation report was finalized on 10 April 2015. This investigation phase was not a disciplinary proceeding, which is only initiated after the completion of the investigation. As Staff Rule 10.3 states:<sup>11</sup>

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations.

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<sup>8</sup> *Ibid.*, para. 22.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, para. 48.

<sup>11</sup> Emphasis added.

27. Thus, as is made clear by this Staff Rule, it is only once the investigative process is over and the disciplinary process has begun that the staff member has a right to receive written notification of the formal allegations and to respond to them; these due process entitlements do not exist during the investigation phase, as this Tribunal has noted before and repeats below.

28. Mr. Ibrahim was only requested to “respond to formal allegations of misconduct under Administrative Instruction ST/AI/371 (Revised disciplinary measures and procedures)” by memorandum dated 5 May 2015, and was provided with a copy of the referral memorandum, the investigation report and all supporting documentation. He was also provided with a copy of the entire video footage, the specialized video player software to view the footage and three shorter extracts from the footage that could be viewed without the specialized software.

29. Further, Mr. Ibrahim was assisted by OSLA at that stage, who requested an extension of time, which was granted. Mr. Ibrahim’s comments were submitted on 20 May 2015. The record also reveals that Mr. Ibrahim was given the opportunity to comment on the video footage, memorandum and other documents, at least four times during the investigation.

30. The Appeals Tribunal notes the careful investigation that was conducted by the Administration, which engendered two memoranda and the detailed seven-page letter of communication of dismissal on 24 July 2015, containing the summary of the facts and the progress of the investigation, from the very date of the event, on 24 December 2014.

31. As we have stated in *Powell*:<sup>12</sup>

... Obviously, all of the due process rights provided in former Staff Rule 110.4 and ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated.

32. Also in *Akello*,<sup>13</sup> we held:

... Furthermore, it has not been suggested that as soon as [the staff member] was identified as a wrongdoer (that is post the ... investigation), she was not afforded a

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<sup>12</sup> *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295, para. 23, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209.

<sup>13</sup> *Akello v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-336, paras. 35-36.

right to counsel. Paragraph 99 of the [United Nations Development Programme] Legal Framework provides:

The charge letter initiates the disciplinary proceedings. In that letter, the staff member is notified in writing of the formal charges ... [and the staff member is] given a specified period of time ... to answer the charges and produce countervailing evidence, if any. The staff member shall also be notified of his or her right to counsel to assist in his or her defence, and be informed as to how to obtain the assistance of the Panel of Counsel.

... While the statutory instruments governing the investigation and disciplinary process in the present case are different instruments to those which governed the Applicant case, our jurisprudence remains that the due process entitlements, which every staff member has, come into play in their entirety once a disciplinary process is initiated. Furthermore, we have held in *Powell* that at the preliminary investigation stage, only limited due process rights apply.

33. We agree with the UNDT Judgment that there is nothing illegal or warranting compensation in the investigation process. The investigation was not vitiated by procedural error or improper motive, and the cross-appeal is therefore dismissed.

*Was the administrative decision lawful?*

34. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant*:<sup>14</sup>

... Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

35. We find that the first manipulation of the bottle of wine, in order to check what was inside the plastic bag on the counter of the supervisor area on that particular day, was part of Mr. Ibrahim’s function as a security officer. He handled the bag on the counter, which he

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<sup>14</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

found suspicious, because he had received no briefing. So he picked up the bag and opened it to examine it. Up to that point, there is no contention and no irregularity.

36. To his superior's surprise,<sup>15</sup> Mr. Ibrahim did not offer any explanation as to what happened to the bottle of wine, which he claimed not to recall during the first interview. Only after having been shown the video footage during the second and third interviews did he admit having handled it to examine it and claim that he then placed it in the overhead compartment.

37. We find that the bottle of wine disappeared immediately after Mr. Ibrahim had handled it for the second time in front of the camera and then with his back obstructing the camera. Although we could really not see from the video the bottle of wine being withdrawn from the plastic bag, it is clear that Mr. Ibrahim removed something (what else but the bottle of wine, if that was the only content of the bag, just after having been checked by Mr. Ibrahim in front of the camera?) and placed it somewhere to the left and then we could perceive that he put the smaller bottle of beer in the plastic bag, carefully folded its top and later placed it in the overhead compartment.

38. As we discover from the hearing before the UNDT, Mr. Ibrahim then added some new important information: that he put both bottles (wine and beer) in the same bag and then both of them in the overhead cabinet, because they were both alcoholic beverages.<sup>16</sup> This version – that he had put both bottles in the same bag and then placed them in the overhead cabinet – was never given during the investigation. We can hardly imagine him putting both bottles in the overhead compartment so quickly and easily, with only one hand, as he did in the video footage.

39. Mr. Ibrahim then denied the fact that there was another chair or a jacket on his left, although we could clearly see at least part of the chair on which another officer even came and sat, and we could also see part of the jacket, which Mr. Ibrahim collected from that chair to the left and put on the back of the chair he was sitting on. Mr. Ibrahim also denied having adjusted something to his left, although it is clear from the video footage that he did. Mr. Ibrahim eventually admitted having had a jacket nearby, but did not acknowledge which

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<sup>15</sup> Impugned Judgment, para. 55.

<sup>16</sup> 31m36s of the video clip 1, part of the record before both Tribunals.

one was his jacket. These contradictions were certainly important to the decision-maker as well as to this Tribunal.

40. Mr. Ibrahim further argued with the fact that it was not possible to confirm that the package containing the bottle of wine was folded at the very top of the bottle, so that it was not possible to compare the height of the package before and after he handled it. Firstly, Officer Lim's evidence makes it clear that the bottle of wine was tightly wrapped inside the plastic bag.<sup>17</sup> Secondly, the video reveals that, after the action of Mr. Ibrahim pulling something out and putting the bottle of beer inside, the same plastic bag was also tightly wrapped and folded, but its height was lower. If the wine bottle had been there, the package would have been higher. There is, thus, a direct link between the handling of the bottle of wine by Mr. Ibrahim and its loss.

41. It would have been reasonable to expect some sort of explanation by Mr. Ibrahim as to what happened immediately after he had handled an unusual item in his work. That is why the three interviews took place during the investigation phase and on each occasion he was given the opportunity to review and make changes, if necessary, having signed the records of the interviews.

42. The fact of having multiple cameras in the holding area is of no relevance, as only one was capable of reproducing the scene of the event in the supervisor area. No other camera focusing on the hall or even on the screening area would have been able to capture the precise, small and compartmentalized area, where Mr. Ibrahim was working that day. Besides, the Administration provided evidence that the second camera in the area was only installed subsequently (in February 2015) and was a fixed camera, unable to capture the scene.

43. It was not necessary that tapes of the lobby or elevator be produced as part of the investigation. The focus of the investigation was rightly on the area from which the missing item had disappeared. Similarly, the fact that two to three hours elapsed between Mr. Ibrahim's departure and the discovery that the bottle of wine was missing and the absence of video footage of this time were irrelevant, since the other elements, including the contradictory information from Mr. Ibrahim, were sufficient to meet the required standard of evidence.

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<sup>17</sup> Impugned Judgment, para. 30.

44. As we have stated in *Molari*:<sup>18</sup>

... Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

... In Ms. Molari’s case the facts are so clear as to be irrefutable. No matter what the standard, the Administration has met the burden. *Who buys 19 litres of milk from seven different brands containing four different levels of fat content in one day with nine different bank cards?*

This is not a criminal case, where the level of evidence would be higher.

45. Further, while we agree with Mr. Ibrahim that “neither preponderance of the evidence nor an inference amounts to clear and convincing evidence”, as we stated in *Diabagate*, that statement should be understood in the context of that case. Indeed, *Diabagate*<sup>19</sup> is distinguishable from the present case, as, in that case, there was “no direct or even circumstantial evidence” and the other elements constituted “hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove” the misconduct.

46. In this case, however, apart from the direct link between the manipulation of the bottle of wine by Mr. Ibrahim and its loss, in view of the video footage and his own contradictions, it is highly probable that Mr. Ibrahim took the bottle of wine. If he had not taken it, he should have provided some other explanation as to what the video footage showed, particularly with regard to his duty to cooperate with the administrative investigation, pursuant to Staff Rule 1.2(c) and to his position as a Security Sergeant at the time. He did not do that, despite having had this opportunity in the three interviews during the investigation and in his hearing before the UNDT.

47. Having reviewed the circumstances of this particular case, we are of the view that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, when it stated that there was no direct evidence of the removal of the bottle of wine, and that the Administration did not take into account or explore other explanations of what may

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<sup>18</sup> *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 30-31 (emphasis in original).

<sup>19</sup> *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403.

have happened. It appears that “the truth of the facts asserted is highly probable”, which is enough for the disciplinary measure, whose proportionality is not challenged in the cross-appeal.

48. Notwithstanding the above, the UNDT did not exceed its competence or err in law when conducting the proceedings and allowing the production of the evidence. On the contrary, this is inherent to its judicial power and to judicial review, particularly in disciplinary cases, when the chain of evidence must be sufficiently clarified.<sup>20</sup> The judge is not bound by the investigation report and has competence, under Article 9 of the UNDT Statute, to “order production of documents or such other evidence as it deems necessary”. The Appeals Tribunal approves of the Dispute Tribunal’s conduct in this case, which was carried out in a very impartial and meticulous manner, although we do not agree with its Judgment for the reasons explained above.

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<sup>20</sup> Article 16.2(2) of the UNDT Rules of Procedure: “A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.”

**Judgment**

49. The appeal is granted in part and Judgment UNDT/2016/210 is vacated, except with respect to the finding that this case was not “marred by significant procedural irregularities or improper influence such as to constitute a lack of due process resulting in illegality or warranting compensation”.<sup>21</sup> The cross-appeal is dismissed.

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<sup>21</sup> Impugned Judgment, para. 56.

Original and Authoritative Version: English

Dated this 14<sup>th</sup> day of July 2017 in Vienna, Austria.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Lussick

*(Signed)*

Judge Knierim

Entered in the Register on this 5<sup>th</sup> day of September 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar