



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:¹

... 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

... On 26 December 2014, Mr. Lenworth James, Senior Security Officer, SIU,

- (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.

- (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

THE

THE UNITED NATIONS APPEALS TRIBUNAL

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2017-UNAT-776

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

THE UNITED NATIONS APPEALS T

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

18. The UNDT also found that the Administration had failed to “explore other explanations of what may have happened”,⁵ since “it was unclear whether he indeed secreted

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2017-UNAT-776

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.

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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

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,¹⁵ 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.¹⁶ 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

¹⁵ Impugned Judgment, para. 55.

¹⁶ 31m36s of the video clip 1, part of the record before both Tribunals.

THE UNITED NATIONS

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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.²⁰ 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.

²⁰ 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”.²¹ The cross-appeal is dismissed.

²¹ Impugned Judgment, para. 56.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)