



Judgment No. 2015-UNAT-510



Counsel for Respondent/Applicant:

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JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

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

Facts and Procedure

2. The following facts are uncontested:¹

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

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

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

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

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

¹ Impugned Judgment, para. 3.

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

... The Applicant's position is that, at the outset of his interview, he was not

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

...

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

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

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

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

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

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

... By letter dated 4 April 2011, the Applicant was informed that the Under-Secretary-General for Management, on behalf of the Secretary-General, had concluded that there was “sufficient credible evidence that, using the Organization’s ICT resources, [he] misused [his] UN Lotus Notes email account by receiving and storing emails containing pornographic, violent and otherwise inappropriate material, that [he] failed to report that other staff members were misusing their UN Lotus Notes email accounts, and that [his] actions amounted to misconduct in violation of former staff regulations 1.2(b), (f) and (q), and ST/SGB/2004/15”. The Applicant was

3. On 9 December 2013, the UNDT rendered Judgment No. UNDT/2013/164, finding that the alleged facts had been established and amounted to misconduct by Mr. Cobarrubias.

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

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

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

8. The UNDT erred in law and exceeded its competence in setting the award of compensation. The decision to separate Mr. Cobarrubias from service was lawful and accordingly, the remedies awarded by the UNDT are legally unsustainable. In the alternative, it is argued that the UNDT erred in law and exceeded its competence when it relied on Mmata

Considerations

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

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

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

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

19. The jurisprudence of the Appeals Tribunal ha

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

...

In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal

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

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar