



JUDGE KAMALJIT SINGH GAREWAL , Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2011/081 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 May 2011 in the case of *Cabrera v. Secretary-General of the United Nations* .
2. The Secretary-General appeals the UNDT's award of two years' net base salary to Mr. Cabrera as compensation for the violation of his due process rights by being kept on Special Leave With Full Pay (SLWFP) during an investigation into allegations of procurement fraud. The UNDT concluded, and we agree, that it was not a preliminary investigation but rather a formal investigation and that the decision to place Mr. Cabrera on SLWFP constituted a de facto disciplinary suspension.
3. Since Mr. Cabrera received his full pay during the 10-month period that he was on special leave and also since he did not lose any money, we reduce the compensation for violation of his due process rights to 10 months net base pay. With this modification, the Appeals Tribunal grants the Secretary-General's appeal in part.
4. The application from the Staff Union for filing a friend-of-the court brief is dismissed.

Facts and Procedure

5. Mr. Cabrera joined the United Nations in 1979 as a G-level staff member. In 1991, Mr. Cabrera successfully took the professional category recruitment examination and was appointed to a position at the P-2 level, Economic Commission for Africa (ECA). In December 2001, Mr. Cabrera was promoted to the P-3 level as a Procurement Officer at the United Nations Headquarters in New York. Effective 1 April 2007, Mr. Cabrera was promoted to the P-4 level. On 8 November 2007, Mr. Cabrera was summarily dismissed for serious misconduct. Mr. Cabrera's summary dismissal was the subject of a separate judgment<sup>1</sup>

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<sup>1</sup> *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089.

6. On 7 March 2003, the Office of Internal Oversight Services, Internal Audit Division

3. I wish to emphasize that your placement on special leave with full pay is purely administrative measure, which is not disciplinary in nature and is taken to assist the Organization in conducting a full assessment of the situation.

11. On 19 January 2006, OIOS/IAD submitted a final version of Audit Report AP2005/600/20 to DM and DPKO (the 2005 Final Report) which appeared to incorporate comments that had been provided by DM. On 23 January 2006, Mr. Cabrera was provided with a copy of the final report and was asked to provide comments, if any, by 1 February 2006. On 22 February 2006, a statement was given to the Member States responding to the findings of the 2005 Final Report:

[A]s a precautionary measure to

14. On 15 April 2006, the Officer-in-Charge of the Administrative Law Unit (OiC/ALU) informed Mr. Cabrebra that the decision to place him on SLWFP “was intended to prevent accusations that key personnel involved in procurement influenced the outcome of these investigations”. The OiC/ALU reiterated that the decision was “not linked to [Mr. Cabrera’s] performance or conduct, neither of which [were] being pre-judged”.

15. On 19 July 2006, the OIOS/PTF issued a report that dealt with the allegations made in the 2005 Final Report in relation to the Thunderbird and TCIL contracts. On 1 August 2006, Mr. Cabrera was informed that the OIOS/PTF had concluded that the evidence “did not support any findings that [Mr. Cabrera had] violated the regulations and rules of the Organization in connection with the award of ... contracts”. On the basis of this report Mr. Cabrera was requested to return to duty.

16. On 28 December 2006, Mr. Cabrera filed an appeal before the Joint Appeals Board (JAB) challenging his placement on SLWFP. On 27 June 2008, the JAB issued its report in which it found that “the respondent’s actions constituted a fundamentally serious and damaging violation of [Mr. Cabrera’s] due process rights as well as his reputation. It therefore unanimously recommends that [Mr. Cabrera] be compensated in the amount of 2 years net base salary at the time the decision was implemented on 16 January 2006”.

17. On 29 September 2008, Mr. Cabrera was informed that the Secretary-General had

Secretary-General filed his answer to Mr. Cabrera's cross-appeal and, on 9 September 2011, he responded to Mr. Cabrera's motion to adduce additional evidence.

### Submissions

#### Secretary-General's Appeal

20. The Secretary-General submits that the UNDT erred in law in concluding that the OIOS investigation was not a preliminary investigation. The Secretary-General submits that under both the Staff Rules and under ST/AI/371, there is no basis to distinguish between a preliminary and a formal investigation as a staff member is only entitled to due process rights once he has been charged with misconduct.

21. The Secretary-General further submits that under former Staff Rule 110.4 "[n]o disciplinary proceedings may be instituted against a staff member unless he or she has been notified in writing, of the allegations against him or her". The process of providing staff members a written notification is generally referred to as "charging". As the UNDT confirmed in Zerezghi,<sup>2</sup>

[u]nder the former Staff Rules and ST/AI/371, it was only when a staff member was charged with misconduct that he or she became entitled to specifically enumerated due process rights, i.e. the right to be informed in writing of the charges, the right to receive a copy of the documentary evidence and the right to seek the assistance of counsel in his or her defence. No such rights existed during the investigation.

These conclusions have to be distinguished from Sokoloff<sup>3</sup> where the specific UNDP/ADM/97/17 rule applied.

22. The Secretary-General submits that under the erroneous two-pronged test approach adopted by the UNDT to determine when the due process rights afforded by ST/AI/371 are triggered, "a report of misconduct must be determined to be well-founded, and the [Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM)] must have made a decision that the matter is of such gravity that it should be pursued further". However, even when using this standard, the test was not met as OHRM decided not to

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<sup>2</sup> Zerezghi v. Secretary-General of the United Nations, Judgment No. UNDT/2010/122.

<sup>3</sup> Former Administrative Tribunal Judgment No. 1246, Sokoloff (2005).

pursue the matter. Consequently, the only possible conclusion is that the OIOS investigation remained a preliminary investigation.

23. The Secretary-General submits that the UNDT erred in law in concluding that Mr. Cabrera was entitled to the rights set out in paragraphs 6 through 9 of ST/AI/371 as the due process rights afforded to a staff member during the preliminary stage of an investigation are less than those afforded to a staff member once he or she has been charged with a misconduct.

24. The Secretary-General submits that the International Labour Organization Administrative Tribunal (ILOAT) has similarly held that the limitations of the due process rights afforded to staff members during the preliminary investigation stage whose purpose is to “ascertain all releva







and therefore he was not able to bring that Judgment, and its relevance, to the attention of the Appeals Tribunal. Mr. Cabrera submits that “[t]he pleas and discussion of the issue of compensation are of particular relevance to the appeal at hand and in fact the [Dispute] Tribunal includes a finding that the clarifying rationale regarding its award for damages is applicable, mutatis mutandis, to Cabrera UNDT/2011/081”.

Secretary-General’s Answer to the Cross-Appeal and Observations on the Motion to File Additional Evidence

Answer to the Cross-Appeal

38. The Secretary-General submits that Mr. Cabrera has neither established that the UNDT erred, nor does he put forward any of the five defects mentioned in Article 2(1) of the Statute of the Appeals Tribunal on which a cross-appeal could be based.

39. The Secretary-General further submits that Mr. Cabrera’s request for additional compensation is not legally sustainable as Mr. Cabrera does not demonstrate any exceptional reasons to exceed the two years’ net base salary limit as required by Article 9(b) of the Statute of the Appeals Tribunal.

40. The Secretary-General also submits that the request to be awarded interest from 2006 onwards, in addition to the UNDT’s award, is legally unsustainable as it would equate to an award of punitive or exemplary damages.

41. The Secretary-General submits that a request for an award of legal costs has no merit as the Secretary-General has not abused the judicial process but rather just exercised his right to appeal. Furthermore, the Secretary-General submits that the UNDT had previously rejected Mr. Cabrera’s argument for costs following his application in front of the former Administrative Tribunal.

43. The Secretary-General notes that the “clarifying rationale’ provided in the Johnson Judgment [with regards to the Cabrera Judgment] appears to relate primarily to the question of when the Dispute Tribunal may award ‘moral damages’”. However, the Secretary-General notes that his appeal of Judgment UNDT/2011/081 is focused on the question of whether the OIOS/ID investigation was a preliminary investigation versus a formal investigation. Consequently, the Secretary-General submits that “the UNDT Judgment cited by [Mr. Cabrera] is not relevant for the consideration of the Appeal”.

#### Considerations

44. The sole question to be considered in this appeal by the Secretary-General is whether placing a staff member on SLWFP violates the staff member’s due process rights in any way. If the measure is a disciplinary one then certain rights automatically come into operation. But not so if the measure is purely administrative.

45. Under the former Staff Rules, the Secretary-General may deal with a staff member in any of the following ways:

- (a) place a staff member on special leave with full pay (SLWFP) (former Staff Rule 105.2(a)(i))
- (b) place the staff member under suspension with full pay or in exceptional circumstances, without pay (former Staff Rule 110.2(a))
- (c) place the staff member under suspension without pay (former Staff Rule 110.3(a)(iv))

46. What is clear after reading the above provisions is that there is a difference between placing a staff member on special leave and suspending them from duty. Special leave may be granted at the request of the staff member for the purpose of conducting advanced studies, research in the interest of the United Nations, in the case of illness, or for child care. In exceptional cases, the Secretary General may, at his own initiative, place a staff member on SLWFP, if he considers that to be in the interest of the Organization.

47. It is obvious that SLWFP is different from suspension (whether it be with full pay or without pay). The initiation of disciplinary proceedings is not a pre-requisite for putting a staff member on special leave. Indeed the staff member is always given full pay when placed on special leave by the Secretary-General under former Staff Rule 105.2(a)(i) “if he considers

such leave to be in the interest of the Organization". However, a suspension with or without pay is altogether a different matter as a charge of misconduct is a pre-requisite for suspending a staff member. This is clear from former Staff Rule 1102(a). Furthermore, under former Staff Rule 110.4(a) no disciplinary proceedings can be instituted against a staff member unless he has been notified of the allegations held against him. This is the stage when the staff member's due process rights come into operation. These rights have been enumerated in former Staff Rule 110.4.

48. In the present case, the UNDT has actually created a new class of special leave, de facto disciplinary suspension - the staff member was put on special leave but was actually being suspended with full pay. The UNDT also made reference to the discussion in Kamunyi<sup>9</sup> where a staff member had been put on SLWFP during an investigation into a possible wrong-doing by that staff member. In that case, the UNDT held that placing the staff member on SLWFP was a veiled disciplinary measure or a de facto disciplinary suspension.

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Original and Authoritative Version: English

Dated this 16<sup>th</sup> day of March 2012 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 7<sup>th</sup> day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar