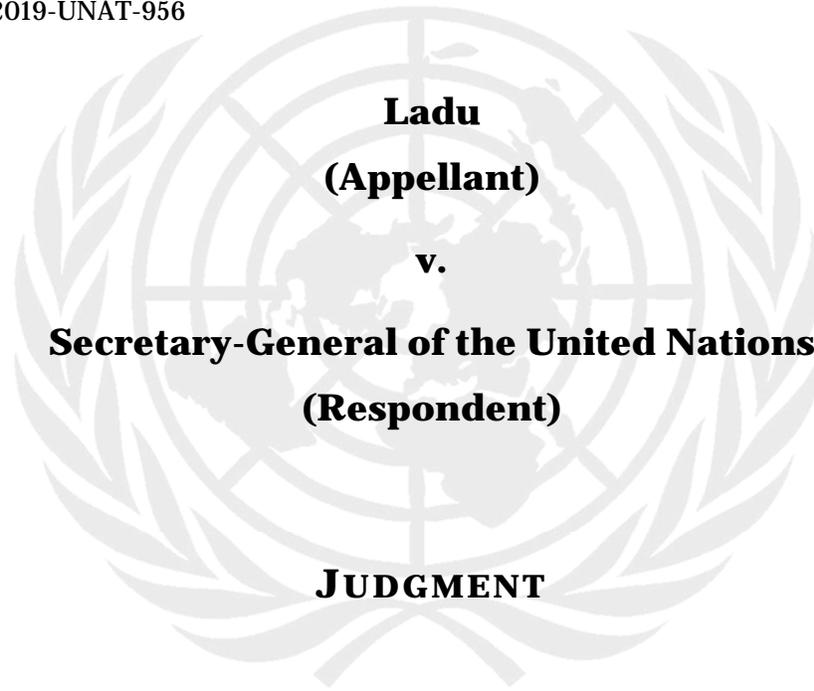




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-956



**Ladu  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Jean-François Neven
Case No.:	2019-1254
Date:	25 October 2019
Registrar:	Weicheng Lin

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Counsel for Mr. Ladu:	Sètondji Roland Adjovi
Counsel for Secretary-General:	Patricia C. Aragonés

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Mr. Scopas Ladu, a Security Assistant with the United Nations Mission in South Sudan (UNMISS), was dismissed from service for his attempt, on 2 January 2015, to remove, without authorization, building materials and household properties belonging to UNMISS. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Ladu's application, finding that the Administration had made the case of misconduct against him by clear and convincing evidence. We affirm the UNDT's Judgment.

**Facts and Procedure**

2. The Dispute Tribunal made the following findings of fact:<sup>1</sup>

... In December 2014, the UNMISS Tamping Protection of Civilians (POC) Site in which some Internally Displaced Persons (IDP) had been housed by the mission was in the process of being closed. The IDP shelters constructed with bamboos and other materials were dismantled on 2 January 2015 and removed but some broken bamboos and other materials were still left at the POC Site.

... Before the shelters were dismantled and upon being asked, [Mr.] Simon Mwinzi the international security officer in charge of the POC Site, sought permission for Mr. Parakiti, a national security guard, to take broken bamboos from the Site for personal use. The permission sought was granted by Mr. Pakala, the Relief Reintegration Protection (RRP) officer. In the presence of another international Security [O]fficer, Ms. Nelly Boit who was the Officer-in-Charge of the Guard Force Unit (GFU) and was responsible for authorizing gate passes, Mr. Pakala instructed that after the dismantling of the POC Site, Mr. Parakiti could take the broken bamboos. Ms. Boit then asked to be informed when the broken bamboos would be removed.

... When the dismantling of the shelters was going on, Mr. Pakala told Ms. Boit to send for the national security guard who wanted the broken bamboos so that [Mr. Pakala] could show [Mr. Parakiti] the bamboos he was permitted to take. Mr. Parakiti came and met Mr. Pakala who pointed the broken bamboos out to [Mr. Parakiti] and told [Mr. Parakiti] to inform the Rwanda Army Captain who was supervising the dismantling of the former IDP shelters that [Mr. Parakiti] was authorized to take broken bamboos.

... That afternoon, Mr. Parakiti went to the GFU and asked Ms. Boit for a form for gate pass authorization which he needed to fill out and to have signed to enable him to take the broken bamboo[s] out of the UNMISS premises. Mr. Parakiti filled out the form in which he indicated that he was taking broken bamboos but on being asked by

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<sup>1</sup> Impugned Judgment, paras. 13-23.

Ms. Boit if he was certain he was only removing broken bamboos[,] he told her that he would also take broken tiles. Upon her insistence, he filled out a new gate pass indicating he would remove broken bamboos and broken tiles and Ms. Boit signed it.

... Soon thereafter, Mr. Parakiti brought a private truck driven by one Mr. Woldemariam and carrying three other men into the UNMISS premises and issued each of them with an UNMISS visitor pass. The truck was driven to the Topping POC Site ostensibly to collect the materials Mr. Parakiti was permitted to take. [Mr. Ladu] was on patrol duty at the POC Site with two other security guards from the Warrior Security Company, a private security firm retained by UNMISS. When Mr. Parakiti arrived, [Mr. Ladu] told the Warrior security guards, [Mr.] John and Ms. Nunu that Mr. Parakiti was permitted to take broken tiles and broken bamboos. There were also freight containers at the POC Site in which new/unused tiles were stored.

... Mr. Parakiti and the men who came with the truck driver started loading the private truck with the new/unused tiles from the containers rather than the broken tiles. [Mr. Ladu] and a few others helped them to load some of the new/unused tiles. While the truck was being loaded, a Warehouse Assistant attached to the UNMISS Transport section, Mr. Amoli came to the POC Site in search of five missing freight containers and saw [Mr. Ladu], Mr. Parakiti and others moving around a private truck. Before he could get close to them, [Mr. Ladu] approached him to ask what he wanted and was told [Mr. Amoli] was searching for some missing freight containers belonging to the Transport section. [Mr. Ladu] asked for the numbers of the missing freight containers and wrote them down with Mr. Amoli's phone number. [Mr. Ladu] then told Mr. Amoli they were only loading broken tiles which they were authorized to do into the truck and that [Mr. Ladu] would help to search for the missing freight containers later.

... About 370 boxes of new Rocconite [two feet x two feet] tiles were loaded into the truck. Also, loaded into the truck were some 18 sheets of plywood, three hollow concrete blocks, one rechargeable lamp, one black 100-litre barrel with tap, one white bucket, one wheelbarrow, two floor mats, one standing fan, nine roofing metal sheets [...]. A tarpaulin was placed over the tiles and other materials in the truck to conceal them and some broken bamboos placed on top as camouflage. The truck was then driven to the UNMISS gate to exit while Mr. Parakiti drove up to the same gate on a motorcycle to ensure the truck exited the UNMISS premises successfully.

... Mr. Andrew Mogga, a Security Assistant of the Special Investigations Unit (SIU) was standing beside the UNMISS main gate hoping to hitch a ride when he saw the laden private truck drive up. He saw UNMISS Security officer Mr. Jada give a gate pass for the private truck to the Warrior Security guard at the gate and tell her it was only carrying broken tiles and broken bamboos and to allow the truck to exit the premises. Mr. Mogga was suspicious when he observed that under a sheet of tarpaulin in the said truck, there were boxes of new tiles. He then requested to see what was in the truck and the supporting document (gate pass). Mr. Parakiti who was also at the gate on a motorcycle quickly drove away into the UNMISS premises. Mr. Mogga reported the

incident to the SIU which responded by going to the main gate, detaining the private truck, inspecting it and starting an investigation.

... During the investigations by the SIU, several witnesses including [Mr. Ladu], were interviewed and gave witness statements. The SIU issued its investigation report on 6 January 2015. On 22 May 2015, the investigation report was referred to the Office of Human Resources Management (OHRM).

... [Mr. Ladu] was formally notified of allegations of misconduct against him by a memorandum dated 22 July 2015 which was delivered to him by hand on 24 July 2015 with a copy of the investigation report and all related annexes for his comments. [Mr. Ladu] signed for receipt of these documents. When on 5 August 2015, [he] requested a 2-week extension of time by email to submit his comments, this was granted. [Mr. Ladu] did not meet the deadline and was allowed a further week. He finally sent his comments by email on 31 August 2015.

... [Mr. Ladu's] comments to the allegations of misconduct were duly considered and by a letter dated 27 April 2016, he was informed that the Under Secretary-General had concluded that misconduct had been proven against him and the sanction of dismissal from service had been imposed. The letter of dismissal was delivered to [Mr. Ladu] on 23 May 2016.

3. In its Judgment now under appeal, the Dispute Tribunal dismissed Mr. Ladu's application. Noting that the facts of the case were not in dispute and that Mr. Ladu was challenging not the facts of the case, but the procedure and the conclusions reached by the Administration, the UNDT concluded that on 2 January 2015 Mr. Ladu and others committed misconduct by removing building materials and household properties belonging to UNMISS without authorization. It

was a deliberate and premeditated act on the part of [Mr. Ladu] and all the other actors in that disgraceful incident. Premeditation and an intent to steal became the common purpose of the actors when each of them decided to participate in loading the truck with UNMISS property that none of them was authorized to take. More aggravating in this sordid drama is the fact that all of them were security personnel working for the Mission.<sup>2</sup>

The UNDT found that the Administration had made the case of misconduct against Mr. Ladu by clear and convincing evidence. The Dispute Tribunal also concluded that Mr. Ladu's due process rights had not been breached during the investigation and disciplinary processes. It further concluded that the sanction of dismissal was proportionate and consistent with the Secretary-General's usual practice in disciplinary cases involving theft.

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<sup>2</sup> *Ibid.*, para. 51.

4. Mr. Ladu appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal) on 29 April 2019. The Secretary-General filed his answer on 1 July 2019.

### **Submissions**

#### **Mr. Ladu's Appeal**

5. Mr. Ladu reiterates that the core facts are not in dispute. But the Dispute Tribunal ignored some evidence leading to a mistake of fact. It was a mistake to consider that the presence of security patrol within the UNMISS compound presumes the value of what was on the site. As he stated in his closing statement, Mr. Ladu believes that at the time of the incident, whatever remained on the site was "garbage". It was also a mistake for the UNDT to have summarily dismissed new evidence exposing flaws and inconsistencies in the testimonies of some eye witnesses. The finding of misconduct against him was not supported by clear and convincing evidence.

6. Moreover, the Dispute Tribunal drew conclusions leading to injustice. There was no evidence of premeditation on the part of Mr. Ladu. He met Mr. Parakiti on the site without any prior plan and it was only then and there that he thought he could take advantage of the opportunity to collect some items similar to those that Mr. Parakiti and his team of loaders were collecting. Mr. Ladu had wrongly assessed the situation, leading to a situation of negligence.

7. The Dispute Tribunal failed to do justice to Mr. Ladu. It rejected Mr. Ladu's statement that he had a limited understanding of English without allowing the evidence that his Counsel planned to adduce or allowing any test on his ability to read and understand English, especially complex legal documents. The Dispute Tribunal's questioning of the integrity of his Counsel and its apparent bias against the Counsel has affected Mr. Ladu's case before the UNDT.

8. Mr. Ladu requests that the Appeals Tribunal set aside the impugned UNDT Judgment, rescind the dismissal decision, and order his reinstatement or the necessary reparation. Alternatively, Mr. Ladu requests that the Appeals Tribunal reduce the sanction to a lesser disciplinary measure, if it finds him only negligent.

**The Secretary-General's Answer**

9. The Dispute Tribunal correctly concluded that the facts on which the disciplinary measure had been based had been established. Mr. Ladu conceded before the Dispute Tribunal and has confirmed in his submission to the Appeals Tribunal that the core facts are not in dispute. The record contains ample evidence for the Dispute Tribunal's conclusion that Mr. Ladu had been unwavering in his admission that he had participated in loading the stolen materials. Mr. Ladu has failed to provide a sufficient and credible explanation or contrary evidence to rebut the charge that he had participated in an attempt to remove unauthorized building materials and/or was reckless or grossly negligent in the execution of his duties.

10. The Dispute Tribunal correctly concluded that the facts legally amounted to misconduct. Mr. Ladu loaded building materials belonging to the Organization onto a private truck with the knowledge that there was no authorization granted for their removal from the UNMISS premises. He has now confirmed that he intended to take some of the loaded new tiles for his personal use. The fact that his attempt to take the property did not succeed in the present case does not undermine the findings of Mr. Ladu's responsibility. Moreover, his reckless or grossly negligent conduct in the performance of his duties also legally amounted to misconduct. It is irrelevant that other security officers were involved or that the truck would be checked upon exiting the UNMISS compound.

11. The Dispute Tribunal correctly concluded that the sanction imposed on Mr. Ladu was proportionate. Mr. Ladu's conduct was particularly grave, in light of the position he held and the responsibilities he was entrusted with as a security officer. By attempting to take property belonging to UNMISS without authorization while on duty as a Security Assistant, Mr. Ladu irreparably breached the relationship of trust between him and the Organization. His position of special trust and responsibility as a security officer was an aggravating factor that was not mitigated by his length of service or personal circumstances. If the Appeals Tribunal were to only find Mr. Ladu reckless or grossly negligent in the execution of his duties, it would have been similarly reasonable for the Secretary-General to conclude that such a failure on the part of Mr. Ladu warranted the sanction of separation from service.

12. The Dispute Tribunal correctly concluded that Mr. Ladu's due process rights were respected. Mr. Ladu conceded that he had been formally notified of the charges against him and his right to seek counsel. The UNDT reviewed his claim of a limited ability to understand English,

but correctly found that his so-called poor knowledge of the English language had never been a factor during the disciplinary process, and that Mr. Ladu's English language ability was sufficient.

13. Mr. Ladu has not established any error on the part of the Dispute Tribunal that warrants the reversal of its Judgment. He has raised various assertions questioning the value of the items found on the UNMISS premises, challenging the Dispute Tribunal's finding of premeditation on his part and alleging the Dispute Tribunal's bias against his Counsel, and accusing the Dispute Tribunal of failing to resolve the alleged contradictions in the testimonies given during the UNDT hearing and failing to conduct a test of Mr. Ladu's English language ability. But none of his submissions provide any basis for calling into question the Dispute Tribunal's reasonable findings and conclusion. The Dispute Tribunal considered all of the arguments advanced on behalf of Mr. Ladu. He is simply dissatisfied with the Judgment and attempts to impermissibly reargue his case before the Appeals Tribunal.

14. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Ladu's appeal in its entirety.

### Considerations

#### *Standard of review in disciplinary cases*

15. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*<sup>3</sup> quoting *Applicant*,<sup>4</sup> and others:<sup>5</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,

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<sup>3</sup> *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.

<sup>4</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

<sup>5</sup> See also *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 46; *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18; *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, paras. 29 and 30; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 29 and 30.

misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

16. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.<sup>6</sup>

17. It is in the context of these definitions and principles that Mr. Ladu’s appeal against the UNDT’s conclusions must be assessed.

*Clear and convincing evidence established that Mr. Ladu participated in an attempt of unauthorized taking of property belonging to the Organization*

18. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Administration based its decision to dismiss Mr. Ladu from service were established, in full respect of his due process rights. The records show clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by Mr. Ladu. The UNDT did not err as there was clear and convincing evidence that Mr. Ladu indeed participated in an attempted unauthorized taking of property belonging to the Organization; neither did it err in concluding that the disciplinary sanction of dismissal from service was proportionate and lawful.

19. As the UNDT provided thorough and convincing reasoning, we do not find it necessary to repeat each and every detail except to refer to paragraphs 45 to 58 of its Judgment. We will, however, present the most important pieces of evidence on record and highlight those factual findings which clearly demonstrate that Mr. Ladu committed misconduct.

20. In reviewing the Administration’s decision, the UNDT had before it the documentary evidence on the record and heard the testimonies of various witnesses together with that of Mr. Ladu.

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<sup>6</sup> *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 47; *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28; *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

21. Regarding the material facts of the case, the UNDT made *inter alia* the following observations and findings:<sup>7</sup>

... The facts of the case were not in dispute. [Mr. Ladu] was a Security guard employed by UNMISS. At the times material to this case, he was posted to duty at the POC Site where IDPs had been housed. He patrolled the said Site with two other security guards who were attached to a private contractor retained by UNMISS to assist with security services.

... In his own sworn testimony at the [Dispute] Tribunal, [Mr. Ladu] told the Tribunal that on 2 January 2015, (the day of the incident leading to this case) another Security Assistant Mr. Parakiti came to him and told him that he had authorization or a gate pass to collect broken bamboos and broken tiles from the POC Site where shelters that formerly housed the IDP had been dismantled. [Mr. Ladu] was on security duty and was patrolling the POC Site with two security guards from a private security company, Mr. John and Ms. Nunu.

... [As per the same testimony,] Mr. Parakiti later brought a rented private truck into the POC Site with three men to help him load the broken building materials. [Mr. Ladu] told the [Dispute] Tribunal that while loading the materials into Mr. Parakiti's truck, he observed that boxes of new tiles were being taken from the containers at the POC Site and loaded into the private truck. It was also his testimony before the [Dispute] Tribunal that he joined Mr. Parakiti and his loaders in loading the new boxes of tiles from freight containers into the truck. Under cross-examination, [Mr. Ladu] repeated that he helped Mr. Parakiti to load the new tiles into the truck. In answer to another question, he said it was his duty to guard and protect United Nations property at the POC Site.

... In his statement to the investigators, Mr. Parakiti admitted that although he had obtained a gate pass to take broken bamboos and broken tiles from the POC Site on 2 January 2015, he had instead loaded 370 boxes of new and unbroken tiles and other materials into the private truck he brought. He also told investigators that [Mr. Ladu] had asked for some of the new tiles and helped load the tiles into his truck. He apologized for his actions and went through a disciplinary process and was dismissed from the Organization.

... Mr. Ladu has been unwavering in his admission that he participated in loading the stolen materials into Mr. Parakiti's truck.

22. The UNDT was clearly not convinced by Mr. Parakiti's different story—when he was called by the Secretary-General to testify before the UNDT—about how he had been procured by his former supervisor, Mr. Mwinzi, who had also supervised Mr. Ladu, to steal the boxes of

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<sup>7</sup> Impugned Judgment, paras. 45-49 and para. 52.

new tiles for him, or by Mr. Parakiti's testimony that Mr. Ladu had not participated in the loading of the new tiles onto the private truck he had brought for that purpose and that he had lied to investigators when he told them Mr. Ladu had participated.

23. The UNDT pointed to these material inconsistencies in the separate accounts given by Mr. Parakiti during the investigation and at the hearing of the case, and found that Mr. Parakiti's "newly-minted story" about being a victim in a plot to steal United Nations property masterminded by his former supervisor was as false as it was desperate.<sup>8</sup> The UNDT found that both Mr. Parakiti's demeanour at its oral hearing of the case and the testimony he tendered showed Mr. Parakiti was not a witness of the truth. On this basis, the UNDT concluded that Mr. Parakiti had made up his mind to use the opportunity of his sworn testimony to lie and to implicate his former supervisor, Mr. Mwinzi.

24. Finally, after carefully and thoroughly considering the evidence on which the Administration had based the sanction, along with its own observations and findings thereupon, the UNDT concluded:<sup>9</sup>

... The Tribunal is not in any doubt that the unauthorized taking of hundreds of boxes of new tiles and other building and household materials from the UNMISS Tomping POC Site on 2 January 2015 was a deliberate and premeditated act on the part of [Mr. Ladu] and all the other actors in that disgraceful incident. Premeditation and an intent to steal became the common purpose of the actors when each of them decided to participate in loading the truck with UNMISS property that none of them was authorized to take. More aggravating in this sordid drama is the fact that all of them were security personnel working for the Mission.

25. The UNDT also considered Mr. Ladu's argument that his due process rights had not been respected during the investigation and disciplinary proceedings, but dismissed it as being without merit.

26. In all the circumstances of the case, we find the UNDT's reasoning persuasive. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and probative value of the evidence placed before him or her by the parties to justify his or her

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<sup>8</sup> *Ibid.*, para. 52.

<sup>9</sup> *Ibid.*, para. 51.

findings,<sup>10</sup> and considering, in particular, that the facts of the case, as conceded by Mr. Ladu, are not in dispute, in the view of this Tribunal, the evidence against Mr. Ladu uncovered by the investigation and the hearing before the first instance Judge was so overwhelming that the only reasonable conclusion available to the UNDT was that the facts of the alleged conduct were established by clear and convincing evidence.

27. Be that as it may, before the UNDT, Mr. Ladu admitted that he had participated in loading the stolen materials. Even in his appeal, Mr. Ladu concedes that “he had helped load [items], some that he had planned to collect later” and that “he thought that he could take advantage of the opportunity to collect some items similar to those that Mr. Parakiti and his team of loaders were collecting”.

28. Mr. Ladu argues that the UNDT erred in a number of ways in upholding the Administration’s decision.

29. Firstly, he submits that the facts that the site was being dismantled, containers had been unlocked and things had been littered out for some time call into question the value of the items inside them which, he contends, corroborates that he did not attempt to take without authorization the Organization’s property because the items were “garbage”.

30. We reject this submission as being entirely without merit. The evidence shows that the materials in the truck included 370 boxes of new tiles of the Rocconite brand valued at USD 5,550, 18 sheets of plywood valued at USD 360 and three hollow concrete blocks valued at USD 4.80. Also, among materials loaded onto the truck were one black 100-litre barrel with a tap, one white bucket, one wheelbarrow, two floor mats, one standing fan, and nine roofing metal sheets. These materials belonged to the Organization and no authorization had been granted for their removal, beyond broken bamboos and broken tiles, as correctly found by the UNDT.

31. Mr. Ladu further submits that the UNDT failed to fully assess the new facts presented by Mr. Parakiti—who recanted the story he had told the investigators—in order to resolve the alleged contradictions in testimonies given during the hearing of the case. However, as already noted, the UNDT carefully and thoughtfully assessed Mr. Parakiti’s testimony in this regard

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<sup>10</sup> *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

and rejected it for lack of credibility for the reasons set out in its Judgment, which we totally agree with and endorse.

32. Again, we repeat that this Tribunal considers that some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence has been heard. The UNDT has the advantage of assessing the demeanour of each witness while he or she is giving evidence and this is critical for assessing the credibility of the witness and the persuasiveness of his or her evidence.<sup>11</sup> This is exactly what happened in the present case in terms of Mr. Parakiti's new account of the events before the UNDT, which was correctly assessed by the UNDT as totally unconvincing.

33. Moreover, as correctly argued by the Secretary-General, Mr. Ladu has failed to explain in what way the alleged UNDT's factual errors resulted in a manifestly unreasonable decision warranting the intervention of the Appeals Tribunal.<sup>12</sup>

*The established facts qualify as misconduct*

34. This Tribunal agrees with the finding of the UNDT that the established facts amounted to serious misconduct on the part of Mr. Ladu.

35. Staff Regulation 1.2(b) provides: "Staff Members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."

36. Under Staff Rule 10.1, a staff member commits misconduct when he or she fails to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant, and such a failure may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

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<sup>11</sup> *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

<sup>12</sup> *Pacheco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-281, para. 25.

37. Mr. Ladu, by his participation in an attempt of unauthorized taking of property belonging to the Organization, violated his obligation under Staff Regulation 1.2(b) to uphold the highest standard of integrity. Since the UNDT properly found that the facts amounting to misconduct were established, the Administration has shown serious misconduct on Mr. Ladu's part.

*The sanction of separation from service was proportionate to the offence*

38. The Appeals Tribunal's jurisprudence on the principle of proportionality is best described in *Sanwidi*, where we held:<sup>13</sup>

... In the present case, we are concerned with the application of the principle of proportionality by the Dispute Tribunal. In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the 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 may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational,

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<sup>13</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 39-40, 42 and 47. See also *Siddiqi v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-913, paras. 41ff.

procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

... Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

39. It follows, and we have consistently held, that the determination of the degree of the sanction is usually reserved for the Administration, which has discretion to impose a measure that it considers adequate to the circumstances of the case in light of the actions and behaviour of the staff member involved. As we have stated in *Portillo Moya*:<sup>14</sup>

... This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration which carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures: a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance, etc.

... That is why only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, that the judicial review would conclude in its unlawfulness and change the consequence (i.e., by imposing a different one). This

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<sup>14</sup> *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, paras. 20 and 21.

rationale is followed in the jurisprudence of this Tribunal.[ ] If that is not the case, judicial review should not interfere with administrative discretion.

40. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose. Given the seriousness and degree of Mr. Ladu's misconduct, the sanction of dismissal was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Secretary-General's discretion to determine that participating in an attempt of an unauthorized taking of the property belonging to the Organization rendered Mr. Ladu unfit for further service with the Organization, and is satisfied that dismissal was neither unfair nor disproportionate to the seriousness of the offence. As the UNDT correctly held, Mr. Ladu violated the relationship of trust that had existed between him and the Organization. His conduct was particularly grave in light of the position he occupied as a security officer, charged with the protection of personnel and property of the Organization. As such, the Appeals Tribunal finds that imposing the sanction of dismissal was a reasonable exercise of the Administration's broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNDT thus did not err in finding the sanction proportionate to the disciplinary offense in the present case.

#### *Due process*

41. The Appeals Tribunal is satisfied that the key elements of Mr. Ladu's right to due process were met and that the interests of justice were served in this case. Mr. Ladu was fully informed of the charges against him and his right to seek advice from the Office of Staff Legal Assistance or other counsel. Moreover, he gave a sworn testimony in English at the oral hearing, which the UNDT found satisfactory. Therefore, as also found by the UNDT, the alleged poor knowledge of the English language was never a factor during the disciplinary process, nor was his understanding of the proceedings against him wanting.

42. Consequently, we find no error in the UNDT's finding that there were no breaches of Mr. Ladu's due process rights during the investigation and disciplinary process. Indeed, there is no evidence that Mr. Ladu's rights had been infringed in any way during the investigation. The Administration diligently undertook the investigation and Mr. Ladu was able to mount a defense and had ample opportunities to make his case. He was provided with the allegations of misconduct and was given, and availed himself of, the opportunity to answer them.

Therefore, we agree with the UNDT that there was no merit in Mr. Ladu's argument that the investigation was procedurally defective. Mr. Ladu's submission to the contrary, *to wit*, that the UNDT erred by not allowing his English language reading ability to be tested during the hearing falls to be rejected as baseless.

43. Additionally, even if any violations of Mr. Ladu's due process rights had occurred due to his alleged limited understanding of the English language, they were cured during the proceedings before the UNDT, which heard the witnesses and Mr. Ladu's own testimony under oath and gave Mr. Ladu the opportunity to confront and cross-examine them. As conceded by Mr. Ladu, the UNDT Judge took extra pains and "made him repeat each set of phrases numerous times, and sometimes summed his evidence to secure accuracy".

44. Be that as it may, as to the alleged procedural irregularities during the disciplinary investigation, the kind and amount of evidence, including Mr. Ladu's own concession of the basis of the charges against him, before the UNDT, rendering clear and convincing evidence that Mr. Ladu participated in an attempt of the unauthorized taking of property belonging to the Organization, call into application our jurisprudence in *Michaud* where we stated:<sup>15</sup>

... This is also one of those cases where the so-called "no difference" principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage that fuller or better due process would have made no difference. The principle applies exceptionally where the ultimate outcome is an irrefutable foregone conclusion, for instance where a gross assault is widely witnessed, a theft is admitted or an employee spurns an opportunity to explain proven misconduct.

45. Finally, Mr. Ladu claims "unfairness" and "injustice" in the outcome of the UNDT Judgment, in that the UNDT "questioned the integrity of [his] counsel and this could be [...] evidence of a bias" that affected his case before the UNDT. However, there is nothing in the UNDT Judgment which could support this allegation. The UNDT did not commit any error of procedure, the kind alleged by Mr. Ladu, such as to affect the decision of the case. There is no indication of bias against Mr. Ladu on the part of UNDT. On the contrary, the documentary evidence shows that, having found some of Mr. Ladu's submissions to be "not only preposterous but scandalous", the UNDT observed that while legal representatives have a duty to protect their clients' interests, they must preserve their own integrity and that of the UNDT

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<sup>15</sup> *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 60.

“by refraining from making ridiculous and scandalous submissions”.<sup>16</sup> While a staff member has a right to be represented by counsel or another staff member pursuant to Article 12(1) of the UNDT Rules of Procedure, the UNDT has a wide discretion in matters of case management.

46. It was thus within the UNDT’s discretion to give some directions to Mr. Ladu’s legal representative in this regard, though it could have done it in a more subtle way, noting that the counsel had advanced arguments that directly contradicted what Mr. Ladu had said or had raised irrelevant matters. In the view of the Appeals Tribunal, the above UNDT’s reasoned statements alone do not reflect bias on its part against Mr. Ladu. We note, further, that Mr. Ladu has not shown, as he ought to, how this alleged “bias” affected the decision of the case.<sup>17</sup>

*Request for compensation*

47. Mr. Ladu’s claim for compensation is rejected. Since no illegality was found, there was no justification for the award of any compensation. As this Tribunal stated before, “compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member’s rights or administrative wrongdoing in need of repair”.<sup>18</sup>

48. For the foregoing reasons, we find that Mr. Ladu has failed to establish that the UNDT made any error of law or fact in its review of the disciplinary measure imposed by the Secretary-General. It follows that the appeal must fail.

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<sup>16</sup> Impugned Judgment, para. 57.

<sup>17</sup> Article 2(1)(d) of the Appeals Tribunal Statute; *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-879, para. 33; *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733, para. 31.

<sup>18</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, which in turn cited *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; and *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

**Judgment**

49. The appeal is dismissed and Judgment No. UNDT/2019/032 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of October 2019 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Colgan

*(Signed)*

Judge Neven

Entered in the Register on this 20<sup>th</sup> day of December 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar