



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/070

Judgment No.: UNDT/2012/169

Date: 7 November 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KAMARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Esther Shamash, OSLA

Counsel for Respondent:
James Hanneman, WFP
Simone Parchment, WFP

Introduction

1. The Applicant was employed by the World Food Programme (WFP) as a member of its locally recruited field staff based at the WFP Country Office in Monrovia, Liberia. On 1 July 2006, the Applicant was appointed under a 100-series fixed-term contract as Logistics Assistant (Shipping) at the G-4 level at the Freeport of Monrovia until his separation from service on 30 June 2010 for misconduct.

2. The Applicant is contesting the decision to separate him from service following an investigation on a charge of misconduct by allegedly committing acts of gross negligence in giving a non-WFP staff member the authority and the means to collect WFP containers from the National Ports Authority (NPA) Park. He was also charged for insubordination, in allegedly bringing the Liberian Seaport Police to a staff member's home contrary to his supervisor's advice and without having the authority to do so.

Background Facts

3. As Logistics Assistant, the Applicant was responsible for among other duties:

- a. Supervising the offloading of WFP vessels during the day and evening, if necessary;
- b. Coordinating WFP operation at Freeport;
- c. Supervising the work of WFP superintendent agents;
- d. Following up on all issues related to WFP port operations.

4. In April 2009, it was reported to Mr Louis Imbleau, the Country Director of WFP Liberia Country Office, that there were fourteen containers of WFP food items missing from the Freeport (Port) of Monrovia. The Country Office Logistics Unit was requested to follow up on the matter and report back.

5. After more than one week, five containers were located and a balance of nine containers remained missing. The Country Office reported the missing containers to the NPA and the Liberian police.

6. On 14 April 2009, the Office of Inspections and Investigations (OSDI) was informed by the Country Director that there were nine WFP containers missing which contained 109 Metric Tonnes (MT) of palm olein oil and 75 MT of yellow split peas with a total value of approximately USD190,000.

7. During the Country Office preliminary investigation, Mr Wleh Jackson, the Forklift Operator for WFP at the time of the theft, admitted in a signed statement that he received a bribe of 30,000 Liberian Dollars from Mr Weah Emmas Nyanplu of Seatrans to misappropriate two WFP containers from the NPA Park. Seatrans Shipping Stevedoring Company was the clearing and forwarding agent for WFP under a contract to clear WFP's cargo at the port.

8. The matter of the nine missing containers was reported to the Country Director who in turn informed OSDI and requested OSDI's assistance in investigating the matter. Based on these events, the OSDI personnel undertook a mission to Monrovia from 23 April to 6 May 2009.

9. On 7 May 2009, the Applicant was suspended with full pay pending the outcome of the investigation.

Investigation

10. On 30 November 2009, OSDI issued an Investigation Report in which they found with regard to operations procedures the following:

11. WFP Logistics staff and WFP warehouses are located at the Port in Monrovia. At the time of the investigations, Mr Musa, the Logistics Officer was the Head of Logistics and he was assisted by Mr Bah, Logistics Officer. The Applicant was the Logistics Assistant responsible for the handling of WFP containers and reported directly to Mr Musa. There were three Forklift Operators working for the WFP namely, Mr Jackson, Mr Swen and Mr Gayflor.

12. Once WFP containerized cargo is discharged, containers are initially stored at the NPA Park and upon completion of the necessary customs clearance, the containers are moved to the WFP Yard which is located within the Port, approximately 200 meters from the NPA Park and de-stuffed thereafter. The transporting of the WFP containers from the NPA Park to the WFP Yard is the responsibility of the NPA. However, due to a lack of sufficient capacity on the part of the NPA, WFP purchased a forklift to move its containers from the NPA Park to the WFP Yard.

13. The OSDI concluded that:

a. Mr Jackson engaged in misconduct and failed to comply with the Standards of Conduct for the International Civil Service as he, based on his admission, accepted a bribe of 30,000 Liberian Dollars from Mr Weah in order to misappropriate two containers;

b. Mr Weah was involved in the diversion and theft of at least two WFP containers from the Port of Monrovia based on Mr Jackson's statement;

c. At least one WFP container was transported out of the Port by Mr Koon (UNMIL driver) with a UNMIL truck, based on his admission, in exchange for USD500 paid by Mr Weah;

d. Considering the evidence that Mr Weah organized the diversion and misappropriation of at least two WFP containers from the Port of Monrovia and that nine WFP containers went missing, it was more probable than not that Mr Weah was involved in the diversion and misappropriation of the other seven containers;

e. The Applicant was grossly negligent in giving Mr Weah, a non WFP staff, the authority and the means to collect WFP containers from the NPA Park without having informed his supervisor of this arrangement, causing a loss to WFP of USD190,000.

f. Based on his admission, the Applicant was insubordinate in that he brought the Liberian Seaport Police (LSP) to a WFP staff member's house

without having the authority to do so and despite the fact that he was told by Mr Musa that only the Country Director could provide such authorization.

14. During the course of the investigation, OSDI noted several inconsistencies and discrepancies in the Applicant's statements in relation to some of his actions after the theft of the WFP containers from the Port of Monrovia became public knowledge.

15. Even though OSDI did not have sufficient evidence to substantiate the involvement of the Applicant in the theft of the nine containers, it concluded that the Applicant gave misleading information during his interviews and thus failed to fully cooperate with the investigation. This negatively impacted on his credibility.

16. OSDI recommended administrative or disciplinary action to be taken against the Applicant for unsatisfactory conduct for the reasons that:

a. The Applicant was grossly negligent in giving Mr Weah, a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisor of this arrangement. This caused WFP a loss amounting to USD190,000.

b. The Applicant was insubordinate in taking the Liberian Police to a WFP staff member's house without the requisite authorisation.

Procedural History

17. On 28 January 2010, WFP sent the Applicant the findings, considerations and conclusions from the Investigation as well as the charges. He was then requested to provide a written response which he provided on 5 March 2010. The Applicant was subsequently charged with misconduct for allegedly acting in a grossly negligent manner leading to loss of the nine containers, failure to timely report this loss to his supervisors and for an act of insubordination.

18. The Applicant was separated from service on 30 June 2010 in accordance with UN staff rule 10.2(a)(viii). Part of his separation letter stated:

Upon careful review of the matter...it is considered that you have not presented any new facts, evidence or mitigating factors which would justify review of the proposed disciplinary measure.

It is considered that in exceeding your authority by delegating your responsibility to an outside third party to monitor containers and their movement from the NPA Park to the WFP warehouse at the Port, you ultimately exposed the Programme to commodity losses amounting to US\$ 190,000.

Your actions as noted above are found to entail an irreparable breach of the bond of trust on which your employment with the Programme is based, and are thus considered to be incompatible with your continued employment with WFP.

In light of the foregoing, this is to inform you that you are hereby imposed the disciplinary measure of "separation from service" without termination indemnities in accordance with UN Staff Rule 10.2(a) (viii). As you are entitled to thirty days' written notice, you shall be afforded compensation in lieu of this notice period, calculated on the basis of the salary and allowances which you would have received had the date of termination been at the end of the notice period.

19. On 27 September 2010, the Applicant filed this Application with the Tribunal challenging his separation from service. The Respondent submitted a Reply on 29 October 2010.

20. On 11 August 2011, the Tribunal issued Order No. 087 (NBI/2011) setting the matter down for hearing for Wednesday 21 and Thursday 22 September 2011. The hearing took place on these dates, but as a result of poor communication, could not proceed effectively, requiring the adjournment of the said hearing.

21. The Tribunal issued Order No. 125 (NBI/2011) on 7 October 2011 and re-scheduled the matter for hearing on Wednesday 12 and Thursday 13 October 2011. During the hearing held on 13 October 2011, the Tribunal heard oral testimony from the Applicant and witnesses for the Applicant and Respondent. It further ordered the Applicant to address the Tribunal in his closing submissions on his objections to the inclusion of the statement of the late Mr Salieu Bah.

22. The Parties filed their closing submissions on 30 November 2011.

Applicant's case

23. The Applicant case is hereunder summarized:

The sanction of separation from service is disproportionate and unfair

24. While the Applicant may have erred in authorising Mr Weah to assist him in locating WFP containers, this error did not amount to gross negligence.

25. Mr Weah already had access to all the shipping documents, as he received them from the WFP Shipping Section in the course of his duties. It was the Applicant's responsibility to deliver all shipping documents to Mr Weah as soon as he received them. The documents were then logged in a registry at the office and Mr Weah signed for each document he received. As such, Mr Weah knew the location of the various containers, making him an obvious choice to assist the Applicant in locating the WFP containers. Throughout the period when the cargo was being cleared, the containers were supposed to be in the custody of the NPA.

26. Although the Applicant authorised Mr Weah to go to the NPA Park and locate the WFP containers, he did not, however, authorise him to remove them from the port terminal.

27. The Applicant's decision to accept assistance from Mr Weah was justified under the circumstances, and it was known to his colleagues. While it may, in hindsight, have been a mistake on his part, such an error in judgment, particularly when it was so systemic, an integral part of the way he carried out his duties and one which was known to WFP, should not in itself amount to negligence, much less gross negligence.

The Applicant's error was not negligent, as its end result was not foreseeable

28. The Applicant could not have foreseen that an NPA employee would engage in criminal activities and offer a bribe to Mr Jackson who accepted the said bribe. The willingness of Mr Jackson, a former WFP staff member, to accept a bribe and be implicated in criminal activities is a new act intervening. These unforeseeable factors arguably broke the chain of causation, so that the end result cannot be

attributed to the Applicant's breach of his duty of care. The Applicant cannot be held liable for these results, and cannot be found to have been negligent.

Alternatively, even if the Applicant was negligent, his conduct did not amount to gross negligence

29. The Applicant's error was the undue delegation of his authority. This error, however, should more correctly be characterised as simply an error made in good faith, based on the exigencies of the day-to-day reality at the port, in which the Applicant was doing his best, according to his understanding, to expedite the timely movement of the WFP containers despite being inadequately resourced. While this error may have amounted to negligence, this could not, by any stretch of the imagination, be characterised as gross negligence.

30. The extent of the Applicant's negligence in authorizing Mr Weah to assist him in locating the WFP containers in the NPA Park is a reflection of the extent of his breach of his duty of care to WFP. That is to say, how far his actual conduct strayed from the standard of reasonableness expected from a reasonable Logistics Assistant under those circumstances.

31. Negligence in itself is not misconduct. It is a performance issue. While the Applicant should perhaps have been taken to task, this error does not warrant a disciplinary sanction, but would be better reflected in his performance appraisals.

32. The results of the Applicant's error, while grave, were unforeseeable. His conduct, contrary to the Administration's position, was not shown to be grossly negligent.

The Administration erred in characterizing the Applicant's accompanying of Liberian Seaport Police to a WFP staff member's home as insubordination

33. The Applicant is a Liberian national, and consequently subject to police arrest and questioning. Had he refused to cooperate with the LSP, he could equally have been charged for not cooperating with a legitimate Liberian police investigation. Under the circumstances, having been requested by the LSP to refer

them to Ms Fredericks, as they wanted her to confirm what she had heard regarding the missing containers, it was reasonable of him to comply with that request.

34. The Applicant did not usurp the Country Director's power, and was not insubordinate in any way. Merely accompanying the LSP was not in itself an act of insubordination. Once Ms Fredericks had agreed that the LSP should come to her home and interview her there, the question of the Country Director's power to order her to do the same became moot. The WFP staff member agreed that the LSP come to her home and they did so. In merely accompanying them, the Applicant was not insubordinate.

Conclusion and remedies

35. The Applicant regretted the loss of USD190,000 of donor money, and the diversion of food from its intended purpose. However, it is the NPA, or at the very least, the Clearing and Forwarding Agents who are responsible for this loss and therefore liable.

36. The Applicant was not negligent in his actions nor was he grossly negligent. Nothing the Applicant did in the instant case could justify his separation from WFP. As an administrative reaction, this sanction is wholly disproportionate.

37. The Applicant prayed the Tribunal to order that the decision to separate him be rescinded.

Respondent's case

38. The Respondent's case is hereunder summarized:

39. The Applicant does not challenge either the facts on which the disciplinary measure was based, or the process through which the disciplinary decision was taken. His claim is that his actions did not amount to misconduct and that if they did, the disciplinary measure was disproportionate.

40. The Applicant's actions amounted to misconduct and the resulting disciplinary measure imposed in this case was a lawful and permissible exercise of WFP's wide discretion in addressing that misconduct and was not disproportionate.

The Applicant's actions amounted to misconduct

41. Recalling staff regulation 1.3(a) which makes staff specifically responsible for the proper discharge of their functions and paragraph 23 of the WFP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct, which stipulates

Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:

- a. Acts or omissions in conflict with general obligations of staff members set forth in Article 1 of the Staff regulations...

42. The Applicant gave Mr Weah the authority and means to oversee the movement of WFP containers from the NPA Park to the WFP Yard. In this regard, the Applicant admitted to authorizing Mr Weah to collect WFP containers from the NPA Park and supervise their move to the WFP Yard on his behalf. He also admitted that Mr Weah could only have done this under the Applicant's instructions. The Applicant thereby enabled Mr Weah to steal WFP property.

43. The Applicant claims that the Clearing and Forwarding Agent authorised Mr Weah to help him. However, he has advanced no evidence in support of this allegation and the evidence on record does not show that this was the case.

44. It may be true that some WFP employees would have known of the Applicant's arrangements with Mr Weah. Mr Musa who was the Applicant's supervisor, confirmed that he was not aware of the Applicant's delegation to Mr Weah and would not have allowed it had he been informed. The Applicant failed to notify or seek the approval of the appropriate WFP officials regarding his arrangement with Mr Weah.

45. The jurisprudence clearly establishes that the decision of whether a staff member's actions should be addressed as a matter of performance or conduct lies at

the organization's discretion. The instances of apparent misconduct are properly addressed through disciplinary proceedings, which offer the staff member greater procedural protections than performance evaluation procedures.

46. It was not necessary for the details of the incident that occurred to have been foreseeable to the Applicant. Rather, it need only have been reasonably foreseeable that the risk of theft of WFP's commodities would increase if the Applicant continued to delegate his responsibilities to locate WFP containers in the NPA Park and have them moved to the WFP Yard.

47. Evidence before the Tribunal shows that the Applicant was aware that WFP had been the victim of theft at the Port on an earlier occasion, including at the hands of its own employees, as he had assisted in investigating such occurrences in the past. Therefore, the Applicant was aware that a high level of diligence was required.

48. The Applicant's delegation of his authority to Mr Weah in the circumstances described above was an "extreme and reckless failure to act as a reasonable person would with respect to a reasonably foreseeable risk"¹ and was grossly negligent. It is therefore noted that the imposition of disciplinary sanctions, including the most severe, has been upheld in cases of gross negligence.

49. The Applicant's actions, as described above, amounted to misconduct and were sufficiently serious to justify the disciplinary measure of separation from service that was imposed on the Applicant.

The Applicant was insubordinate

50. As a UN organisation, WFP and its officials are granted certain privileges and immunities that are designed to allow the Organisation to fulfil its mandate without any undue interference from national authorities and to safeguard the independent exercise of its staff members' functions. This includes immunity from legal process in respect of words spoken or written and all acts performed by WFP staff, in their official capacity.

¹ The former UN Administrative Tribunal Judgment No. 926 *Al Ansari* (1999), para XVIII

51. The LSP's investigation and interview of the WFP staff member were related to official WFP activities – that is, the theft of WFP commodities and therefore fell within the ambit of functional immunity. WFP has established procedures in place to deal with such situations, which are designed to ensure that no prejudice is caused to the privileges and immunities of WFP or its staff. The Applicant circumvented those procedures and, in so doing, endangered the interests of WFP.

52. The Applicant therefore knowingly acted outside the scope of his authority and thereby violated his obligation under Article 1 of the Staff Regulations mandating him to regulate his conduct with the interests of the Programme only in view.

The disciplinary measure imposed was proportionate

53. The measure of separation from service that was imposed on the Applicant was supported by the evidence and proportionate to the Applicant's proven misconduct.

54. The Applicant in this case did not make one isolated mistake, but committed acts of gross negligence and insubordination leading to the WFP suffering significant losses that amounted to USD190,000.

55. The disciplinary measure of separation from service without termination indemnities that was imposed on the Applicant was warranted by his gross negligence alone, which was aggravated by his insubordination. The disciplinary measure that was imposed on the Applicant was a lawful and permissible exercise of WFP's wide discretion in disciplinary matters, and was proportionate and fair.

56. WFP acted well within its discretion in concluding that the Applicant's actions entailed an irreparable breach of the bond of trust on which his employment with the Programme is based. The situation brought about by the Applicant's negligence was thus incompatible with his continued employment with WFP.

57. The Respondent prayed the Tribunal to find (a) that the disciplinary measure of separation from service without termination indemnities was properly imposed on the Applicant and (b) to dismiss the Application in its entirety.

Issues

58. The Tribunal formulates the following questions for consideration:

59. Was the Applicant grossly negligent in giving a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisors of this arrangement?

60. Was the sanction imposed on the Applicant proportionate to the imputed conduct?

Considerations

Was the Applicant grossly negligent in giving a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisors of this arrangement?

61. In accordance with an agreement dated 18 March 1999, between the United Nations Development Programme (“UNDP”) and WFP, national staff or other employees engaged by WFP in Country Offices are subject to the United Nations Staff Regulations and Rules and related UNDP policies/procedures as well as practices.

62. According to the Applicant’s letter of appointment, his fixed term contract was administered by the UNDP and was therefore subject to the “terms and conditions specified ... and subject to the provisions of the Staff Regulations, Rules and Personnel Policies applicable to the United Nations Development Programme (U.N.D.P), which govern your contract on behalf of the UN/World Food Programme.... [The Applicant is] also bound to abide by the applicable UN/UNDP Staff Rules and Regulations.”

63. At the time the Applicant was charged with misconduct, on 28 January 2010, the applicable law was the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (“UNDP Legal Framework”) which came into effect in January 2010 and applied to “all staff members holding UNDP

letters of appointment...regardless of whether their assignment is with UNDP, or another Agency, Programme or Fund...”

64. Section 2.4 in the UNDP Legal Framework defines misconduct as follows

Misconduct...is the failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and the Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant. Such a failure could be deliberate (intentional, or wilful act), or result from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk (gross negligence) or from a complete disregard of a risk which is likely to cause harm (recklessness).

65. Furthermore, misconduct may include, “whether wilful, reckless or grossly negligent... the[m]ishandling of contract obligations and relations with third parties leading to loss of property or assets, or generating liabilities for the Organization; [b]reach of fiduciary obligations vis-à-vis the Organization.”² Fiduciary, in the Black Laws Dictionary, is defined as “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candour.”³

66. Gross negligence is defined in the UNDP Legal Framework as “a failure that results from an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk.”⁴ This definition of gross negligence was applied in the former UN Administrative Tribunal Judgments No. 742, *Manson* (1995) and No. 926 *Al Ansari* (1999). From the foregoing definition, the Tribunal identifies three elements which must be established to prove gross negligence; namely, (1) a failure in the form of an act or omission to exercise the requisite standard of care; (2) the standard of care required is that which a reasonable person would have exercised; (3) the risk involved would be such as can be reasonably foreseeable.

² As found in section 3 (h) and (j) of the UNDP Legal Framework.

³ Bryan A. Garner, *Black Laws Dictionary* Eighth Edition Thomson West (2004) page 658.

⁴ Section 3, para 23 of the UNDP Legal Framework.

67. The Tribunal will, in examining the issue of negligence, look to some established principles in determining whether there was negligence on the part of the Applicant.

68. In *Kruger v. Coetzee*⁵ Holmes JA, of the Appeals Court in South Africa, authoritatively laid down the test used in order to establish liability for negligence as follows:

- a. A reasonable person in the position of the defendant
- b. Would foresee that his conduct could cause loss to another by reason of injury to his person or property,
- c. Would take reasonable steps to guard against such occurrence, and
- d. The defendant failed to take such steps.

69. Central to the test is the element of reasonable foreseeability. In other words whether the kind of harm, which did occur, was reasonably foreseeable.⁶

70. The Applicant's duties, as reflected in his curriculum vitae and the vacancy announcement for the post, as a Logistics Assistant in Shipping, included:

- a. Assisting the logistics officer (Shipping) for the management of the WFP Shipping activities, at the port of Monrovia (National Port Authority);
- b. Coordinating with the NPA to ensure movement of full TEUS⁷ from the Port Container Yard to WFP container yard and the returned same at completion of stripping;
- c. Ensuring that the WFP standard systems are properly maintained during vessel and container discharging;
- d. Supervising WFP Tally Clerks on pier during Vessel discharge/loading operation;

⁵ 1966 (2) SA 428 (A) at 430.

⁶ C.G. van der Merwe, Jacques E. du Plessis "Introduction to the law of South Africa" [Chapter 8, page 307] (2004) Kluwer Law International, page 307.

⁷ Twenty-foot Equivalent Units: a measure used for capacity in containers transportation.

- e. Supervising the offloading of WFP vessel/s both during day and evening, if necessary;
- f. Supervising the work of WFP superintendent agents;
- g. Following up on all issues related to WFP port operations.

71. From the evidence, it can be distilled that the structure and steps involved in the processing, receiving and handling of WFP containerized cargo are as follows.

72. WFP Logistics staff and WFP warehouses in Monrovia were located at the port. At the time of the incident, Mr Musa, Logistics Officer, was the head of Logistics and was assisted by Mr Bah, a Logistics Officer. The Applicant, who was responsible for discharging and handling WFP containers, reported to Mr Musa. The Applicant was occasionally assisted by the Tally Clerk. There were three Forklift Operators: Mr Jackson, Mr Swen and Mr Gayflor.

73. Prior to the arrival of any shipment, WFP Shipping Unit would receive ten copies of the shipping documents which consisted of the Bill of Lading, the commercial invoice of the consignment, the order and necessary documents that describe the food, quality ...etc...of the contents in the containers. The Applicant would record these documents in the WFP Shipping Registry and then immediately deliver the Bill of Lading and the invoice to the clearing and forwarding agent.

74. The clearing and forwarding agent of WFP at the time, Seatrans Shipping Stevedoring Company, had the duty of processing all necessary documents, received from WFP Shipping Unit, and receiving clearance from Customs for tax exemption and for containers to be discharged. Once the containers arrived at the Port in Monrovia, the Shipping Department of the NPA would discharge the containers in the NPA Park. The WFP Country Office would receive a release note stating that the NPA had received a certain number of containers and that these were available for WFP to collect. This document is received by the Applicant from the NPA through Seatrans, the clearing agent. The release note would include the Bill of Charge and Container Receipt.

75. Mr Avorkyla, the Shipping Manager and Ferry and Forwarding Manager of Seatrans stated in his oral testimony on 12 October 2011 that Mr Weah served as coordinator between Seatrans and WFP. Whenever Seatrans completed the processing of necessary documents after receiving the Bill of Charge and container receipt from the NPA, Mr Weah, would assist the Applicant in identifying WFP containers in the NPA Park pursuant to an agreement between Seatrans and the Applicant. The Bill of Charge was the sole document that would permit the containers to move from the NPA Park to the WFP Yard.

76. According to a letter of understanding, dated 19 May 2008, between the WFP Country Office and the NPA, the NPA was responsible, under the supervision of WFP, for transporting the containers with WFP food from the NPA Park to the WFP Yard, a distance of approximately 200 meters. The true position was that the NPA did not have sufficient equipment and personnel to do this. Therefore, to facilitate the process, WFP purchased a forklift to move its containers from the NPA Park to the WFP Yard.

77. The Applicant was responsible for monitoring and collecting WFP containers from the NPA Park to the WFP Yard. The Applicant, in the process of collecting the said containers from the NPA Park, was to physically visit the NPA Park with the Bill of Charge and Container Receipt stamped by the NPA as "Paid" to identify the locations of the WFP containers to be moved. The containers would be loaded by either the NPA or the WFP forklift and moved to the WFP Yard. The WFP forklift would usually be operated by Mr Jackson. No documents are signed by either the NPA or WFP staff as proof of release and receipt of WFP containers.

78. The Applicant had conceded that he made an error in judgment in authorising a non-WFP staff, Mr Weah, to assist him in locating containers in the NPA Park. The Applicant admitted in his interview with investigators that he would usually instruct Mr Weah to look for the WFP containers on his behalf with the Forklift operator. The relevant portion of the interview transcript reads as follows:

[Investigator]: When Weah goes and looks for the WFP containers on your behalf, do you tell him to go with the Forklift Operator?

[Applicant]: Yes.

...

[Investigator]: So they can collect the containers only under your instructions?

[Applicant]: Yes.

...

[Investigator]: Do you give instructions to Weah and Forklift Operator to look for containers and collect these? Do you give Weah Bill of Charge and Container Receipt and do you tell the Forklift Operator to go and look for containers and move them to WFP warehouse?

[Applicant]: Yes. I give him the listing of containers which are included in this document and give these instructions.

79. It is clear from the Applicant's answers that he delegated the location of and movement of WFP containers at the port to WFP yard to Mr Weah and the fork-lift operator. In doing so, did he exercise the standard of care that would be reasonably expected of him with respect to a reasonably foreseeable risk in that regard?

80. The evidence before the Tribunal is that the organisation and environment at the Port in Monrovia were chaotic and poor. The Applicant testified as much on 12 October 2011 before the Tribunal. It was in evidence also that WFP had been a victim of theft of commodities in the past, a fact well known to the Applicant according to his testimony.

81. The Applicant argued that it was not his responsibility to move containers from the NPA Park to WFP Yard and that this was the responsibility of the NPA authorities as per a letter of understanding. He testified that because of the failure of the NPA to timeously move the containers, he was "constrained to go and locate the containers." WFP had also, bearing in mind the constraints, purchased a forklift to transport the containers. The Applicant stated that it became his responsibility as a result of the NPA's failure to do carry out this responsibility.

82. Although this was not expressly stated in his job description, as a result of the difficult conditions that hindered the proper handling of WFP cargo at the port and the clause in the vacancy announcement for his post which required that he was to "perform other duties as required," this task became his responsibility when he

was assigned to oversee the handling of matters concerning the clearing and storing of WFP cargo at the port.

83. After having taken the responsibility for the movement of containers using the WFP Forklift Operator, a responsibility he had held for more than one year, the Applicant cannot turn around to deny responsibility on the untenable ground that it was not an assigned duty under the vacancy announcement for his post. By virtue of this established practice, it fell under his duties as a Logistics Assistant.

84. The Applicant testified that "...Weah should really go by himself to locate containers and then bring the lading where the containers are located. He tells me 'the containers are located here, here, here.' Then we all go with forklift and the forklift starts to move them. He alone, yes, can go alone to locate where the containers are. That was my request."

85. It is clear from the evidence that Mr Weah assisted the Applicant, to locate the containers in a most disorganized NPA Park using the Bill of Lading which listed the container numbers for all WFP containers. Thereafter the Applicant would then wait for Mr Weah to return with information about the locations of the containers. Mr Weah in this particular instance was also in possession of the Bill of Charge which, the Applicant confirmed in testimony, was the key document that permitted the containers to leave the NPA Park.

86. There is nothing that supports the Applicant's testimony that the assistance provided by Mr Weah was part of a contract between WFP and Seatrans. Mr Musa testified that the sole responsibility of Seatrans was to deal with customs and clearing. Once this had been done, WFP was then solely responsible for the movement of the containers from the NPA Park to the WFP Yard. The Applicant also admitted in his testimony that he had not sought authorisation from Mr Musa, Mr Bah or any other supervisor to use Mr Weah to locate and move containers.

87. Instead, it was his testimony that Mr Weah's assistance in helping him to locate containers would speed up the process and "that's how *I gave the go ahead* to the supervisor for this guy to come and be helping." [Emphasis added]. Not only did

the Applicant not have authorisation to have Mr Weah perform his duties, he did not inform his supervisors of this arrangement.

88. The testimony of Mr Avorklya that the Applicant's supervisors may have known that Mr Weah usually assisted the Applicant in locating and moving WFP containers is irrelevant. Mr Musa testified on 13 October 2011 that he had not given the Applicant any authority to transfer his responsibilities to another person nor had he been informed of the arrangement between the Applicant and Mr Weah until the incident that gave rise to this case. The Applicant had not informed his supervisors of this arrangement and the said arrangement was not endorsed by any of them.

89. In light of the foregoing facts, the Tribunal finds as follows:

90. The Port in Monrovia was poorly organised and chaotic with respect to the handling of containers in the NPA Park. WFP had previously been a victim of theft of its cargo, a fact the Applicant was aware of. In such a chaotic and disorganised environment it would not be far-fetched to expect the staff member, who had been assigned the responsibility of overseeing the location, clearing and delivering of WFP containers to the WFP yard, to exercise a requisite degree of care with respect to this assignment. It was expected that the Applicant would implement such cautionary measures as necessary as there clearly was a high probability of theft.

91. The Tribunal finds that the Applicant did not exercise the degree of care expected of him in the circumstances.

92. In addition, the Applicant had negligently allowed Mr Weah possession of the Bill of Lading (documents that contains all the container numbers and information) and the Bill of Charge (document that permits the containers to leave the NPA Park) at the time the nine WFP containers went missing from the port. Armed with these key documents, which ought to have been retrieved by the Applicant, it was easy to steal the containers.

93. A duty-conscious and vigilant Logistics Assistant in the Applicant's position ought to have reasonably foreseen that the documents in possession of Mr Weah were sufficient to enable him to misappropriate the containers.

94. By virtue of the Applicant allowing Mr Weah to locate containers on his own and allowing him to go with the Forklift Operator, sometimes, to collect the containers (as he had stated in his interview with the investigators), the opportunity to misappropriate containers was enabled by the Applicant's lack of due diligence in his monitoring and supervising of the movement of WFP containers.

95. It is the finding of this Tribunal that the Applicant in this case failed to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk. This was a rather serious failure which cost the Organisation loss of property valued at USD190,000.

96. Furthermore, the Applicant's conduct amounted to misconduct as he was grossly negligent in carrying out his assigned responsibilities.

Was the sanction imposed on the Applicant proportionate to the imputed conduct?

97. The International Labour Organisation Administrative Tribunal ("ILOAT") reaffirmed the established precedent that the decision-maker has the discretion in determining the relevant sanction and its severity to be imposed on a staff member whose misconduct has been established. It must be noted however that such discretion must be exercised "in observance of the rule of law, particularly the principle of proportionality."⁸

98. 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 found to be excessive.⁹

99. The Respondent submits that these failures constituted gross negligence of such magnitude that the Respondent could reasonably decide that it could not entrust the Applicant with responsibility for the Organisation's primary commodity—the food intended for beneficiaries. The Respondent submits that WFP was correct in concluding that the bond of trust between the Applicant and WFP was irrevocably broken, rendering his continued employment untenable.

⁸ ILOAT Judgment No. 1984, In re *van Walstijn* (2000) (para 7).

⁹ *Sanwidi* UNAT/2010/084 para 39.

100. It was argued on behalf of the Applicant that he erred in good faith, doing his best, in the exigencies of the day-to-day reality at the port, and despite being inadequately resourced to expedite the timely movement of the WFP containers. Such an error should have been dealt with in the context of his performance management, not through disciplinary proceedings. It certainly does not justify separation from service with no termination indemnity.

101. The Tribunal disagrees with the Applicant's arguments and finds that the sanction of separation from service without termination indemnities in accordance with staff rule 10.2(a) (viii) as well as being afforded compensation in lieu of notice was fair and proportionate.

Conclusion

102. The Application hereby fails.

Signed

Judge Nkemdilim Izuako

Dated this 7th day of November 2012

Entered in the Register on this 7th day of November 2012

Signed

Jean-Pelé Fomété, Registrar, Nairobi