



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/033
Judgment No.: UNDT/2014/060
Date: 11 June 2014
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MIZYED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Mr. Jean-Marc Lafreniere

Counsel for the Respondent:

Ms. Sophie Parent, ALS/OHRM

Ms. Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Truce Supervision Organization (UNTSO) having joined the Organization on 1 June 2000. Prior to his separation from service on 19 March 2013 he was serving as a Movement Control Assistant in the Movement and Control Unit (“MOVCON”) on a Fixed-Term Appointment at the G-5 level in Jerusalem, Israel.

2. The decision to terminate his appointment was taken on the grounds that he stole and used a duty-free PAZOMAT Company fuel card, belonging to the Mission’s duty-free shop, to refuel his personal car. The said duty-free fuel card is reserved for the use of international staff members who purchase it.

3. On 20 June 2013, the Applicant filed an Application with the Tribunal primarily contesting the decision to impose on him the disciplinary measure of separation from service. He admitted that he had used the stolen fuel card to refuel his car, but stated that he had not stolen it, that he believed it was planted on him and that he was unaware that he was using a stolen fuel card when he refuelled his car.

4. The Respondent filed his Reply on 24 July 2013 and submitted that he had carefully exercised his discretion in finding that the Applicant engaged in the misconduct alleged against him. It was also the Respondent’s case that having carried out a thorough investigation, he took due consideration of all mitigating circumstances and the disciplinary measure applied was proportionate to the offence.

Facts

5. The UNTSO Service Institute (“the PX”) is an operation under the authority of the UNTSO Chief of Staff which sells duty-free goods to United Nations international staff members and military personnel.

6. Duty-free fuel cards are cards which, once purchased from the PX, contain a credit of New Israeli Shekels 1000 for gasoline (the equivalent of approximately

USD258 in November 2011), redeemable at PAZOMAT Company fuel stations and dealers in Israel. In November 2011 these cards could be purchased from the PX for USD158.

7. One of the duties of MOVCON was to carry out an official mail run to the north of Israel, exchanging a mail pouch from the UNTSO office in Jerusalem at the border with Lebanon. There existed an informal arrangement for a staff member of MOVCON, while on the mail run, to pick up the fuel cards from the PAZOMAT Company office near Netanya on behalf of the PX.

8. On 16 November 2011, Mr. Zvika Pyankevich, a colleague of the Applicant in the MOVCON unit, went to collect new fuel cards issued by the PAZOMAT Company on behalf of the PX. The cards collected by Mr. Pyankevich were in an unsealed box which, when collected, contained 250 sequentially numbered cards.

9. Mr. Pyankevich spent at least one evening in the north of Israel and having returned to the Jerusalem office in the morning of 18 November 2011, delivered the cards to the PX office later the same morning. They were subsequently counted by a member of the PX staff in the course of the same day and it was found that one card was missing, namely card number 80002000170457343 (“the missing card”).

10. The PX office contacted the PAZOMAT Company over the matter and was informed that the missing card had been sent with the box.

11. On 25 November 2011, the PX Coordinator reported the loss of the missing card to the UNTSO Special Investigations Unit (“SIU”).

12. Following investigations into the report, the SIU established that the missing card had been used on 19 November 2011 at the Mendel Bon Gas Station in Jerusalem to purchase over 41 litres of fuel. A fake vehicle registration number 00-011-11 was entered by the purchaser into the vehicle-data-section during the purchase.

13. There was an attempt to use the missing card once more on a subsequent date, by which time it had been disabled by the PAZOMAT Company.

14. After making a report with the police, the SIU investigator was given access to Mendel Bon Gas Station's CCTV footage of 19 November at the time the missing card was used. The CCTV footage showed that the vehicle being filled carried the registration number 53-404-14 and after contacting the Israeli police, it was established that the said vehicle belonged to the Applicant.

15. The investigator started by contacting and obtaining a voluntary statement from Mr. Pyankevich of the MOVCON office who collected the fuel cards from the PAZOMAT office on the afternoon of 16 November 2011 and delivered them to the PX on the morning of 18 November.

16. The Applicant was first contacted by the investigator over the missing card on 15 December 2011. The Applicant, on 29 December 2011, emailed the investigator a voluntary statement, which he signed on 3 January 2012. The investigator first interviewed the Applicant on 5 January 2012.

17. On 12 January 2012, she conducted a follow-up interview with the Applicant and at the conclusion of that interview requested that he hand over the missing card. Later the same day, the Applicant gave the SIU investigator a duty free PAZOMAT Company fuel card bearing the serial number 80002000170462075 ("the second fuel card"). It was not the missing card.

18. During SIU investigations, the investigator also obtained voluntary statements with regard to the missing fuel card from Mr. Gaston Bamulanzeki, Officer-in-Charge (OIC) of the MOVCON unit and Ms. Riva Ghoury also of the MOVCON office who was mentioned by the Applicant in his statements and interviews. Statements were also obtained from other witnesses.

19. The Applicant eventually handed in the missing card on 16 February 2012.

20. The SIU investigator forwarded her investigation report to Mr. Khaled Awar, Deputy Chief Security Officer, on 17 January 2012 recommending that the

enquiries should be followed up by the UNTSO Administration and appropriate disciplinary measures taken. The report stated that:

- a. The Applicant was in illegal possession of two duty free PAZOMAT Company fuel cards; one being the missing card and the other a second fuel card. National Staff cannot buy or use such duty-free fuel cards.
- b. Evidence gathered, including video footage and witness statements, led to the conclusion that the Applicant took illegal possession of the missing fuel card.
- c. The Applicant admitted that on 19 November 2011, he knowingly and unlawfully possessed and used a duty free fuel card to refuel his private vehicle. The investigation did not yield any evidence of a conspiracy or entrapment of the Applicant and therefore his possession of the missing fuel card could not be justified.

21. On 10 July 2012, Major General Juha Kilpiä, Chief of Staff and Head of the UNTSO mission, having reviewed the SIU report forwarded the findings to the Department of Field Support (“DFS”) for appropriate action. The memorandum recommended that:

The allegations against [the Applicant] of theft or misappropriation of PAZOMAT fuel card No. 80002000170457343 and entitlement fraud by soliciting or obtaining through international staff members duty-free items from the PX to which he was not entitled be referred to the Office of Human Resources Management for appropriate disciplinary action.

22. On 12 September 2012, DFS, having reviewed the recommendations of UNTSO as well as the SIU report, endorsed the conclusion therein and forwarded the report and allegations against the Applicant to the Office of Human Resources Management (“OHRM”).

23. On 19 December 2012, Ms. Ruth de Miranda, Chief, Human Resources Policy Service, OHRM, charged the Applicant with misconduct and asked him to respond to the allegations made against him.

24. On 6 February 2013, the Applicant responded to the allegations of misconduct. He claimed that he did not steal the missing card nor did he knowingly use it to refuel his private vehicle.

25. By letter dated 19 March 2013, Ms. Catherine Pollard, Assistant Secretary-General, OHRM, informed the Applicant that following a review of the SIU report and its supporting documentation, the Under-Secretary-General for Management acting on behalf of the Secretary-General concluded that there was sufficient evidence that he had engaged in the misconduct alleged.

26. The letter stated that, given the lack of motive, the complicated nature of the scheme, the proximity to the cards and the danger involved; it was highly improbable that Mr. Pyankevich would seek to incriminate the Applicant by switching the fuel card he said he kept in his office desk drawer.

27. The Under-Secretary-General for Management noted that the Applicant's actions were clearly in violation of the Staff Regulations and the standards of integrity United Nations staff members are expected to uphold. Taking into consideration mitigating factors and the Applicant's prior good service, the disciplinary measure of separation from service was imposed.

28. On 20 June 2013, the Applicant submitted an Application to the United Nations Dispute Tribunal challenging the decision to terminate his fixed-term appointment.

Applicant's case

29. The Applicant's case as deduced from his pleadings and oral testimony is summarized below.

30. The allegation that he stole the missing fuel card is untrue and there is no direct evidence that he did in fact do so. Though he admits that he used the

missing card to refuel his car on 19 November 2011, he was using it under the assumption that it was a fuel card that he had purchased at an earlier date.

31. Contrary to the statements of Mr. Pyankevich, he and the Applicant were at no point alone within the office nor was he left alone in the office on the morning of 18 November 2011. The Applicant was in the habit of having coffee with his colleagues to start the day and as such was out of the office when Mr. Pyankevich arrived. On his return to the MOVCON office he found Mr. Bamulanzeki and Ms. Ghoury present.

32. The Applicant was unaware that Mr. Pyankevich had fuel cards in his possession and only became aware of the fact when he returned to the office after having coffee and Mr. Pyankevich was on his way to the PX to deliver the cards. At no point in time did he have the opportunity to steal the missing card.

33. The Applicant had a reliable and steady source of fuel cards through one Ms. Shireen Bawab. In 2011, he had purchased at least 2 fuel cards and received a third one from a departing national staff member, Mr. Eric Tshimbumbu.

34. Having recently been appointed to the G5 level he would have no reason to put himself at risk. Since he had a steady source of fuel cards, he had no reason to steal one.

35. At the time of the incident, the Applicant was in possession of another fuel card which he had received from Mr. Tshimbumbu. He was in the habit of placing this card in his desk drawer and this would have been common knowledge to the other members of the MOVCON office.

36. Even before the allegations against him surfaced, the Applicant had experienced difficulties working with his colleagues in the MOVCON Unit and the fuel card was switched with the one he kept in his desk drawer in a plot to discredit him and have him fired. The set-up is primarily at the behest of Mr. Pyankevich who, being a G4 at the time of the incident, wanted to take the Applicant's G-5 post.

37. Prior to joining the MOVCON office, he had applied for the G-5 post and his name was not placed on the shortlist by Mr. Bamulanzeki and it was only at the intervention of the Chief of Mission Support (“CMS”) that his name was added. Apart from this, there had been a disagreement with Ms. Ghoury’s sister who was a dentist. Ms. Ghoury had boasted to MOVCON staff that the Applicant would be unsuccessful in his application to join MOVCON; and even if he was successful he would not last in the unit.

38. All these instances bear witness to the conclusion that the missing card was substituted for the one in the Applicant’s desk in an effort to discredit him.

39. The Applicant admitted being at fault in making use of duty free fuel cards solely intended for military and international staff but did not immediately recognise the implications of his actions due to the common use of PAZOMAT fuel cards by other national staff in UNTSO.

40. He had served the United Nations with dignity, integrity and honesty and all the accusations levied against him are part of a conspiracy to engineer his exit from the Organization.

Respondent’s case

41. The Respondent’s case is summarized below.

42. The Respondent acted lawfully and rationally in exercising his discretion and finding that the facts set out clearly demonstrated that the Applicant failed to maintain the standards of integrity required of staff members.

43. Evidence at his disposal showed that the Applicant had the opportunity to take the missing fuel card and, by his own admission, was in possession of and used the missing fuel card the day after it was stolen. The second fuel card that the Applicant handed in to the SIU investigator had no credit left on it as it had been fully used by the end of September 2011, more than two months before the missing card was stolen.

44. Given the frequency of the use of the second fuel card produced by the Applicant and the fact that it had no credit on it, it was more likely than not that the Applicant was in need of a new card to purchase discounted fuel.

45. The Applicant's honesty was called into question by his evasiveness and lack of candour with the SIU investigator during the interviews carried out with him. He claimed to have only the missing card in his possession and had only ever had two cards in his possession. When asked to hand over the missing card to the investigator he instead handed over the second fuel card which had he claimed he obtained from Ms. Bawab.

46. During investigations, the Applicant was reluctant to provide information as to how he came about having the fuel cards in his possession. During his first interview on 5 January 2013, he stated that he could not recall whom he purchased it from and at a second interview on 12 January 2013, he changed his story and stated that it had been given to him by a national staff member called Eric Tshimbumbu who had left the mission. It was very late into the interview that the Applicant provided Eric's full names.

47. The Applicant's story that he was having coffee with some of his colleagues on the morning that the box of fuel cards was brought by Mr. Pyankevich to the MOVCON office from which the missing card was said to have been stolen, lacked merit as further investigation revealed that two of the three individuals he said he had coffee with him were actually away on sick leave on that day.

48. Careful consideration was given to the Applicant's allegation that he was set up by either Ms. Ghoury, due to her apparent dislike for him, or by Mr. Pyankevich, in order to secure the Applicant's position for himself.

49. Ms. Ghoury did not appear to have had the opportunity to remove the missing card from the box and to place it in the Applicants desk. For the alleged plot to work she would have had to know that, the Applicant though a national staff, used duty-free fuel cards and that at the material time he was in possession of a fuel card; that he would make use of this card; that Mr. Pyankevich was in

possession of new fuel cards; that the loss of the missing fuel card would be noticed by the PX; and that an investigation and disciplinary measures would be undertaken leading to the Applicant's eventual dismissal. She would also have had to disregard the personal risk both in taking the missing card from Mr. Pyankevich as well as in placing it in the Applicant's drawer.

50. With regard to Mr. Pyankevich, he did not have any past grievance with the Applicant and had no interest in the Applicant's position, in fact he often told the head of MOVCON unit that he desired to move away from Jerusalem to the North of Israel so as to be closer to his family. It is noted that he has since been appointed to such a position while the Applicant's post remains vacant.

51. His involvement in the scheme would carry risks common to those that would have to be entertained by Ms. Ghoury as a potential transgressor. It would additionally require him to take on the risk of losing his own employment exacerbated by the likelihood that, as the courier, initial suspicion would undoubtedly fall on him.

52. He further stated that at the relevant time he had recently been selected for a G-4 position and understood the policy of the Organization precluded him from applying for a G-5 position and required that he serve at this level for a period of 18 months prior to any promotion.

53. In both scenarios it would require an overly complicated scheme as well as the assumption of a significant amount of risk on the part of the alleged perpetrator. It was highly improbable that either individual would have planted the missing card in the Applicant's desk in order to incriminate him. It was therefore reasonable for the Respondent to hold that the Applicant's allegation of such a conspiracy against him were unfounded.

54. The Applicant stated that he would never steal a fuel card bearing in mind they could be easily traced, but it remains unclear whether it was widely known that the PX would confirm delivery of all the fuel cards. As such it was likely that the Applicant would have thought that the absence of one card would go unnoticed by the PX.

55. The Respondent noted the absence of direct evidence of the theft, however he submitted that such evidence is rare in cases of theft and there was a significant amount of circumstantial evidence. Beyond this, contrary to the Applicant's assertion that he had no motive to steal the card as he had a ready source of them, the Applicant stood to obtain a financial advantage - the obtainment of USD258 of free fuel serves as a motive for the theft.

56. Having been placed in a position whereby he had to explain how he came to be in possession of the missing card, the Applicant could either admit having stolen it or deny it and provide an account of how he came to into possession of the missing card.

57. Given the facts before the Respondent, and the lack of a credible explanation for how the missing card came to be in the Applicant's possession, the Respondent was properly entitled to reach the rational conclusion that the Applicant had stolen the missing fuel card.

58. The contested decision was a proportionate exercise of the decision maker's discretion. Prior practice in disciplinary matters evidences that cases of theft, misappropriation or taking of property of the Organization without authorization normally attract the most severe sanction.

59. Having established the allegations of misconduct against the Applicant, the Respondent took proper account of relevant mitigating factors such as the Applicant's prior good service and positive recommendations and lessened the sanction from one of dismissal to one of separation from service.

60. The Applicant's due process rights were respected throughout the investigation and disciplinary process. He was interviewed on a number of occasions and signed the statements recorded to certify their accuracy; all allegations that the card was planted in his desk drawer were investigated fully; and he was afforded the opportunity to comment on the allegations against him, submissions which were duly considered.

61. The Applicant also contended that SIU, in the person of Ms. Tracey Walcott, failed to carry out a sufficiently detailed investigation and to properly consider the proffered alternative explanation as to how the missing card came to be in his possession.

62. The Applicant took issue with the sufficiency of the investigation citing various actions that the Respondent should have taken. It is the role of the Tribunal to examine the correctness of the decision taken by the Respondent and not to conduct a further investigation. The investigation was sufficient given that it was a disciplinary matter being investigated and not a criminal matter. Beyond this, even if the steps the Applicant argues should have been explored, it is unlikely that they would have led to any probative evidence.

63. The Applicant alleged that Mr. Pyankevich came into the office on 17 November 2011 after working hours as opposed to the morning of 18 November 2012. This would not have been dispositive and in any event the Applicant's version that the card had been planted on him was discredited.

64. Similarly an examination of fingerprints, where the card was missing from the box, the layout of the office or any prior habit of mentioning of the cards by Mr. Pyankevich all lacked probative value and/or were beyond what would be reasonably required of a disciplinary investigation.

65. The Applicant failed to show that the decision was unreasonable, unfair, legally or procedurally incorrect or that it was disproportionate. Accordingly the Respondent prays that the Application be rejected in its entirety.

Issues

66. Having reviewed the case record the Tribunal identifies the following issues for consideration:

- a. Was it established that the Applicant had stolen the missing fuel card?

- b. Was the disciplinary measure of separation from service proportionate?

Considerations

Did the Applicant steal the missing fuel card?

67. It was the Respondent's case that the Applicant stole a duty-free fuel card belonging to the UNTSO PX and illegally used it to fuel his personal car. The missing fuel card was traced to the Applicant after he had used it to fill his personal car at the Mendel Bon Gas Station in Jerusalem on the day after it was discovered to be missing. It was also the Respondent's case that the Applicant had the opportunity to steal the missing fuel card.

68. While admitting that he had used the missing fuel card to fill his personal car, the Applicant claimed that he was unaware that it was stolen and believed it to be one he had previously received from a fellow staff member. He explained that he believed that the missing fuel card was exchanged with one he had stored in his desk drawer at the time. His case was that he suspected that it was exchanged either by Mr. Pyankevich or Ms. Ghoury both of whom shared the same office with him and two other colleagues, in order to put him in trouble and force him out of the Organization.

Material inconsistencies in the Applicants separate accounts?

69. While testifying under an affirmation to tell the truth, the Applicant told the Tribunal that all the statements he made to investigators were true. A number of inconsistencies were however identified in the separate accounts given by the Applicant at various times during the SIU investigations and at the hearing of the case. Some of these inconsistencies and their materiality will be reviewed below.

70. In the Applicant's voluntary statement to the SIU investigator dated 28 December 2011 which was his first reaction in the matter of the missing fuel card, he stated that on the morning of 18 November 2011 when the card was allegedly stolen from his office, he had coffee with some of his colleagues. He gave the

names of these colleagues as: (a) Barsoum, (b) Anastasio, (c) Ibrahim and (d) Minassian and stated that they were later joined by Mr. Pyankevich.

71. It was later established that two of the staff members he named were in fact away on certified sick leave and away from the office on that day and could not have had coffee with the Applicant on the morning of Friday 18 December 2011.

72. The Applicant also wrote in his statement that before he went for coffee, Ms. Ghoury was in the office. On his return to the MOVCON office after having coffee with the named colleagues, he found Ms. Ghoury and Mr. Bamulanzeki in the office. Mr. Pyankevich then showed him the cards and told him that he was going to deliver the fuel cards to the PX and thereafter left with the cards.

73. In the same statement, the Applicant wrote that it was easy for him to purchase duty-free fuel cards through some work colleagues and had no reason to steal one. Before leaving the office on Friday 18 November 2011, he took out a fuel card which he believed was the one he had kept in his desk drawer and used it the next day, 19 November 2011, to fuel his car. He did not know that the card he used was the missing card. He stated that he believed someone replaced the missing card with the one he kept in his drawer.

74. During his first interview with the SIU investigator on 5 January 2012, the Applicant stated that he could not recall when he purchased the fuel card that he had placed in his desk drawer, which he alleged was exchanged by someone with the missing card. He stated that he was unsure whom he had received it from; he was also not sure whether it was a new card or had been used previously because he sometimes made use of the same fuel card for five months.

75. The Applicant admitted that he had tried to use the missing card in his possession to fuel his car a second time only to discover that it was disabled. When asked why he did not report that the card was blocked, he said he was still trying to recall who had purchased the card for him in order to ask the purchaser to follow the matter up with the PX.

76. When the Applicant was re-interviewed one week later on 12 January, he said he could then recall that the fuel card he had placed in his desk drawer was given to him as a gift by a staff member who at the time was about to repatriate and did not need the fuel card anymore. He gave the name of the staff member as Eric Tshimbumbu. He also submitted an email from Tshimbumbu dated 11 January 2012 saying he gave the Applicant a fuel card.

77. Evidence shows that the Applicant was first contacted by an SIU investigator to make a written statement about the missing fuel card on 15 December 2011, less than four weeks after he had used it to fuel his car. Two weeks later on 29 December 2011 when he emailed his statement, he could not recall who purchased the fuel card he claimed to have kept in his desk drawer.

78. Under cross-examination, the Applicant told the Tribunal that the fuel card which he alleged was substituted with the missing card was given him in October 2011 by Eric Tshimbumbu and that the first time he ever tried to use the said card was on 19 November 2011. In answer to a question from the Tribunal, the Applicant said he did not report that the fuel card was disabled when he could not use it a second time because he was still trying to locate the person who gave him the particular fuel card. He said he did not know that it was Eric Tshimbumbu at the time.

79. Inquiries by the investigators revealed that Mr. Tshimbumbu was a national staff member who had worked as a driver at the Office of the United Nations Special Coordinator for the Middle East Peace Process (“UNSCO”). He had proceeded on annual leave in October 2011 and then sent a resignation letter to the Organization without any forwarding address and without completing the necessary separation requirements.

80. When he was first interviewed on 5 January, the Applicant still could not recall when the fuel card was purchased or whom he got it from. He was not sure if it was a new fuel card either. His assertion one week later on 12 January 2012 that it was given him as a gift by Mr. Tshimbumbu is unconvincing and clearly inconsistent with his previous claims, so too is his testimony that he used the card for the first time on 19 November 2011.

81. Also during his second interview with the investigator, the Applicant said he had purchased a fuel card from a United Nations Military Observer (UNMO) named 'Gerald' who was 'maybe Irish' but that he could not remember. It was established that there had been an UNMO officer named Commandant Gerald O'Grady who was Irish who had since left the mission.

82. On being contacted by investigators, Commandant O'Grady who left Jerusalem in June 2009 stated that he had never met the Applicant and that they had only spoken on the phone when he was importing his private vehicle and organizing the necessary paperwork. At no point in time had he provided the Applicant with a fuel card, nor had he ever had reason to purchase a petrol fuel card from the PX as his vehicle used diesel fuel.

83. During the second interview the Applicant was asked if he owned or had in his possession any duty-free fuel cards. He stated that he only had the missing card which he had unknowingly used once in his possession. He was requested by the investigator to hand it in and later the same day he handed in an entirely different card (the second fuel card).

84. During the same interview, the Applicant stated that on the morning of 18 November 2011, Mr. Pyankevich joined him and other colleagues for coffee after which they returned to the office together where they found Ms. Ghoury. This clearly contradicts his earlier assertion that he returned to the office to find Mr. Pyankevich en-route or just about to leave to go to the PX office to deliver the fuel cards.

85. The Applicant was not truthful and contradicted himself in the various accounts he gave at different interviews with investigators on different dates and during his testimony before the Tribunal.

The Credibility of the Applicant's other claims

86. In response to the Respondent's case, the Applicant's story was that though he had used the missing fuel card, he did not know that it was stolen. He said he believed that it had been swapped for one he had kept in his desk drawer.

He also believed that the perpetrator was either Ms. Ghoury, who he said had a longstanding problem with him following a disagreement between his wife and Ms. Ghoury's sister; or Mr. Pyankevich who he said wanted him out of the way so that he could take over his G-5 position.

87. He stated that Mr. Bamulanzeki who was head of the MOVCON office did not like him and had initially not included him in a shortlist for the post for which he was later selected. He had told investigators at one stage that Mr. Bamulanzeki and Ms. Ghoury were in the office when he returned with other colleagues after having coffee in the morning of 18 November 2011.

88. The Tribunal also heard testimony from Saher Zreiq, a driver attached to the UNTSO Transport Section. Mr. Zreiq testified for the Applicant that he worked with him for one and a half years and that they would start work at about 7.00 a.m. and before then have coffee in an area adjacent to their office. He said that this routine continued until the Applicant was separated in March 2012.

89. The witness said he heard Ms. Ghoury state many times before the Applicant went to work in the MOVCON unit that he would not be successful in his application for the G-5 posting as long as she was in that office. The witness said that he was not the only one that heard Ms. Ghoury say so and added that she would whisper about the Applicant when he was not in the office.

90. In reply to a question from the Tribunal, Mr. Zreiq could not identify who else was present when Ms. Ghoury allegedly made this threat. Under cross-examination, the witness admitted that between July and December 2011, he was away from the office on sick leave.

91. The Tribunal will examine the veracity of these claims by the Applicant via-a-vis the Respondent's answer to them.

92. Mr. Pyankevich testified that he had no interest in the Applicant's position and in fact wanted to move closer to the North of Israel where his family was situated. He testified that, at the time, he understood he was ineligible to apply to a G-5 post, assuming he were interested in it. He had recently been promoted to

the G-4 level and believed the rules of the Organization required him to perform in this post for at least 18 months before he could be considered for further promotion.

93. In his testimony, Mr. Bamulanzeki stated that on 18 November 2011, he had come into the office late at about 9.00 a.m. and knew nothing about the missing card until investigations had started. He also testified that as Programme Manager for recruitment to the Applicant's post, he had not included the Applicant and seven others in an initial shortlist because he felt they did not meet the requirements but included them on being instructed by a senior officer to do so.

94. It was also his testimony that Mr. Pyankevich had previously told him that if a posting in the North of Israel did not come up in the near future he would be forced to quit and pursue other opportunities closer to his family. He told the Tribunal that Mr. Pyankevich currently occupies a post in the Golan Heights while the Applicant's former position has remained vacant.

95. Mr. Bamulanzeki further testified that he had never received any reports of discord or work-related difficulties within the MOVCON unit as regards the Applicant. He believed the Applicant's relationship with both Mr. Pyankevich and with Ms. Ghoury to be normal and amicable.

96. For her part, Ms. Ghoury denied stating at any time that the Applicant would not last in his job in the MOVCON office if he got it. It was her testimony that although she and the Applicant did not have a personal relationship, they enjoyed a formal, non-antagonistic and professional one.

97. In weighing the evidence placed before it, the Tribunal finds that the Applicant and his witness, Mr. Zreiq, are not witnesses of the truth. While it has been established that the Applicant had knowledge of the contents of the box of fuel cards and the opportunity on the morning of Friday, 18 November 2011 to steal the missing fuel card; his claim that he was out having coffee that morning with four other named colleagues was successfully rebutted when it was shown that two of the said staff members were not in the office at all on that day.

98. With regard to the evidence tendered by Mr. Zreiq, it is clear that the witness was not in the office at the time the Applicant got the position in MOVCON, he was also not in the office when the Applicant started working in the unit and up until the time that the missing fuel card was stolen, reported and investigations started. If he had any interactions in the MOVCON office with the Applicant and others in that office, it was certainly from January 2012 after he returned from sick leave and after the incident of the missing card.

99. The SIU investigator Ms. Walcott testified. She told the Tribunal that the Applicant was uncooperative and told her several stories that were untrue during the investigations.

100. Evidence shows that the Applicant was first contacted by investigators to make a written statement on the matter of the missing card on 15 December 2011. In spite of the seriousness of the matter in which he was suspected of stealing the fuel card, it is rather telling that it took him two weeks to send his statement by email.

101. Evidence is also clear that while using the missing fuel card to fuel his private car, the Applicant entered a fake registration number rather than his own vehicle number at the gas station. His explanation was that he did not remember his vehicle registration number. If that were so and if he had nothing to hide, he could easily have looked at the license plates of the very car he was fuelling to put in the right information.

102. The Tribunal is not in any doubt that the Applicant put in fake registration numbers in order to cover his tracks and avoid detection. Neither is this Tribunal impressed with the Applicant's story that he had kept a fuel card in his office desk drawer which was exchanged by one or more of his work colleagues with the missing card, especially considering that these colleagues had no way of knowing that he used duty-free fuel cards which were not meant for national staff.

103. Since the Applicant's case is that he sourced the duty-free fuel cards from others outside the MOVCON office and there is no evidence that he discussed his use of them with his MOVCON colleagues, it is rather far-fetched to claim that

the said colleagues set him up by exchanging a stolen fuel card with the one he had kept in his desk drawer.

104. It is also highly improbable and unbelievable that the Applicant's office colleagues who did not know that he procured duty-free fuel cards for personal use would search through his desk drawers to exchange a stolen fuel-card, the size of a credit card, in order to implicate him. It is reasonable to assume that an average person would normally keep credit cards, ATM cards, identity cards and store cards and other cards of similar size in a wallet or purse where they can be easily reached when needed, not in the deep recesses of an office drawer.

105. If indeed the Applicant's colleagues had set him up by planting the missing fuel card on him on 18 November 2011; it is utterly incredible that he took the said fuel card out of his desk drawer the same day, mistaking it for a fuel card he got from Tshimbumbu since October, and took it home only to use it for fuelling his private vehicle the very next day!

106. The Tribunal is unconvinced that Mr. Pyankevich would embark upon such a plot as to exchange a stolen fuel card with one in the Applicant's desk drawer due to both the high risk of discovery, as initial suspicion would undoubtedly fall on him as the courier, as well as the overall complexity of the plot. As to the Applicant's explanation about a motive for planting the missing card on him, there was no guarantee that Mr. Pyankevich would get the Applicant's job following a competitive recruitment process.

107. There is no evidence either that Ms. Ghoury had the opportunity or the requisite knowledge of the cards to embark on a plot as convoluted as that suggested by the Applicant.

108. The Applicant argued that the investigation into the matter was insufficient and that the investigator should have taken forensic evidence such as fingerprints on the missing card and on the box that contained the fuel cards. He also argued that the investigator did not obtain car logs to determine if Mr. Pyankevich entered UNTSO premises after work hours on 17 November 2011 when he could

have had the opportunity to exchange the Applicant's fuel card with the missing card.

109. These arguments have no merit. As the Respondent correctly submitted, these investigative practices go above and beyond what is required in a disciplinary matter. Even if the missing card which had been used by the Applicant on 19 November 2011 and produced to investigators by him on 13 February 2012 and the box in which the fuel cards were delivered to the PX were to be tested for finger prints; no value would have been added to the investigation of the case in the circumstances.

110. The Tribunal finds that the Applicant had both the opportunity as well as a pecuniary motive to steal the missing fuel card. His argument that he could easily procure duty-free fuel cards to which he was not entitled and so had no need to steal one, does in fact betray a pecuniary motive. The only reason why the Applicant would procure duty-free fuel cards was in order to obtain a pecuniary benefit by paying less for gasoline when he fuelled his private vehicle.

111. Given the inconsistencies in the Applicant's statements to investigators, his unreliable and unconvincing testimony, his apparent inability to explain how he came to use a stolen fuel card, as well as the untenable explanations of a suspected conspiracy to set him up by his work colleagues; the Tribunal finds that the Applicant has not told the truth and has not successfully discharged the burden of establishing that the Administration wrongfully imposed a disciplinary measure on him in this case.

112. The Tribunal is not in any doubt that the facts upon which the sanction imposed on the Applicant was based have been established and that the said facts amount to serious misconduct on the part of the Applicant.

Was the disciplinary measure imposed on the Applicant proportionate to the misconduct established?

113. The Respondent submitted that the disciplinary measure imposed on the Applicant was proportionate. He stated that a review of the Secretary-General's

practice in disciplinary matters shows that cases of misappropriation, theft or taking of the Organization's property usually attract the most severe of sanctions.

114. The Appeals Tribunal has repeatedly stated that in disciplinary cases the role of the Tribunal is among other things to examine whether the sanction is proportionate to the offense.¹

115. The Basic Rights and Obligations of Staff (Core Values) are contained in the Staff Regulations of the United Nations² and govern the conduct of staff members. 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.

116. The Applicant clearly has not lived up to the standards of integrity as demanded by section 1.2 (b) of the Staff Regulations of the United Nations.

117. It was held in *Yisma* UNDT/2011/061 that in assessing the proportionality of the sanction, both aggravating and mitigating factors should be considered.

118. The Respondent submitted that the Applicant's prior good service and letters of recommendation were also taken into account and the disciplinary measure imposed was lessened from one of dismissal to one of separation from service with compensation in lieu of notice and without termination indemnity.

119. The Tribunal's jurisprudence supports the imposition of the disciplinary measure of separation from service in cases where staff members have been found to have engaged in dishonest activity. As stated by Carstens J in *Yisma*:

Separation from service or dismissal is often justified in the case of serious or gross misconduct of such gravity that it makes the continued employment relationship intolerable, especially where the relationship of trust has been breached.³

¹ See *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028, *Masri* 2010 UNAT-098.

² Staff Regulations of the United Nations, ST/SGB/2011/1.

³ *Yisma*, para. 40.

120. Termination of an employment contract is undoubtedly only applicable in the most severe of cases. A review of the practice of the Secretary-General in disciplinary matters and cases of criminal behaviour show that cases of theft or misappropriation of the Organization's property consistently attracts this most severe of sanctions.⁴

121. In the present case, the Applicant in misappropriating the missing fuel card violated the relationship of trust that existed between him and the Organisation.

122. The Tribunal is satisfied that the Respondent properly considered all the mitigating factors and finds that the disciplinary measure imposed was proportionate to the serious misconduct established against the Applicant.

Judgment

123. The case as made out in this Application is unreliable, unconvincing, evasive and untenable.

124. The Applicant took illegal possession of a fuel-card belonging to the UNTSO PX. With guilty knowledge he used it to purchase discounted fuel on one occasion, and attempted to do so on a second occasion.

125. The Applicant's actions amounted to serious misconduct contrary to the Organization's Staff Rules and Regulations.

126. The Respondent's imposition of the disciplinary measure of separation from service was proportionate taking into account all mitigating factors in the case.

127. This Application is dismissed in its entirety.

⁴ See the Practice of the Secretary-General in Disciplinary Matters and Possible Criminal Behaviour; ST/IC/2010/26, ST/IC/2011/20, ST/IC/2012/19 and ST/IC/2013/29.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of June 2014

Entered in the Register on this 11th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi