



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/040

Judgment No.: UNDT/2017/057

Date: 14 July 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DANIEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Brandon Gardner, OSLA

Counsel for the Respondent:
Jonathan Croft, ALS/OHRM
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant filed this Application on 2 March 2015 challenging the administrative decision of the Organization to impose on him the disciplinary sanction of separation from service.

2. He joined the United Nations Mission in Liberia (UNMIL) in October 2004. Before his separation, the Applicant held a fixed-term contract as an Engineering Technician at the G-3 level.

3. On 5 December 2015, the Applicant was informed by a memorandum that the disciplinary measure of separation from service, with compensation *in lieu* of notice and without termination indemnity, was being imposed on him.

Facts

4. On 30 January 2012, two store-men at UNMIL discovered that the padlocks to several containers used to store new tyres for United Nations vehicles at the heavy-duty vehicle park in the UNMIL Star Base compound in Monrovia, Liberia, would not open.

5. The two store-men, Jean Colins and Emmanuel Sarpong, first went to the container with the original keys to the padlocks in their possession but on inserting them into the said padlocks found that they would not open.

6. The padlocks to the four affected containers were thereafter cut open with a bolt cutter. It was then discovered that 382 out of 636 tyres stored in the containers were missing.

7. A joint investigation into the missing tyres was launched on 1 February 2012 by the UNMIL Special Investigations Unit (SIU), the United Nations Police Crimes Services Division (UNPOL) and the Liberian National Police Anti-Theft Squad (LNP).

8. Shortly after the start of the joint investigations, officers discovered on 5-7 March 2012 that two local tyre dealers YK and FK were in possession of 13 of the missing tyres. 10 of these tyres were of the Ling Long brand, believed to be exclusively imported into Liberia by UNMIL.

9. Subsequently, the two tyre dealers gave statements explaining that the tyres were sold to them by certain staff members of UNMIL. They were then arrested by the LNP.

Investigations

10. The two tyre dealers, YK and FK, told investigators in their separate statements made on 22 April 2013 that a man with the phone number 0886-81653 and a radio call sign of “Limba” had sold the tyres to them.

11. In his statement, YK said that in late January 2012, a United Nations staff member (who was later established to be AW, a heavy-duty vehicle driver at UNMIL) visited his tyre shop and told him that he had some tyres that he wished to sell.

12. He said also that AW returned a few days later in early February 2012 accompanied by a man named Emmanuel whose telephone number was 0886-401127.

13. Emmanuel is the Applicant’s first name, and the said mobile telephone number belonged to him. YK said the two men sold 13 truck tyres to him for USD4,550.

14. During the investigation, AW admitted that the first telephone number and the radio call sign were both his. In his first statement on 27 March 2012, he had denied any involvement with the theft of tyres.

15. Upon the issuance of a judicial subpoena on 27 December 2012, Lonestar Cell MTN, which was the local cellular telephone service provider, provided the call records from 1 January 2012 until 16 March 2012 in respect of the two tyre dealers YK and FK.

16. The call records during the same period for AW, and five other UNMIL staff members who had been named as being part of the scheme, were also provided. These staff members were the Applicant, TS, BS, ES and JB.

17. The call records established that there was significant telephone traffic between six staff members and one of the tyre dealers, FK. They showed that AW called the tyre dealer FK 138 times during the period; FK, in turn, called AW 126 times. The Applicant called the tyre dealer FK seven times, and another staff member, TS, called him 15 times.

18. As between the six staff members whose activities concerning the stolen tyres at the time were investigated, it was established that in the same period of about two months AW called the Applicant 49 times, while the Applicant called AW 107 times. Also, the Applicant called another staff member, JB, 120 times, while JB called the Applicant 112 times and called AW eight times.

19. The Applicant called another implicated staff member, TS, 161 times, while TS called him 98 times. TS also called AW 55 times, while another staff member BS called AW 68 times and called the Applicant seven times. ES who was also a staff member called AW 13 times and called the Applicant eight times.

20. Following a review of these call records, the six staff members were asked to provide statements regarding the stolen tyres.

Admissions by some staff members under investigation and their implicating of the Applicant.

21. In a statement to investigators on 21 February 2013, AW admitted that between January and March 2012, he and other staff members stole and sold two containers of tyres to FK and shared the proceeds between the six individuals who carried out the theft. He stated that the Applicant was among them. He stated also that their group, which included the Applicant, had stolen 13 tyres which they also sold to FK. He added that they had all shared the proceeds of the sale among themselves.

22. BS in his statements on 22 February, and 19 March 2013, said that he saw the Applicant, TS and ES standing near an open 40ft container with a dump pan close by. He stated that later that day he saw an unknown quantity of brand new tyres inside the dump pan but did not make a report as he did not suspect that they were stolen.

23. TS admitted in his statement of 2 April 2013 that he participated in two incidents of stealing and selling stolen tyres from the UNMIL Star Base with AW, the Applicant and another staff member. He stated also that when the tyres were sold, the Applicant gave him USD300 from the proceeds of sale. He said he maintained telephone contacts with others who were involved in the scheme.

The Disciplinary Process

24. At the end of the investigations into the theft and sale of tyres in this case, a memorandum dated 9 July 2014 with formal allegations of misconduct was sent to the Applicant.

25. It was alleged that between December 2011 and April 2012, the Applicant was involved in the unauthorized removal and sale of tyres belonging to the Organization in violation of staff regulations 1.2(b) and (q), and staff rule 1.7.

26. On 21 August 2014, the Applicant submitted his comments in defense of himself.

27. Upon a review of the available dossier, the Under-Secretary-General (USG) for Management concluded on behalf of the Respondent that the allegations of misconduct against the Applicant in this case were sufficiently established.

28. It was decided that the Applicant be separated from service with compensation *in lieu* of notice and without termination indemnity. This decision was conveyed to the Applicant by a memorandum dated 3 December 2015.

The Applicant's case

29. The Applicant denies any involvement in the stealing and sale of tyres belonging to the Organization, both when questioned by investigators and in his witness statement to the Tribunal.

30. The allegation of misconduct was not proven by clear and convincing evidence. There were material and substantive credibility gaps and flaws in the facts said to have been established by the investigations, which when properly considered cannot lead to the conclusion that misconduct was committed by the Applicant.

31. The witness statements that implicated the Applicant which were taken from persons also otherwise implicated in the theft and sales, are false, vague and ought to be discounted.

32. The Applicant also argues, in the alternative, that even if misconduct is found to have been established, the sanction imposed was not proportionate to the alleged misconduct.

33. The Applicant received the investigation report and a letter containing the allegations against him on 9 July 2014.

34. When all the evidence presented by the Respondent is considered, they only generally implicate the Applicant. The phone records do not definitively prove that the

calls to the tyre dealer, and other staff members, involved in the stealing of the tyres which were made from the Applicant's number, were made by the Applicant himself. The Applicant's cell phone was used daily by his colleagues and friends.

35. The Applicant's due process rights were violated because of the time that had elapsed between the discovery of the alleged misconduct, and the charges of misconduct, including the delay in the investigative process.

36. The Applicant's due process rights were also violated by the Respondent's use of private mobile phone records of the Applicant and others which were subpoenaed by the national Police in its criminal investigations; a written statement said to have been signed by the Applicant on 18 February 2013, which was a forgery and denied by him; and the tyre dealers' failure to identify the Applicant in a physical or photo lineup.

37. The Applicant was also denied due process rights when the other staff members who were initially facing the same allegations as he was, were not further investigated or disciplined. It is possible that they were offered leniency in exchange for giving inculpatory evidence against the Applicant.

38. The allegations against the Applicant were not properly proven, and the sanction imposed on him was disproportionate.

39. The Applicant asks for any order that the Tribunal finds suitable in the circumstances of this case.

The Respondent's case

40. There is clear and convincing evidence from the facts presented by the Respondent that the Applicant engaged in the misconduct alleged. The involvement of the Applicant was established by the consistent accounts of one of the tyre dealers, and other staff members, who participated in the theft and sale of the tyres.

41. It was established that the Applicant participated in the removal and sale of UN-owned tyres. He received part of the proceeds from the sale of the stolen tyres, and distributed parts of it to others who were involved in the theft. These acts amount to misconduct.

42. The disciplinary measure applied was proportionate to the offence after considering both the mitigating and aggravating factors and it was also consistent with the Organization's past practices.

43. The rights of the Applicant to due process were respected during the investigations and the disciplinary process.

44. Specifically, the Applicant was given full and fair opportunity to provide his version of events to the investigators and to answer to the allegations against him during the disciplinary process and to have them properly reviewed and evaluated.

45. When the Applicant requested an additional three weeks to respond to the allegations of misconduct against him, it was granted.

46. At the request of the Applicant's counsel on 2 March 2015, the investigation report and related materials, which were previously provided to the Applicant on 22 July 2014, were sent to her on the same day.

47. The Applicant has not tendered evidence to show that the use of the telephone records subpoenaed by the Liberian Police was unreliable or was illegally obtained. The said call records are relevant evidence and have probative value.

48. There is no record that the Applicant offered to be in a lineup for identification purposes or raised the issue at any time when he was interviewed by investigators or when he responded to the allegations against him.

49. The records show that neither of the two staff members mentioned by the Applicant as having been offered leniency by the Respondent in exchange for inculpatory evidence against their colleagues had offered evidence implicating the Applicant.

Oral Hearing

50. An oral hearing of this matter took place on 16 and 17 August 2016. In his sworn testimony and under cross-examination, the Applicant denied any participation in the stealing and sale of tyres belonging to UNMIL. He told the Tribunal that he was wrongly accused, and that the hand-written statement of 18 February 2013 which bore his signature was not made by him. He added that he did not know the tyre dealer YK nor how YK came to have his name and phone number.

51. The Applicant admitted that during the period relevant to the theft and sale of tyres, there were over 150 calls between him and AW, and 259 calls between him and TS. These were work-related. He stated that he often lent his phone to other colleagues and that it must have been AW who called FK, one of the tyre dealers, from his phone. The Applicant denied ever standing beside a container of tyres with others who were implicated in the theft. In answer to a question in cross-examination, he said he had no problem with the investigator or the other staff members who implicated him in the thefts.

52. Mr. Talawali who was the investigator gave sworn testimony for the Respondent. It was his testimony that he took two separate statements from the Applicant during the investigation. The first of the statements was made and signed on 18 February 2013 by the Applicant in his own handwriting after he was shown the call logs. He stated that two days later, he called the Applicant again to answer other questions but the Applicant asked to be allowed to destroy his first statement and to make a new one.

53. The investigator said that when he refused to have the first statement destroyed, the Applicant became hostile and went on to type a new statement which was totally different from the first one. In this second statement, he denied any involvement or participation in the theft and sale of the UNMIL tyres. The witness said that the Applicant signed both statements in his presence.

54. In answer to a question in cross-examination, the witness said that when he refused to allow the destruction of the Applicant's first statement, the Applicant became aggressive and hostile. This behavior was recorded in the investigation report. The witness said he asked the Applicant why he wanted his first statement destroyed, and was told that he (the Applicant) was out of his mind when he wrote it.

Considerations

55. This application seeks to challenge the investigative and disciplinary processes that culminated in him being separated from service with compensation *in lieu* of notice and without termination indemnity. It was argued for the Applicant that the case against him was not sufficiently established, that his due process rights were breached and that the sanction imposed was disproportionate.

56. The Respondent for his part contends that the investigations into the case and the disciplinary process that followed were done fairly, that the case was sufficiently established and that the sanction imposed on the Applicant was proportionate and consistent with the Secretary-General's practices in similar situations.

57. The issues for consideration are formulated as follows: (1) Did the Respondent meet the required standard to prove that the Applicant had participated in the theft and sale of tyres belonging to UNMIL or were his findings against the Applicant based on evidence that were flawed and unreliable? (2) Were any of the Applicant's due process rights violated at any time during the investigations and disciplinary process? (3) Was the sanction imposed on the Applicant disproportionate in the circumstances?

Did the Respondent meet the required standard of proof when he found that the Applicant committed misconduct in this case or were his findings against the Applicant based on flawed and unreliable evidence?

58. The core of the Applicant's case is that the Respondent did not establish through 'clear and convincing evidence' that he participated in the unauthorized removal and sale of tyres belonging to UNMIL between January and February 2012. It is also his case that the failure to meet this required standard of proof rendered the disciplinary process and sanction of separation from service illegal.

59. The Applicant in his oral testimony denied any participation in the stealing and sale of UNMIL tyres. His counsel also submitted in closing submissions that statements made to the investigators by others who had either owned up to the theft or were implicated in one way or the other including phone records between them and the Applicant were vague and unreliable. These persons are AW, BS, TS and the tyre dealers YK and FK.

60. Counsel pointed out that AW, who was at the centre of the stealing and sale of the tyres at UNMIL, had lied and sought to implicate other staff members including two of his supervisors and the Applicant. He continued that since AW's story about his two supervisors were found not to be credible and no charges were brought against them, it follows then that AW's statement implicating the Applicant cannot be credible and should not be used against the Applicant.

61. The Applicant had testified that it was AW who made calls from his cell phone to the tyre dealers. Although he claimed that he had sometimes lent his mobile phone to other staff members, independent contractors and AW and that AW may have used it to call the tyre dealer, the investigator's analysis of the phone logs showed that the phone calls showed a usual pattern in which when the Applicant called AW, another call quickly followed from his phone to TS and then the tyre dealer FK.

62. Despite this analysis, it was submitted for the Applicant that these calls were wrongly used as evidence of the Applicant's participation in the scheme. The Applicant could not explain convincingly how his personal cell phone came to be at the disposal of AW, other staff members and independent contractors to enable anyone and everyone to make calls with it to the implicated tyre dealer during the two-month period when the tyres were stolen and sold.

63. Further the Applicant argued that it must have been AW who gave his name and cell phone number to the tyre dealer YK as an alternate contact number much in the same way that AW gave the phone number of JB, another UNMIL staff member who was not implicated in the scheme, to the other tyre dealer FK. He argued that although JB's contact details were found in one of the tyre dealer's cell phone, no charges were brought against JB and therefore that the Applicant also should never have been charged with misconduct. The Applicant failed to acknowledge that records showed that there had not been a single phone call between JB and any tyre dealer.

64. Regarding the numerous and frequent mobile phone calls between him and AW during the two-month period when the tyres were stolen and sold, the Applicant testified that all the 156 mobile phone calls between them had nothing to do with the said theft and sale of tyres in issue. His testimony was that all the calls were solely related to a common project of relocating the procurement section at UNMIL premises and that the said communication should not be used as evidence to implicate him.

65. The Tribunal will here review the Applicant's case, his testimony and submissions. As a starting point into this review, the Tribunal agrees that the Respondent must indeed establish through clear and convincing evidence¹ that the Applicant was part of the scheme to steal and sell the tyres belonging to UNMIL. This standard of proof is required for any disciplinary sanction of the Applicant to properly follow.² Was this threshold reached by the Respondent?

¹ See *Masri* UNAT-2010-98; *Molari* 2011-UNAT-164.

² *Ibid.*

66. Evidence placed before this Tribunal unequivocally shows that AW was the central figure in the case of the theft and sale of about 382 different sizes and brands of tyres valued at USD104,178.86. It is not contested that the said tyres were taken from four storage containers in the UNMIL Star Base compound. AW was the mastermind and coordinator of the thefts and recruited other staff members who participated in the scheme while he also found buyers for the stolen tyres.

67. On 21 February 2013, the said AW who had previously denied any knowledge or participation in the stealing of the missing tyres in March 2012 when the theft was first discovered, made a confessional statement to SIU investigators. In that later statement, he confessed to stealing and selling the tyres and named the Applicant as one of his accomplices.

68. Specifically, AW recorded in his statement that on one occasion, he together with the Applicant stole some thirteen tyres from a container at Star Base which they covered with dirt in the UNMIL dirt truck. He said they then drove to the tyre dealer FK and sold the tyres to him and shared the money with TS and others who were involved with the stealing.

69. Also before the Tribunal is the statement of BS, another staff member, who at the times material to this application was a heavy-duty vehicle driver attached to the Transport/Dispatch Unit at UNMIL. His statement to investigators was made on 22 February 2013. He stated therein that on one occasion during the period that the thefts took place; he was instructed by his supervisor to move a container from the drive way to allow the dump truck to collect dirt from the newly renovated cafeteria site. He said he complied with the instruction and left.

70. The statement continued that soon afterwards, BS was on his way to eat at the cafeteria at about midday when he observed the Applicant and two others namely TS and ES standing beside a 40ft container that was open on one side. When he left the

said cafeteria to return to his office, he saw some brand new tyres inside the dump truck but did not make any report about it since he did not know that the tyres were being stolen or taken without authorization.

71. Another confessional statement was made to investigators on 2 April 2013 by one TS who was a carpenter at UNMIL at the time. He stated that he had participated in the stealing of the tyres on a few occasions and was given a share of USD300 each time from the proceeds of the sale and had collected about USD900 in total. He implicated the Applicant by stating that the Applicant participated and played active roles during the stealing episodes.

72. One of the two tyre dealers arrested by the LNP for receiving the stolen tyres was YK and he also made a confessional statement. He stated that AW, accompanied by the Applicant, brought some tyres to him at his shop for sale sometime towards the end of January 2012. He said he gave them a part payment of USD2,500 for the tyres and that AW returned three days later for the balance. He stated also that he had the mobile phone numbers of both AW and the Applicant in his own mobile phone.

73. A handwritten statement attributed to the Applicant and said to be his first statement to UNMIL investigators on 18 February 2013 was part of the trial bundle. It was stated therein that sometime in February 2012, AW came to the Applicant's department with a truck to collect dirt. After loading the truck, AW asked the Applicant to go with him and they drove out of UNMIL premises to a tyre dealer at Somalia Drive.

74. The statement continued that when the dirt was removed, there were thirteen tyres underneath which were sold to the tyre dealer who had a store at a nearby container. In the statement, the Applicant was said to have received the sum of USD1,500 from the buyer while it was agreed that the balance of the sale money would be given later to AW. It was also stated that the sum of USD300 from the proceeds of the sale was given to the Applicant by AW.

75. Two days after the Applicant allegedly made the inculpatory statement, he was called to make another statement by investigators. In the second statement, which was typewritten and dated 20 February 2012, the Applicant stated that he had AW's mobile phone number because there were times that they were assigned to work together and they exchanged phone numbers to communicate over work issues. He denied selling tyres with AW to anyone.

76. The phone logs showed that the Applicant had called TS who had confessed to his own participation in the theft 161 times in the same two-month period of 1 January 2012 – 3 March 2012 when the thefts had occurred. About the same period and until 20 April 2012, TS had called him 98 times.

77. It was not disputed that the Applicant's phone was used to call one of the tyre dealers FK seven times between 13 January 2012 and 23 February 2012 while the said FK called the Applicant's phone once. A further analysis of the phone logs showed that most of the time when calls were made from the Applicant's phone to AW, other calls would immediately thereafter be made to TS and FK.

78. In support of his case, the Applicant testified that what was said to be his first recorded statement made to SIU investigators on 18 February 2013 in which his alleged role in the thefts was admitted is not his statement but a forgery. However, the Tribunal finds that the statement in issue is handwritten and bears a similar signature to the typewritten statement dated 20 February 2013 in which the Applicant denied any role in the thefts. The Applicant testified that this second statement was made by him.

79. In cross-examination, the Applicant said he had no problem with the investigator who took his statement. In answer to another question, he said he had no problem with any of the other staff members who implicated him in the thefts. While answering a question from the Tribunal, the Applicant said he did not know who called the tyre dealer using his mobile phone.

80. The Tribunal took cognizance of the striking similarity between the alleged signature of the Applicant in the handwritten statement which he labeled a forgery and the typewritten one given two days later. The signatures on the two statements are also strikingly like the signature of the Applicant on his witness statement in this case dated 1 February 2016. Beyond his denial of the inculpatory statement of 18 February 2013, the Applicant made no attempt to prove the alleged forgery. Neither did the Applicant challenge the investigator's testimony that he had asked the said investigator to allow him to destroy the statement of 18 February 2013.

81. In other words, no effort was made by the Applicant to prove that the statement of 18 February 2013 which bore his signature was not made by him. No evidence was led to show that the handwriting was not his. In a case where a party alleges that a felonious offence such as a forgery has been committed, the law is that the onus is on him to prove it. The Applicant therefore has a clear duty to prove that forgery was committed by the investigators who provided the statement of 18 February 2013. He must do so by tendering credible evidence. A mere submission is not proof of a fact in issue and does not discharge the burden of proof.

82. In the circumstances, the Tribunal has no reason to believe that the investigator whom the Applicant testified that he had no problems with had forged the handwritten statement dated 18 February 2013 and forged the Applicant's signature on it.

83. There is, additionally, ample uncontroverted evidence that in the two-month period between January and March 2012 when the thefts of the tyres took place, the Applicant had frequent telephone communication with at least two other confessed participants in the thefts namely AW and TS. Similarly, despite denying that he knew any of the tyre dealers who received the stolen tyres, the Applicant had telephone communication with one of them namely FK on eight occasions during the period of the thefts. Seven of the said eight calls were from his phone to the tyre dealer.

84. The Tribunal finds it difficult to believe the testimony of the Applicant that it must have been AW who had used his mobile phone to call the tyre dealer FK on seven separate occasions when the theft and sale of tyres were on-going. Not only is this submission speculative, but it must be noted that the tyre dealer also called the Applicant's phone albeit once. If he had no dealings with the Applicant, the question arises as to why FK made the call.

85. He could not have made the call to the Applicant's phone to speak to AW whose own mobile phone FK called 126 times and from which he received 138 calls in the 2-month period material to this case. Clearly FK knew how to call AW and had no need to call the Applicant's phone except when he wanted to talk to the Applicant himself. There is therefore every reason to believe that FK and the Applicant knew and called each other in relation to the scheme of theft and sale of UNMIL tyres.

86. Nor is the Tribunal persuaded that a total of 156 mobile phone calls between AW, the master-mind of the thefts, and the Applicant within the two-month period that the thefts took place were normal and only work-related. It must be borne in mind that the Applicant's testimony is that he worked with AW on a common project and in the same compound at the times of these calls. Why would the Applicant spend his money to call a work colleague whom he met daily at work on work-related matters so many times in a two-month period?

87. The Tribunal finds the Applicant's testimony, that it was AW who must have used his mobile phone to call the tyre dealer on the seven occasions, to be speculative and incredible. In the same vein, the Applicant's testimony that he was in the habit of freely lending his mobile phone to any staff member and independent contractor who asked him to make calls, because he wanted to show them love, is not only incredible but absurd.

88. It cannot be believed that due to the Applicant's unbridled generosity, his personal mobile phone was at the disposal of other staff members, and contractors at

UNMIL, to use as they pleased during the period of the thefts. It is significant that the heavy phone traffic between the implicated staff members including the Applicant ceased after the arrest of FK the tyre dealer in March 2012.

89. Having considered the Applicant's denials and the evidence before the Tribunal linking the Applicant to active participation in the theft and sale of UNMIL tyres, the Tribunal makes no hesitation in concluding that the required threshold of clear and convincing evidence was indeed reached by the Respondent. The Tribunal finds and holds that the Respondent acted lawfully in finding that a case of misconduct was established against the Applicant and in taking disciplinary action against him.

Were any of the Applicant's due process rights violated, at any time, during the investigations and disciplinary process?

90. It was submitted on behalf of the Applicant that several of his due process rights were violated. These violations were said to include:

- a. The delay between the discovery of the theft, the investigation and the bringing of charges against the Applicant.
- b. The use of private mobile phone records of the Applicant obtained on subpoena upon the application of the LNP.
- c. The tendering of a signed hand-written statement dated 18 February 2013 which is a forgery.
- d. The non-identification of the Applicant by the tyre dealer FK in a physical or photo line-up.
- e. The possibility that two other staff members who were not charged or disciplined were offered leniency for implicating the Applicant.

91. The Respondent submitted on this score that the Applicant was given a full and fair opportunity to provide his own version of events to the investigators and to answer to the allegations against him during the disciplinary process. He submitted further that:

- a. An additional three weeks was granted to the Applicant to respond to the said allegations upon his request.
- b. The Applicant's response to the allegations were properly reviewed and evaluated.
- c. At the request of the Applicant's counsel on 2 March 2016, the investigation report and related materials were sent to her on the same day.
- d. The Applicant did not tender any evidence to challenge the legality of the phone records neither did he challenge their reliability.
- e. There are no records that the Applicant offered to participate in a line-up for identification purposes during investigations.
- f. Neither of the two staff members mentioned by the Applicant as not being charged implicated him.

92. In considering whether any breaches of due process occurred before this Application was brought, the Tribunal restates that the observance of due process is simply the requirement that the Respondent respect all the legal rights owed the Applicant through the investigation and disciplinary process.

93. Reviewing the Applicant's various allegations on the breach of his due process rights, there is no evidence that the mobile phone records of the Applicant and others were illegally obtained. The evidence is that they were released by the telecom company following a *subpoena duces tecum* order by a national court. In the absence of any credible evidence to the contrary, the presumption of regularity establishes that

the said records came from proper custody on the orders of a properly constituted court and did not constitute a breach of due process.

94. Also, the tendering of a hand-written and signed statement said to have been made to investigators by the Applicant is evidence which the Applicant may rebut and does not constitute a breach of due process. Similarly, non-identification of the Applicant by the tyre dealer who gave the Applicant's name and phone number and claimed that they were acquainted, in a physical or photo line-up might have implications for the weight to be attached to the tyre dealer's statements concerning the Applicant's participation in the scheme but is not a due process violation.

95. A person against whom allegations and charges of misconduct are brought has a right to have a decision made within a reasonable time. In this case, the theft of UNMIL tyres was discovered in or about March 2012. In February 2013, SIU investigators invited the Applicant and he became one of the subjects of their investigation. The disciplinary process against him commenced on 9 July 2014 when the Applicant was formally presented with allegations of misconduct. He was notified of the disciplinary sanction of separation from service with one month's salary *in lieu* of notice and without termination indemnity on 4 December 2014.

96. A staff member who has been placed on administrative leave pending investigations has a right to a fair and speedy investigation. When a staff member has been presented with charges of misconduct and he sends his response, it is important for the Respondent to review the staff member's case quickly to minimize the anxiety of waiting for a decision on the case. There is no evidence before the Tribunal that the Applicant was placed on administrative leave from 2013 when he became a subject of the investigations.

97. After being presented with the allegations of misconduct on 9 July 2014, the Applicant responded on 21 August 2014. The decision to impose a disciplinary sanction on the Applicant was communicated to him on 4 December 2014. Thus, a

review of the entire case against the Applicant and communicating to him of the outcome took a little over three months. This time frame is not unreasonable and does not constitute a breach of due process.

98. The claim by the Applicant that any breaches of his due process rights occurred in this case is accordingly without merit.

Was the disciplinary sanction imposed on the Applicant disproportionate in the circumstances?

99. The Applicant contends that the sanction meted out against him was disproportionate.

100. While the Secretary-General has wide discretion in applying sanctions for misconduct, he “must adhere to the principle of proportionality.”³ In reviewing the exercise of his discretion, the court has been urged to show “due deference” to the Secretary-General’s obligation to “hold staff members to the highest standards of integrity.”⁴

101. Generally, courts do not interfere with the “exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.”⁵

102. On the facts before the Tribunal, the Applicant has not adduced any evidence to give the Tribunal a basis for reviewing the Secretary-General’s exercise of discretion in this case, nor has he shown that the Secretary-General’s discretion was improperly exercised.

Conclusion

103. The Applicant’s claim is dismissed in its entirety.

³ *Applicant* 2013-UNAT-280. See also *Lauritzen* 2013-UNAT-282; *Hersh* 2014-UNAT-282.

⁴ *Sanwidi* 2010-UNAT-084.

⁵ *Abu Hamda v Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* 2010 UNAT-027.

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(Signed)

Judge Nkemdilim Izuako

Dated this 14th day of July 2017

Entered in the Register on this 14th day of July 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi