



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MULONGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Matthias Schuster, ALS/OHRM
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant is a former Engineering Assistant at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), based in Goma.
2. On 18 March 2016 he filed an application contesting a decision dated 5 January 2016 (transmitted to him by the Officer-in-Charge of the Office of Human Resources Management (OHRM) on behalf of the Under-Secretary-General for Management (USG/DM)) to impose on him the disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii) for serious misconduct consisting of taking, without authorization, construction material that belonged to the Organization.
3. The Respondent filed a reply on 13 May 2016.

Procedure

a. Investigation

4. On 25 June 2014, the Applicant submitted a request for materials from MONUSCO's Engineering Store in Goma, DRC, for the construction of a waste water treatment plant in Sake.¹ The Applicant and a MONUSCO Individual Contractor, Mr. Georges Shabani, were assigned to transport the materials to Sake.
5. Sometime between the end of June and 8 July 2014, it was reported to the MONUSCO Security Investigations Unit (SIU) that some of the material dispensed to

¹ Page 37 of annex 2 to the reply – MONUSCO Engineering Section Material Request.

the Applicant never reached its intended destination in Sake. Specifically, 20 bags of cement, 11 kilogrammes of nails and eight pieces of timber were unaccounted for.²

6. On 8 July the Applicant and his alleged accomplice, Mr. Shabani, were interviewed by the MONUSCO Security, where they admitted to have misappropriated the materials. The voluntary statement of the Applicant reads:

Concernant les materiels de construction de waste water treatment plant a sake, il s'agit de timber 6cmx20cmx4m, clous de 10cm 6 kg, roofing nails (clous de tôle) 5 kg et 20 sacs de ciment don't moi et Shabani avons retires au store mais ces materiels n'ont pas arrives au chantier c'a'dire a Sake. Nous les avons detournes ou (voler).

Mais aujourd'hui en date du 08/07/2014 nous venons de les remettre telle qu'ils etait avant le detournement et nous demandons d'etre pardones et si le meme erreur se repete[s] dans les jours avenir la securite prendra sa responsabilite et je serais chasse du travail.

Sv plais je repete la derniere phrase.

NB. Nous demandons d'etre pardonner devant notre Superviseur Mr. Monsi et devant la securite Mr. Rajabu. Si les vols ou detournement se repete dans l'avenir je serais chasse du travail (perdre le travail).

7. Mr. Shabani also gave a statement in which he admitted misappropriation of the materials. The statements were signed by the authors and by Mr. Baseke from MONUSCO Security as witness. Subsequently the Applicant, Mr. Shabani and Mr. Baseke went to Mr. Shabani's house where they retrieved the remaining nails and thereafter went to a local market they bought cement and the timber and returned it to MONUSCO.

8. On 10 September 2014, the Applicant was interviewed by SIU in connection with the matter.³ The second voluntary statement of the Applicant reads:

Q: Reconnaissez-vous la declaration que vous avez fait en date du 8/07/2014 et dans laquelle vous avez avoue avoir vole le materiel de construction de la

² Ibid., at page 14.

³ Ibid., at pages 24 and 33.

Monusco don't le timber 6cmx20cmx4m (8 pieces), clous de 10cm (6 kg), roofing nails 5 kg et 20 sacs de ciment?

R: Oui, je reconnais.

Q2: Avez-vous des explications a donner par rapport a ce vol comme vous n'etiez pas le seul dans ce coup?

R2: Oui, certainement, moi personnellement je reconnais avoir reçu l'argent pour 10 sacs de ciment c'est a dire 150\$ car un sac etait vendu a 15\$. Concernant la reste des materiels, ils ont ete amane par Mr. Shabani. En bref, celui qui avail meme amene le client, car ils se connaisse bien avec son client.

Q3: Avez-vous autre chose a ajouter?

R3: Ecoute, nous avions retourne le materiel vole a la MONUSCO et tout etait achete par moi or j'avais seulement pris 150\$ pour 10 sacs de ciment. Donc je demande a Mr. Shabani de me restituer le reste c'est a dire 225\$ (deux cent vingt cinq dollars Americain).

9. Mr. Shabani was interviewed on the same date and gave a statement in which he admitted to misappropriation of the materials but blamed the Applicant for using his position of authority to push him into participating in the venture.

10. Mr. Kandolo, who worked on the Sake site and was supposed to record the materials received, gave a statement in which he denied having received any materials that day.

11. On 16 October 2014, Mr. Jules Msafiri, MONUSCO Security Investigation Assistant, transmitted an investigation report to Mr. Oumarou Hamo, Chief Security Officer.⁴ The report's findings/conclusions are summarized below:

a. On 25 June 2014, the Applicant raised a material request for 8 pieces of timber, 30 bags of cement, 5 kilograms of roofing nails, 6 kilograms of 10 cm nails, 2 metres of galvanized iron sheets and a masonry rope which was

⁴ Ibid., at page 12.

approved by Mr. Andre Lebo, MONUSCO Engineering Section in relation to the installation of a waste water treatment plant in Sake.

b. On 26 June 2014, the materials were issued and loaded onto a United Nations vehicle driven by Shabani.

c. Not all the materials reached Sake. Some of the materials were offloaded halfway, specifically, 8 pieces of timber, 20 bags of cement, 5 kilograms of roofing nails and 6 kilograms of the 10 cm nails.

d. The stolen materials were shared between the Applicant and Shabani and sold to an unnamed buyer.

e. The Applicant stated to the investigators that he took 10 bags of cement which he sold for USD150.

f. All the materials or their equivalent were returned to MONUSCO.

12. On 20 March 2015, a report of possible misconduct implicating the Applicant was referred to the Assistant Secretary General (ASG), OHRM by the ASG, Department of Field Support.⁵

13. By memorandum dated 9 June 2015 from the Chief, Human Resources Policy Service/OHRM to the Applicant, it was alleged that in June 2014, the Applicant took, without authorization, construction material that belonged to the Organization. The

⁵ *Ibid.*, at page 6.

Applicant was requested to provide a response to the memorandum within two weeks of receipt.⁶

14. On 8 July 2015, the Applicant submitted his comments on the allegations having been granted an extension of time to do so.⁷ In his response, the Applicant stated, among others:

The same day of 8th before we went to shops to buy the materials Mr. Mastaki from security, Shabani and me went to see Mr. Shabani house and himself (Shabani) showed to us the materials he used all ready.

I did not use my power to push him but I planned to bring everything back because of the security situation in my country same one can lose his life in the case like this.

The true is I did not take the cement as it is written in Security report but I said to the security that is Mr. Shabani who sold the cement I did not even know his client he sold the materials it was lunch time, when I see that as the supervisor of the project my choice was to bring back the materials to the site. That's why I asked him the 150\$ for 10 bags of cement. I did not bring the materials back before 8th because there was a very big discussion with Mr. Shabani.

15. By letter dated 5 January 2016, the Applicant was informed that the USG/DM had concluded that that it had been established by clear and convincing evidence that the allegations against him had been established. It was on this basis that the USG/DM was imposing on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).⁸

b. Procedure before the UNDT

16. The Tribunal heard the case from 18 to 20 June 2018. The Tribunal reviewed the investigative record and received oral evidence from Messrs. Monsi Chenthiyethu, MONUSCO Field Engineering Officer, Peter Ndugutu MONUSCO Engineering Officer, Andre Lebo, Mastaki Baseke MONUSCO Security Section, Georges Shabani,

⁶ Ibid., at page 2.

⁷ Reply- annex 3.

⁸ Annex 2 to the application.

Jules Musafiri, Mondo Kandolo, MONUSCO Warehouse Storekeeper and Rajabu Mmbaga, then MONUSCO Officer-in Charge of Guard Force Management. The Tribunal undertook to obtain an initial report purportedly filed with MONUSCO Security by the Applicant's supervisor, Mr. Monsi, and mentioned in an email included in the investigation. This, however, proved unsuccessful.

17. The Applicant and Respondent were afforded time to file their closing submissions which they did on 30 and 31 July 2018 respectively.

Evidence adduced in the hearing

The Applicant

18. As the supervisor of the project, he is the one who made the material request on 25 June 2014, and on 26 June 2014 collected all the materials and together with Shabani loaded them on the truck for transportation to Sake. They finished loading the materials on to the truck at lunch time. He agreed with Shabani that they would depart after lunch, but when he returned from lunch, he did not find Shabani. He called Shabani who told him that was already on the way to the work site. He told Shabani to wait for him so that they could go together and took a motorbike taxi to catch up with him.

19. He did not check the materials immediately, but when they were unloading the materials at the site, he discovered that 20 bags of cement, 8 pieces of timber and nails were missing. He asked Shabani where he had put those materials but he did not answer; he said he would explain later. He told Shabani to bring back the materials and instructed his site storekeeper, Kandolo, to indicate the shortage of materials received in the site bin card and give it to Monsi upon his return to make Shabani justify the missing material.

20. The document used by Kandolo for issuing the materials was given to Monsi. But Monsi collaborated with Kandolo to fix him. Kandolo had been wishing him ill for a long time, that is why Kandolo did not bring the paper with the list of missing

materials to the investigators. Kandolo's credibility is also undermined by his claim that he had not received any bag of cement whereas in fact he had received 10 bags.

21. After several days, on 8 July 2014, Monsi called him and told him that he had to return the missing materials because he was the supervisor of the project and was also the one who made the material request. The Applicant explained to Monsi that it was Shabani who had taken the materials to build his own house. Monsi told him to help Shabani who was an individual contractor and did not have money and so asked the Applicant to lend money to Shabani for the purchase of the missing materials.

22. Monsi took him and Shabani to MONUSCO security. Shabani confirmed in front of MONUSCO security and Monsi that he had used the materials to build his house. MONUSCO security told the Applicant and Shabani to go with Mr. Baseke, MONUSCO Security Assistant, to Shabani's house to check on the materials. When they arrived at Shabani's house, Shabani showed the Applicant and Baseke the materials that he had already utilized. Only the nails remained.

23. He lent Shabani money to buy the missing materials as per instructions from Monsi. As stated in the September 2014 declaration, Shabani gave him USD150 for 10 bags of cement, which was insufficient. On the morning of 8 July 2014, he lent Shabani USD125 to top up for the missing materials. Shabani was supposed to later refund the money.

24. It was not the first time that it happened that Shabani stole materials. He had done so under other supervisors, Mr. Mulongo just did not expect that the blame would be put on him this time. On another day, someone else stole material which could not be found in Goma. On that occasion, the individual responsible arranged with his supervisor to send some people with the national police to go and check at the local market and indeed managed to retrieve the stolen material. On that instance Monsi was notified. When Monsi told him to bring back the materials in this case, he thought it would be a similar situation.

25. In the past the Applicant had reported to Monsi about missing materials and nothing had been done. Since Monsi and Shabani were good friends, Monsi has always

protected Shabani who had in the past engaged in acts of misconduct against the Organization. For example, despite the fact that Shabani's driver's licence had expired, Monsi allowed him to drive official United Nations vehicles. Shabani was an administrative assistant, yet served as driver. That is why the Applicant did not report Shabani to security at first place.

26. He did not report to Mr. Lebo because Monsi would think he was trying to create a fight between them. He did not report to Mr. Ndugutu because he would be perceived as creating a problem between Monsi and Ndugutu. He did not want to create problems for other people's jobs.

27. In this instance, in order to protect Shabani, Monsi took them both to MONUSCO's security office and told them what to write in their first declarations. This is evident from the fact how the first declaration is written. He trusted Monsi that is why he did what Monsi told him to do. Mr. Basake was present too when the declaration was being made.

28. When making the September 2014 declaration, in turn, he found it difficult because he was asked questions referencing the first declaration. The matter of receiving USD150 for the 10 bags of cement was not recorded properly. Mr. Masrifi from SIU colluded with Monsi because Monsi had employed his brother in 2012.

Mr. Georges Shabani

29. Mr. Shabani started with confirming his guilt, claiming that he was the only one responsible for "this".

30. He was supposed to go to Sake with the supervisor (i.e., the Applicant), but instead he went alone in the truck and only after he had deposed a part of the material in his barn, he returned to the log base to pick up the Applicant and then they went together to Sake. He offloaded the remaining material in the presence of the storekeeper, Mr. Kandolo, but the Applicant was absent at this time because he went to check the works. Shabani did not know if anyone noticed anything regarding the

missing material, especially if the Applicant noticed it. Then he returned to Goma. It is not true that he had organised the client. He and the Applicant did not have any discussion about the missing material in Sake.

31. When asked why he stated differently in his statement to United Nations Security, Shabani said that they had been pushed by their supervisor, Monsi. Monsi told them to accept the fact and buy the missing material. This took place in the office of Rajabu and everyone was there. Monsi promised him that he would be protected. He returned the material that was left with him and for the rest he borrowed from the Applicant. The Applicant agreed to lend him money because of this promised protection.

32. The second time when he was interviewed he was also forced by Monsi to make the declaration about the Applicant using his authority to push him into participation in the theft.

Mr. Chenthiyethu Monsi

33. Mr. Monsi was in charge of the Field Engineering Office in Goma. He was on leave from 19 June to 3 July 2014. On his return, he went through the June monthly material requests for reconciliation and checked with Kandolo, who was in charge of the store, on the Sake project material. For all major projects it was always necessary to check the project stock and that was why he double checked the materials for the Sake project. Kandolo confirmed that this material was not received.

34. Next, he checked and found that the material had been requested and received by the Applicant and transported by Shabani. The material was missing from the end of June to 8 July 2014 and no one had reported that it had not reached the site. The Applicant, who was the Sake site supervisor, was supposed to attest to the receipt of

materials. Once the materials are handed over to the site supervisor, it his responsibility to take care of them.

35. He reported to the Security Officer, Mr. Rajabu, on 8 July 2014. Rajabu took down his statement and then, one or two days later, Rajabu said that he had received back the missing materials. After he was informed that the material had been returned, he checked the cement but he could not recall checking the remaining items. The check was conducted next to Rajabu's office. He never discussed with the Applicant or Shabani about the missing materials, including when he reported the matter to Rajabu neither did he accompany them to make their statements.

36. He did not draw a written report himself because once he reported the matter to SIU, and Rajabiu wrote it dawn, nothing written was required from him and he did not see the need for further involvement.

Mr. Andre Lebo

37. The Applicant came to him in order to estimate the amount of materials needed to finalise a job in Sake on a septic tank. He authorised the quantity of the material which was to be collected from the store and the next week the material was issued. Upon the issuance of the material from the store it was the Applicant's responsibility to deliver it to the site and to arrange for the material on daily basis. After Monsi came from leave, he approached him and said that some of the material had been stolen and he was going to inform security. Mr. Lebo was not involved in the investigation.

Mr. Masteki Basake

38. He was in his office with Mr. Rajabu, his supervisor, when Monsi came in to inform them that some materials had been stolen by two people, Shabani and the Applicant. Rajabu told the Applicant and Shabani that if they returned the materials, he would not make a report and that they would not be sacked. They agreed.

39. He drove Rajabu's vehicle with Shabani and the Applicant to the place where Shabani was building his house. He overhead the Applicant ask Shabani, "what

happened to the materials?” They found the building nails, whereas the cement and wood had already been used in the house construction. Shabani showed him where the materials had been used.

40. As they drove back to the office, Shabani and the Applicant were seated behind him, he heard Shabani ask the Applicant to assist him with some money to buy materials that he would refund later. They then went to the market, bought cement and wood. When they returned from the market with the materials and reported to Rajabu, Rajabu called Monsi and showed him the materials. He remembers seeing them inspecting the materials with the Applicant.

41. He cannot recall anything about witnessing the signing of statements by Shabani and the Applicant.

Mr. Rajabu Mmbaga

42. Sometime in July 2014, he was the Officer-in-Charge, Guard Management at MONUSCO. They received information about suspected stolen MONUSCO building materials from an anonymous source who was attached to the United Nations and who provided ongoing security information from outside the United Nations. Shabani was found with the suspected building materials in a building he was constructing at that time. Several bags of cement, timber and some nails were recovered. He doesn't recall Mr. Baseke going to retrieve the material.

43. He was the first one to question Shabani as to what had happened to the building materials. Shabani told him that the materials was supposed to be taken to Sake where they had a project but he decided to divert the material to his place so that he could finish constructing his house in Goma. He decided to find out how the material was removed from the MONUSCO store without the knowledge of supervisors. He therefore contacted Mr. Monsi. Monsi confirmed that the material belonged to the Engineering Section and that he had given him a job request and a gate pass for the material to leave the store. He then returned to Shabani and asked him why it did not reach its intended destination. At the same time, he asked Monsi who was the

supervisor of the Sake project. Monsi mentioned that it was the Applicant who was overseeing the project. He called the Applicant and they had a discussion about how the stolen material was found in Shabani's house.

44. The Applicant admitted to having been involved in the whole thing and asked him for forgiveness. He then asked the Applicant and Shabani to write statements. The statements were in French. His assistant security officer Mr. Baseke was present as a witness since his French was not fluent. He however could speak Swahili with the Applicant and Shabani. Monsi was not present when the voluntary statements were taken from the Applicant and Shabani. The Applicant spoke freely and voluntarily when he gave his statement; he was not intimidated.

45. He compiled his initial report and sent it to the investigators. From that point onward the case was taken over by the investigators. At the time he wrote his email he had the incident report from Monsi, the job request, the gate pass for the exportation of the materials and statements from the Applicant and Shabani.

46. When asked about the incident report, he said that there was a possibility that some documents could be removed from security files. He scanned and attached all the documents and later sent the hard copies to the investigators. At a certain point of the investigation, he got permission from the investigation unit to hand over the material back to Monsi.

47. He did not interview Kandolo. His reference to Kandolo in his email was probably a typographical error.

Mr. Jules Musafiri

48. Mr. Musafiri conducted the investigation on behalf of the SIU. On 9 July 2014, SIU received an email from Rajabu accusing the Applicant and Shabani of stealing MONUSCO construction materials on 26 June 2014. The email was accompanied by two voluntary statements from the two admitting to the theft. In Rajabu's email, he had mentioned that there was an incident report from Monsi. The allegations against the

Applicant were received from Rajabu after a tip-off from an anonymous source and not from Mr. Monsi.

49. The whole investigation was conducted based on the information provided by the two accused and the information from the storekeeper, Kandolo. They also reviewed material requests and issue vouchers from the store.

50. On the second page of the statement that he took from the Applicant in September 2014, the Applicant was talking about the money that he had received from selling the materials on the local market.

51. Shabani, in his statement, claimed that the materials had been sold and the Applicant took a lion's share. The Applicant claimed that he had only received the money for 10 bags. The Applicant later went and bought the materials at the local market to return them to MONUSCO and thus he expected Shabani to reimburse him for his share of money received for the stolen materials. At the last page of Shabani's statement it is said that the stolen materials had already been used by the person who had bought them on the black market. The statement means that Shabani could not return the same material. Thus, the Applicant had to go back to the black market to buy the materials.

52. The Applicant was not stressed when giving his statement. He had been invited by SIU in advance, by email, he was in a good mood, the questions were clear and were in a language of his choice. He called at the SIU, was made aware of the allegations against him, he was shown the statement that he had signed with Rajabu, he was not intimidated in any way. The whole process was transparent and clear.

53. The report's findings indicate that the materials were returned to MONUSCO in the correct quantities. In drawing it he also relied on the email from Rajabu. The galvanized iron sheets and masonry rope were not stolen by the Applicant and this is clearly reflected in the investigation report. The statement was sought from Monsi later in 2015 upon request from the Conduct and Discipline Team (CDT). When Monsi

received a message from CDT requesting him to forward the incident report, Monsi contacted him to see whether he could find the said report.

54. Mr. Kandolo's statement was taken later and was not in the initial list of statements received from Rajabu. Whilst he was copied in the email transmitting the statement from Kandolo, he did not receive it and it might have gotten lost during the migration from lotus notes to the outlook email application.

Mr. Eric Kandolo

55. He had given an interview before Mr. Rajabu but could not recall the date. He forgot everything about the interview. He had received part of the material but what part he did not remember. He is no longer employed by the United Nations.

Mr. Peter Ndugutu

56. He sent an email alleging that the Applicant was set up or framed.

57. He has known the Applicant since 2008 when he was first deployed to Goma. He picked him up from the group of daily casual workers as an unusually capable individual. He therefore began giving the Applicant more responsibilities. The Applicant came out top in the tests for recruitment of construction foremen. At the time, he was a United Nations Volunteer (UNV) Civil Engineer and took the Applicant on his team. For the three years when he worked as the Applicant's supervisor, the Applicant was responsible for a lot of the materials and at no point did he ever find anything missing. When he was away on leave, he would delegate to the Applicant the running of the storage and there has never been any incident of loss of materials. Within the five years that he had known the Applicant, there was no incident to suggest that the Applicant could be involved in any irregularity. He could not believe that the Applicant could be involved in the current incident since he had entrusted the Applicant

with a lot more than the materials in the present case. That is why he felt there was something unusual with this incident.

58. The other reason he believes that the Applicant may have been set up was the involvement of Shabani. He had also known Shabani since 2012. At that time Shabani worked as a temporary administrative clerk in the office. There were a lot of confidentiality issues involving Shabani. Documents used to leak and at one point there was an exam which leaked and had to be cancelled. Shabani was implicated. When they got another administrative officer they immediately released Shabani because they did not want any more confidentiality breaches. He moved to Goma where he continued to work with Monsi. Shabani had an unusual relationship with Monsi because even over the weekends they could be found together and Monsi would use him as his driver. It was not clear why an individual contractor would be hanging out with his supervisor over weekends.

59. In 2014, when the incident at bar occurred, he was MONUSCO's Operations Officer based in Goma. He was overseeing the 11 field offices of MONUSCO of which Goma was a part. He was supervising the project at Sake, he would issue instructions to Monsi but he was not involved in the issuance of materials.

60. The procedure for the issuance of materials is such that when the project is designed, he has to clear the project proposal. His office had to approve the project design/ proposals, human resources etc. His office was more supervisory and had to track any discrepancies. This particular incident did not come to his attention immediately because he came to know about it in early July 2014. He was not involved in the daily issuance of materials which was done by the store keeper. At his level, he would only be informed if materials were not available in which case he would source the materials from other warehouses. He could remember what materials were missing because when the issue came about the Applicant told him what he was accused of and

the materials were of such low value compared to with what he had entrusted the Applicant.

61. He wrote an email to Mr. Gabriel Bora, Chief Engineer, his direct supervisor, informing him that the Applicant had been “fixed” because some of the materials were found in Shabani’s compound and some of the materials had been used to construct Shabani’s house. Monsi chose not to sanction Shabani and shifted the blame entirely onto the Applicant. He knew that the materials were found at Shabani’s house from the Applicant.

Applicant’s case

62. The Applicant reiterates the version of events as narrated in his testimony before the Tribunal. He prays the Tribunal to find that he did not commit misconduct and to grant him the following reliefs:

- a. Reinstatement to his position;
- b. Payment of all his salaries from January 2016 to the date of judgment;
- c. Compensation for the damage to his reputation arising as a result of this unlawful decision.

Respondent’s case

63. The facts are established by clear and convincing evidence.

- a. The Applicant admitted on two separate occasions during the investigation that he took, without authorization, together with Mr. Shabani, construction material that belonged to the Organization. His admissions were clear as to his participation in the matter and left no room for ambiguity and he could not reasonably have been mistaken as to the facts underlying his admission. The Applicant’s contention that Shabani alone was responsible for misappropriating the building material and used it for construction at his

residence and was the one responsible for selling all the bags of cement was only raised after allegations of misconduct were issued against him and after he had first admitted to the conduct on two separate occasions.

b. The Applicant's submissions were corroborated by two statements given by Shabani who admitted that he and the Applicant appropriated the material together. The Applicant's version of events as put forth in his response to the allegations of misconduct and in his application lack credibility and is at odds with statements of Shabani.

c. The fact that the Applicant decided to restore to the Organization material equivalent to that which was taken further points to his involvement in the matter. The Applicant could not explain why he, together with Shabani, would have replaced the material and brought it back to the Mission if he had not been responsible for its theft in the first place. In this regard, the Applicant's allegation that a number of Mission staff—including Monsi, Kandolo, Mmbaga and Musafiri, were all colluding against him, was not supported by any evidence.

d. The disciplinary process conducted under Chapter X of the Staff Rules and ST/AI/371 (Revised disciplinary measures and procedures) has concluded and the Applicant is barred from raising new means of defence against the allegations formally issued against him.

e. According to the Applicant, after he had caught up with Shabani, he did not check the contents of the truck and only once they reached the site, he noticed that material was missing. He questioned Shabani about it, but received no explanation from him. When asked why he would accept such lack of response from a person under his supervision, the Applicant initially could not provide an answer, except stating that it was "complicated". Upon further questioning, the Applicant changed his story, stating that Shabani had told him that he needed the material. However, the Applicant conceded that he accepted

Shabani's lack of explanation and did not ask Shabani further questions about the matter.

f. In this regard, the Applicant himself confirmed that he, as the site supervisor, was responsible for the material. Even if accepted that Monsi was friends with Shabani—and Monsi denied it - this does not explain why the Applicant did not report the matter through other channels. The Applicant's claim that he did not do so because both Lebo, who was Officer-in-Charge during Monsi's absence at the time, as well as staff members of the SIU, were all friends with Monsi, lacks credibility, given that it assumes that these individuals for personal reasons would violate their professional obligations with respect to reports of possible misconduct. The Applicant was also unable to provide a credible explanation why he would not have reported the matter to Ndugutu, Monsi supervisor, with whom the Applicant had a good relationship or through the normal channels, including the SIU, the Mission's Conduct and Discipline Team or the Office of Internal Oversight Services.

g. Shabani testified that he had taken the material and that the Applicant had not been involved. However, his testimony appeared rehearsed and his account of events was internally inconsistent and contradictory. Without prompting, he immediately assumed all responsibility for the taking of the materials but could not provide a coherent response when asked specific questions. For example, he was not able to explain why he would have implicated the Applicant in his two statements, except stating, without providing particulars, that he had been forced to do so by Monsi. Shabani's answers were evasive and his demeanour was not that of a witness who speaks truthfully; he appeared nervous and became aggravated when probed by the Tribunal.

64. The Applicant's claim that he was forced to give the statements is not credible.

a. According to the Applicant, Monsi and Rajabu Mmbaga, acting together in Mmbaga's office, pressured him to write the statement admitting his role in the taking of materials and apologizing for it. However, when testifying, both Monsi and Rajabu Mmbaga denied having done so.

b. Rajabu Mmbaga testified that Monsi was not present when the voluntary statement was being taken, explaining that this would have been against the rules and that only his Security Assistant, Baseke, had been in his office. The presence of Baseke is confirmed by the fact that he signed the statements of the Applicant and Shabani as a witness. When asked why the Applicant and Shabani in their statements apologized to Monsi, Rajabu Mmbaga explained that both had wanted to seek Monsi's forgiveness, given that he was their supervisor. Rajabu Mmbaga also confirmed that the Applicant gave his statement freely and had not been intimidated in any way.

c. The Applicant also provided shifting explanations as to why Monsi would have pushed him to confess to stealing the building material. He first alleged that Monsi was a good friend of Shabani and wanted to protect him. When it was pointed out to the Applicant that this assertion was implausible given that he had implicated Shabani in his statement, he changed his story to state that Monsi acted not to protect Shabani but to harm the Applicant. However, the Applicant failed to substantiate this claim, including providing a reason why Monsi would have wanted to do so. On the contrary, Monsi testified that he had a good working relationship with the Applicant and that he had assigned the Applicant to his position of a site supervisor for the Sake water treatment plant.

d. The Applicant's claim that his second statement of 10 September 2014 - in which he again admitted to taking the material together with Shabani and selling some of it to a third person - was incorrectly recorded by the SIU

investigator, Musafiri, and that he signed it because he was “stressed”, lacks credibility. The Applicant was unable to explain why he would have been stressed or confused, more than two months after giving his first statement, to the extent that he was unable to read his statement and ensure that it was correct before signing it.

e. Musafiri’s testimony belies any unusual stressing or intimidating factor during the interview.

f. In sum, there is no indication that the Applicant was forced on two occasions, two months apart, by different individuals, to give statements in which he admitted to taking the building materials together with Shabani.

65. The established facts legally amount to misconduct. In taking building materials belonging to the Organization, the Applicant failed to uphold the highest standards of integrity expected of an international civil servant, in violation of staff regulation 1.2(b). He also violated staff regulation 1.2(q), which provides that staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

66. The sanction is proportionate to the established misconduct.

a. In determining the appropriate sanction in the Applicant’s case, the USG/DM noted, among other things, that the Organization’s past practice in disciplinary matters indicates that cases such as the present normally result in the cessation of the employment relationship.

b. The fact that the Applicant replaced some of the material he took operated as a mitigating factor in his case. Accordingly, a sanction of separation from service with compensation in lieu of notice and without termination indemnity was imposed on the Applicant.

67. The Applicant's due process rights were respected throughout the investigation and disciplinary process.

Considerations

Standard of review

68. As the starting point the Tribunal recalls that as per the UNAT full bench holding in *Applicant*, “[j]udicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.”⁹ The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable.¹⁰ In its jurisprudence since *Applicant*, the UNAT has maintained that this is not the role of the UNDT to conduct a *de novo* review of the evidence and place itself “in the shoes of the decision-maker”¹¹, as well as that the definition of “judicial review” articulated in *Sanwidi* retains actuality in disciplinary cases:

During [its] process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.¹²

⁹ *Applicant* 2013-UNAT-302 at para 29, citing to *Messinger* 2011-UNAT-123, presumably in that “it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations”, and confirmed since in *e.g.*, *Nyambuza* 2013-UNAT-364, *Diabagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486, *Mayut* 2018-UNAT-862 para 48,

¹⁰ *Bagot* 2017-UNAT-718 at para. 46 citing *Mizyed* 2015-UNAT-550, para. 18, *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; *Molari* 2011-UNAT-164, paras. 29 and 30.

¹¹ *Wishah*, 2015-UNAT-537, para. 21 and 23.

¹² See *Ouriques* 2017-UNAT-745 para 14 and 15, citing to *Sanwidi* 2010-UNAT-084.

69. This said, the Tribunal is mindful of one of the recent judgments by UNAT in *Mbaigolmen* where a preference has been expressed for making determinations of misconduct in a hearing, especially in cases resulting in termination.¹³ This Tribunal has earlier noted practical difficulties in having the hearing as a the principal tool of fact-finding, including the unfortunate but inescapable reality of a lag between the incidents and the time when the cases reach the Tribunal and the fact that the UNDT has no subpoena nor sanctioning power over non-employees. When non-employees appear before the UNDT, they do it on their own volition and veracity of their testimony is secured only by a declaration on “honour and conscience” but not under any institutional sanction. As such, this Tribunal takes it that *Mbaigolmen* confirms an authorisation and not the obligation for the UNDT to carry out a re-determination and to seek evidence under certain circumstances. The exercise of this authority is to be guided by what is necessary to determine the disputed and doubtful material facts in view of a readily available evidence, without, however, placing the UNDT “in the shoes” of the entity responsible for discharging the burden of proof. The function of the Respondent in properly conducting the investigation and litigation rests at the crux of the matter.¹⁴

Whether relevant facts were established by clear and convincing evidence

70. With the facts admitted and undisputed regarding the materials for the Sake construction project having been issued on 26 June 2014 and subsequently misappropriated by Georges Shabani, in the quantity established in the impugned decision, the question before the Tribunal was to determine whether the Applicant’s involvement was correctly established. Considering the admitted and undisputed facts, the main issue was whether the Applicant would have been responsible only for not

¹³ *Mbaigolmen* 2018-UNAT-819, at paras. 26 and 27.

¹⁴ See *Ricks* UNDT/2018/090, at para. 62.

reporting the misappropriation of the materials by Georges Shabani or whether he would have acted as accomplice.

71. The case at bar confirms observations cited in the preceding section about the limited import of the hearing before the Tribunal and the importance of a thorough, professional investigation. The Tribunal undertook to hear all persons implicated in the case. It has found, however, that the testimony adduced in the hearing was not of much assistance, given the discrepancies between the testimony and the earlier statements as well as a degree of contradictions between different individuals. Some of the discrepancies might be attributed to the lapse of time, some to an effort to misrepresent certain facts.

72. Specifically, before the Tribunal Mr. Monsi presents himself as the one who informed MONUSCO Security of the missing material while Mr. Rajabu maintains that the source of information had been his informant; an initial incident report which Mr. Monsi had allegedly made, is nowhere to be found. Moreover, Mr. Monsi denies having any involvement in the inquiry by MONUSCO Security whereas the first statements of the Applicant and Shabani indicate that he had a role; also Shabani's second statement mentions that Mr. Monsi had "followed the case". Mr. Baseke, a witness proposed by the Applicant, recounts details of the trip with the Applicant and Georges Shabani to recover the materials, including that the Applicant had lent Shabani some money to buy the equivalent of the stolen cement. He, on the other hand, claims to not remember witnessing their first statements, a circumstance confirmed by his signature, by the testimony of Mr. Rajabu with his plausible explanation that he needed Mr. Baseke's assistance as a French-speaking person, as well as inherently probable given Mr. Baseke's function as security assistant. As concerns Mr. Kandolo, he in the investigation denied having obtained any material whatsoever, a circumstance belied by all the remaining evidence. At present, however, he is no longer employed by the United Nations. He was inclined to admit that he had received a part of the material; he could not remember any details though. Mr. Kandolo, therefore, has not been found credible.

73. Statements from the Applicant and Shabani are the only direct evidence regarding the Applicant's involvement in the incident. Before the Tribunal, both the Applicant and Georges Shabani significantly changed their versions in the direction of exonerating the Applicant as much as possible. The Tribunal finds the testimony of Georges Shabani not credible given the drastic shift in his account of the events, from blaming the Applicant as the initiator, organiser and the one who profited the most from the misappropriation, to claiming that the Applicant had not been aware of it and from claiming to have been promised protection by Mr. Monsi to claiming that he had been forced by Monsi to falsely implicate the Applicant. Moreover, the testimony of Georges Shabani at hearing differs from that of the Applicant: while the Applicant testified that after Shabani's departure with the materials he caught up with him *en route* by a motorbike taxi, Shabani maintains that he had deposited the stolen materials at his house and returned to Goma pick up the Applicant. This circumstance is not material for the question of the Applicant's responsibility but, given that either of the witnesses insisted on his version, the discord indicates that the story was concocted.

74. The Tribunal regrets that statements taken from the Applicant and Georges Shabani on two occasions are lacking detail, this cursory approach to investigation enabling the present reinterpretation of statements on the record. The Tribunal accepts, however, that these statements convey admission to participation in the misappropriation of the materials by the Applicant. The Tribunal concedes that the first time around the admissions could have been, to some extent, induced by a promise of impunity, which is implied in the statements as such: "si le meme erreur se repete[s] dans l[es jours] avenir la securite prendra sa responsabilite et je serais chasse du travail". It notes, moreover, that the first statement by the Applicant, while admitting responsibility, is quite general and impersonal, and does not determine the mode of his participation in the impugned venture. At the same time, the Tribunal finds it is implausible that the Applicant would have admitted to misconduct in which he had had no part. It further agrees with the Respondent that it would be entirely unreasonable, and is thus improbable, for the Applicant to have admitted to have participated in the misappropriation of the material for the second time, before a different individual,

when it was obvious that the case had been forwarded for investigation, thus the promise of impunity was unfulfilled.

75. Absent evidence to the contrary, the Tribunal accepts as true the Applicant's consistent contention that he had no role in disposing of the cement, the timber and the nails, and that this was a doing of Shabani, who had identified a client and had taken the unsold material for the use at his house. The Tribunal finds, however, that the Applicant accepted USD150 on account of the half of the misappropriated cement, the fact evidenced not only in his second interview before the SIU but also reiterated in his response to the allegation of misconduct, reproduced above in paragraph 13. The latter is explicit in that the Applicant accepted USD150 for the 10 bags of cement from Shabani not on 8 July 2014 on the occasion of purchasing the equivalent of misappropriated materials in order to return them to MONUSCO, but, rather, at the time when the material had been misappropriated. The explanation that the Applicant offered, namely, that he had demanded from Shabani the equivalent of half of the misappropriated cement because he had wanted to buy and return the materials, but waited because the "situation in the country", is entirely implausible. Had the Applicant indeed intended to replenish the misappropriated material he could have undertaken to retrieve unsold items immediately. Moreover, it would have been rational to demand the whole worth of the cement sold, not just half; accepting half clearly indicates that it was the Applicant's share in the venture. This conclusion is not contradicted by the testimony according to which Shabani would have shown he Applicant and Mr. Baseke the cement he had used on his house, as the cement after use is not recognisable.

76. The Tribunal further concurs with the Respondent's observations concerning the discrepancies in the Applicant's statements about his communication with Shabani regarding the missing material. The Applicant first maintained that he had questioned Shabani about it, but received no explanation from him; then he claimed that Shabani's answer had been that he had needed the material; finally, in his response to the allegation of misconduct, the Applicant claims to have had a "very big discussion" with Shabani. This shifting story indicates untruthfulness.

77. In conclusion, the Tribunal is not persuaded by the Applicant's and Shabani's testimonies in the hearing. On the other hand, based upon the two earlier statements of the Applicant and the testimony of Mr. Musafiri, the Tribunal is satisfied that the Applicant partook in the misappropriation of the material, which belonged to the Organization, and for which he was responsible, by not reporting its misappropriation and, instead, by accepting the value of the 10 bags of cement.

Whereas the facts amount to misconduct

78. Considering the aforesaid, the established facts legally amount to misconduct, in violation of staff regulation 1.2(b).

Whether the sanction is proportionate

79. The Secretary-General has wide discretion in determining the appropriate disciplinary measure. It is only if the sanction appears to be blatantly arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, or discriminatory that the judicial review would conclude its unlawfulness and impose a different one. The Tribunal does not find the measure imposed in this case disproportionate.

Conclusion

The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 2nd day of January 2019

Entered in the Register on this 2nd day of January 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi