



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LADU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adjovi

Counsel for the Respondent:

Matthias Schuster, AAS/ALD/OHR

Susan Maddox, AAS/ALD/OHR

Introduction and Procedural History

1. The Applicant is a former Security Officer with the United Nations Mission in South Sudan (UNMISS). He served on a fixed-term appointment at the G-3 level, and was based in Juba.

2. On 20 July 2016, the Applicant filed an application with the United Nations Dispute Tribunal (UNDT) in Nairobi, challenging the Respondent's decision to summarily dismiss him for misconduct. The Application was registered as UNDT/NBI/2016/052.

3. The Respondent filed his Reply to the Application on 17 August 2016.

4. On 9 September 2016, by way of Order No. 430 (NBI/2016), the parties were invited to submit their views on the possibility of this matter being transferred to the docket of the UNDT in New York. Neither party objected to the transfer.

5. On 21 September 2016, the Tribunal issued Order No. 439 (NBI/2016) transferring the case to the UNDT in New York, where it was registered as UNDT/NY/2016/044.

6. On 11 April 2017, the parties were invited to attend a case management discussion (CMD), which was subsequently held on 20 April 2017.

7. Between May and July 2017, the parties filed joint submissions as directed by the Tribunal and a complete list of witnesses who would testify.

8. The parties attended another CMD on 12 October 2017, during which discussion the UNDT in New York informed the parties that it was "minded to order a change of venue of the proceedings to Geneva or Nairobi" given the scope of the case and the location of the witnesses.

9. On 1 November 2017, the UNDT in New York issued Order No. 243 (NY/2017) transferring the matter back to Nairobi.

10. The case is now registered as UNDT/NBI/2017/101.

11. A CMD took place on 11 April 2018. Both parties indicated that they were ready to proceed to an oral hearing of this matter.

12. The matter was heard on 13 and 14 June 2018.

Facts

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

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

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

Captain who was supervising the dismantling of the former IDP shelters that he was authorized to take broken bamboos.

16. That afternoon, Mr. Parakiti went to the GFU and asked Ms. Boit for a form for gate pass authorization which he needed to fill out and to have signed to enable him to take the broken bamboo out of the UNMISS premises. Mr. Parakiti filled out the form in which he indicated that he was taking broken bamboos but on being asked by Ms. Boit if he was certain he was only removing broken bamboos; he told her that he would also take broken tiles. Upon her insistence, he filled out a new gate pass indicating he would remove broken bamboos and broken tiles and Ms. Boit signed it.

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

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

told Mr. Amoli they were only loading broken tiles which they were authorized to do into the truck and that he would help to search for the missing freight containers later.

19. About 370 boxes of new Rocconite 24' x 24' tiles were loaded into the truck. Also, loaded into the truck were some 18 sheets of plywood, three hollow concrete blocks, one rechargeable lamp, one black 100-litre barrel with tap, one white bucket, one wheelbarrow, two floor mats, one standing fan, nine roofing metal sheets and 18 sheets of plywood. A tarpaulin was placed over the tiles and other materials in the truck to conceal them and some broken bamboos placed on top as camouflage. The truck was then driven to the UNMISS gate to exit while Mr. Parakiti drove up to the same gate on a motorcycle to ensure the truck exited the UNMISS premises successfully.

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

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

22. The Applicant was formally notified of allegations of misconduct against him by a memorandum dated 22 July 2015 which was delivered to him by hand on 24 July 2015 with a copy of the investigation report and all related annexes for his comments.

The Applicant signed for receipt of these documents. When on 5 August 2015, the Applicant requested a 2-week extension of time by email to submit his comments, this was granted. The Applicant did not meet the deadline and was allowed a further week. He finally sent his comments by email on 31 August 2015.

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

Case for the Applicant

24. The Applicant does not challenge the facts of the case but challenges the procedure and the conclusions reached by the Respondent. Only the investigation report was given to the Applicant for his comments. He is not a lawyer and did not have legal assistance when he made his comments. For this reason, it is submitted that the Applicant's right to a fair procedure was not respected by the Respondent.

25. The investigations did not establish that any container was broken and there was no evidence connecting the Applicant to the status of the containers. The investigation witnesses played an active part in the alleged offence and are properly accomplices but much weight was given to their evidence while the Applicant was disbelieved.

26. It was not established that it was part of the duty of the Applicant to control other security officers at the POC Site. He was patrolling the POC Site and helped his colleague who had authorization to load some items into the truck under the guidance of that colleague.

27. The Applicant was only negligent since many security guards took advantage of the opportunity to take some unauthorized items for themselves without fully

assessing the situation. Moreover, there was no attempt to hide the new tiles in the truck since some witnesses could see them without any prior search.

28. There is no evidence of premeditation or intent to steal on the part of the Applicant.

29. There is evidence that the materials at the POC Site were garbage. Mr. Mwinzi testified that the containers were broken into and the contents littered around. Taking things from a garbage site cannot be theft.

30. Mr. Parakiti's recanted testimony shows that two international security officers from Kenya organized the removal of items using local staff members as intermediaries.

31. The Respondent has not established through clear and convincing evidence that the Applicant had committed misconduct.

32. Both the disciplinary procedure and its outcome were flawed. The disciplinary sanction is disproportionate. The Respondent did not consider any mitigating circumstances such as the Applicant's ten years of unblemished service.

Remedies sought

33. The Applicant requests that his dismissal be rescinded by the Tribunal.

34. If he cannot be reinstated, the Applicant demands payment as follows: (a) two years' salary with all allowances for loss of employment; (b) one years' salary as compensation for violation of his due process rights; and (c) full payment of the remaining months of his contract which ended on 30 June 2016.

The Respondent's case

35. The facts are established by clear and convincing evidence. It was established that the Applicant participated in the removal of certain building materials and other property belonging to the Organization without authorization. He loaded new/unused

tiles into a private truck driven by Mr. Woldemariam on 2 January 2015. This piece of evidence is supported by the witness statements of Mr. Parakiti, security guards Ms. Nunu and Mr. John, Mr. Amoli and the Applicant's own admission to investigators and in his comments to the allegations of misconduct.

36. The Applicant knew that he was participating in the taking of the properties without authorization. The gate pass showed that Mr. Parakiti was only authorized to take broken bamboos and broken tiles. Mr. Parakiti told investigators that the Applicant asked if he could take some of the tiles for himself and the Applicant admitted that as part of his duty, he requested for and saw the gate pass brought by Mr. Parakiti.

37. The Respondent considered the Applicant's comments as well as the statements of all those who participated in the unauthorized removal of the building materials.

38. The status of the containers or the matter of who it was that broke into them is not relevant to this case. Also, irrelevant is whether any efforts were made to hide the building materials in the truck.

39. The Applicant's actions in not only permitting but assisting Mr. Parakiti to remove unauthorized building materials from the POC Site was reckless or grossly negligent in his duty as a Security Assistant.

40. The facts established against the Applicant legally amount to misconduct under staff regulations 1.2(b) and 1.2(q) because he had failed to uphold the highest standards of integrity as required by the legislation.

41. The disciplinary sanction imposed on the Applicant is proportionate. The Respondent also considered both aggravating and mitigating factors in the case. As a Security Assistant, the Applicant's position entailed special trust and responsibility. His length of service cannot serve as a mitigating factor.

42. The Applicant was accorded his due process rights throughout the investigations and disciplinary process. There is no evidence that he was not.

Considerations

Issues and Considerations

43. Three principal issues arise for determination in this case. The first is whether a case of misconduct was established against the Applicant by clear and convincing evidence, whether the Applicant's due process rights were respected during the investigations and disciplinary proceedings and, thirdly, whether the disciplinary sanction was disproportionate.

Was a case of misconduct established against the Applicant by clear and convincing evidence?

44. In *Molari* 2011-UNAT-164, the Appeals Tribunal explained the standard of proof in disciplinary cases as follows:

Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

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

46. In his own sworn testimony at the Tribunal, the Applicant told the Tribunal that on 2 January 2015, (the day of the incident leading to this case) another Security Assistant Mr. Parakiti came to him and told him that he had authorization or a gate pass to collect broken bamboos and broken tiles from the POC Site where shelters that formerly housed the IDP had been dismantled. The Applicant was on security duty and

was patrolling the POC Site with two security guards from a private security company, Mr. John and Ms. Nunu.

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

48. It is in evidence that afterwards, the truck with its loaded contents was driven to the UNMISS main gate to exit the premises. Upon inspection, it was discovered that the materials in the truck included 370 boxes of new tiles of the Rocconite brand valued at \$5,550, 18 sheets of plywood valued at \$360 and three hollow concrete blocks valued at \$4.80. Also among materials loaded into the truck were one black 100-litre barrel with a tap, one white bucket, one wheelbarrow, two floor mats, one standing fan, nine roofing metal sheets.

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

50. When Mr. Parakiti was called by the Respondent to testify before the Tribunal, he recanted his admission to the stealing of the building materials in issue. Instead, he told a different story of how he was procured by his former supervisor Mr. Mwinzi,

who had also supervised the Applicant, to steal the boxes of new tiles for him. He continued in his testimony under oath that the Applicant did not participate in the loading of the new tiles into the private truck he brought for that purpose and that he lied to investigators when he told them the Applicant participated. Mr. Mwinzi who had testified to the Applicant's good character denied any involvement with the stealing of the materials from the POC Site.

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

52. Mr. Parakiti's newly-minted story about being a victim in a plot to steal United Nations property masterminded by his former supervisor is as false as it is desperate. While Mr. Parakiti is not the Applicant in this case, he had made up his mind to use the opportunity of his sworn testimony lie and to implicate his former supervisor Mr. Mwinzi. Both his demeanour at the Tribunal's oral hearing of the case and the testimony he tendered show Mr. Parakiti is not a witness of the truth. The Applicant has been unwavering in his admission that he participated in loading the stolen materials into Mr. Parakiti's truck.

53. The Applicant's counsel sought to urge upon the Tribunal that the Applicant had a poor understanding of the English language and that this would have affected his understanding of what was authorized on Mr. Parakiti's gate pass. The records show that the Applicant never made such a claim to investigators nor did he do so in his testimony at the hearing and it is highly embarrassing that counsel would seek to introduce what amounts to evidence that contradicts his client's position. The

Applicant has repeatedly stated that he knew that authorization was given only for the removal of broken bamboos and broken tiles.

54. Counsel further argued that the new boxes of tiles and other building materials that were taken from the POC Site without authorization by the Applicant and others on 2 January 2015 were all garbage and not capable of being stolen. The logical conclusion to counsel's argument is that the Applicant, a United Nations Security Assistant, was posted to the POC Site on 2 January 2015 to protect garbage!

55. The Applicant's counsel also submitted that it was not established that any containers were broken or that the Applicant had any connection to the status of the containers from which the new tiles were stolen. He continued that it was not the duty of the Applicant to control other security guards at the POC Site and that he had only helped a colleague who had authorization to load items into the truck "under the guidance of that colleague." He further submitted that the Applicant was only negligent and had no intention to steal.

56. It needs be underscored that the status of the containers was never at issue in this case and that the Applicant himself testified that it was his duty to protect UNMISS' property including all the property at the POC Site and that he had responsibility to check and verify if anyone was trying to remove any properties from the Site. Surely the protection of UNMISS property at the POC Site by the Applicant included preventing or stopping anyone, including other security guards, who would try to take them away without authorization. It also follows that the Applicant was not to help his colleague, "under the guidance of that colleague" to steal UNMISS properties.

57. Some of the arguments and submissions of the Applicant's counsel summarized above are not only preposterous but scandalous and do not serve to advance or help the case of the Applicant. Relevancy is the hallmark of evidence. It is also the principal standard by which the facts of a case presented to the Tribunal are evaluated or reviewed. This Tribunal must observe that the duty to provide legal representation for

a party must be approached with a sense of responsibility and candor. The legal representative of a party is an officer of the Tribunal and while he has a duty to protect his client's interest, he must preserve his own integrity and that of the Tribunal by refraining from making ridiculous and scandalous submissions.

58. The Tribunal finds that the undisputed facts in this case establish that the Applicant, and others, on 2 January 2015, committed misconduct by removing building materials and household properties belonging to the Mission without authorization. The Tribunal also finds that the case of misconduct against the Applicant was established by clear and convincing evidence.

Were the Applicant's due process rights respected during the investigations and disciplinary proceedings?

59. In the Applicant's pleadings, he contends that he was not formally notified of the charges against him and that he was only given the investigation report for his comments. Moreover, he did not think of securing legal assistance when he prepared his comments. In his closing statement, it was argued that the Applicant had low education and limited understanding of the English language. These factors, it was submitted, meant that the due process rights of the Applicant were not respected.

60. During the hearing, the Applicant admitted that he received the memorandum which set out the allegations against him. The memorandum also informed him of his right to seek advice from the Office of Staff Legal Assistance (OSLA). The Applicant gave sworn testimony in English at the oral hearing, which the Tribunal found satisfactory. The Tribunal therefore finds that poor knowledge of the English language was never a factor during the disciplinary process. Nor is the Tribunal persuaded that the Applicant's understanding of the proceedings against him was wanting. There were, the Tribunal finds, no breaches of the Applicant's due process rights during the investigation and disciplinary process.

Is the disciplinary sanction of dismissal disproportionate in this case?

61. The role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.¹

62. The degree of the sanction is usually reserved for the Administration, who has discretion to impose the measure that it considers adequate to the circumstances of the case and to the actions and behavior of the staff member involved.²

63. The Appeals Tribunal has previously made findings on staff members whose occupations within the United Nations system place them in “positions[s] of trust” and held that a breach of that trust impacts negatively “on the issue of proportionality.”³ The Tribunal finds that security officers within the United Nations system similarly occupy positions of trust, charged as they are with the protection of personnel and property of the United Nations.

64. The Tribunal has considered the past practices of the Respondent in disciplinary matters and finds that in established cases of theft, the sanction is usually severe. The sanction of dismissal from service in this case accords with the Respondent’s usual practice.⁴ The Tribunal will not interfere with it.

Conclusion and Judgment

65. This Application fails.

¹ *Masri* 2010-UNAT-098.

² *Portillo Moya* 2015-UNAT-523. *See also* S. Nourain & A. Nourain 2013-UNAT-362; Cabrera 2010-UNAT-089; *Koutang* 2013-UNAT-374.

³ *See Jaffa* 2015-UNAT-545; *see also Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 2013-UNAT-29, *Sanwidi* 2010-UNAT-084.

⁴ *See Jahnsen Lecca* 2014-UNAT-408.

Case No. UNDT/NBI/2017/101

Judgment No.: UNDT/2019/032

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of February 2019

Entered in the Register on this 26th day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi