



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/24

Judgment No.: UNDT/2010/096

Date: 21 May 2010

Original: English

Before: Judge Boolell
Registry: Nairobi
Registrar: Jean-Pelé Fomété

WOLDESELASSIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
AGAINST A SUMMARY DISMISSAL**

Counsel for applicant:

Self-represented

Counsel for respondent:

Elizabeth Brown, Senior Legal Officer, Legal Affairs Section (LAS), UNHCR

Mehreen Afzal, Associate Legal Officer, LAS, UNHCR

Introduction

1. The Applicant, a former staff member of the United Nations High Commissioner for Refugees (UNHCR), is contesting an administrative decision, dated 21 November 2007, to summarily dismiss him for serious misconduct. The charges were based on the ground that the Applicant “behaved inappropriately as a UNHCR staff member by having stolen an official printer from the Field-Office Jijiga, Ethiopia”.

The facts

2. The Applicant has worked for UNHCR at the Field-Office Jijiga, Ethiopia (hereinafter “FOJ”) in several positions since February 1989, initially as a Storekeeper under a Special Project Contract (SPC) until 31 January 1995. From March 1995 to July 1996, the Applicant worked as a supervisor at Block Hollow Production, a private company, thereafter he was re-hired by UNHCR as a Storekeeper under another SPC as of August 1996 through the end of 1996. The SPC was later converted to a short-term appointment in January 1997 at the GL-3. After completing his studies, the Applicant rejoined UNHCR in April 1999 as a Secretary at the GL-3 on a short-term appointment until the end of 2005. In January 2006, the Applicant was appointed as a Finance Assistant at the GL-4 on an indefinite contract.

3. In mid-2005, following a mission and recommendations by the Asset Management Unit at Headquarters in Geneva, the Regional Liaison Office (RLO) in Addis Ababa sent technical staff on two occasions, in October and December 2005, to the FOJ, to identify and arrange for the disposal and relocation of assets and inventories stored at the former Logistics Support Unit (LSU) compound. In December 2005, a quantity of heavy-duty vehicles and spare parts were donated to the Government of Ethiopia, while a further lot of inventories, including the “NFIs” (referring to 6, 925 blankets and 5, 628 jerry cans), were handed over to the FOJ.

4. On 5 December 2005, the Assistant Programme Officer, at the request of the Associate Protection Officer and the then-Officer-in-Charge, took over the receipt of spare parts for water equipment, a Toyota Land Cruiser with machinery and NFIs from the outgoing Senior Storekeeper at the LSU.

5. At the time, the Applicant was responsible for the NFIs, various heavy machinery spare parts, as well as the inventory of office items. Until the end of 2005, when his post was cut, the Applicant who was a storekeeper at the time kept the keys for both the Rub Hall and the stores.

6. On 27 November 2006, plastic sheets were reported to be missing from the Rub Hall.

7. On 7 December 2006, the Inspector General's Office (IGO) received a complaint involving a loss of UNHCR assets in the FOJ. The complaint targeted a senior national staff member, since separated.

8. On 2 July 2007, the IGO issued its report. The report found that the Applicant, was involved in the theft of a printer bar-coded as "328260" in October 2006, an asset belonging to UNHCR. It also found that the Applicant, either alone or with another person or persons, was involved in the theft of UNHCR assets, namely: (i) a "big water pump" and motor vehicle spare parts in 1994/95; (ii) two generators and two water pumps in 1997; (iii) one printer bar-coded as "328260" in October 1996; and (iv) one starter, one generator and one Air Conditioner compressor from UNHCR motor vehicle Toyota Land Cruiser with number plate UN 0784 between 1 January 2007 and 23 March 2007 inclusive. The Applicant was also found to have taken in late 2006 a UNHCR laptop computer out of the office without due authorization and later lied about its real status; that the Applicant had failed to inform UNHCR of his arrest and detention in 1997 in the personal history form dated 21 April 1997; and that he had admitted to have stored on the UNHCR computer pornographic materials. The initial investigation concluded that the Applicant's conduct was inconsistent with

his obligations under the UN Staff Regulations and Rules, and other administrative issuances.

9. On 12 July 2007, the Applicant received a letter from the Division of Human Resources Management (“Charges letter”) concerning allegations of misconduct against him. The Applicant was also provided with a copy of the preliminary investigation report issued by the IGO, dated 2 July 2007.

10. On 8 August 2007, the Applicant admitted that he had stored three pornographic files on his office computer but denied all the other allegations of misconduct, including having stolen an official printer from the FOJ.

11. On 24 October 2007, the Legal Affairs Section (LAS) of UNHCR at Headquarters recommended to the Director of the Division of Human Resources to summarily dismiss the Applicant for serious misconduct on the grounds that the Applicant had been found to have (i) stolen a printer from the FOJ; (ii) temporarily removed an office computer from the FOJ; (iii) and stored three pornographic files on his office computer.

12. On 21 November 2007, the Division of Human Resources endorsed LAS’ recommendation and separated the Applicant without notice for serious misconduct on the basis that he had stolen a printer belonging to UNHCR.

13. On 13 December 2007, the Applicant appealed the decision to summarily dismiss him to the Joint Disciplinary Committee (JDC) in New York. On 15 January 2008, he submitted additional documentary evidence at the JDC’s request.

14. On 8 February 2008, the JDC Secretariat transmitted the additional documents to the Respondent, who was requested to provide his reply by 10 March 2008.

15. On 13 March 2008, the JDC Secretariat transmitted the Respondent’s reply to the Applicant.

16. On 24 June 2009, the Applicant was informed that his case would be transferred to the United Nations Dispute Tribunal (UNDT) as of 1 July 2009 in accordance with resolutions 62/228 and 36/253 on the introduction of a new system of administration of justice. The case was transferred to the UNDT in New York on 10 July 2009.

17. On 5 November 2009 the Applicant was informed that his case had been transferred from the UNDT in New York to the UNDT in Nairobi and that the review of his case was being finalized.

UNDT Proceedings

18. On 11 January 2010, the Tribunal provided the parties with pre-hearing guidelines. The hearing was subsequently held on 28 January 2010. However, due to technical difficulties with the telephone connection between Kenya and Ethiopia, the hearing was adjourned and reconvened on 16 February 2010 during which the parties called three witnesses.

Applicant's submissions

19. The Applicant contests the Respondent's allegations that he stole the printer and avers that the assets under his custody were not found missing during the inventory.

20. The Applicant further claims that the accusations made against him were concocted by another staff member. The latter also persuaded other staff members to testify against him in an attempt to destroy his career because the Applicant claimed that he took administrative actions against him as a result of which their personal relations were spoiled. The Applicant avers that the staff member could have obtained a bar code and a serial number from any implementing partner's office as UNHCR provided many printers and computers in the region.

21. The Applicant is also dissatisfied with the way the investigation was conducted by the IGO. He claimed that while the testimonies of certain staff members would have been useful for the report, they were not interviewed by the IGO.

22. He avers that the decision to summarily dismiss him did not take into consideration his long years of service and his good reputation. He apologized for having stored pornographic files on his UNHCR computer but asserts that this is not a ground upon which to dismiss him from the organization without any termination indemnity.

Respondent's submissions

23. The Respondent summarily dismissed the Applicant on the ground that he “behaved inappropriately as a UNHCR staff member by having stolen an official printer from the Field-Office Jijiga, Ethiopia”.

24. The Respondent based its decision on the testimony of a driver. In December 2006, the driver stated to the IGO that, in October 2006, he was taking staff to Dire Dawa, about 165 kilometers away from Jijiga when the Applicant asked him to deliver one carton to his house in Dire Dawa. When the witness asked him what the box contained, the Applicant responded that it contained books. The witness said that he was near the front of the Applicant's house and tried to carry the carton but it was heavy. Because he doubted that the carton contained books, he drove far from the house and opened it. He saw it was full of books. However, further inside, in the middle of the carton, he found a UNHCR printer. He took its particulars, as bar code “32820” and serial number “FRH315375”.

25. The driver added that, for the second time in about mid-December 2006 when he was on a mission to collect staff from Dire Dawa, the Applicant got a lift from him as he was to visit his family in Dire Dawa. He carried a carton with him. The driver asked him what was inside and the Applicant replied that it was a computer which he

said belonged to him. When the driver arrived in Dire Dawa, he dropped the Applicant at his house.

26. The Respondent considers that the Applicant, in his response of 8 August 2007, does not manage to refute the allegations against him. The Respondent avers that the only opportunity the driver would have had to note all the given details of the said printer would have been if the Applicant had actually given the printer (packed inside a box) to him. Otherwise, a driver would not usually have access to such office equipment. Had the driver attempted to take the printer himself, the attention given thereto in the FOJ would have been rather substantial.

27. The Respondent further argues that since an item that is not recorded on an official inventory list is less likely to be missed in case of its disappearance, the printer was more susceptible to theft than other goods recorded on official inventory lists. Unlike the driver, only the Applicant knew that the printer was not on the inventory list of 30 January 2006. Given the Applicant's senior position vis-à-vis the driver, it would also explain why the driver had not reported the incident of October 2006 to the Head of the FOJ.

28. The Respondent notes that considering the slack stock-keeping practices found at the FOJ, and confirmed by the two mission reports of the Field Assistant and another staff member, the inventory lists the staff member provided in his defense cannot be considered as accurate and up-to-date. Also, it could not be expected of the person who allegedly stole the item, to still maintain its existence in his own inventory list which itself had not been updated since December 2005. In this respect, the Applicant also gave no explanation for the sudden disappearance of the printer from the FOJ and rather threatened to discontinue any co-operation with the IGO if he was further questioned on this matter and stated that he has "no interest in answering this kind of questions".

29. On the issue of the burden of proof, the Respondent submits that disciplinary proceedings are administrative in nature, not criminal proceedings. Therefore, the

standard of proof in a case of misconduct is “adequate evidence in support of its conclusion and recommendations” (see former UNAT Judgment No. 1022, *Araim*, and No. 484, *Omosola*), which state that once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question.

30. Based on the report of the IGO, the Respondent found sufficient evidence that the Applicant had stolen a UNHCR printer from the FOJ. There was a credible written testimony from a witness who provided the particulars of the printer accurately. A subsequent check by the IGO with the asset management unit showed that the printer was registered to the FOJ. The said staff member corroborated this evidence in his oral testimony.

31. Based on the Applicant’s response to the allegations of misconduct, the Respondent is of the view that he did not bring sufficient evidence to rebut the charges. It thus established a *prima facie* case.

32. The Applicant’s theft of the UNHCR printer represents an unlawful act under former Staff Rule 101.2 (c) and Article 2 of the ST/AI/371.

33. In addition, it has been a practice of the Organization not to tolerate theft. Even though the nominal value of a printer, as the one stolen by the Applicant may not be considered as major, the mere value of the stolen item can in itself not be considered as a mitigating factor, especially when coupled with the other established incidents of misconduct, namely the established fact that the Applicant temporarily removed an office computer from the FOJ without due authorization and stored three pornographic files on his office computer.

34. Finally, the Respondent avers that due process has been carefully respected in the present case; the staff member was given ample opportunity and sufficient time to comment on all documentation.

Witness Statements

35. In the course of the hearing held on 28 January and 16 February 2010, the Applicant confirmed that he did not steal the printer.

36. The Applicant called one witness, Mr. "T", Telecom Operator at the FOJ, who confirmed the Applicant's allegations. The witness added that no items were missing and indicated that no item can leave the premises without a gate pass. He did not find evidence that the bar coded printer in question had been authorized to leave the UNHCR premises.

37. Counsel for the Respondent called two witnesses, namely the UNHCR driver, Mr "X", and a Field Assistant, Mr. "Y". In their oral testimonies, both witnesses corroborated their written statements to the IGO.

38. The second witness, Mr. "Y", Field Assistant testified regarding a laptop, which is not relevant here for the purpose of the present case.

Applicable Legal Principles

39. Former Staff Regulation 1.2 (b) provides that "staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."

40. Former Staff Regulation 10.2 provides that the "Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory."

41. Former Staff Rule 110.1 defines misconduct as:

"Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution

of disciplinary proceedings and the imposition of disciplinary measures for misconduct.”

42. The Tribunal will also consider its judgment UNDT/2010/024 (Diakite) on the burden of proof in disciplinary cases.

Issues

43. The Tribunal observes that the Applicant was charged with three counts of misconduct but was summarily dismissed on the basis of only one count, which is the alleged theft of a UNHCR printer.

44. Therefore, the Tribunal will assess only whether there was sufficient evidence to establish a *prima facie* case against the Applicant for the theft of a UNHCR printer and whether the sanction was proportionate.

Considerations

45. As a preliminary remark the Tribunal finds it very troublesome that the Applicant was charged with storage of pornography but surprisingly enough, was not dismissed for this too even though he admitted to it.

46. The Applicant denies the allegations of theft of a UNHCR printer. He explains that UNHCR is claiming he stole a printer which was neither on the inventory list he took over from the former storekeeper on 30 January 2006 nor in the 2005 list. He avers that this particular printer was not at all in UNHCR FOJ premises, as was confirmed by the inventory, and the properties he received from the former storekeeper were in place and nothing was found missing.

47. The Tribunal observes that the main evidence against him was the testimony of the driver who claimed that he had been asked by the Applicant to bring a carton to Dire Dawa. The driver stated that he found a UNCHR printer and many different books in the carton and that he took the particulars of the printer. The Respondent

claimed that the printer was missing from the inventory list while the Applicant rebuts those assertions.

48. In the case of *Diakite*¹, the Tribunal adopted the following reasoning:

“The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient of being acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is capable of leading to the irresistible and reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit one and only conclusion that proof has been made out? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations.”

49. On the basis of the evidence provided by the parties, the Tribunal finds the testimony of the driver is credible, in particular that he was able to provide precise details on the printer’s bar code and the serial number. The Tribunal is convinced that the Applicant was in violation of former Staff Regulation 1.2 (b) and therefore engaged in misconduct.

50. Former Staff Regulation 10.2 provides that the Secretary-General “may summarily dismiss a member of the staff for serious misconduct”. As the former

¹ UNDT Judgment No. 2010/024, dated 8 February 2010

United Nations Administrative Tribunal (UNAT) held in Judgment No. 1244 (2005), it “has consistently upheld the Secretary-General’s broad discretion in disciplinary matters; specifically, in determining what actions constitute serious misconduct and what attendant disciplinary measures may be imposed”. This discretion is not without limit, however. In Judgment No. 941, *Kiwanuka* (1999), the former UNAT held that:

“In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive.”

51. The Tribunal now comes to the issue of whether the disciplinary measure imposed on the Applicant for the theft of the printer was proportionate.

52. The former UNAT held in Judgment No. 1310 that:

“Whilst in the vast majority of cases coming to the Tribunal where serious misconduct has been found to have occurred and the staff member has been separated from service, the staff member was found to have engaged in dishonest activity or activity designed to advance his or her situation or financial position, the absence of such a motive does not automatically remove a case from the realm of serious misconduct. One must also consider matters such as the degree of departure from the norm; whether it was a one-off decision or a course of conduct; and, of course, the potential such conduct may have had on the welfare or wealth of the employer organization.”

53. In view of the overwhelming evidence that the Applicant has shown a pattern of misconduct, including the storage of obscene material on his official computer, the Tribunal is satisfied that the Respondent established a *prima facie* case of misconduct on the part of the Applicant.

54. As far as concerns the proportionality of the disciplinary measure imposed, the case law of the Dispute Tribunal cited in the impugned decision supports the

summary dismissal for the offence of theft. Likewise, in UNDT Judgment 2010/024 (Diakite), the Applicant was dismissed for having submitted a fraudulent travel expense claim. The Tribunal dismissed the application and held that that the sanction was proportionate.

55. In the UN, as in any other international organization, theft constitutes an egregious lapse in the integrity expected of an international civil servant². In Judgment No. 1925, the ILOAT upheld a decision taken by the Director-General of IAEA to summarily dismiss a staff member who had stolen property belonging to the Agency, on the grounds, *inter alia*, that “[t]here can be no doubt that theft by an official of an international organization of goods belonging to that organization constitutes serious misconduct which may warrant summary dismissal.” In ILOAT Judgment No. 1828, the complainant was dismissed for having submitted a fraudulent travel expenses claim. The Tribunal held that “[e]ven though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing the Applicant for the misconduct he had committed”.

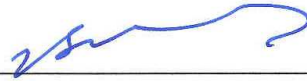
Judgment

56. In the light of the foregoing, the Tribunal decides to **reject the application in its entirety.**

² International Labour Organization Administrative Tribunal [ILOAT] Judgment No. 2231²

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Judge Vinod Boolell

Dated this 21st day of May 2010

Entered in the Register on this 21st day of May 2010



For
Jean-Pelé Fomété, Registrar, UNDT, Nairobi