
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/070

Judgment No.: UNDT/2012/169

Date: 7 November 2012

Original: English

Before:

5. After more than one week, five containers were located and a balance of nine containers remained missing. The Country Office reported the missing containers to the NPA and the Liberian police.

6. On 14 April 2009, the Office of Inspections and Investigations (OSDI) was informed by the Country Director that there were nine WFP containers missing which contained 109 Metric Tonnes (MT) palm olein oil and 75 MT of yellow split peas with a total value of approximately USD190,000.

7. During the Country Office preliminary investigation, Mr Wleh Jackson, the Forklift Operator for WFP at the time of the theft, admitted in a signed statement that he received a bribe of 30,000 Liberian Dollars from Mr Weah Emmas Nyanplu of Seatrans to misappropriate two WFP containers from the NPA Park. Seatrans Shipping Stevedoring Company was the clearing and forwarding agent for WFP under a contract to clear WFP's cargo at the port.

8. The matter of the nine missing containers was reported to the Country Director who in turn informed OSDI and requested OSDI's assistance in investigating the matter. Based on the events, the OSDI personnel undertook a mission to Monrovia from 23 April to 6 May 2009.

9. On 7 May 2009, the Applicant was suspended with full pay pending the outcome of the investigation.

Investigation

10. On 30 November 2009, OSDI issued an Investigation Report in which they found with regard to operations procedures the following:

11. WFP Logistics staff and WFP warehouses are located at the Port in Monrovia. At the time of the investigation, Mr Musa, the Logistics Officer was the Head of Logistics and he was assisted by Mr Bah, Logistics Officer. The Applicant was the Logistics Assistant responsible for the handling of WFP containers and reported directly to Mr Musa. There were three Forklift Operators working for the WFP namely, Mr Jackson, Mr Swen and Mr Gayflor.

12. Once WFP containerized cargo is discharged, containers are initially stored at the NPA Park and upon completion of the necessary customs clearance, the containers are moved to the WFP Yard which is located within the Port, approximately 200 meters from the NPA Park and de-stuffed thereafter. The transporting of the WFP containers from the NPA Park to the WFP Yard is the responsibility of the NPA. However, due to a lack of sufficient capacity on the part of the NPA, WFP purchased a forklift to move its containers from the NPA Park to the WFP Yard.

13. The OSDI concluded that:

a. Mr Jackson engaged in misconduct and failed to comply with the Standards of Conduct for the International Civil Service as he, based on his admission, accepted a bribe of 30,000 Liberian Dollars from Mr Weah in order to misappropriate two containers;

b. Mr Weah was involved in the diversion and theft of at least two WFP containers from the Port of Monrovia based on Mr Jackson's statement;

c. At least one WFP container was transported out of the Port by Mr Koon (UNMIL driver) with a UNMIL truck, based on his admission, in exchange for USD500 paid by Mr Weah;

d. Considering the evidence that Mr Weah organized the diversion and misappropriation of at least two WFP containers from the Port of Monrovia and that nine WFP containers were missing, it was more probable than not that Mr Weah was involved in the diversion and misappropriation of the other seven containers;

e. The Applicant was grossly negligent in giving Mr Weah, a non WFP staff, the authority and the means to collect WFP containers from the NPA Park without having informed his superior of this arrangement, causing a loss to WFP of USD190,000.

f. Based on his admission, the Applicant was insubordinate in that he brought the Liberian Seaport Police (LSP) to a WFP staff member's house

without having the authority to do so and despite the fact that he was told by Mr Musa that only the Country Director could provide such authorization.

14. During the course of the investigation, OSDI noted several inconsistencies and discrepancies in the Applicant's statements in relation to some of his actions after the theft of the WFP containers from the Port of Monrovia became public knowledge.

15. Even though OSDI did not have sufficient evidence to substantiate the involvement of the Applicant in the theft of the nine containers, it concluded that the Applicant gave misleading information during his interviews and thus failed to fully cooperate with the investigation. This negatively impacted on his credibility.

16. OSDI recommended administrative disciplinary action to be taken against the Applicant for unsatisfactory conduct for the reasons that:

- a. The Applicant was grossly negligent in giving Mr Weah, a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisor of this arrangement. This caused WFP a loss amounting to USD190,000.
- b. The Applicant was insubordinate taking the Liberian Police to a WFP staff member's home without the requisite authorisation.

Procedural History

17. On 28 January 2010, WFP sent the Applicant the findings, considerations and conclusions from the Investigation as well as the charges. He was then requested to provide a written response which he provided on 5 March 2010. The Applicant was subsequently charged with misconduct for allegedly acting in a grossly negligent manner leading to loss of the containers, failure to timely report this loss to his supervisors and for an act of insubordination.

18. The Applicant was separated from service on 30 June 2010 in accordance with UN staff rule 10.2(a)(viii). Part of his separation letter stated:

Upon careful review of the matter...it is considered that you have not presented any new facts, evidence or mitigating factors which would justify review of the proposed disciplinary measure.

It is considered that in exceeding your authority by delegating your

Applicant's case

23. The Applicant case is hereunder summarized:

The sanction of separation from service is disproportionate and unfair

24. While the Applicant may have erred in authorising Mr Weah to assist him in locating WFP containers, this error did not amount to gross negligence.

25. Mr Weah already had access to all the shipping documents, as he received them from the WFP Shipping Section the course of his duties. It was the Applicant's responsibility to deliver all shipping documents to Mr Weah as soon as he received them. The documents were then logged in a registry at the office and Mr Weah signed for each document he received. As such, Mr Weah knew the location of the various containers, making him an obvious choice to assist the Applicant in locating the WFP containers. Throughout the period when the cargo was being cleared, the containers were supposed to be in the custody of the NPA.

26. Although the Applicant authorised Mr Weah to go to the NPA Park and locate the WFP containers, he did not, however, authorise him to remove them from the port terminal.

27. The Applicant's decision to accept assistance from Mr Weah was justified under the circumstances, and it was known to his colleagues. While it may, in hindsight, have been a mistake on his part, such an error in judgment, particularly when it was so systemic, an integral part of the way he carried out his duties and one which was known to WFP, should not in itself amount to negligence, much less gross negligence.

The Applicant's error was not negligent, as its end result was not foreseeable

28. The Applicant could not have foreseen that an NPA employee would engage in criminal activities and offer a bribe to Mr Jackson who accepted the said bribe. The willingness of Mr Jackson, a former WFP staff member, to accept a bribe and be implicated in criminal activities is a new act intervening. These unforeseeable factors arguably broke the chain of causation, so that the end result cannot be

attributed to the Applicant's breach of his duty of care. The Applicant cannot be held liable for these results, and cannot be found to have been negligent.

Alternatively, even if the Applicant was negligent, his conduct did not amount to gross negligence

29. The Applicant's error was the undue delegation of his authority. This error, however, should more correctly be characterized as simply an error made in good faith, based on the exigencies of the day-to-day reality at the port, in which the Applicant was doing his best, according to his understanding, to expedite the timely movement of the WFP containers despite being inadequately resourced. While this error may have amounted to negligence, it could not, by any stretch of the imagination, be characterized as gross negligence.

30. The extent of the Applicant's negligence in authorizing Mr Weah to assist him in locating the WFP containers in NEPA Park is a reflection of the extent of his breach of his duty of care to WFP. This is to say, how far his actual conduct strayed from the standard of reasonableness expected from a reasonable Logistics Assistant under the circumstances.

31. Negligence in itself is not misconduct. It is a performance issue. While the Applicant should perhaps have been taken to task, this error does not warrant a disciplinary sanction, but could be better reflected in his performance appraisals.

32. The results of the Applicant's error, while grave, were unforeseeable. His conduct, contrary to the Administration's position, was not shown to be grossly negligent.

The Administration erred in characterizing the Applicant's accompanying of Liberian Seaport Police to a WFP staff member's home as insubordination

33. The Applicant is a Liberian national and consequently subject to police arrest and questioning. Had he refused to cooperate with the LSP, he could equally have been charged for not cooperating with a legitimate Liberian police investigation. Under the circumstances, having been requested by the LSP to refer

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40. The Applicant's actions amounted to misconduct and the resulting disciplinary measure imposed in this case was a lawful and permissible exercise of WFP's wide discretion in addressing that misconduct and was not disproportionate.

The Applicant's actions amounted to misconduct

41.

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51. The LSP's investigation and interview of the WFP staff member were related to official WFP activities – that is, the theft of WFP commodities and therefore fell within the ambit of functional immunity. WFP has established procedures in place to deal with such situations, which are designed to ensure that no prejudice is caused to the privileges and immunities of WFP or its staff. The Applicant circumvented those procedures and, in so doing, endangered the interests of WFP.

52. The Applicant therefore knowingly acted

Issues

58. The Tribunal formulates the following questions for consideration:

59. Was the Applicant grossly negligent in giving a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisors of this arrangement?

60. Was the sanction imposed on the Applicant proportionate to the imputed conduct?

Considerations

Was the Applicant grossly negligent in giving a non WFP staff member the authority and the means to collect WFP containers from the NPA Park without informing his supervisors of this arrangement?

61. In accordance with an agreement dated 18 March 1999, between the United Nations Development Programme (“UNDP”) and WFP, national staff or other employees engaged by WFP in Country Office are subject to the United Nations Staff Regulations and Rules and related UNDP policies/procedures as well as practices.

62. According to the Applicant’s letter of appointment, his fixed term contract was administered by the UNDP and was therefore subject to the “terms and conditions specified ... and subject to the provisions of the Staff Regulations, Rules and Personnel Policies applicable to United Nations Development Programme (U.N.D.P), which govern your contract on behalf of the UN/World Food Programme.... [The Applicant is] also bound to abide by the applicable UN/UNDP Staff Rules and Regulations.”

63. At the time the Applicant was charged with misconduct, on 28 January 2010, the applicable law was the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct (“UNDP Legal Framework”) which came into effect in January 2010 and applied to “all staff members holding UNDP

letters of appointment...regardless of ~~who~~ their assignment is with UNDP, or

67. The Tribunal will, in examining the issue of negligence, look to some established principles in determining whether there was negligence on the part of the Applicant.

68. In *Kruger v. Coetzee*⁵ Holmes JA, of the Appals Court in South Africa, authoritatively laid down the test used in order to establish liability for negligence as follows:

- e. Supervising the offloading of WFP vessel/s both during day and evening, if necessary;
- f. Supervising the work of WFP superintendent agents;
- g. Following up on all issues related to WFP port operations.

71. From the evidence, it can be distilled that the structure and steps involved in the processing, receiving and handling of WFP containerized cargo are as follows.

72. WFP Logistics staff and WFP warehouse in Monrovia were located at the port. At the time of the incident, Mr Musa, Logistics Officer, was the head of Logistics and was assisted by Mr Bah, Logistics Officer. The Applicant, who was responsible for discharging and handling WFP containers, reported to Mr Musa. The Applicant was occasionally assisted by the Tally Clerk. There were three Forklift Operators: Mr Jackson, Mr Swen and Mr Gayflor.

73. Prior to the arrival of any shipment, WFP Shipping Unit would receive ten copies of the shipping documents which consisted of the Bill of Lading, the commercial invoice of the consignment, the order and necessary documents that describe the food, quality ...etc...of the contents in the containers. The Applicant would record these documents in the WFP Shipping Registry and then immediately deliver the Bill of Lading and the invoice to the clearing and forwarding agent.

74. The clearing and forwarding agent of WFP at the time, Seatrans Shipping Stevedoring Company, had the duty of processing all necessary documents, received from WFP Shipping Unit, and receiving clearance from Customs for tax exemption and for containers to be discharged. Once the containers arrived at the Port in Monrovia, the Shipping Department of the NPA would discharge the containers in the NPA Park. The WFP Country Office would receive a release note stating that the NPA had received a certain number of containers and that these were available for WFP to collect. This document is received by the Applicant from the NPA through Seatrans, the clearing agent. The release note would include the Bill of Charge and Container Receipt.

75. Mr Avorkyla, the Shipping Manager of Ferry and Forwarding Manager of Seatrans stated in his testimony on 12 October 2011 that Mr Weah served as coordinator between Seatrans and WFP. Whenever Seatrans completed the processing of necessary documents after receiving the Bill of Charge and container receipt from the NPA, Mr Weah, would assist the Applicant in identifying WFP containers in the NPA Park pursuant to agreement between Seatrans and the Applicant. The Bill of Charge was the sole document that would permit the containers to move from the NPA Park to the WFP Yard.

76. According to a letter of understanding, dated 19 May 2008, between the WFP Country Office and the NPA, the NPA was responsible, under the supervision of WFP, for transporting the containers with WFP food from the NPA Park to the WFP Yard, a distance of approximately 200 meters. The true position was that the NPA did not have sufficient equipment and personnel to do this. Therefore, to facilitate the process, WFP purchased trucks to move its containers from the NPA Park to the WFP Yard.

77. The Applicant was responsible for monitoring and collecting WFP containers from the NPA Park to the WFP Yard. The Applicant, in the process of collecting the said containers from the NPA Park, was to physically visit the NPA Park with the Bill of Charge and Container Receipt stamped by the NPA as "Paid" to identify the

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was assigned to oversee the handling of containers concerning the clearing and storing of WFP cargo at the port.

83. After having taken the responsibility for the movement of containers using the WFP Forklift Operator, a responsibility he had held for more than one year, the Applicant cannot turn around to deny responsibility on the untenable ground that it was not an assigned duty under the vacancy announcement for his post. By virtue of this established practice, it fell under his duties as a Logistics Assistant.

84. The Applicant testified that "...Weah should really go by himself to locate containers and then bring the lading where the containers are located. He tells me 'the containers are located here, here, here. Then we all go with forklift and the forklift starts to move them. He alone, yes, can go alone to locate where the containers are. That was my request."

85. It is clear from the evidence that Mr Weah assisted the Applicant, to locate the containers in a most disorganized NPA Park using the Bill of Lading which listed the container numbers for all WFP containers. Thereafter the Applicant would then wait for Mr Weah to return with information about the locations of the containers. Mr Weah in this particular instance was also in possession of the Bill of Charge which, the Applicant confirmed in his testimony, was the key document that permitted the containers to leave the NPA Park.

86. There is nothing that supports the Applicant's testimony that the assistance provided by Mr Weah was part of a contract between WFP and Seatrans. Mr Musa testified that the sole responsibility of Seatrans was to deal with customs and clearing. Once this had been done, WFP was then solely responsible for the movement of the containers from the NPA Park to the WFP Yard. The Applicant also admitted in his testimony that he called 185689 -11h in the evening of 01/09/2009 (Tc 0.2699Tw f)58D 0.09(9

94. By virtue of the Applicant allowing MWeah to locate containers on his own and allowing him to go with the Forklift Operator, sometimes, to collect the containers (as he had stated in his interview with the investigators), the opportunity to misappropriate containers was enabled by the Applicant's lack of due diligence in his monitoring and supervising of the movement of WFP containers.

95. It is the finding of this Tribunal that the Applicant in this case failed to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk. This was a rather serious failure which cost the Organisation loss of property valued at USD190,000.

96. Furthermore, the Applicant's conduct amounted to misconduct as he was grossly negligent in carrying out his assigned responsibilities.

Was the sanction imposed on the Applicant proportionate to the imputed conduct?

97. The International Labour Organisation Administrative Tribunal ("ILOAT") reaffirmed the established precedent that the decision-maker has the discretion in determining the relevant sanction and its severity to be imposed on a staff member whose misconduct has been established. It must be noted however that such discretion must be exercised "in observance of the rule of law, particularly the principle of proportionality."⁸

98. The principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if the course of action is reasonable, but not if the course of action is found to be excessive.⁹

99. The Respondent submits that these facts constituted gross negligence of such magnitude that the Respondent could reasonably decide that it could not entrust the Applicant with responsibility for the Organisation's primary commodity—the food intended for beneficiaries. The Respondent submits that WFP was correct in concluding that the bond of trust between the Applicant and WFP was irrevocably broken, rendering his continued employment untenable.

⁸ ILOAT Judgment No. 1984, In *van Walstijn* (2000) (para 7).

⁹ *Sanwidi* UNAT/2010/084 para 39.

100. It was argued on behalf of the Applicant that he erred in good faith, doing his best, in the exigencies of the day-to-day reality at the port, and despite being inadequately resourced to expedite the timely movement of the WFP containers. Such an error should have been dealt with in the context of his performance management, not through disciplinary proceedings. It certainly does not justify separation from service with termination indemnity.

101. The Tribunal disagrees with the Applicant's arguments and finds that the sanction of separation from service with termination indemnities in accordance with staff rule 10.2(a) (viii) as well as being afforded compensation in lieu of notice was fair and proportionate.

Conclusion

102. The Application hereby fails.

Signed

Judge Nkemdilim Izuako

Dated this 7th day of November 2012

Entered in the Register on this 7th day of November 2012

Signed

Jean-Pelé Fomété, Registrar, Nairobi