
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/020

Judgment No.: UNDT/2019/001

Date: 2 January 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

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 in

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.

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.,

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,

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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.

materials to the investigators.

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 w

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 he had received the materials, 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 Rajabu wrote it down, nothing written was required from him and he did not

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

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

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 superw4 0.0 0.0hr.,0 0.0 rg 0.9

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

investigator, Musafiri, and that he signed it because he was “stressed”, lacks

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

Considerations

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 sto

73. Statements from the Applicant and Shabani

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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