

Application and procedural history

1. The Applicant, a security officer with the United Nations Department of Safety

Facts

6. The facts in this case are mainly deduced from the viewing of video footages tendered by the Respondent. On Saturday 23 January 2016, the Applicant entered the Commissary located in the United Nations Office at Nairobi (UNON) at about 4.40pm. The Applicant then took a r0 G4/8 g0 G2 79n0/5b ~~ahb~~

and that something happened. They did not finish the conversation before another car drove up and Mr. Mommer drove away.

10. The Applicant was not on duty the next day which was a Sunday but when he came to work on Monday morning, 25 January 2016 at about 7am, he went to Mr. [redacted] ersons. He then asked him what he was trying to tell him on Saturday evening but the response was that since he had said that he did not know or see anything which happened at the Commissary when he shopped, he would be contacted by Management. The Applicant left.

11. At about 6.57pm that evening, Mr. Mommer sent an email to the Chief of Commercial Operations Unit at UNON and reported that the Applicant made purchases at the Commissary on 23 January 2016 but deliberately did not pay for Kinder chocolates which he stole but gave a tip to the Commissary staff. He continued in the email report that the Commissary cashier who completed the transaction had been dismissed since he participated in the theft. He also sent the link of video footages with the email and promised to bring the viewer software the next day. He asked also that UNON treat the incident in a manner as to ensure that such an event did not repeat itself in the future.

12. The next day, [redacted] referred the matter by email to the Chief Investigations Section of the UN/OIOS office at UNON requesting that he initiate an investigation of the incident. In her email referral of the case, she stated that it was very clear that the Applicant knew that the box of chocolates was not scanned and that he intentionally collected it and placed it in the shopping bag, thereby stealing it. She also stated that the footage showed the [redacted] footage with her.

13. On 27 January 2016, two investigators interviewed the cashier Mr. Kifana at OIOS offices at UNON. In the evening of 4 February 2016, 12 days after the incident, the Applicant was invited by email to attend an interview with investigators at the

OIOS offices in UNON at 10am the next day 5 February. The Applicant who had been on night duties from the evening of 4 February lasting into the morning of 5 February attended the interview.

14. An investigation report regarding the incident was issued on 18 March 2016 and concluded that there were reasonable grounds to find that the Applicant had stolen a pack of juice and a box of Kinder chocolates from the Commissary. The investigator further recommended that UNON take appropriate action against the Applicant and

about 4.40pm, you took a carton of juice (value US\$1.90) and a box of Kinder chocolates (value US\$7.40) from the United Nations Commissary without paying for these items.” The charges as framed do not amount to misconduct under the applicable Staff rules and Regulations.

b)

c) The Respondent failed to properly consider the available exculpatory testimonial evidence when he rejected the testimonies of both the Applicant and Mr. Kifana that Mr. Kifana was solely at fault for his failure to scan the items

d) The Respondent ought to investigate tipping practices within the UN Commissary before drawing conclusions that the tipping of Mr. Kifana by the Applicant showed they had colluded to defraud the Commissary. Since Mr. Kifana and the Applicant defended their actions and claimed that tipping was normal and in line with prevailing practices, it was incumbent upon the Respondent to investigate tipping practices rather than the investigators relying on their own interpretation.

e) The investigators did not identify the particular type of chocolate allegedly taken or its price. Instead they relied entirely on the unsubstantiated allegations made by the IDF Manager in his complaint to the Chief Commercial Operations Unit. The said manager was not interviewed by the investigators.

21. The sanction imposed is clearly disproportionate: Even if it is found that misconduct is established, the sanction imposed is clearly disproportionate. Although in his Reply, the Respondent relied on a number of cases in support of his assertion that the sanction imposed is proportionate, the cases he referred to all relate to deliberate conduct.

22. Remedies sought:

a) The Applicant requests the rescission of the impugned decision and requests also that he is reinstated.

b) If the Respondent elects to pay financial compensation in lieu of reinstatement that, the Applicant is paid the equivalent of two years net salary based on his salary in October 2016.

- c) The Applicant should be awarded moral damages equivalent to nine months net base salary for violations of fundamental rights.

Case for the Respondent

23. The Respondent case is that the Application ought to be entirely dismissed. His case is summarized hereunder:

24. The allegations of misconduct are clear and sufficient:

- a) The wordings used in the allegations of misconduct memorandum were clearly sufficient. Reference to the deliberateness of the alleged conduct is irrelevant because UNAT affirmed in the case of *Jahnsen Lecca*¹ that a finding of taking property without authorization justifies the imposition of disciplinary sanction. For a staff member who takes sale items without paying amounts to required.

- b)

b) The Respondent considered the evidence of Mr. Kifana and his acceptance of responsibility for the non-payment of the goods as his mistake. A thorough review of the evidence showed that his acceptance of responsibility was not consistent with the security video footage which captured the incident

account to investigators.

c) The Applicant changed his version of events during the interview. His

disciplinary measures. In *Woldeselassie*,² the Applicant was dismissed for stealing an official printer with a nominal value. The UNDT held that in the United Nations, theft constitutes an egregious lapse in the integrity expected of an international civil servant.

c) In this case, the Applicant took advantage of the fact that he had access to the UN Commissary to take goods without paying for them. This shows a serious lapse of integrity on his part.

27. The disciplinary measure against the Applicant was not disproportionate:

a) It was held by the Appeals Tribunal that a decision to impose a specific disciplinary measure for established misconduct may only be reviewed by the

³ In order to interfere with the decision on the basis of proportionality, the disciplinary

by the respective norms, excessive, abusive, discriminatory or absurd in its

b) For the Respondent, misappropriation and taking goods without authorization are considered most serious offences with very severe sanctions imposed.

c) The Applicant was charged with heightened trust and authority as a Security officer to act with the utmost integrity, especially as concerns the protection of life and property. By his conduct, the Applicant breached the core duties entrusted upon him by the Organization.

d) In the Secretary-General -
2016, six out of 15 cases of misappropriation and removing property without

² *Woldeselassie*; UNDT/2010/096

³ *Jaffa*; 2015-UNAT-545

authorization were punished with dismissals and eight with separation from service, with or without termination indemnity. In 2014-2015, 13 staff members were separated while three were dismissed.

e) In the majority of cases of taking the property of a 3rd party, staff members were dismissed or separated from service. In this case, the relative low value of the goods taken was considered a mitigating factor and the most severe sanction of dismissal was not imposed on the Applicant.

28.

a) Throughout the investigations and entire disciplinary process, the were respected. The OIOS duly conducted the investigations in accordance with its mandate and the applicable rules and procedures. With the allegations of misconduct memorandum, the Applicant was provided with a copy of the investigation report and all supporting documents including the security footage video.

b) The Applicant was informed of his right to seek the help of counsel and given an opportunity to comment on the allegations against him. He was afforded extensions of time to submit his comments which were then duly considered.

Issues

29. The issues for determination in this case include: (1) whether with the assistance of an employee of International Duty Free Kenya Ltd. which operates the UN Commissary, the Applicant by clear and convincing evidence, stole items from the said Commissary on 23 January 2016 and thereby committed misconduct; and (2)

whether the disciplinary process instituted against the Applicant was tainted by bias and prejudice.

Considerations

Is it established by clear and convincing evidence that the Applicant, with assistance from an employee of International Duty Free (IDF) Kenya Ltd which operates the UN Commissary, committed misconduct by stealing items from the said Commissary on 23 January 2016?

30. It is not contested that in the evening of Saturday, 23 January 2016, the Applicant shopped for groceries at the UN Commissary. After paying for his purchases at the check-out desk, the Applicant left the Commissary with some goods for which he had not paid.

31. that the Applicant was assisted or encouraged by one Mr. Kifana, who worked for the IDF and was the cashier at the check-out desk when the Applicant paid for his purchases, to steal certain items from the Commissary rather than pay for them.

32. On his part, the Applicant argued that his failure to pay for certain items at the check-out desk was as a result of a mistake, not an intention to steal.

Video footages

33. The Tribunal has viewed the video footages which are tendered as part of the

manned by Mr. Kifana with five 1-litre packs of juices in a shopping basket. When it was his turn, he was signaled to approach the check-out by Mr. Kifana and he did. Although there is no sound on the video recording, it is not in doubt that the Applicant and Mr. Kifana were conversing all through the transaction.

34. Another video footage shows that the Applicant put the five 1-litre packs of juice on the check-out desk and that Mr. Kifana scanned the five juice packs. The Applicant gave his ground pass whose details appeared to have been taken manually by Mr. Kifana. He also tendered what looked like a Ksh1,000 bank note and was given some change and a receipt.

35. The Applicant is then seen returning to the shelves on the floor of the shop while Mr. Kifana began to put the packs of juice into a shopping bag. While he was still doing so, the Applicant returned to the check-out desk bringing with him a box of chocolates which he gave to Mr. Kifana who immediately put it into the shopping bag without scanning it. The Applicant also pushed the last pack of juice which was lying on the desk toward the shopping bag and Mr. Kifana put it into the shopping bag. Evidently still in conversation, the Applicant handed a folded Ksh200 bank note which was part of the change given him when he earlier paid for the packs of juice to Mr. Kifana.

Synopsis of Mr. Kifana's interview

36. The OIOS investigator testified that he started the investigation by first speaking to the Commissary manager, Mr. Mommer, on Monday, 26 January 2016 when the matter was referred for investigation. Mr. Mommer gave the investigator security footage from different cameras within the Commissary. He then interviewed Mr. Kifana the next day Tuesday, 27 January 2016.

37. Although Mr. Kifana was not brought to testify at the hearing, a synopsis⁴ of the answers he gave in his interview by the investigator was provided by the

⁴ R/2

49. Eleven days later, he was invited by the investigator to attend an interview with him on 5 February 2016. He did so and told the investigator that he had hijacked him because he had just come off from night duty and was exhausted. He requested some time but the investigator insisted on interviewing him there and then. He was unhappy due to the time that had elapsed between the date of the alleged incident and the interview.

50. Under cross-examination, the Applicant said the money he paid was enough for all the items he bought but that until he was shown his receipt by the investigator, he did not know that the chocolates were not paid for. The investigator kept asking him how much he had and how much he gave the cashier. He may have told the investigator that he gave the cashier Ksh2,000 due to the confusing manner in which he was questioned.

Other oral testimonies

51. One Mr. Ndirangu testified for the Applicant while the investigator testified for that Mr. Kifana told him that he forgot to scan a box of chocolates the Applicant bought and was accused of stealing the money for the chocolates while being also persuaded by the Commissary Manager Mr. Mommer to implicate the Applicant in order to retain his job. The witness who was a former staff of the Commissary tried to explain to the Tribunal how an item to be purchased could be entered manually into the system for payment even before the item was taken from the shelves to the check-out desk. This the box of chocolates before taking it from the shelves.

52. The investigator in his testimony stated that he did not know the Applicant before the interview and bore him no grudge and that he wrote the investigation report. According to him, the issue as to when payment was made for the items the Applicant bought was never really clarified with the Applicant as he had different accounts in that regard which were contradictory. When the Tribunal asked the investigator why he did

not think that the Applicant was entitled to a benefit of the doubt, he responded that the footages and interview showed that the Applicant could not be believed.

53. The Tribunal has carefully reproduced the essential contents of the video footage, the testimonies of witnesses and the synopsis made by the investigator of the interviews with both the Applicant and Mr. Kifani with a view to providing a background to the determination of the principal issue of whether the Applicant stole from the Commissary when he did not pay for the box of chocolates and a pack of juice and whether he was assisted to steal by the check-out cashier, Mr. Kifana.

54. The Tribunal finds that it is established that on 23 January 2016, the Applicant left the Commissary with a bag of shopping containing some goods for which he had 1 558.4 5

Was the investigation of the Applicant tainted by bias and prejudice?

67.

officials was tainted by bias and prejudice. In closing submissions, it is stated that improper questioning techniques were employed to frustrate and confuse the Applicant because the investigators kept putting the same questions to him. The investigators

the Applicant. In that email, she unfortunately stated that she had watched the video footages and that it was clear that the Applicant intentionally took the box of chocolates