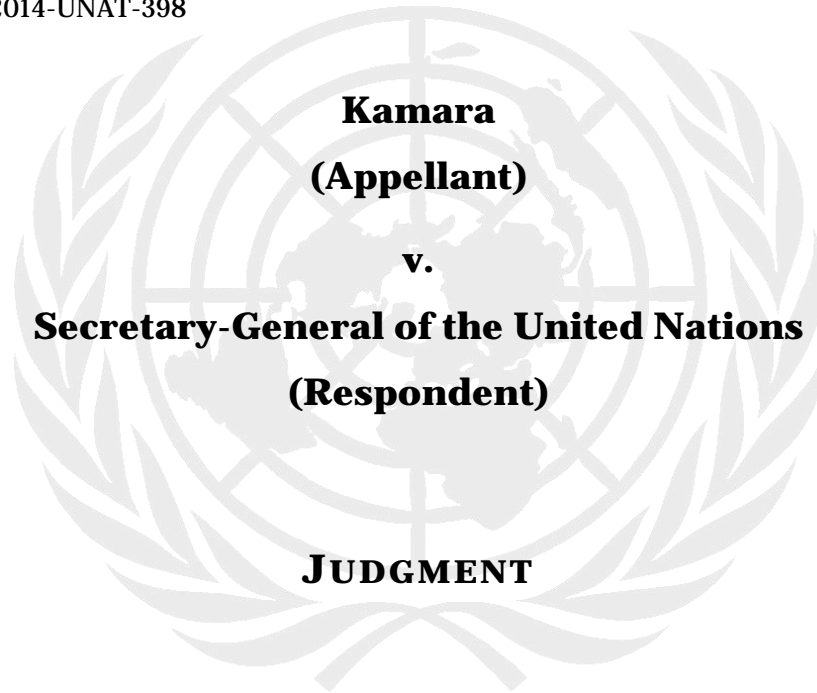




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-398



**Kamara
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Inés Weinberg de Roca
Judge Sophia Adinyira

Case No.: 2013-446

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Appellant: Miles Hastie

Counsel for Respondent: Amy Wood

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Soko Kamara against Judgment No. UNDT/2012/169, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 7 November 2012 in the case of *Kamara v. Secretary-General of the United Nations*.

Facts and Procedure

2. Mr. Kamara worked for the World Food Programme (WFP) as a locally recruited field staff member in Monrovia, Liberia. On 1 July 2006, he was appointed under a 100-series fixed-term contract as Logistics Assistant (Shipping) at the G-4 level at the Freeport of Monrovia.

3. As Logistics Assistant, Mr. Kamara was responsible for, among other duties: a) supervising the offloading of WFP vessels during the day and evening, if necessary; b) coordinating WFP operation at Freeport; c) supervising the work of WFP superintendent agents; and d) following up on all issues related to WFP port operations.

4. In April 2009, the Country Director of WFP's Liberia Country Office (Country Office) received a report that there were fourteen containers of WFP food items missing from the Freeport. The Country Office Logistics Unit was requested to follow up on the matter and report back.

5. After more than one week, five containers were located and a balance of nine containers remained missing. Of the nine containers, five contained 109 metric tonnes of palmolein oil and four contained 75 metric tonnes of yellow split peas, for a total value of approximately USD 190,000. The Country Office reported the missing containers to the Liberian National Port Authorities (NPA) and the Liberian police.

6. During the Country Office's preliminary investigation, Mr. Wleh Jackson, a forklift operator for WFP at the time of the theft, admitted in a signed statement that he had received a bribe of 30,000 Liberian Dollars¹ from Mr. Weah Emmas Nyanplu of the Seatrans Shipping Stevedoring Company (Seatrans) to misappropriate two WFP containers from the NPA Park.

¹ 30,000 Liberian Dollars are equivalent to USD 468 at the exchange rate of 64:1 provided by the United Nations Treasury for May 2009.

Seatrans was the clearing and forwarding (C&F) agent for WFP contracted to clear WFP's cargo at Freeport.

7. The Country Director informed WFP's Office of Inspections and Investigations (OSDI) of the loss of nine containers and requested OSDI's assistance. From 23 April to 6 May 2009, OSDI conducted a field investigation in Monrovia.

8. On 30 November 2009, OSDI issued an Investigation Report. Its description of the operations procedures for the receipt and handling of WFP containerized cargo at Freeport is as follows.

9. WFP Logistics staff and WFP warehouses are located within the Freeport. At the time of the investigations, Mr. Kamara was a Logistics Assistant reporting directly to Mr. Musa, Head of Logistics. He was responsible for discharging and handling WFP containers.

10. Prior to the arrival of any shipment, the WFP Shipping Unit would receive first a shipping instruction and then copies of shipping documents including the Bill of Lading and an invoice of the goods contained in the shipment. Mr. Kamara would record these documents and thereafter contact Mr. Weah of Seatrans.

11. Once WFP containerized cargo is discharged at the Freeport, containers are initially stored at the NPA Park, waiting for customs clearance. Upon the completion of the customs clearance, Mr. Kamara would receive from the NPA through Mr. Weah the original Delivery Order from the shipping line. According to Mr. Kamara, Mr. Weah would take the Delivery Order and the customs clearance documents to the NPA and request the NPA to release the items stated on the Delivery Order. The NPA would issue a Bill of Charges and Container Receipt stating that the NPA had received a certain number of containers and that they were available for WFP to collect. It should be noted that the Bill of Charges and Container Receipt did not state container numbers but made reference to the Bill of Lading.

12. Mr. Weah would bring the Bill of Charges and Container Receipt to Mr. Kamara for approval and payment of port handling costs and delivery charges. Upon payment of the costs and charges, the NPA would stamp "Paid" on the Bill of Charges and Container Receipt. This stamped document is required for the release of the WFP containers or cargo from the NPA Park, which is also located within the Freeport. However, again according to Mr. Kamara, "[t]here are no documents that have to be signed" by either NPA upon release of the WFP cargo from the

NPA Park or WFP upon receipt of its cargo at the WFP warehouse. "I just present the Bill of Charges which lists the containers and I collect the containers."

13. The WFP containers would then be moved from the NPA Park to the WFP warehouse, approximately 200 meters from each other.

14. The transportation of the WFP containers from the NPA Park to the WFP warehouse is NPA's responsibility. However, due to a lack of sufficient capacity on the part of NPA and to expedite the cargo delivery, WFP purchased a forklift and engaged three forklift operators to move its containers from the NPA Park to the WFP warehouse.

15. Notwithstanding WFP's efforts, some WFP containers remained at the NPA Park for more than five months before they were moved to the WFP warehouse.

16. OSDI found, as was determined during the preliminary investigation, that one of the forklift operators, Mr. Jackson, had accepted a bribe of 30,000 Liberian Dollars from Mr. Weah in order to misappropriate two containers out of the NPA Park, that a Mr. Koon, a truck driver for the United Nations Mission in Liberia, had accepted a bribe of USD 500 from Mr. Weah for transporting at least one container out of the Freeport, and that it was more probable than not that Mr. Weah was involved in the diversion and misappropriation of the other seven containers.

17. In respect of Mr. Kamara, OSDI found that he 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 supervisor of this arrangement. It also found that Mr. Kamara was insubordinate in that he had brought the Liberian Seaport Police (LSP) to a WFP staff member's house without having the authority to do so and despite the instruction from Mr. Musa that only the Country Director could provide such authorization.²

² According to the WFP staff member, who was a Storekeeper with WFP/Liberia, she had told Mr. Kamara about what she had heard about the theft of the WFP containers. A week later, Mr. Kamara telephoned to inform her that he wanted to bring the LSP officers to her house in order to interview her about the missing containers. Again according to the WFP staff member, she told Mr. Kamara that she did not feel safe about having the LSP officers at her home. Nevertheless, later the same day, Mr. Kamara brought four LSP officers to her house. On the advice of her husband, the WFP staff member allowed the LSP officers into her house.

18. On 28 January 2010, WFP sent Mr. Kamara the findings, considerations and conclusions from the investigation and charged him with gross negligence leading to loss of nine containers, failure to timely report the theft to his supervisors and insubordination. Mr. Kamara provided a written response on 5 March 2010.

19. Mr. Kamara was separated from service on 30 June 2010 on the basis of two counts of gross negligence and insubordination. The separation from service was effected without termination indemnities, but with compensation in lieu of the 30-day notice period.

20. Mr. Kamara appealed. In Judgment No. UNDT/2012/169 of 7 November 2012, the Dispute Tribunal rejected Mr. Kamara's application as it determined that the sanction of separation from service without termination indemnities but with compensation in lieu of notice was fair and proportionate. The Dispute Tribunal found that Mr. Kamara had "failed to exercise the standard of care that a reasonable person would have exercised with respect to a reasonably foreseeable risk" by allowing Mr. Weah possession of the Bill of Lading, which contained all the container numbers and information, and the Bill of Charges and Container Receipt, which permitted the containers to leave the NPA Park, by allowing Mr. Weah to locate containers on his own and by allowing Mr. Weah to go with the forklift operator to collect the WFP containers. "This was a rather serious failure which cost the Organization loss of property valued at USD 190,000." The Dispute Tribunal concluded that Mr. Kamara's actions "amounted to misconduct as he was grossly negligent in carrying out his assigned responsibilities".

21. On 8 February 2013, Mr. Kamara filed a request for waiver of the time limit to appeal. In Order No. 131 dated 26 March 2013, this Tribunal waived the time limit and granted Mr. Kamara seven days to appeal the UNDT Judgment, which he did on 1 April 2013. The Secretary-General answered on 3 June 2013.

Submissions

Mr. Kamara's Appeal

22. Mr. Kamara submits that the UNDT erred in fact in finding that his actions of delegating his functions of locating containers at the NPA Park made it "easy to steal the containers" or were "sufficient to enable [Mr. Weah] to misappropriate the containers". Mr. Kamara maintains that the documentation (Bill of Lading/Bill of Charges and Container Receipt) was either the documentation that Mr. Weah already had or that he was required to give to Mr. Weah. He also

maintains that the documentation that Mr. Weah had only permitted movement of cargo from the NPA Park to the WFP warehouse, but did not allow the cargo to exit the Freeport through its single gate, for which a gate pass was needed. There is no clear evidence showing that the WFP containers were stolen from the WFP warehouse, or while en route to the WFP warehouse, and there is no document by which he assumed or acknowledged possession of the missing containers. Mr. Kamara believes that the NPA employee(s) must have been bribed to allow the stolen containers to exit the port, and asserts that the bribery rendered all of his actions superfluous. His failure to prevent Mr. Weah and others from criminally conspiring to steal goods from a remote location could therefore not be considered grossly negligent.

23. Mr. Kamara also submits that the Dispute Tribunal erred in law in finding him guilty of gross negligence, when the Judge actually applied a standard of simple negligence and equated gross negligence with simple negligence. In his view, the loss of USD 190,000 should have no bearing on whether the risk was reasonably foreseeable nor does it establish the extreme or aggravated nature of the misconduct. The Dispute Tribunal failed to apply the correct standard of gross negligence defined in the WFP Legal Framework for Addressing Non-compliance with United Nations Standards of Conduct to his case and reached an erroneous conclusion on the basis of which it made a manifestly unreasonable decision.

24. Mr. Kamara further submits that the Dispute Tribunal failed to address the charge of insubordination against him. Mr. Kamara maintains that it would be unreasonable to separate him for failing to follow an equivocal message from his supervisor about speaking to national authorities, when the WFP staff member's subsequent consent rendered any such action lawful. His desire to cooperate with his own government is entirely understandable. It caused no discernable harm to either WFP or the investigation.

25. Mr. Kamara requests that this Tribunal overturn the UNDT Judgment, rescind the decision to separate him from service and award him compensation for lost salary, or alternatively order that he be paid two years' net base salary in addition to pre-judgment and post-judgment interest.

The Secretary-General's Answer

26. The Secretary-General submits that the UNDT correctly concluded that the disciplinary measure of separation from service was lawful in the circumstances of the case, as the facts on

which the disciplinary measure was based were properly established, the established facts legally amounted to misconduct, i.e. gross negligence, the disciplinary measure of separation from service was proportionate to the offence, and his rights to due process were respected.

27. The Secretary-General also submits that Mr. Kamara has failed to substantiate his allegations that the Dispute Tribunal applied an erroneous disciplinary standard in his case or made erroneous fact findings. He notes that Mr. Kamara admitted in writing that his conduct amounted to “gross negligence”. The Secretary-General is of the view that the Dispute Tribunal correctly found that Mr. Kamara was grossly negligent in allowing Mr. Weah to retain custody of the shipping documents, including the Bill of Charges marked as “Paid” after the customs process was completed. He is also of the view that the Dispute Tribunal correctly concluded that, as Mr. Kamara was aware of the past instances of theft of the WFP property at the Freeport, his actions created an unreasonable risk that Mr. Weah could use the documents to facilitate the theft of the WFP property.

28. The Secretary-General therefore requests that this Tribunal affirm the UNDT Judgment and reject the appeal in its entirety.

Considerations

29. In *Haniya*,³ this Tribunal held that, when reviewing a disciplinary sanction imposed by the Administration, 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.

30. This examination was thoroughly done by the Judgment under appeal and this Tribunal holds that no error of fact or law was committed by the UNDT, whose decision will be affirmed.

31. It must be first pointed out that the Appellant has not persuaded this Court that the UNDT’s conclusions of fact rendered unreasonable its decision as required by Article 2(e) of the Statute of the Appeals Tribunal.

³ *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029, para. 31. See also *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028, para. 20.

32. The first-instance Court established that the staff member failed to exercise the standard of care that a reasonable person would have followed with regard to a foreseeable risk, characterized the failure as serious amounting to gross negligence, thereby causing the Organization's loss of approximately USD 190,000.

33. The evidence on file clearly supports that finding and characterization and thus, shows the existence of misconduct.

34. There was no due process violation on the part of the Administration for having charged the staff member with three accounts of misconduct (gross negligence, failure to timely report theft to supervisors and insubordination), but separated him from service on the basis of two accounts (gross negligence and insubordination).

35. The staff member was given the opportunity to defend himself against all of the charges and certainly it is perfectly legal to base the sanction on fewer charges than the initial ones considered in the investigation, if not all of them become substantiated. The sanction based on charges that are more numerous than those initially imposed would be illegal.

36. Furthermore, the UNDT adequately reasoned that the faults amounted to misconduct under the applicable norms, because without them being committed concurrently, the loss of the valuable containers would not have occurred, even if to make it happen some activities or omissions on the part of other persons were also necessary. This circumstance neither exculpates the staff member for failing to perform his duties nor reduces its seriousness so much as to allow a less severe characterization: he essentially permitted a non-staff member the possession of shipping documents, which facilitated the subsequent theft, disregarding the most basic prevention that his position and duties imposed on him.

37. Thus, misconduct was established and the disciplinary measure of separation from service without termination indemnities adopted in this case was proportionate to it. No person working at the port facilities would ignore the risks involved in the handling of the very valuable containers filled with food for international assistance. All staff members entrusted with the responsibility for this kind of international humanitarian support should behave with the highest level of integrity and thoroughness in relation to their functions. Any staff member whose duties include control of this kind of goods and who acts in such a negligent manner as the Appellant did should be separated from service.

38. In conclusion, we decide to affirm the challenged administrative decision imposing the sanction. There are no grounds upon which to reverse the UNDT Judgment dismissing the staff member's application.

Judgment

39. The UNDT Judgment is affirmed and the appeal is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar