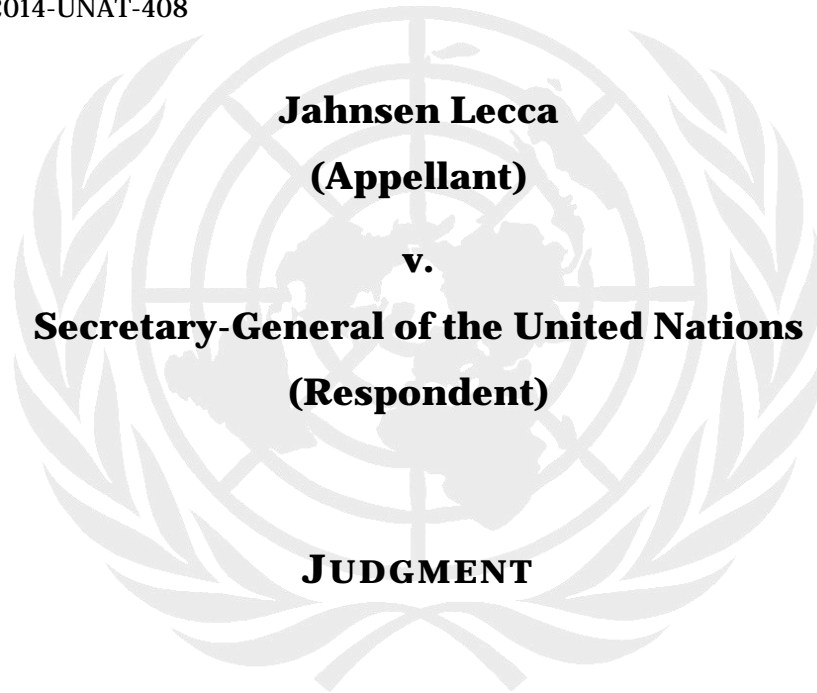




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-408



Jahnsen Lecca

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Mary Faherty
Judge Sophia Adinyira

Case No.: 2013-458

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Appellant: April L. Carter

Counsel for Respondent: Zarqaa Chohan

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Aixa Irma Antonia Jahnsen Lecca against Judgment No. UNDT/2012/206, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 31 December 2012 in the case of *Jahnsen Lecca v. Secretary-General of the United Nations*. Ms. Jahnsen Lecca appealed on 4 April 2013 and the Secretary-General answered on 7 June 2013.

Facts and Procedure

2. At the time of the events, Ms. Jahnsen Lecca was a Trial Support Assistant at the G-5 level with the Office of the Prosecutor (OTP), the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. On 7 June 2011, she removed an unlocked bicycle belonging to another ICTY staff member, without the owner's authorization, from the ICTY bicycle parking area and took it to the atrium of the KPMG building (KPMG atrium), a nearby commercial building approximately 50 meters away from the ICTY main building, and left it there.

3. Following receipt of a complaint by the owner of the missing bicycle, on 14 June 2011, the ICTY Chief Administrative Officer established a fact-finding panel to conduct a preliminary investigation. A close-circuit television (CCTV) footage with respect to the ICTY bicycle parking area and the portion of the main lobby for selected time periods on 7 June 2011 and the key-in/key-out logs for the period of 1:00pm until 1:19pm on 7 June 2011 were made available to the fact-finding panel.

4. On 14 and 15 June 2011, the fact-finding panel interviewed Ms. Jahnsen Lecca. The interviews included a walk through the ICTY bicycle parking area and the KPMG atrium and Ms. Jahnsen Lecca's viewing of the CCTV footage. During the interviews on those days, Ms. Jahnsen Lecca insisted that she had used her own bicycle to ride to work and denied ever taking somebody else's bicycle from the ICTY bicycle parking area to a location outside the ICTY premises, not even by mistake.

5. On 16 June 2011, however, Ms. Jahnsen Lecca requested a meeting with the fact-finding panel, during which she confessed that she had indeed taken the missing bicycle from the ICTY bicycle parking area at noon on 7 June 2011, which she knew was not hers. She apologized to the fact-finding panel, and through the panel to the owner of the bicycle. Ms. Jahnsen Lecca also informed the fact-finding panel that she had left the said bicycle at the KPMG atrium and threw the bicycle key in the grass nearby. Ms. Jahnsen Lecca insisted that she had merely wanted to borrow the bicycle for running an errand and had intended to return it in the days thereafter before 9:00 a.m., but she did not do so because she feared that she would get caught or encounter the owner of the bicycle.

6. The bicycle in question was recovered at the KPMG atrium on 15 June 2011, but with the keys to the rear-wheel lock, a rear chain lock and the wicker basket missing. On 16 June 2011, Ms. Jahnsen Lecca brought a new rear-wheel lock to her meeting with the fact-finding panel and asked the panel to pass it to the owner of the bicycle. She also agreed to reimburse the owner of the bicycle for the wicker basket and the chain lock.

7. On 28 June 2011, the fact-finding panel issued a report entitled “Preliminary fact finding inquiry - Allegation of theft of personal property on premises of the ICTY”. Paragraphs 40 and 42 of the report reads:

40. Matter of intent:

- a. The Panel has no evidence that Ms. Jahnsen Lecca intended to steal the bicycle for her permanent future use or sale to a third party. She claims she “borrowed” the bike and then left it at the KPMG building with the intention to return it to the ICTY Bike Parking Area shortly thereafter. However, she clearly failed to do that, perhaps out of a sense of shame or fear. Fact remains that she acted with full knowledge that the bicycle was not hers.
- b. Ms. Jahnsen Lecca’s actions in terms of twice walking past this unlocked bicycle and then returning on two occasions to inspect the bicycle and then subsequently taking the bicycle out of the ICTY premises suggested that she clearly thought things over and that she did not act on an impulse in taking the bicycle. Her actions at the ICTY Bike Parking Area covered a time period of over a minute, namely from 13:03:51 hrs until 13:05:01 hrs. She carefully looked at the bicycle and was not obviously distracted by other persons or actions in the nearby vicinity. There is no semblance of hurried behaviour on the part of Ms. Jahnsen Lecca.

42. Willingness to cooperate with the Panel: Ms. Jahnsen Lecca was not truthful in her meetings with the Panel on 14 and 15 June 2011. Her admission that she had

knowingly taken somebody's bicycle only came two full days later on 16 June 2011. The Panel does observe that Ms. Jahnsen Lecca appeared to genuinely regret having taken the actions and having attempted to mislead the Panel.

8. On 23 November 2011, the ICTY Registrar referred the case of Ms. Jahnsen Lecca to the Assistant Secretary-General for Human Resources Management for possible disciplinary proceedings, as he concluded that there was sufficient evidence indicating that Ms. Jahnsen Lecca had engaged in wrongdoing that could amount to misconduct. The fact-finding panel's report was attached. In the referral memorandum, the ICTY Registrar added that Ms. Jahnsen Lecca was "an extremely hard worker and ha[d] the respect of all persons with whom she work[ed]", and that the OTP was of the view that, considering that there had been no other incidents of that nature and Ms. Jahnsen Lecca was a single mother and the sole source of support for her child, administrative measures (such as a warning) might be sufficient.

9. On 8 December 2011, the Office of Human Resources Management (OHRM) charged Ms. Jahnsen Lecca with misconduct, specifically with taking another staff member's property without her authorization, in violation of Staff Regulation 1.2(b) and (f). Ms. Jahnsen Lecca was requested to respond to the charges within two weeks. However, though she was granted extensions of time on 16 April 2012, 15 May 2012 and 4 June 2012 "given [her] medical condition", Ms. Jahnsen Lecca failed to submit comments on the allegations of misconduct against her.

10. By letter dated 13 August 2012, Ms. Jahnsen Lecca was informed of the decision to separate her from service, with compensation in lieu of notice and with termination indemnities, on the basis that her contentions that she had merely borrowed the bicycle and had intended to return it were contradicted by her actions, that she returned the bicycle only after nine days and after she had been interviewed twice by the fact-finding panel, and that she did not take another staff member's bicycle on an impulse, but did so "with the necessary intent". It was the view of the Secretary-General that Ms. Jahnsen Lecca's conduct showed a lack of integrity and the disciplinary measure of separation from service took into account her regrets, her attempts to make reparation, her unblemished performance record and her personal circumstances as mitigating factors.

11. Ms. Jahnsen Lecca appealed. In Judgment No. UNDT/2012/206, the Dispute Tribunal dismissed her application. The UNDT determined that the only issue before it was the proportionality of the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnities. The Dispute Tribunal concluded that the said disciplinary measure took into account some extenuating circumstances as it was not the most severe available, given the serious nature of the established misconduct. In the view of the Dispute Tribunal, the Secretary-General was not legally required to consider the opinions of those who had worked with Ms. Jahnsen Lecca before taking a disciplinary decision.

Ms. Jahnsen Lecca's Appeal

12. Ms. Jahnsen Lecca submits that the UNDT erred when it failed to find that there was an inappropriate escalation of charges and when it failed to state the specific misconduct proven. She notes that theft was a charge not expressly imposed against her, but it “has crept into this case”. At the time of the investigation, she was said to have taken another person’s property without permission or authorization. However, after she appealed to the Dispute Tribunal, the Secretary-General labelled her conduct as theft. That was an improper escalation of charges against her. The Secretary-General has conflated the concept of theft and unauthorized use.

13. Alternatively, Ms. Jahnsen Lecca submits that if theft had been properly before the Dispute Tribunal, the UNDT erred when it failed to hold the Secretary-General to his burden to prove the charge of theft against her. The question for the UNDT was not whether she had taken the bicycle without authorization, but whether she had intended to steal the bicycle. In her view, there was no evidence in the record which would support the latter.

14. Ms. Jahnsen Lecca maintains that the UNDT erred when it failed to evaluate the sanction of separation imposed on her and when it found the misconduct as serious as opposed to routine. She notes that the fact-finding panel did not find , and the Secretary-General did not prove, theft. In her view, for her misconduct of unauthorized use of a third party’s property, which falls under the offence of misuse or failure to exercise reasonable care, the consistent sanction is censure. Ms. Jahnsen Lecca believes that her actions, however categorized, do not rise to the level of “serious” misconduct. Even if she had been charged with and found to have committed theft, it would be only “simple theft, which is routine misconduct and not serious misconduct”.

15. Finally, Ms. Jahnsen Lecca states that the UNDT erred when it failed to consider a relevant matter, i.e., the position of the ICTY Prosecutor, which should have been accorded some weight given his unique position in staffing decisions within his office. Rather than finding the Prosecutor's position as a mitigating factor, the UNDT instead found her employment with the ICTY as an additional aggravating factor.

16. Ms. Jahnsen Lecca requests that this Tribunal order the rescission of the disciplinary measure of separation from service and her retroactive reinstatement, or the payment to her of the monetary compensation equivalent to her net base salary through December 2015.

The Secretary-General's Answer

17. 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, and the disciplinary measure of separation from service was proportionate to the offence.

18. The Secretary-General also submits that the Administration had a sufficient basis to find that Ms. Jahnsen Lecca "did not act on an impulse in taking the bicycle", and that "she acted with the necessary intent". He is of the view that the fact that Ms. Jahnsen Lecca returned the bicycle only after she had been interviewed twice by the fact-finding panel strongly suggests that she would have kept the bicycle had its theft not been discovered. In this connection, the Secretary-General stresses that Ms. Jahnsen Lecca is using her appeal to this Tribunal as an opportunity to reargue her case about insufficient evidence of her intent to steal the bicycle, and notes that the Dispute Tribunal considered and properly dismissed her argument on this point.

19. The Secretary-General further submits that the Dispute Tribunal did evaluate the sanction imposed on Ms. Jahnsen Lecca against the misconduct that was proven. The Secretary-General points out that the UNDT did not commit any error in characterizing Ms. Jahnsen Lecca's misconduct as serious. In this connection, the Secretary-General stresses that the OIOS Investigations Manual, which Ms. Jahnsen Lecca cites in reference to "routine misconduct" and "serious misconduct", is intended as a tool and a guide for investigation, and it is not a legally binding document to constrain the Administration's discretion when assessing the appropriate disciplinary sanction.

20. The Secretary-General further submits that, contrary to Ms. Jahnsen Lecca's assertion that she was not informed of the specific charge of theft, theft was the central issue of the case and she was consistently informed of the allegation.

21. The Secretary-General finally submits that Ms. Jahnsen Lecca has not provided any new evidence or arguments to show that the Dispute Tribunal made any error in determining that the disciplinary sanction of separation from service was warranted in the present case, and that she has thus failed to discharge the burden of proving that the Judgment was defective. The Secretary-General therefore requests that this Tribunal affirm the UNDT Judgment and reject the appeal in its entirety.

Considerations

22. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant*:¹

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".

23. Ms. Jahnsen Lecca claims that "theft, a charge not expressly before the Appellant at the time of her separation, has crept into this case". She submits that the UNDT failed to make findings on the specific category of misconduct and that she did not receive notice of the specific charge of theft prior to receiving a disciplinary sanction. We find that these submissions are not sustainable.

24. Disciplinary cases are not criminal, so that criminal law procedure and the criminal definition of theft are not applicable to this case. There was no need to give notice of a specific charge of theft because from first to last, the charge against Ms. Jahnsen Lecca was "taking,

¹ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29 (internal citations omitted).

without authorization, a staff member's property". Contrary to her claims, Ms. Jahnsen Lecca had never at any stage been left in doubt as to the alleged circumstances of her misconduct. The OHRM memorandum of 8 December 2011 made it clear that the allegation of misconduct concerned the theft of a bicycle. The report of the fact-finding panel of 28 June 2011, a copy of which was attached to the charge letter, was entitled "Allegation of theft of personal property on premises of the ICTY". In the OHRM memorandum of 13 August 2012 Ms. Jahnsen Lecca was informed that there was sufficient evidence to demonstrate that she had taken, without authorization, another staff member's property, namely, a bicycle and that "theft and misappropriation of property is misconduct normally deserving of dismissal".

25. In her case before the UNDT, Ms. Jahnsen Lecca did not dispute that she took a bicycle without the owner's permission, but she claimed that she did not intend to steal it, a claim which the UNDT clearly rejected. The Dispute Tribunal found that the facts alleged by the Secretary-General in the disputed decision imposing the disciplinary measure constituted misconduct under the Staff Regulations and Rules. In our view, this was a decision which was fully supported by the facts.

26. On the question of proportionality, Ms. Jahnsen Lecca argues that the UNDT erred in failing to consider the ICTY Prosecutor's representation on her behalf as a mitigating factor. In our view, the UNDT committed no error in finding that the Secretary-General was not bound to consider this representation as mitigation, notwithstanding that he did take other factors into account as being in mitigation.

27. We are satisfied that the UNDT correctly addressed the issue of proportionality. The UNDT found on the evidence before it that Ms. Jahnsen Lecca's misconduct was serious, but that the Secretary-General had taken some mitigating circumstances into account in arriving at the appropriate disciplinary measure, which was not the most severe available. Considering the circumstances of the misconduct, we cannot discern any error in the UNDT's finding that the disciplinary measure imposed was not manifestly disproportionate to the misconduct.

28. For the foregoing reasons, we find that Ms. Jahnsen Lecca has failed to establish that the UNDT made any error of law or fact in its review of the disciplinary measure imposed by the Secretary-General. It follows that the appeal must fail.

Judgment

29. The appeal is dismissed and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Adinyira

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

(Signed)

Weicheng Lin, Registrar