



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

Judgment No. 2021-UNAT-1167

**Cheikh Thiare
(Respondent)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Martha Halfeld Judge Kanwaldeep Sandhu
Case No.:	2020-1466
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Respondent:	Self-represented
Counsel for Appellant:	Francisca Lagos Pola

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Cheikh Thiare (Mr. Thiare) contested the decision of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO or Mission) to dismiss him from service for having forged the Chief of Staff's signature on a draft document, which he then presented to a Military Prosecutor.

2. The United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Judgment No. UNDT/2020/139/Corr.1 granted Mr. Thiare's application and ordered the Administration to replace the original dismissal sanction for another one with less gravity: separation from service with compensation *in lieu* of notice and without termination indemnity.¹ For the reasons set forth below, we vacate the UNDT Judgment.

Facts and Procedure

3. Mr. Thiare joined MONUSCO as a Security Officer on 14 November 2006. At the time of his separation from service, he was serving on a continuing appointment at the FS-4 level.

4. On 23 December 2015, Mr. Thiare filed a complaint with the Public Prosecutor's Office in Beni, Democratic Republic of the Congo (DRC), against one of his colleagues, JT, alleging that the latter had threatened to kill him.

5. Also on 23 December 2015, Mr. Thiare allowed two national police officers onto the MONUSCO compound in Beni and stationed them outside his office for protection against JT.

6. On 5 January 2016, MONUSCO's Legal Affairs Office (LAO) received a letter dated 2 January 2016 from the Major Magistrate at the Beni-Butembo Military Garrison (Military Prosecutor). The Military Prosecutor intended to prosecute Mr. Thiare for improperly securing the two national police officers and allowing them on the MONUSCO compound without authorization, actions which allegedly violated Congolese military law. The Military Prosecutor requested that MONUSCO waive Mr. Thiare's United Nations privileges and immunities so that he could be prosecuted.

¹ *Thiare v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/139/Corr.1 dated 7 August 2020 (Impugned Judgment).

7. The LAO prepared an official response to the Military Prosecutor's letter but decided to "hold off" on sending it.
8. Mr. Thiare contacted a Legal Assistant in the LAO by telephone to inform the office of his possible arrest. The Legal Assistant informed Mr. Thiare that the LAO had received a letter from the Military Prosecutor requesting the waiver of Mr. Thiare's diplomatic immunity and that the LAO was in the process of drafting a response. The Legal Assistant prepared a draft reply and shared it with Mr. Thiare in order for him to confirm the details.
9. On 8 January 2016, Mr. Thiare learned from a Judicial Police Officer that the Office of the Military Prosecutor planned to arrest him on 11 January 2016, as the Military Prosecutor had interpreted the LAO's lack of an official response as an assent to the prosecutor's request pertaining to the waiver of Mr. Thiare's privileges and immunities. On 9 January 2016, Mr. Thiare learned from a colleague that the LAO had decided to halt its reply.
10. On 10 January 2016, Mr. Thiare retrieved the draft reply he had received from the Legal Assistant, forged the signature of the MONUSCO Chief of Staff and delivered it to the Military Prosecutor's private residence.
11. On 21 January 2016, the Military Prosecutor sent a letter to the Chief of Staff informing him that based on MONUSCO's 10 January 2016 letter — the one with the forged signature — he had decided not to pursue the prosecution of Mr. Thiare.
12. On 25 January 2016, MONUSCO replied to the Military Prosecutor and informed him that the 10 January 2016 letter was not authentic and that the Administration would investigate the matter.
13. On 29 May 2016, the Office of Internal Oversight Services (OIOS) notified Mr. Thiare that it had commenced an investigation against him for potential misconduct. On 30 May 2016, OIOS interviewed Mr. Thiare, and during the interview, he acknowledged that he had signed the document without authorization, but he stated that he had done so out of a fear for his life.
14. On 31 July 2017, OIOS concluded in its report that Mr. Thiare had forged the Chief of Staff's signature and recommended that the Department of Field Support take appropriate action.

15. On 17 August, the Assistant Secretary-General for Field Support referred Mr. Thiare's case file to the Office of Human Resources Management (OHRM). On 28 March 2018, OHRM notified Mr. Thiare of the formal allegations of misconduct against him, and on 27 August 2018, Mr. Thiare provided his comments on the allegations.

16. On 25 October 2018, the Under-Secretary-General for Management decided to dismiss Mr. Thiare, in accordance with Staff Rule 10.2(a)(ix). On 31 October 2018, Mr. Thiare was separated from service.

17. On 7 August 2020, the Dispute Tribunal issued the Impugned Judgment. Because the parties agreed on the facts of the case and agreed that Mr. Thiare's actions constituted misconduct and that Mr. Thiare's due process rights had been observed, the UNDT focused solely on the issue of whether the sanction imposed was proportionate to the gravity of the offense.

18. The UNDT acknowledged that deference should be given to the discretionary powers of the Secretary-General in these cases. However, the UNDT emphasized that Appeals Tribunal jurisprudence permits the UNDT to interfere with the Organization's disciplinary powers when the sanction is disproportionate to the offense. The UNDT indicated that the standard for interference when assessing proportionality requires the UNDT to analyze the basis, purpose and effects of the administrative decision.²

19. The tribunal underlined the importance of consistency across the Organization's administrative practice. The UNDT cited two instances in which the administrative sanction for forging a document or signature was not dismissal but separation from service with compensation *in lieu* of notice and without termination indemnity. The tribunal found that there was no justification to apply a harsher disciplinary measure in the instant case.

20. Specifically, the UNDT identified four mitigating factors that it found the Organization should have considered:³

- a. The fact that [Mr. Thiare] has admitted the misconduct and fully cooperated with the investigation;
- b. The fact that a request for a waiver of his immunity was made to MONUSCO and [Mr. Thiare's] imminent arrest by the local authorities;

² Impugned Judgment, para. 43.

³ *Ibid.*, para. 69.

c. MONUSCO's delay in answering the Military Prosecutor in due time so as to avoid [Mr. Thiare's] imminent arrest and the fact that [the Senior Legal Advisor] had halted the reply without a proper justification;

d. The risks for [Mr. Thiare's] life and well-being related to the hazardous duty station where he was working.

21. The UNDT found it was reasonable to believe that Mr. Thiare acted under pressure and out of a fear for his life. Had the Organization considered the above-listed factors, it would have likely concluded that MONUSCO should have quickly replied to the Military Prosecutor. Thus, the Organization could have issued a less severe sanction.

22. The UNDT then held that the Secretary-General should replace the original disciplinary sanction, dismissal, with a less-severe sanction: separation from service with compensation *in lieu* of notice and without termination indemnity.

23. On 6 October 2020, the Secretary-General submitted his appeal of the Impugned Judgment. This appeal was registered with the Appeals Tribunal as Case No. 2020-1466. On 7 December 2020, Mr. Thiare filed his answer.

Submissions

The Secretary-General's Appeal

24. The Secretary-General submits that the UNDT erred in law and fact in concluding that Mr. Thiare's dismissal was not proportionate to his misconduct. The Secretary-General argues that the sanction of dismissal in this case was in line with the Organization's practice, as Mr. Thiare's conduct interfered with the legal proceedings of a Member State and impacted the Organization's reputation and credibility.

25. The Secretary-General argues that the "mitigating circumstances" identified by the UNDT were not in fact mitigating; to wit: (a) while Mr. Thiare admitted to the misconduct, he never took responsibility and did not report the incident himself; (b) there is no contemporaneous evidence on record that Mr. Thiare's arrest by local authorities was "imminent"; (c) there was no undue delay in MONUSCO's response to the Military Prosecutor's request, as the request was received on 5 January 2016 and Mr. Thiare delivered the falsified memorandum on 10 January 2016; and (d) serving in a hazardous duty station does not justify or mitigate Mr. Thiare's misconduct. The Secretary-General additionally argues that even if

there was a delay in MONUSCO's response to the Military Prosecutor, the Secretary-General's decisions on matters of privileges and immunities are not administrative decisions capable of judicial review, and therefore the delay cannot be a mitigating factor.

26. The Secretary-General further submits that the UNDT erred in law and exceeded its jurisdiction by substituting its own judgment for that of the Secretary-General, as the Secretary-General has the discretionary authority to impose disciplinary measures. The Secretary-General argues that there is no evidence that the decision to dismiss Mr. Thiare was blatantly illegal, arbitrary, excessive, abusive, discriminatory, or absurd in its severity so as to warrant judicial review of his discretion.

27. Finally, the Secretary-General submits in the alternative that, if the Appeals Tribunal affirms that dismissal was a disproportionate sanction, the UNDT erred in not awarding compensation *in lieu* of rescission.

28. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and affirm the decision to dismiss Mr. Thiare. In the alternative, the Secretary-General requests that the Appeals Tribunal set compensation *in lieu* of rescinding the decision to dismiss Mr. Thiare from service.

Mr. Thiare's Answer

29. Mr. Thiare submits that the Organization ignored several mitigating circumstances when imposing the sanction of dismissal, namely: (a) the fact that he admitted to the misconduct and fully cooperated with the investigation; (b) the Military Prosecutor's request for the waiver of his immunity and the imminence of his arrest; (c) MONUSCO's failure to reply to the Military Prosecutor, and (d) the risk to Mr. Thiare's life and well-being. Mr. Thiare emphasizes the insecurity of the area in which he was stationed and argues that MONUSCO failed to fulfill its obligation to protect and assist him. Without this failure, Mr. Thiare would not have engaged in the misconduct that led to his dismissal.

30. Mr. Thiare requests that the Appeals Tribunal confirm the UNDT Judgment. Mr. Thiare further requests that the Appeals Tribunal order the Secretary-General to pay him damages and interest in the sum of USD 150,000 regardless of the compensation ordered in the UNDT Judgment (compensation *in lieu* of notice of separation from service).

Considerations

31. The sole issue for the Appeals Tribunal to consider is whether the UNDT erred when it found that the disciplinary measure of dismissal imposed on Mr. Thiare was disproportionate to the gravity of the offense and therefore was manifestly abusive and should be replaced by another one with less severe consequences: separation with compensation *in lieu* of notice and without termination indemnity.

32. Staff Rule 10.3(b) provides that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”.

33. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the specific actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority.⁴ It is the Administration that carries out the administrative activity and procedure, and it is the Administration that deals with the staff members.⁵ Therefore, the Administration is the best suited actor to select an adequate sanction able to fulfill the following general requirements, which include *inter alia* that the sanction imposed is within the limits stated by the respective norms, and second, the sanction must be sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance.⁶ That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity.⁷ This rationale is followed in the jurisprudence of this Tribunal.⁸

⁴ *Portillo Moya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-523, para. 20.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*, para. 21.

⁸ *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 89; *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 39; *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.

34. The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.⁹ Further, as we stated in *Samandarov*:¹⁰

... [D]ue deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.

... The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

35. In the case at hand, the UNDT examined, as per its reasoning, the administrative practice of the Organization in similar cases, i.e., in cases where the staff member has forged a document or a signature in an official document, and found out that, at least in two cases, the administrative sanction was not dismissal but separation from service with compensation *in lieu* of notice and without termination indemnity.

36. Specifically, in the first case, a staff member falsified invoices for medical treatment and subsequently submitted them to the staff member's private insurance company in support of medical claims.¹¹ The staff member made an early admission of the misconduct and cooperated fully with the investigation. The time taken to conclude the investigation and the subsequent disciplinary process were taken into account in determining the disciplinary

⁹ *George M'mbetsa Nyawa* Judgment, *op. cit.*; *Ladu* Judgment, *op. cit.*, para. 40.

¹⁰ *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24 - 25.

¹¹ *Impugned* Judgment, para. 46.

measure. The disposition in that case was separation from service with compensation *in lieu* of notice but without termination indemnity.¹²

37. In the second case, a staff member created a false *note verbale* on official letterhead on his United Nations computer.¹³ The staff member forged the signature of another staff member and sold the *note verbale* to another staff member in order for the latter to obtain a non-immigrant visa. Several false documents, such as fake diplomas, were found on the staff member's United Nations computer. Mitigating factors were taken into account in determining the disciplinary measure, including flaws in the investigation process and the time taken to complete the disciplinary process. The disposition in the second case was again separation from service with compensation *in lieu* of notice but without termination indemnity.

38. Next, the UNDT went on to identify a specific set of mitigating circumstances that it found should have been taken into consideration by the Administration, leading the latter to impose a less severe sanction,¹⁴ namely: (a) The fact that Mr. Thiare had admitted to misconduct and fully cooperated with the investigation; (b) The fact that a request for waiver of his immunity was made to MONUSCO and Mr. Thiare's imminent arrest by the local authorities; (c) MONUSCO's delay in answering the Military Prosecutor in due time so as to avoid Mr. Thiare's imminent arrest and the fact that the Senior Legal Officer in the LAO halted the reply without a proper justification; and (d) The risk to Mr. Thiare's life and well-being related to the hazardous duty station where he was working.

39. Based on these findings, the UNDT held that the Administration should have been consistent with its own administrative practices given in similar situations, the Administration had imposed a sanction, lesser in gravity, than dismissal. It thus concluded that the measure taken in the current case was disproportionate and manifestly abusive.¹⁵ Thereupon, the UNDT concluded that the Administration should replace the original disciplinary sanction for another one with less severe consequences: separation with compensation *in lieu* of notice and without termination indemnity.¹⁶

¹² *Ibid.*

¹³ *Ibid.*, para.47.

¹⁴ *Ibid.*, para. 69.

¹⁵ *Ibid.*, para. 77.

¹⁶ *Ibid.*, para. 78.

40. At the outset, we note the fact that the UNDT does not agree with the decision does not change the reasonableness of the decision. Also, the fact that the UNDT does not agree with the choice of the sanction imposed by the Administration does not make the implementation of the sanction arbitrary and/or disproportionate. It is certainly not the role of the Dispute Tribunal to select what it believes to be the most appropriate sanction for the Administration to impose, but rather it is only to examine the fairness and reasonableness of the decision.

41. The misconduct of Mr. Thiare must be viewed in terms of the nature of the Mission, the purpose and principles of the United Nations and the impact which this type of misconduct can have on the Organization's reputation, credibility and integrity. This type of misconduct, namely the forging of the Chief of Staff's signature on a draft LAO document and its subsequent presentation to the Military Prosecutor claiming it to be the LAO's official response to the prosecutor's request for a waiver of Mr. Thiare's privileges and immunities, if allowed, can have a substantial reputational impact on an organization such as the United Nations. It can also adversely impact the trust and confidence which Member States repose in the system and therefore hurt the relationship between the Organization and host countries.

42. Though we sympathize with Mr. Thiare's strained situation and the pressure he must have felt in this exceptionally difficult context in which he seemed to have feared for his life and physical well-being, and even though we also note the regrettable failure of the Organization to act with due diligence and without delay in fulfilling its duty of care towards its staff members, in particular those who work in difficult conditions, like in the case at hand, we are not inclined to accept that such a behavior on the part of a staff member is justifiable.

43. Fraudulent misconduct on its own is a very serious offense in any work place. In the present case, however, it transcends the internal affairs of the Organization and impacts on the relationship and the trust between the Organization and a host country. It involves the falsification of a document and the use of this falsified document in order to inhibit the legal proceedings of a host state. Such behavior must be treated with the utmost seriousness and ought not to be condoned by any Organization, more so, an Organization like the United Nations, which reports to and is accountable to Member States. It is no coincidence that a paramount obligation of staff members, as provided for under Staff Regulation 1.2(b), is that they must "uphold the highest standards of efficiency, competence, and integrity" and the

concept of integrity includes, *inter alia*, “fairness, honesty and truthfulness in all matters affecting their work and status”.

44. We have examined and considered all the authorities which have been cited by the UNDT and the reasoning advanced to mitigate the sanction and to show that it was disproportionate to the offense. As correctly claimed by the Secretary-General, the facts in the present case are entirely different from the two cases cited by the UNDT in paragraphs 46 and 47 of the Impugned Judgment, and so is the ramifications of the misconduct in the present case and those two other cases. While the two cases cited by the UNDT involved the falsification of documents by staff members in order to obtain a benefit, they did not involve the additional element of interference with the legal proceedings of a Member State and did not impact the relationship of trust between the Organization and a host state. In the instant case, Mr. Thiare falsely signed a memorandum purporting to originate from the United Nations, and he then delivered the false document to an authority of a Member State in order to avoid potential criminal proceedings and criminal liability involving himself.

45. Finally, on the totality of the evidence, we find that the misconduct was of a grave and serious nature and as such, the sanction of dismissal, though harsh in relation to the circumstances of the case, was not disproportionate and manifestly abusive. Consequently, we find that the UNDT erred when it rescinded the Secretary-General’s decision to dismiss Mr. Thiare and ordered that the Administration replace such sanction with another one with less severe consequences: separation with compensation *in lieu* of notice and without termination indemnity.

46. As the disciplinary decision was lawful, there could be neither rescission nor modification of the impugned administrative decision. Consequently, it is not necessary to address the ground of appeal advanced by the Secretary-General that by rescinding the original sanction of dismissal without setting compensation *in lieu* of rescission, the UNDT failed to comply with Article 10(5)(a) of the Dispute Tribunal Statute (UNDT Statute) and therefore erred in law.

47. For the foregoing reasons, the Judgment of the UNDT should be vacated.

48. Finally, we would like to make the following comment: The history of this case presents a sorrowful picture of failures on the part of MONUSCO to fulfill its duty of care towards Mr. Thiare, which he deserved as a staff member of this Organization serving in a difficult and hazardous duty station. The failure did not only encompass the delay in answering the Military Prosecutor in due time so as to avoid Mr. Thiare's imminent arrest but it also includes the fact that the abovementioned reply was halted by the Senior Legal Officer without a proper justification. Such kind of administrative *faux pas* up the hierarchy of the Organization undermines the team spirit and collegiality of staff members, reflects badly on their morale and does not serve the long-standing interests of the Organization and therefore should be avoided in the future.

Judgment

49. We grant the appeal and order that Judgment No. UNDT/2020/139/Corr.1 be vacated in its entirety. The administrative decision to dismiss Mr. Thiare is affirmed.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 29th day of December 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar