



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/064

Judgment No.: UNDT/2012/079

Date: 31 May 2012

Original: English

**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

NYEPAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for Applicant:**

Bart Willemsen, OSLA

**Counsel for Respondent:**

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

## **Introduction**

1. The Applicant entered into service with the Organization in April 2003. At the time the decision to summarily dismiss him for serious misconduct (“the impugned decision”) was taken in June 2008, the Applicant was employed as a Heavy Duty Vehicle Driver with the United Nations Mission in Liberia (UNMIL) under a 100 series contract.

## **Facts**

2. On Saturday 26 November 2005 at about 17:45 hrs, the Applicant was stopped while attempting to leave the main gate at UNMIL Star Base in a UNMIL truck registered as UNMIL # 6144 with eight bundles of concertina wires loaded in the back of the vehicle. The two security men who stopped him from leaving the UNMIL premises interrogated him over the bundles of concertina wires in the vehicle for which he had no pass or authorization to take out of the premises. Thereafter, the same evening, the Applicant was handed over to the Special Investigations Unit (SIU).

3. This incident was followed by an investigation by the SIU of UNMIL headed by one Louis Sedegah. The Applicant was interviewed and made two statements, one on the day he was apprehended and the other two days later. Some security officers and other witnesses were interviewed by the SIU. The Investigation report was finalized on 30 November 2005. The report found that the Applicant had attempted to steal the eight bundles of concertina wires valued at approximately USD 12,090.

4. The SIU at UNMIL sent the investigation report to the Department of Field Support (DFS) on 19 January 2006. Two years and two months later, on 19 March 2008, the Director of DFS sent a memorandum to the Office of Human Resources Management (OHRM) on the subject of the alleged attempted stealing incident by the Applicant.

5. The DFS, having reviewed the findings and recommendations of UNMIL that disciplinary proceedings against the Applicant should be instituted, concluded that by

this alleged act, the Applicant had violated UN Regulations and Rules including staff regulation 1.2. It therefore recommended that the Applicant be subjected to disciplinary action.

6. On 4 April 2008, OHRM charged the Applicant with the attempted stealing of concertina wires as follows:

on the basis of the evidence and findings contained in the Investigation report and supporting documentation, [the Applicant is] hereby charged with the attempted theft of the property of the Organization, namely the 8 bundles of concertina wires valued at approximately 12,090 USD thereby violating the standards of integrity and conduct expected of staff members of the United Nations and acting in a manner unbecoming of your status as an international civil servant.

7. The Applicant responded to the charges on 15 May 2008. In his response, he disagreed with the investigation report except the portion in which he had stated that he was not aware that the concertina wires were in the vehicle he was driving. The Applicant further stated that he never pleaded for mercy nor tried to bribe anyone. He also denied writing or signing any of the two statements in which he had allegedly admitted the attempted theft.

8. On 6 June 2008, the Secretary-General informed the Applicant that, following a review of evidence on the record, he had reached the conclusion that the Applicant had engaged in serious misconduct. The said conduct, he stated, was inconsistent with the standard of conduct expected of an international civil servant and was incompatible with further service and “the gravity of [his] conduct warranted immediate separation from service.”

#### **Joint Disciplinary Committee (JDC)**

9. In accordance with former staff rule 110.4(c), by a memorandum dated 24 November 2008, the Applicant requested review of the decision to summarily dismiss him and a hearing of his case by the Joint Disciplinary Committee (JDC). The Applicant requested the JDC to find that the decision was unsubstantiated and that the burden of proof had not been met. He prayed that the contested decision be rescinded and that he be retroactively reinstated.

10. On 19 March 2009, an *ad hoc* JDC panel was established to review the Applicant's case. On 31 March 2009, the Respondent replied to the Applicant's request for review and submitted that the allegations against the Applicant were supported by conclusive evidence and that his comments did not contradict the preponderance of the evidence available on the record that he engaged in the conduct alleged.

11. The JDC Panel held a hearing and two executive sessions on 22 April 2009 and issued Report No. 253-JDC, Case No. 2008-101. The proceedings of the Panel consisted of written submissions and oral statements made by the Parties.

12. In deciding not to make a recommendation in favour of the Applicant, the JDC made the following findings:

a. Considering and noting the voluntary statements signed by the Applicant on 26 and 28 November 2005, the Applicant's contention that he had made that admission under duress was not plausible.

b. The Applicant admitted to the attempted theft on 26 November and on 28 November 2005 in two separate signed statements.

c. Even assuming that the Applicant made the 26 November 2005 statement to investigators under duress, he did not appear to be under duress on 28 November 2005 when he gave the second statement reiterating his admission that he had attempted to steal the concertina wires.

d. The decision to summarily dismiss the Applicant was based on facts that were adequately established by the SIU investigation, supported by testimonial evidence, as well as the Applicant's own admissions.

e. The charge of attempted theft of UN property was properly characterized as serious misconduct warranting the Applicant's immediate separation from service.

f. With respect to due process which the Applicant claimed he was denied, the Panel found that the Applicant's summary dismissal was preceded

by an investigation in which he was afforded a reasonable opportunity to present his version of events. The SIU investigators interviewed the Applicant and he subsequently signed two statements in which he admitted to have attempted the theft.

g. The facts on which the charge of misconduct was based were established by the Applicant's own admissions. The attempted theft admitted by the Applicant constituted serious misconduct and his due process rights were respected.

### **UNDT Application**

13. The Applicant filed the present Application with the United Nations Dispute Tribunal (UNDT) on 29 September 2009. The Respondent duly filed his Reply dated 16 November 2009 on 17 November 2009.

14. On 6 October 2010, a case management hearing was held, as per Order No. 154 (NBI/2010) dated 9 August 2010, where Counsel were, *inter alia*, to address the Tribunal on the legal issues arising from the facts of the case and any other issue(s) which may have a bearing on the readiness of the case.

15. On 15 October 2010, the Tribunal issued a notice informing the Parties that a hearing on the merits had been set down for three consecutive days as from 11 January 2011.

16. The Parties appeared before the Tribunal on 11 January 2011. At the outset, it became apparent that Counsel for the Applicant, at the time, was not prepared to present the case and that none of the witnesses listed as appearing for the Applicant had even been contacted. The Tribunal therefore adjourned the hearing.

17. Following from the hearing, Counsel for the Applicant advised the Tribunal by email that while one witness was available on 12 January 2011, operational difficulties dictated that the other three scheduled witnesses would have to be called at a date later than 13 January 2011. Counsel moved for an adjournment of the hearing to 27 January to facilitate the availability of the witnesses.

18. On 20 January 2011, the Applicant filed a motion seeking leave of the Tribunal for the Counsel on record to withdraw from the case and an adjournment to enable the newly engaged counsel to familiarise himself with the case. The Respondent had no objection to the application for adjournment.

19. The Tribunal issued Order No. 011 (NBI/2011) on 8 February 2011 granting the Motion and adjourning the matter to 7 April 2011. The Parties submitted a joint Motion requesting a case management hearing to be held on the 7 April in which a full hearing would be scheduled at a later date. On 17 May 2011 the Tribunal issued Order No. 034 (NBI/2011) in which the substantive hearing was set down for 6, 7 and 8 June 2011.

20. On 6 June 2011, the Tribunal commenced hearing in the matter on which date the Applicant testified. The Respondent called his first witness whose evidence in chief was completed before the matter was adjourned. On 7 June 2011, Counsel for the Applicant commenced cross-examination of the Respondent's witness but as a result of telecommunication difficulties the Tribunal instructed Counsel for the Applicant to present the remainder of the questions in writing. The witness provided the answers to the questions in writing on 8 June 2011.

21. The Applicant's closing submissions were filed on 22 July 2011 and the Respondent filed his on 1 August 2011, as per Order No. 079 (NBI/2011) dated 29 July 2011.

### **Applicant's version of events before the Tribunal**

22. On 26 November 2005, the Applicant arrived at the Star Base compound around 9 o'clock in the morning to start the relocation of a large number of containers within the compound on instructions he received earlier that week. It was late that afternoon when the liaison officer at the compound, instructed him to refuel UNMIL truck number 6144 for an assignment the following morning.

23. The Applicant's supervisor, Mr. Mohammed Kamokai requested him at the end of the day to refuel the UNMIL 6144 truck for a trip the next day. The supervisor

was never questioned or interviewed by the investigator. Mr. Kamokai passed away one year later.

24. The Applicant entered the truck and drove to the main gate of the compound as the truck was to be refuelled outside the compound. At the gate he was stopped by two guards who had noticed that the truck appeared to be loaded with bundles of concertina wire.

25. The two guards requested the Applicant to produce a gate pass for the bundles of concertina wires and the Applicant told them that he had no such gate pass and that, in fact, he had not even noticed that the truck was loaded with these wires. The two guards then proceeded to contact the supervisor for assistance.

26. The two guards detained the Applicant and the loaded truck and after a while the Applicant was taken to the office of Mr. Louis Sedegah, a security officer who was also an investigator with the SIU. The Applicant was treated like a criminal, handcuffed and subjected to a lengthy interrogation akin to a criminal interrogation.

27. The Applicant gave a statement verbally which was typed on the computer by Mr. Sedegah. It was only after the statement was read back to him that the Applicant realized that what had been recorded was not what he related to the investigator. He then refused to sign the statement.

28. The Applicant was thereafter placed in the back of a white Nissan car with two security officers, of which one was the head investigator, Mr. Sedegah. He was driven away from the Star Base at approximately 19:30 hrs for about one hour and 15 minutes. When they were about five minutes away from the police station the security officers turned around and drove back to the SIU office on Star Base.

29. When they returned to the Star Base compound at 01:46 am the next morning, the Applicant then agreed to sign the document for he could no longer bear further interrogation. The statement of 26 November 2005 was therefore signed under duress.

30. The Applicant does not recall making or signing the second alleged statement of 28 November 2005.

*The Applicant submitted as follows:*

31. With the available evidence, it cannot be substantiated that the facts on which the sanction was based had been established, let alone against the standard of proof applicable in these proceedings. Moreover, the Respondent failed to produce any of the witnesses whose statements were relied upon to support the sanction. The Applicant however testified under oath and his evidence was clear and consistent and therefore should be awarded the appropriate weight *vis-à-vis* the untested written statements in the investigation report.

32. An attempt to commit an act that could amount, if completed, to misconduct is not a sanctionable offence under the prevailing legislative framework of the United Nations. Moreover, even assuming *arguendo* that an attempt to commit an act was a sanctionable offence, the sanction imposed would arguably have to be less severe as opposed to a sanction for a completed act/offence.

33. Should the Tribunal hold that the sanction was not *ultra vires* as argued above, on the available evidence it cannot be sustained that the facts on which the sanction was based have been established, let alone against the standard of proof appropriate for a dismissal for serious misconduct.

34. The fact that neither the Administration nor the JDC ever investigated or took into account the psychologically intense, lengthy, criminal type interrogation conditions under which the voluntary statements were produced was a denial of the Applicant's due process rights and a failure on the part of both to take an essential fact into account.

35. There are certain factors that raise serious questions as to the credibility of the SIU investigation report and the statements of the security officers on which it was based.

36. In analysing the statements made by the security guards, it is clear that these statements are riddled with inconsistencies as to the timing of the sequence of events surrounding the Applicant's alleged movements and that they are not consistent with the facts that the Applicant is alleged to have confirmed in the contested admissions.



37. Based on the inconsistent statements made by the guards and those contained in the findings of the SIU investigation report, it was never conclusively established that the Applicant either unloaded the eight bundles of concertina wire on 26 November 2005 from the container or how and when the bundles of wire were loaded onto the UNMIL 6144 truck. It follows that the Tribunal should accord little weight to the written statements in the report of witnesses the Respondent failed to produce at trial.

38. The issue of how the Applicant opened the container was not established by the SIU investigation report neither was it demonstrated how the SIU found the facts and arrived at the conclusion that the Applicant had access to the key or that the Engineering Office key rack was not properly secured.

39. Although in the present case, the Applicant was apprehended with the bundles of concertina wire when he was attempting to exit the Star Base compound, this fact standing alone, and in light of the Applicant's explanations, was not adequate to establish a *prima facie* case of attempted theft.

40. Given the fact that the SIU never investigated the statements made by the Applicant concerning why he was taking the truck out of the compound without a pass or interviewed the person who he alleged requested him to refuel the truck, the Administration failed to take an essential fact into account. A fact that could have exculpated the Applicant.

41. Based on the available evidence, the Respondent's failure to produce any witnesses he relied upon in arriving at the sanction and the observation that the investigation did not meet the most basic standards of fairness and professionalism, it cannot be sustained that the facts on which the sanction was based have been established, let alone against the standard of proof applicable in these proceedings.

42. The Applicant prays therefore that the impugned decision be vitiated and that he be awarded compensation in the amount of two years net base salary for the combination of material and immaterial damages.

### **Respondent's version of events**

43. The Respondent's version of events can be distilled from inter-office memoranda, the investigation report of 30 November 2005, and the testimony of the Respondent's lone witness, Louis Sedegah, who investigated this case.

44. The Applicant, on 26 November 2005 at about 17:45hrs, attempted to drive a truck registered as UNMIL # 6144 through the main gate of the UNMIL compound. The said truck was loaded with eight bundles of concertina wires valued at approximately USD 12,090. When he drove up to the main gate, two security guards manning the said gate, on observing the concertina wires inside the truck, which were the properties of the Organization, asked the Applicant to produce a gate pass or authorization to take the property out of the premises.

45. The Applicant, who could not provide any such authorization, told the security guards that he did not know that the bundles of concertina wires were in the truck. He also told them that he was only taking the vehicle outside of the compound in order to refuel it. He pleaded for mercy, told the guards that his wife was pregnant, and begged them not to do anything that would affect his job. He attempted to bribe one of the guards, Mr. Baker, with USD700 and a mobile phone.

46. The Applicant was apprehended and handed over to the SIU officers soon thereafter. The investigation commenced immediately the same evening. Statements were taken from six security guards in UNMIL premises. Two of these guards had apprehended him as he attempted to drive out with the UNMIL truck loaded with eight bundles of concertina wires. The statement of the other four security guards indicated that they had observed the Applicant lifting concertina wire from containers onto a truck on the day in question.

47. According to a signed statement dated 30 November 2005 by one Rogers Dossen, a security guard, he had seen the Applicant earlier that day at about 15:58 hrs operating a crane lifting a blue container. Another security guard, Mr. Sayforteh in his statement dated 3 December 2005, stated that he had observed the Applicant on the day of the incident loading some concertina wire from a container onto a truck with a forklift at approximately 17:20hrs.

48. Another security guard, David Dean in his statement dated 2 December 2005, said that he had observed the Applicant operating a huge container lifter at approximately 16:08hrs on the day of the incident and that when he returned to his duty the post at 17:30hrs the same day, he was informed that the Applicant had left. Also Rahiem Massaquoi, another security guard, stated that he had observed the Applicant opening a container and loading some concertina wire onto a truck. He was aided by a forklift operator who failed to disclose his identity when asked at about 16:08hrs.

49. In the Applicant's voluntary statements, dated 26 and 28 November 2005, he admitted that he "intended to dump the wire with some guys at the Gardensville refuse dumping site for safe keeping and until [he] could find some customers to purchase them." He told the investigators that there were no other staff members involved. Based on the foregoing, the SIU concluded in its report that the Applicant was guilty of premeditated attempted theft.

50. By memorandum dated 4 April 2008 and based on the findings of the investigation report and supporting documentation, the Applicant was charged with attempted theft of the property of the Organisation, namely 8 bundles of concertina wires valued at approximately USD 12,090 in violation of staff regulations 1.2(b) and (e).

51. In addition to the memorandum setting out the charges, the Applicant was provided with a copy of the investigation report and relevant supporting documentation, pursuant to paragraph 6(b) of ST/SGB/371 ("Revised Disciplinary Measures and Procedures"). He was also provided with the memorandum dated 19 March 2008 referring his case to OHRM for appropriate action. He was afforded an opportunity to submit comments within two weeks of receiving the allegations and was advised of his right to counsel.

52. By memorandum dated 15 May 2008, the Applicant submitted his comments. He therein stated that he disagreed with the investigation report, except the portion of the report which stated that he said that he did not know that the bundles of wires were in the truck when tried to drive it out of the compound. He also denied that he pleaded for mercy or attempted to bribe the security guard.

53. The Applicant alleged in his response that his signed voluntary statement dated 26 November 2005 was a “fabrication as it was not written or signed by [him]”.

54. The Applicant, in the said response to the charge against him, stated that under Liberian law an employee accused by his employer is presumed innocent until found guilty by a court of competent jurisdiction. He added that until he was found guilty by a court of competent jurisdiction, he rejected having violated staff regulations 1.2 (b) and (e).

55. The Secretary-General concluded that the Applicant failed to comply with his obligations as a United Nations staff member, that his conduct was inconsistent with the standards of conduct expected of an international civil servant and was incompatible with further service, and that the gravity of his conduct warranted his immediate separation from service.

56. Accordingly, on 6 June 2008, the Applicant was notified that he was summarily dismissed for serious misconduct in accordance with staff regulation 10.2.

*The Respondent submits as follows:*

57. The investigation report of 30 November 2005 concluded that the Applicant was guilty of attempted theft.

58. With regard to due process, the Applicant was informed of his right to submit comments, if any, within two weeks of receiving the charges. He was also advised of his right to secure the assistance of counsel.

59. The Applicant did not deny his second signed voluntary statement, dated 28 November 2005 in which he also admitted having attempted to take the bundles of wire.

60. The Secretary-General determined that the allegations of misconduct against the Applicant were supported by conclusive evidence and that the Applicant’s response did not contradict the preponderance of evidence available on the record that he engaged in the conduct alleged.

61. The *ad hoc* JDC was of the view that the Applicant had signed both statements of his own free will and that there was no evidence that he was under duress. The Applicant did not proffer any evidence of duress to the UNDT and, as such, the Secretary-General's findings on this issue should be upheld. The Applicant's response dated 15 May 2008 contradicted his voluntary signed statements.

62. The Applicant did not satisfy the requisite burden of proof before the *ad hoc* JDC. The Applicant had to show that due process had not been followed or that the Secretary-General's actions were tainted by prejudice, bias, a significant mistake of fact or a significant procedural or extraneous irregularity. The Applicant failed to provide any concrete evidence in that regard.

63. The Applicant had simply resubmitted his contentions as set out in his request for review and comments on the charges dated 15 May 2008. The Applicant has not provided any new evidence to the UNDT to justify a re-examination of the facts already established by the *ad hoc* JDC.

64. The evidence before the *ad hoc* JDC showed that the facts underlying the charges had been properly established. The findings made were reasonably justifiable and were supported by the evidence. There had been no failures to consider significant facts and no irrelevant facts were unduly considered. It was also noted that the established facts legally amounted to serious misconduct.

65. In view of the Applicant's functions as a Heavy Duty Vehicle Driver, Respondent found that, based on the JDC's advice, his actions of attempting to steal UN property valued at USD 12,090 amounted to a fundamental lack of integrity and that the original decision to summarily dismiss him was therefore proper.

66. In light of the grave nature of the Applicant's misconduct, the disciplinary measure of summary dismissal, under staff rule 110.3 (a) (viii) was appropriate.

67. The Respondent prayed the Tribunal to uphold the Secretary-General's decision and to reject the Applicant's pleas in their entirety.

## Issues

68. The Tribunal formulates the following questions for consideration:
- a. Did the Applicant attempt to take UN property out of the premises without the required authorization?
  - b. Were the statements of 26 and 28 November 2005 made and signed by the Applicant?
  - c. Were the explanations proffered by the Applicant sufficient to exculpate him or to give him the benefit of the doubt?
  - d. Is attempted theft misconduct within the UN legal framework?
  - e. The alleged inconsistencies in the statements of the security guards.

## Considerations

### **Did the Applicant attempt to take UN property out of the premises without the required authorization?**

69. Evidence before the Tribunal shows that on 26 November 2005, a Saturday, the Applicant attempted to drive out of UNMIL premises with a UNMIL truck # 6144 at about 17:45.

70. The Applicant, who was carrying eight bundles of concertina wires in the said UNMIL truck # 6144, was apprehended by two security guards at the UNMIL Stare Base exit gate when he could not produce a gate pass or the required authorization. The said security guards, not being satisfied with the Applicant's explanations, handed him over to the head of SIU (Keith Worrell) who appointed Louis Sedegah to conduct an investigation into the incident.

71. The Applicant neither denies that he was apprehended when attempting to drive out of the UNMIL Star Base Compound nor that he did not possess the required authorization for the concertina wires found in the truck. The Applicant and the Respondent agree on one material point, that the Applicant was driving the said truck

with the concertina wires attempting to leave the compound without a gate pass or authorization.

72. This Tribunal notes that the Applicant's story was that he had been instructed to fuel the truck by his supervisor, Mr. Kamokai. Granted that he was indeed so instructed, such instruction did not include that he take the concertina wires which was property of the Organization out of Star Base compound.

73. It is therefore the finding of this Tribunal that the Applicant did attempt to leave the premises with the concertina wires without the required authorization.

**Were the statements of 26 and 28 November 2005 made and signed by the Applicant?**

74. The Respondent tendered two statements which were obtained from the Applicant and signed by him on 26 and 28 November 2005. In the said statements, which are before the Tribunal, he admitted that he "intended to dump the wires with some guys at the Gardensville refuse dumping site for safe keeping until [he] could find some customers to purchase them."

75. When the Applicant was charged on 4 April 2008, he provided comments to the charges on 15 May 2008, in which he stated that at no time did he write and sign a statement in which he admitted stealing any concertina wires. The voluntary statement of 26 November 2005, according to him, was a fabrication as it was not written or signed by him.

76. At the JDC hearing, the Applicant's testimony was that he had been treated like a criminal and subjected to a lengthy interrogation on the date of the incident until 1:46 am the next day. He alleged that he was handcuffed and driven to the police station by the SIU investigation officers. He thereafter signed the statement dated 26 November 2005 was signed under duress because he could not bear further interrogation and the handcuffs. He told the JDC that he did not recall signing his second voluntary statement of 28 November 2005 and that his signature on the document may have been forged."

77. In his Application to the UNDT, the Applicant restated his claim that he had been handcuffed and interrogated like a criminal and had been made to sign the statement of 26 November 2005 under duress. He further claimed that the so-called voluntary statement dated 28 November 2005 was neither made nor signed by him.

78. It was submitted on behalf of the Applicant that neither the Administration nor the JDC ever investigated or took into account the psychologically intense, lengthy and criminal type interrogation conditions under which the voluntary statements were produced. It was further submitted that the circumstances constituted a denial of the Applicant's due process rights and a failure to take an essential fact into account.

79. It is curious that in the Applicant's denial of the two documents dated 26 and 28 November 2005 that have been described as his voluntary statements he had alleged torture, cruel treatment and that he was forced to sign the statement of 26 November 2005. This is so because his first mention of any mistreatment, torture or duress was when his case went to the JDC and later in his testimony before the Tribunal.

80. This allegation of mistreatment and duress was never raised by the Applicant even two years after the incident when he responded to the charge of attempted stealing of UN property in May 2008. It is the view of the Tribunal that if indeed the Applicant had undergone such cruel and inhumane treatment at the hands of the SIU, he would have complained especially as he remained in the employment of UNMIL for over two years after the incident. At the time when he replied to the charge of attempted theft of the concertina wires in May 2008, he merely claimed that he did not make or sign the voluntary statements. It was only when his case went to the JDC and thereafter to the Tribunal that he admitted signing the statement of 26 November 2005 claiming that he did so under duress.

81. Aside of his *ipse dixit*, the Applicant did not provide any evidence of torture or duress before the Tribunal. Under cross-examination, the Applicant had admitted that the signature on the 28 November 2005 statement was similar to his own although he did not sign it. It has been argued on his behalf that the failure of the Administration to investigate further or request an independent handwriting expert verification of the signatures was a denial of due process.



82. In his response to the charges against him, the Applicant attacked the credibility of the investigation process and the report produced from it without making any effort to state what had happened on the day of the incident. He did not explain why the concertina wires were found in a truck which he was attempting to drive out of UN premises.

83. It is the finding of the Tribunal that the statements of 26 and 28 November 2005 were made and signed by the Applicant and that these statements were voluntary and not made under duress. The Tribunal further finds that there was no denial of the Applicant's due process rights.

**Were the explanations proffered by the Applicant sufficient to exculpate him or to give him the benefit of the doubt?**

84. It was submitted on behalf of the Applicant that although he was apprehended with the bundles of concertina wires when attempting to exit the entrance gate to the Star Base compound, this fact alone and in the light of the Applicant's explanations was not enough to establish a *prima facie* case of attempted theft.

85. It was also submitted that since the SIU never investigated the statements made by the Applicant as to why he was taking the truck out of the premises without authorization or interviewed Mr. Kamokai who had asked the Applicant to refuel the truck, the Administration had failed to take an essential fact into account. This fact was enough to exculpate the Applicant.

86. Even if it was true that the Applicant was indeed instructed to refuel the truck late in the day of Saturday 26 November 2005 by Mr. Kamokai and that this refuelling had to be done outside the Star Base compound after working hours, this fact did not provide justification for attempting to take the bundles of concertina wires out of the UN premises.

87. It is for the Applicant to present his case with evidence concrete enough to throw doubt on the contested decision. The Applicant has not convinced the Tribunal as to why it was necessary to refuel the UNMIL truck after working hours on a non-working day for some alleged assignment on a Sunday morning and how he came to

be in possession of eight bundles of concertina wires which were clearly visible and protruding from the truck.

88. The photographic evidence, in Annex 18 of the Applicant's bundle, shows the truck fully loaded with the concertina wires at the time that the Applicant was apprehended while attempting to drive the said truck out of the premises. The Applicant's story that he did not see the bundles of wires in the truck and that he had merely entered and drove the truck to the gate is not credible. A reasonable, responsible and experienced official driver taking a vehicle out of the Organisation's premises must be aware of the proper procedure of requiring authorization for carrying items out of the compound. He would check for any properties in a vehicle he was taking out for refuelling outside the premises. In this case, he would have seen the bundles of concertina wires which were visible from the top of the truck or at least felt the weight of them whilst driving.

89. The Tribunal finds that in light of the circumstances, the explanations offered by the Applicant were not sufficient to exculpate him or give him the benefit of the doubt.

**Is attempted theft misconduct within the UN legal framework?**

90. The charge against the Applicant is one of attempted theft of eight bundles of concertina wires valued at USD 12,090. In UNDT Judgment no. UNDT/2011/106 dated 23 June 2011, this Tribunal held that a misconduct of attempted abuse of authority does not exist within the legal framework of the Organization. The Tribunal was of the view that where misconduct is clearly defined under the Rules or Administrative Issuances, the said misconduct is either committed or not committed. There are no Rules that provide for attempted misconduct.

91. In the instant case, the Applicant's counsel cites the 23 June 2011 Judgment and argued that "it follows that whereas the offence of an attempt to commit an act that could amount, if completed, to misconduct is not envisaged as a sanctionable offence within the prevailing legislative framework of the United Nations, the dismissal of the Applicant must be held to have been *ultra vires*."

92. With respect, this interpretation and application of the Tribunal's reasoning in the said judgment to this case and the Applicant's circumstances is misconceived and misleading. This is because the offence of attempted theft with which the Applicant is charged is a criminal offence in every legal system the world over. It is an act of dishonesty and shows an absence of the core requirement of integrity expected of every staff member of this Organization. Even though the act of attempted stealing belongs in the class of inchoate offences in criminal law, it is a full, complete and sanctionable criminal offence and constitutes a misconduct for which a staff member can be disciplined. It cannot therefore be compared to such misconduct as abuse of authority or other prohibited conduct in the work environment.

**The alleged inconsistencies in the statements of the security guards;**

93. It was submitted on behalf of the Applicant that the evidence relied upon by the Respondent was riddled with numerous inconsistencies to establish conclusively the offence with which the Applicant was charged with.

94. The essence of this case, however, is that the Applicant was apprehended with the concertina wires in his possession while attempting to leave the compound without the required authorization. The inconsistencies in the statements of four security guards as to how and when the Applicant accessed and loaded the concertina wires in question into the truck which he attempted to drive out of Star Base premises are not central or material to the case against the Applicant.

**Findings**

95. The summary of the Tribunal's findings are as follows:

96. The Applicant, on 26 November 2005 at about 17:45 hrs did attempt to take eight bundles of concertina wires out of the Organisation's premises without the authorization.

97. Aside of his *ipse dixit*, the Applicant did not provide any evidence of torture or duress before the Tribunal

98. The statements of 26 and 28 November 2005 were made and signed by the Applicant and these statements were voluntary and not made under duress.

99. There was no denial of the Applicant's due process rights.

100. The Applicant's story that he did not see the bundles of wires in the truck and that he had merely entered and drove the truck to the gate is not credible. A reasonable, responsible and experienced official driver taking a vehicle out of the Organisation's premises must be aware of the proper procedure of requiring authorization for carrying items out of the compound.

101. In light of the circumstances, the explanations offered by the Applicant were not sufficient to exculpate him or give him the benefit of the doubt.

102. The inconsistencies in the statements of four security guards as to how and when the Applicant accessed and loaded the concertina wires in question into the truck which he attempted to drive out of Star Base premises are not central or material to the case against the Applicant.

### **Conclusion**

103. In light of the findings stated above, the Tribunal refuses this Application in its entirety and further upholds the actions of the Secretary-General in the Applicant's case.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 31<sup>st</sup> day of May 2012

Entered in the Register on this 31<sup>st</sup> day of May 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi