



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ONGERI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Miryoungh An, ALS/OHRM
Susan Maddox, ALS/OHRM

Application and procedural history

1. The Applicant, a security officer with the United Nations Department of Safety and Security (UNDSS) at the Nairobi duty station, had the disciplinary sanction of separation from service with compensation in lieu of notice and with termination indemnity imposed on him by an administrative decision dated 31 October 2016 which became effective on 4 November 2016 when it was communicated to him.

2. By this Application filed on 17 November 2016, the Applicant is challenging the said disciplinary sanction and further contends that the OIOS investigative findings on which the sanction is based were tainted with discrimination and bias and that the disciplinary sanction is punitive and irrational and not proportionate to the offence alleged.

3. Upon service of the Application on him by the Tribunal's Registry, the Respondent filed his Reply to the Application on 23 December 2016. He submitted that the facts were established by clear and convincing evidence, that the facts established legally amount to misconduct and that the disciplinary sanction imposed is not disproportionate.

4. A case management discussion took place with the participation of the Applicant and Counsel for the Respondent on 11 April 2017. The Tribunal being of the view that access to justice on the part of the Applicant could be negatively impacted by his self-representation, ordered him to seek professional legal advice from OSLA.

5. On 29 May 2017 after obtaining OSLA's representation, the Tribunal granted the Applicant's prayer to amend his application. The amended Application was filed on 31 May 2017 and the Respondent filed his amended Reply on 2 June 2017.

Facts

6. The facts in this case are mainly deduced from the viewing of video footages tendered by the Respondent. On Saturday 23 January 2016, the Applicant entered the Commissary located in the United Nations Office at Nairobi (UNON) at about 4.40pm. The Applicant then took a shopping basket and picked out five 1-litre cartons of juice and proceeded to the check-out desk. There was only one cashier serving another customer. When it was his turn, the Applicant placed each of the five cartons of juice on the desk where the cashier on duty was one Mr. Cyrus Kifana, an employee of the private company operating the Commissary.

7. Mr. Kifana scanned the five cartons of juice; one carton of juice was later removed from the transaction at the Applicant's request although it remained on the check-out desk. The Applicant paid for four cartons of juice whose value was \$7.60 by handing a 1,000 Kenya Shilling (Ksh) note to the cashier and was given change and a till receipt of the transaction.

8. Investigations and unrebutted oral evidence show that the Applicant told the cashier that he wanted to replace the fifth carton of juice with chocolates for his children. He then returned to the shelves to pick up a box of Kinder chocolates which he gave to Mr. Kifana who did not scan it before putting it into the Applicant's shopping bag. The Applicant also handed Mr. Kifana the fifth carton of juice which had been removed and he put it into the shopping bag. Neither the box of chocolates nor the fifth carton of juice was paid for. After his shopping bag was packed, the Applicant handed a folded Ksh200 bill to Mr. Kifana.

9. The Applicant then left the Commissary with the shopping bags and went to assume duties at his duty post before 5pm which at the time was at the main gate of the UNON premises. Just before 6pm that evening, The Commissary's manager, Mr. Mommer, drove up and called him and told him he had shopped at the Commissary

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

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

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

12. The next day, 26 January 2016, UNON's Chief of Commercial Operations referred the matter by email to the Chief Investigations Section of the UN/OIOS office at UNON requesting that he initiate an investigation of the incident. In her email referral of the case, she stated that it was very clear that the Applicant knew that the box of chocolates was not scanned and that he intentionally collected it and placed it in the shopping bag, thereby stealing it. She also stated that the footage showed the Applicant "tipping" the cashier and asked if the investigators wanted to view the footage with her.

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

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

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

15. Thereafter, on 19 April 2016, the matter was referred to OHRM for review and possible disciplinary action. The Applicant received a memorandum on 19 July 2016 dated 19 June from OHRM charging him with misconduct and asking him to respond to the allegations as outlined in the said memorandum. The Applicant's responses denying the allegations of misconduct were submitted by the Office of Staff Legal Assistance (OSLA) to OHRM on 6 September 2016.

16. By a memorandum dated 31 October 2016, OHRM concluded that the allegations were established by clear and convincing evidence and that the Applicant had violated Staff Regulations 1.2(b) and 1.2(f). The disciplinary sanction of separation from service, with compensation in lieu of notice and with termination indemnity was imposed on the Applicant.

Case for the Applicant

17. The Applicant's case is deduced from his submissions in his pleadings and closing submissions. A summary of these is set out below.

18. Neither the initial charges nor the amended one constitute misconduct:

- a) Both in the investigation report and in the letter imposing disciplinary sanction on the Applicant, the charge is framed thus: "*on 23 January 2016, at*

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

b) An amendment to the charges as reflected in the Respondent’s Reply and the memorandum conveying the disciplinary sanction against the Applicant are now before the Tribunal and read *“The evidence on the record, including the statements, the receipt and the security video footage, establishes to the clear and convincing standard, that the Applicant took the goods from the UN Commissary without paying for them and that the Applicant either knew or should have known that he was taking the goods without paying for them.”*

c) The fact that the Applicant took certain items from the UN Commissary without paying for them does not by itself amount to misconduct, unless it is established that there was a malicious intent on the part of the Applicant to do so; especially since the conduct occurred in the context of a commercial transaction involving the purchase of numerous items in which only some of the items were paid for. For a finding of misconduct to succeed, a mental element or a guilty mind must be present. A non-deliberate act, even if careless cannot constitute a violation of Staff Regulations 1.2(b) and 1.2(f).

19. The investigation was tainted by bias and prejudice against the Applicant:

a) The Applicant had asked the investigators to schedule an interview for another day since he was just coming off from a night shift and did not feel well. This request was denied and he was made to attend the interview at that time.

b) The manner in which the interview was conducted robbed the Applicant of any meaningful opportunity to present his defense. The Applicant was put under tremendous pressure during the interview resulting in the OIOS

personnel confusing him. The manner in which they framed the questions, the comments they made to his answers and their overall behavior throughout the interview clearly reflected prejudice and bias.

c) The investigators' attitude also affected the way in which the evidence was collected and assessed. The investigators displayed bias and lacked impartiality which impacted on the entire disciplinary process.

d) Improper questioning techniques were used by the investigators. For instance, the Applicant was asked repeatedly how he paid for the goods in order to frustrate and confuse him. The Applicant was also asked argumentative and leading questions reflecting the investigator's personal viewpoint in an attempt to unduly influence him. He was questioned regarding the total amount of money he had on him when he made the purchases at the Commissary and in what specific notes he had them.

e) The Applicant told the OIOS investigators that due to the lapse of time between the incident and the interview he may not be able to recall everything but this fact was not taken into consideration in the assessment of the evidence.

20. The Respondent's total reliance on his own interpretation of the video footage and disregard of testimonial/contextual evidence is prejudicial to his case:

a) The security video footage and the transaction receipt alone are clearly insufficient to satisfy the requisite evidentiary standard of clear and convincing evidence. The Respondent completely and unreasonably relied on his views and interpretation of the video footage to make assumption and to draw conclusions.

b) The actions depicted in the video footage are at best equivocal and may be subject to different reasonable interpretations. In this situation, a benefit of doubt ought to have been availed to the Applicant.

c) The Respondent failed to properly consider the available exculpatory testimonial evidence when he rejected the testimonies of both the Applicant and Mr. Kifana that Mr. Kifana was solely at fault for his failure to scan the items not paid for before placing them in the Applicant's shopping bag.

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

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

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

22. Remedies sought:

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

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

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

Case for the Respondent

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

24. The allegations of misconduct are clear and sufficient:

- a) The wordings used in the allegations of misconduct memorandum were clearly sufficient. Reference to the deliberateness of the alleged conduct is irrelevant because UNAT affirmed in the case of *Jahnsen Lecca*¹ that a finding of taking property without authorization justifies the imposition of disciplinary sanction. For a staff member who takes sale items without paying amounts to the taking of another's property without authorization and nothing more is required.

- b) Applying a criminal definition of intent to steal is not appropriate in a disciplinary process because disciplinary cases are not criminal and the definition of theft is not applicable to disciplinary cases. The criminal definition of theft and its mental element of *mens rea* are not applicable to a disciplinary process at the United Nations.

25. The allegations were established by clear and convincing evidence:

- a) All the evidence on the record, including the statements, the receipts and the security video footage establish to the clear and convincing standard that the Applicant took the goods in issue from the UN Commissary without paying for them and that the Applicant either knew or should have known that he was taking the goods without paying for them.

¹ 2014-UNAT-408

b) The Respondent considered the evidence of Mr. Kifana and his acceptance of responsibility for the non-payment of the goods as his mistake. A thorough review of the evidence showed that his acceptance of responsibility was not consistent with the security video footage which captured the incident in issue. Mr. Kifana's version of events that he was talking and chatting to the Applicant and forgot to scan the goods was not consistent with the Applicant's account to investigators.

c) The Applicant changed his version of events during the interview. His account that he did not notice that Mr. Kifana had not scanned the chocolates and put the fifth pack of juice into his shopping bag is not borne out by the sequence of events as captured on the security video footage.

d) The Applicant again changed his version of events during his testimony before the Tribunal by adding that the cashier told him that he could enter the information into the cash register without the chocolate being brought to the cash register and scanned. He further testified that when the cashier gave him the receipt, he told him that everything was included.

e) The testimony of the Applicant's witness that it was possible to manually include a product in the bill without scanning it does not disprove the facts. His evidence is hearsay as to what he was told by Mr. Kifana at the time of the incident and ought to be expunged by the Tribunal.

26. The facts legally amount to misconduct:

a) By taking a pack of juice and a box of Kinder chocolates from the United Nations Commissary without paying for them, the Applicant violated Staff Regulations 1.2(b) and 1.2(f).

b) The taking of items without paying for them is serious misconduct regardless of the value of the items in issue and warrants one of the sternest

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

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

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

a) It was held by the Appeals Tribunal that a decision to impose a specific disciplinary measure for established misconduct may only be reviewed by the Tribunal “in cases of obvious absurdity or flagrant arbitrariness.”³ In order to interfere with the decision on the basis of proportionality, the disciplinary measure must be “blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity”, “altogether disproportionate” and akin to “taking a sledgehammer to crack a nut.”

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

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

d) In the Secretary-General’s practice in disciplinary matters for 2015-2016, six out of 15 cases of misappropriation and removing property without

² *Woldeselassie*; UNDT/2010/096

³ *Jaffa*; 2015-UNAT-545

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

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

28. The Applicant's procedural fairness rights were respected.

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

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

Issues

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

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

Considerations

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

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

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

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

Video footages

33. The Tribunal has viewed the video footages which are tendered as part of the Respondent's case. In one of the video footages, the Applicant can be seen entering the Commissary and is greeted familiarly by two of its employees, one of whom is Mr. Kifana. In another video footage, the Applicant is seen walking to the check-out desk

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

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

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

Synopsis of Mr. Kifana's interview

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

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

⁴ R/2

Respondent. The said synopsis of Mr. Kifana's answers shows that when the Applicant entered the Commissary on 23 January 2016, he greeted him familiarly and told him that he wanted to buy some juice for his children. Mr. Kifana returned to the check-out desk to attend to customers while the Applicant picked out the packs of juice that he wanted from the shelves and came with them to the check-out desk.

38. The Applicant placed five packs of juice on the check-out desk. Mr. Kifana scanned the five packs of juice and the Applicant who was busy on his phone asked for the total price. When he told him what his bill was, the Applicant said he wanted to exchange one pack of juice with a box of chocolates and asked him to remove one pack from the shopping and he accordingly deleted it from the bill. He intended to return the fifth pack of juice whose sale had been voided to the shelves later.

39. The Applicant who had already paid in cash for four packs of juice and had been given a receipt and some change then went back to the shelves and picked up a box of chocolates and while they were chatting when he returned to the check-out desk, he forgot to scan the box of chocolates when it was handed to him and also forgot he had voided the purchase of the fifth pack of juice and then proceeded to pack them all into the Applicant's shopping bag. The Applicant also forgot to pay for the chocolates because they were talking.

40. Before he left with the bag of shopping, the Applicant gave a folded Ksh200 note to Mr. Kifana as tip. Customers at the Commissary tend sometimes to give a tip to the cashier after being served. Mr. Kifana knew the Applicant by sight but did not know his name. He said he had seen the CCTV footage of the incident many times. He said also that he had previously worked for an ICT firm that installed CCTV cameras and was aware that the Commissary had CCTV. If he wanted to steal money, he would move away from the camera. He was now dismissed from the Commissary on accusation of stealing over the incident.

Synopsis of Applicant's interview with OIOS

41. A synopsis of the answers given by the Applicant to the investigator during his interview was also before the Tribunal. From the synopsis, the Applicant's story is that he remembered going to the Commissary. When at the check-out desk, he realized that the packs of juice he picked out to buy were rather expensive, he told the cashier to take out a pack of juice and that he would replace it with chocolate. He went back and brought the chocolates which he gave to the cashier who packed all his shopping in a plastic bag and he took the bag and left.

42. The Applicant had about Ksh5,000 on him and could not remember when he made payment for his purchases or how much he paid for them. He said that when a customer finishes shopping, he hands the goods to the cashier to record it and pack the shopping. He can afford a chocolate and it was not worth stealing and he gave the cashier Ksh200 as appreciation for serving him. He sometimes gives a tip from his change and the cashier said he needed money for his fare as he had not been paid.

43. After the Applicant was shown a video footage of the transaction, he said he gave the chocolates to the cashier and did not know why it was not scanned. He had told the cashier to remove a pack of juice so that he would have enough money to pay for the chocolates. He replaced the pack of juice with the chocolates. If the box of chocolates was not scanned, it was not his fault. He gave Ksh200 to Mr. Kifana who said he had no money for his fare.

44. When asked why he thought he had paid for everything, the Applicant said he gave Ksh2,000 of new bank notes stuck together to Mr. Kifani, not Ksh1,000. He did not want to spend all his money on juice. The mistake is that of Mr. Kifani who did not scan the box of chocolates. He gave Mr. Kifani the tip in good faith and had no intention to steal.

45. Later, on the day of the incident, he saw Mr. Mommer, the Commissary manager, exiting the gate and Mr. Mommer asked him what happened when he

shopped at the Commissary but he told him he did not know anything. The following Monday 25 January 2016, he went to Mr. Mommer's office and asked him what he was talking to him about on Saturday but was told that since he said he didn't know, he would be contacted by management.

Oral testimony of the Applicant

46. In his sworn testimony at the oral hearing of this case, the Applicant told the Tribunal that he had placed five packs of juice on the check-out desk and while they were being scanned, he told the cashier that he needed one more item from the shop. When he was told that the scanning of the juice packs had been completed, he asked the cashier to remove one and that he would replace it with a box of Kinder chocolates.

47. He told him that he could put the description of the chocolates on the screen and add it to the Applicant's final bill. He then told him that he had done so, printed a receipt, gave him his change and told him to go and bring the chocolates from the shelves. The Applicant then brought the chocolates and handed it to the cashier who then packed it with the rest of his shopping. He gave Ksh200 to the cashier who told him he was broke and had not received his salary. He did not inspect his receipt when it was given to him.

48. At about 6pm that evening while the Applicant was on guard duty at the UNON main gate, the Commissary's manager was driving out of the UNON compound and called out to him. When he approached, the manager asked him what had happened when he shopped at the Commissary earlier. When he responded by asking the manager what he meant, he drove off. Two days later which was a Monday and the next working day, the Applicant went to the Commissary in the morning to ask the manager what he was talking to him about when they met at the gate on Saturday evening. The manager told him that since he had said he did not know, he would be hearing from management.

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

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

Other oral testimonies

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

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

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

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

54. The Tribunal finds that it is established that on 23 January 2016, the Applicant left the Commissary with a bag of shopping containing some goods for which he had paid and other goods which he had not paid for. Can it be safely concluded that the available evidence sufficiently establishes that in taking with him certain goods he had not paid for, the Applicant had essentially stolen them?

55. The Respondent in framing charges of misconduct against the Applicant stated as follows:

In particular, it is alleged that you engaged in misconduct on 23 January 2016 at or about 4.40pm, when you took a carton of juice (value US\$1.90) and a box of Kinder chocolates (value \$7.40) from the United Nations Commissary without paying for these items.

If established, your conduct would constitute a violation of Staff Regulations 1.2(b) and 1.2(f) ...

56. Staff Regulation 1.2(b) provides that staff members shall uphold the highest standards of efficiency, competence and integrity. The regulation explains further that integrity includes probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. Staff Regulation 1.2(f) enjoins staff members to conduct themselves at all times in a manner befitting their status as international civil servants.

57. In paragraph 23 of his amended pleadings, the Respondent in arguing that the facts were sufficiently established against the Applicant stated that when he took the goods without paying for them, the Applicant knew or should have known that he was taking the goods without paying. In his closing submissions, he appeared to have abandoned that position and instead submitted that the criminal definition of theft, including the mental element or *mens rea* is not applicable to a disciplinary process at the United Nations. He continued that without clear countervailing evidence, a conclusion can be drawn from a person's action that the person intends to undertake the action at issue. In his pleadings, he cited UNAT's reasoning in *Ainte*⁵ to support his submission that *mens rea* is not a requirement in disciplinary cases.

58. He argued further that in this case, the allegations of misconduct are based on a conclusion that the Applicant *intended* to take one carton of juice and one box of chocolates without paying for them and that throughout the investigations and disciplinary process, there has been no doubt about this aspect of the allegations of misconduct.

59. It was also submitted for the Respondent that in *Jahnsen Lecca*,⁶ misconduct was sufficiently established by merely showing that the applicant in that case had taken a bicycle without the owner's authorization. But in his submissions in *Jahnsen Lecca*, the Respondent stated that the applicant "acted with the necessary intent." Although UNAT had stated in *Jahnsen Lecca* that "disciplinary cases are not criminal, so that criminal law procedure and the criminal definition of theft are not applicable..."; it cannot mean that in a case where stealing is alleged, the mental element of 'intent' or *mens rea* can be ignored or dispensed with. That mental element does not require any kind of clairvoyance or special procedure but may even be proven by the actions of the Applicant.

⁵ 2013-UNAT-388

⁶ 2014-UNAT-408

60. With regard to the Respondent's earlier position that the Applicant knew or should have known that he was taking the goods without paying for them, it needs to be observed that this imports unnecessary confusion in disciplinary cases that deal with matters of misconduct. In misconduct, especially if it concerns theft or misappropriation, it needs to be established that the subject staff member has guilty knowledge that he or she has engaged in the act alleged against him or her. There are areas of law such as Tort and Commercial practice where persons may be liable, because by virtue of their position, they ought to have known or are deemed to know certain facts. Misconduct does not belong in those areas of law.

61. In the instant case, although the Applicant had initially told the investigator that his failure to pay for a pack of juice and a box of chocolates was as a result of the mistake of not scanning the items by Mr. Kifana; he later changed his story and stated that he paid with the sum of Ksh2,000 instead of Ksh1,000. While being cross-examined at the oral hearing of this case, he told the Tribunal that he gave the cashier enough money for what he bought. He added that he gave Mr. Kifana the money for the chocolates before he went back to the shelves to pick out the chocolate he wanted.

62. While the Tribunal does not agree with the Respondent that the actions of the Applicant as seen on the video footages were sufficient to rise to the required standard of proof of clear and convincing evidence to establish stealing; the Tribunal finds that the actions of the Applicant after he left with the shopping bag and the glaring inconsistencies in his testimony clearly point to a level of dishonesty betraying guilty knowledge that he did not pay for the items at issue. In other words, the Applicant knew that he did not pay for certain items especially after he, a career security officer, was accosted barely an hour later by the Commissary's manager Mr. Mommer. He however chose to behave as if nothing had happened.

63. The Tribunal reasons that for an honest staff member who had shopped only an hour earlier at the Commissary to be so accosted by the Commissary's manager, it was enough to make him look through his shopping, which he still had with him at the time, not having yet gone home, to see that there were no issues with his purchases and

receipt. The Applicant was clearly sufficiently concerned about Mr. Mommer's question to him that evening, so much so, that early on Monday morning, which was the very next working day; he went to Mr. Mommer to ask and seek clarification as to the question he had asked him at the gate on the Saturday evening. It is not in doubt that he did so only to find out how much the Commissary management knew concerning his shopping.

64. The efforts of the Applicant to procure Mr. Ndirangu as a witness who would tender such evidence as to support his later account that he had paid for the box of chocolates before he went to pick it from the shelves is entirely dishonest and an afterthought. It is unfortunate that he would seek to mislead the Tribunal in this way. The Applicant's three differing accounts that (a) he did not know that the box of chocolates was not scanned by the cashier, (b) that he had given the cashier Ksh2,000 stuck together rather than Ksh1,000 and (c) that he had paid for the box of chocolates before he went to pick it off the shelves; are fatal to his case. Clearly, these differing accounts are the products of a guilty mind, not the words of an honest staff member.

65. As to whether Mr. Kifani had made an honest mistake or deliberately assisted a shoplifting when he failed to scan the box of chocolates before packing it into the Applicant's shopping, the Tribunal does not have sufficient evidence to determine that issue. As already stated, the Tribunal does not believe that the actions of Mr. Kifani and the Applicant as seen on the video footages alone establish by clear and convincing evidence that they were both engaged in stealing goods from the Commissary. Also, the fact that Mr. Kifani received a tip from the Applicant and the manner in which it was given does not sufficiently rise to the standard of proof required.

66. The Tribunal finds that it is established by clear and convincing evidence that the Applicant knowingly removed a box of chocolates and a pack of juice from the Commissary on 23 January 2016 without paying for them and therefore committed misconduct.

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

67. Part of the Applicant's case is that the investigation of the Applicant by OIOS officials was tainted by bias and prejudice. In closing submissions, it is stated that improper questioning techniques were employed to frustrate and confuse the Applicant because the investigators kept putting the same questions to him. The investigators expected the Applicant to provide accurate and conclusive answers.

68. It was also submitted for the Applicant that the investigators failed to consider his procedural objections because he raised concerns about the lapse of time between the incident and the interview. Also, despite telling the investigators that he felt sick and had just left night shift duties, they insisted on interviewing him on that day.

69. The inconsistencies in the Applicant's responses were as a result of improper questioning techniques and improper conclusions were drawn based on this flawed procedure.

70. The Respondent countered that the Applicant has not put any evidence before the Tribunal to substantiate his claims of a flawed investigation.

71. I have considered the submissions of the Applicant on bias and prejudice. My evaluation of them against the background of the conduct of the investigation interviews by OIOS officials do not reveal any bias or prejudice as to affect the outcome of the investigation. In particular, the Applicant was not mistreated or threatened. The Applicant is a career Security Officer and the repetition of the same questions by investigators as to how he paid for a box of chocolates cannot confuse or frustrate him. In any case, the Applicant did not tell the investigators that he did not recall how he made his purchases on 23 January 2016 at the Commissary. He had his explanations and conflicting accounts. These are not the fault of the investigators.

72. With regard to the issue of bias, the Tribunal was concerned about the tone of the Chief Commercial Operations Unit's (COU) referral email of 26 January 2016 to the OIOS to conduct investigation into the incident leading to the allegations against

the Applicant. In that email, she unfortunately stated that she had watched the video footages and that it was clear that the Applicant intentionally took the box of chocolates without having them scanned, “essentially stealing it.” Despite the unwarranted rush to judgment by the Chief (COU) in her email referring the matter for investigation to the OIOS, I do not find that it tainted the investigation in any way.

73. The Applicant raised the issue of proportionality of the sanction imposed on him. The Tribunal finds that the sanction accords with the practice of the Secretary-General in cases of theft or misappropriation and will not address it.

Judgment

74. The Application fails and is accordingly dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of February 2019

Entered in the Register on this 1st day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi