



## **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

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 He prayed that the contested decision be rescinded and that he be retroactively reinstated.

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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

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*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

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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

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



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Judgment No. UNDT/2012/079

## **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.

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 pes ti-5.i

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



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

be in possession of eight bundles of concer

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

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,