



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SANWIDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL
AGAINST SUMMARY DISMISSAL**

Counsel for Applicant:

Edwin Nhliziyo

Counsel for Respondent:

Stephen Margetts, ALU/OHRM

1. The Applicant's employment history

1.1 The Applicant joined the Organization in March 1994 as a Procurement Assistant at the United Nations Assistance Mission for Rwanda (UNAMIR), and later became a Procurement Officer in 1996 with the International Criminal Tribunal for Rwanda. The Applicant was then transferred to the United Nations Mission in the Democratic Republic of Congo (MONUC) in March 2003 and was promoted to Chief of the Supply Service Unit (SSU) in 2005. He acted as the Officer-in-Charge (OIC) of the Procurement Section at the P-4 level from October 2006 until the arrival of the new Chief Personnel Officer in May 2007.

2. Summary of relevant facts

2.1 From 1 July 2002 to 30 June 2007, MONUC issued 31 purchase orders and 3 contracts totaling US\$3,408,000 to a local Congolese company, Maison Mukoie Fils (MMF) for their charter services. On or about 22 July 2005, the Applicant approached the owner of MMF and requested a cash advance of \$7,000 in order to pay for a used car. The said cash advance was paid back in full by a bank transfer on 10 August 2005 based on an instruction by the Applicant to his bankers one week before.

2.2 In February 2007, the Procurement Task Force (PTF) of the Office of Internal Oversight Services (OIOS) began an investigation into MONUC's procurement activities based on referrals from other investigative agencies, staff members, and the analysis of previously closed cases in which re-investigation was warranted. That same month, the PTF seized the Applicant's work computer, where they found a document entitled "Dc26.doc" containing instructions for a bank transfer of US\$7,000 from the Applicant's bank account to that of the owner of MMF. The document was created on 3 August 2005.

2.3 On 21 February 2007, the Applicant was interviewed by the PTF in regards to the structure of the Procurement Department and the allegations of irregularities within it. He was interviewed for a second time on 26 and 27 February 2007

regarding the procurement process in MONUC and the procurement of material for a HIV Awareness Campaign.

2.4 On 1 March 2007, a certain person whose identity was not disclosed but described as Confidential Witness 3 (“CW-3”) was said to have been interviewed by the PTF in regards to allegations of corruption within MONUC's Procurement Department. CW-3 told the investigators of an incident in June or July 2005 when the Applicant had asked him/her for the owner of MMF's phone number. CW-3 said that s/he overheard the Applicant shortly afterwards having a phone conversation in French, in which he asked for "either US\$5,000 or US\$7,000". According to the PTF Report, CW-3 claimed that the Applicant realized that CW-3 had overheard the phone conversation and approached CW-3 shortly after and told him/her that he had asked the owner of MMF to "lend him cash for a car he intended to buy" and assured CW-3 that he would reimburse the loan. CW-3 stated that s/he did not hear any mention of a loan during the telephone conversation that she overheard, only a request for cash.

2.5 On 10 April 2007, a request for voluntary financial disclosure was sent to the Applicant to which he responded with the requested documents on 23 April 2007.

2.6 On 3 May 2007, the PTF interviewed the owner of MMF. He recalled that the Applicant had called him over a year before and asked for US\$7,000 cash in order to purchase a car, a sum which the Applicant immediately repaid in full via a bank transfer.

2.7 On 15 May 2007, the Applicant was once again interviewed by the PTF. When questioned about the US\$7,000 loan from the owner of MMF, the Applicant stated that he "didn't consider it as a bribe or corrupt practice" and that he "didn't even see a conflict of interest," as he gave the money back and had nothing to do with the contracts with MMF.

2.8 By an email dated 19 June 2007, the PTF informed the Applicant of the proposed interim report findings that he had improperly received a sum of money from a MONUC vendor. The following were the PTF's findings:

"...requesting and accepting payments from a UN vendor doing business with the Organization knowingly and purposefully violated the following Staff Regulation(s):

-Regulation 1.2 (b): by failing to uphold the highest standards of efficiency, competence, and integrity.

-Regulation 2 (e): by not regulating his conduct with the interests of the Organization only in view.

-Regulation 1.2(f): by being engaged in inappropriate activities with a UN vendor, which adversely reflects on the integrity, independence and impartiality that are required by his status as a procurement official with the United Nations.

-Regulation 1.2 (g): providing that Staff members shall not use their office for private gain, financial or otherwise.

-Regulation 1.2 (l): by accepting favors from a vendor doing business with the Organization. [Applicant] further purposefully and knowingly breached the general principles set down in Regulation 5.12 of the Financial Rules and Regulations of the United Nations, providing that the procurement process shall be carried out in a fair, integral and transparent manner based on effective competition in order to best serve the financial interests of the Organization.

In addition, [Applicant] purposefully and knowingly violated the following sections of the United Nations Procurement Manual.

-Section 4.2 (1): providing that a Procurement Officer in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as reflecting favourable treatment to an individual or entity by accepting offers or gifts and hospitality or other similar considerations.

-Section 4.2 (2): providing that it is inconsistent that a Procurement Officer accepts any gift from any outside source regardless of the value and regardless of whether the outside source is or is not soliciting business with the United Nations.

All staff members involved in procurement shall decline offers or gifts. As a result of [Applicant]'s actions, the integrity of the procurement process in bidding exercises with this MONUC vendor was severely compromised."

2.9 On 28 June 2007, the Applicant submitted by letter his response to the draft findings. He reiterated that "the contracts with MMF were established long before his arrival in the Mission and the contracts at the time was also awarded and handled by another Unit of the Procurement Section and that he was not responsible for the award made to the vendor."

3. *Charges and Applicant's comments on the charges*

3.1 On 6 July 2007, OIOS submitted the PTF's Interim Report to the Under-Secretary-General for Peacekeeping Operations. On 13 July 2007, the matter was referred to the Office of Human Resources Management (OHRM), who again outlined the allegations of misconduct to the Applicant by a memorandum dated 24 July 2007.

3.2 The Applicant was suspended from duty with full pay on 13 August 2007. The Applicant submitted comments by memorandum to OHRM on the charges against him on 29 and 30 August 2007. The PTF submitted observations and recommendations on the Applicant's comments on 15 November 2007.

4. *Administrative Decision and JDC Review*

4.1 By a letter dated 11 January 2008, OHRM informed the Applicant that he had been summarily dismissed for serious misconduct, namely, failing to comply with UN Staff Member obligations by soliciting and accepting money from a vendor who did or sought to do business with MONUC.

4.2 On 11 February 2008, the Applicant submitted a request for review by a Joint Disciplinary Committee panel ("JDC panel") pursuant to Staff Rule 110.4 (c). On 17 March 2008, the Administration submitted its comments on the

request for review to which the Applicant responded with additional comments on 3 April 2008.

4.3 A JDC panel was constituted on 15 December 2008. A JDC hearing was held on 26 January 2009 which was attended by the Applicant participating by telephone, his counsel, and the representative of the Secretary-General.

4.4 The JDC panel submitted its report on 7 April 2009. Its conclusions and recommendations read as follows:

“Conclusions and Recommendations

27. In light of the foregoing, the Panel unanimously decides that the factual basis in the present case was insufficient to establish by a preponderance of evidence that the Requestor had engaged in serious misconduct or had engaged in corrupt or unlawful activity that warranted summary dismissal.

28. Notwithstanding, it is established that the staff member initiated a currency transaction of US\$7,000 from [], the owner of MMF, and the Panel unanimously finds that this currency exchange represented a conflict of interest which would call into question any UN procurement exercises with this MONUC vendor.

29. In view of the above findings and in view of the Requestor's position as a Chief of Unit and/or Officer-in-Charge of the Procurement Section, the Panel unanimously recommends:

- a. that the decision to summarily dismiss the staff member be rescinded;
- b. that the staff member be separated from service effective the date of expiration of his last contract with the UN or the date of his summary dismissal 11 January 2008, with all salary and entitlements including restoration of pension rights up to that date.”

4.5 In a separate opinion, a member of the JDC while agreeing with the considerations of the panel arrived at the conclusion that the Applicant was deprived of a fair opportunity to defend himself, his job and reputation under

staff rule 110.4 governing disciplinary proceedings. He found that the Applicant's rights of due process were violated and recommended that the Applicant be awarded \$1,000 compensation.

4.6 On 3 June 2009, the Deputy-Secretary-General informed the Applicant that,

"The Secretary-General has examined your case in the light of the JDC's conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General does not agree with the JDC's conclusion that the facts in this case were not sufficient to establish that you had engaged in serious misconduct or had engaged in corrupt or unlawful activity that warranted summary dismissal. The Secretary-General also did not agree with the JDC's conclusions resulting from its characterization of the transaction in this matter as being a "currency transaction".

The Secretary-General notes that you were charged with "having solicited, received and accepted a sum of money from Maison Mukoie Fils (MMF), a vendor who did business and sought to do business with MONUC". In your letter dated "28 June 2007" to the Chairman of the Procurement Task Force, you state that you borrowed US\$7,000 against a refund by bank transfer and that the refund was made by bank transfer in early August 2005. The evidence on the record shows that you received and accepted the money in question from MMF, which was a vendor that did business with MONUC. The purpose for which you solicited the money is not relevant. The evidence also shows that at the time of the transaction in question, you were a Procurement Officer in MONUC.

The Secretary-General is of the view that your actions in this case harmed the reputation of the United Nations. The Secretary-General considers that the JDC's reasoning and conclusions do not provide any grounds for rescinding the decision to summarily dismiss you.

With respect to the separate opinion in which it is stated that you had been deprived of a fair opportunity to defend yourself, the evidence on the record does not support such a finding. The evidence shows that you were given the opportunity to review the records of conversation between representatives of OIOS and yourself, dated 15

May 2007, and that you wrote to the PTF by letter dated "28 June 2007" providing comments in response to PTF's letter dated "19 July 2007" (sic) in which the PTF requested you to provide comments. The record shows that your counsel provided comments on 29 August 2007 in response to the letter dated 24 July 2007 from OHRM, which contained the charges against you. The JDC report also shows that on 26 January 2008, you participated in a hearing before the JDC by telephone, as well as being represented by your counsel. Accordingly, the Secretary-General has decided not to accept the conclusion in the separate opinion that your due process rights were violated, nor the recommendation that you be awarded \$1,000 in compensation and any costs incurred in bringing this case.

Accordingly, the Secretary-General does not agree with the conclusions of the JDC and, therefore, has decided not to accept the recommendation of the JDC that the decision to summarily dismiss you be rescinded. The Secretary-General has also decided not to accept any of the other recommendations by the JDC. The Secretary-General will take no further action in this matter.”

4.7 The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the Administrative Tribunal or, as a result of the reforms to the United Nations internal justice system, to the newly established United Nations Dispute Tribunal.

4.8 On 18 August 2009, the Applicant filed this Application dated 17 August 2009 with the Nairobi UNDT. The Respondent's Reply was filed on 18 September 2009. On 23 September 2009, the Applicant filed comments on the Respondent's Reply. The Tribunal held a Hearing on 14 January 2010 and the Parties filed their closing statements on 19 January 2010.

5. *The Applicant's contentions/pleas*

5.1 The Applicant's principal contentions are:

(i) That the Secretary-General's decision to reject the advice of the JDC to rescind his initial decision to summarily dismiss the Applicant is indicative of a number of assumptions and conclusions that are

unsupported by any logic, evidence or clear rationale, thus appearing arbitrary and unjustified.

(ii) That at the time of making the contested decision, the Secretary-General knew or should have known that what was involved was a currency exchange and not a loan as originally described.

(iii) That the Applicant never got a chance to properly defend himself against the conflict of interest charge that he learned about for the first time in the JDC report.

(iv) That the decision to summarily dismiss the Applicant was based on facts that had not been established, that the facts established by the JDC did not legally amount to misconduct or serious misconduct and that the punishment imposed was disproportionate.

(v) That the investigation in MONUC targeted five people to the exclusion of everybody else and that there was an improper motive or abuse of purpose in both the investigation and prosecution of these cases.

(vi) That the mere appearance of a conflict of interest does not amount to misconduct.

5.2 In light of the foregoing, the Applicant requests the Tribunal:

“...Pleas

7. With respect to competence and procedure...

(a) to find and rule that it is competent to hear and pass judgement upon the present application under Article 2 of its Statute;

(b) to consider the present application receivable under Article 7 of its Statute;

(c) to decide to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;

8. On the merits, the Applicant respectfully requests the Tribunal:
- (a) to rescind the decision of the Secretary-General finding that serious misconduct occurred and imposing the disciplinary penalty of summary dismissal;
 - (b) to find and rule that the recommendation of the JDC Panel to separate [the Applicant] was not supported by any evidence of misconduct;
 - (c) to find and rule that the separate opinion by [] with respect due process lapses were valid and relevant.
 - (d) to rule and order that the Applicant should be reinstated and that he be paid his salary retroactively to the date of his summary dismissal;
 - (e) to rule that the decision of the Secretary-General and his actions during the course of the case were improperly motivated by prejudice and other extraneous factors;
 - (f) to order that in view of the patent nature of the extent of disregard of previous decisions of the Tribunal, all officers who knowingly or should have known that the case was wrongly decided or contributed to the wrong decision be made accountable;
 - (g) to award the Applicant five years' net base pay as compensation for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof, in view of the special circumstances of the case;
 - (h) to award the Applicant as cost, the sum of \$5,500.00 in fees for counsel and \$1,000.00 in expenses and disbursements."

6. *The Respondent's contentions*

6.1 The Respondent's principal contentions are:

- (i) That the investigation into the allegations against the Applicant was not improperly motivated and that the Applicant's due process rights were respected.

(ii) That as a result of the Applicant's involvement, procurement exercises with MMF were tainted by corruption.

(iii) That the record shows that the facts underlying the charges have been properly established and that the findings are reasonably justifiable and are supported by the evidence.

(iv) That there have been no failures to consider significant facts and no irrelevant facts were unduly considered.

(v) That the established facts legally amount to serious misconduct.

7. Considerations

7.1 The nature of the Tribunal's control over the Administration's disciplinary powers

7.1.1 Article 1 of the Statute of the UNDT established the Tribunal as the first instance of the two-tier formal system of administration of justice. Article 2 of the said Statute states that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General as the Chief Administrative Officer of the UN. Among the applications that may be brought against the Secretary-General are those to appeal administrative decisions imposing disciplinary measures. Under Article 3 of the Statute, the individuals who qualify to file an application before the Tribunal include any former staff member of the UN. Article 7 provides that the Tribunal shall be competent to hear and pass judgment on cases referred to it from the JAB/JDC or one transferred to it from the UNAT.

7.1.2 The Respondent argued that the Tribunal's role in disciplinary cases is limited to what he has described as a judicial review. In other words, the Respondent submits that the Tribunal may only look at "evidence" presented to the Secretary-General by investigators and OHRM and examine the action taken by the Secretary-General in

order to decide if that action was reasonably justified and if the disciplinary measure imposed is appropriate or disproportionate.

7.1.3 Nothing can be further from the true mandate of the Tribunal. As the first tier of the formal component of the internal justice system of the United Nations, the Tribunal is competent to entertain applications as provided for by the Statute creating it. In entertaining such an application, the Tribunal as a judicial body shall receive evidence that is relevant and evaluate such evidence for a just determination of the case or application. Nothing and no-one shall constrain or limit the Tribunal's power in its judicial functions to grant full equality to the parties in a fair and public hearing, to be independent and impartial in the determination of rights and obligations of any party as required by the most basic of the UN's instruments- the Universal Declaration of Human Rights.

7.1.4 In dealing with any application before it, the Tribunal while admitting and examining evidence that is relevant shall require that the parties place all their cards face-up on its table. Evidence that is shrouded from judicial inquiry without good cause shall have no place in the Tribunal's findings of relevancy. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General imposing disciplinary measures but also examine the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and OHRM. In Judgment No. 941 *Kiwanuka* (1999), the UNAT was of the view that the Tribunal had a duty to examine the facts and the evidence critically and fully and to review the Administration's decision.

7.2 Nature of Transaction between the Applicant and the owner of MMF

7.2.1 It is agreed by both parties that the Applicant approached the owner of MMF, a company that was a vendor to MONUC, sometime in July 2007 to ask for the sum of \$7,000 in cash.

7.2.2 The Applicant had explained in his interviews with investigators, in his responses to the investigator's findings and in the hearings before the JDC and the Tribunal that he approached the vendor and told him of his difficulties in trying to raise \$7,000 in cash for a car he wanted to buy. The owner of MMF assured the Applicant that he could provide him with the cash and they agreed that the Applicant would return the money by bank transfer from his bank in France to the former's bank account. The money was sent to the Applicant on 22 July 2005 and by 3 August 2005 the Applicant had instructed his bank to pay the said amount into the owner of MMF's bank account in Brussels. By 10 August 2005, the said sum of \$7,000 had been fully transferred into the MMF Brussels' account from the Applicant's French bank account.

7.2.3 The Applicant further explained that he was constrained to approach the vendor for the currency transaction because as a result of the post-conflict situation in DRC at the time, banks did not allow individuals to open private accounts and that his private account was in France which made it quite difficult to access the sum of \$7,000 he needed to quickly pay for a used car as the seller wanted a cash payment immediately.

7.2.4 The Respondent on the other hand has consistently described this transaction as the Applicant soliciting payment of the \$7,000 from a MONUC vendor. In other words, the Respondent characterizes the transaction between the Applicant and the owner of MMF as a bribe or as money corruptly received by the Applicant. In the JDC report of 7 April 2009, the JDC panel was of the view that the evidence showed that the \$7,000 was indeed a currency exchange transaction and that there was no evidence that the transaction was a bribe or even a loan.

7.2.5 Specifically at paragraph 24 of the report, the JDC panel found,

“...based on the record, there is no evidence to sustain the characterization by the PTF that he engaged in corrupt or unlawful activity. The charge that he solicited received and accepted a sum of money implies in the context of this characterization that he asked for and was paid a bribe or kickback. He did not. He solicited and accepted a service from MMF whereby he exchanged his own money for the equivalent of another currency. More specifically, he did not solicit payments of monies in the amount of \$7,000 belonging to MMF; he solicited their assistance with exchanging that amount of his own money.”

I find, having examined the facts and circumstances as did the JDC, that the nature of this single transaction of about 22 July 2005 between the Applicant and the owner of MMF was one of a currency exchange and was not a bribe, kickback, payment or a corrupt acceptance of money on the part of the Applicant.

7.3 *Did the transaction amount to a conflict of interest or misconduct?*

7.3.1 In the conclusion to the JDC report and specifically at paragraph 28 of that report, the panel found that “this currency exchange represented a conflict of interest which would call into question any UN procurement exercises with this MONUC vendor”.

7.3.2 A conflict of interest situation arises where a person’s private interest is taken into consideration by that person when performing functions of a public office in such a way as to benefit that person or his family or friends.

7.3.3 According to the Black’s Law dictionary, a conflict of interest is a situation where there is a real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties. In other words, the different roles of the individual must be seen to contradict each other.

7.3.4 Evidence tendered by the Applicant, both before this Tribunal and in his 28 July 2007 reply to the chairman of the OIOS/PTF, is that the contracts with the owner

of MMF were established before his arrival in the mission, that the contracts were awarded by another unit of the Procurement Section and that he was not in any way responsible for the contract awards made in favor of the vendor. This piece of evidence was never rebutted. At paragraph 220 of the OIOS/PTF interim report, a table is made showing contracts awarded to MMF, their value and the Officer responsible for each award. The said table does not show that the Applicant was responsible for any of the contract awards.

7.3.5 Under the former staff regulations applicable at all the times material to this application, paragraph 1.2 (g) provides against conflict of interests thus:

“Staff members shall not use their office or knowledge gained from official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favor. Nor shall staff member use their office for personal reasons to prejudice the positions of those they do not favor.”

There is no evidence that the Applicant used his office or knowledge gained from official functions for the private gain of himself or anybody else. I do not therefore subscribe to the view of the JDC panel that the Applicant had engaged in any activity that can be characterized as a conflict of interest, whether before, during or after the currency exchange transaction with the owner of MMF.

7.3.6 I do however find that the currency exchange transaction with a MONUC vendor was an act that had the potential for creating a possible conflict of interest situation in the future for the Applicant especially as his stature and role in MONUC grew. By approaching a MONUC vendor for a currency exchange, the Applicant exhibited poor judgment and put himself at the risk that others could labor under a perception that he may favor the vendor if any opportunity presented itself to do so.

7.3.7 I find also that the actions of the Applicant do not amount to serious misconduct deserving of summary dismissal. Certainly the action of the Applicant calls for some kind of disciplinary action much milder than what he got.

7.3.8 In UNAT Judgment No. 745, *Huzeima* (1995), the applicant in that case entered the service of UNRWA in 1974. In June 1990, he was promoted to Deputy Field Supply and Transport Officer. At a meeting on 6 October 1992 convened to discuss an allegation that the applicant had assisted a bidder in the completion of a tender document, the applicant stated that upon request, he had assisted a bidder to complete the form as the bidder did not speak English. He denied revealing any confidential information. The bid in question which was the lowest was deemed to be tainted and excluded from consideration.

7.3.9 A Board of Inquiry appointed to look into the allegation found that:

- (i) The applicant did not complete the tender document with a view towards securing gain and was therefore not guilty of conflict of interest;
- (ii) That he had demonstrated poor judgment in the sense that he saw nothing wrong with his actions;
- (iii) That he ought to have perceived that as a senior staff member that he may have been guilty of violating principles of fair tendering and the calling into question the possibility of a conflict of interest; and
- (iv) That the applicant's actions were more ones of improper judgment rather than ones of actual conflict of interest, and as such, as a senior staff member of the Agency, he should have known better.

7.3.10 On 24 February 1993, the Field Administration Officer, Gaza, informed the applicant that the Director of UNRWA Operations, Gaza, and the UNRWA Representative, Egypt, had reviewed the findings of the Board of Inquiry and had decided that he would not be re-instated to his previous job as Deputy Field Supply & Transport Officer. The applicant was further advised that under Area Staff Regulation 10.2, he would be demoted and transferred to the post of Administrative Assistant, at Grade 10 step 20 level, in the Department of Environmental Affairs and that his period of suspension without pay would be converted to suspension with full pay.

7.3.11 In an appeal lodged with the JAB, the panel evaluated the evidence and found that

- (i) The Administration had justifiably imposed a disciplinary measure against the appellant;
- (ii) The propriety and proportionality of the measure imposed could hardly be conceived, taking into consideration the very clean record of the appellant during his long service with the Agency and his immediate admission of the act of assisting a tenderer to fill an Agency tender document for no personal gain;
- (iii) The report of the Board of Inquiry did not incriminate the appellant in as much as if had solely pinpointed his improper judgment as a staff member on one occasion only.

7.3.11 In pronouncing judgment, the UNAT found that as regards conflict of interest, the applicant did not deny that he helped a neighbor fill in a Tender Form for a contract with UNRWA at GAZA. There was no accusation by the Respondent that the applicant gained financially in any way by his action or that there was a possibility of UNRWA suffering losses. There was no clear evidence of conflict of interest.

7.4 CW-3 and his/her evidence

7.4.1 It is in evidence that a certain anonymous witness referred to as “CW3” was interviewed by the investigators. According to the witness statement of the lead investigator, CW-3 was granted confidentiality because the said witness said he/she feared for his/her personal safety and the impact that providing information to OIOS may have on his/her work at the mission. The lead investigator relied on and referred to section 18 (b) of ST/SGB/273- *Establishment of the Office of Internal Oversight Services*, which provides, inter alia,

“...designated officials shall be responsible for...ensuring that the identity of staff members and others who have submitted such reports to the office is not disclosed...”

Further,

“...the identity of staff members and others submitting suggestions and reports to the office may be disclosed where such disclosure is necessary for the conduct of proceedings, whether administrative, disciplinary or judicial, and only with their consent.”

7.4.2 The lead investigator also called attention to section 18 (d) of the same document which allows for the use of the information provided by anonymous witnesses in providing thus:

“Confidential suggestions and/or reports may be used in official reports without attribution directly or indirectly as to source or identity of the individuals involved or implicated.”

The report of CW-3’s interview of 1 March 2007, which is before this Tribunal, is that in June or July 2005 after the contract for the long-term charter of pushers, barges and fast boats was awarded to MMF, the Applicant came to the working space of the confidential witness and asked for the owner of MMF’s phone number. The Applicant told CW-3 that he could not reach the owner of MMF under any of the numbers he had. CW-3 gave the Applicant another of the owner of MMF’s phone numbers. A few minutes later, CW-3 was passing by the toilets that were located outside the office and overheard the Applicant talking to someone on the phone and asking for money. The conversation was in French and CW-3 understood that the Applicant was asking for either the amount of \$5,000 or \$7,000.

7.4.3 When the Applicant realized that CW-3 had overheard the conversation, he went to the latter’s desk soon after and told him/her that he spoke to the owner of MMF and asked him to lend the Applicant cash for a car he wanted to buy in Kinshasa and that they had agreed that the Applicant would pay back the money by transferring it to the owner of MMF’s account in Brussels. CW-3 stated that in the

phone conversation she overheard, the Applicant never mentioned anything about a loan but simply requested the money.

7.4.4 CW-3 also related that some weeks later, another staff member (“SM”) who was supervised by the Applicant, told him/her that the owner of MMF had told him that the Applicant was in the habit of calling the owner of MMF every time he needed money to ask for payments. Sometimes, according to CW-3, immediately after the Applicant called the owner of MMF, the latter would call and tell SM. CW-3 was of the opinion that SM told him/her these things because he may have had an argument with the Applicant.

7.4.5 CW-3 is the “star witness” and the record of the interview with her is the “star evidence” that to some extent lent a corruption tint to the report prepared by the investigators and acted upon by the Respondent. The Applicant has challenged both the existence of this witness and his/her veracity. Throughout the proceedings and particularly in his closing address, the Applicant’s counsel had submitted that this witness is an invention of the investigators. The Applicant’s counsel further submitted that if the said CW-3 existed, his/her veracity ought to be tested under oath. The Tribunal, he said, had not even had an opportunity to know the identity of this witness and why he/she feared for his/her safety.

7.4.6 In paragraph 7(c) of her witness statement, the lead investigator stated that under paragraph 29 of the OIOS *Manual of Investigation Practices and Policies* (2005), there is a distinction made between the protection of a witness’ identity and the use that can be made of information elicited from the witness. She cited that paragraph of the OIOS Manual thus:

“...it is crucial to note that although the identity of a person making a suggestion or report is protected, the information supplied is not protected and may be used for the conduct of the investigation. For example, information from a confidential source can be used to develop other sources, be they witnesses or documentary evidence relevant to the substance of a complaint.”

7.4.7 In examining the personality of CW-3 and his/her testimony on which sufficient reliance was placed by the investigators to form part of their report and to support the criminal allegations of soliciting and receiving bribes or payments, I am inclined to ask the following questions:

(i) Was CW-3 English or French speaking as to have followed a telephone conversation in French but was still confused about the words “cinq” and “sept” which are French words? Not being sure about the amount being requested, is it not possible that he/she was not sure about other things he/she thought that he/she had overheard?

(ii) Was it CW-3 or the investigators who decided that “cinq” and “sept” sound very similar in French since the only evidence tendered in this regard was the reported version of CW-3’s interview with the investigators?

(iii) How could CW-3, who claimed he/she overheard the Applicant’s side of a conversation which was already in progress when he/she approached, be certain that the said conversation was about the Applicant simply requesting money and that no mention of a loan was made?

(iv) Why would the Applicant, who had already spent two years in MONUC at the time, ask CW-3 for another phone number for the owner of MMF if he was so familiar with the vendor as to be in the habit of asking him for money payments anytime he needed money? In such a situation, it sounds more sensible that the Applicant would know how to reach the owner of MMF without help from others in the office.

7.4.8 Section 18 (b) of ST/SGB/273 which was referred to by the lead investigator and reproduced above, provides that the identity of a confidential witness may be disclosed only where such disclosure is necessary for the conduct of proceedings whether administrative, disciplinary or judicial, and only with their consent. The issue of whether the disclosure of the identity of CW-3 in these proceedings is necessary was evidently decided by the Respondent and OIOS investigators. Any decision to

disclose the identity of the said witness, whose interview statements have had quite an impact for the investigations against the Applicant, cannot rest with the Respondent and the investigators, only the Tribunal can decide on the necessity of such a disclosure even though the disclosure cannot be made without the consent of the witness in question.

7.4.9 While I agree with the lead investigator's observation that information from a confidential source can be used to develop other sources, I must underscore the fact that the stories told by CW-3 have not helped to develop any other sources in the investigations leading to the administrative decision being challenged in this case. By the time CW-3 was interviewed on 1 March 2007, investigators had already collected and processed the Applicant's work computer and discovered the instructions sent by the Applicant to his bank in France to credit MMF's account in Brussels with \$7,000. The information collected from CW-3 did not play any part in discovering the \$7,000 transaction between the Applicant and the owner of MMF. Again, when CW-3 claimed that SM confided in him/her about the owner of MMF's complaints that the Applicant always asked MMF for money which he needed, SM denied that he said so when confronted by the investigators.

7.4.10 Due to the prominence given to them by the investigators, the only value which can be attributed to the accounts by CW-3 is that of tainting and coloring the investigator's report to the Office of Human Resource Management and the Secretary-General. I have no doubt that CW-3 is unreliable and his/her stories untenable. Under the full glare of judicial scrutiny, it is evident that his/her accounts cannot stand. In the light of this, the report of PTF investigators in so far as it concerns any interviews with CW-3 and any other related references to such an interview is hereby expunged from the records of these proceedings.

7.5 Need for proportionality of disciplinary sanctions and equality of treatment of all UN staff members as espoused in decided cases.

7.5.1 In UNAT Judgment Number 1414 (2008), the applicant in that case joined the UN in 1980 as a Human Rights Officer. At the time of the alleged misconduct, he was serving on a permanent appointment as Chief of the Sanctions Branch and Deputy-Director of the Security Council Affairs Division, Department of Political Affairs (DPA), in which capacity he advised and supported the Iraq Sanctions Committee working closely with the Steering Committee set up by the Secretary-General to establish the Oil-for-Food Programme (OFP). On 1 December 1999, the applicant was promoted to Director, Security Council Affairs Division until he was summarily dismissed on 31 May 2005. His dismissal was rescinded in November 2008, he was instead given a written censure and appointed Head of Office in Addis Ababa for the United Nations Mission in Ethiopia and Eritrea.

7.5.2 Following his reinstatement, the applicant brought an action before the UNAT challenging the decision of the Secretary-General to sanction him by way of a written censure. The applicant also claimed compensation alleging that his due process rights were violated. The matter that gave rise to his earlier summary dismissal which was replaced by a written censure, stemmed from the interim report of an Independent Inquiry Committee (IIC) which had investigated the administration and management of the OFP including allegations of fraud and corruption on the part of UN officials. The interim report detailed the involvement of the applicant, among others, in the procurement process of UN contracts for inspection of humanitarian goods entering Iraq under the OFP, which was awarded to Lloyd's Register Inspection Limited. In August 1996. While the DPA was developing the technical requirements to be included in a Request for Proposals, the applicant had met with two employees of Lloyds to seek their ideas on how inspections might work. He had also told a British Diplomat in April 1996 that other companies were asking about the inspection contract, but that he would have to turn them down because he trusted Lloyds. The Steering Committee decided that there would be a competitive bidding process and

five companies responded including Lloyds. Veritas, a French company, had the lowest bid with Lloyd's as the second lowest. The applicant did not agree with the recommendation of the Procurement Division that the contract be awarded to Veritas.

7.5.3 Whilst the contract was yet to be awarded, the applicant told an official of the UK mission that Veritas' price bid would be approved because of the "whopping" price difference between Veritas and Lloyds. He also described how much lower the Lloyds bid needed to be in order to compete with Veritas. As a result, the UK's Permanent Representative to the UN wrote to the Chair of the Steering Committee advising that Lloyds was prepared to lower its bid by \$900,000 thus bringing it much closer to Veritas bid. The UN awarded the contract to Lloyds. Part of the interim report stated that there was a clear early preference for Lloyds and that the regular competitive bidding process was tainted by the applicant's contact with a member state mission.

7.5.4 A JDC panel looked into the matter and recommended that the applicant's summary dismissal be rescinded and that he be reinstated in his post, level and functions. The JDC recommended that compensation be paid to the applicant for damage and injury to his rights, public image and reputation. The Secretary-General rescinded the summary dismissal and sent the applicant the written censure.

7.5.5 The United Nations Administrative Tribunal found that providing information prior to the award of a contract to any person who is not an official of the UN is a breach of the rules. It also found that it was reasonable for the Respondent to decide, notwithstanding the finding of the JDC, that there had been a breach constituting misconduct and that the written censure imposed was not disproportionate in the light of the applicant's conduct. The Tribunal observed that while it would not condone impropriety in the procurement process, it is fully aware that termination for serious misconduct is invariably not imposed in the absence of fraud or the motive of personal gain. It agreed with the conclusions of the JDC that summary dismissal was, under the circumstances, disproportionate.

7.5.6 In UNAT Judgment No. 1391 (2008), the applicant in that case submitted some forged invoices for a special education grant claim in respect of her son. The applicant insisted that all the money she collected was used to pay for her son's education and that she did not deviate any money from its final destination. The JDC concluded that the actions of the applicant constituted misconduct and ought to be penalized but that summary dismissal with loss of benefits to which the applicant was entitled by virtue of her years of service was not proportional to the misconduct committed. The Secretary-General refused the JDC's recommendations and the applicant appealed to UNAT which held that in filing two falsified invoices, the applicant had fallen short of the standards required of her as a staff member. UNAT analyzed the applicant's conduct and found that she did not intend to defraud the organization by fraudulently obtaining funds for personal gain. Her summary dismissal was overturned.

7.5.7 In UNAT Judgment No. 1391 (2008), UNAT emphasized that in determining whether a staff member was guilty of fraud, a determination of intent must be made. UNAT found, in Judgment No. 1175, *Ikegame* (2004), where a D-1 level staff member falsified a cheque in connection with a claim for rental subsidy, that the Respondent had not established his charge of serious misconduct based on rental subsidy fraud but had substantiated the charge of falsification of documents. Disciplinary action against the staff member was his demotion by two grades. This was upheld by UNAT.

7.5.8 In UNAT Judgment No. 1011, *Iddi* (2001), UNAT was of the view that "even in case of serious misconduct, the administration does not always proceed to summary dismissal of its guilty employee together with the loss of terminal benefits." The Tribunal decided in that case that summary dismissal was disproportionate to the applicable facts and proceeded to award compensation. The Tribunal recalled the principle of equality of treatment which should be applied to all UN employees in conformity with the Staff Regulations and Rules and with previous decisions of the UNAT.

7.5.9 It is evident from the foregoing cases that staff members who have engaged in conduct similar to that of the Applicant in the present case, where there was an absence of fraud or a motive of personal gain, did not have the disciplinary sanction of summary dismissal imposed on them. Equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated alike. The Tribunal considers that applying this equality principle in the present case ensures consistency in the jurisprudence of the Tribunal. It is therefore reasonable, just and proportionate in the present case for the disciplinary sanction imposed on the Applicant to be a written censure as opposed to summary dismissal.

7.6 OIOS/PTF investigations and the investigation report

7.6.1 The sheer importance of the investigation process leading up to the disciplinary action against the Applicant cannot be over-emphasized. Part of the OIOS Procurement Task Force Interim Report on MONUC procurement formed a part of the documentary evidence before this Tribunal and an examination of this document raises sufficient concern for the Tribunal to make certain observations and findings.

7.6.2 The *OIOS Manual of Investigation Practices and Policies* (2005) (“the Manual”) quite rightly asserts at paragraph 12 (page 8) that the role of ID/OIOS (OIOS Investigations Division) is to establish facts and make recommendations in the light of its findings. At paragraph 14 (page 9), it is again emphasized that an ID/OIOS investigation is a fact-finding exercise. Paragraph 55 (page 19) of the Manual is clear that an investigator has to approach the matter with an open mind. It continues that the task of the investigator is to establish facts and draw reasonable conclusions from those facts. It is a dispassionate professional exercise.

7.6.3 On investigation standards, the *OIOS Manual of Investigation Practices and Policies* (2009) (“the Manual (2009)”) at paragraph 2.1.2 (page 18) requires that investigators maintain objectivity, impartiality, and fairness throughout the

investigative process. At paragraph 2.3.4 (page 29), the Manual (2009) deals with fairness during investigations and demands accuracy which requires “collection and recording of clear and complete information establishing the facts, whether incriminating or exculpatory.”

7.6.4 On the issue of investigation report-writing, the Manual (2009) at paragraph 6.2 (page 76) states that “OIOS reports are summaries of preliminary fact-finding investigations with findings and conclusions based on verifiable facts”. The report must be impartial and objective and demonstrate that conclusions drawn and recommendations made are rational and sustainable. ST/SGB/273 at paragraph 18 (a) provides that investigations shall be concluded with strict regard for fairness.

7.6.5 Against this backdrop, it is pertinent to examine paragraphs 339 and 340 of the OIOS interim report on the findings made in respect of the Applicant:

“339. Based upon the evidence gathered during the investigation, the Task Force further finds that [the Applicant] may well have requested and received other payments and other tangible benefits in return for this improper assistance to Maison Mukoie Fils in obtaining and maintaining contracts with the organization.

340. As a result, [the Applicant]’s corrupt actions...contributed to the decay and compromise of the integrity of the procurement process in the procurement exercise in MONUC, and in particular, the bidding exercises in which Maison Mukoie Fils was involved.”

7.6.6 In respect of the investigation finding at paragraph 339, the Tribunal is inclined to ask why the report-writer finds that the Applicant “may have requested and received other payments and tangible benefits?” On what evidence is this incriminating guesswork made? What was this evidence gathered? Was it the unverified story of what CW3 said that SM told her or another unverified tale of CW2 which did not name any culprit? Further, why does the same paragraph 339 refer to improper assistance given to MMF by the Applicant “in obtaining and maintaining contracts with the organization”? Is this finding borne out by any verified facts at the disposal of the investigator who wrote the report?

7.6.7 The report itself shows that the Applicant denied being responsible for any of the contracts awarded to MMF. Paragraph 220 (page 44) of the report exhibits a table that shows all purchase orders issued to MMF, their value and officers responsible. The Applicant's name did not appear on that table. None of the witnesses, including the confidential witnesses, attempted to link the Applicant with any contract awards made to MMF or suggested that the Applicant helped MMF in any way. Can it be said that this investigation was conducted with an open mind? Are the conclusions being drawn here reasonably based on the facts established?

7.6.8 In the same way, paragraph 340 refers sweepingly to the Applicant's "corrupt actions" which "contributed to the decay and compromise of the integrity of the procurement process in procurement exercises in MONUC and in particular the bidding exercises in which Maison Mukoie Fils was involved". What corrupt actions of the Applicant were established as a result of the investigation? The report itself did establish a one-off currency exchange transaction between the Applicant and MMF. What bidding exercise in which MMF was involved was compromised as a result of the Applicant's actions?

7.6.9 At paragraph 341 (iv) of the report, the investigator reached the conclusion that the Applicant violated Regulation 1.2 (g) "by using the office or his knowledge gained from his official functions for private financial gain". How is this conclusion based on the facts? How did the Applicant use his office and knowledge gained from the office for private financial gain?

7.6.10 Again at paragraph 369 of the investigation report, it is recommended that the Applicant and four others "be held financially liable to the United Nations for any and all financial loss suffered by the organization as a result of violation of its regulations and rules pursuant to staff Rule 112.3". What is this financial liability? How has such financial liability been traced to the Applicant? How is it determined and over what period? This report has not established, from what is in evidence, any financial losses. What established facts is this recommendation based on?

7.6.11 The investigation report shows that the Applicant explained that it was impossible to open individual bank accounts in a post-conflict DRC at the material time which made access to the required cash to buy a used car very difficult for him. Did the investigators make any effort to investigate this explanation? Perhaps the result of investigating this claim and finding that there is truth in it may not be exculpatory but could have a mitigating effect on any disciplinary sanctions taken against the Applicant. I find on the whole that the investigations were not conducted with an open mind. The standards of objectivity, impartiality and fairness were not maintained. The investigation report is replete with irrelevant but prejudicial details. Its findings, recommendations and conclusions are not based on established facts.

7.6.12 Specifically at paragraph 215 (page 43), the report stated that the Chief of General Services, in a conversation, reported that the Applicant and another staff member had luxurious life standards that did not reflect their earnings as United Nations employees. The said Chief of General Services did not provide further information or substantiate this allegation. What would constitute 'luxurious life standards' here? Is it in the designer label clothes, cars, holidays or food consumed by the staff member? Or the splendor of the house in which he lived or the jewelry/classy cigarette case? Why did the investigators make such an obviously subjective statement part of their report? It is evident that OIOS investigations conducted in this manner would run the risk of jettisoning objectivity and degenerating into medieval witch hunts.

7.6.13 Again at paragraph 218 and 219 under section (C) of the investigation report titled "MMF Payments to [Applicant]", allegations of payments made by MMF to procurement staff members in exchange for contracts are made. None of MONUC's staff is named in those allegations. Why then were the allegations placed as an opening to the section of the report that dealt with investigations on the Applicant? Is the reader of the report meant to infer that these unsubstantiated accounts of payments by MMF were made to the Applicant? The Tribunal is appalled at the unprofessional efforts of the investigators and report-writers to drown the Applicant

in a sea of corrupt practices and ascribe more faults to him than they can find. The JDC in their report had found that “based on the record, there is no evidence to sustain the characterization by the PTF that he (Applicant) engaged in corrupt or unlawful activity”. The rush by the investigators to produce a prejudiced report dripping with innuendos, riddled with ridiculous findings and which completely and unjustly tars the Applicant with a brush of criminality must be loudly condemned by this Tribunal.

8. *Findings*

8.1 In light of the foregoing, the Tribunal makes the following findings:

(i) That the nature of the single transaction of about 22 July 2005 between the Applicant and the owner of MMF was one of a currency exchange and was not a bribe, kickback, payment or a corrupt acceptance of money on the part of the Applicant.

(ii) That the said transaction with a MONUC vendor was an act that had the potential for creating a possible conflict of interest situation in the future for the Applicant especially as his stature and role in MONUC grew.

(iii) That the actions of the Applicant do not amount to serious misconduct or any misconduct deserving of summary dismissal. By approaching a MONUC vendor for a currency exchange, the Applicant exhibited poor judgment and put himself at the risk that others could labor under a perception that he may favor the vendor if any opportunity presented itself to do so. Certainly the action of the Applicant calls for some kind of disciplinary action much milder than what he got.

(iv) That the Applicant was not in any way responsible for the contract awards made in favor of the MONUC Vendor.

(v) The OIOS PTF investigation report was prejudiced, full of innuendos, riddled with ridiculous findings and completely and unjustly tars the Applicant with a brush of criminality.

9. Remedy

9.1 In view of the Tribunal's findings, the Parties are directed to provide written submissions as to the appropriate relief that should be ordered within 7 days from the distribution of this judgment.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of March 2010

Entered in the Register on this 1st day of March 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi