



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

COHEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPEAL AGAINST
SUMMARY DISMISSAL**

Counsel for applicant:
Edwin Nhliziyo

Counsel for respondent:
Stephen Margetts, ALS/OHRM

Background

1. On 11 January 2008, the Secretary-General summarily dismissed the Applicant for serious misconduct. The decision was based on findings by the Office of Internal Oversight Services (OIOS) that the Applicant had solicited, received and accepted sums of money from a company engaged in business with the Organization. The Applicant appealed the decision to the Joint Disciplinary Committee (JDC), which heard the matter, found in favour of the Applicant and recommended that the decision to summarily dismiss the Applicant be rescinded. On 25 June 2009, the Applicant was informed that the Secretary-General had not accepted the findings and recommendations of the JDC so that the summary dismissal stood (the contested Decision).

2. The Applicant contends that the contested Decision was not reasoned, that it was arbitrary, tainted with prejudice and that she was not accorded due process. She alleges that the key failing in the contested Decision is the reliance placed on evidence provided by witness CW-4, whose identity was not revealed to her.

The Applicant's employment history

3. The Applicant commenced employment with the United Nations (UN) as a UN Volunteer with the United Nations Operation in Somalia (UNOSOM) on 5 April 1994. From December 1994 to sometime in 1999, the Applicant worked in the private sector in Jamaica and in the United States. Thereafter, on 30 September 1999 she rejoined the Organization, serving as a Procurement Assistant at the United Nations Mission in Kosovo pursuant to the terms of a 300-series contract. From September 2001, the Applicant was employed by the United Nations Mission in the Democratic Republic of the Congo (MONUC) as a Procurement Assistant at the FS-4 level pursuant to the terms of successive fixed-term contracts. The Applicant's last fixed-term appointment expired on 30 June 2007.

4. The Applicant was charged with "having solicited, received and accepted sums of money from Transport Fluvial et Commerce (TFCE), a vendor who did business and sought to do business with the United Nations Mission in the Democratic Republic of the Congo (MONUC), in violation of staff regulations 1.2(b)(e)(f)(g) and (1) and financial regulation 5.12."

Facts

5. On 7 August 2000, l'Avenir, a Congolese newspaper, published an article entitled, "*Bandits et criminels people (sic) la MONUC,*" alleging that several MONUC staff members, in Procurement and other departments, were involved in corruption and fraud. The article named a Procurement Assistant at MONUC, as having favoured a Lebanese contractor in return for receiving free hotel accommodation and a new car. On 14 August 2000, the Chief of Administration of MONUC forwarded the newspaper article to OIOS recommending that they undertake an investigation. Nothing, it appears, came out of these investigations.

6. On 7 April 2004, the Chief Procurement Officer (CPO) sent an interoffice memorandum to the MONUC Chief of Staff (COS) stating that MONUC Procurement staff members handling the rental of barges, pushers, and fast boats had requested, and received, illicit payments from a company known as TFCE in return for steering MONUC contracts to them and facilitating the processing of payments of invoices they submitted. The memorandum cited Mr. David Blattner, who owns several transportation companies in Kinshasa and his brother Mr. Elwyn Blattner, who owns TFCE, as sources for this information.

7. On 10 April 2004, the Director of Administration, Marcel Savard, forwarded the CPO's memorandum to Mr. William Petersen, the Chief Resident Auditor, requesting that the allegations be investigated. Thereafter, on 13 April 2004, the CPO told Mr. Petersen that the Applicant was alleged to have requested US\$ 70,000 from TFCE in return for facilitating the award of MONUC contracts.

The Investigation and Charge

8. The allegations made against the Applicant were forwarded to the Investigations Division of the Office of Internal Oversight Services (ID/OIOS) on 15 April 2007, which, in turn, referred the matter to the Procurement Task Force (PTF), an ad hoc investigative unit of OIOS created in January 2006 to address perceived problems in the procurement processes at the UN.

9. The PTF investigation focused on the activities of five staff members within the Procurement Section, one of whom was the Applicant. The Task Force stated that the five staff members were fully informed of the allegations against them and were furnished with copies of relevant evidence, "where applicable." The Applicant was interviewed on 10 and 18 May 2007, and was afforded the opportunity to respond to the allegations. The PTF further stated that all staff members implicated in the allegations of misconduct, including the Applicant, reviewed and signed the interview records.

10. Between September 2001 and 2003, the Applicant was assigned as the Case Officer responsible for the charter of barges, pushers, and fast boats. During this period, the Applicant is alleged to have issued purchase orders for boats and charters valued at over U.S. \$9.7 million, including eleven purchase orders issued to TFCE valued at U.S. \$1,919,008.

11. In her interview with the PTF, the Applicant confirmed that she had been in charge of boat contracts since 2001, and that Mr. Thierry M'Bra was her supervisor. The Applicant stated that she had visited the TFCE office on two occasions, during which she met with its owner and denied that she had ever directly or indirectly requested or received payments or other tangible benefits from TFCE or any other vendor.

12. On 19 June 2007, the Task Force provided the Applicant with its draft findings, which alleged that she had improperly solicited, accepted and received sums of money from TFCE.

13. On 25 June 2007, the Applicant requested that the PTF furnish her with documentation supporting its findings against her. The Taskforce accorded the Applicant an opportunity to review her records of conversations with the PTF and some other documents. On 28 June 2007, the Applicant submitted her comments on the draft findings denying the allegations therein.

14. On 6 July 2007, the PTF issued its' report dated 5 July 2007 (PTF Report).

15. As a preliminary point, the Task Force noted that since November 1999, the Procurement Section of MONUC had a succession of six Chief Procurement Officers; that as turnover was high with a lack of continuity at the managerial level; there was little rotation within the professional and general service staff. It noted further that all the staff members that formed the target of the investigation, including the Applicant, had worked at MONUC for more than four years. The PTF found that MONUC's operations primarily consisted of transporting humanitarian, military, and cargo convoys along the Congo River, for which purpose the Mission was required to charter vessels and lease a loading pier and dock handling facilities for their barges and pushers. The records revealed that between 1 July 2002 and 30 June 2007, U.S. \$12.4 million had been awarded in boat contracts to seven Congolese companies. The Taskforce concluded that 32 purchase orders for boats totalling \$3,406,239 had been issued to TFCE between 1 July 2001 and 31 December 2006. TFCE also provided docking facilities to MONUC at \$12,000 to \$14,000 a month between 2002 and 2003.

16. On 13 July 2007, the Director of the Administrative Services Division, Office of Mission Support, Department of Field Support, referred the case of the Applicant to the Office of Human Resources Management (OHRM) with the recommendation that appropriate disciplinary action be taken.

17. On 24 July 2007, the Director of the Division of Organizational Development, OHRM wrote to the Applicant formally charging her with having solicited and received money from TFCE. The Applicant was also placed on ‘special leave with full pay’ for a period of 3 months commencing 16 July 2007, which on 6 August 2007 was changed to suspension from duty with full pay.

18. On 21 August 2007, the Applicant submitted her response to the charges. The Applicant denied having solicited or received any payments of any kind from TFCE and made the point that as a Procurement Assistant, she lacked the authority to issue purchase orders or contracts. The Applicant also challenged the credibility of the witness CW-4 and questioned the Task Force’s reliance on his statement over that of the owners of TFCE and herself.

19. On 11 January 2008, the Secretary-General notified the Applicant of his decision to summarily dismiss her for serious misconduct in accordance with Staff Regulation 10.2. Thereafter, the Applicant applied to the Joint Disciplinary Committee (JDC) for review of the Secretary-General’s decision to summarily dismiss her. The Respondent submitted his comments to the same on 19 March 2008.

20. The JDC held hearings on 21 January and 12 February 2009, following which the Parties were invited to submit their closing statements along with additional evidence they wished to bring to the attention of the Committee. The JDC issued its Report on 8 June 2009. The Committee found that the summary dismissal of the Applicant was **“not warranted by the evidence adduced in the PTF Report and that the facts underlying the charges have not been established,”** and recommended that the Secretary-General rescind his decision.

21. On 25 June 2009, the Applicant was notified of the decision to **“take no further action”** in respect of this matter, and informed her of her right of appeal to the United Nations Administrative Tribunal (UNAT). The Applicant was also informed that given the reform within the United Nations of its internal justice

system, an application could also be filed with the newly established United Nations Dispute Tribunal.

22. The present Application was filed with the Registry of the United Nations Dispute Tribunal on 10 August 2009. The Respondent's Reply was filed on 10 September 2009. On 23 September 2009, the Applicant filed comments on the Respondent's Reply. The Tribunal heard the case on 13 January 2010 following which the Parties filed their closing statements on 22 January 2010.

The Applicant's Prayers

23. The Applicant prayed the court to:

- (a) rescind the decision of the Secretary-General imposing the disciplinary decision of summary dismissal on the Applicant and that the Applicant be reinstated;
- (b) find and rule that the considerations that formed the basis for the Secretary-General's decision were wrong in matters of law and fact and in its conclusions;
- (c) order that the conclusions and recommendations of the JDC Panel be upheld and that the Secretary-General reinstate the Applicant without the option to pay compensation as a matter of justice;
- (d) find and 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;
- (e) award the Applicant 5 years' net base salary 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;

- (f) award costs in the sum of \$5,000.00 for counsel's time and expenses and \$1,500.00 in expenses and disbursements.

The Respondent's contentions

24. The Respondent contends that the Applicant was accorded due process throughout the investigative process and in the subsequent stages of the disciplinary process.

25. The investigation was conducted in accordance with the Staff Rules, ST/AI/371, ST/SGB/273, the OIOS Investigation Manual and the Terms of Reference of the Task Force, all of which require the Respondent to ensure fairness in the conduct of its investigations. The present Applicant was at all stages of the investigation treated "fairly". She was informed of OIOS' intention to report the scope of the allegations against her and was provided with an opportunity to comment and respond to the evidence against her both during the interview and in the Report. Later, the Applicant was also afforded the opportunity to view the record of her interview and to provide any additional documents/evidence to the Task Force.

26. Subsequently, at the time of charging the Applicant in accordance with ST/AI/371 she was provided with copies of the documentary evidence which formed the basis of the charge including the investigation report and witness statements; and given the opportunity to respond. She was informed that the nature and gravity of the allegations required her to be placed on suspension from duty with pay. The Applicant was advised of her right to legal counsel.

27. On the issue of witness CW-4, the Respondent submits that as the witness feared for his/her physical safety and was concerned about the impact that cooperation with investigators could have on TFCE's business in DRC, the investigators agreed to maintain CW-4's anonymity, but nevertheless provided the Applicant and other subjects of the investigation with the detailed information that the confidential witness provided the investigators.

28. The Applicant was specifically provided with the records of the investigators' conversations with CW-4 on 1 March 2007, and 4 May 2007 and a detailed summary of CW-4's evidence at paragraphs 261 to 278 of the Investigations Report.

29. An assessment must be made in each case as to whether it is necessary for a witness' identity to be revealed to the subject of an investigation. Citing jurisprudence of the United Nations Administrative Tribunal (UNAT), the Respondent argues that once a prima facie case of misconduct is established, the staff member must provide satisfactory proof showing that the conduct alleged did not occur.¹ The Respondent takes the position that the Applicant had ample opportunity to refute the allegations against her so that there is nothing to "suggest, in the absence of any objective basis for denying the allegations, that the opportunity to confront CW-4 in cross-examination" would have affected her case positively.

30. The Respondent finally submits that the evidence available to him was sufficient to justify the Applicant's summary dismissal. In addition to the consistent testimony of CW-4, the Applicant gave false information to investigators. The Applicant's statement that she did not have the authority to issue purchase orders is refuted both by the evidence on the record and her own statement, where she stated that she was in charge of procurement exercises and of contract and price negotiations for the boat contracts since 2001. The Applicant was in a position to influence procurement exercises handled by her and her supervisor.

31. The Respondent maintains that as a result, the Applicant caused procurement exercises with TFCE to be "severely tainted by fraud and corruption and goods and services were procured for the Organization through corrupt and illegal acts and without the use of fair, transparent, objective, and truly competitive processes."

¹ Judgements No. 1103, *Dilleyta* (2003), No. 897, *Jhuti* (1998), and No. 484, *Omosola* (1990).

32. The Respondent submits in conclusion that the facts underlying the charges have been properly established, the findings reasonably justifiable and supported by the evidence as there was no failure to “consider significant facts and no irrelevant facts were unduly considered.”

DELIBERATIONS

The nature of the Tribunal’s jurisdiction over the Administration’s decisions on disciplinary matters

33. Article 1 of the Statute of the UNDT (the Statute) established the Tribunal as the first instance of a two-tier system of administration of justice. Article 2 of the 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 challenging 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.

34. The Respondent submits that the primary question for the Tribunal is whether the findings which led to the Applicant’s summary dismissal are reasonably justifiable when assessed against the evidence before it. Also at issue, according to the Respondent, is whether the Applicant was informed of the allegations against her and afforded the opportunity to respond.

35. In *Sanwidi* I held that

[T]he 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.

36. In so holding, I endorsed the ruling of the UNAT in *Kiwanuka* (1999) in which it was decided that “*the Tribunal had a duty to examine the facts and the evidence critically and fully and to review the Administration’s decision.*”

37. In the interest of consistency and clarity, I find I must reiterate that position for the purposes of the present case.

The charge against the Applicant

38. The charge which led to the summary dismissal of the Applicant is that she solicited and received bribes from TFCE in exchange for her assistance in securing contracts and expediting the processing and payment of its invoices.

39. The Applicant is alleged to have received payment in the amounts of US\$5000 and US\$22000 as bribes. She is also alleged to have solicited between US\$40000 and US\$45000, which were refused by TFCE.

The Evidence

40. The Respondent’s case is based on what was allegedly told to the PTF investigators by a confidential witness CW-4 who was also an employee of TFCE, after the owners of TFCE refused to discuss the payment of bribes. By way of proof of alleged bribe-takings, CW-4 is said to have shown the investigators an index card on which he said he recorded payments made to the Applicant and some of her colleagues in the Procurement Section. The Applicant and her colleagues are said to have been listed on the index card using their initials. Citing security concerns, the witness refused to hand the index card, or even a copy of the same, over to the investigators. The witness was said to have also told the investigators that TFCE’s refusal to pay the solicited amounts resulted in the company losing the bid for a contract in 2003, and in its invoices for the period July-September 2003 not being

paid. According to the Respondent, minutes of a meeting of the MONUC Local Committee of Contracts (LCC) in October 2003 corroborate the witness' version of events in respect of the non-payment of invoices.

41. The witness was said to have told the investigators that the Applicant and her colleagues made at least two visits to TFCE's offices. The Respondent submits that this is conduct unbecoming of a procurement official, as it breaches the "accepted standards of conduct." The Respondent cites Article 4.14(2) of the Procurement Manual (requiring civil servants to protect the international civil service from any appearance of impropriety) and the testimony of Barbara Klopp, a former MONUC Procurement official, in support of this submission.

42. The Respondent submits further that the Applicant misled the Tribunal in her testimony when she said that she lacked the necessary influence to ensure that payments were effected as payment on invoices are not within her direct or immediate responsibility. On the issue of the untidy state of the files in the section, the Respondent contends that the Applicant misrepresented the actual position to the Tribunal; in that the situation is in fact that the files were irregular, incomplete and showed a number of over-priced boat rentals and *ad hoc* purchase orders, as testified to by Ms Gabrielle Renois and Ms Debbie Santalesa. The Respondent submits that this is consistent with there being a system of bribery and ties in with what one of the owners of TFCE told the investigators – that over-priced contracts suggest a pattern of bribery and favours within the procurement system.

43. These are the facts proffered by the Respondent justifying the Secretary-General's decision to summarily dismiss the Applicant.

The required standard of proof

44. In the case of Masri, I held on the matter of standard of proof that:

Even though the jurisdiction of the UNDT is in fact a civil rather than a criminal one, matters which give rise to summary dismissal by the Secretary-General, being the most severe sanction that may be applied, must be subjected to a higher standard of proof even though such a standard would still find itself somewhat below the beyond reasonable doubt standard required in criminal cases. There are thus applications before the Tribunal which a careful consideration as to a separate standard of proof is called for.

45. Some of the investigators' findings and conclusions in this case as recorded in the PTF/OIOS report were:

348: As a result of Ms. Cohen's and Mr. M'Bra's involvement, the procurement exercises with TFCE were severely tainted by fraud and corruption.

349...it is evident that Ms. Cohen's and Mr. M'Bra's involvement in this criminal scheme also resulted in substantial losses to the organization.

353: Further, Ms. Cohen and Mr. M'Bra committed criminal acts in that they each knowingly and purposefully engaged in the corrupt activities described above by soliciting and accepting payments from a vendor doing and seeking to do business with the organization in return for being improperly influenced in the performance of their duty as procurement officials of the United Nations. Such activity constitutes criminal acts of bribery, conspiracy and unlawful gratuity.

46. The same report recommended thus:

368: The task force recommends that the organization, as a victim of crime, refer the matter to the appropriate authorities, including prosecutorial authorities in the Democratic Republic of Congo, for any and all action such authorities deem appropriate.

47. In view of the fact that the charge against the Applicant is based on allegations of a criminal nature and that the investigators not only adjudged her guilty of criminal acts but additionally recommended her prosecution; considering also that her summary dismissal is based largely on the findings and recommendations of the said

investigators, the standard of proof required must be higher than that of *the balance of probabilities*.

Was a prima facie case made out?

48. The argument that once a prima facie case of misconduct is established, the staff member must provide satisfactory proof showing that the conduct alleged did not occur does not hold water here.

49. The following are what the investigations revealed: (1) An allegation by CW-4 that he had given bribe monies to the Applicant who he said demanded them to award contracts to TFCE and to facilitate the payment of invoices. (2) The production and exhibition of a personal index card to investigators on which CW-4 himself had written the initials of the Applicant with sums of money whose purposes are not specified and showing no clear dates. (3) A refusal to hand over the said index card or a copy of it to the investigators to form part of the case against the Applicant. (4) The inability of the investigation to establish which of the boat contracts bribe money was solicited and received; which TFCE invoices were refused payment for not making bribe payments and on what dates. (5) Accounts by a witness who took over duties from the Applicant and an investigator that some of the inherited files contained incomplete records of transactions due to the fault of the Applicant. Do these establish a prima facie case of soliciting and receiving bribes from the company TFCE against the Applicant?

50. To the extent that a prima facie case is one that is sufficient to raise a presumption of fact, or to establish the fact in issue, it is my finding that a prima facie case was never made out against the Applicant in this case.

Findings on the evidence – Admissibility of CW-4's Statements to the Investigators

51. Great reliance was placed CW-4's version of events in deciding to charge and later summarily dismiss the Applicant. This witness was afforded anonymity even from the Joint Disciplinary Committee, so that both the Panel and the Applicant were

denied the opportunity to test the witness' evidence. In the same manner, when the matter came up for hearing before this Tribunal, the said CW-4 remained shrouded.

52. I find it curious, that the Respondent has continued to rely so heavily on the statements of CW-4 and vigorously argued the propriety of such reliance despite the findings of the JDC in respect of this witness. One would think that faced with the Panel's findings on the credibility and reliability of this anonymous witness, and indeed the wisdom of relying on such a witness in the first place, the Respondent might have adopted a different tack, as it were, in respect of justifying the charges against the Applicant and the subsequent decision to effectively ignore the JDC's findings and recommendation.

53. I have ruled in *Masri* and *Sanwidi* on the propriety of using information of the kind provided by witness CW-4 to form the basis of such serious allegations against a staff member. In *Masri*, I delved into the Report in some detail and raised concerns and questions on the veracity of the information provided by the witness to the investigators.

54. I find I have to restate it here. It is, to my mind, surprising that information such as that provided by the said confidential witness CW-4 could possibly find its way into an investigative report that is then used to frame charges against a staff member. Not only was the witness cloaked away from the JDC and the Tribunal, the index card which he is said to have shown them as proof of his allegations could not be included in the dossier of the investigators.

55. The link which counsel for the Respondent seeks to make between CW-4's story on why payments of invoices were delayed and the minute of the Local Contracts Committee (LCC) is most tenuous. I am baffled as to how what appear to be the Applicant's initials written by CW-4 on an index card read together with the minutes of the LCC meeting could have led any conscientious investigator to suggest that CW-4 was a credible source of information, let alone a witness. For counsel to take that already tenuous link further and argue that this information coupled with the

fact that the Applicant and her colleagues had engaged in improper conduct by visiting the premises of TFCE indicates a degree of carelessness on how 'evidence' is collected, handled, analysed, treated and placed before the Respondent which I find troubling.

56. The Respondent has made extensive submissions to justify the veiling and protection that the CW-4 was afforded, and is at pains to persuade the Tribunal that no prejudice was occasioned by this non-disclosure because all the information provided by the witness was disclosed to the Applicant so that the only element missing from the disclosure is the witness' identity. The protection of CW-4's identity is entirely justified, according to the Respondent, because the witness had every reason to fear for his security and safety and the jeopardy to which the interests of his company TFCE would be subjected. The Respondent makes this submission based on the unproven assertion that another colleague of the Applicant, Karim Masri, had threatened the witness by phone.

57. On the issue of this putative threat in the case of *Masri*, the value of the information and its relevance to the proceedings at hand, I held as follows:

8.11.4 An employee of a vendor, TFCE, who was granted anonymity by the investigators and the Respondent and referred to as CW4 was also alleged to have been threatened by the Applicant through telephone calls. Again, I wonder at the relevancy or admissibility of this report. Is it testimony given from the Bar by the Respondent's Counsel or testimony given by the investigator who was a witness during the proceedings? At the very best, this piece of information is hearsay. The person allegedly threatened has been shielded from appearing before the Tribunal. He is unable to tell us the nature of this threat. Even if the alleged report of threatening of the witness mentioned above goes to any issue assuming that such evidence would be relevant if properly tendered, it is absolutely useless coming from a ghost witness such as CW4.

58. In light of the facts of the present case, the Respondent's submissions and the witness in question, I see no reason to revise the finding I made in *Masri* and endorse it for the present purposes.

59. So as not to leave any stone in respect of this witness, and the due process implications of his statements, unturned I must unfortunately deal with the Respondent's submission that it is "disingenuous" for the Applicant to cry foul over the lack of due process given her admission to the Tribunal that "she was able to deduce who CW-4 was." Quite apart from the fact that it is disingenuous for counsel to attempt to make a no-prejudice argument in such a situation, I am perplexed as to the intended import of the submission. Is counsel suggesting that it was up to the Applicant to call the person she assumes is CW-4 to testify so that she may attribute to him all the statements the PTF Report says are his and then proceed to test the veracity of that information?

60. It strikes me as odd that a lawyer with such a serious brief would even dare to suggest that it is appropriate for the statements of one informant to be accepted as true and correct by this Tribunal, so that the Tribunal must uphold the terminal effect that this information has had on the Applicant staff member without any other corroborating evidence or material being tendered, and with his identity being so protected from the Tribunal itself that his veracity cannot be tested; and in the same breath attempt to persuade this Tribunal that the shrouding of CW-4's identity is "of no consequence" because "in any event" the applicant knew the identity of the witness!

61. Referring specifically to the self-same CW-4, in *Masri*, I held that:

The power to confer anonymity to a witness in judicial proceedings lies with the Tribunal only, not with the investigators or a party to an application. The Respondent cannot without good cause shield his witness from judicial scrutiny. Such good cause would be for the Tribunal to decide.

62. In the act of balancing the rights of an Applicant and his/her witnesses with that of the Respondent and his/her witnesses, the Tribunal is guided by the principle that no party should be placed in the situation of being ambushed by witnesses or evidence they had no notice of, or be denied the opportunity to properly challenge,

and thus have a decision rendered against him/her on the basis of that unchallenged or untested witness or evidence.

63. Whatever the practice adopted by the different actors within the former internal justice system, Parties would do well to bear in mind that the process currently in force is a full and formal judicial mechanism, so that any material brought before it must be capable of withstanding the eagle eyes of judicial scrutiny.

64. I therefore find the statements of witness CW-4 unreliable and inadmissible in their entirety and accordingly expunge them from the records.

Other submissions by the Respondent

65. Having expunged all statements emanating from witness CW-4 and conclusions arising from those statements, I would be remiss if I did not deal with what is left of the Respondent's submissions in respect of this Applicant.

66. As previously stated, the Respondent takes issue with the propriety of the Applicant's conduct as a United Nations procurement official for visiting the offices of TFCE and challenges the credibility of the Applicant in respect of her testimony before this Tribunal.

67. In order for those factors to be of any value, they must be relevant to the charge on which she was summarily dismissed so that it can be shown that the exercise of the discretion was correctly done.

68. The Applicant's testimony in respect of her influence on the payment process is challenged by the Respondent as being untruthful and lacking in candour and the Respondent argues that the Applicant did in fact have the necessary influence, which influence she would have exercised had TFCE paid the solicited amounts. The Respondent links the Applicant's testimony on the state and contents of the files to Mr. Blattner's observations that such over-priced contracts point to the system being manipulated for the fraudulent transactions to be effected. The *only* source of

information in respect of those irregularities was CW-4. I observe also that the Respondent has not led any evidence to show how a procurement assistant at the level of the Applicant in MONUC came about such influence and power. Did this flow from her terms of reference in the position she held or from a failure of management? It is unfortunate that managers in the system appeared to have sat pretty while far-reaching decisions involving millions of dollars were taken by procurement assistants in MONUC.

69. To my mind, the arguments that have been urged upon this Tribunal in the efforts to prove that the Secretary-General acted justifiably in this case are little more than an earnest attempt at connecting both visible and invisible dots to frame the serious charge for which this Applicant was dismissed.

Findings

70. In light of the foregoing, the Tribunal makes the following findings:

- (i) There is no evidence on the record to show that the Applicant solicited or received bribes.
- (ii) The Applicant was not in any way responsible for the contract awards or delayed payments to TFCE.
- (iii) None of the established actions of the Applicant amount to serious misconduct or any misconduct deserving of summary dismissal.
- (iv) The Applicant was denied her due process rights in not being afforded an opportunity to test the veracity of her accuser CW-4.
- (iv) The OIOS/PTF investigation report was unfair and prejudiced against the Applicant, portrayed an unfortunate desperation to establish her guilt and unprofessionally served up accusations as facts in this case.

Remedies

The Tribunal therefore rescinds the decision to summarily dismiss the Applicant and

ORDERS:

- (i) the reinstatement of the Applicant;
- (ii) that the Applicant be paid her salaries and entitlements from the date of her summary dismissal to the date of this judgment with interest at 8%;
- (iii) that the Applicant be compensated for the breach of her right to due process at the rate of two months net base salary;
- (iv) that compensation be fixed, should the Secretary-General decide in the interest of the Administration not to perform the obligation to reinstate the Applicant, at two years' net base salary at the rate in effect on the date of the Applicant's separation from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgment until payment is effected; and,
- (v) rejects all other pleas.



Judge Nkemdilim Izuako

Dated this 12th day of July 2010

Entered in the Register on this 12th day of July 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi