



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/52
Judgment No.: UNDT/2010/185
Date: 18 October 2010
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Jean-Pelé Fomété

M'BRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Edwin Nhliziyo

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 25 June 2009, the Applicant was informed that the Secretary-General had decided to summarily dismiss him from the United Nations Mission in the Democratic Republic of the Congo (MONUC), for having solicited, received and accepted sums of money from a vendor who did business with MONUC in violation of Staff Regulations 1.2 (b) (e) (f) (g) and (l) as well as the UN Financial Rules 5.12 (Contested Decision). The Applicant contested his summary dismissal before the Joint Disciplinary Committee (JDC), whose recommendation to the Secretary-General was to rescind the decision.¹

2. The Applicant filed an application with the Dispute Tribunal (UNDT) on 10 August 2009, to contest his summary dismissal on grounds that the Secretary-General did not find sufficient evidence to establish misconduct and that his findings were based on extraneous factors and factual errors.

3. The Applicant seeks the quashing of the contested decision, his reinstatement and full payment of his salary and benefits from the day of his summary dismissal, in addition to appropriate compensation for moral damage.

Facts

4. The Applicant joined the MONUC Procurement Section in September 2000 as Chief of the Contracts Unit. In 2003, the Applicant became the Chief of the Purchasing Unit and later a Procurement Officer. In 2005, the Applicant was appointed Chief of the Engineering and Transportation Unit. He served in that capacity until February 2007, when he took up his responsibilities as the Officer-in-Charge of the Logistics and Communications Unit.

5. In February 2007, the Procurement Task Force (PTF/Taskforce) of the UN Office of Internal Oversight Services (OIOS) conducted an investigation into various allegations of corruption in the Procurement Section of MONUC. The PTF focused on the activities of the Applicant in addition to four other staff members. On 24 February and 11 May 2007, the PTF interviewed the Applicant and afforded him an opportunity to present relevant documentation

¹ JDC report dated 8 June 2009

and information. All the staff members implicated in the allegations of misconduct, including the Applicant, reviewed and signed the records of interviews with the PTF.

The PTF's Investigation

6. On 6 July 2007, the PTF issued its Interim Report on MONUC and Five United Nations Procurement Officials, dated 5 July 2007 (PTF Report/Report). The PTF noted that since the establishment of MONUC in November 1999 the Procurement Section has been headed by a succession of six Chief Procurement Officers. The PTF further remarked that while there was a high turnover and lack of continuity at the managerial level, there was little rotation within the professional and general service staff, noting that all the staff members who have been subjected to the investigation, including the Applicant, had worked at MONUC for more than four years.

The Boat Contracts

7. At the end of the investigation, the PTF found that the operations of MONUC primarily consisted of transporting humanitarian, military, and cargo convoys along the Congo River. For this purpose, MONUC was required to charter vessels and to lease a loading pier and dock handling facilities for their barges and pushers. The records reviewed by the PTF revealed that between 1 July 2002 and 30 June 2007 MONUC had awarded in excess USD 12,4 million in boat contracts to seven local Congolese companies. Based on the information it received, PTF concluded that, between July 2001 and 31 December 2006, thirty-two purchase orders for boats totaling USD 3,406,239 had been issued to Transport Fluvial et Commerce de l'Equateur (TFCE), a Kinshasa-based company that has been providing pushers, barges, fast boats, and pier facilities to MONUC since 2001. In addition, TFCE also provided docking facilities to MONUC for a monthly cost ranging from USD 14,000 in 2002 to USD 12,000 in 2003.

Allegations against the Applicant

8. Mr. Coggon, a former MONUC Procurement Officer, wrote to the Taskforce on 25 April 2007 with information on "some specifics or known facts on personnel in MONUC Procurement". In his email, Mr. Coggon stated, *inter alia*, that the Applicant and another staff member implicated in the allegations are known to own two of the river barges that were contracted to the United Nations for cargo operations.

9. The Taskforce interviewed the boat owners, dock workers and staff members on these allegations. Where available, it reviewed ownership certificates of the vessels chartered by MONUC. Following these enquiries, the investigators found Mr. Coggon's claim to be unfounded and that there was no indication that the Applicant "either directly or through a third party owned one of the boats operated by MONUC."

Confidential Witness 4 (CW-4)

10. On 4 May 2007, a confidential witness referred to in the PTF Report as CW-4, told the investigators that the Applicant had received a sum of USD 7,500 for a holiday and the rental of a car in 2003.² CW-4 further stated that the Applicant owned one of the boats used by MONUC registered as UN09A. Finally, CW-4 showed to the PTF investigators an index card with handwritten notes that listed the dates and amounts paid to MONUC staff members between 2000 and 2003. The card listed the initials of the Applicant and three other individuals.

PTF Findings on the Applicant

11. The Taskforce concluded that the Applicant had on several occasions solicited, received and accepted sums of money from TFCE in exchange for improper and unlawful assistance in MONUC's contract bidding process between 2001 and 2003.

12. Specifically, the Applicant was found to have knowingly and deliberately violated the following provisions of the Staff Regulations:

- a. Regulation 1.2 (b), by failing to uphold the highest standards of efficiency, competence and integrity;
- b. Regulation 1.2 (f), by not regulating his conduct with the interests of the Organization only in view;
- c. Regulation 1.2 (f), by engaging in inappropriate activities with a UN vendor, which adversely reflected on the integrity, independence, and impartiality that are required by his status as a procurement officer with the UN;

² OIOS Procurement Task Force, Interim Report on MONUC Procurement, page 13, paragraph 65. It appears that the total would be USD 6,000 instead of 7,500.

- d. Regulation 1.2 (g), by using the office or his knowledge gained from his official functions for private financial gain, and
 - e. Regulation 1.2 (l), by accepting favours and gifts, including sums of money characterized as interest free “loans” from vendors doing business with the Organisation;
 - f. Section 5.12 of the Financial Rules and Regulations of the UN which provides that the procurement process shall be carried out with fairness, integrity, transparency and effective competition in order to best serve the financial interests of the Organisation;
 - g. Section 4.2 (1), which provides 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;
 - h. Section 4.2 (2) which provides 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 UN.³
13. The Applicant was notified of the PTF findings on 20 June 2007 and asked to provide his comments.

The Charges

14. On 13 July 2007, the Director of the Administrative Services Division, Office of Mission Support in the Department of Field Support, referred the case of the Applicant to the Office of Human Resources Management (OHRM), recommending that appropriate disciplinary action be taken.
15. On 16 July 2007, OHRM placed the Applicant on Special Leave with Full Pay (SLFP).
16. On 24 July 2007, OHRM formally charged the Applicant for having solicited and received money from TFCE from 2001 to 2003.
17. Effective 6 August 2007, the Applicant’s SLFP was converted to Suspension from Duty with Full Pay.

³ *Ibidem*, pp. 74-75.

18. On 29 August 2007, the Applicant submitted his comments on the charges. He categorically denied all the charges, stating that he had never solicited or received any payments of any kind from TFCE or from any other vendor doing business with the Organization.

19. On 11 January 2008, the Secretary-General notified the Applicant that he has decided to summarily dismiss him for serious misconduct in accordance with staff regulation 10.2.

20. On 14 February 2008, the Applicant requested the Secretary-General to review his decision to summarily dismiss him. He also submitted his case to the JDC.

21. On 17 March 2008, the Respondent provided his comments on the Applicant's request for review.

The Joint Disciplinary Committee

22. The JDC in New York held hearings on 21 January 2009 and 12 February 2009. Two OIOS staff members testified. The first one was investigator of the matter. The other one was made available by OIOS to assist the JDC have a better understanding of the investigative process used in the case. On 26 March 2009, the JDC met in executive session to deliberate and finalise its report. The JDC found that the Applicant's summary dismissal was not warranted by the evidence adduced in the PTF Report nor at the hearing in this matter. The JDC recommended that the summary dismissal of the Applicant be rescinded.

23. On 25 June 2009, the Secretary-General advised the Applicant that he did not accept the findings of the JDC. The decision to summarily dismiss the Applicant was upheld.

UNDT Proceedings

24. On 10 August 2009, the Applicant filed an application with the UNDT contesting his summary dismissal; the Respondent replied on 10 September 2009.

25. The matter was heard on 9 February 2010. The Applicant, counsel for the Applicant, and counsel for the Respondent were heard via audio-conference from New York. The Respondent tendered a written statement by an OIOS investigator, on the basis of which she was cross-examined by the Applicant.

Applicant's Submissions

26. The Applicant submits that the Secretary-General's decision dated 25 June 2009 should be rescinded for lack of evidence, as pointed out in the JDC's report, and that his rights to due process have been violated.

27. The Applicant avers that while the Secretary-General has wide discretionary powers in disciplinary matters, including whether to accept or reject the recommendations of the JDC, this authority is not absolute.

28. The Applicant further argues that the key issue in this case remains the reliability and credibility of witness CW-4. The Respondent failed to offer good reasons for the anonymity conferred on this witness. In addition, there were several inconsistencies in the statements of this witness that needed to be clarified. Nevertheless, the Respondent never made that witness available.

29. The Applicant has consistently denied that he ever solicited, received, or accepted sums of money from a vendor and the Respondent's case rests solely on unsubstantiated allegations made by CW-4. While the Respondent insists that statements by the witness were corroborated, he has not identified any other witness whose statement supposedly corroborates the statements of CW-4. They were not corroborated by Mr. Elwin Blattner, the owner of TFCE. In fact, Mr. Blattner's statement contradicts the allegations made by CW-4. More specifically, Mr. Blattner clearly stated that he was unaware of such payments having been made to the Applicant, as well as of the existence of an index card. The allegations, resting as they did on the statement of CW-4, meant that the facts of this case were never established.

30. The Applicant avers that a proper review of all the facts leads to the conclusion that the disciplinary process was misused by both the Respondent and the PTF for extraneous considerations and that the result represents a serious miscarriage of justice as highlighted by the JDC.

31. The Applicant requests the Tribunal to rescind the Secretary-General's decision to summarily dismiss him, to reinstate him, to pay him a full salary and benefits from the day of his summary dismissal and to award appropriate damage for the harm done to the Applicant.

Respondent's Submissions

32. In early 2004, the Chief Procurement Officer in MONUC received information, from a member of the Blattner family who owns TFCE that procurement staff had demanded and received payment from TFCE. Later in 2004, the owner of TFCE, Mr. Elwyn Blattner, told the Chief Procurement Officer that the company had made payments to MONUC staff in order to get their invoices paid. The Chief Procurement Officer reported these allegations to OIOS.

33. Between February and June 2007, the OIOS PTF interviewed some of the TFCE owners. They stated that they no longer conducted business with MONUC because of the corruption in the Procurement Section. The owner himself refused to meet with the investigators and denied having knowledge of payments by TFCE to procurement staff.

34. Thereafter, the investigators met with CW-4 who admitted that TFCE had paid repeated bribes to procurement staff members at MONUC in the period 2000 to 2003. The investigators granted anonymity to the witness, fearing retaliation, pursuant to Section 18(b) of ST/SGB/273 and paragraphs 26 to 29 of the OIOS Manual of Investigation Practices and Policies of 2005. The Applicant was confronted with the evidence given by CW-4 and was afforded the opportunity to respond to these allegations.

35. With regards to the Applicant, CW-4 stated to the investigators on two occasions that the Applicant had been paid USD 7,500 for the rental of a car and a holiday. As for the boat contracts, the PTF requested all procurement files for the charter of pushers, barges and fast boats. The documents that were obtained were incomplete and inconsistent and, as a consequence, a comprehensive analysis of the boat contracts could not be compiled.

36. In addition, several irregularities in pricing were identified by a new procurement assistant and a now former procurement officer in early 2004 in which colleagues under the Applicant's supervision were involved. The Respondent argues that the Applicant was responsible both individually and in his capacity as a supervisor for the contracts in and around the period when the new procurement assistant and the procurement officer identified these inflated prices. The Applicant was given the opportunity to produce documentary records to assist investigators, and if possible, contradict these allegations, yet he failed to do so.

37. In addition, there is reliable evidence against the Applicant as provided by CW-4 and that the handwritten notes on the index card listing the dates and amounts paid to the Applicant and others in MONUC Procurement Section were authentic. CW-4's testimony was against interest. The statement by this witness was not favourable to TFCE and was further corroborated by the circumstances. Finally, the Applicant socialised quite extensively with MONUC vendors when he should have refrained from doing so.

38. The Respondent also avers that CW-4 was interviewed twice and provided the same statement on both occasions. He argues that this witness was an "inherently reliable witness" and that "on the balance of probability", the evidence available on the record indicated that the Applicant had engaged in serious misconduct. The Respondent stresses that CW-4's statement was corroborated by "surrounding circumstances." According to the Respondent, the Applicant was responsible both individually and in his capacity as a supervisor for the contracts during and around the period when the new procurement assistant and the procurement officer identified inflated prices.

39. Finally, the Respondent argues that the Applicant was treated fairly in line with ST/SGB/273 and the OIOS Manual and was afforded due process. He was confronted with the evidence and allegations against him during the investigation process and was given the opportunity to respond.

Considerations

40. This is one of the five MONUC disciplinary cases⁴ in which the Secretary-General decided to summarily dismiss the concerned staff members for serious misconduct following an investigation by the PTF.

Applicable Law

41. Staff regulation⁵ 1.2 (b) provides that:

⁴ Applicants *Sanwidi* (Case No. UNDT/NBI/2009/36); *Cohen* (Case No. UNDT/NBI/2009/49); *Masri* (Case No. UN UNDT/NBI/2009/51); *Parkes* (Case No. UNDT/NBI/2009/50 and *M'bra* (Case No. UNDT/NBI/2009/52).

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

42. Staff regulation 1.2 (e) states that:

By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants.

43. Staff regulation 1.2 (f) reads, in relevant part,

[Staff members] shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations ...

44. Staff regulation 1.2 (g) provides:

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

45. Regarding honours, gifts and remunerations, staff regulation 1.2 (l) provides:

No staff member shall accept any honours, decoration, favour, gift or remuneration from any non-governmental source without first obtaining the approval of the Secretary-General.

46. The provisions of Financial Regulation 5.12 read as follows:

Procurement functions include all actions necessary for the acquisition, by purchase or lease, of property, including products and real property, and of services, including works.

⁵ Reference to Staff Regulations under ST/SGB/2007/4, applicable at the time.

The following general principles shall be given due consideration when exercising the procurement functions of the United Nations:

- i. Best value for money;
- ii. Fairness, integrity and transparency;
- iii. Effective international competition;
- iv. The interest of the United Nations.

Considerations

The Probative Value of the Evidence of CW-4

47. The PTF recorded in their report that CW-4 claimed to have paid sums of money to the Applicant. Specifically, he stated to the investigators that “US \$3,500 was paid to [the Applicant] for a holiday trip; another US \$2,500 was paid to [the Applicant] for a car rental in 2003[...]”. In the PTF Report, the investigators wrote that “CW[-]4 stated that he had paid in total US \$7,500 to [the Applicant]”. Like the JDC Panel, the Tribunal takes note of a gross arithmetical error as the total amounts to USD 6000, not USD 7,500 as stated in the PTF Report. Curiously, neither the investigators nor the Respondent sought to clarify this error. This is the more strange as the Respondent states that CW-4 gave the same statement on two occasions.

48. Secondly, the PTF investigators considered as evidence an index card provided by the witness on which, it was alleged, the initials of the Applicant appear. The Tribunal observes that when one of the PTF investigators was asked by the JDC if she believed that the index card produced by CW-4 had any probative value, she stated that the card did not look like something that someone had just written that day as it was tattered and discolored. The investigators appear to have accepted the document that CW-4 produced at its face value without attempting to verify the details in it. The index card was not dated and the fact that the investigator’s assessment was limited to an impression that the ink was not fresh on that card does not help to strengthen that evidence.

49. CW-4 also told the investigators that the Applicant owned a boat registered with a UN number plate. The Tribunal notes that the PTF itself found that this allegation could not be substantiated. This conclusion in itself casts a fatal blow to the credibility of witness CW-4.

50. In the light of the above observations the Tribunal concludes that CW-4's statement is so fraught with irregularities and inconsistencies as to make it inherently unreliable. The quality of the evidence relied upon so completely and simply by the Respondent, leaves the Tribunal with troubling questions as to the actual goal of the investigators.

Surrounding Circumstances

51. The Tribunal notes that the investigators interviewed the Blattner family who own TFCE. The PTF clearly stated that the Blattner brothers did not identify the Applicant as being responsible for the alleged corruption within the Procurement Section.

52. The Respondent submits that the Applicant must be held responsible given his position during the course of the material period when irregularities in pricing were happening.

53. The Respondent also alleges that the Applicant socialised with the vendors, which conduct was inappropriate given his position, but tendered no evidence to support the allegation that he did not conduct himself in a manner expected of an international civil servant.

Was the Applicant treated in accordance with his due process rights?

54. The Applicant contends in denying him the opportunity to confront CW-4, the Respondent violated his rights to due process.

55. With regard to the Applicant's contention that he was not afforded an opportunity to confront a witness on whom the investigators had conferred anonymity the UNDT held in *Liyandarachchige* (UNDT/2010/41) that,

All the rights that an accused enjoys in the course of a criminal trial may not necessarily be available to a person who is subjected to disciplinary proceedings. The exercise that the Tribunal should undertake in such a situation is an analysis of whether the basic interests of a staff member were safeguarded in the light of the nature of the charges, the nature and complexity of the investigation, the need to afford protection to witnesses, whether the absence of confrontation is so detrimental to the interest of the staff member, whether the absence of witnesses so weakens the evidence in support of the charges that it cannot be relied upon and whether overall the proceedings were fair.

56. The essence of due process in disciplinary proceedings is to provide staff members with an opportunity to present arguments and evidence to respond to the charges of misconduct. The staff member should have an opportunity to tell his or her side of the story.

57. Did the anonymity of CW-4 adversely affect the due process rights of the Applicant? Was the exercise of the Secretary-General's discretion, in his reliance on this witness' testimony, correct and proper under the circumstances?

58. Since the Applicant is challenging the discretion of the Respondent to summarily dismiss him, it is imperative for the Tribunal to inquire into the basis for the exercise of that discretion. The Tribunal's task in disciplinary matters is to review the evidence, and decide whether the evidence was such that the discretion can be said to have been properly and judiciously exercised. Broad as it is, no discretion can be exercised in a vacuum.

59. It is for an applicant challenging the decision reached through the exercise of discretion to establish the grounds for the challenge. This does not mean that he bears the burden of establishing his innocence. Rather he must bring in sufficient facts and reasons to convince the Tribunal why the decision should be set aside. To that end, all that an applicant is required to do is to point at weaknesses in the evidence or procedural flaws. Once the applicant has done this, the burden is on the respondent to satisfy the Tribunal that the evidence in support of the charge or charges is capable of belief and that the discretion was properly exercised on such evidence.

60. The Applicant's argument is that the evidence on which the discretion of the Respondent hinges was of such poor quality that the Respondent's discretion cannot stand. He argues that the Respondent's main witness, CW-4, was neither credible nor reliable. The fact that he was not given an opportunity to confront that witness and cross-examine him/her on pertinent issues relating to the index card and the alleged ownership of the boat deprived him of a fair hearing. It was up to the Respondent, then, to satisfy the court of the probative value of the evidence in that it justified the discretion of the Respondent to summarily dismiss the Applicant *and* that no prejudice was occasioned to the latter in the process.

61. The Respondent remained content both before the JDC, and later the Tribunal, and continued to rely almost wholly on the written statement of witness CW-4 and the index card. Did he by taking that stand discharge the burden resting on him to establish to the satisfaction of

the Tribunal that the evidence was credible and capable of leading to the only and irresistible inference that the charges against the Applicant had been proved?

62. It was always open to the Respondent to call the witness and move the Tribunal for such protective measures as was considered necessary. The Respondent may well have had good reasons for shielding CW-4 from cross-examination, but did not proffer any of those reasons. Indeed, no satisfactory explanation was communicated to the Tribunal on why the witness was not called.

63. The Tribunal takes the view that at the investigation stage, investigators may well have good reasons to confer anonymity on a witness. It would be quite legitimate and proper for investigators to confer such anonymity because at this stage the investigators are in the process of gathering evidence. Vital evidence that a witness in need of protection might be able to provide during an investigation might not be forthcoming and the investigation could run the risk of being compromised.

64. Within the realm of a judicial process, however, the court is not bound by an investigator's decision to confer anonymity on a witness. Where a party in a disciplinary case, is relying solely or heavily on the testimony of a witness on whom anonymity was conferred at the investigation stage, to establish a charge of misconduct, that party cannot expect the Tribunal to endorse this decision during a hearing. It is up to the party seeking anonymity, or any other protective measure in respect of a witness, to move the court for those measures to be granted. The court will then strike a balance considering the submissions of the moving and opposing parties respectively. Equally, where the anonymity of a witness is in issue, it is up to the party seeking disclosure to move the court for the order being sought.

65. In the case of *Liyanarachchige* referred to above reasons were put forward for conferring anonymity on the witnesses who were victims of human trafficking within a network of prostitution. It was the Tribunal's judgment, that the overall circumstances of the case warranted the anonymity that was sought and conferred.

66. In the present case, the Tribunal is not persuaded that the anonymity conferred on CW-4 was warranted under the circumstances. It is difficult to understand why the Respondent took the position that it was necessary to protect the witness' identity even from the court.

67. Since CW-4 was not called to testify the Tribunal could only assess his/her evidence from documents. Having done so, the Tribunal comes to the conclusion that the evidence of CW-4 was so fraught with irregularities and inconsistencies that no reliance could be placed on it. This being the case the discretion that hinges on such spurious evidence cannot be allowed to stand. The Tribunal concludes that the Secretary-General's reliance of CW-4's testimony to such terminal effect was inappropriate, ill-advised, and fundamentally unfair to the Applicant.

Judgment

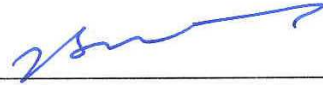
68. The evidence presented by the Respondent does not establish to the satisfaction of the Tribunal that the Applicant engaged in misconduct pursuant to staff regulation 1.2 and UN financial rule 5.12.

69. In the light of the foregoing, pursuant to Article 10.5 (a) and (b) of the UNDT Statute, the Tribunal hereby **ORDERS**:

- i. the reinstatement of the Applicant;
- ii. that the Applicant be paid his salary and entitlements from the date of his summary dismissal to the date of this judgment with interest at eight (8) per cent;
- iii. that the Applicant be compensated for the breach of his rights 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 (8) 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.

Case No. UNDT/NBI/2009/52

Judgment No. UNDT/2010/185



Judge Vinod Boolell

Dated this 18th day of October 2010

Entered in the Register on this 18th day of October 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi