
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/041

Judgment No.: UNDT/2011/143

Date: 12 August 2011

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

IGUNDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPLICATION FOR
SUSPENSION OF ACTION

Facts

1. The Applicant is a Supply Clerk at ~~at~~ GL-3 level with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”).
2. In January 2008, MONUSCO received ~~part~~ of suspected theft of MREs (“Meals Ready to Eat”). The Applicant was interviewed during the investigation by MONUC (as it then was) Security, as ~~had~~ another staff member ~~was~~ were allegedly involved in transporting a shipment of

Panel confirmed the rating. The 2009/2010 performance rating of “partially meets performance expectations” was not challenged by the Applicant.

5. During the 2010/2011 performance cycle the Applicant’s First Reporting Officer (FRO) identified shortcomings in the Applicant’s performance and took action to remedy his shortcomings. A Performance Improvement Plan (PIP) for the period from 1 October to 31 December 2010 was put in place in accordance with ST/AI/2010/5 (Performance Management and Development System). The PIP identified four goals and associated success criteria.

6. On 15 December 2010, the Applicant’s performance was reviewed under the PIP. The Applicant’s FRO commented that “overall the performance did not meet the expected mark and failed in achieving the goals specifically”.

7. A second performance improvement plan was put in place, which covered the period from 1 January 2011 to 31 March 2011. The second PIP identified three goals and associated success criteria. In February 2011, an investigation report was

10. On 16 May 2011, the Applicant signed off on his e-PAS for 2010/2011

17. The Tribunal held a hearing based on the amended submissions on 5 August 2011 and heard oral testimony from the Applicant and Seyed Mohammed Moulana, the Applicant's FRO.

The Applicant's Case

18. The Applicant's case as per his amended application and his oral testimony is summarized below:

19. He joined MONUSCO full-time in 2006 and worked in the Ration and General Supply Section. His involvement with MONUSCO began with casual daily work in 2003 before receiving a National Staff post. In 2008, he was promoted from GL-2 to GL-3 based on his good performance. There was no suggestion of unsatisfactory performance or any questions raised about his integrity in his 2006-7 e-PAS. Although there is mention of an allegation in his 2008-9 e-PAS, it was merely a pending matter and again there were no problems raised in respect of performance. In 2009, he was short-listed for an FS-4 role in the United Nations Missions in Sudan ("UNMIS").

20. In 2008, the Applicant was accused of theft relating to MREs. He maintained that in relation to that allegation and other suggestions of impropriety, he was innocent. He further stated that no disciplinary proceedings had ever been concluded in relation to any alleged wrongdoing (although it is suggested by his FRO in his 2011 e-PAS that in respect of one allegation there has been a formal finding of guilt).

21. The assessment that his FRO made in his 2010-2011 e-PAS was not an accurate representation of his conduct and performance. His problems began with the unjustified allegation of theft in relation to the MREs. Once his character and integrity was called into doubt, the suspicions of the MONUSCO Administration seemed to all align on him.

22. It was within this context that Seyed Moulana (Bukavu Officer-in-Charge of the Supply Section) became the Applicant's FRO in June 2009. Seyed Moulana made

it clear to him from the outset that he did not want him to remain a part of MONUSCO. Moulana announced to others, including staff representative, Deddy Furume, that he intended to ensure that the Applicant would not remain in MONUSCO supply under his management. This animosity directed towards him by Moulana began to be echoed by others in MONUSCO, culminating in the sudden and dramatic decline in his appraisals.

23. In respect to the requirement of unlawfulness, the Applicant submits that the

27. In respect to the element of urgency, was due to be separated on 31 July 2011 and the MONUSCO Administration had attempted to enforce his separation and prevent him from being paid his July salary as well as access to the MONUSCO offices despite there being in place a suspension of action order from this Tribunal.

28. In respect to irreparable harm, the Applicant submits that should the MONUSCO Administration enforce the separation, it will be on the basis of poor performance and the unproven allegations. The damage to his reputation as well as his career prospects cannot be remedied by a monetary award. Further, the Administration is seeking to characterize him as dishonest in breach of due process. If the decision is allowed to stand, he will be unfairly tainted without having been found guilty. He will also lose the prospect of applying for jobs within the United Nations as an internal candidate.

Respondent's Case

2012 The Respondent's case is 2012-01-12-01-PA5 a6(S cycles..1 -1 T)6No

32. On 1 April 2010, the 2010/2011 e-PAS period commenced. After the Applicant's FRO identified shortcomings in his performance, a PIP was established under Section 10.1 of ST/AI/2010/5. In this case two PIPs were established covering a total period of six months (from October 2010 to 31 March 2011). The plans identified the Applicant's performance shortcomings and the required action to improve his performance.

33. The Applicant's performance did not improve under both PIPs. As a consequence, the Applicant's performance rating for 2010/2011 was "does not meet performance expectations". The Applicant sought to rebut the performance rating. Pursuant to section 15 of ST/AI/2010/5, a Rebuttal Panel was convened to review the Applicant's case. The Panel comprised three staff members of MONUSCO. The panel interviewed the Applicant's two reporting officers, a former reporting officer, the Applicant and three of the Applicant's colleagues who were acquainted with his work.

34. The Panel did not find any compelling reason to revoke the current e-PAS evaluations of the Applicant's current supervisors and also concluded that "besides his dismal performance, issues relating to his integrity seem to make him an unsuitable candidate for supply work given the sensitivities of the job".

35. Given the confirmation by the Rebuttal Panel of the Applicant's performance rating of "does not meet performance expectations", the non-renewal of the Applicant's appointment for unsatisfactory performance was lawful. The Applicant has failed to proffer any evidence to show that the impugned decision was based on an improper purpose.

36. The Respondent rejects the Applicant's assertions that the PIPs, e-PAS process and rebuttal process were a charade. The documentary evidence shows that the MONUSCO Administration followed the procedures under ST

37. The Rebuttal Panel independently and objectively reviewed the Applicant's performance rating. The panel was made up of three independent staff members. The panel interviewed the Applicant, his two reporting officers, a former reporting officer, and three of the Applicant's colleagues. In its report, the Rebuttal Panel made detailed findings regarding the Applicant's performance. The findings reveal that the Panel carefully weighed the evidence of the witnesses and took care to find corroborating statements to support the intentions of the Applicants' reporting officers.

38. There was ample evidence to show that the Applicant's performance was problematic. The Panel made the following findings:

- a. The Applicant lacked skills in performing inventories using the Galileo system, which was a basic requirement for his position and he made no progress in improving those skills;
- b. Despite two PIPs and coaching the Applicant made no improvement;
- c. The Applicant made mistakes in loading and off-loading;
- d. The Applicant had "roaming tendencies", which indicated a lack of assiduity in his functions; and
- e. The Applicant lacked a sense of accountability as he failed to report the loss of a Logbook to his supervisor or to MONUSCO security.

39. The Rebuttal Panel confirmed the Applicant's performance rating of "does not meet performance expectations". Followi

to his first reporting officer and unnamed "others" and "key actors" within MONUSCO. In support of his assertions, the Applicant makes various allegations in his amended Application. These allegations are false:

- a. The Applicant was not promoted in 2008 for good performance, but as a result of a mission-wide promotion for all national staff;
- b. The Applicant's FRO denies he made statements that he is alleged to have made to the Applicant and others; and
- c. There was no sudden dramatic decline in the appraisals of the Applicant from 2009. In 2007/2008, the Applicant was given a performance rating of "partially meets performance expectations", which was confirmed after a rebuttal process.

41. No disciplinary proceedings have been commenced against the Applicant under ST/AI/37I (Revised Disciplinary Measures and Procedures) in connection with the possible theft of MREs or any other allegations. In the e-PAS records for 2009/2010 and 2010/2011, the reporting officers refer to investigations involving the Applicant. These references were made in the context of other detailed comments concerning his performance shortcomings.

42. The independent Rebuttal Panel referred the investigations against the Applicant in its report. However, these references are made in the context of findings identifying numerous performance shortcomings. The Rebuttal Panel confirmed the performance rating given to the Applicant by his reporting officers. Accordingly, there is no cogent evidence put forward by the Applicant to support his contention that the decision was taken to drive him out of MONUSCO, having failed to do so through disciplinary proceedings.

43. The assertions advanced by the Applicant to challenge the lawfulness of the decision do not stand up to scrutiny in light of the evidence before the Tribunal. The evidence shows that the decision is *prima facie* lawful. The documentary evidence

indicates that all the relevant procedures under ST/2010/5 were duly followed. The Applicant has not proffered any evidence to support his contention that the decision was based on an improper purpose. The Applicant's performance shortcomings are well documented, spanning three performance cycles. The MONUSCO Administration acted properly when it decided not to extend the Applicant's appointment once it became clear that his performance had not improved. Accordingly, the Respondent submits that the Applicant has failed to discharge the burden of persuading the Tribunal that the decision is *prima facie* unlawful.

44. The Applicant has not established that he will suffer irreparable harm upon implementation of the decision. In his amended Application, the Applicant contends that the damage to his reputation, as well as his career prospects cannot be remedied by a monetary award alone. He argues that he will be characterized as dishonest and that he will be unfairly tainted, without having been found guilty. This argument has no basis as the decision is based on unsatisfactory performance, not allegations of misconduct.

45. The Applicant also contends that if he is separated, he will lose the prospect of applying for jobs as an "internal candidate". This argument has no merit, because under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference.

46. Any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages. The Applicant has therefore failed to meet his burden of establishing (application, or ansuetnon isj 11.44020 TD -0.0001 Tw (bu appion the use of y th9ofirst es. Th

respective reports made against the Applicant. He however kept an open mind despite being aware that the on-going investigations.

g. He had never taken the Supply Request Logbook as alleged by the Applicant.

Considerations

Is the Contested Decision unlawful?

50. The Applicant's case is that the performance appraisal process was vitiated by the unproven allegations of misconduct against him being used as an integral part of his evaluation. The Applicant argues that the performance appraisals were a charade. The Respondent's case is that unsatisfactory performance is a lawful basis for non-renewal of a fixed-term appointment in accordance with ST/AI/2010/5 and that there were numerous measures put in place to improve the Applicant's performance to no avail.

51. The Tribunal has carefully considered the Parties' oral and written submissions and testimonies. During the reporting period for 2009/2010 and 2010/2011, the Applicant's performance appraisals were assessed by Mr Moulana, the FRO at the time. It is noteworthy that the unfavourable e-PAS reports for those periods made numerous references to "ongoing investigations" against the Applicant, which at the time had been concluded and investigation reports made.

2009/2010 Performance Appraisal

52. In the 2009/2010 e-PAS, the Applicant's FRO commented as follows under the section for 'Comments on Values and Competencies':

The S/M is still in development stage in his integrity. Investigation still progressing on the case of CR (sic) theft reported in 2008 (REF#BUK/SEC/08/017) by Security

followed up on tasks and responsibilities including those which are routine. He needs to be supervised closely to get satisfactory results...

The S/M is been employed in limited tasks in Supply where supervision is not required. Due to the ongoing investigation (REF#BUK/SEC/08/017), he cannot be reliably placed in the store to carry out routine tasks. It is recommended he should be given short term contracts due to the pending Investigation and during each renewal his performance should be reviewed.

2010/2011 Performance Appraisal

53. In the 2010/2011 e-PAS, the Applicant FRO again commented as follows:

The staff member's integrity is seriously questioned. In addition to the existing case of MRE theft (Ref #BUK/SEC/08/017) he was also caught for fraudulent use of his Supervisor's signature for financial benefit. Security has concluded the case (REF#BUK/SEC/11/001) and he has been found gross negligent. His professionalism is well below the expectation and time and again he has been found incurring disrepute to the Section and Organization.

[...]

Two cycles in a row (2009/2010 and 2010/2011) he has failed to perform. In 2007/2008 cycle his contract was not recommended for extension. In addition to the existing case for theft (Ref #BUK/SEC/08/017), he was also found fraudulently using his Supervisor's signature for financial benefit (Ref: #BUK/SEC/11/001)... His unannounced absenteeism and disappearance from office during working time is another issue which has hampered operations. At best his performance is below average if not very well below average. He is neither suitable to work in Clerical function not in a Warehouse environment due to his accountability issue. He has not shown Team spirit in disposal of his duties and on occasions he is suspected to be under the influence of alcohol. Since he has failed in all opportunities that was presented to him for improved performance and make good his Integrity issues, I strongly recommend that his contract should NOT be extended anymore.

Rebuttal Process

54. Under Section 15 of ST/AI/2010/5 (Performance Management and Development System), a staff member who disagrees with a poor performance rating at the end of the performance year may file a rebuttal of the said rating. Section 15.4 provides that when a Rebuttal Panel is constituted it shall review the case and shall prepare a report on why the original rating should or should not be maintained. In

the instant case, the Rebuttal Panel report dated 14 July 2011 made, somehow disturbingly, numerous references to the investigations that had been previously conducted on the previous allegations of the staff's forgery against the Applicant. Part of the Rebuttal Panel's Report read as follows:

2.5 The Panel further requested persons to make available to it the concluded investigations of cases against the staff member alluded to in his E-pas as compromising his integrity. The Panel therefore received and read the investigations on the staff member's implication in MONUC MRE's theft reported in 2007 and investigated in 2008. It also had available from HR reports pertaining to an alleged signature fraud by staff member to secure a bank loan. The investigated reports attached to the current report as annex C...

3.3 As pertains to integrity and accountability, the Panel found that the staff member had serious problems with his integrity and accountability, having been implicated in MREs theft in 2007. He had been assigned to collect MRE's with a driver from the airport. Upon the return leg of the journey after several hours on the way he dropped half-way and purportedly went home. He left the driver to continue with the products to HQ alone and never off loaded the truck until two days after. He gave the panel a different representation which he never

Were the investigations with regard to allegations of the theft and forgery against the Applicant relevant in his performance appraisals?

56. It is crystal clear that the matter of earlier allegations of theft of MREs in 2007 and forgery in 2010 on which the investigations were said to have been concluded played a prominent, in fact a central role in the performance appraisal ratings of the Applicant. Even the Rebuttal Panel went to great lengths to re-state the theft allegations and conduct what amounted to another investigation on it as evidenced in paragraph 3.3 of the report reproduced above. Should this have been the case? Certainly not!

57. The said Rebuttal Panel appeared unfortunately to have launched into an investigation of the forgery of signature allegations. The proper procedure for dealing with allegations of misconduct is well spelt out in ST/A/371 (Revised Disciplinary Measures and Procedures). Performan

59. In view of the preceding, the Tribunal makes the following findings:
- a. The decision not to renew the Applicant's appointment was informed by his e-PAS ratings which in turn were heavily influenced by investigations into allegations against him.
 - b. The Rebuttal Panel's Report was influenced by the investigations into allegations against the Applicant (see for example the Rebuttal Panel's conclusion at para. 34 above).
 - c. There is evidence of bias and discrimination against the Applicant such as the installation of a security camera to monitor his activities. This evidence was not rebutted by the Respondent. The e-PAS reports show that the investigations into allegations against the Applicant weighed heavily on the FRO's mind.
 - d. The PIPs were implemented and reviewed by the same FRO who had demonstrated bias and discrimination against the Applicant.
 - e. The fact that the investigations were utilized as a basis for his e-PAS and in the Rebuttal Panel's report presents a gross violation of the Applicant's due process rights as set out in ST/AI/371 and this is *prima facie* unlawful.
 - f. It is disingenuous for the Applicant's FRO to purport to base the decision not to renew the Applicant's appointment on performance shortcomings when evidently the reasons were the allegations against the Applicant.
 - g. The presumption of innocence is a fundamental principle of natural justice. An accused person is presumed innocent until proven guilty in accordance with the requirements of due process. In this case the Applicant's

stand, he will be unfairly tainted without having been found guilty. He will also lose the prospect of applying for jobs with the UN as an internal candidate.

64. The Respondent contends that this argument has no basis as the decision is based on unsatisfactory performance, allegations of misconduct and that under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference. The Respondent submits that any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages.

65. Having considered the Applicant's submissions, the Tribunal finds that the harm suffered to the Applicant's reputation and career prospects if the decision is implemented cannot be adequately compensated by monetary damages.

Conclusion

66. The Tribunal grants the Applicant's request for suspension of action of the decision not to renew his contract beyond 31 July 2011 pending the outcome of management evaluation.

67. The Tribunal further directs Council Seth Levine of Office of Staff Legal Assistance (OSLA) to assist the Applicant

