

Case No.: UNDT/NBI/2009/049

Judgment No.: UNDT/2010/118

Date: 12 July 2010

***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the matter, found in favour of the Applicant and recommended that the decision to summarily dismiss the Applicant be rescinded.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 co



***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 or

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 Manage

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 th



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

*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

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





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



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



***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.

