



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS U



JUDGE KAMALJIT SINGH GAREWAL , Presiding.

Synopsis

1. Joel Sanwidi (Sanwidi) (deceased on 7 August 2010, now represented by his father Ignace Sanwidi) was a Procurement Officer with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). On 22 July 2005, Sanwidi entered into a currency exchange transaction with the owner of Maison Mukoie Fils (MMF) in order to buy a car in Kinshasa. The owner of MMF lent Sanwidi USD 7,000 in cash, which Sanwidi repaid on 10 August 2005 by transferring funds from his bank account in France to MMF's bank account in Belgium. MMF was a vendor in business with MONUC for the charter of boats and was paid USD 3.4 million by MONUC between 2002 and 2007.

2. Based on this transaction, Sanwidi was summarily dismissed for serious misconduct. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that his acts did not amount to serious misconduct and that the penalty of summary dismissal was disproportionate to the misconduct. In the UNDT's view, Sanwidi deserved a much milder disciplinary sanction.

3.

Facts and Procedure

4. Sanwidi joined the United Nations in 1994 as a Procurement Assistant with the United Nations Assistance Mission for Rwanda. He was later appointed a Procurement Officer with the International Criminal Tribunal for Rwanda.

5. In March 2003, Sanwidi was appointed as a Procurement Officer at the P-4 level with MONUC, where shortly thereafter he began to serve as Chief of the Contracts Unit. He later became Chief of the Supplies and Services Unit. From October 2006 until the arrival of a new Chief Procurement Officer in May 2007, Sanwidi served as Officer-in-Charge of the Procurement Section.

6. In July 2005, Sanwidi asked the owner of MMF for USD 7,000 in cash to buy a car in Kinshasa. This company was a vendor which did business with MONUC, worth about USD 3.4 million from July 2002 to June 2005.

10. On 24 July 2007, Sanwidi was formally charged with “having solicited, received and accepted a sum of money from Maison Mukoie Fils, a vendor who did business and sought to do business with MONUC”. Sanwidi was suspended with full pay on 13 August 2007. After he provided written comments on the charges, he was informed by the Office of Human Resources Management (OHRM) by letter dated 11 January 2008 that he was summarily dismissed for serious misconduct. His conduct violated his obligations as a staff member, set out in Staff Regulations 1.2(b), (e), (f), (g) and (l), Financial Regulation 5.12 and Sections 4.2(1) and (2) of the Procurement Manual.

11. A request for review of the decision was submitted by Sanwidi and a Joint Disciplinary Committee (JDC) panel was established on 15 December 2008. After a hearing in January 2009, the JDC concluded in its report of 7 April 2009 that the factual record was insufficient to establish that Sanwidi had engaged in serious misconduct. The JDC found as follows:

[B]ased on the record, there is no evidence to sustain the characterization by the PTF that he engaged in corrupt or unlawful activity. The charge that he solicited received and accepted a sum of money implies in the context of this characterization that he asked for and was paid a bribe or kickback. He did not. He solicited and accepted a service from MMF whereby he exchanged his own money for the equivalent of another currency. More specifically, he did not solicit payments of monies in the amount of \$ 7000 belonging to MMF; he solicited their assistance with exchanging that amount of his own money.

The JDC concluded that this conduct represented a conflict of interest that would call into question any United Nations procurement exercises with the vendor, MMF. The panel advised that the decision to summarily dismiss Sanwidi be rescinded, and recommended his separation from service “effective the date of expiration of his last contract with the UN or the date of his summary dismissal 11 January 2008, with all salary and entitlements including restoration of pension rights up to that date”.

12. By letter dated 3 June 2009, the Deputy Secretary-General informed Sanwidi that the Secretary-General had decided not to accept the JDC’s recommendation of rescission of his summary dismissal. In the opinion of the Secretary-General, Sanwidi had solicited, received, and accepted money from MMF, which did business with MONUC. The purpose for which the money was obtained was not relevant, and Sanwidi’s actions had harmed the reputation of the United Nations.

13.

22. Under Staff Regulation 10.2, the Secretary-General has the authority to impose disciplinary measures on a staff member whose conduct is unsatisfactory and to summarily dismiss a staff member for serious misconduct. The former Administrative Tribunal held that the discretion of the Secretary-General is, and must remain, necessarily extensive.

23. In view of the Secretary-General's broad discretion, the former Administrative Tribunal deferred to the determinations made by the Secretary-General regarding the evaluation of facts, whether the impugned conduct constituted misconduct, and the appropriate disciplinary measure to be imposed. In reviewing whether the facts were established, the former Administrative Tribunal examined whether the findings of fact against the appellant were supported by the evidence. In doing so, the former Administrative Tribunal did not substitute its own judgment for that of the Administration.

24. The Secretary-General argues that the reports of the JDC are advisory only and he was entitled to reach a different conclusion. The UNDT substituted its own judgment for that of the Secretary-General in concluding that it shared the JDC's view that the transaction was a "currency exchange". The Dispute Tribunal may only consider whether the findings of fact made by the Secretary-General are reasonably justifiable and supported by evidence. Therefore, the Dispute Tribunal erred on a question of law and exceeded its competence by substituting its own judgment regarding the facts for that of the Secretary-General.

25. The Secretary-General submits that the UNDT erred on a question of law in characterizing Sanwidi's actions as not amounting to serious misconduct. Sanwidi used his office to obtain a private gain in breach of Staff Regulation 1.2(g): had he gone to a local bank to exchange currency, he would have been charged approximately USD 700 for the transaction. Further, Sanwidi's personal transaction with a MONUC vendor created the impression that he was influenced or could be influenced in his official procurement capacity, in breach of Section 4.2(1) of the Procurement Manual.

26. The Secretary-General contends that the UNDT erred on a question of law and exceeded its competence in substituting its own judgment for that of the Secretary-General regarding the appropriate disciplinary sanction. The former Administrative Tribunal consistently declined to substitute its own judgment for that of the Secretary-General regarding the appropriate sanction.

27. The Secretary-General submits that the Judgment places the Secretary-General in an untenable position: on one hand he is expected by the General Assembly and the public to hold staff members to the highest standards of integrity. However whenever the Secretary-General tries to punish misconduct appropriately, he risks being second-guessed by the

32. Sanwidi makes several arguments which largely repeat his main argument that the JDC and the UNDT found that there was no serious misconduct which justified the disciplinary sanction of summary dismissal. Therefore, the Secretary-General's decision to summarily dismiss Sanwidi was rightly rescinded by the UNDT.

33.

THE U

47. Keeping in mind the matters outlined above, we hold that the UNDT, in exercising

50. In this case, we cannot overlook the fact that Sanwidi was a Procurement Officer, at the P-4 level, in the Procurement Section of MONUC and held senior positions as Chief of the Contracts Unit and later Chief of the Supplies Service Unit. He occupied a position of trust and great financial responsibility and he was called upon to take important financial decisions. Therefore, a high standard of conduct and integrity was expected from him.

51. Entering into the currency exchange transaction with a MONUC vendor was a serious breach of the Staff Regulations and the Procurement Manual. Under Staff Regulation 1.2(g), staff members are prohibited from using their office for private gain, financial or otherwise. Sanwidi personally negotiated the exchange of currency with the owner of MMF. The currency exchange involved the amount of USD 7,000, a substantial sum of money. In his statement to the PTF investigators, Sanwidi explained that he needed to make an immediate cash payment to buy a vehicle, however the amount of money he could withdraw using his credit card was limited and there were commission costs associated with exchanging money at a local bank. These difficulties were avoided by entering into the transaction with the owner of MMF. Sanwidi therefore obtained a private gain in contravention of Staff Regulation 1.2(g).

52. Under Staff Regulation 1.2(b), Sanwidi was required to uphold the highest standards of efficiency, competence and integrity. Further, Section 4.2(1) of the Procurement Manual provides as follows:

It is of overriding importance that the staff member acting 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 considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression that their actions will create on others.

53. Sanwidi occupied an important position in the Procurement Section of MONUC and the person with whom he exchanged money was the owner of a vendor. He was required to be especially aware of the financial relationships between MONUC and its vendors. He was required to maintain a very high standard of integrity, objectivity, and aloofness in the conduct of his duties, in order not to appear to be influenced or exploited by those vendors. Sanwidi was to perform an honest service for MONUC. He was not to be seen conducting

himself in such a way that may give the impression that he was working against the interests of MONUC and favouring one of its vendors. Sanwidi did not meet the standards expected of a staff member involved in procurement. Accordingly, in these circumstances we hold that Sanwidi's misconduct was serious and the disciplinary measure of summary dismissal was not disproportionate.

Judgment

54. This appeal is allowed, the Judgment is set aside and the Secretary-General's decision to summarily dismiss Sanwidi is affirmed.

Dated this 27th day of October in New York, United States.

Original and authoritative version: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

v2r ()Td