



Case No.: UNDT/NBI/2010/31/
UNAT/1689

Judgment No.: UNDT/2011/138

Date: 2 August 2011

Facts

1. The Applicant was recruited to the organization on 26 February 2002 as a Casual Daily Worker (CDW) with the United Nations Mission in the Democratic Republic of Congo (MONUC) (as it then was) in Bukavu. On 1 September 2004, he received a 300-series appointment as a Warehouse Worker in Bukavu at the G-2 level.

2. According to a Joint Disciplinary Committee (JDC) report dated 9 October 2008, as a result of complaints addressed to the Regional Administrative Officer some time in late 2005 or early 2006 by several CDWs, an investigation was conducted by a Special Investigations Unit (SIU) concerning allegations that several staff members in the Engineering Section, MONUC, Bukavu, had forced them to pay money to secure and then retain their jobs in MONUC. The Applicant was one of those against whom allegations were made. The Applicant was in MOS0005 T8I.1446 T82 the Un

2008. The Panel unanimously found that the evidence showed that the Applicant was more likely than not to have engaged in taking payments from local citizens in exchange for or with the promise of securing them jobs and unanimously recommended that he should be summarily dismissed.

11. On 6 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined his case in the light of the JDC's findings, conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General accepted the conclusions of the JDC and its recommendations. The Secretary-General was of the view that the Applicant's actions were inconsistent with the standard of integrity required for international civil servants and that the severity of his misconduct was incompatible with continued service in the Organization. Pursuant to discretionary authority in disciplinary matters, the Secretary-General decided that pursuant to staff rule 110.3(a)(vii), the Applicant would be separated from service without notice or compensation in lieu thereof.

12. The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the former UN Administrative Tribunal.

13. On 13 May 2009, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed an Answer on 16 November 2009. On 22 December 2009, the Applicant counter-filed a document titled "Observations to the Respondent's Answer" challenging the Secretary-General's decision to separate him from service. The Application was subsequently transferred to this Tribunal.

14. The Applicant's case was that the WOs who had brought the complaint of extorting money from them for UN jobs had lied and wanted to tell the Tribunal that they had lied against the Applicant in their complaints. The said complainants wished to set the record straight by attending the hearing and explaining why and how they had lied against the Applicant. They were to attend the hearing as witnesses

- b. Mr. Mihigo Mudekereza.
- c. Mr. Minani Buroko.
- d. Mr. Iragi Mirindi.
- e. Mr. Kashemwa Rubangiza.

witness a substantial amount of money. The JDC did not address any of these facts or the evidence to suggest prejudice or ill-motive.

21. The JDC demonstrated a high level of doubt and conjecture in its consideration of his case. The standard of proof utilized by the JDC is “a preponderance of evidence” and the role of the JDC was to establish facts based on this standard. The JDC report reveals that there were serious doubts in the Panel’s findings, evidenced by the use of language such as “probably” and “more likely than not”. The Applicant submits that this language is unacceptable and constitutes a lack of due process, indicating that the JDC failed to meet its burden by the application of a standard lower than appropriate.

22. The JDC failed to establish facts and instead, relied upon conjecture and opinion without giving sufficient detail to explain why it reached certain conclusions. The JDC failed to address the major inconsistencies between the statements given during the investigation process and the oral testimonies given before it.

23. The Applicant requests the Tribunal find that the Secretary-General erred when exercising his discretionary authority in summarily dismissing him.

Respondent’s Case

24. The Respondents’ submissions are as follows. The Secretary-General has broad discretion with regard to disciplinary matters and this includes determination of what constitutes misconduct. The United Nations Charter and the Staff Regulations vests the Secretary-General with the authority to determine whether a staff member has met the required standards of conduct.

25. It is within the Secretary-General’s discretionary power to determine what behaviour constitutes misconduct as well as the disciplinary measure to be imposed. The Secretary-General has complied with the criteria established in the Tribunal’s jurisprudence for the review of disciplinary measures.

26. The facts on which the disciplinary measures were based have been established and legally amount to misconduct. There was no substantive or procedural irregularity. The Respondent submits that the Applicant's claim that the JDC Panel failed to consider that his accused motives to falsify claims against him are not correct as this claim was explicitly considered by the JDC and rejected.

27. In view of the standard to be met for establishing misconduct, the Respondent submits that the testimony of seven witnesses determined by the JDC to be credible constitutes more than adequate evidence in support of its conclusion that the

31. The Respondent, therefore, requests the Tribunal to dismiss each and all of the Applicant's pleas and to dismiss the Application in its entirety.

Consideration

Charge of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff

32. The Investigation report dated 12 July 2006 concluded, *inter alia*, that:

- a. There was concrete and tangible evidence that the Applicant was engaged in extortion activities.

34. Mihigo Mudekerezwa testified that he had worked for MONUC at the Kavumu airport approximately six years ago. He had worked for only 12 days before he was laid off and told that when more equipment became available he would be re-employed. He was subsequently re-employed when the equipment arrived. When pay day came, the Applicant paid him much less than what he was entitled to. The Applicant told him that he would pay him at a later date. Despite repeated requests to the Applicant he never received any money. That is the reason why he filed a complaint against the Applicant with MONUC. He suspected that other people were receiving money meant to pay him. Mudekerezwa also testified that the Applicant used to meet with people and request them to raise funds and give them to him and that only those people who followed the Applicant's will were employed.

35. Minani Buroko testified that he worked for MONUC in 2006 at the airport in Kavumu. He and six other people met the Applicant at a place called Kavumu Monument. The Applicant promised them work with MONUC in exchange for a \$100 payment per person. He paid the Applicant \$100 and worked for one month. He did not receive any pay at the end of the month. When he asked the Applicant for his pay, the Applicant told him that MONUC would solve his problem.

36. Iragi Mirindi testified that the Applicant gave him a job in MONUC in 2006. Before he started working, he gave the Applicant \$100 at the Kavumu monument. There were nine other people present when he was hired. He went to Bukavu to sign his name on a list of those to be paid. When the payroll personnel called out names for payments, his name was not on the payroll and others in similar situations were told to go and speak to the Applicant. They tried unsuccessfully to contact the Applicant. He subsequently filed a complaint against the Applicant with MONUC.

37. Mirindi further testified that the Applicant had brought an impostor to the Bukavu airport to travel to Kishasa to appear before the Tribunal and that he and the

38. Kashemwa Rubangiza testified that he met the Applicant in 2006 who informed him that if he needed a job in MONUC that he was required to pay \$100. He borrowed \$100 from a cooperative and paid the Applicant in exchange for a job in MONUC. He worked for one month. He was told to go to Bukavu to sign some papers before he could be paid. When he went to Bukavu, he discovered that his name was not on the payroll list. He went back to Kavumu to confront the Applicant who told him that there must be some kind of confusion and that he would eventually be paid two months salary at the end of the second month. He continued working and was again not paid. He subsequently filed a complaint against the Applicant with MONUC.

39. Mpirirwa Mulolo testified that he was selected to work for MONUC by a white man sometime in 2006. After one month of employment, the Applicant told him that if he wanted to work an extra month he would have to pay \$50. Someone named Ting was sent by the Applicant to collect the money from him. He paid \$50 to that man. He was later told that his name was not on the shortlist and returned to his village. He did not hear anything else about this matter until recently when he received a phone call from his colleague telling him that someone was trying to impersonate him before this Tribunal and that he should travel to Kinshasa to attend the hearing.

40. Buroko Masaka testified that he gave the Applicant \$100 in 2006 so that he could obtain employment with MONUC. He sold a pig to obtain the money. He remembered seeing a lot of people give the Applicant money. After working for one month, he did not receive any payment. He then filed a complaint against the Applicant. Masaka testified that the Applicant cannot travel to Kavumu because people there can "kill him because he is a bad man" and that he "is a thief and a cunning politician".

the end of his first month of employment, went to Bukavu to get his pay but found that his name was not on the payroll. He protested but was asked to leave by the security guards. He was offered \$10 for transport.

42. Lumbwe Asembo testified that the applicant had informed him and others,

against the Respondent and unquantifiable damage against the reputation of the United Nations would have been occasioned.

Need for closure of complaints and private legal obligations of staff members

- b. As it is already on the record how much money the individual witnesses paid to the Applicant for employment with MONUC, these sums should be added to the amount in part (a) above.
- c. These monies should be recovered from any final entitlements that are due to the Applicant.
- d. In the event that the final entitlements due to the Applicant are not sufficient to cover the afore-mentioned sums, the witnesses should be advised to pursue their claims in accordance with the laws of DRC.
- e. Alternatively, the Tribunal encourages the MONUSCO Administration to exercise its discretion in determining how best to bring closure to the suffering of the witnesses in accordance with the applicable Staff Regulations and Staff Rules and with the Tribunal's findings in this case.

Criminal accountability of United Nations officials and experts on mission

53. Section 2 of General Assembly Resolution 62/63 (Criminal accountability of United Nations officials and experts on mission) of 8 January 2008 strongly urges UN member States to take all appropriate measures to ensure that any person who is found to have committed a crime under international law in the course of the performance of their official functions is held accountable and that the victims of such crimes are provided with adequate and effective remedies.

- a. Having observed the demeanour of the witnesses, examined and analyzed the evidence provided by the witnesses in support of the charge against the Applicant, the Tribunal finds the evidence credible, truthful and properly acted upon.
- b. The testimonies relied upon by the Respondent when imposing the disciplinary sanction against the Applicant are substantial, corroborated and truthful.
- c. The evidence relied upon by the Respondent in this case sufficiently supports the charge against the Applicant of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff, as was not recanted as alleged by the Applicant.
- d. The Applicant had tried to bring impostors to appear before the Tribunal in Kinshasa. The Tribunal finds that the Applicant's actions are criminal in the extreme and amount to a blatant abuse of the Tribunal's process and aggravated contempt of *coffice curiae*.
- e. This case amply illustrates some of the dangers inherent in conducting judicial proceedings via teleconference. Such proceedings are hampered by, *inter alia*, the difficulty of ascertaining the identities and demeanour of witnesses testifying on the other end of the telephone and compromise the integrity of the judicial process.
- f. Pursuant to art. 10(6) of its Statute, the Tribunal finds that the Applicant has manifestly abused the proceedings before it. The Tribunal recommends that in the present case, Administration should withhold all final entitlements, if any, still due to the Applicant pending its determination of all amounts owed to the witnesses and the settlement of those claims.

g. Alternatively, the Tribunal encourages the MONUSCO Administration to exercise its discretion to determine how best to bring closure to the suffering of the witnesses in accordance with the applicable Staff Regulations and Staff Rules.

Conclusions

55. In view of its findings above, the Tribunal rejects the Application of Norbert Bagula in its entirety and awards costs against him in the terms described at para. 52 above.

(Signed)

Judge Nkemdilim Izuako

Dated this 2nd day of August 2011

Entered in the Register on this 2nd day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi