



1. *Employment History*

1.1 The Applicant joined the Organization in March 1982 on mission with the United Nations Disengagement Observer Force in Syria (UNDOF), as a local buyer in Procurement. In 1994, the Applicant was assigned to the United Nations Assistance Mission for Rwanda (UNAMIR) as a Procurement Assistant. Between 1996 and 1997, the Applicant was reassigned to UNDOF but resigned in 1997. In March 2000, the Applicant joined the United Nations Mission in the Democratic Republic of the Congo (MONUC) as a Procurement Assistant at the FS-4 level.

2. *Background and Facts*

2.1 Between February and June 2007, the Procurement Task Force (PTF), an ad hoc investigative unit of the Office of Internal Oversight Services (OIOS), conducted an investigation into allegations it had received about corruption within MONUC's procurement systems. The PTF focused on the activities of the Applicant in addition to four other staff members within MONUC's Procurement Section. Under cover of a memorandum dated 6 July 2007, the PTF issued a report entitled "Interim Report on MONUC and Five United Nations Procurement Officials," dated 5 July 2007 ("PTF Report").

2.2 The PTF interviewed the Applicant on 27 February and 16 May 2007 and the afforded him an opportunity to present relevant documentation and information. The PTF further stated that all staff members implicated in the allegations of misconduct, including the Applicant, reviewed and signed the records of interviews with the PTF. In specific regard to the Applicant, the following were the PTF's findings:

3. *The PTF's Investigation Report and Conclusions*

Applicant and the owner of the company were friends.

3.2.2 In respect of Contract No. Con/MON/03/02, which was issued for bidding in 2002, the owner of one of the unsuccessful bidders for the cafeteria contract stated to PTF investigators that he believed that the contract had been wrongfully awarded to the successful bidder citing irregularities in the bidding process. In particular, the unsuccessful bidder claimed that after submitting his bid he was approached by the Applicant's friend, a Greek national, who assured him that he would be awarded the contract if only he would rent his villa to the Applicant for a good price. The unsuccessful bidder stated that the said fr

twelve bids received, only Matina was found to have been technically compliant for all nine cafeteria and snack bar locations set forth in the Request for Proposals (RFP).

3.2.5 When interviewed by the PTF, the Applicant confirmed that the owner of Matina had been a long-time friend of his and that he had borrowed money from him “once or twice”. The Applicant offered no explanation in respect of the apparent irregularities in the bidding process for MONUC's cafeteria services. In respect of Matina's documents found on his computer, the Applicant stated that the only assistance he had provided to the company was to print out the documents.

facilities to MONUC since 2001. In that connection, the MONUC Chief Procurement Officer stated to the PTF that the owner of TFCE had told her that he had paid the Applicant US\$ 1,000 in order to obtain payment of his invoices from MONUC. When interviewed by the PTF, however, the TFCE's owners were unwilling to discuss the issue of having been solicited for or having paid bribes to UN staff members to receive

members' visits to TFCE's office. CW 4 stated that a number of payments were, nevertheless, made in cash to the MONUC staff members, including payments to the Applicant. In support of this last statement, at his interview with the PTF investigators, CW 4 displayed an index card containing his own handwritten notations listing dates and amounts he stated had been paid to MONUC staff members from 2000 to 2003. The card referred to four individuals receiving payments by their initials, including the Applicant, who was represented by the initials "KM". The PTF investigators recorded the information on the index card because CW 4 had stated that TFCE's owner had directed him not to provide a copy of the card to the PTF.

3.7.4 When interviewed by the PTF, the Applicant stated that he could not recall anything in respect to MONUC boat contracts or with TFCE as he had only handled such contracts on a substitute basis during the absence of the procurement staff member responsible for such contracts.

3.7.5 On 19 June 2007, the PTF informed the Applicant that as a result of its investigation, evidence gathered showed that he was in violation of Staff Regulations and Staff Rules and that he had committed corrupt acts through bribery in connection with the United Nations procurement exercises and in his interaction with various vendors.

3.7.6 On 22 June 2007, the Applicant requested documentation from the PTF regarding its findings. On 25 June 2007, the PTF accorded the Applicant an opportunity to review his records of conversations with the PTF and non-confidential documents. In addition, the PTF states that the Applicant was provided an opportunity to comment on the findings of the investigation and to provide any additional document or information he believed to ^{3.7.}

tenure at UNDOF and UNAMIR, the Applicant stated that he found it disturbing that such stale claims had been resurrected as he had since that time received good reviews of his performance and had been promoted from the G-6 to the G-7 level. In addition, the Applicant explained that the bank transfers from his accounts were in payment for cholesterol-lowering medication

(vi) Accepted, in the guise of “loans”, sums of money in excess of US\$ 4,200 from three MONUC vendors; and

(vii) Made false, misleading and inaccurate material statements to the investigators of the PTF.

3.7.10 The PTF further concluded that the Applicant's denials and other explanations were not credible because they were,

“belied by overwhelming evidence to the contrary, including forensic evidence gathered from his computer and by a plethora of witness statements”.

Moreover, the PTF found the statements of CW-4 to be credible and reliable as his statements were found to have been corroborated by the surrounding circumstances including the fact that the information s/he provided inculcates him and is consistent with the well-known environment then prevalent at MONUC where paying money to MONUC Procurement Staff was a condition to doing business with the Organization.

4. *Charges and Applicant’s comments on the Charges*

4.1 By memorandum dated 13 July 2007, the Director, Administrative Services Division, Office of Mission Support, 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.

4.2 Effective 16 July 2007, OHRM placed the Applicant on special leave with full pay.

4.3 By memorandum dated 24 July 2007, the Director of the Division of Organizational Development, OHRM, formally charged the Applicant with,

“having engaged in a pattern of bribes and a scheme to solicit payments from a number of MONUC vendors and companies doing or which did or sought to do business in Kinshasa, and with having knowingly made false, misleading and inaccurate statements to PTF Investigators”.

4.4 By memoranda dated 16 September 2007, the Applicant and his counsel each submitted comments in respect of the charges. The Applicant categorically denied the charges stating that none of the allegations appearing in the PTF Report is based on fact. Moreover, the Applicant impugned the validity of the PTF's findings and conclusion stating they were based entirely on hearsay and on the subjective beliefs of witnesses rather than on factual evidence. In addition, citing the PTF's recitation of allegations arising in the context of the Applicant's various assignments before MONUC, the Applicant submitted that it was unfair for the PTF to seek to resurrect such stale allegations as such previous investigations had been closed because the underlying allegations had been found to be unsubstantiated. Moreover, the Applicant submitted that he is at a concerted disadvantage in responding to the stale allegation because witness memories have faded with the lapse of time.

4.5 By memorandum to the Administrative Law Unit, dated 5 November 2007, the PTF submitted observations in respect of the Applicant's comments on the charges.

5. Administrative Decisions and JDC Review

5.1 By letter dated 11 January 2008, the Secretary-General notified the Applicant that he had decided to summarily dismiss him for serious misconduct in accordance with Staff Regulation 10.2. By memorandum dated 3 April 2008, filed with the Joint Disciplinary Committee on 4 April 2008, the Applicant requested review of the decision to summarily dismiss him.

5.2 A JDC hearing was held on 21 January 2009 at which the Applicant's counsel appeared in person. The Applicant participated in the hearing via telephone. The Representative of the Secretary-General participated in the hearing via telephone conference from the United Nations in Geneva. An additional hearing was held on 12 February 2009, at which an Investigator with the PTF, and an OIOS staff member gave testimony in person. The Applicant's counsel likewise appeared

in person to represent the Applicant who was not present. The Representative of the Secretary-General appeared in person.

5.3 On 26 March 2009, the Panel met in executive session to deliberate about the case and to conclude its report. The JDC Panel adopted its report and concluded that based on its consideration of the entirety of the evidentiary record, including the PTF Report and the evidence adduced at the hearing that the Secretary-General properly concluded, based on the evidence then on the record, that the Applicant had engaged in acts of serious misconduct warranting his summary dismissal by having:

- (i) Assisted Matina and its owner in preparing and obtaining the contract for MONUC's cafeteria services;
- (ii) Engaged in improper monetary transactions, in the guise of "loans", sums of money from two MONUC vendors UAC and Panache) and
- (iii) Made false, misleading and inaccurate material statements to the investigators of the PTF.

5.4 As to the portion of the charges grounded in allegations that the Applicant had received payments or items of value in return for his alleged improper dealings with Ekima, AVC, TFCE and SoTraBen, the Panel unanimously concluded that they are not substantiated by the evidence on the record.

5.5 The Pane30e22.7(8)ings thing and a7308 -2.725f25T-50dm(r)s4.25(As should Tw[.005f25T-

investigation of procurement abuses in MONUC and that this is a factor that suggests the Applicant and his colleagues were targeted.

6.2 In light of these submissions, the Applicant requests the Tribunal:

“...Pleas

1. With respect to competence and procedure...
 - (a) to find and rule that it is competent to hear and pass judgment upon the present application under Article 2 of its Statute;
 - (b) to consider the present application receivable under Article 7 of its Statute;
 - (c) to decide to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;
2. On the merits, the Applicant respectfully requests the Tribunal:
 - (a) to rescind the decision of the Secretary-General finding that serious misconduct occurred and imposing the disciplinary sanction of summary dismissal on the Applicant;
 - (b) to order that the Applicant be reinstated and paid his salary and benefits retroactively from the date of his summary dismissal;
 - (c) to find and rule that the arguments that formed the basis for the Secretary-General's decision erred in matters of law and fact⁷(the)ie

(g) to award as cost, the sum of \$6,500 in compensation to cover the expense incurred to defend this case.”

7. Respondent's Submissions

7.1 The Respondent's principal contentions are that:

(i) The investigation into the allegations against the Applicant was not improperly motivated, and the Applicant's due process rights were respected.

(ii) As a result of the Applicant's involvement, procurement exercises with six companies were severely tainted by fraud and corruption and goods and services were procured for the Organization through corrupt and illegal acts and without the use of fair, transparent, objective and truly competitive processes.

(iii) The record shows that the facts underlying the charges have been properly established and that the findings are reasonably justifiable and are supported by the evidence.

(iv) There have been no failures to consider significant facts and no irrelevant facts were unduly considered.

(v) The established facts legally amount to serious misconduct.

8. Considerations

8.1 What is the standard of proof of evidence required to support a summary dismissal of a staff member?

8.1.1 The standard of proof of evidence required to institute disciplinary proceedings appears to have been well set down in the UNAT judgment of *Araim*¹ where it was stated as follows:

¹ UNAT Judgment No. 1022, (2001).

“The Tribunal has repeatedly stated that disciplinary proceedings are not of a criminal nature, but rather they are administ

8.1.5 In the English case of Miller v Minister of Pensions², Denning LJ explained the general standard of proof in civil cases as adopted in *Araim*

“The degree or quantum of proof required by the court before it comes to a conclusion may vary according to gravity of the subject matter to which the conclusion relates...”

8.1.9 In Hornal v Neuberger Products Ltd⁵, Morris LJ reiterated:

“Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities”.

8.1.10 In the instant case, the Applicant came before the Tribunal because he was summarily dismissed on allegations of being engaged in what amounts to criminal conduct. In fact, the PTF investigators at paragraph 336 of their report came to the conclusions that,

“the aforementioned acts, namely the solicitation of bribes and kickbacks, the receipt of sums of money in exchange for favourable treatment in official bidding exercises, are clearly criminal acts and can be prosecuted in a court of law. In that regard, [Applicant] has committed criminal acts of bribery, conspiracy and solicitation and acceptance of unlawful gratuity.”

Establishing criminal liability in investigations and judicial proceedings even in the context of a civil matter such as this must necessarily require that a standard higher than the ordinary one of a balance of probabilities must be attained. Did the investigators meet this standard?

8.2 *Allegations concerning Ekima*

8.2.1 The Applicant is alleged to have solicited bribes and benefits from the owner of Ekima. He is also alleged to have had Ekima paint his apartment and swimming pool for free.

8.2.2 According to the PTF Report, the owner of Ekima had on 15 May 2006 submitted a written complaint to MONUC’s Director of Administration. In that complaint, he

⁵ [1957] 1 QB 247.

reported that on 8 April 2006, the Applicant had invited him to his house where he told him that his company would be blacklisted by MONUC because Ekima had an improperly close relationship with another Procurement Assistant. The complainant also reported that the Applicant repeatedly provided him with internal information on MONUC's bidding exercises. At a meeting of the Procurement Section where the Applicant was given an opportunity to comment on the allegations, he confirmed that he had met the owner of Ekima in private and preferred to wait for meeting with the Director of Administration to comment on the allegations.

8.2.3 The PTF Report stated that the Task Force interviewed the owner of Ekima on 2 May and 4 May 2007 who told them that the Applicant called him unofficially and offered to help in connection with a bid for a steel contract but he declined the offer. Subsequently in 2001 the Applicant saw him by coincidence in a Greek Restaurant and made another similar offer which he again declined. Again in 2006, the owner of Ekima met the Applicant at a night club where he told him that he learned Ekima had problems over ongoing biddings on a cement contract and offered to help. He then invited the owner of Ekima to his house to continue the discussion. The owner of Ekima stated that although the Applicant did not explicitly ask for bribes on any of the three occasions, it was clear that the Applicant's only intention was to receive some form of monetary payment.

8.2.4 At the second interview with the owner of Ekima two days later, the latter told the investigators that he wanted to provide additional information off the records. He then told the investigators that he had provided free painting services for the Applicant's private apartment and swimming pool. The first painting service, he said, was the one for the swimming pool after which the Applicant requested a fake receipt to present to his landlord for reimbursement and the owner of Ekima complied. He said the market value

multiple, concurrent requirements. In the past, an award to one cement contractor only had been problematic and had caused considerable delays in key construction works when the vendor did not have the capacity to handle MONUC's full requirements concurrently. Given that cement is a commodity with a limited shelf-life, MONUC typically requests it via task-order once a contract is in place, prior to its need for the commodity.

b. Accordingly, the invitation to bid resulted in three (3) offers, which in turn resulted in awards to the two lowest-priced companies

sent as part of an attachment to the Applicant by NK on the day before - 12 September 2006.

8.3.13 In other words, NK sent a rough draft of the technical proposal to the Applicant on 12 September 2006. On 13 September 2006 a file was created on the Applicant's computer containing a final edited version of the rough draft he had received only the day before. Is it based on this that the investigators asserted that "infact, it is evident that the applicant himself drafted Matina's technical proposal"? Is this assertion borne out by the facts as set out by the investigators?

8.3.14 My answer is No. If someone sent a draft of a document to another person by email and then a final, edited version of the said document is "created" on the recipient's computer, does it stand to reason to claim that that final, edited version is "evidently drafted" by the recipient? At the very best, the recipient has edited the document sent to him, he has not drafted it!

8.3.15 The PTF report had claimed that the forensic examination demonstrated that the explanation that the document was merely printed from the Applicant's machine was "absolutely false". How has forensic examination demonstrated that the document was not merely printed from the Applicant's machine? It is elementary knowledge that computer documents originally created by author X can be copied into a new blank document created by author Y thus changing the author of the original document from X to Y. Though the real author is X, the computer would cite the author as Y because the document has been copied and saved by Y. If in this case the Applicant had copied the document onto a new blank page in order to save and print it, then the explanation given about merely printing the document may be plausible and ought to be further investigated. It would in the light of this scenario be wrong to dismiss the Applicant's explanations as "absolutely false".

8.3.16 While the PTF report at paragraph 149 stated that the Word document "Proposal [Applicant] + [NK] doc" found on the Applicant's computer contained a final edited version of a proposal submitted as Matina's technical proposal on 15 September 2006; the investigators have not exhibited the signed proposal by Matina which they claim was

submitted to MONUC. The submitted proposal ought to bear MONUC's stamp or marking showing that it was received on that date by MONUC. How then can a visual comparison be made between "Proposal [Applicant] + [NK] doc" and the document Matina submitted to MONUC as its technical proposal on 15 September 2006?

8.3.17 My finding on this score is that the investigation has not established that the Applicant drafted any proposal for Matina in connection with on-going bidding exercises at the time. If, as the Applicant explained, he merely printed a proposal for his friend from the Applicant's own computer, is it misconduct on his part to do so? Nothing placed before this Tribunal makes the mere printing of a proposal for a vendor by a Procurement Officer a misconduct.

8.4 Allegations concerning AVC Construct

8.4.1 According to the PTF report, the then OIC of the Procurement Section recorded a note to file on 30 November 2005. The contents of that note were that a staff member had told the OIC that one MONUC contractor whose company AVC Construct had been awarded the contract for the rehabilitation of the Bunia Airfield Project informed her that the Applicant approached him during the bidding exercise to ask for 15% of the contract price which amounted to US\$ 824,097 in return for ensuring that AVC Construct was awarded the contract. The Applicant was said to have told the vendor that he was soliciting the money for his "Chief".

8.4.2 In a later memorandum the OIC reported the allegation to the Chief Resident Investigator and in the report stated that the amount requested by the Applicant according to the staff member who told her was US\$ 150,000. When the OIC asked the owner of AVC to submit a written complaint, he did so but omitted the detailed and specific information he was said to have reported to the staff member.

8.4.3 The Task Force interviewed the staff member ("CW1") on 21 February 2007 who confirmed that the owner of AVC had told him/her that the Applicant had invited him to his house and told him that if the vendor wanted things to go smoothly with the contract, he should pay 15% of the contract value for his cooperation claiming that the money was

for the “Chief”. CW1 added that the owner of AVC had also told him/her that the Applicant had approached another contractor “SoTra Ben” who was handling the Bukavu runway contract with similar request for payments.

8.4.4 In an interview with the Task Force, the owner of AVC said the Applicant invited him to his house and then provided a detailed description of the Applicant’s house. The owner of AVC said that during the meeting,

from AVC against the Applicant is not established. Any disciplinary action against the Applicant on this score is not maintainable.

8.5 *The allegations that payments to vendors were described as repayment of loans*

8.5.1 Through forensic computer evidence, the Task Force investigators discovered that there were bank transfers made from the

transactions were sometimes difficult in DRC and people loaned each other money. MONUC records showed that Panache goods were purchased by MONUC on only four occasions with a total value of US\$ 88,381 and that none of these purchases had any involvement of the Applicant.

8.5.6 What is clearly established in the transactions of the Applicant with UAC and Panache is that the Applicant either borrowed money which he repaid in the case of Panache or bought goods on credit from UAC only to pay up later. In the case of UAC, it took the Applicant two years to settle his account with the store. Both UAC and Panache are stores which sell either electronic household goods or plumbing materials and had on some occasions sold goods to MONUC. The total purchases made by MONUC from both UAC and Panache stores over the seven-year period it had been in the DRC were worth less than US\$ 285,000. The Applicant was not linked to any of the two stores or companies through MONUC contracts or purchases.

8.5.7 Does a Procurement Officer who has no official dealings with a UN vendor breach any rules by borrowing money from such a vendor and repaying the money in a post-conflict DRC where due to difficult banking transactions, people borrowed money from each other? Does the fact that a Procurement Officer who has made purchases on credit from a vendor, with whom he had no official dealings and repays after a long period constitute misconduct?

8.5.8 To answer these questions, I turn for guidance to the provisions of section 4 of the United Nations Procurement Manual 2004, particularly section 4.2(1) and (2) which are referred to in the charge against the Applicant. The said section and subsections are reproduced below:

“4.2 (1) 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 or hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression their actions will create on others.

4.2 (2) in principle, UN staff members shall not accept any honours, decorations, favour, gift or remuneration from any source without first obtaining the approval of the Secretary-General”.

8.5.9 The Applicant in asking the owner of Panache, whom he knew through his wife, to lend him US\$ 1,000 and repaying the said money did not breach any UN procurement rules even though MONUC had at some times made purchases from Panache. The transaction was a private one

company, Panache had more access to cash than individuals and was in a position to grant loans to people.

8.6 *Alleged TFCE payments to the Applicant*

8.6.1 About thirty two purchase orders totalling at least US\$ 2,406,239 had been issued to TFCE from 1 July 2002 until 31 December 2006 for the boat contracts.

8.6.2 The Chief Procurement Officer told the investigators on 7 March 2007 that during a social event, a TFCE official told her that he had paid the Applicant US\$ 1,000 to get his invoices paid. He also stated that his brother, owner of TFCE, paid bribes to procurement staff as well. When contacted, the owner of TFCE would only meet with investigators to discuss MONUC's inefficiency but was not willing to discuss the matter of bribes.

8.6.3 The PTF investigators then interviewed an employee of the company, a confidential witness ("CW4") who admitted that TFCE had paid repeated bribes to procurement staff of MONUC in order to receive and maintain contracts between 2000 and 2003. In the course of the interview, CW4 reportedly showed the investigators an index card with handwritten notes listing dates and amounts paid to MONUC's staff members. One of those said to be listed on the said index card as receiving payments was the Applicant. CW4 said that an amount of US\$ 10,000 was paid to the Applicant. CW4's index card listed the letters "KM" and he/she told investigators that this stood for the names of the Applicant. CW4 was said to have refused to provide a copy of the said index card to the investigators.

8.6.4 CW4 further told the investigators that when money was requested by the MONUC procurement staff members which included the Applicant, they each came to CW4's office to talk about the TFCE boat contracts and in the process would tell CW4 that he or she was going on holiday or travelling and then ask for a present for the travel.

8.6.5 Based on the interview with the said CW4, the PTF investigators found at paragraph 327 (v) of their interim report that the Applicant solicited and received US\$

10,000 from TFCE in exchange for his assistance in securing contracts on behalf of the company with MONUC.

8.6.6 The story of the said CW4 as related by the investigators did not include that the Applicant helped TFCE to secure any contracts for which the Applicant demanded and was paid the sum of money. In fact, there are huge gaps in what this witness is said to have told investigators concerning the Applicant rendering the entire account incomprehensible. An index card with handwritten notes listing dates and amounts paid to MONUC staff was said to have been shown to investigators. The card listed initials of four persons and the initials KM stood for the Applicant's name. While the index card is said to have shown that the Applicant received US\$ 10,000, it did not show the date of the receipt of this sum of money except that CW 4 said that the payments were for the period 2000-2003.

8.6.7 The index card did not show whether it was a lump sum payment or an instalment. The card did not show what the payment was for. The record of interview with the CW4 prepared by the investigators did not state for what reason the Applicant asked for and received the US\$ 10,000. It is noteworthy that while CW 4 stated that the payments were made between 2000 and 2003, the same CW4 had told investigators, according to the interview notes, that TFCE began doing business with MONUC in 2001. Why then was TFCE paying money since 2000?

8.6.8 More importantly, why was CW4 who evidently is a staff of TFCE afraid of being identified? The information he was said to have provided did not lead to any new findings by the investigators. Neither the Applicant nor the Tribunal was told the identity of this witness. The investigators and the Respondent decided to shield this witness from any appearance before this Tribunal. Such an appearance would have afforded an opportunity to test the veracity of the witness. The power to confer anonymity to a witness in judicial proceedings lies with the Tribunal only, not with the investigators or a party to an application. The Respondent cannot without good cause shield his witness from judicial scrutiny. Such good cause would be for the Tribunal to decide. Open justice is the cornerstone of judicial work the world over and the United Nations Organisation

has fathered instruments and conventions that entrench openness and transparency as some of the hallmarks of judicial enquiry.

8.6.9 The reported interview of CW4 clearly shows that his company TFCE was unhappy over its inability to have monopoly over MONUC boat contracts and the leasing of a port. At paragraph 21 of the interview recorded by the investigators, CW4 was reported as stating that individuals in the procurement section of MONUC had created liaisons all over town with the local Congolese vendors because, according to him, it is more difficult for the European companies to pay bribes. CW4 was also of the opinion that it would be difficult for the PTF to break or get information from the local vendors. He is reported to have also stated that the Senegalese people in procurement were afraid of business with whites because they know business is not done by making payments.

8.6.10 I have no doubt in my mind that CW4 was unhappy that local Congolese vendors were winning MONUC contracts. The only reason these local vendors would win contracts, in his view, was because they were corrupt whereas those he characterised as European companies had difficulties because they would not make corrupt payments to MONUC staff. CW4 makes these assertions in spite of admitting that his company TFCE had been paying bribes to MONUC staff.

8.6.11 I find that the statements allegedly made by CW4 to investigators were largely self-serving, unreliable, racist and malicious and that no reasonable Tribunal would admit or rely on them. I am even more shocked that the investigators would take the stories of this character so seriously as to make them the basis for the conclusions that MONUC procurement staff solicited and received bribe payments and would even go further to shield CW 4 from answering any questions from the Applicant and the Tribunal.

8.7 *The OIOS/PTF Investigation Report*

8.7.1 Pursuant to General Assembly Resolution 48/218B at paragraph 5(c)(iv), the Office of Internal Oversight Services (OIOS) was mandated to:

“Investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such

investigations together with appropriate recommendations to guide the Secretary General in deciding on jurisdictional or disciplinary action to be taken.”

8.7.2 This mandate is further incorporated and reproduced in paragraph 16 of the Secretary-General’s Bulletin ST/SGB/273 – “Establishment of the Office of Internal Oversight Services”. Further, the OIOS Investigations Manual 2005 and 2009 in describing the fact-finding nature of an OIOS investigation states that:

“The role of the/OIOS is to establish facts and make recommendations in the light of its findings.”

8.7.3 The Investigations Manual requires that investigators approach matters with an “open mind” and emphasises that their task is to “establish facts” and draw “reasonable conclusions” from those facts. It is a “dispassionate professional exercise” which shall be conducted with strict regard for “fairness” throughout the investigative process.

8.7.4 Under the provisions of the Investigations Manual, the OIOS report must be “impartial” and “objective” and must demonstrate that conclusion drawn and recommendations made are “rational and sustainable”. The reports must be factually “accurate”

8.7.6 The OIOS in view of their mandate, the functions they perform and the singular weight attached to their investigation report must therefore be alive to the awesome and enormous responsibility they bear. Since disciplinary action such as summary dismissal of a staff member would often depend mostly on an investigation report, OIOS investigators must exercise their functions and power with a high sense of accountability and responsibility.

8.7.7 As the Investigations Manual provides, their conclusions and recommendations must be seen to be both rational and sustainable. This is even more so when in their report, they arrive at a conclusion that a staff member's actions are enough to found criminal liability.

Allegations dressed up as facts

8.7.8 At paragraph 207 of the OIOS/PTF interim investigation report in this case, it is stated as follows:

“The investigation revealed that [Applicant] solicited, received and accepted cash payments of \$10,000 from a company named Transport Fluvial of Commerce (TFCE) in return for his

A report that is tendentious and speculative

8.7.14 The Investigations Manual rightly requires that reports should, where available, include exculpatory and mitigating evidence. It continues that some issues involving conduct may not necessarily constitute a contravention of United Nations regulations, rules and administrative issuances: but rather show poor management or judgment.

8.7.15 Both the OIOS/PTF interim report and the PTF response to the Applicant's defence to the charges against him are overly tendentious. Not only do these documents exhibit unbridled bias in presenting allegations made against the Applicant as established facts, they choose also to discountenance every explanation or position that supports the Applicant's case as false. For instance, these documents conclude that the Applicant drafted the Matina proposal because the proposal was found on his computer. They refuse the explanation that the Applicant merely printed the proposal for the vendor who was his friend. Even where forensic evidence does reveal that the proposal was sent to the Applicant by another person, the PTF report and response claim that forensic evidence clearly established that the Applicant had drafted the proposal. How could the Applicant have drafted a proposal which the PTF discovered in their investigations was sent to him by e-mail by someone else?

8.7.16 The investigation report further claims at paragraph 327 (iii) that the Applicant gave assistance to Matina in not only preparing but also "submitting" bidding documents. Nowhere in the interviews of witnesses by investigators or records of MONUC was it said or suggested that the Applicant also "submitted" the Matina proposal by himself to MONUC. How do the investigators come about these fallacious conclusions? Is this an example of factual accuracy or an invention of the investigators? Why did the PTF investigators find it difficult to exhibit the Matina proposal which was submitted to MONUC? This would be necessary to enable a visual comparison of the submitted copy with the copy found on the Applicant's computer in order to establish that what Matina submitted to MONUC was indeed a copy of what was found on the Applicant's computer.

8.7.17 Again, with respect to allegations of soliciting for bribery payments made by the owner of AVC against the Applicant, the PTF report states as follows:

“Although the Task Force did not find indications that [Applicant] had interfered with the contract award for Bunia or was the responsible case officer for the second bid, it is clear that [Applicant] had access to the case files as well as relevant information regarding the bid that could have been used to request payments from a vendor”.

8.7.18 The report went on to make the following finding of guilt against the Applicant at paragraph 327(iv):

“Request for payment sometime between in or about October 2004 and July 2005 from AVC Construct, and its owner,[] in exchange for securing the contract for the company for the rehabilitation of the Bunia runway, contract no. CON/MON/05/075, worth approximately \$5.5 million”.

It is difficult to determine on what premises, the investigators concluded that the Applicant had relevant information regarding the bid and that he could have used such information to request payments from a vendor when the Applicant was not the officer assigned to the said project. Nowhere in the conversation records or written records of MONUC was this suggested. Clearly the investigators were speculating on the possibility that the Applicant may have approached the vendor AVC for bribes. This cannot form the basis for a finding that the Applicant actually asked for a bribe from AVC.

8.7.19 In their report, at paragraph 190, the investigations and findings are shown not to be as transparent as they ought to be. Lines 5-7 of that paragraph state that the Applicant was to be removed from all aviation projects around March 2006 but the OIC did not because,

“she was advised in a conversation with OIOS to keep him in place until he was prov

making findings of guilt against him even where they admit that he did not interfere with the contract award for the Bunia runway project.

OIOS/PTF findings on false statements by the Applicant are subjective and inaccurate

8.7.20 The OIOS report arrived at the conclusion that the Applicant knowingly made

8.7.23 There is no evidence on record that proves this assertion. The Applicant told investigators that he helped the owner of Matina print his technical proposal from his work computer. Forensic evidence did not prove that the Applicant drafted the proposal. The same investigators have shown by forensic evidence that the proposal was sent to the Applicant by email.

(iv) “(d) You falsely asserted that [the owner of AVC] had not been to your house to

thing first and while still continuing his answer uninterrupted, says something else which clarifies or qualifies what he had earlier said.

8.7.27 The tendency to characterise answers given by the Applicant to questions posed by the investigators as falsehood without taking human characteristics in conversation into account, points unfortunately to the bias and subjective state of mind of the investigators. This is even more so given that the conversation records are not even taped and then transcribed, but are manually recorded by the investigators themselves and usually not in language that is neutral.

8.8 Facts properly established by OIOS/PTF investigators and the charge against the Applicant

8.8.1 The investigators were able to establish on a higher standard of probabilities as demanded by the nature of this case that at least five MONUC vendors made complaints during the investigations against the Applicant. Some procurement staff members of MONUC who were the Applicant's work colleagues and supervisors were suspicious of the manner in which he handled procurement exercises. At least two written complaints against the Applicant were received by MONUC management.

8.8.2 However, bad reports without more are not sufficient to prove allegations made, nor does suspicion, however strong, provide proof that the Applicant had engaged in acts that constitute misconduct or serious misconduct.

8.8.3 The investigation also established that the Applicant was a member of the Greek and Lebanese communities in the Democratic Republic of Congo at the times material to this investigation and mingled freely with vendors from these communities, some of whom were his friends. I have found nothing in the rules, regulations and issuances of the Organization that put such associations in the realm of misconduct.

8.8.4 It is also established that the Applicant was in the habit of meeting with some vendors at his home outside working hours and discussed MONUC contracts with them. He also discussed MONUC contracts sometimes with vendors he met at the club or in restaurants. This was clearly unprofessional, reckless and exhibited poor judgment on the

part of the Applicant. On the part of his supervisors, it was certainly very poor management. Did it amount to misconduct? I think not. The Tribunal considers that, in line with the United Nations Administrative Tribunal case of *Huzeima*⁷, that the appropriate disciplinary sanction in this respect should be a demotion of four steps within his job level at the time of his summary dismissal.

8.8.5 It is established that on 8 June 2006 the Applicant signed a memorandum sent to all procurement staff of MONUC by the then Chief Procurement Officer stating that he had read section 4 of the Procurement Manual, noted in particular section 4.1.5 and agreed to abide by its contents. The said section 4.1.5 provides that procurement activities be carried out with complete impartiality and with no preferential treatment. Procurement staff must maintain fairness in the treatment of all vendors. Staff must not give information to a vendor on a particular acquisition before such information is given to the business community at large nor should they restrict or discourage competition. Procurement staff should not have a financial interest in any UN vendors and must not be involved in the procurement action if they do, they must not solicit or accept any promise of future employment with a UN vendor. Staffs are prohibited from disclosing proprietary and source information to any person not authorised to receive such information.

8.8.6 Under section 4.2.1, the matter of conflict of interest is dealt with while section 4.2.2 prohibits the acceptance of gifts. None of the prohibited conducts forbidden in section 4 of the procurement manual has been established by the investigators against the Applicant.

8.8.7 The memorandum of 24 July 2007 from OHRM to the Applicant charged him with,

“having engaged in a pattern of bribery and a scheme to solicit payments from a number of MONUC vendors and companies doing or which did or sought to do business in Kinshasa,

⁷ United Nations Administrative Tribunal Judgment No. 745, (1995).

and with having knowingly made false, misleading and inaccurate material statements to PTF investigators.”

8.8.8 The said memorandum referred to violations of “regulations governing standards of conduct expected of international civil servants” by the Applicant. The regulations cited require staff members to “uphold the highest standards of efficiency, competence and integrity.” Does such lofty language amount in practice to any properly spelt-out rules for the benefit of procurement staff or their managers? Adams J in *D’Hooge*⁸ answers this question as follows:

“The vice is that everyone knows that the highest standards of integrity and efficiency are neither possessed nor actually applied. The objection to the posited standard is that it does not mean what it says. In the real world there simply cannot be an absolute standard. Moreover, it is manifest that not every failure to meet the highest standards could justify termination. The failure must be a substantial one that significantly affects the staff member’s effectiveness as an employee. The basic problem with the use of terms with little or no discernible or applicable content is that they yield no real information either to the decision-maker or, just as important, to the staff member as to what material facts can justify termination and thus they permit – indeed, render inevitable – arbitrary and inconsistent decision-making”.

8.9 *The tendency of the drafter of the charge to fabricate and supplement evidence*

8.9.1 Within sixty-six paragraphs of the memorandum stating the charge against the Applicant, parts of the OIOS/PTF investigation report is reproduced. It

“the theoretical part of bribe is based on 10 per cent, give or take. None of the allegations raised even suggests that [Applicant] took anything close to these amounts”.

8.9.3 I have searched for this letter in the mountain of documents presented to this Tribunal as exhibits by the Respondent and placed before the Secretary-General to guide him in taking disciplinary action against the Applicant. The said letter, if it exists, claims by implication that the Applicant admitted to taking bribes below 10 percent of the value of the contracts in question. Where then is this letter? Does it exist? Why isn't it produced? I am inclined to believe that there is no such letter written by the Applicant.

“CW 4 stated that an amount of US\$ 10, 000 was paid to Karim Masri. Mr. Masri received payments for only one year because he was later withdrawn from the boat contracts.”

It is thus evident that CW 4 did not give any dates on which he allegedly made the payments to the Applicant.

8.10 Apparent authority exercised by the Applicant

8.10.1 Accusations made against the Applicant ranged from efforts at extorting money in connection with a contract for the reconstruction of an airfield worth nearly US\$ 5.5 million to collecting thousands of dollars over boat contracts and other sums of money to ensure the payments of vendor’s invoices. The Applicant was said to have been in charge of not only of catering contracts and to have issued several purchase orders, but also the Bukavu airfield contract.

8.10.2 In the PTF investigators’ conversations records with the OIC Procurement Section at MONUC on 15 May 2007, the latter is reported to have stated, when asked about contracts at the mission, that:

“ a number of lease contracts, for which [Applicant] had been the responsible case officer needed a rework too in 2003. He stated that they couldn’t believe their eyes when they saw that some clearly long term lease contracts were awarded piece by piece only for six months periods between the break of the calendar year and MONUC’S financial year. Some of the cases had already been presented to the HCC, others had to be post facto presented to either the LCC or HCC since the aggregate contract amount exceeded again the LCC’s authorised limit.”

8.10.3 Further in the same conversation records, the same Officer related what had gone wrong with another bidding process and that,

“it was decided to withdraw [Applicant] from the c7(o).v015 -1.m4p

8.10.4 The OIOS/PTF at its paragraph 95 stated,

“yet based upon the findings, it is evident that [Applicant] was also in the position to unduly influence procurement exercises handled by his colleagues.”

8.10.5 Considering that the Applicant was a Procurement Assistant and one of the most junior of the staff in the Procurement Section, it is curious that the authority he exercised was quite extensive. He appeared to handle all manner of contracts no matter the financial value. Did this mean that as an FS4 level staff member, there was no limit as to what contracts he could be assigned to deal with? What was the role of the managers and the Applicant’s supervisors in the Procurement Section in allowing and condoning this state of affairs for about seven years?

8.10.6 In spite of allowing a very junior staff member to handle sensitive procurement tasks with heavy cost implications, the Applicant at the end of the day became the soft target and whipping boy at whose door so many wrong doings in the section were laid. The Tribunal is not told that the Applicant had any performance issues in his yearly performance reviews. I have no doubt that there was a massive failure of supervision and management at MONUC’s Procurement Section at the times material to this application.

8.10.7 At paragraph 172 of the investigation report, it is stated that the OIC of the Procurement Section, in or about December 2005 had requested the vendor AVC to submit a written complaint against the Applicant following information received about him requesting payments on the Bunia runway contract from the said vendor. The AVC was said to have submitted a complaint which did not contain the same detailed and specific information previously reported to a staff member. What is quite curious and disturbing is that the OIC told the investigators that she did not keep a copy of the letter from the AVC. Was the letter destroyed and binned? Why was this letter not preserved as part of the records especially as about the same time, the said OIC was reporting her suspicions about the Applicant to the Chief of OIOS’ Investigations Division following “persistent rumours”? It is easy to see that the habit of not keeping comprehensive records was not only a problem with the junior Procurement Section staff members on the boat contracts, it was also a problem with some Managers at MONUC.

8.11 Allegations that the Applicant threatened the Respondent's witnesses

8.11.1 The Applicant was not charged with threatening any witnesses but in the course of the proceedings, a witness told the Tribunal that the Applicant sent her an email which was tendered before this Tribunal. I have examined the contents of the said email which is reproduced hereunder:

“If you know how big God can be, then you should know how big is your bill which you will be paying soon, VERY SOON. In life everybody has his own days, presently it is yours, but don't be surprised it turn against you. Have a nice Easter.”

8.11.2 I do not find any threats against the witness. I however find that the Applicant exhibits a certain level of immaturity in sending this unnecessary email. I have wondered at the value of this piece of evidence in the proceedings. Was it meant to prove bad character on the part of the Applicant? The proceedings were not a criminal trial and evidence of the Applicant's bad character is irrelevant and even inadmissible.

8.11.3 The Tribunal was also told that the Applicant sent an identical email to a confidential witness CW1. It is rather unfortunate that the Respondent's Counsel tried to mislead the Tribunal here. Who is this CW1? I find that the Applicant did not send the said email twice. It stands to reason, taking all the circumstances of this case into consideration, that CW1 is one and the same staff member mentioned above. (See paragraph 8.11.1).

8.11.4 An employee of a vendor, TFCE, who was granted anonymity by the investigators and the Respondent and referred to as CW4 was also alleged to have been threatened by the Applicant through telephone calls. Again, I wonder at the relevancy or admissibility of this report. Is it testimony given from the Bar by the Respondent's Counsel or testimony given by the investigator who was a witness during the proceedings? At the very best, this piece of information is hearsay. The person allegedly threatened has been shielded from appearing before the Tribunal. He is unable to tell us the nature of this threat. Even if the alleged report of threatening of the witness mentioned above goes to any issue assuming that such evidence would be relevant if properly tendered, it is absolutely useless coming from a “ghost witness” such as CW4.

8.12 *Late filing of Respondent's Exhibits*

8.12.1 The UNDT Statute and Rules of Procedure are silent on the issue of when Exhibits to be relied upon by parties during the hearing should be filed in the Registry and served on the other party. That having been said, it is reasonable to expect, in accordance with Articles 8(2) (g) and 10 of the UNDT Rules of Procedure, that a party to the proceedings must file all the documents he or she intends to rely upon at the hearing in a timely manner. Article 8(2) (g) provides that:

“2. The [Applicant's] application should include the following information:

... (g) Any supporting documentation (annexed and numbered, including, if translated, an indication thereof).”

8.12.2 Article 10 provides that:

“The respondent's reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. The signed original reply and the annexes thereto shall be submitted together. The document may be transmitted electronically. A respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal.”

8.12.3 In the present case, the Respondent filed a Reply on 11 September 2009. The Reply did not contain any annexes or any other supporting documentation. The parties attended a status conference on 16 December 2009, following which they were required to disclose and to file with the Registry any documents they intended to rely upon at the hearing. The parties were served a Hearing Notice by the Registry on 17 December 2009. On 11 January 2010, the day of the hearing, the Respondent filed a total of 19 documents with the Registry by email and copied to the Applicant's counsel. The documents were marked as Exhibits 1 to 16.

8.12.4 In view of this state of affairs, the Tribunal notes with concern and strongly discourages this sort of thinly-veiled “ambush tactic” by the Respondent's counsel and considers it to be detrimental to the objective of a fair hearing of the case.

9. Findings

9.1 In light of the foregoing, the Tribunal makes the following findings:

- (i) The allegation that the Applicant solicited bribes and payments from the owner of Ekima has not been established.
- (ii) The investigation did not establish that the Applicant drafted any proposal for Matina in connection with on-going bidding exercises at the time. The printing of a proposal for a vendor by a Procurement Officer does not amount to a misconduct.
- (iii) The case of requesting for bribes or money payments from AVC against the Applicant is not established. Any disciplinary action against the Applicant on this score is not maintainable.
- (iv) The transaction between the Applicant and the owner of Panache was a private one and can by no stretch of the imagination be described as an offer, a gift, hospitality or a favour in the context of the rules referred to. However, there existed the possibility that sometime in the future, the Applicant could in an official procurement capacity find that he had to deal with bids from Panache. Others may then be prone to labour under the perception, wrong as it might be that since he had a previous personal dealing with the vendor, the Applicant might be inclined to favour him in an official capacity.
- (v) The statements allegedly made by CW4 to investigators were largely self-serving, unreliable, racist and malicious and no reasonable Tribunal would admit or rely on them.
- (vi) The OIOS/PTF Report is based on findings and conclusions following an investigation conducted with bias, subjectivity and with no regard for fairness. The report consists of mere allegations dressed up as facts, exceeded the scope of its assignment, is tendentious and speculative.

(iii) Orders that the Applicant be demoted by four steps within his job level at the time of his summary dismissal;

(iv) Fixes the compensation to be paid to the Applicant, should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to rescind the decision, 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,

(iv) Rejects all other pleas.

(Signed)

Judge Nkemdilim Izuako

Dated this 7th day of April 2010

Entered in the Register on this 7th day of April 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi