



Case No.: UNDT/NY/2010/068

Judgment No.: UNDT/2012/061

Date: 1 May 2012



shortcomings which appear to be demonstrated by the evidence on record. It is understood from part of the Applicant's comments in the joint response to Order No. 76 (NY/2012) that he complained to the chairman of the Procurement Task Force ("PTF") about what he regarded as the "unprofessional behaviour of the investigators". However, whether the PTF investigators were incompetent or unprofessional, as alleged, is not a matter that is before the Tribunal in this case.

5. However, the Tribunal is required to examine the PTF report and findings as well as the Applicant's rebuttal of the report and the further response of the PTF/OIOS. This will enable the Tribunal to assess whether the PTF gave fair and unbiased consideration to the Applicant's rebuttal of the PTF report. A further issue is whether the decision-making managers' consideration and evaluation of the investigation report of the PTF dated 16 July 2007 ("the PTF Report") and its recommendations, the Applicant's rebuttal, and the PTF's response thereto were examined as a whole in an objective and dispassionate manner before a decision was 7

procurements in MINUSTAH. A subsequent audit of fuel management in missions was issued and also made findings regarding the procurement of ground fuel at MINUSTAH, which included both breaches of the procurement rules and the procurement exercise overall. Subsequent to the IAD audit, the PTF conducted an investigation into allegations of impropriety in relation to two competitive bidding exercises, which were held to procure a short-term and then a long-term supply of ground fuel for MINUSTAH.

8. With respect to the first procurement exercise, the PTF made no findings against the Applicant as he did not participate in that process.

9. During the second procurement exercise, namely, the 2005 long-term ground fuel procurement exercise, the Applicant was serving as a Procurement Assistant, FS-5, within the Procurement Section at MINUSTAH.

10. The PTF report was issued on 16 July 2007. In this Report, the PTF concluded that the Applicant had colluded with others to steer the technical and commercial evaluations in favour of a specific vendor. As a result, it was said that the procurement exercise was not conducted in compliance with the applicable rules and regulations nor was it undertaken in a fair and transparent manner. The PTF Report went on to enumerate a number of areas in which they concluded that the Applicant had breached procedures, including the serious allegation that he attempted to solicit a bribe from a vendor (in fact, the PTF Report stated that he attempted to bribe a vendor. However, in the subsequent letter of charges dated 20 September 2007, see para. 10 below, this was corrected to him soliciting a bribe).

11. It is understood that several staff members involved in this procurement exercise, including the Applicant, were subsequently charged with having committed disciplinary offences. The Applicant was a junior member of the team having been assigned to MINUSTAH as Procurement Assistant barely three months prior to the events in question. It is not disputed that he was inexperienced and received minimal training in the complicated task of procurement. The Tribunal does not express a

view, one way or the other, as to the appropriateness of the disciplinary charges brought against other more senior colleagues or with the question whether the evidence of culpability is or is not more persuasive in their cases. The Tribunal is concerned solely with issues relating to the manner in which the Applicant had been treated in the course of disciplinary proceedings, including, for example, whether due consideration was given to his position as an inexperienced junior member of the team subject to supervision, direction and control of more senior colleagues.

12. By a letter dated 20 September 2007, Ms. Georgette Miller, Director of the Division for Organisational Development, OHRM, sent the Applicant a copy of the PTF Report. This letter provided full and detailed particulars in support of the charge of misconduct. The Applicant was requested to provide a response to the allegations. He was advised of his right to receive assistance from a serving or former member of the Panel of Counsel or alternatively from any serving or former staff member or other counsel. The Tribunal concludes that this letter, listing in full the case that the Applicant had to meet, was appropriate, necessary and in compliance with due process. He was left in no doubt as to the charges he had to meet and advised of his rights and given a full and fair opportunity to respond. The remaining key question is whether the detailed and carefully formulated charges were supported by a sufficiency of evidence.

13. By letter dated 19 October 2007, through his counsel, Mr. Nhliziyo, the Applicant put forward a strongly worded and detailed rebuttal of the allegations and the findings in the PTF Report. This was forwarded to the PTF for comments. A letter dated 6 November 2007 from Mr. Robert Appleton, chairman of the PTF, in an equally strong rebuttal, concluded that the

evidence as to whether misconduct occurred and, if it did, what disciplinary measure should be imposed. In making up this reference to the JDC, did Ms. Haji-Ahmed consider both the Applicant's comments and the PTF report so as to satisfy herself that there was a case to answer?

15. A JDC panel ("the Panel") considered the documentation and submitted its Report no. 259 dated 29 June 2009 ("the JDC Report") to the Deputy Secretary-General. At para. 36 of the JDC Report, the JDC panel recorded their findings in the following terms:

The Panel concurred with the Administration's view that in certain circumstances, significant lapses on performance could be so serious as to rise to the level of misconduct. However, after reviewing the totality of evidence, the Panel could not find adequate evidence warranting the institution of disciplinary proceedings against [the Applicant]. ... [T]he Panel felt that some mistakes had been made by various MINUSTAH staff as well as [Procurement Service/New York] staff. However, these were bona fide lapses that did not rise to the level of misconduct and could have been addressed through the performance appraisal of the concerned staff members.

16. In the Applicant's case, the JDC panel found "no evidence that [he] had a wrongful intent to favour a particular vendor, or that he colluded with others to award the fuel contract to [name redacted]" (para. 36 of the JDC Report).

17. As to the flaws in the procurement exercise, at para. 37 of the JDC Report, the JDC panel stated that:

The Panel's analysis of the evidence indicated that there were certain minor deficiencies in the procurement process, but such deficiencies were not so serious as to compromise the integrity of the procurement exercise. In the Panel's view there was no evidence that these lapses had prejudiced the chances of the other vendors to be awarded the contract. ...

18. The JDC panel's conclusions and recommendations were recorded as follows (para. 38 of the JDC Report):

Based on the foregoing findings the panel unanimously concluded that there was no evidence of misconduct on the part of [the Applicant] in connection with this procurement exercise. Therefore, the Panel

## **Respondent's submissions**

21. The Respondent's principal contention may be summarised as follows:
- a. The Applicant was not entitled to any damages or compensation as the investigation and disciplinary proceeding were carried out in accordance with the Organization's rules and procedures, particularly para. 2 of ST/AI/371 (Revised disciplinary measures and procedures);
  - b. The Applicant had not produced evidence in support of his contention that this was an exceptional case and that he was entitled to be compensated for "moral damage, unnecessary stress and mental anxiety".

## **Considerations**

### *Introduction*

22. It is clear from the application that there are three component parts to the Applicant's claim:
- a. The manner of treatment of the Applicant;
  - b. Unjustified delay in the disciplinary process; and
  - c. Mental anguish suffered by the Applicant.

### *The manner of treatment of the Applicant*

23. At the case management discussion on 28 March 2012, the parties agreed that there cannot be an immutable principle of law conferring an automatic entitlement to compensation to staff members who may have been acquitted of disciplinary charges. However, it must be unarguable, in principle, that where the disciplinary charges would appear to have been brought for improper motives, were baseless, devoid of merit, unnecessary, irrational, or for that matter negligently brought, the decision-makers must be held to a



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Applicant's rebuttal and the PTF's letter of response, all taken together, could reasonably justify the serious charges that were brought against the Applicant. In this respect, the Tribunal takes note that the Respondent accepted fully the Report and recommendations of the JDC panel.

25. The charge letter dated the 20 September 2007 comprising 13 pages itemises in detail the case against the Applicant so that he would have been in no doubt as to the charges and the evidence being relied upon in support of those charges. To this extent, the letter complied, partially, with the requirements of due process in that the Applicant knew the case he had to meet. However, due process requirements do not stop there; not only must the individual charged with a disciplinary offence be given full particulars of the case he has to meet, but there is a duty on those bringing the charges to ensure that the charges themselves stand up to scrutiny and are fully justified by the evidence available. An examination of the charge letter clearly reveals a fundamental failure to draw a distinction between the role of the Applicant from that of those senior to him. He was an inexperienced junior member of staff subject to direction and control by senior colleagues in relation to the entire procurement exercise. The letter is clearly based almost wholly on the PTF Report and the weight given to their rebuttal of the Applicant's detailed representations. Minimal regard appears to have been given to the Applicant's criticisms comments and observations. It may be said that the referral to the JDC was a proper exercise of management power and discretion placing reliance on the JDC panel to investigate and report on whether any misconduct had taken place. It is the Tribunal's view that any such approach would involve not only a dereliction of responsibility by "the programme managers" mentioned in ST/SGB/273 but an utter disregard for the consequences on the staff member who would thereby be subject to unnecessary anxiety and stress. The Tribunal does not consider it necessary to conduct a step-by-step analysis of the charge letter. However, a simple example will illustrate the point. Arguably one of the most serious charges against the Applicant is that he attempted to solicit a bribe from one of the vendors. The seriousness of this allegation, which amounts to the commission of a criminal offence, would leave the Applicant open not only to



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*(Signed)*

Judge Goolam Meeran

Dated this 1<sup>st</sup> day of May 2012

Entered in the Register on this 1<sup>st</sup> day of May 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York