



Case No.: UNDT/NBI/2010/37

Judgment No.: UNDT/2012/139

Date: 18 September 2012

Introduction

1. The Applicant joined the United Nations Observation Mission in the Democratic Republic of Congo (“MONUC/DRC”) (as it then was), on 3 February 2004 as a Junior Clerk on a 300-series appointment at the GL-2 level.

2. The Applicant contests a decision, dated 6 November 2008, summarily dismissing her from MONUC for improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and continued service as United Nations staff in violation of staff regulations 1.2(b), (e), (f) and (g) and under staff rules 301.3(e) and (i).

Facts

3. As a result of complaints addressed to MONUC’s Regional Administrative Officer some time in late 2005 or early 2006 by several Casual Daily Workers (CDWs), an investigation was conducted by the Special Investigations Unit (SIU) concerning allegations that several staff members in the Engineering Section, MONUC, Bukavu, had forced them to pay money tow[(tf28e in f25 TD5006 Tc1.19

- a. She had no role in the recruitment of CDWs.
- b. She did not know either Mr. Masudi or Mr. Lievain, two of the three complainants.
- c. She was supervised by three international staff members in the recruitment process of CDWs and it was the Chief of the Engineering Section who reviewed the lists of CDWs.
- d. She was on maternity leave at the time Mr. Lievain, the third complainant, alleged that he had made a payment to her.
- e. A key witness and accuser recanted his statements against the Applicant and alleged that there had been a plot to have her services terminated.

JDC Review

7. A Joint Disciplinary Committee (JDC) Panel was established on 13 July 2008 to consider the Applicant's case and held its hearing on 13 August 2008. On 7 August 2008 one of the complainants, Mr. Telesphore Bisho, addressed a letter to the JDC Panel recanting his testimony against the Applicant. In his letter, he informed the JDC that certain expatriates and other Congolese were trying to get even with the Applicant and had promised him a contract with MONUC if he implicated the Applicant in misconduct.

9. On 6 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined her case in the light of the

locate one of the complainants, Mr. Bisho, who was previously not available. Mr. Bisho had stated that the Applicant had approached him for payment before being hired as a CDW but on 7 August 2008, several days before the JDC hearing of the case, the JDC Secretary received a communication that Mr. Bisho had recanted his testimony.

14. The Applicant filed her response to the Motion on 15 August 2011. In her response, Counsel for the Applicant opposed the Motion on the following grounds:

- a. The Applicant should not be penalized for the failure by the Respondent to put its case in order prior to the hearing.
- b. There is no provision in the Statute or Rules of Procedure of the Tribunal to allow for the re-opening of a case, in the manner sought by the Respondent, prior to the issuance of the Judgment in the case.
- c. The Tribunal moved to Kinshasa, at considerable effort and expense, to hear witnesses from the DRC in person. The reopening of proceedings would mean a resumption of proceedings in Kinshasa which would be enormously wasteful of resources.

15. On 22 August 2011, the Tribunal granted the Respondent's Motion to reopen the proceedings. On 13 December 2011, the Tribunal received testimony from Mr. Bisho for the Respondent via teleconference. On 14 December 2011, Mr. Bisho failed to attend the hearing fo

independent of its content. Mr. Bisho's willingness to provide new evidence in direct examination but unwillingness to attend for cross-examination permits an inference to be drawn about his credibility. However, the real indictment of Mr. Bisho's evidence is its extraordinary set of unexplained contradictions.

30. If the evidence of Mr. Bisho is excluded, together with the hearsay evidence of Messrs. Lievain and Masudi, the Tribunal is left solely with the Applicant's evidence. Her account is believable, requiring no incredible suppositions, it is internally consistent, it is consonant with evidence she has given in the past, it is in accordance with documentary records concerning her maternity leave and it was unshaken under cross-examination.

31. The Respondent denied the Applicant due process by failing to properly investigate the facts of the case. Information regarding the nature and scope of the allegations against her was not disclosed and she was not advised of the evidence against her or the right to counsel. A number of "Voluntary Statements" were produced at trial. To date, the entirety of the Preliminary Investigation Report and its annexes have not been produced.

32. On the basis of the foregoing, the Applicant requests the Tribunal to

42. When asked by the Tribunal what both lists looked like upon her supervisors' approval, the Applicant could not answer the question. The Applicant was the last person to have possession of both lists before they were posted at the security entrance. There is no evidence that the Applicant was either closely monitored or that the list of new recruits was checked by another person in order to ensure that the integrity of recruitment process was not compromised. In this regard, the former JDC correctly found that the Applicant was certainly in a position to improperly add a name to the list.

43. The Applicant was asked on cross-examination whether she knew Mr. Saio Badesire who was allegedly collecting money from local staff on her behalf. While the Applicant confirmed knowing Mr. Badesire she denied the allegation that Mr. Badesire collected money on her behalf. The Applicant did not present any evidence before the Tribunal to prove that Mr. Badesire did not collect money from the complainants on her behalf.

44. The Applicant also submitted at trial that she had no role in the recruitment of CDWs. It was established that the Applicant gave the perception that she had the authority to hire and fire CDWs by virtue of the fact that she was responsible for the list. The Applicant simply exploited this perception for financial gain.

45. Though the Applicant did not cross-examine Mr. Bisho, his evidence is relevant. The probative value of Mr. Bisho's evidence outweighs any prejudice the Applicant may suffer due to the fact that her Counsel did not have the opportunity to cross-examine him. The Respondent submits that Mr. Bisho's evidence should be considered.

46. Mr. Bisho's explanation for retracting his accusations against the Applicant before the JDC should also be considered. Mr. Bisho recalled that before the JDC hearing the Applicant visited him and asked him to retract his accusations against her which he did in a letter to MONUC dated 7 August 2008.

to submit comments, if any, within two weeks of receiving the charges. She was also advised of her right to seek the assistance of counsel and that, should she not avail herself of the opportunity to comment within the specified deadline, her case would nevertheless proceed.

51. The Respondent submits that the Applicant's due process rights were fully respected in accordance with the former Staff Rules and former ST/AI/371.

52. In view of the above, the Respondent requests the Dispute Tribunal to reject this Application.

Considerations

The Evidence

The Applicant's testimony

53. The Applicant's testimony at the hearing of 12 July 2011 is summarised below.

a. She prepared the list of new recruits from a list that came from the international supervisors. She was not the one who made the decisions on recruiting the daily staff. This was done by the supervisor of each unit together with the Officer-in-Charge.

b. The rotation of CDWs was only done when new CDWs were required, when there was a new project or when they were recruiting. When the new system of rotation came into place, only the "helpers" were rotated. The technicians were not rotated. It was only the "all-rounders" who were rotated.

c. It was only the supervisors who knew the list of CDWs who were to be rotated. They would rotate the number of people they wanted and take on new ones.

d. What “rotation” means is that a list was posted at the main gate and if 10 people were to be rotated, the 10 names were put up and also the names of the 10 others of the previous month who were going to leave. This recommendation came from Kinshasa. They called it rotation but it was just a system of replacing staff.

e. She could not have manipulated the list because when the heads of unit went on mission, they took copies of names and they also knew the individuals concerned. If the heads of unit returned and saw a different person whose name was not on the list, this would have caused problems.

f. It was not within her power to change the lists. All the lists were signed by the supervisors and sent to each unit. She could not change or add anyone to the list because after the list was typed on the computer, was

g. She has never received any money from a CDW. Those who allege that she has are jealous 5TWSDP from a CDW husband’s salaries

h. She knew Mr. Bisho because MONUC
Section at the airport. She never asked Mr. Masu
know how he was hired. She had never Mr. Masu
pay to work at MONUC
worked at the airport at the same time. According to what she heard from
others, they were best friends. She did not know why they made a

i. Since her separation from service fr
employed by a local NGO where she was p

Mr. Jacinto Bala's testimony

54. Mr. Bala's testimony at the hearing of 13 July 2011 is summarised below.

a. Prior to joining the Organization, he was in the Philippines' military. He has undertaken investigations in the military police and also when he was serving in the Philippines' navy. He has worked in the security section of MONUC and now MONUSCO for over seven years.

b. His role in this case was as the investigator. He and his colleague, Mr. Manfred Grauber, were assigned this task as part of their duties of investigating cases involving UN staff, UN equipment and issues of losses, debts and allegations.

c. This particular case came about from allegations and written complaint letters by CDWs in the Bukavu Engineering Section. The complaints were not only about the Applicant but also several other staff members.

d. In relation to the Applicant's case, the complainants gave voluntary statements. They were interviewed in person and asked to provide voluntary statements on their allegations against the Applicant. After taking their statements, he interviewed those involved including the Applicant. He asked them to provide voluntary statements taken from the interview. He also interviewed Mr. Masudi, and Mr. Lievain as well as Mr. Bisho. The complainants were not forced or coerced to give their statements.

e. He also interviewed the Officer-in-Charge of the Engineering Section, Mr. Adelana Jackson. Mr. Jack

by Mr. Gruber. He was not present during the interview of both staff members.

f. He submitted the report to the Special Investigations Unit in Kinshasa. He heard about the case in 2008 when the JDC went to Kinshasa. He never gave evidence before the JDC.

e. New recruits were employed after paying the Applicant. The CDWs were rotated every month except him and his deputy. The new CDWs had to pay about USD20 to keep their jobs and when he asked them to put more effort in the job, their response was that he should not put them under any more pressure because they had already paid to get the job.

f. Those CDWs who refused to pay were rotated immediately. Rotation meant that they were replaced for a particular month and that would mean losing their jobs for a while. After the month, they would not necessarily be rotated back immediately and some workers left MONUC frustrated after this. Other workers came back to pay money in order to get back to the system.

g. Mr. Lukembe Mutola Dudu collected money from the workers on behalf of the Applicant. There were instances when he actually saw Mr. Dudu doing this.

h. There was an instance when someone gave him money to secure a job but he deposited the money with the MONUC security section in Kavumu and in particular to one Jerome Bisimwa and a Kenyan national. He asked Jerome to hand over the money in Bukavu to prove that CDWs were handing over money to keep their jobs but Jerome did not do so. When he was paid he returned the money back to the person who had come to request him a job because he had received death threats from that person.

i. He was accused of stealing cement and was put in prison. Packets of cement were stolen on a Sunday yet MONUC did not operate on Sundays. The Applicant and one Mr. Bagula accused him to divert attention from his own accusation against them for asking people for money in exchange for casual jobs at MONUC.

j. The statement allegedly issued by him recanting his allegations against the Applicant was a forgery since it was not in his handwriting. The Applicant had visited him and asked him to write a letter retracting his accusations against her and promised him that in exchange she would ensure that he was reinstated in

by another national staff member, witnessed by the second investigator, Mr. Gruber and is summarized below:

- a. He was trying to get a job as a CDW in the Engineering Section on 16 December 2004. On that day, he met the Applicant at the front of the headquarters office in Bukavu.

Admissibility and relevance of evidence and the evidentiary burden of proof

60. This Tribunal has on previous occasions commented on the shortcomings of relying on written witness statements. When the person who provided the information recorded in them does not appear in the ensuing judicial proceedings, the truth of the contents of these documents cannot be tested by cross-examination in an open hearing and therefore have little probative value.

This practice of placing reliance upon recordings in initial fact finding exercises and interview notes of appointed investigators in an effort to establish gross misconduct warranting summary dismissal before the Tribunal is grossly inadequate and cannot establish the facts in issue¹

68. Before this Tribunal on 13 December 2011, Mr. Bisho stated that the statement allegedly made by him recanting his allegations against the Applicant was a forgery since it was not in his handwriting and that everything he had written in the retraction letter was what the Applicant had wanted him to say.

69. As indicated earlier, Mr. Bisho had sent a communication to the JDC Secretary hearing the Applicant's case recanting his testimony and even attended the JDC hearing to give evidence. How could he then argue that the recanting letter was a forgery? He had begun to deny his initial complaint even as early as the JDC hearing.

70. Mr. Bisho has proven to be an unreliable witness. He has recanted his statements on more than one occasion and failed to attend the second day of the hearing before the Tribunal for his cross-examination. The Tribunal finds that the evidence tendered by Mr. Bisho is inadmissible and has no probative value.

The Preliminary "Investigation"

71. Mr. Bala gave evidence of what can only be described as a farcical investigation. It appears that the entire investigation consisted of asking witnesses to give what were described as "voluntary statements" from which the investigators drew unsubstantiated conclusions. They did not interview the Applicant and others accused of extortion. The investigation process was his inthe Tri6sted 3.6(to atsci)]T72 TDacnly be .75 Twye secgte thanBTD.0(83 Denuiiuntaru8stotie(tire

72. Having acknowledged that they lacked sufficient evidence and that they had not established whether any money was in actual fact paid or received by anyone, the investigators nevertheless went on to recommend that administrative sanctions be instituted against those against whom allegations were made, including the Applicant in this case.

73. There is no record of what questions the complainants were asked and what their individual responses to the questions were. The investigators failed to investigate certain explanatory and exculpatory claims made to them by the Applicant and the Applicant's supervisor. They did not check the Applicant's leave records to ascertain whether she was at work on the dates the alleged payments were said to have been made to her.

An investigator must be committed to ascertaining the facts of the case through relevant inquiry involving the questioning of witnesses, forensic evidence where necessary and identification and collection of relevant documentary evidence. The investigator's findings should be based on substantiated facts and related analysis, not suppositions and assumptions. Factual accuracy is very important².

74. This Tribunal has consistently held that establishing criminal liability in investigations and judicial proceedings even in the context of a civil matter, such as in the present case, must necessarily require that a standard higher than the ordinary one of a balance of probabilities must be attained. In disciplinary cases where the charges against a staff-member are quasi-criminal in nature, the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred³. This requirement was not met in the present case.

² *Ibid.*

Has the charge of impr

81. It was not within her power to change

Did the Applicant use her office to prejudice the positions of those she did not favour?

85. To satisfy this element of the charge, the Respondent is required to prove, beyond a balance of probabilities, that the Applicant used her office or position to ensure that certain CDWs were not recruited or that when they were recruited, they were then “rotated” (as defined by the Applicant) if they failed to pay her money as she demanded. Such CDWs would then not return to work in the Engineering Section in Bukavu.

86. The uncontested evidence before the Tribunal is that the Applicant had no authority in the recruitment of CDWs or in their rotation. The Respondent’s argument is that the Applicant gave the perception that she had the authority to hire and fire CDWs by virtue of the fact that she was the responsible for the list and that the Applicant simply exploited this perception for financial gain. The Respondent relied on the voluntary statements of Messrs. Masudi and Lievain and on their untested evidence during the JDC hearings. As earlier stated, the absence of these two complainants from the proceedings meant that the Tribunal did not have an opportunity to assess their credibility. Their recorded statements alone are not sufficient to establish this element of the charge.

87. The Respondent has adduced no documentary evidence to substantiate this charge. The Tribunal would at the very least have expected to see the original lists given to the Applicant by her supervisors and the lists allegedly altered by the Applicant.

Did the Applicant accept any favour, gift, remuneration or any other personal benefit from another staff member or from any third party in exchange for performing, failing to perform or delaying the performance of any official act?

88. The Respondent did not adduce any evidence to show how the Applicant manipulated the list of new recruits or placed any unapproved names on the list. The Respondent has failed to produce evidence that raises a reasonable inference

Judgment

90. The sanction of summary dismissal was based on unsubstantiated charges. Accordingly, the Tribunal:

- a. Rescinds the Applicant's summary dismissal and holds that until the date of this judgment the Applicant remained lawfully in the service of the Organization.
- b. Orders the Respondent to reinstate the Applicant in service of

(Signed)

Judge Nkemdilim Izuako

Dated this 18th day of September 2012

Entered in the Register on this 18th day of September 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi