

1. The Applicant's employment history

1.1 The Applicant joined the Organization in March 1994 as a Procurement Assistant at the United Nations Assistance Mission for Rwanda (UNAMIR), and later became a Procurement Officer in 1996 with the International Criminal Tribunal for Rwanda. The Applicant was then transferred to the United Nations Mission in the Democratic Republic of Congo (MONUC) in March 2003 and was promoted to Chief of the Supply Service Unit (SSU) in 2005. He acted as the Officer-in-Charge (OIC) of the Procurement Section at the P-4 level from October 2006 until the arrival of the new Chief Personnel Officer in May 2007.

2. Summary of relevant facts

2.1 From 1 July 2002 to 30 June 2007, MONUC issued 31 purchase orders and 3 contracts totaling US\$3,408,000 to a local Congolese company, Maison Mukoie Fils (MMF) for their charter services. On or about 22 July 2005, the Applicant approached the owner of MMF and requested a cash advance of \$7,000 in order to pay for a used car. The said cash advance was paid back in full by a bank transfer on 10 August 2005 based on an instruction by the Applicant to his bankers one week before.

2.2 In February 2007, the Procurement Task Force (PTF) of the Office of Internal Oversight Services (OIOS) began an investigation into MONUC's procurement

regarding the procurement process in MONUC and the procurement of material for a HIV Awareness Campaign.

2.4 On 1 March 2007, a certain person whose identity was not disclosed but described as Confidential Witness 3 (“CW-3”) was said to have been interviewed by the PTF in regards to allegations of corruption within MONUC's Procurement Department. CW-3 told the investigators of an incident in June or July 2005 when the Applicant had asked him/her for the owner of MMF's phone number. CW-3 said that s/he overheard the Applicant shortly afterwards having a phone conversation in French, in which he asked for "either US\$5,000 or US\$7,000". According to the PTF Report, CW-3 claimed that the Applicant realized that CW-3 had overheard the phone conversation and approached CW-3 shortly after and told him/her that he had asked the owner of MMF to "lend him cash for a car he intended to buy" and assured CW-3 that he would reimburse the loan. CW-3 stated that s/he did not hear any mention of a loan during the telephone conversation that she overheard, only a request for cash.

2.5 On 10 April 2007, a request for voluntary financial disclosure was sent to the Applicant to which he responded with the requested documents on 23 April 2007.

2.6 On 3 May 2007, the PTF interviewed the owner of MMF. He recalled that the Applicant had called him over a year before and asked for US\$7,000 cash in order to purchase a car, a sum which the Applicant immediately repaid in full via a bank transfer.

2.7 On 15 May 2007, the Applicant was once again interviewed by the PTF. When questioned about the US\$7,000 loan from the owner of MMF, the Applicant stated that he "didn't consider it as a bribe or corrupt practice" and that he "didn't even see a conflict of interest," as he gave the money back and had nothing to do with the contracts with MMF.

2.8 By an email dated 19 June 2007, the PTF informed the Applicant of the proposed interim report findings that he had improperly received a sum of money from a MONUC vendor. The following were the PTF's findings:

"...requesting and accepting payments from a UN vendor doing business with the

All staff members involved in procurement shall decline offers or gifts. As a result of [Applicant]'s actions, the integrity of the procurement process in bidding exercises with this MONUC vendor was severely compromised."

2.9 On 28 June 2007, the Applicant submitted by letter his response to the draft findings. He reiterated that "the contracts with MMF were established long before his arrival in the Mission and the contracts at the time was also awarded and handled by another Unit of the Procurement Section and that he was not responsible for the award made to the vendor."

3. *Charges and Applicant's comments on the charges*

3.1 On 6 July 2007, OIOS submitted the PTF's Interim Report to the Under-Secretary-General for Peacekeeping Operations. On 13 July 2007, the matter was referred to the Office of Human Resources Management (OHRM), who again outlined the allegations of misconduct to the Applicant by a memorandum dated 24 July 2007.

3.2 The Applicant was suspended from duty with full pay on 13 August 2007. T(3.2)-1ii743 T2.36 514Tcyb tlineons. cl.3()3825 TD0.0 TcvmC8()e6wipTw[(a[uTwip

request for review to which the Applicant responded with additional comments on 3 April 2008.

4.3 A JDC panel was constituted on 15 December 2008. A JDC hearing was held on 26 January 2009 which was attended by the Applicant participating by telephone, his counsel, and the representative of the Secretary-General.

4.4 The JDC panel submitted its report on 7 April 2009. Its conclusions and recommendations read as follows:

“Conclusions and Recommendations

27. In light of the foregoing, the Panel unanimously decides that the factual basis in the present case was insufficient to establish by a preponderance of evidence that the Requestor had engaged in serious misconduct or had engaged in corrupt or unlawful activity that warranted summary dismissal.

28. Notwithstanding, it is established that the staff member initiated a currency transaction of US\$7,000 from [], the owner of MMF, and the Panel unanimously finds that this currency exchange represented a conflict of interest which would call into question any UN procurement exercises with this MONUC vendor.

29. In view of the above findings and in view of the Requestor's position as a Chief of Unit and/or Officer-in-Charge of the Procurement Section, the Panel unanimously recommends:

- a. that the decision to summarily dismiss the staff member be rescinded;
- b. that the staff member be separated from service effective the date of expiration of his last contract with the UN or the date of his summary dismissal 11 January 2008, with all salary and entitlements including restoration of pension rights up to that date.”

4.5 In a separate opinion, a member of the JDC while agreeing with the considerations of the panel arrived at the conclusion that the Applicant was deprived of a fair opportunity to defend himself, his job and reputation under

staff rule 110.4 governing disciplinary proceedings. He found that the Applicant's rights of due process were violated and recommended that the Applicant be awarded \$1,000 compensation.

4.6 On 3 June 2009, the Deputy-Secretary-General informed the Applicant that,

"The Secretary-General has examined your case in the light of the JDC's conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General does not agree with the JDC's conclusion that the facts in this case were not sufficient to establish that you had engaged in serious misconduct or had engaged in corrupt or unlawful activity that warranted summary dismissal. The Secretary-General also did not agree with the JDC's conclusions resulting from its characterization of the transaction in this matter as being a "currency transaction".

The Secretary-General notes that you were charged with "having solicited, received and accepted a sum of money from Maison Mukoie Fils (MMF), a vendor who did business and sought to do business with MONUC". In your letter dated "28 June 2007" to the Chairman of the Procurement Task Force, you state that you borrowed US\$7,000 against a refund by bank transfer and that the refund was made by bank transfer in early August 2005. The evidence on the record shows that you received and accepted the money in question from MMF, which was a vendor that did business with MONUC. The purpose for which you solicited the money is not relevant. The evidence also shows that at the time of the transaction in question, you were a Procurement Officer in MONUC.

The Secretary-General is of the view that your actions in this case harmed the reputation of the United Nations. The Secretary-General considers that the JDC's reasoning and conclusions do not provide any grounds for rescinding the decision to summarily dismiss you.

With respect to the separate opinion in which it is stated that you had been deprived of a fair opportunity to defend yourself, the evidence on the record does not support such a finding. The evidence shows that you were given the opportunity to review the records of conversation between representatives of OIOS and yourself, dated 15

May 2007, and that you wrote to the PTF by letter dated "28 June 2007" providing comments in response to PTF's letter dated "19 July 2007" (sic) in which the PTF requested you to provide comments. The record shows that your counsel provided comments on 29 August 2007 in response to the letter dated 24 July 2007 from OHRM, which contained the charges against you. The JDC report also shows that on 26 January 2008, you participated in a hearing before the JDC by telephone, as well as being represented by your counsel. Accordingly, the Secretary-General has decided not to accept the conclusion in the separate opinion that your due process rights were violated, nor the recommendation that you be awarded \$1,000 in compensation and any costs incurred in bringing this case.

Accordingly, the Secretary-General does not agree with the conclusions of the JDC and, therefore, has decided not to accept the recommendation of the JDC that the decision to summarily dismiss you be rescinded. The Secretary-General has also decided not to accept any of the other recommendations by the JDC. The Secretary-General will take no further action in this matter.”

4.7 The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the Administrative Tribunal or, as a result of the reforms to the United Nations internal justice system, to the newly established United Nations Dispute Tribunal.

4.8 On 18 August 2009, the Applicant filed this Application dated 17 August 2009 with the Nairobi UNDT. The Respondent's Reply was filed on 18 September 2009. On 23 September 2009, the Applicant filed comments on the Respondent's Reply. The Tribunal held a Hearing on 14 January 2010 and the Parties filed their closing statements on 19 January 2010.

5. *The Applicant's contentions/pleas*

5.1 The Applicant's principal contentions are:

(i) That the Secretary-General's decision to reject the advice of the

unsupported by any logic, evidence or clear rationale, thus appearing arbitrary and unjustified.

(ii) That at the time of making the contested decision, the Secretary-General knew or should have known that what was involved was a currency exchange and not a loan as originally described.

(iii) That the Applicant never got a chance to properly defend himself against the conflict of inte

8. 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 penalty of summary dismissal;

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(ii) That as a result of the Applicant's involvement, procurement exercises with MMF were tainted by corruption.

(iii) That the record shows that the facts underlying the charges have been properly established

order to decide if that action was reasonably justified and if the disciplinary measure imposed is appropriate or disproportionate.

7.1.3 Nothing can be further from the true mandate of the Tribunal. As the first tier of the formal component of the internal justice system of the United Nations, the Tribunal is competent to entertain applications as provided for by the Statute creating it. In entertaining such an application, the Tribunal as a judicial body shall receive evidence that is relevant and evaluate such evidence for a just determination of the case or application. Nothing and no-one shall constrain or limit the Tribunal's power in its judicial functions to grant full equality to the parties in a fair and public hearing, to be independent and impartial in the determination of rights and obligations of any party as required by the most basic of the UN's instruments- the Universal Declaration of Human Rights.

7.1.4 In dealing with clarifications (er)]TJu .0006 Tc0.138 Tw[(the UN'-23uex9Edquired su)3.6le ad(a

7.2 *Nature of Transaction between the Applicant and the owner of MMF*

7.2.1 It is agreed by both parties that the Applicant approached the owner of MMF, a company that was a vendor to MONUC, sometime in July 2007 to ask for the sum of \$7,000 in cash.

7.2.2 The Applicant had explained in his interviews with inve

7.2.5 Specifically at paragraph 24 of the report, the JDC panel found,

“...based on the record, there is no evidence to sustain the characterization by the PTF that he engaged in corrupt or unlawful activity. The charge that he solicited received and accepted a sum of money implies in the context of this characterization that he asked for and was paid a bribe or kickback. He did not. He solicited and accepted a service from MMF whereby he exchanged his own money for the equivalent of another currency.

of MMF were established before his arrival in the mission, that the contracts were awarded by another unit of the Procurement Section and that he was not in any way responsible for the contract awards made in favor of the vendor. This piece of evidence was never rebutted. At paragraph 220 of the OIOS/PTF interim report, a table is made showing contracts awarded to MMF, their value and the Officer responsible for each award. The said table does not show that the Applicant was responsible for any of the contract awards.

7.3.5 Under the former staff regulations applicable at all the times material to this application, paragraph 1.2 (g) provides against conflict of interests thus:

“Staff members shall not use their office or knowledge gained from official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favor. Nor shall staff member use their office for personal reasons to prejudice the positions of those they do not favor.”

There is no evidence that the Applicant used his office or knowledge gained from official functions for the private gain of himself or anybody else. I do not therefore subscribe to the view of the JDC panel that the Applicant had engaged in any activity that can be characterized as a conflict of interest, whether before, during or after the currency exchange transaction with the owner of MMF.

7.3.6 I do however find that the currency exchange transaction with a MONUC vendor was an act that had the potential for creating a possible conflict of interest situation in the future for the Applicant especially as his stature and role in MONUC grew. By approaching a MONUC vendor for a currency exchange, the Applicant exhibited poor judgment and put himself at the risk that others could labor under a perception that he may favor the vendor if any opportunity presented itself to do so.

7.3.7 I find also that the actions of the Applicant do not amount to serious misconduct deserving of summary dismissal. Certainly the action of the Applicant calls for some kind of disciplinary action much milder than what he got.

7.3.11 In an appeal lodged with the JAB, the panel evaluated the evidence and found that

- (i) The Administration had justifiably imposed a disciplinary measure against the appellant;
- (ii) The propriety and proportionality of the measure imposed could hardly be conceived, taking into consideration the very clean record of the appellant during his long service with the Agency and his immediate admission of the act of assisting a tenderer to fill an Agency tender document for no personal gain;
- (iii) The report of the Board of Inquiry did not incriminate the appellant in as much as if had solely pinpointed his improper judgment as a staff member on one occasion only.

7.3.11 In pronouncing judgment, the UNAT found that as regards conflict of interest, the applicant did not deny that he helped a neighbor fill in a Tender Form for a contract with UNRWA at GAZA. There was no accusation by the Respondent that the applicant gained financially in any way by his action or that there was a possibility of UNRWA suffering losses. There was no clear evidence of conflict of interest.

7.4 CW-3 and his/her evidence

7.4.1 It is in evidence that a certain anonymous witness referred to as “CW3” was interviewed by the investigators. According to the witness statement of the lead investigator, CW-3 was granted confidentiality because the said witness said he/she feared for his/her personal safety and the impact that providing information to OIOS may have on his/her work at the mission. The lead investigator relied on and referred to section 18 (b) of ST/SGB/273- *Establishment of the Office of Internal Oversight Services*, which provides, inter alia,

phone conversation she overheard, the Applicant never mentioned anything about a loan but simply requested the money.

7.4.4 CW-3 also related that some weeks later, another staff member (“SM”) who was supervised by the Applicant, told him/her that the owner of MMF had told him that the Applicant was in the habit of calling the owner of MMF every time he needed money to ask for payments. Sometimes, according to CW-3, immediately after the Applicant called the owner of MMF, the latter would call and tell SM. CW-3 was of the opinion that SM told him/her these things because he may have had an argument with the Applicant.

7.4.5 CW-3 is the “star witness” and the record of the interview with her is the “star evidence” that to some extent lent a corruption tint to the report prepared by the investigators and acted upon by the Respondent. The Applicant has challenged both the existence of this witness and his/her veracity. Throughout the proceedings and particularly in his closing address, the Applicant’s counsel had submitted that this witness is an invention of the investigators. The Applicant’s counsel further submitted that if the said CW-3 existed, his/her veracity ought to be tested under oath. The Tribunal, he said, had not even had an opportunity to know the identity of this witness and why he/she feared for his/her safety.

7.4.6 In paragraph 7(c) of her witness statement, the lead investigator stated that under paragraph 29 of the OIOS *Manual of Investigation Practices and Policies* (2005), there is a distinction made between the protection of a witness’ identity and the use that can be made of information elicited from the witness. She cited that paragraph of the OIOS Manual thus:

“...it is crucial to note that although the identity of a person making a suggestion or report is protected, the information supplied is not protected and may be used for the conduct of the investigation. For example, information from a confidential source can be used to develop other sources, be they witnesses or documentary evidence relevant to the substance of a complaint.”

7.4.7 In examining the personality of CW-3 and his/her testimony on which sufficient reliance was placed by the investigators to form part of their report and to support the criminal allegations of soliciting and receiving bribes or payments, I am inclined to ask the following questions:

(i) Was CW-3 English or French speaking as to have followed a telephone conversation in French but was still confused about the words “cinq” and “sept” which are French words? Not being sure about the amount being requested, is it not possible that he/she was not sure about other things he/she thought that he/she had overheard?

(ii) Was it CW-3 or the investigators who decided that “cinq” and “sept” sound very similar in French since the only evidence tendered in this regard was the reported version of CW-3’s interview with the investigators?

(iii) How could CW-3, who claimed he/she overheard the Applicant’s side of a conversation which was already in progress when he/she approached, be certain that the said conversation was about the Applicant simply requesting money and that no mention of a loan was made?

(iv) Why would the Applicant, who had already spent two years in MONUC at the time, ask CW-3 for another phone number for the owner of MMF if he was so familiar with the vendor as to be in the habit of asking him for money payments anytime he needed money? In such a situation, it sounds more sensible that the Applicant would know how to reach the owner of MMF without help from others in the office.

7.4.8 Section 18 (b) of ST/SGB/273 which was referred to by the lead investigator and reproduced above, provides that the identity of a confidential witness may be disclosed only where such disclosure is necessary for the conduct of proceedings whether administrative, discip

disclose the identity of the said witness, whose interview statements have had quite an impact for the investigations against the Applicant, cannot rest with the Respondent and the investigators, only the Tribunal can decide on the necessity of such a disclosure even though the disclosure cannot be made without the consent of the witness in question.

7.4.9 While I agree with the le

7.5 Need for proportionality of disciplinary sanctions and equality of treatment of all UN staff members as espoused in decided cases.

7.5.1 In UNAT Judgment Number 1414 (2008), the applicant in that case joined the UN in 1980 as a Human Rights Officer. At the time of the alleged misconduct, he was serving on a permanent appointment as Chief of the Sanctions Branch and

7.5.6 In UNAT Judgment No. 1391 (2008), the applicant in that case submitted some forged invoices for a special education grant claim in respect of her son. The applicant insisted that all the money she collected was used to pay for her son's education and that she did not deviate any money from its final destination. The JDC concluded that the actions of the applicant constituted misconduct and ought to be penalized but that summary dismissal with loss of benefits to which the applicant was entitled by virtue of her years of service was not proportional to the misconduct committed. The Secretary-General refused the JDC's recommendations and the applicant appealed to UNAT which held that in filing two falsified invoices, the applicant had fallen short of the standards required of her as a staff member. UNAT analyzed the applicant's conduct and found that she did not intend to defraud the organization by fraudulently obtaining funds for personal gain. Her summary dismissal was overturned.

7.5.7 In UNAT Judgment No. 1391 (2008), UNAT emphasized that in determining whether a staff member was guilty of fraud, a determination of intent must be made. UNAT found, in Judgment No. 1175, *Ikegame* (2004), where a D-1 level staff member falsified a cheque in connection with a claim for rental subsidy, that the Respondent had not established his charge of serious misconduct based on rental subsidy fraud but had substantiated the charge of falsification of documents. Disciplinary action against the staff member was his demotion by two grades. This was upheld by UNAT.

7.5.8 In UNAT Judgment No. 1011, *Iddi* (2001), UNAT was of the view that "even in case of serious misconduct, the administration does not always proceed to summary dismissal of its guilty employee together with the loss of terminal benefits." The Tribunal decided in that case that summary dismissal was disproportionate to the applicable facts and proceeded to award compensation. The Tribunal recalled the principle of equality of treatment which should be applied to all UN employees in conformity with the Staff Regulations and Rules and with previous decisions of the UNAT.

7.5.9 It is evident from the foregoing cases that staff members who have engaged in conduct similar to that of the Applicant in the present case, where there was an absence of fraud or a motive of personal gain, did not have the disciplinary sanction of summary dismissal imposed on them. Equality of treatment in the workplace is a core principle recognized and promoted by the United Nations. Simply presented, the principle of equality requires that those in like cases should be treated alike. The Tribunal considers that applying this equality principle in the present case ensures consistency in the jurisprudence of the Tribunal. It is therefore reasonable, just and proportionate in the present case for the disciplinary sanction imposed on the Applicant to be a written censure as opposed to summary dismissal.

7.6 OIOS/PTF investigations and the investigation report

7.6.1 The sheer importance of the investigation process leading up to the disciplinary action against the Applicant cannot be over-emphasized. Part of the OIOS Procurement Task Force Interim Report on MONUC procurement formed a part of the documentary evidence before this Tribunal and an examination of this document raises sufficient concern for the Tribunal to make certain observations and findings.

7.6.2 The *OIOS Manual of Investigation Practices and Policies* (2005) (“the Manual”) quite rightly asserts at paragraph 12 (page 8) that the role of ID/OIOS (OIOS Investiga74 TwInvk4g.nvesd banual”) quic0.d.1(tiga74 TwIn0 Tw(OT145 Tw[(is(ptrse that the rol

7.6.7 The report itself shows th

7.6.11 The investigation report shows that the Applicant explained that it was impossible to open individual bank accounts in a post-conflict DRC at the material time which made access to the required cash to buy a used car very difficult for him. Did the investigators make any effort to investigate this explanation? Perhaps the result of investigating this claim and finding that there is truth in it may not be exculpatory but could have a mitigating effect on any disciplinary sanctions taken against the Applicant. I find on the whole that the investigations were not conducted with an open mind. The standards of objectivity, impartiality and fairness were not maintained. The investigation report is replete with irrelevant but prejudicial details. Its findings, recommendations and conclusions are not based on established facts.

7.6.12 Specifically at paragraph 215 (page 43), the report stated that the Chief of General Services, in a conversation, reported that the Applicant and another staff member had luxurious life standards that did not reflect their earnings as United Nations employees. The said Chief of General Services did not provide further information or substantiate this allegation. What would constitute 'luxurious life standards' here? Is it in the designer label clothes, cars, holidays or food consumed by the staff member? Or the splendor of the house in which he lived or the jewelry/classy cigarette case? Why did the investigators make such an obviously subjective statement part of their report? It is evident that OIOS investigations conducted in this manner would run the risk of jettisoning objectivity and degenerating into medieval witch hunts.

7.6.13 Again at paragraph 218 and 219 under section (C) of the investigation report titled "MMF Payments to [Applicant]", allegations of payments made by MMF to procurement staff members in exchange for contracts are made. None of MONUC's jewith

- (v) The OIOS PTF investigation report was prejudiced, full of innuendos,