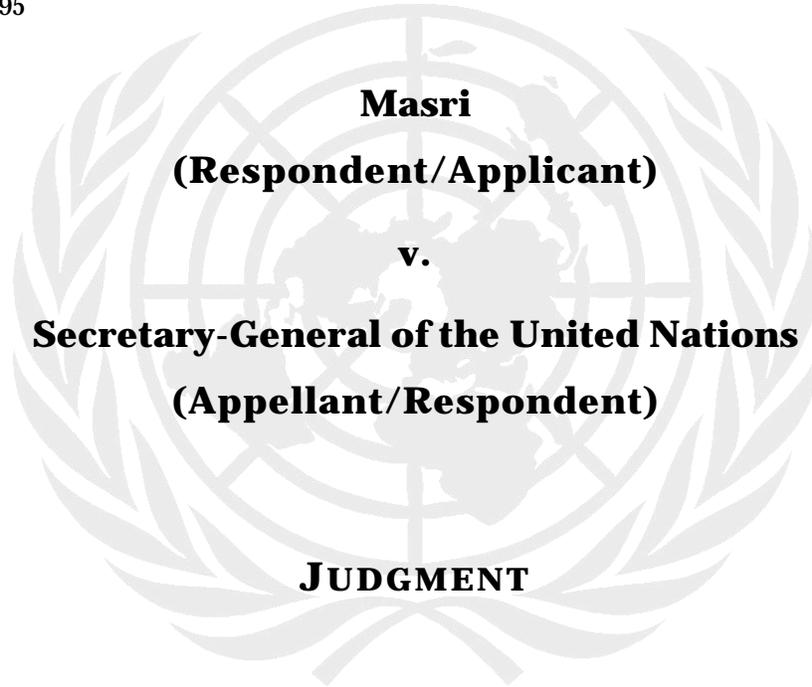




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-095



**Masri
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Jean Courtial
Judge Kamaljit Singh Garewal

Judgment No.: 2010-UNAT-098

Date: 29 December 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Edwin Nhliziyo

Counsel for Appellant/Respondent: John Stompor

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. This is a disciplinary case concerning the summary dismissal of Abdul Karim Masri (Masri), a staff member in the Procurement Section of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). The Judgment rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) ordered the rescission of Masri's summary dismissal, reinstatement of Masri with a demotion of four steps within his job level, and fixed alternative compensation should the Secretary-General elect not to reinstate Masri.

2. The evidence established that Masri met vendors at his home outside working hours and discussed MONUC contracts, he received the benefit of interest-free loans from two vendors, and he gave assistance to a vendor in connection with its technical proposal for a catering contract with MONUC. This conduct violated a number of the Financial and Staff Regulations, and amounted to serious misconduct. Accordingly, this Tribunal reverses the Judgment under appeal and affirms the administrative decision to impose the disciplinary measure of summary dismissal.

Facts and Procedure

3. Masri joined the United Nations in 1982. In March 2000, Masri was appointed as a Procurement Assistant at the FS-4 level with MONUC. In 2007, the Procurement Task Force (PTF) of the Office of Internal Oversight Services (OIOS) conducted an investigation into alleged irregularities in MONUC's Procurement Section. The PTF issued its report on 6 July 2007.

4. On 24 July 2007, Masri was charged 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, and with having knowingly made false, misleading and inaccurate material statements to PTF Investigators." Masri was charged with violations of Staff Regulation 1.2, Financial Regulation 5.12, Financial Rule 101.2, and Section 4 of the United Nations Procurement Manual.

5. After providing a written response to the charges, Masri was notified, by letter dated 11 January 2008, that he was summarily dismissed for serious misconduct under Staff Regulation 10.2. Masri submitted a request for review of the decision by the Joint Disciplinary Committee (JDC). The report of the JDC concluded that, while some of the charges against Masri were not substantiated, the summary dismissal of Masri should be upheld. By letter dated 25 June 2009, the Deputy Secretary-General informed Masri that the Secretary-General accepted the conclusion of the JDC that the summary dismissal should be upheld. On 18 August 2009, Masri filed an application to the Dispute Tribunal contesting his summary dismissal. A hearing was held on 11 January 2010.

6. In its Judgment No. UNDT/2010/056 dated 7 April 2010, the Dispute Tribunal considered the allegations of misconduct which were the basis for summary dismissal, namely that Masri: (1) solicited payments of bribes from Etablissement Ekima (Ekima) in exchange for favourable treatment in connection with the procurement of cement contracts; (2) assisted Société Matina Sprl (Matina) in preparing a technical proposal for a catering contract with MONUC; (3) requested payment from AVC Construct (AVC) in return for assisting AVC in securing the contract for the rehabilitation of the Bunia runway; (4) accepted in the guise of “loans” payments from two MONUC vendors, UAC Sprl (UAC) and Panache Sprl (Panache); (5) solicited and received payments totaling USD 10,000 from Transport Fluvial et Commerce (TFCE) in return for securing TFCE boat and barge pushers contracts with MONUC; and (6) made false, misleading and inaccurate statements to the PTF investigators.

7. The Dispute Tribunal found that the Secretary-General failed to substantiate the disciplinary charges against Masri to the required standard of proof, and the sanction of summary dismissal was disproportionate. Further, the Dispute Tribunal found that Masri's contact with some vendors outside working hours was unprofessional, reckless and exhibited poor judgement, and the appropriate disciplinary sanction was a demotion of four steps. The Dispute Tribunal rescinded the decision to summarily dismiss Masri; ordered the Secretary-General to reinstate Masri and make good his lost earnings with interest at eight per cent per annum; ordered that Masri be demoted by four steps within his job level at the time of his summary dismissal; and fixed compensation to be paid to Masri, should the Secretary-General decide not to perform the obligation to rescind the decision, at two years' net base salary at the rate in effect on the date of Masri's separation from service, with interest

payable at eight per cent per annum as from 90 days from the date of distribution of the Judgment until payment is effected.

8. The Secretary-General filed an appeal against the Judgment on 24 May 2010. Masri filed an answer to the appeal on 7 July 2010, together with a “Motion to dismiss appeal of Judgement UNDT/2010/056”.

9. On 24 September 2010, five staff members of the Office of Staff Legal Assistance filed a “Joint application to file a friend-of-court brief” under Article 17 of the Rules of Procedure of the Appeals Tribunal (Rules). By Order No. 13 (2010), the President of the Appeals Tribunal rejected the joint application.

10. On 6 October 2010, the MONUSCO Field Staff Union ¹ filed an “Application for leave to file a friend-of-court brief” under Article 17 of the Rules. On 6 October 2010, Masri filed observations stating that he did not object to the application. On 11 October 2010, the Secretary-General filed observations in which he opposed the application and, should the application be granted, he requested 30 days to respond to the brief.

Submissions

Secretary-General’s Appeal

11. The Secretary-General submits that the Dispute Tribunal erred on a question of law in holding that he must substantiate charges of misconduct against Masri pursuant to a standard of proof higher than a balance of probabilities. The Dispute Tribunal erred in relying upon national law to this effect, and the standard of proof applied was not in accordance with the jurisprudence of the former Administrative Tribunal or other judgments of the Dispute Tribunal.

12. The Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence by going beyond a review of whether there was a reasonable basis for the Secretary-General’s determinations. The Secretary-General has a broad discretion in exercising his authority with respect to disciplinary measures. The Dispute

¹ United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (see Security Council resolution 1925 (2010) adopted on 28 May 2010).

Tribunal adopted an erroneous approach as it reviewed the Secretary-General's determinations without any deference to his decision.

13. The Secretary-General argues that the Dispute Tribunal made a further error of law and exceeded its competence by substituting its own judgment for that of the Secretary-General when evaluating the facts. The proper role of the Dispute Tribunal is to review the Secretary-General's findings and determine if the findings are reasonably justifiable and supported by the evidence. In this case, there was a reasonable basis for the Secretary-General to conclude that Masri had engaged in serious misconduct. The Secretary-General refers to five instances of misconduct. First, Masri received the benefit of an interest-free loan of USD 839 from UAC arising from the provision of goods in 2001 which Masri repaid 17 months later in 2003. As Masri did not provide a satisfactory explanation for the receipt of the benefit, the Secretary-General had a reasonable basis to conclude that Masri had engaged in misconduct.

14. Second, Masri received the benefit of interest-free loans totalling USD 2,000 from Panache, of which he had repaid one loan of USD 1,000. Third, there was evidence that Masri received the benefit of interest-free loans of USD 2,400 from the owner of Matina, which Masri had since repaid. The Dispute Tribunal did not address the loans from Matina in the Judgment. The Secretary-General contends that it was reasonable for him to conclude that procurement staff should not accept benefits from vendors of the United Nations and Masri's explanation that the benefits were personal or private in nature was not satisfactory.

15. Fourth, Masri improperly assisted Matina in preparing its technical proposal for a catering services contract with MONUC. The Dispute Tribunal improperly substituted its judgment for that of the Secretary-General in evaluating the facts. Fifth, Masri made false, misleading and inaccurate material statements to the PTF investigators concerning his assistance to Matina. The Dispute Tribunal erred in substituting its own judgment for that of the Secretary-General in concluding that there was no evidence that Masri falsely denied providing assistance to Matina.

16. The Secretary-General submits that the Dispute Tribunal erred on question of law in characterizing Masri's actions as not amounting to serious misconduct. Masri's receipt of the benefit of interest-free loans from three MONUC vendors violated Staff Regulation 1.2(b) and Section 4.2(1) of the Procurement Manual. Masri's improper assistance to Matina

violated Staff Regulation 1.2(g) and Masri's false, misleading and inaccurate statements to PTF investigators violated Staff Regulation 1.2(b). Further, the Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence in substituting its own judgment for that of the Secretary-General regarding the appropriate disciplinary sanction.

17. The Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence in awarding compensation in excess of two years' net base salary without explaining the exceptional circumstances justifying the award as required under Article 10(5) of the Statute of the Dispute Tribunal (UNDT Statute). Finally, the Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence in awarding interest and setting the rate of interest at eight per cent per annum.

18. The Secretary-General requests that the Appeals Tribunal make a number of findings and annul the Judgment of the Dispute Tribunal in its entirety.

Masri's Answer

19. Masri submits that the appeal is frivolous and without merit as the Judgment is in accordance with the standards set out in UNAT Judgment No. 941, *Kiwanuka* (1999) of the former Administrative Tribunal. As to the argument that the Dispute Tribunal applied a standard of proof higher than a balance of probabilities, Masri submits that the Dispute Tribunal determined that the evidence in support of the charges was insufficient and the real issue was the lack of evidence provided by the Secretary-General. Concerning the argument that the Dispute Tribunal erred by going beyond a review of whether there was a reasonable basis for the Secretary-General's determination, Masri contends that there was insufficient evidence for the Secretary-General to make the determinations he made.

20. Masri submits that the Dispute Tribunal has competence under the UNDT Statute to review the Secretary-General's decisions in disciplinary matters and the Secretary-General's decision, which was based on facts that have not been established, cannot stand. Masri argues that the Dispute Tribunal did not make any error in law with respect to the characterization of his conduct and the appropriate disciplinary sanction.

21. Masri contends that the compensation awarded by the Dispute Tribunal was reasonable in the circumstances of the case and the award of interest was in accordance with jurisprudence of the former Administrative Tribunal. Masri argues that the appeal is designed to delay the implementation of the Judgment and it is malicious and unconscionable. Masri also contends that the failure of the internal justice system to prioritize summary dismissal cases needs to be reviewed as staff members who are dismissed lose their source of income.

22. In his motion to dismiss the appeal, Masri repeats most of the arguments in his answer to the appeal. Masri also contends that the appeal is not receivable as it was filed after the 45-day statutory period set out in Article 7(1)(a) of the Rules.

Considerations

23. After receiving the Dispute Tribunal's Judgment on 7 April 2010, the Secretary-General filed his appeal on 24 May 2010, the date of expiry of the time limit to file an appeal under Article 7 (1)(a) of the Rules. Accordingly, the appeal is receivable.

24. This Tribunal decides to reject the application to file a friend-of-the-court brief submitted by the MONUSCO Field Staff Union under Article 17 of the Rules.

25. While the MONUSCO Field Staff Union may be regarded as a staff association under Article 17 of the Rules and therefore may qualify as a friend-of-the-court, the application will only be granted if the proposed brief would assist the Appeals Tribunal in its deliberations.

26. The purpose of a friend-of-the-court brief will generally be to address matters other than the law. The Appeals Tribunal is composed of experienced, professional Judges who are able to ensure that proper deliberations are held concerning the general principles of law that are applicable in the case with the benefit of the parties' submissions, the UNDT Judgment and the judicial work of the Tribunal itself, without the need for additional contributions from friends-of-the-court.

27. If the issues in a case raise very specific or particular questions of law which are not generally within the expertise of counsel or the Judges, an application to file a friend-of-the-court brief may be granted. But in this case, the issues can be addressed based on the

submissions, the case record and the judicial work carried out by the panel of Judges hearing the appeal.

28. In considering whether to allow a friend-of-the-court brief to be filed, the Appeals Tribunal will also examine the impact of its decision on the hearing of the case. The parties must be granted an adequate opportunity to be heard in response to a friend-of-the-court brief. The Appeals Tribunal strives to dispose of its caseload in the most efficient way possible. In this case, granting the application to file a friend-of-the-court brief would defeat this goal by forcing the postponement of the hearing of the appeal to the next session to enable the parties to file submissions in response to the brief. The Appeals Tribunal considers that this outcome would be less desirable than the absence of additional submissions on the legal issues in the case.

29. While acknowledging the excellent analysis of the evidence and legal issues in the UNDT's Judgment, this Tribunal does not agree with the main grounds for the UNDT's decision on the merits of the case and, accordingly, will allow the Secretary-General's appeal and reverse the UNDT's Judgment.

30. In the *Haniya* and *Maslamani* Judgments,² this Tribunal held that, when reviewing a disciplinary sanction imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

31. In reaching a decision in this case, we do not consider it necessary to rule on the appropriate standard of proof in disciplinary proceedings. Whether the standard of proof is that applied in the Judgment or a lower standard, the evidence is sufficient to prove misconduct by Masri.

² *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Maslamani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-028.

32. This Tribunal considers that the Administration quite properly decided that certain conduct of Masri constituted serious misconduct and was not excusable due to poor management, unprofessionalism or mere lapses in judgement, as concluded by the UNDT in the Judgment at first instance.

33. Although not all the allegations of misconduct against Masri were proved, some of the allegations were sufficiently supported by the evidence. Masri himself admitted that vendors of MONUC attended social gatherings at his home, and he discussed MONUC contracts with vendors during these gatherings. He also accepted that he obtained interest-free loans from two MONUC vendors, UAC and Panache.

34. Masri also had a number of dealings with the owner of Matina in connection with Matina's technical proposal for a catering contract with MONUC. In its investigation report, the PTF found that Masri received an e-mail from the owner of Matina on 12 September 2006, which attached a rough draft of Matina's technical proposal. On 13 September 2006, a file was created on Masri's computer which contained an edited version of Matina's technical proposal. On 14 September 2006, another file was created on Masri's computer containing a letter from Matina to the chairperson of the Tenders Opening Committee of MONUC concerning Matina's technical proposal for the catering contract. Masri admitted that the owner of Matina was his friend and gave an explanation of the circumstances in which he assisted the owner by printing out Matina's technical proposal. Masri denied having drafted the technical proposal. The UNDT accepted Masri's explanation of events and found that his assistance to Matina by printing the technical proposal did not amount to misconduct. Even if Masri's explanation of events is accepted, this Tribunal disagrees with the UNDT's finding that Masri's actions did not amount to misconduct.

35. The conduct described above violates several regulations and rules concerning the obligations of staff members with respect to procurement activities. For instance, Financial Regulation 5.12 provides as follows: "The following general principles shall be given due consideration when exercising the procurement functions of the United Nations: ... (b) Fairness, integrity and transparency; ... (d) The interest of the United Nations". Under Financial Rule 101.2, a staff member who does not comply with the Financial Regulations and Rules may be held personally accountable for his or her actions.

36. Significantly for this case, Staff Regulation 1.2(b) states that “[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”. Staff Regulation 1.2(g) provides that “[s]taff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour”.

37. It is the view of this Tribunal that staff members exercising procurement functions are required to conduct themselves, from an objective standpoint, in an impartial and honest way and act in the interests of the United Nations only. To comply with this duty, staff members must be seen to act with integrity, obtain no personal benefit from third parties and not engage in any conduct which could create the impression of favouring third parties, that is to say, they must be and appear to be above reproach, particularly when interacting with persons or entities who could potentially become involved in supplying goods or services to the Organization, or are currently in such a relationship, like vendors.

38. Masri’s discussions with vendors concerning procurement contracts at his home breached the principles of fairness, integrity and transparency applicable to the exercise of procurement functions under Financial Regulation 5.12. This conduct also violated Masri’s obligation to uphold the highest standards of integrity under Staff Regulation 1.2(b) as his interaction with vendors in this manner gave rise to a reasonable apprehension that he would not be impartial in exercising his procurement functions.

39. The benefits obtained by Masri from vendors in the form of interest-free loans violated his obligation to act with integrity under Financial Regulation 5.12 and Staff Regulation 1.2(b). Masri also violated Staff Regulation 1.2(g) by using his office for private gain. Masri again violated these regulations by receiving Matina’s technical proposal for the MONUC catering contract by e-mail and assisting the owner of Matina by printing out the technical proposal. This conduct failed to meet the standards of impartiality and integrity required of a staff member exercising procurement functions and also undermined the transparency of the procurement process. In providing this assistance, Masri violated Staff Regulation 1.2(g) by using his office for the private gain of a vendor.

40. Thus, misconduct was established and in Masri's case, it must be considered serious. The nature and pattern of the conduct at fault, namely the personal benefits obtained from vendors, the assistance given to a vendor and the resulting overall impression of corruption arising from the procurement staff member's activities, amount to serious misconduct.

41. This Tribunal finds that the disciplinary measure of summary dismissal adopted in this case was proportionate to the misconduct, which was serious.

42. In conclusion, the challenged administrative decision imposing the disciplinary measure of summary dismissal must be affirmed and the UNDT's Judgment reversed. There are no grounds to modify the disciplinary measure adopted or to award any compensation to Masri.

Judgment

43. This Court reverses the Judgment under appeal and affirms the impugned administrative decision to impose the disciplinary measure of summary dismissal.

Dated this 29th day of December 2010.

Original and authoritative version: English

(Signed)

Judge Simón, Presiding,
Montevideo, Uruguay

(Signed)

Judge Courtial,
Paris, France

(Signed)

Judge Garewal,
Chandigarh, India

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar