



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KONATÉ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Michael Duttweiler, OSLA

Counsel for the Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. On 21 February 2011 the Applicant filed an Application with the United Nations Dispute Tribunal (UNDT) challenging the decision of the Secretary-General to separate him from service with compensation in lieu of notice in accordance with staff rule 10.2.

Facts

2. The Applicant joined the United Nations Population Fund (“UNFPA”) as Operations Manager, Mali Country Office, on 1 April 2005. At the time of his appointment, the Country Representative was Mr. Mamadou Diallo. In April 2009 Mr. Diallo resigned and in 2010 he took up a position with the United Nations Development Programme (UNDP) and a new Country Representative, Mr. Makane Kane, took up office.

3. From 2-8 March 2010, the International Operations Manager, Africa Regional Office, Mr. Hicham Nahro, conducted a mission to the UNFPA Mali Country Office to assess business practices there. In an undated document entitled ‘Briefing on Mali mission’, he wrote:

Suspicion of fraud

[...]

When asked about the process undertaken to select a transit company (Sahel Transit), forged documents were provided. When asked about this, [the Applicant] has indicated that this is to protect the previous rep.

[...]

[Division of Oversight Services] should be informed without any delay to field an investigative mission immediately. The rep should seek advice...on the way forward with regards to the staff member in question.

4. In Mr. Nahro’s full mission report, dated merely “March 2010”, the following is said:

A concern was raised as it pertains to [a Long Term Agreement] signed with SAHEL TRANSIT, first [the Applicant] has indicated that the [Country Representative] has done the process in Conakry when looking for a company to transport vehicles, than [sic] an enquiry of those documents was made and nothing was provided. When requested any process has taken place [sic] he confirmed indeed it happened and presented with documents, not complete, but there were quotes. In the last 3 years, at least US\$400,000 was paid to this organization but no submission to the CAP or for this matter to [Contracts Review Committee] in NY. This shows, no competitive bidding was provided and procedures have not been followed.

5. On 11 March 2010, the Country Representative, Mr. Makane Kane, sent a Report of Allegation of Fraud, along with Mr. Nahro's report, to the Division of Oversight Services (DOS), stating:

When requested on the process of selection of a transit company called SAHEL TRANSIT, the staff member provided documents that have **been forged to look like quotes were received including a signature on the contract which looked suspicious**. Furthermore, the quote provided were [sic] supposed to be dated in 2005 while the documents were 2009 as the contract was signed in 2005. It is important that the whole process of selection of the SAHEL TRANSIT looked very suspicious. SAHEL TRANSIT received approximately US\$400,000 in the last 4 years. More over the letter signed (dated 9 December 2005) by Mr M. Konaté on behalf of the former Representative informing the "bidding" suppliers to send in their proposals was drafted on a paper with UNDP letter head, the old address (the office moved to new premises in 2008) but yet with the new telephones lines [sic] of the new premises (office was provided with different numbers after the move). **This again is indicative of a forged document**. Finally in the same letter the bidders were asked to submit their documents on 24 December at 4p.m, the deadline for the opening of the bids by a committee (therefore less than 3 weeks notice). On a second look we realised also that it was quite strange to have a committee sit on a Saturday afternoon, just before Christmas, when most people are on holidays. When probed on that Mr. Konaté remained vague in his answer as he did not even notice that the selected day was not a normal working day.

[...]

Procedures were circumvented to select the Sahel Transit to have vehicles transported from Conakry, Guinea. The **fraud was done by forging the documents** to justify the selection of SAHEL TRANSIT.

[...]

Obviously this must have been done because the perpetrator was getting a financial gain from the transaction at the expenses of the organisation. (Emphases in original).

6. As a result of these allegations, the Applicant was placed on administrative leave from 22 March 2010 and an investigation was conducted by DOS from 31 May 2010 to 8 June 2010. On 18 August, DOS produced a report [“the Report”]. The Report indicates that for procurement of \$30,000 or above, the UNFPA Internal Control Framework requires sealed, competitive, international, public bids. The Report concluded that “[t]he procurement process for selecting transportation service companies was not conducted in accordance with UNFPA Policies and Procedures relating to procurement and unfair advantages were given to the selected vendor (Sahel Transit)” and that “there is evidence of possible misconduct by systematic violation of the procurement policies and procedures also by means of fraud as defined by the UNFPA [Procurement Procedures Manual] and possible fraud committed.”

7. DOS considered not only the role of the Applicant but also that of the former Representative, Mr. Diallo. In the conclusions of the Report, it is stated:

...the role of UNFPA’s former Representative (Dr Diallo) was central in approving the Long Term Agreement and multiple payments over an extended period. As the officer approving the transactions, and as the one who signed the [Long Term Agreement] with Sahel Transit, Dr Diallo should have known the high value of this procurement and the appropriate [Local Contracts Review Committee] or [Contracts Review Committee] review which should have taken place.

8. The Report made two recommendations. Firstly, that appropriate action be taken against the Applicant “as evidence proves that it is reasonable to believe that a procurement process was intentionally driven towards awarding business to a company named Sahel Transit” and secondly, it was recommended that UNFPA consider “disclosing this report to the UNDP Office of Audit and Investigations since Mr. Diallo is presently the UNDP Resident Representative for Eritrea. The investigative details and evidence at hand provide for a responsibility by Mr. Diallo for grave negligence in

implementing his oversight and managerial role in the UNFPA Country Office. Such grave negligence allowed for improper business processes that occurred in total violation of the UNFPA [Procurement Procedures Manual] resulting in payment to a wrongfully contracted company for a total amount of £329,894.”

9. In the course of the investigation, DOS interviewed Hicham Nahro, who stated, *inter alia*, “[we] presented these findings [of suspected forgery] at the end of the mission to [the Applicant] and asked him to please answer the questions we had regarding these documents. However, [he] did not come up with straight answers to our questions and at the end of the conversation, he said that the former Country Representative (Mr. Mamadou Diallo) pressured him to do that.”

10. In the first DOS interview with the Applicant, on 7 June 2010, in respect to the procurement process in question, the Applicant stated that he had gone to the Chamber of Commerce and the bus station to get the names and telephone numbers of transport companies, had verified three or four companies, and had prepared invitations to bid. The Applicant further stated that the Country Representative, Mamadou Diallo, said that he knew of a company called Sahel Transit which he had worked with in Sierra Leone. So they contacted them and invited them to bid, and they decided that Sahel Transit was the best because they were based in Conakry and had a representative in Bamako, Mali.

11. The Applicant went on to explain that this was the first time that he had personally prepared invitations to bid—the administrative assistant who would normally have done it was on leave at the relevant time. The Applicant explained that they had asked to receive the bids by 24 December 2005 because they needed to provide the name and address of the successful company to Toyota Gibraltar, by 31 December 2005, in order to finalise a contract with the latter for the delivery of vehicles to Bamako. It was therefore urgent. The Applicant went on to state that on 24 December, in the presence of the Representative, he opened the sealed bids. He then prepared a table and a memo which was signed by the Representative, although at the time of the interview he was unable to locate these.

12. When asked why a Long Term Agreement had been made with Sahel Transit, the Applicant stated that the ultimate authority in the office was the Representative. When asked about the safeguards in place in relation to contracts of over 30,000 USD, the Applicant stated that in December 2005, he was not aware that the contract would be for more than that amount and in any event, the Representative had approved it. In fact, the Applicant told the investigators that everything he did was done under the orders of the Representative, Mr. Diallo, and that during his first years in the position he was under pressure from everyone: from staff and the Representative.

13. In the second DOS interview, on 8 June 2010, the Applicant informed the investigators that he had recalled that Mr. Diallo had sent an email to Toyota Gibraltar giving them the address of Sahel Transit before the completion of the bidding process. The Applicant stated that this behaviour was, to the Applicant, a form of psychological pressure and not very honest. Both interviews were written up by DOS and signed by the Applicant.

14. On 15 September 2010, 14, 22 and 23 October 2010, the Applicant submitted comments on the Report.

15. On 29 October 2010 the Applicant was charged with: (1) including three false documents purporting to constitute three vendor quotations in the procurement stream for a transports/logistics contract, in violation of UNFPA Financial Regulation 14.8(b) and UNFPA Procurement Procedure A.4; (2) failing to apply formal methods of solicitation in respect of the transport/logistics contract, in violation of UNFPA Financial Regulation 14.8(c), Financial Rule 114.14(a) and UNFPA Procurement Procedures C.1 and C.2; and (3) failing to refer the transport/logistics contract to the UNDP Headquarters Contracts Review Committee, in violation of UNFPA Financial Rule 111.11(b)(ii) and UNFPA Procurement Procedure A.9.4.2 (in force in 2007/8) and E.2.5.1.

16. On 24 November 2010, the Executive Director of UNFPA wrote to the Applicant and advised that:

You permitted “Sahel Transit” to receive business from UNFPA from 2006 to 2009 in the amount of US\$329,836...on the basis of a procurement process undermined by quotes from non-existent companies. Moreover, the procurement process was undermined by multiple regulatory violations. Importantly, you implemented the process in violation of basic procurement principles such as integrity, transparency and international competition, and you withheld the contract from any review by the competent contracts review committees although submission for such review was required.

[...]

On the one hand, I have considered that you claim that you failed to follow the applicable regulations, rules and procurement policies due to lack of knowledge and because, as you say, you supposedly followed orders from the former UNFPA Representative, Mr. Diallo. In this context, you also argued that your terms of reference include that you are subordinate to the UNFPA Representative as well as to programme officers or technical specialists. On the other hand, however, I have also considered that you deny the fact that the quotes you provided are from non-existent companies. As explained above, if it were true that the former UNFPA Representative had instructed you to violate the rules, it would have been your duty as the UNFPA Operations Manager in the [Country Office] to bring the alleged instructions so clearly in contravention of the regulatory framework on finance and procurement to the attention of the UNFPA Division for Oversight Services or another appropriate office...

17. The letter concluded by informing the Applicant that he was to be separated from service in accordance with staff rule 10.2 (vii), with compensation in lieu of notice.

Consideration

18. The role of the Tribunal in reviewing disciplinary cases is to examine the following:¹

a. Whether the facts on which the disciplinary measure was based have been established;

¹ *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; and *Maslamani* 2010-UNAT-028.

- b. Whether the established facts legally amount to misconduct under the Regulations and Rules of the United Nations;
 - c. Whether the disciplinary measure applied is proportionate to the offence; and
 - d. Whether there was a substantive or procedural irregularity.
19. As regards issue (a) above, in the case of *Molari* UNAT-2010-164 the Appeals Tribunal considered the issue of the standard of proof required in disciplinary cases. The Appeals Tribunal held that:
- ...when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.²
20. Thus it falls to the Tribunal to determine whether the evidence presented by the investigators in this case was ‘clear and convincing’ evidence of each of the three charges of misconduct on the part of the Applicant.

Charge No. 1 – The Applicant included three false documents purporting to constitute three vendor quotations in the procurement stream for the transport/logistics contract

21. This is said to violate UNFPA Financial Regulation 14.8 (b) and UNFPA Procurement Procedure A.4. Financial Regulation 14.8, as applicable in December 2005, states:

The following general principles shall be given due consideration in carrying out the procurement functions of UNFPA:

- (a) Best value for money considering all relevant factors, including costs and benefits to UNFPA;
- (b) Fairness, integrity and transparency;

² *Molari* UNAT-2010-164, para. 2, citing *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 27.

(c) Open and effective international competition; and

(d) The interest of UNFPA.

22. The UNFPA Procurement Procedure part A.4 sets out the procurement process to be applied: initiation through invitations to bid, evaluation of the bids, and awarding of the bid to the lowest quotation or bid. It is clear that producing a false set of bids would be in breach of these rules.

23. The evidence in this case is interesting. The Respondent bases his case primarily on the documents produced by the Applicant as quotations made by three companies – T.P.S. Transit, Matti-Sarl, and National Transit Bamako, which the Applicant provided to the investigators at their request in March 2010. The Respondent compares these to the quotation supplied by Sahel Transit—the selected company—and asserts that they are clearly fake.

24. Furthermore, the investigators made efforts to locate the three companies, and were unsuccessful. The investigators could not find anyone in Bamako who was able to confirm that these companies ever existed. The investigators visited the *Tribunal de commerce* in Bamako and could not find any record of the existence of these companies there, either. Therefore, says the Respondent, the companies never existed and the quotations are forged to suggest that a fair procurement process took place.

25. It does seem to this Tribunal that the documents produced by the Applicant—whether he created them or somebody else did, with or without his knowledge—do have the appearance of being fake. In the course of the hearing, the Tribunal heard from the investigator who went through the documents and explained the various ‘red flags’ that indicated forgery. For example, the witness highlighted that all three documents bore a striking similarity to one another, considering that they purported to emanate from three different companies. Further, they were numbered consecutively, even though, again, they were supposed to come from different companies. Finally, one of the documents was actually dated 2009. However, Paul Lucas, who headed the investigation, told the Tribunal that he was not able to ascertain when the documents were created, and the

evidence on file shows that a search of the Applicant's office computer showed no evidence of the creation of these documents. It did, however, show that the invitation to bid letters were created, as the Applicant says, on 15 December 2005.

26. The investigators told the Tribunal that they had been unsuccessful in tracing any evidence of the existence of the three companies, Matti-Sarl, National Transit Bamako, and T.P.S. Transit. The addresses given on the documents proved to be vague or non-existent areas, and a visit to the *Tribunal de Commerce* in Mali revealed that no such companies were registered. In fact, the information provided by the *Tribunal de Commerce* was that the register was not computerised, and that without a registration number, it could not confirm whether or not these companies existed.

27. It is also interesting to note that the company which was awarded the contract, Sahel Transit, was not traceable either, yet it does not seem to be disputed that the company *did* exist, and did carry out its part of the contracts it was awarded.

28. The suggestion made by the investigators, and subsequently the Administration, is that the contract was given straight to Sahel Transit, without any other company being invited to bid, without any fair bidding process at all, and that, when questioned about the Sahel Transit contract some five years later, the Applicant forged some offer letters and bids to make it appear as though the process had been properly conducted. The Tribunal finds that there are a number of circumstances which militate against this.

29. Firstly, the analysis of the Applicant's office computer shows that on 15 December 2005 offer letters were created on that computer and were addressed to the three companies, Matti-SARL, T.P.S. Transit, and National Transit Bamako. This suggests that the Applicant genuinely created the offer letters to the respective companies at the relevant time. It is exculpatory evidence that was brushed over by the investigation completely.

30. Secondly—and this was accepted by Paul Lucas, the chief investigator, and Counsel for the Respondent during the hearing—there was no evidence that the Applicant stood to gain financially by faking the bidding process. Despite that, under cross-

examination, Mr. Lucas admitted that he was convinced that the Applicant had committed a fraud. He also admitted that he had used the allegedly forged documents during a presentation in 2010 as examples of procurement fraud, in Australia. Though there is no evidence that the name of the Applicant was revealed at the seminar, the question remains whether it is advisable, ethical or proper to use materials that are subject to an investigation, for the purposes of a seminar or conference that is called to discuss procurement fraud.

31. Thirdly, the investigators and the Administration appear to have overlooked the fact that there were two rounds of bidding in which the relevant companies were involved – one in 2005 and one in 2009. The Applicant supplied three sets of bids to Mr. Nahro in March 2010 and a further three in October 2010 when he responded to the Report. These last three documents he had found amongst his personal records—the existence of which he had mentioned to the investigators earlier. Put together, the six bids (two each from Matti-SARL, T.P.S. Transit, and National Transit Bamako) include three dated December 2005 (but not the subject, apparently, of the charge), two undated, and one dated 2009. Logically, it would seem that the Applicant presented the 2009 bids in error to Mr. Nahro, believing them to be the 2005 bids. The Applicant said as much in his testimony to this Tribunal. It is too clumsy to be false.

32. Bearing in mind the standard of proof in disciplinary matters the Tribunal is not convinced that the documents alleged to be fake or forged are so. At the hearing the only evidence presented in an attempt to establish that the documents were fake or forged was the mere allegation of red flags without more. This in itself does not indicate that it is highly probable that the documents were actually fake or forged, though they may appear to be so. Conjuring the “may” approach simply goes against the well-established rule in matters of standard of proof.

Charge 2 – the Applicant failed to apply formal methods of solicitation in respect of the transport/logistics contract

33. According to the charge letter dated 24 November 2010, the issue here is that for the Sahel Transit contracts issued in 2006-2009, because their value was greater than USD 30,000, “formal methods of solicitation” should have been used. This charge of misconduct is said to violate UNFPA Financial Regulation 14.8, Financial Rule 114.14(a) and UNFPA Procurement Procedures C.1 and C.4.2.

34. UNFPA Financial Rule 114.14(a), as applicable in December 2005, states:

(a) The award of a procurement contract shall be made after due consideration has been given to the general principles described in Regulation 14.8 and in accordance with the following:

- (i) When a formal invitation to bid has been issued, the procurement contract shall be awarded to the qualified bidder whose bid substantially conforms to the requirements set forth in the solicitation documents and is evaluated to be the lowest cost to UNFPA.
- (ii) When a formal request for proposals has been issued, the procurement contract shall be awarded to the qualified proposer whose proposal, all factors considered, is the most responsive to the requirements set forth in the solicitation documents.

35. In charging the Applicant, it seems UNFPA relied on a later version of the Procurement Procedures than that in force in 2005-2008. However, the Procurement Procedures that did apply contain the same or similar provisions under different sections. In 2005-2008, the requirements in relation to higher value contracts are set out in sections A and B. Section A.6.2 states that “Procurement at a cost of more than USD 30,000 is subject to sealed competitive bidding” and goes on to describe the process in detail.

36. The Respondent accepts that the 2006 contract, since its value was less than USD 30,000, did not require sealed international bids. Therefore, the Respondent states, “the requests for quotations issued to T.P.S. Transit, Matt SARL, National Transit Bamako

and Sahel Transit...if they had truly been sent to these four vendors and if the vendors existed, would have sufficed as compliant solicitation documents.”³

37. The Applicant argues that in 2007-2009, whenever the Sahel Transit contract was renewed, he was specifically informed by the former Country Representative, Mr. Diallo, that as the Long Term Agreement had been concluded in 2006, it was not necessary to consult either of the Contracts Review Committees.

38. The Tribunal gives its findings in regard to Charge 2 at paragraph 42 below.

Charge 3 – failing to refer the contract to the UNFPA Headquarters Contracts Review Committee

39. This charge is said to be in violation of UNFPA Financial Rule 114.11(b)(ii) and UNFPA Procurement Procedure A.9.4.2 (in force in 2007/8) and E.2.5.1 (in force in 2009).

40. Financial Rule 114.11(b) deals with the establishment of review committees, and the sections of the Procurement Procedure referred to essentially stipulate that procurement for contracts worth more than USD 100,000 must be reviewed by the Headquarters Contract Review Committee. In 2007, the Sahel Transit contract was worth USD 117,241; in 2009, it was worth USD 116,359. Therefore, the Respondent argues that on two occasions the Applicant should have submitted the contract for review, and he did not.

41. The Applicant does not deny that these rules were not complied with. He asserts however, as he does in relation to Charge 2, that he is being unfairly blamed for the faults of his supervisor, Mr. Diallo. He states that he at all times acted under the instructions of Mr. Diallo, and cannot be blamed for not following the correct procedure.

42. Was the Applicant to blame for having followed the advice of the Country Representative, or should he have exercised a higher level of care and prudence and

³ Respondent’s Closing Submissions.

followed the established procedure relative to procurement and bids? Whilst a junior employee is entitled to follow or listen to the advice or instructions of a supervisor, he or she cannot be blind, more particularly, in such serious matters as procurement. Mr. Diallo may well have had his own reasons or agenda for the advice he gave to the Applicant and the latter may well have followed that advice in good faith. But given the nature of the functions he was occupying he took a big risk. It was his duty to comply with the rule personally, the advice of Mr. Diallo notwithstanding.

The conduct and responsibility of Mr. Diallo

43. Whilst he is not the subject of the present application, the Tribunal cannot help but remark upon the extraordinary unfairness in the prosecution of disciplinary proceedings against the Applicant, the Operations Manager, whilst the supervisor, the Country Representative, Mr. Diallo, appears to have escaped all inquiry, let alone sanction.

44. It was pointed out by Mr. Lucas in his testimony that there was no evidence of any personal gain to the Applicant in the granting of the contracts to Sahel Transit. It seems to this Tribunal that there is cause for suspicion that there may have been some gain on the part of Mr. Diallo. No investigation has been carried out into Mr. Diallo's conduct; he has not been disciplined, as far as this Tribunal is aware. Indeed, he has been given a top position in Eritrea with UNDP. It seems to this Tribunal that Mr. Diallo is escaping accountability by virtue of his move to UNDP, and that is something that cannot be condoned. The case of Mr. Diallo is hereby referred to the Secretary-General pursuant to Article 10.8, for investigation—the more so because the report of DOS indicated that there was evidence of gross negligence on the part of Mr. Diallo and recommended that the report be communicated to the UNDP Office of Audit and investigations as Mr. Diallo is presently the UNDP Resident Representative for Eritrea.

Conclusion

45. The Respondent was wrong to find the Applicant guilty of the first charge of misconduct as the evidence supporting the contention that the documents were false was not sufficiently convincing to meet the standard of proof required. However, in view of the Applicant's roles as Operations Manager and the importance of adhering to the proper procurement procedures, the Tribunal cannot fault the findings of the Respondent that the Applicant was guilty of charges 2 and 3. In the circumstances, the sanction of separation from service, whilst severe, was not unduly so, and the Application must therefore fail.

46. The Application is dismissed.

47. The case of Mr. Diallo referred to above in paragraphs 43-44 is referred to the Secretary-General for possible action.

(Signed)

Judge Vinod Boolell

Dated this 14th day of June 2012

Entered in the Register on this 14th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi