



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

Judgment No. 2013-UNAT-364

**Nyambuza
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Sophia Adinyira
Judge Luis María Simón

Case No.: 2012-412

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Ms. Nyambuza: Miles Hastie

Counsel for Secretary-General: Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/139, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 18 September 2012 in the case of *Nyambuza v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 16 November 2012, and Ms. Cathy Nyambuza filed her answer on 8 January 2013.

Facts and Procedure

2. Ms. Nyambuza began employment with the United Nations Observation Mission in the Democratic Republic of the Congo (MONUC) on 3 February 2004, as a Junior Clerk at the GL-2 level. In this role, Ms. Nyambuza was responsible for composing lists of Casual Daily Workers (CDWs) to be employed and giving those lists to Security for posting.

3. In late 2005 or early 2006, several CDWs made complaints against Ms. Nyambuza and other staff members in the Engineering Section (Section) of MONUC at Bukavu, alleging they had extorted money from CDWs to obtain and keep jobs (“money for jobs scheme”) with MONUC.

4. The Special Investigations Unit (SIU) conducted an investigation of these complaints. The two lead investigators (Mssrs. Jacinto Bala and Manfred Gruber) conducted interviews with all the complainants they could find, as well as the thirteen accused staff members, including Ms. Nyambuza. As to the allegations against Ms. Nyambuza, the SIU investigators interviewed three CDWs: Mr. Hussein Masudi, Mr. Kurhengamuzimu Lievain and Mr. Telesphore Bisho. Each of these CDWs wrote a statement in French describing the “money for jobs scheme” and implicating Ms. Nyambuza. Each statement contained the following introduction: “This statement (consisting of ___ pages, and signed by me) is true to the best of my knowledge. I make it voluntarily knowing that if I intentionally reveal false information, I may become liable to administrative or disciplinary action.”

5. Mssrs. Masudi, Lievain and Bisho each signed and dated their statements, which were then transcribed into English by a local staff member. Ms. Nyambuza was also interviewed and she, too, wrote a voluntary statement (in English), denying the allegations made against her.

6. The SIU issued a preliminary investigation report on 5 June 2006. The preliminary investigation report summarized the voluntary statements by many CDWs and the accused, and generally concluded:

Although... the proof and evidence of the personal receipt of the money collected cannot be established, the collective complainant letters submitted by the [CDWs] who readily and voluntarily stated in their complaint letters cannot be ruled out as false, artificial and fictitious complaints. Likewise, said complaints cannot be appraised as fabricated story lies because those workers were so afraid. ...

7. The preliminary investigation report recommended that “immediate administrative sanctions be instituted” against Ms. Nyambuza and other staff members “[i]n view of the gravity of the offense and the available, limited circumstantial evidence”.

8. Additionally, the preliminary investigation report made broad, general observations about the causes of the “money for jobs scheme” or extortion activities, and assigned the blame for it on the “mismanagement” of the Section and organizational “deficiencies”, including the “lack of manpower for supervision, incompetent personnel, excessive delegation for recruitment of CDWs and abuse of authority”.

9. On 30 August 2007, the preliminary investigation report was referred to the Office of Human Resources Management (OHRM).

10. On 12 November 2007, the Director, Division for Organizational Development, OHRM, sent Ms. Nyambuza a memorandum informing her that she was being charged with “misconduct on the basis that [she] improperly solicited and received monies from local citizens in exchange for their initial recruitment and continued service as United Nations staff” in violation of Staff Regulation 1.2 and Staff Rule 301.3. Copies of the preliminary investigation report and referral letter of 30 August 2007 were attached to the memorandum. Ms. Nyambuza was also advised that she could make a written response within two weeks of receipt of the memorandum.

11. On 30 November 2007, Ms. Nyambuza made a written response to the charges, denying the allegations against her.

12. On 2 May 2008, the Officer-In-Charge, OHRM, decided that the matter should be referred to an *ad hoc* Joint Disciplinary Committee (JDC) at MONUC, which was established on 13 July 2008. On 7 August 2008, Mr. Bisho wrote a letter recanting his allegations against Ms. Nyambuza, which was transmitted to the JDC.

13. The JDC held a hearing on 13 August 2008, at which Msrs. Masudi, Lievain and Bisho testified, as did Ms. Nyambuza. Counsel for the Secretary-General and Ms. Nyambuza were also present at the hearing. However, there is no transcript of the testimony adduced at the hearing.

14. On 9 October 2008, the JDC issued its report to the Secretary-General. In the report, the JDC summarized the witnesses' testimony and concluded that Msrs. Masudi and Lievain were credible witnesses. However, the JDC drew "no conclusions" from Mr. Bisho's testimony. Further, the JDC noted:

[T]here is no direct testimony beyond the statements of the three former CDWs of any payments to [Ms. Nyambuza], and no documentary circumstantial evidence in support of these statements. The foundation of the case therefore rests on the credibility of the three former CDWs versus the ... staff member's denial.

15. The JDC unanimously determined that "in the balance of probabilities the evidence supports the allegations that [Ms. Nyambuza] solicited and received payments from the three CDWs in exchange for recruitment and continued employment". Based on this determination, the JDC unanimously recommended that Ms. Nyambuza be separated from service.

16. On 6 November 2008, the Deputy Secretary-General sent Ms. Nyambuza a termination letter, advising her that the Secretary-General had accepted the conclusions and recommendation of the JDC and was separating her from service "without notice or compensation" under Staff Rule 110.3(a)(vii). The letter informed Ms. Nyambuza that the Secretary-General found her conduct in "solicit[ing] and receiv[ing] payments from the three CDWs in exchange for recruitment and continued employment" to be "inconsistent with the standard of integrity required for international civil servants and ... the severity of [her] misconduct [to be] incompatible with continued service in the Organization". A copy of the JDC report was attached to the termination letter. Finally, Ms. Nyambuza was advised that she could appeal the decision to the former Administrative Tribunal.

17. On 29 June 2009, Ms. Nyambuza filed an application with the former Administrative Tribunal, and the Secretary-General filed an answer on 18 December 2009. The case was subsequently transferred to the Dispute Tribunal.

18. The Dispute Tribunal held a hearing on 12 and 13 July 2011, at which testimony was taken from Ms. Nyambuza and Mr. Bala, one of the SIU investigators. On 11 August 2011, the Secretary-General filed a motion to reopen the proceedings to take testimony from Mr. Bisho, who was previously not available. Ms. Nyambuza filed an opposition to the motion. On 22 August 2011, the UNDT granted the motion to reopen the proceedings, and direct testimony was taken under oath from Mr. Bisho by teleconference on 13 December 2011. Mr. Bisho failed to return to the hearing for cross-examination on 14 December 2011.

19. On 18 September 2012, the UNDT issued Judgment No. UNDT/2012/139, which concluded that “[t]he sanction of summary dismissal was based on unsubstantiated charges”. Based on this conclusion, the UNDT, *inter alia*, rescinded Ms. Nyambuza’s summary dismissal and reinstated her in the service of MONUC or the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) “with retroactive effect” or, alternatively, ordered compensation in lieu of reinstatement in the amount of two years’ net base salary.

Submissions

The Secretary-General’s Appeal

20. The UNDT made an error of law in concluding that two witnesses before the JDC, Mssrs. Masudi and Lievain, were “untested” and the Secretary-General could not rely on their testimony. Rather, their testimony was “tested” since Ms. Nyambuza was present at the hearing before the JDC and had an opportunity to cross-examine them and to offer rebuttal evidence.

21. The UNDT erred in not accepting the testimony of Mssrs. Masudi and Lievain due to the failure of the Administration to produce them at the hearing before the UNDT. Article 16(2) of the UNDT Rules of Procedure provides that a hearing shall “normally” be held following an appeal of a disciplinary action. The use of the word “normally” means that the witnesses need not be present and orally examined in every case.

22. The UNDT erred in concluding that Ms. Nyambuza had not been interviewed as part of the SIU investigation and, thus, the Secretary-General should not have relied on the SIU investigation report. Ms. Nyambuza was interviewed as part of the SIU investigation. Accordingly, this is not a ground for finding the SIU investigation report was flawed.

23. The UNDT erred in concluding that the Secretary-General relied on the SIU investigation report as a basis for the disciplinary action; he relied solely on the JDC report. The JDC took evidence from Ms. Nyambuza and the CDWs and reached its own conclusions. Any flaws in the SIU investigation were resolved by the JDC process.

24. The manner in which the Organization was required to conduct its investigation is set forth in ST/AI/371, entitled “Revised Disciplinary Measures and Procedures”, which establishes three stages to an investigation. First, the preliminary investigation is conducted; second, the staff member is advised in writing of the charges and given an opportunity to respond and to produce countervailing evidence; and third, the case is referred to the JDC to provide advice to the Secretary-General, who makes the final decision. These procedures were fully complied with in Ms. Nyambuza’s case. In fact, the UNDT did not find that Ms. Nyambuza’s due process rights were violated by the Organization during the investigation process.

Ms. Nyambuza’s Answer

25. The UNDT’s characterization of the testimony of Mssrs. Masudi and Lievain as “untested” is correct. There is no evidence that an oath was administered to witnesses testifying before the JDC panel, and there is no transcript or notes of their testimony. Further, since no proof of the witnesses’ identities was required, it is not at all clear that the individuals who appeared before the JDC were the complainants. Finally, the Secretary-General’s claim that Ms. Nyambuza had an opportunity to cross-examine the complainants before the JDC is speculation that is not supported by evidence in the record. For all these reasons, “untested” is a fair characterization of the testimony of Mssrs. Masudi and Lievain.

26. The UNDT did not err in finding that Ms. Nyambuza was not interviewed during the SIU investigation. Although Ms. Nyambuza signed a short, one page voluntary statement, that statement does not qualify as an interview. In any event, the UNDT’s comments that Ms. Nyambuza was not interviewed are not significant since the UNDT did not find any due

process violations occurred during the investigation process. Therefore, this claim is merely “academic”.

27. The UNDT correctly concluded that the Secretary-General relied, in part, on the SIU preliminary investigation report in terminating Ms. Nyambuza’s service. In any event, the UNDT’s comments about the SIU report are not significant since the UNDT did not find any due process violations occurred during the investigation process. Therefore, this claim is merely “academic”.

28. The Secretary-General’s claims on appeal do not address the ultimate issue: whether clear and convincing evidence of Ms. Nyambuza’s misconduct was produced before the UNDT. Even the JDC did not find clear and convincing evidence of misconduct; it applied a lesser standard of proof.

29. The Secretary-General’s claims on appeal address erroneous factual findings made by the UNDT, rather than procedural error. For erroneous factual findings to be a ground for reversal, the factual findings must result in a “manifestly unreasonable” decision. The UNDT’s decision is not “manifestly unreasonable”.

Considerations

30. Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration.¹ In this context, the UNDT must “examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”.²

31. “[T]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.”³ When

¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

² *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018.

³ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

termination is a possible sanction, the “misconduct must be established by clear and convincing evidence,” which “means that the truth of the facts asserted is highly probable”.⁴

32. The pending appeal focuses on the first prong of the requisite legal analysis: whether the “facts on which the sanction is based have been established”. The UNDT found the facts had not been established by clear and convincing evidence. This Tribunal agrees, albeit for different reasons than proffered by the UNDT.

33. As the UNDT (and the JDC) noted, the only evidence against Ms. Nyambuza was from the three CDWs, Mssrs. Masudi, Lievain and Bisho; there was no documentary evidence. The evidence from the three CDWs included their written statements made during the SIU investigation, their testimony before the JDC, and Mr. Bisho’s direct testimony before the UNDT. On appeal, the Secretary-General challenges the UNDT’s treatment of the evidence from Mssrs. Masudi and Lievain; he does not challenge the UNDT’s treatment of Mr. Bisho’s evidence.⁵

34. The UNDT determined that the evidence from Mssrs. Masudi and Lievain had “little probative value” because these witnesses did not appear before the UNDT and were not subject to cross-examination. This rationale is not correct as a matter of law under our jurisprudence in *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 (full bench).⁶ Nevertheless, the UNDT’s determination that the evidence had “little probative value” is correct, for the reasons discussed below.

⁴ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

⁵ The UNDT found:

Mr. Bisho has proven to be an unreliable witness. He 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. ... [T]he evidence tendered by Mr. Bisho is inadmissible and has no probative value.

In light of the inconsistencies in Mr. Bisho’s testimony and his recantations, as well as his failure to appear for cross-examination, the UNDT could properly have found that he was not a credible or reliable witness and, accordingly, given no weight to his testimony.

⁶ We noted in *Applicant*, that the Administration may be unable to produce witnesses at hearings held years after the alleged events, especially when those witnesses are not staff members. The events underlying Ms. Nyambuza’s alleged misconduct took place in 2004 and 2005 – six years before the UNDT hearing. The CDWs were casual workers from other countries, who were temporarily living in the Democratic Republic of the Congo; they were not regular staff members of the Organization.

35. Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member.⁷ When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.⁸

36. The written statements signed by Mssrs. Mahudi and Lievain during the SIU investigation are lacking indicia of reliability or truthfulness. First, the statements were written in French; but the averment of truthfulness was in English, and the witnesses may not have been able to read English. Second, under the English averment of truthfulness, each witness merely made the representations that the statement was “true to the best of [his] knowledge” and “if [he] intentionally reveal[ed] false information, [he] may become liable to administrative or disciplinary action”. These representations are significantly different than those required under Article 17(3) of the UNDT Rules of Procedure (UNDT Rules).⁹ The phrase “to the best of my knowledge” is problematic and, since neither Mr. Mahudi nor Mr. Lievan was a staff member at the time he gave the written statement, the possibility of administrative or disciplinary action offered little assurance of the witness’s truthfulness.¹⁰

37. Since there is no transcript of the evidence taken before the JDC, this Tribunal cannot determine whether Mssrs. Masudi’s and Lievain’s testimony was reliable or truthful. Without a transcript, we have only the JDC report’s summarization of the witnesses’ testimony. Such summarization is merely hearsay, which may properly be found to have “little probative value” when it does not corroborate competent evidence.

38. As this Tribunal has stated:

... [T]he notion of justice and fair trial mandates that witness statements shall form part of the case records. This is particularly important if the Judgment is appealable and heavy reliance has been placed on what the witnesses said before the [JDC].

...

... While appraising the testimony of a witness, this Tribunal is entitled to examine the complete statement of the witness in order to form a balanced view on his

⁷ *Applicant, ibid.*

⁸ *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

⁹ Article 17(3) requires that each witness state: “I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.”

¹⁰ *Azzouni, ibid.*

or her credibility before deciding whether the evidence can be accepted. This cannot be done in the absence of the written record. Therefore, there has been a grave error of procedure.¹¹

It is the responsibility of the Administration to assure that a transcript of the proceedings before the JDC can be provided to the Appeals Tribunal, if requested; the Administration was unable to do so.

39. The quality of the Administration's evidence is not saved by the findings and conclusions of the JDC. The JDC panel, who observed the demeanor of Mssrs. Masudi and Lievain, found their testimony established the facts underlying Ms. Nyambuza's alleged misconduct on "the balance of probabilities." This standard of proof is considerably less than the clear and convincing evidence standard required for dismissal of a staff member.¹²

40. This Tribunal finds, for the foregoing reasons, that the UNDT correctly concluded that the Administration did not establish by clear and convincing evidence that Ms. Nyambuza "solicited and received payments from the three CDWs in exchange for recruitment and continued employment".¹³ Accordingly, the UNDT's Judgment should be affirmed and the Secretary-General's appeal should be dismissed.

Judgment

41. Judgment No. UNDT/2012/139 is affirmed and the appeal is dismissed.

¹¹ *Finniss v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-210, paras. 34 and 39.

¹² *Applicant, ibid; Molari, ibid.*

¹³ In light of this conclusion, it is not necessary to address the Secretary-General's other claims of procedural error, which even if meritorious, would not affect the Judgment.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar