



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

IGUNDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Seth Levine, OSLA (appeared at the request of the Tribunal)

Counsel for Respondent:

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Facts

1. The Applicant is a Supply Clerk at the GL-3 level with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”).

2. In January 2008, MONUSCO received a report of suspected theft of MREs (“Meals Ready to Eat”). The Applicant was interviewed during the investigation by MONUC (as it then was) Security, as he and another staff member were allegedly involved in transporting a shipment of MREs to MONUC’s Bukavu Headquarters. The investigation report was completed on 12 March 2008 and 10 April 2010 [BUK/SEC/08/017] concluding that “204 packets of MONUC MREs were found in the custody of non-MONUC person(s) who claimed they were bought from a MONUC driver and another accompanying person. Evidence circumstantially point the [Applicant and another].” The recommendation was to tighten security with regard to transportation. No disciplinary proceedings were instituted against the Applicant in connection with this investigation.

3. The performance ratings given to the Applicant in his performance appraisals (“e-PAS) since 2006 are as follows:

- a. 2006/2007 - Fully successful performance.
- b. 2007/2008 - Partially meets performance
- c. 2008/2009 - Fully successful performance
- d. 2009/2010 - Partially meets performance expectations
- e. 2010/2011 - Does not meet performance expectations

4. The Applicant’s performance rating of “partially meets performance expectations” for 2007/2008 was disputed by the Applicant; however a Rebuttal

Panel confirmed the rating. The 2009/2010 performance rating of “partially meets performance expectations” was not challenged by the Applicant.

5. During the 2010/2011 performance cycle, the Applicant’s First Reporting Officer (FRO) identified shortcomings in the Applicant’s performance and took action to remedy his shortcomings. A Performance Improvement Plan (PIP) for the period from 1 October to 31 December 2010 was put in place in accordance with ST/AI/2010/5 (Performance Management and Development System). The PIP identified four goals and associated success criteria.

6. On 15 December 2010, the Applicant’s performance was reviewed under the PIP. The Applicant’s FRO commented that “[o]verall the performance did not meet the expected mark and failed in achieving the goals specifically”.

7. A second performance improvement plan was put in place, which covered the period from 1 January 2011 to 31 March 2011. The second PIP identified three goals and associated success criteria. In February 2011, an investigation report was completed following a report that the Applicant forged the signature of his supervisor on loan documents. No disciplinary proceedings have been commenced against the Applicant in connection with this matter.

8. Effective 1 April 2011, the Applicant’s fixed-term appointment was extended for a period of three months, to 30 June 2011. On 13 April 2011, the Applicant’s FRO reviewed the Applicant’s performance under the second PIP and concluded that he had failed in his goals and had not improved from his previous PIP.

9. On 15 April 2011, the Applicant was given a further performance appraisal for the period from 1 January 2011 to 31 March 2011. His FRO gave a performance appraisal rating of “does not meet performance expectations”, and recommended that the Applicant’s contract not be extended. Also on 15 April 2011, a progress evaluation report was completed with respect to the two performance improvement plans, covering the six-month period from 1 October 2010 to 31 March 2011. The FRO gave an overall progress rating of “did not improve performance”.

10. On 16 May 2011, the Applicant signed off on his e-PAS for 2010/2011 (covering the year from 1 April 2010 to 31 March 2011). The Applicant's performance rating was "does not meet performance expectations". On 25 May 2011, the Applicant submitted a rebuttal statement in which he disagreed with the performance rating in his 2010/2011 e-PAS.

11. On 31 May 2011, the Chief, Civilian Personnel Officer ("CPPO") advised the Applicant that his contract would not be extended beyond 30 June 2011. Later, the Applicant's appointment was extended for one month, to 31 July 2011, to enable the rebuttal process to be completed.

12. A rebuttal panel was established, and in its report dated 13 July 2011, the panel concluded that it did not find any compelling reason to revoke the current e-PAS evaluation or recommendations of the Applicant's current supervisors.

13. On 15 July 2011, the CPPO advised the Applicant that the rebuttal panel agreed that the performance rating for his 2010/2011 e-PAS should remain the same. On 27 July 2011, the Applicant filed this Application seeking a suspension of action of the decision not to renew his appointment beyond 31 July 2011.

14. On 29 July 2011, the Respondent filed a response to the Application arguing that the Applicant had failed to clearly identify the grounds or the evidence he relies upon for his Application. On the same date, the Tribunal held a hearing with the Applicant and Counsel for Respondent to ascertain the facts of this case and to seek clarification of the Applicant's submissions which were found to be vague.

15. The Tribunal subsequently issued Order No. 082 (NBI/2011) suspending the implementation of the decision until 5 August 2011 and for the Applicant's suspension of action Application to be submitted in a more articulate manner by a representative from OSLA.

16. On 2 August 2011, the Applicant filed the amended Application for suspension of action. The Respondent submitted a Reply on 4 August 2011.

17. The Tribunal held a hearing based on these amended submissions on 5 August 2011 and heard oral testimony from the Applicant and Seyed Mohammed Moulana, the Applicant's FRO.

The Applicant's Case

18. The Applicant's case as per his amended Application and his oral testimony is summarized below:

19. He joined MONUSCO full-time in 2006 and worked in the Ration and General Supply Section. His involvement with MONUSCO began with casual daily work in 2003 before receiving a National Staff post. In 2008, he was promoted from GL-2 to GL-3 based on his good performance. There was no suggestion of unsatisfactory performance or any questions raised about his integrity in his 2006-7 e-PAS. Although there is mention of an allegation in his 2008-9 e-PAS, it was merely a pending matter and again there were no problems raised in respect of performance. In 2009, he was short-listed for an FS-4 role with the United Nations Missions in Sudan ("UNMIS").

20. In 2008, the Applicant was accused of theft relating to MREs. He maintained that in relation to that allegation and all other suggestions of impropriety, he was innocent. He further stated that no disciplinary proceedings had ever been concluded in relation to any alleged wrongdoing (although it is suggested by his FRO in his 2011 e-PAS that in respect of one allegation, there has been a formal finding of guilt).

21. The assessment that his FRO made in his 2010-2011 e-PAS was not an accurate representation of his conduct and performance. His problems began with the unjustified allegation of theft in relation to the MREs. Once his character and integrity was called into doubt, the suspicions of the MONUSCO Administration seemed to all alight on him.

22. It was within this context that Seyed Moulana (Bukavu Officer-in-Charge of the Supply Section) became the Applicant's FRO in June 2009. Seyed Moulana made

it clear to him from the outset that he did not want him to remain a part of MONUSCO. Moulana announced to others, including staff representative, Deddy Furume, that he intended to ensure that the Applicant would not remain in MONUSCO supply under his management. This animosity directed towards him by Moulana began to be echoed by others within MONUSCO, culminating in the sudden and dramatic decline in his appraisals.

23. In respect to the requirement of unlawfulness, the Applicant submits that the allegations of performance shortcomings are entirely without foundation. Specifically, the Applicant avers that he is well-versed in the use of the Galileo system which he has been using since 2003. An allegation in respect of a lost Supply Request Registry Logbook is another example of a malicious lie concocted by Moulana. The book in question was in fact in the custody of Moulana. The Applicant had the Logbook in his custody for three years and had never lost it.

24. The e-PAS appraisals conducted by Moulana do not reflect poor performance but rather his and others' desire to drive the Applicant out of MONUSCO. Having failed to do so through disciplinary proceedings, they are now manufacturing poor performance as an excuse to get rid of somebody they unfairly characterized as a bad apple. The key actors in MONUSCO who are seeking to drive him out have done so in the manner described because they know that were he to be afforded due process in relation to the allegations against him, they would fail to achieve their goals.

25. When he came back from leave on 13 September 2009, he was put on a Performance Improvement Plan (PIP). He also found other changes in his office such as the seating arrangement. His seat was now facing a wall unlike other staff members. There was also a surveillance camera mounted to monitor his usage of his computer and his movements.

26. The allegations contained in his e-PAS appraisals that he stole MREs and forged his supervisor's signature are false. It is also a false allegation that he threatened his FRO.

27. In respect to the element of urgency, he was due to be separated on 31 July 2011 and the MONUSCO Administration had attempted to enforce his separation and prevent him from being paid his July salary as well as access to the MONUSCO offices despite there being in place a suspension of action order from this Tribunal.

28. In respect to irreparable harm, the Applicant submits that should the MONUSCO Administration enforce the separation, it will still be on the basis of poor performance and the unproven allegations. The damage to his reputation as well as his career prospects cannot be remedied by a monetary award. Further, the Administration is seeking to characterize him as dishonest in breach of due process. If the decision is allowed to stand, he will be unfairly tainted without having been found guilty. He will also lose the prospect of applying for jobs within the United Nations as an internal candidate.

Respondent's Case

29. The Respondent's case is summarized below:

30. When a staff member holding a fixed-term contract obtains the lowest rating of "does not meet performance expectations", the Administration is entitled not to renew the staff member's contract on the ground of under-performance alone. The requirement of *prima facie* unlawfulness is met if there are serious and reasonable doubts about the lawfulness of a contested decision. The Applicant has failed to discharge his burden of establishing that the decision not to renew his appointment is *prima facie* unlawful.

31. The decision not to renew the Applicant's appointment beyond 31 July 2011 was based on unsatisfactory performance. Under section 10.3 of ST/AI/2010/5, non-renewal of an appointment is one of the administrative actions which may ensue as a result of unsatisfactory performance. The Applicant has performed unsatisfactorily in three e-PAS cycles. The decision not to renew the Applicant's appointment for unsatisfactory performance was taken only after the 2010/2011 e-PAS was completed.

32. On 1 April 2010, the 2010/2011 e-PAS period commenced. After the Applicant's FRO identified shortcomings in his performance, a PIP was established under Section 10.1 of ST/AI/2010/5. In this case, two PIPs were established covering a total period of six months (from 1 October 2010 to 31 March 2011). The plans identified the Applicant's performance shortcomings and the required action to improve his performance.

33. The Applicant's performance did not improve under both PIPs. As a consequence, the Applicant's performance rating for 2010/2011 was "does not meet performance expectations". The Applicant sought to rebut the performance rating. Pursuant to section 15 of ST/AI/2010/5, a Rebuttal Panel was convened to review the Applicant's case. The Panel comprised of three staff members of MONUSCO. The panel interviewed the Applicant's two reporting officers, a former reporting officer, the Applicant and three of the Applicant's colleagues who were acquainted with his work.

34. The Panel did not find any compelling reason to revoke the current e-PAS evaluations of the Applicant's current supervisors and also concluded that "besides his dismal performance, issues relating to his integrity seem to make him an unsuitable candidate for supply work given the sensitivities of the job".

35. Given the confirmation by the Rebuttal Panel of the Applicant's performance rating of "does not meet performance expectations", the non-renewal of the Applicant's appointment for unsatisfactory performance was lawful. The Applicant has failed to proffer any evidence to show that the impugned decision was based on an improper purpose.

36. The Respondent rejects the Applicant's assertions that the PIPs, e-PAS process and rebuttal process were a charade. The documentary evidence shows that the MONUSCO Administration followed the procedures under ST/AI/2010/5 in good faith to address the Applicant's shortcomings by establishing two performance improvement plans.

37. The Rebuttal Panel independently and objectively reviewed the Applicant's performance rating. The panel was made up of three independent staff members. The panel interviewed the Applicant, his two reporting officers, a former reporting officer, and three of the Applicant's colleagues. In its report, the Rebuttal Panel made detailed findings regarding the Applicant's performance. The findings reveal that the Panel carefully weighed the evidence of the witnesses and took care to find corroborating statements to support the contentions of the Applicants' reporting officers.

38. There was ample evidence to show that the Applicant's performance was problematic. The Panel made the following findings:

- a. The Applicant lacked skills in performing inventories using the Galileo system, which was a basic requirement for his position and he made no progress in improving those skills;
- b. Despite two PIPs and coaching, the Applicant made no improvement;
- c. The Applicant made mistakes in loading and off-loading;
- d. The Applicant had "roaming tendencies", which indicated a lack of assiduity in his functions; and
- e. The Applicant lacked a sense of accountability as he failed to report the loss of a Logbook to his supervisor or to MONUSCO security.

39. The Rebuttal Panel confirmed the Applicant's performance rating of "does not meet performance expectations". Following the completion of the rebuttal process under ST/AI/2010/5, the decision to not renew the Applicant's appointment due to unsatisfactory performance was lawful. The Applicant has not put forward any cogent evidence that the decision was not due to unsatisfactory performance.

40. The Applicant asserts that his problems began with the unjustified allegations of theft of MREs. The Applicant attributes the desire to drive him out of MONUSCO

to his first reporting officer and unnamed “others” and “key actors” within MONUSCO. In support of his assertions, the Applicant makes various allegations in his amended Application. These allegations are false:

- a. The Applicant was not promoted in 2008 for good performance, but as a result of a mission-wide promotion for all national staff;
- b. The Applicant’s FRO denies he made the statements that he is alleged to have made to the Applicant and others; and
- c. There was no sudden dramatic decline in the appraisals of the Applicant from 2009. In 2007/2008, the Applicant was given a performance rating of “partially meets performance expectations”, which was confirmed after a rebuttal process.

41. No disciplinary proceedings have been commenced against the Applicant under ST/AI/371 (Revised Disciplinary Measures and Procedures) in connection with the possible theft of MREs or any other allegations. In the e-PAS records for 2009/2010 and 2010/2011, the reporting officers do refer to investigations involving the Applicant. These references were made in the context of other detailed comments concerning his performance shortcomings.

42. The independent Rebuttal Panel referred to the investigations against the Applicant in its report. However, these references are made in the context of findings identifying numerous performance shortcomings. The Rebuttal Panel confirmed the performance rating given to the Applicant by his reporting officers. Accordingly, there is no cogent evidence put forward by the Applicant to support his contention that the decision was taken to drive him out of MONUSCO, having failed to do so through disciplinary proceedings.

43. The assertions advanced by the Applicant to challenge the lawfulness of the decision do not stand up to scrutiny in light of the evidence before the Tribunal. The evidence shows that the decision is *prima facie* lawful. The documentary evidence

indicates that all the relevant procedures under ST/AI/2010/5 were duly followed. The Applicant has not proffered any evidence to support his contention that the decision was based on an improper purpose. The Applicant's performance shortcomings are well documented, spanning three performance cycles. The MONUSCO Administration acted properly when it decided not to extend the Applicant's appointment once it became clear that his performance had not improved. Accordingly, the Respondent submits that the Applicant has failed to discharge the burden of persuading the Tribunal that the decision is *prima facie* unlawful.

44. The Applicant has not established that he will suffer irreparable harm upon implementation of the decision. In his amended Application, the Applicant contends that the damage to his reputation, as well as his career prospects cannot be remedied by a monetary award alone. He argues that he will be characterized as dishonest and that he will be unfairly tainted, without having been found guilty. This argument has no basis as the decision is based on unsatisfactory performance, not allegations of misconduct.

45. The Applicant also contends that if he is separated, he will lose the prospect of applying for jobs as an "internal candidate". This argument has no merit, because under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference.

46. Any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages. The Applicant has therefore failed to meet his burden of establishing that he would be irreparably harmed in the event his Application for suspension of action is not granted.

47. The Applicant's delay in filing this Application for suspension of action demonstrates that the Application is not urgent. The Applicant states that he was informed of the decision on 22 July 2011. The Applicant has failed to satisfy the element of urgency under art. 2.2 of the Statute of the Dispute Tribunal.

48. In view of the foregoing, the Respondent requests that the Tribunal should reject the Application in its entirety.

49. During the oral hearing of this Application, the Tribunal received testimony via teleconference from the Applicant's FRO. The following is a summary of the testimony:

a. The Applicant failed to meet performance standards and did not improve after the implementation of the PIPs. The Applicant took no responsibility for a container he was responsible for in respect to discrepancies detected but instead blamed a United Nations Volunteer working with the Supply Section. He also failed to maintain the relevant databases.

b. The Applicant failed to account for materials handed over to him. Even with basic tasks, the Applicant failed to meet the required standard. There were always discrepancies found in respect to the Applicant's responsibilities when quarterly inventories of materials were done.

c. Despite the numerous attempts to show the Applicant his mistakes, he failed to improve.

d. He received numerous complaints were received from clients about the Applicant. Clients were unable to collect items because the Applicant was never around, he did not respect time and during one incident, he behaved irrationally due to alcoholic intoxication.

e. The Applicant had threatened the life of the FRO in April 2011 after the rebuttal process. He reported the incidents to the Security Section who beefed up his security and gave him security advice.

f. When he took over as the Applicant's FRO, the former FRO of the Applicant, during handover, informed him of the allegations and their

respective reports made against the Applicant. He however kept an open mind despite being aware that these on-going investigations.

g. He had never taken the Supply Request Logbook as alleged by the Applicant.

Considerations

Is the Contested Decision unlawful?

50. The Applicant's case is that the performance appraisal process was vitiated by the unproven allegations of misconduct against him being used as an integral part of his evaluation. The Applicant argues that the performance appraisals were a charade. The Respondent's case is that unsatisfactory performance is a lawful basis for non-renewal of a fixed-term appointment in accordance with ST/AI/2010/5 and that there were numerous measures put in place to improve the Applicant's performance to no avail.

51. The Tribunal has carefully considered the Parties' oral and written submissions and testimonies. During the reporting period for 2009/2010 and 2010/2011, the Applicant's performance appraisals were assessed by Mr Moulana, the FRO at the time. It is noteworthy that the unfavourable e-PAS reports for those periods made numerous references to "on-going investigations" against the Applicant, which at the time had been concluded and investigation reports made.

2009/2010 Performance Appraisal

52. In the 2009/2010 e-PAS, the Applicant's FRO commented as follows under the section for 'Comments on Values and Competencies':

The S/M is still in development stage in his integrity. Investigation still progressing on the case of CRP (sic) theft reported in 2008 (REF#BUK/SEC/08/017) by Security Section Bukavu. He has been clearly explained to raise his integrity during the next cycle. Professionalism is in developing stage. The S/M needs to be directed and

followed up on tasks and responsibilities including those which are routine. He needs to be supervised closely to get satisfactory results...

The S/M is been employed in limited tasks in Supply where supervision is not required. Due to the ongoing investigation (REF#BUK/SEC/08/017), he cannot be reliably placed in the store to carry out routine tasks. It is recommended he should be given short term contracts due to the pending Investigation and during each renewal his performance should be reviewed.

2010/2011 Performance Appraisal

53. In the 2010/2011 e-PAS, the Applicant's FRO again commented as follows:

The staff member's integrity is seriously questioned. In addition to the existing case of MRE theft (Ref #BUK/SEC/08/017) he was also caught for fraudulent use of his Supervisor's signature for financial benefit. Security has concluded the case (Ref: #BUK/SEC/11/001) and he has been found gross negligent. His professionalism is well below the expectation and time and again he has been found to bring disrepute to the Section and Organization.

[...]

Two cycles in a row (2009/2010 and 2010/2011) he has failed to perform. In 2007/2008 cycle his contract was not recommended for extension. In addition to the existing case for theft (Ref #BUK/SEC/08/017), he was also found fraudulently using his Supervisor's signature for financial benefit (Ref: #BUK/SEC/11/001)...His unannounced absenteeism and disappearance from office during working time is another issue which has hampered operations. At best his performance is below average if not very well below average. He is neither suitable to work in Clerical function not in a Warehouse environment due to his accountability issue. He has not shown Team spirit in disposal of his duties and on occasions he is suspected to be under the influence of alcohol. Since he has failed in all opportunities that was presented to him for improved performance and make good his Integrity issues, I strongly recommend that his contract should NOT be extended anymore.

Rebuttal Process

54. Under Section 15 of ST/AI/2010/5 (Performance Management and Development System), a staff member who disagrees with a poor performance rating at the end of the performance year may initiate a rebuttal of the said rating. Section 15.4 provides that when a Rebuttal Panel is constituted it shall review the case and shall prepare a report on why the original rating should or should not be maintained. In

the instant case, the Rebuttal Panel report dated 14 July 2011 made, somehow disturbingly, numerous references to the investigations that had been previously conducted on the previous allegations of theft and forgery against the Applicant. Part of the Rebuttal Panel's Report read as follows:

2.5 The Panel further requested personnel to make available to it the concluded investigations of cases against the staff member alluded to in his E-pas as compromising his integrity. The Panel therefore received and read the investigations on the staff members implication in MONUC MRE's theft reported in 2007 and investigated in 2008; and also had available from HR reports pertaining to an alleged signature fraud by staff member to secure a bank loan. The investigated reports are attached to the current report as annex C...

3.3 As pertains to integrity and accountability, the Panel found that the staff member had serious problems with his integrity and accountability, having been implicated in MREs theft in 2007. He had been assigned to collect MRE's with a driver from the airport. Upon the return leg of the journey after several hours on the way he dropped off mid-way and purportedly went home. He left the driver to continue with the products to HQ alone and never off loaded the truck until two days after. He gave the panel a different representation which he never alluded to during the investigation of the case stating that his former supervisor gave him two assignments at the same time which is why he had allegedly dropped off to load up a truck with water at the Chinese base. These facts of having been given dual assignments by his supervisor at the same time were never presented before to the investigators and cannot be verified as the supervisor in question is no longer in service with MONUSCO. He also did not off load the truck until two days after because he claimed he had other more urgent assignments. The panel however again noted the lack of assiduity in performing this particular assignment and which may have created room for the products to be tampered...

4.3. Also, besides his dismal performance, issues relating to his integrity seem to make him an unsuitable candidate for supply work given the sensitivities of the job.

55. Part of the Rebuttal Panel's conclusions were that "it was clear that his two supervisors no longer wanted to work with him on account of his dismal performance and unreliable character...besides his dismal performance, issues relating to his integrity seem to make him an unsuitable candidate for supply work given the sensitivities of the job."

Were the investigations with regard to allegations of the theft and forgery against the Applicant relevant in his performance appraisals?

56. It is crystal clear that the matter of earlier allegations of theft of MREs in 2007 and forgery in 2010 on which the investigations were said to have been concluded played a prominent, in fact a central role in the performance appraisal ratings of the Applicant. Even the Rebuttal Panel went to great lengths to re-state the theft allegations and conduct what amounted to another investigation on it as evidenced in paragraph 3.3 of the report reproduced above. Should this have been the case? Certainly not!

57. The said Rebuttal Panel appeared also unfortunately to have launched into an investigation of the forgery of signature allegations. The proper procedure for dealing with allegations of misconduct is well spelt out in ST/AI/371 (Revised Disciplinary Measures and Procedures). Performance appraisals cannot take the place of disciplinary proceedings which ought to be instituted where a strong case of misconduct or serious misconduct has been made out against a staff member. In this instance the performance appraisals for 2010/2011, on which the decision not to renew the Applicant's contract is said to have been based, was heavily tainted with irrelevant considerations and assessments. An investigation report, without more, cannot be relied upon to evaluate a staff member's integrity.

58. It was still up to the ASG/OHRM to present or not to present the Applicant with formal charges and follow through the disciplinary process if considered necessary. Even the rebuttal process became sullied for its resort to examining and inquiring into misconduct allegations. Similarly, the oral evidence of the FRO that the Applicant had threatened his life points to criminal conduct for which the disciplinary process ought to be considered.

59. In view of the preceding, the Tribunal makes the following findings:
- a. The decision not to renew the Applicant's appointment was informed by his e-PAS ratings which in turn were heavily influenced by investigations into allegations against him.
 - b. The Rebuttal Panel's Report was also influenced by the investigations into allegations against the Applicant (see for example the Rebuttal Panel's conclusion at para. 34 above).
 - c. There is evidence of bias and discrimination against the Applicant such as the installation of a security camera to monitor his activities. This evidence was not rebutted by the Respondent. The e-PAS reports show that the investigations into allegations against the Applicant weighed heavily on the FRO's mind.
 - d. The PIPs were implemented and reviewed by the same FRO who had demonstrated bias and discrimination against the Applicant.
 - e. The fact that the investigations were utilized as a basis for his e-PAS and in the Rebuttal Panel's report represents a gross violation of the Applicant's due process rights as spelt out in ST/AI/371 and this is *prima facie* unlawful.
 - f. It is disingenuous for the Applicant's FRO to purport to base the decision not to renew the Applicant's appointment on performance shortcomings when evidently the real reasons were the allegations against the Applicant.
 - g. The presumption of innocence is a fundamental principle of natural justice. An accused person is presumed innocent until proven guilty in accordance with the requirements of due process. In this case the Applicant's

FRO presumed him guilty of criminal wrongdoing and even the Rebuttal Panel found that he no longer wanted the Applicant to work in his Section.

60. The Tribunal finds that the Applicant has established a case of *prima facie* unlawfulness.

The element of urgency

61. The second condition precedent for the grant of a suspension of action is urgency. The Applicant's Counsel submitted that the matter is of an urgent nature because he was due to be separated on 31 July 2011 and that the Administration had attempted to enforce his separation and prevent him being paid his July salary despite there being in place a suspension of action. The Respondent argues that the Applicant's delay in filing this Application for suspension of action demonstrates that the Application is not urgent.

62. The Tribunal observes that the Applicant was informed of the decision of the Rebuttal Panel on 22 July 2011 and that the instant Application for suspension of action was filed only on 27 July 2011. Given the difficulty the Applicant experienced in filing this Application and the fact that the Tribunal was minded to require OSLA to submit the Application for the Applicant in a more articulate manner, the Tribunal finds that the Applicant has actively and diligently pursued his course of action. The Tribunal also finds that the element of urgency is met.

Irreparable damage

63. It is the case of the Applicant that the irreparable harm that would be caused by the impugned decision is the fact that should the Administration enforce the separation, it will still be on the basis of poor performance and alleged criminal conduct. The damage to his reputation as well as his career prospects cannot be remedied by a monetary award alone. Further, the Administration is seeking to characterize him as dishonest in breach of due process. If the decision is allowed to

stand, he will be unfairly tainted without having been found guilty. He will also lose the prospect of applying for jobs within the UN as an internal candidate.

64. The Respondent contends that this argument has no basis as the decision is based on unsatisfactory performance, not allegations of misconduct and that under the new staff selection system, internal candidates are no longer considered first for any vacancy or given any preference. The Respondent submits that any damage that might ultimately be suffered by the Applicant can be remedied through an award of damages.

65. Having considered the Applicant's submissions, the Tribunal finds that the harm suffered to the Applicant's reputation and career prospects if the decision is implemented cannot be adequately compensated by monetary damages.

Conclusion

66. The Tribunal grants the Applicant's request for suspension of action of the decision not to renew his contract beyond 31 July 2011 pending the outcome of management evaluation.

67. The Tribunal further directs Counsel Seth Levine of Office of Staff Legal Assistance (OSLA) to assist the Applicant within the next seven days to properly articulate his application to the Management Evaluation Unit (MEU).

(Signed)

Judge Nkemdilim Izuako
Dated this 12th day of August 2011

Entered in the Register on this 12th day of August 2011

Legal Officer: *(Signed)*

For:
Jean-Pelé Fomété, Registrar, UNDT, Nairobi