
UNITED NATIONS DISPUTE TRIBUNAL

Case No: UNDI/NE/202001

Judgment No: UNDI/2022013

Date: 15 February 2022

Original: English

Before: Judge Agnieszka Kluczkowa-Milat

Registry: Nairobi

Registrar: Abena Kwakye Berko

APPLICANT

v.

**SECRETARY-GENERAL
OF THE UNITED NATIONS**

JUDGMENT

**Counsel for the Applicant:
Self-represented**

**Counsel for the Respondent:
Isabella M Vasilongorgi, AAS/ALD/CHR
Jacob van de Velden, AAS/ALD/CHR**

physically present at the fuel station⁹

11. At the time, the price per 20 litres of fuel was CFA12,000. Vivo Energy employees would give CFA10,000 (approximately USD17) per 20 litres of inflated fuel to the MINUSMA driver, leaving CFA2,000 (approximately USD340) per 20 litres for the Vivo Energy employee¹⁰

Involvement of the Applicant in the fuel fraud scheme

12. Two of the interviewed Vivo Energy employees, namely, Mr. Madu Sangaré and Mr. Issaka Karé, identified the Applicant as one of the MINUSMA drivers involved in the false fuel transactions. Both witnesses stated that the Applicant used to request them to inflate the fuel volume. Mr. Sangaré clarified that the Applicant requested him to inflate the fuel volume up to 80 litres above the amount that was dispensed to the United Nations vehicle that the Applicant was driving¹¹

13. During the investigation, the OIOS also analyzed the electronic fuel monitoring system ("EFMS") records for the Applicant, reflecting the fuel transactions registered with his driving license between August 2015 and August 2017, at Vivo Energy fuel stations in Banako. It identified 117 fuel transactions for the period between 6 September 2016 and 24 June 2017, analyzed the quantity photo of the pump for each transaction and found

- a. 73 quantity photos without price indication and thus considered to be possible fraudulent transactions;
- b. 11 quantity photos with price indication and considered to be genuine transactions; and
- c. 33 quantity photos where no determination would be made due to the

⁹ Ibid, para 28

¹⁰ Ibid, para 29

¹¹ Ibid, para 32

poor quality or incomplete photograph¹²

14 Based on examination of two sets of records Vivo Energy log sheets and EFMS, OIOS also found that, on several occasions, the Applicant's driving license was used to refill the same UN vehicle twice on the same day. OIOS noted that the details on the Vivo Energy fuel transaction log sheets were not consistent with the EFMS records¹³

15 The Applicant was interviewed by OIOS on 7 March 2018 where he denied being implicated in any type of fuel fraud¹⁴ The Applicant was shown fuel transaction log sheets and he confirmed his signature on five out of six fuel transaction log sheets dated between 2 and 17 May 2017. He denied having signed the log sheet of one transaction on 17 May 2017, but admitted that it was his handwriting

the fraudulent fuel scheme¹⁹

Submissions

Applicant's submissions

19 The Applicant denies participation in the alleged false transactions scheme or having benefitted monetarily from the scheme. He points out to evidentiary insufficiency of the case against him and maintains that his due process rights were violated. As such, he requests the Tribunal to exonerate him of the charges and award him damages for the loss of his job, dignity and honour.

Respondent's submissions

20 The Respondent's position is that there is clear and convincing evidence that the Applicant took part in a scheme whereby fuel volumes that were charged to the Organization were inflated above the actual volume dispensed to the United Nations vehicles; additionally, that the Applicant intentionally falsified official records entrusted to him by virtue of his functions with the Organization and monetarily benefited from his actions. The sanction imposed was not disproportionate and the Applicant's due process rights were at all times respected during the investigation and disciplinary processes. Accordingly, the applications should be dismissed in their entirety.

Considerations

Scope of judicial review

21 In disciplinary cases UNDT performs a judicial review in examination of the following elements:

- a** Whether facts giving rise to the disciplinary measure were established by clear and convincing evidence;

¹⁹ Reply, annex 7

LO0839 which he had not given to a different driver and which he had never lost.²² The records demonstrate that on 2, 9 and 16 February 2017, the Applicant used his badge LO0839 five times for refueling of UN vehicles.²³ Four of these transactions indicate an irregularity in the process, given that the photos taken at the pump display as part of the EFMS records show the fuel volume but not the price. The Applicant recognized his signature on the Vivo Energy log sheets for three of the February transactions, unbeknownst to the Applicant, all of them had been marked by OIOS as fraudulent.

26 Moreover, the record demonstrates that on 16 February 2017, the Applicant refueled vehicle UN 27203, a Ford Everest with maximum tank capacity of 110 litres, three times: (i) at 1609 with 95 litres; (ii) at 1657, with 90 litres; and (iii) at 1739

the standard consumption of that vehicle is 22 litres/100 kilometres ²⁴ The Tribunal finds that it is similarly materially impossible for any car to consume 222 litres of fuel (57.92-75) within two hours for a distance of several kilometres

28 During OIOS interview, the Applicant recognized his signature for the second transaction and recognized his handwriting for the first transaction but may have forgotten to sign the transaction log sheet

29 The Tribunal finds that documentary evidence, including at least two instances of consecutive transactions for materially impossible refueling on 16 February 2017 and on 17 May 2017, confirms the Applicant's participation in the fraudulent is handwritten al

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disciplinary process were initiated prior to 26 October 2017. In the present case, OIOS commenced investigations in 2018 and the disciplinary process was initiated in 2019.

38 The Respondent submits that the investigation into the false transactions scheme in which the Applicant was involved started in May 2017 when the OIC of the Fuel Unit at MINUSMA informed SIU about potential false fuel transactions. OIOS received from SIU all materials relating to the Applicant's case on 15 August 2017 and commenced its own investigation on 18 August 2017.

39 The Tribunal agrees that the controlling date is when SIU commenced investigations in May 2017, hence, in accordance with Section 132 of ST/AI/2017/1, the case fell properly under the regime of ST/AI/371 Annex 1. In any event, the Applicant does not allege what procedural right would have been infringed and what impact the procedural regime might have had on the findings of the investigation. His argument is, therefore, unfounded.

Whether the facts amount to misconduct

40 The sanctioning letter invokes violation of staff regulations 1.2(b) and 1.2(q) and staff rules 1.2(i) and 1.7.

41 Staff regulation 1.2(b) requires staff members to "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". Participation in a fraudulent scheme is clearly irreconcilable with the concept of integrity. Staff regulation 1.2(q) provides that staff members "shall use the property and assets of the Organization only for official purposes, and shall exercise reasonable care when utilizing such property and assets."

42 The Tribunal agrees with the Respondent that the Applicant improperly used UN property for his personal gain in a matter affecting financial interests of the Organization. Accordingly, the Tribunal finds that the Applicant's acts constituted a misconduct.

Whether the sanction is proportionate to the gravity of the offense

43 The Applicant does not expressly make submissions on the issue of proportionality of the sanction. He only raises personal circumstances, such as his role in taking care of his family and requests the Tribunal to take that into account in determination of the sanction.

44 The Respondent maintains that though his actions, the Applicant undermined the trust and confidence placed in him by the Organization. There were no mitigating factors. Absent compelling reasons, the Applicant's personal circumstances, are not relevant to the determination of the sanction.

45 In accordance with staff rule 103(b), a disciplinary measure imposed on a staff member must be proportionate to the nature and gravity of his or her misconduct. The United Nations Appeals Tribunal ("UNAT") has elaborated that:

In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective.³⁰

46 The Tribunal finds that the sanction letter dated 14 October 2019 demonstrates a proper consideration of the nature of the Applicant's actions as well as the mitigating and aggravating factors. The Tribunal concurs that retaining the Applicant in service would be incongruous with the values of the Organization. The practice in the past cases is consistent in that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 102(a).³¹ Therefore, the Tribunal finds that the disciplinary measure of separation

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