

---

UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/062

Judgment No.: UNDT/2012/179

Case No.: UNDT/NBI/2010/062

Judgment No.: UNDT/2012/179

*Complaint 2*

6. From 28 June to 21 October 2009, the Applicant had rented a room at the Ihusi Hotel in Goma, DRC. The hotel had charged him USD85 a night. This was a lower rate usually charged to UN staff members under an arrangement between the hotel and the Organisation. As of 25 August 2009, the Applicant owed the said hotel USD9,357. In September 2009, the hotel manager at the time approached the Senior Project Coordinator of UNOPS seeking assistance in settling the bill.

*Complaint 3*

7. A female non-UN staff member from Bukavu, DRC, submitted on 8 September 2009, a written complaint to an unidentified international female staff member at MONUC in which she alleged that the Applicant owed her husband the sum of USD15,000 as reimbursement for a high interest loan of USD5,000. Thereafter, the husband of the said non-staff member made a written statement to the Security Officer of MONUC complaining about the USD15,000 owed him by the Applicant. He also stated that the Applicant had showed him his UN Laissez-Passer and the UN Identification card (UNLP and UN ID) at the time they entered into the transaction.

*Complaint 4*

8. The Coordinator for a local NGO in Goma sent a letter on 9 September 2009 to the Chief of UNMACC complaining that the Applicant owed him the sum of USD10,000 as reimbursement for a loan and that he only paid back USD6,500.

9. On 18 September 2009, with regards to the several complaints received about the Applicant, the Portfolio Manager of UNMACC wrote to the Programme Manager of UNMACC stating:

Until now, we were advised that it is a personal issue. However, the issue of the UN MONUC, UNMACC and UNOPS reputation was raised and the case was forwarded to the UNOPS General Council for advice. A letter will be drafted by the UNOPS Legal office to remind [the Applicant] on the UN code of conduct.

10. In a letter dated 1 October 2009, the General Counsel of UNOPS encouraged the Applicant to promptly address and settle any private matters as necessary and to fulfil his on-going obligations.

11. On 12 October 2009, the Applicant gave a seminar at the Polytechnic Institute of Turin. The title of the seminar was “Humanitarian Demining Conducted by the United Nations: What is and what are its goals in the world?” The Applicant’s title was given as “Regional Manager UNMACC-UN Mine Action.”

12. The Applicant admitted that he made a presentation at the seminar and used his title without obtaining permission from the Secretary-General as required by the Staff Regulations. He called attention to the fact that he received no honorarium for his presentation and was not aware that it was against the UN Regulations and Rules.

13. On 23 October 2009, the Executive Director of UNOPS (“ED of UNOPS”) notified the Applicant that, following additional information with regards to the complaints received against him, an investigation had commenced and that he was immediately suspended with full pay for three months or until further notification, whichever came first.

14. On 26 November 2009, the Internal Audit and Investigation Group (IAIG) issued an Investigation Report in which they found that:

- a. The Applicant admitted that he obtained personal loans from staff posted in DRC and non-staff living and working in DRC of approximately USD203,000. He also admitted that

e. The Applicant failed to pay his debts to Ihusi Hotel amounting to USD9,357 for charges incurred for accommodation and board during the period of June to October 2008.

f. The Applicant utilized his UNLP and UN ID for purposes of obtaining the private loans.

### **Procedural History**

15. On 9 December 2009, the ED of UNOPS informed the Applicant that the investigation was complete and a report as to his conduct had been finalised. Based on the findings, it was decided that the allegations of misconduct against the Applicant were well founded and consequently he was formally charged him with misconduct. It was also decided that due to the seriousness of the allegations, effective 10 December 2009, the Applicant's suspension would be without pay.

16. The Applicant filed his response on 23 December 2009 stating, among other things, that the debt he incurred and the problems that ensued with the female staff member from MONUC was going to trial in an Italian court and only then would the real story be exposed. He argued that his debts were private matters and should not have involved the UN unless he was found guilty of some wrongdoing by a court of law.

17. The Applicant's contract was not renewed and expired automatically on 31 December 2009.

18. More than five months later and specifically on 11 May 2010, the ED of UNOPS notified the Applicant of a decision to separate him from service without notice and without compensation in lieu of notice. He concluded that the Applicant's behaviour constituted serious misconduct. The effect of the decision was that although the Applicant's contract had already expired on 31 December 2009, he would not be retroactively paid for the pe

19. The Applicant filed the present Application on 18 August 2010, challenging his purported separation from service more than five months after he had left the Organisation's services. The Respondent filed a Reply on 13 September 2010.

20. On 18 November 2010, the Applicant filed a Motion for summary judgment praying the Tribunal to rescind the decision to separate him and to award him compensation for both material and immaterial damages. On 7 January 2010, the Respondent filed a response to the Motion stating that *there is no dispute as to the facts and* contending that the decision was lawful and praying that summary judgment be entered in his favour.

21. The Applicant filed a Motion for leave to file a Rejoinder on 11 January 2011. The Tribunal issued Order No. 019 (NBI/2011) granting the leave to file the said Rejoinder by 2 March 2011. The Applicant filed the Rejoinder on 25 February 2011. On 11 August 2011, the Tribunal issued Order No. 088 (NBI/2011) setting the matter down for hearing for 26 and 27 September 2011.

#### **Submissions made by the Parties**

22. On 23 September 2011, the Parties filed a Joint statement before the Tribunal in which they stated that, with minor exceptions, they agreed that the facts are not in dispute. They also identified five outstanding legal questions and prayed the Tribunal to suspend proceedings and rule on each Party's motion for summary Judgment on the basis of the existing record.

23. The Parties submissions are hereunder summarized:

*Can the Secretary-General impose disciplinary sanctions on non-staff members?*

24. The Applicant argued that the contested decision was *ultra vires* as the Secretary-General is not authorised to impose disciplinary sanctions on non-staff members. The Applicant separated from the service of the Organisation on 31 December 2009 whereas the contested decision, dated 11 May 2010, was taken well after the Applicant had separated and lost his status as a staff member. A disciplinary sanction can only be imposed on a staff member.

25. The Respondent for his part submitted that the contested decision was *intra vires* as even though the Applicant was not a staff member when the disciplinary sanction was imposed, the distribution and amount of his separation payments were determined by the method of separation set out in the contested decision. He further noted that the disciplinary process began at a time when the Applicant was still a staff member. In fact, the investigative portion of the disciplinary process was concluded whilst the Applicant was a staff member.

*The alleged violation of the Applicant's right to due process*

26.

completeness. The Respondent therefore submitted that the appropriate remedy would be to exclude these additional findings contained in the pleadings.

*Summary Judgment is appropriate*

30. The Applicant submitted that his failure to repay private loans without an enforceable court order cannot constitute a violation of staff rule 1.2(b), which requires staff members to honour their private legal obligations. Whilst there might have been, on his part, an obligation to repay private loans, these do not constitute private legal obligations under staff rule 1.2(b) as they are not enforceable. The natural consequence of the standard which the Secretary-General argues for would be that individual staff members could be considered to be in violation of staff rule 1.2(b) for simply being late on the payment of their rent or energy bill.

31. As no evidence had been introduced in this case to suggest that there was any judicial or official order for repayment of the Applicant's private loans, the singular legal question before this Tribunal on this point is whether the fact of private indebtedness is sufficient to impose a disciplinary sanction.

32. It was argued on behalf of the Respondent that the Applicant violated his duty to honour his private legal obligations. By incurring a number of large unpaid debts, to UN staff members and others, and refusing to pay them even when he could, the Applicant repeatedly and egregiously breached his duty to honour his private legal obligations. He further embroiled UNOPS in his private affairs resulting in UNOPS expending considerable resources due the Applicant's behaviour.

33. A staff member's duty to honour their private legal obligations goes beyond an obligation to honour court orders. The phrase "but not limited to" found in staff rule 1.2(b) clearly indicates that a legal obligation does not need to have been found as such by a court of law for it to fall within a staff member's duty to honour it. The obligation to honour court orders is but a subset of the private legal obligations of staff members. Since a loan is a contract, and the obligation to repay it is enforceable at law, the staff member has a duty to honour such an obligation. The Applicant's overall conduct violated his obligation to observe the standards of conduct expected of an international civil servant.



*The Applicant's alleged misuse of his UN ID and his UNLP (staff rule 1.2(q))*

34. The Applicant submitted that he did not misuse these identification/travel documents to take advantage of his status in order to obtain private loans. There is no evidence, let alone credible evidence, that the Applicant deliberately used these documents to take advantage of his employment status at the UN in obtaining private loans. None of his creditors mentioned that the Applicant's status as a UN employee had played any role in the decision to lend



governed by a body of legislation which includes the UN Charter, Staff Rules and Regulations, Secretary-General Bulletins, Administrative Instructions and others.

42. Former staff rules 309.5(a) and (b) deal with expiration of appointments. cr

46. In the case of *Applicant*<sup>3</sup>, where the Applicant on record had challenged the placing of a note on his file which referred to an investigation earlier undertaken against him while he occupied another UN post but did not result in disciplinary proceedings, Judge Adams was of the view that the matter was incomplete or unresolved since disciplinary proceedings, as prescribed in ST/AI/371 (“Revised

upon the subsistence of the contractual entitlement to subject a staff member to them, on the one hand, and the contractual obligation of the staff member to suffer them in accordance with the relevant instruments, on the other.”<sup>5</sup> [Emphasis added]

50. The Secretary-General or his agents in the instant case blatantly acted outside the scope of his or their authority in pursuing/going through with a disciplinary process beyond the expiry date of the staff member’s contract. The decision to separate the Applicant in May 2010 was manifestly *ultra vires* and therefore unlawful. The Respondent in fact conceded that the Applicant, at the time the disciplinary sanction was imposed, was no longer a staff member. He submitted that the contested decision was within the Secretary-General’s competence as “the distribution and amount of his separation payments were determined by the method of a separation set out in the impugned decision.”<sup>6</sup>

51. Whatever the implications with regard to the distribution of the Applicant’s separation entitlements, the Respondent by not renewing the Applicant’s contract beyond its expiry date of 31 December 2009 had no authority over him after that date. Of course the Organisation is entitled under staff rule 3.17 to recover sums owed to it by the Applicant upon satisfactory application of the relevant processes. The Respondent had neither *locus standi* nor the competence to pronounce a termination or other sanction against the Applicant at the time he purported to do so. Accordingly, the termination letter of UNOPS Executive Director dated 11 May 2010 is null, void and of no effect.

**Is the Respondent entitled to deduct monies owed to third parties from the Applicant’s emoluments?**

52. With regard to the allegations that the Applicant owed various sums of money to some UN staff members and non-UN staff which gave rise to a disciplinary process against him, the Respondent’s counsel submitted that a staff member’s duty to honour his private legal obligations goes beyond an obligation to honour court orders. According to counsel, since a loan is a contract, an obligation to repay it is enforceable at law and the staff member has a duty to honour such an

---

<sup>5</sup> UNDT Judgment *Applicant* UNDT/2010/069, para 14.

<sup>6</sup>



him, the action of imposing or purporting to impose disciplinary sanctions on the Applicant more than five months after he left the Organisation is null, void and of no effect. The only tenable position is that the Applicant left the Organisation upon the automatic expiration of his contract.

57. The purported termination conveyed in the letter from the ED of UNOPS dated 11May 2010 is accordingly rescinded.

58. The Organisation is not a debt collector and can only deduct monies due to a former staff member in the enforcement of a proper garnishee order of a properly constituted court.

59. The Applicant did not misuse his UNLP and UN ID when he showed them to his creditors.

60. The Tribunal rejects any other pleas.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 16<sup>th</sup> day of November 2012

Entered in the Register on this 16<sup>th</sup> day of November 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi