



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MOBONO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Bart Willemsen, OSLA

Counsel for the Respondent:

Salman Haq, UNOPS

Introduction

1. The Applicant joined the United Nations on 17 April 2004 as an Operations Specialist under an Appointment of Limited Duration (ALD) contract at Level 3/Step 3 with the United Nations Mine Action Coordination Centre (UNMACC) in Bunia, Democratic Republic of Congo (DRC) until 28 June 2007.

2. After a break from service, the Applicant entered into a new contract with the United Nations Office for Project Services (UNOPS) under an ALD on 7 April 2008 for the same post and at the same level in Bukavu, DRC. His contract was subsequently renewed four times. The last contract commenced on 1 July 2009 and expired on 31 December 2009.

3. The Applicant is contesting the decision, dated 11 May 2010, to separate him from the Organisation without notice and without compensation in lieu of notice, which decision he received on 12 May 2010. The said administrative decision to separate him came about as a result of a finding that certain alleged actions on his part amounted to serious misconduct.

Background Facts

4. A number of individuals brought complaints to the Organisation against the Applicant alleging that he had failed to honour personal financial arrangements he had made with them. Some of the major complaints are summarized below.

Complaint 1:

5. On 21 May 2009, a female staff member of the United Nations Mission in the Democratic Republic of the Congo (MONUC) in DRC wrote to the Italian Ministry of Foreign Affairs alleging that the Applicant owed her at least USD71,744 from an investment made by him on her behalf. She also sent copies of her email to, *inter alia*, the Special Representative of the Secretary-General (SRSG), the Under-Secretary-General (USG) and the Applicant's Programme Manager at UNMACC. On 21 August 2009, she sent another email to UNOPS restating her complaint and requesting assistance to resolve the matter.

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 he agreed to pay approximately USD300,000 to his creditors as consideration for the loans.

b. It is highly probable that the Applicant obtained personal loans from staff and non-staff that have not been reported.

c. The Applicant wrote several post-dated checks as security for the loans without having sufficient funds in the bank to honour the checks.

d. He intentionally misappropriated the sum of EUR50,000 (approximately USD71,744).

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 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 period of 10 December 2009 to 31 December 2009 when he remained on suspension without pay.

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. The Applicant argued that the Secretary-General had committed a flagrant violation of his right to due process in (i) introducing new evidence not relied upon in arriving at the contested decision with the sole aim to assassinate the Applicant's character; and (ii) admitting that some of these additional findings have in fact been relied upon in arriving at the contested decision but which were never part of the investigation and/or charges.

27. The fore-going actions violated the Applicant's right to due process and vitiated any effort to determine whether the Secretary-General properly exercised his discretion on the basis of the information he had available at the time of the contested decision. This new evidence is irrelevant and ought not to have been taken into account by the Secretary-General in arriving at his decision to terminate the Applicant.

28. The Respondent submitted that the introduction of new evidence did not violate the Applicant's right to due process. They were included in the pleadings before the Tribunal—and were not considered or relied upon in the taking of the contested administrative decision. They were included in the pleadings in good faith with no intention of assassinating the Applicant's character. If however, it is found that the Applicant's right to due process was violated on this score, the breach occurred after the imposition of the sanction. There is no causal relationship between the alleged breach and the contested decision.

29. The introduction of this evidence was merely to update the Tribunal on new developments to provide a larger picture of the Applicant's conduct and for

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 him money or that they requested the said documents as security for the loan.

35. It is clear from the investigation report that the copies of these documents were shown after the loan arrangements were made, supporting the view that they did not serve any substantive function regarding the private loan arrangements. The sole purpose of providing copies of them was confirming the Applicant's identity in good faith to his creditors, just like a passport or a driver's license serves as a form of identification.

36. The Respondent argued that the Applicant had in fact misused the said documents. Staff rule 1.2(q) states that "staff members shall use the property and assets of the Organisation only for official purposes..." This rule categorically prohibits the use of UN-issued documentation for non-official business. This rule does not make allowances for the use of such documents for identification purposes.

37. The preponderance of evidence suggested that the Applicant used his UN identification in a significantly abusive manner—to secure private loans. The fact that the Applicant and his creditors chose to use his UNLP and UN ID instead of his national passport indicated that the Applicant and the creditors were not merely confirming his identity but also relying on the Applicant's status as a UN staff member.

The Applicant gave an unauthorised lecture (staff rule 301.3(q)(ii))

38. The Parties are in agreement that the Applicant gave an unauthorised lecture. The Applicant explained that he was not aware that he was required to obtain

authorisation. The Respondent submitted that the absence of *mens rea* did not excuse the conduct.

Issues

39. The Tribunal will hereunder consider the following questions:
- a. Can the Secretary-General impose disciplinary sanctions on non-staff members?
 - b. Is the Respondent entitled to deduct monies owed to third parties from the Applicant's emoluments?
 - c. Did the Applicant misuse his UN ID or UNLP under staff rule 1.2(q) by showing them to a non-staff member with whom he had entered into a business transaction?

Considerations

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

40. The Applicant was separated from service pursuant to former staff rule 310.1(e)(iv) and (ii). The former staff rules 301.1-312.6 governed appointments for service of a limited duration. Former staff rule 301.1(a) provided that "staff rules 301.1-312.6 are applicable to staff members." In addition, staff rule 301.3 provides that disciplinary measures imposed, as set out in Article X of the staff regulations and rule 310.1, "may be instituted against a staff member..." It goes without saying that the former staff rules and regulations and any disciplinary measures that may be imposed are only applicable to staff members.

41. An employment relationship gives rise to rights and obligations for the parties to it. It is the "key point of reference for determining the nature and extent of employer's rights and obligations towards their workers."¹ Certain employment relationships such as that between a given UN staff member and the Organisation is

¹ International Labour Organisation (ILO) *The Employment Relationship*, 95th Session Conference (2006), Report V(1) page 7.

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. They provide that “appointments under these Rules shall expire automatically and without prior notice on the expiration date of the period specified in the letter of appointment; separation as a result of the expiration of any such appointments shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules.”

43. The Applicant in this case left the Organisation upon expiry of his contract on 31 December 2009. More than five months thereafter, UNOPS purported to impose a disciplinary sanction on him. The purported disciplinary sanction stated that: (i) the Applicant was separated from service without notice and without compensation in lieu of notice; (ii) the decision to suspend him without pay effective 10 December 2009 until 31 December 2009 was made permanent; and (iii) his contract which had expired on 31 December 2009 would not be renewed.

44. In the United Nations system, staff members are appointed by the Secretary-General (or those to whom this power has been delegated). Once the letter of appointment is signed specifying the terms and conditions of the said employment, the employment relationship between the individual and the UN, governed by the relevant UN Staff Regulations and Rules, comes into effect.² At the expiration of the contract, the employment relationship expires with it.

45. A disciplinary measure cannot be imposed on a person with whom an employment relationship no longer exists. At the expiration of his contract, the Applicant was no longer bound by the Staff Rules and Regulations or indeed any of the Organisation’s legislation. The Applicant’s contract in this case expired automatically on 31 December 2009. It was at this point that the employment relationship ended. Neither the Applicant nor the Organisation bore duties and obligations to each other after that date and therefore no authority existed on the part of the Respondent to impose disciplinary sanctions on the Applicant.

² Former UN Administrative Tribunal Judgment No. 427, *Raj* (1988) at para VIII. See also UNDT Judgment *Turner* UNDT/2010/170.

46. In the case of *Applicant*³, 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 Disciplinary Measures and Procedures”), had not been completed. He observed, *inter alia*:

Given the purposes to which these provisions are directed [ST/AI/371 “Revised Disciplinary Measures and Procedures”], (and subject to the possible single exception mentioned below) they can only be instituted against persons who are at the time of institution staff members even though they were staff members at the time of the alleged misconduct. The first and most obvious basis for this conclusion is that, as at separation, the contract between the Organization and the staff member has come to an end...

47. The exception Judge Adams spoke of here is in the instance where the Organisation withholds the separation payments as a means to reimburse the Organisation for loss incurred by his or her misconduct. This case does not include that exception.

48. UNOPS had the option of renewing the Applicant’s contract while keeping him on the suspension without pay which it had commenced on 10 December 2009.⁴ It did not seize upon this option but rather allowed the Applicant’s contract to expire automatically on 31 December 2009. The action of imposing or attempting to impose the sanction of termination on him at any time after the expiration of his employment contract clearly amounted to blowing hot and cold at the same time. The Organisation cannot approbate and reprobate all at once. It had no capacity in law to exercise any authority over the Applicant after 31 December 2009.

49. In the case already cited above, the Tribunal held that the Secretary-General may decide in appropriate cases to undertake fact-findings or investigations so as to know what his staff has or has not done wrong. “Such investigations or inquiries cannot be disciplinary proceedings under Chapter X, because these depend entirely

³ *Applicant* UNDT/2010/069 at para 12.

⁴ See UNDT Judgment *Adewusi* UNDT/2012/161.

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.”⁵ [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/following 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.”⁶

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

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

⁶ Respondent’s Reply to the Applicant’s Motion for Summary Judgment (January 2011).

obligation. It is necessary to emphasize here that the Organisation is not a debt collector and can only lawfully deduct monies owed to third parties in the enforcement of proper garnishee orders of properly constituted courts.

Did the Applicant misuse or abuse his UNLP and UN ID by showing it to a non-staff member with whom he had entered into a business transaction?

53. Showing his UN ID to any creditors only meant at the worst that the creditors were able to confirm that the Applicant was a gainfully employed individual who had the capacity to repay his loans. The Applicant was not alleged to have misrepresented his status. It was not shown that the UN ID was used to obtain loans under false pretences. The Tribunal finds that the Applicant had not misused his UNLP and UN ID when he showed it to the person with whom he had entered into a business transaction.

54. The Tribunal has not fully entertained the claim that the Respondent had, in arriving at the impugned decision to separate the Applicant, considered other material for which the Applicant was neither invited to comment upon nor charged. The Applicant had submitted that this amounted to a violation of his due process rights. The Respondent for his part submitted that these were included in good faith in the pleadings before the Tribunal but were not relied upon in arriving at the decision to terminate the Applicant.

55. The fore-going arguments and submissions about the consideration of new materials are most irrelevant to the extent that they are simply extinguished by the fact that the Respondent was not in any position to the Applicant to breach his due process rights or impose any disciplinary sanction when the Applicant was no longer a staff member.

Conclusion

56. The Applicant left the services of the Respondent when his contract automatically expired on 31 December 2009 during the pendency of disciplinary proceedings. Since UNOPS did not exercise the option of extending his contract with a view to concluding the disciplinary proceedings that had been commenced against

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 16th day of November 2012

Entered in the Register on this 16th day of November 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi