



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Isavella M. Vasilongeorgi, AAS/ALD/OHR

Jacob van de Velden, AAS/ALD/OHR

## **Introduction**

1. On 6 January 2020, the Applicant, a former Light Vehicle Driver, at G-2 level, working with the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”) in Bamako, filed an application before the Dispute Tribunal.<sup>1</sup> He contests a disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).<sup>2</sup>

2. The Respondent filed a reply on 4 February 2020.

3. The Tribunal held a hearing on the merits of the case on 17 and 18 November 2021, where it heard the Applicant and one witness, Mr. Luc Nijs, an Investigator of the Office of Internal Oversight Services (“OIOS”), who was responsible for the investigation of the case.

4. The parties filed their closing submissions on 9 December 2021.

## **Facts established by the investigation**

5. On 15 May 2017, the Officer-in-Charge (“OIC”) of MINUSMA’s Fuel Unit, informed the Chief of MINUSMA’s Special Investigation Unit (“SIU”), of a possible fuel fraud at Vivo Energy Fuel Stations in Bamako and requested investigation.<sup>3</sup>

6. On 23 June 2017, the SIU commenced the investigations as requested and on 15 August 2017, provided all the documentation related to its preliminary investigation to OIOS. Specifically, OIOS was informed that the Applicant frequently requested Vivo Energy personnel to inflate the reporting of fuel volume above the actual volume dispensed to MINUSMA vehicles that he drove.<sup>4</sup> On 18 August 2017, OIOS started its own investigation.

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<sup>1</sup> Application, section I.

<sup>2</sup> Application, annex 1.

<sup>3</sup> Reply, annex 2, (OIOS investigation report), paras. 16-18.

<sup>4</sup> Ibid.

7. In the investigation report dated 30 November 2018, OIOS established as follows:

8. There was a wide-spread scheme of false fuel transactions. OIOS interviewed 11 Vivo Energy employees; nine of the 11 confirmed that they colluded with about 15 national staff members at MINUSMA to commit fraudulent fuel transactions, from which both benefitted monetarily.<sup>5</sup> Further, the Vivo Energy personnel explained that the fuel scheme had been committed exclusively by Malian nationals, since the start of the contract between the United Nations and Vivo Energy in late 2015. In addition, that some MINUSMA staff had adopted the scheme from the time that the United Nations vehicles were served at Total Fuel stations before the contract was awarded to Vivo Energy.<sup>6</sup> Several MINUSMA drivers also admitted or partially admitted to participating in the scheme.<sup>7</sup>

9. The scheme involved the following actions: when a MINUSMA driver arrived at a Vivo Energy station, a Vivo Energy employee first scanned the bar codes of the fuel pump, the driver's United Nations ("UN") identification card and the UN vehicle. After pumping the fuel in the UN vehicle, the Vivo Energy employee would manually alter (i.e., inflate) the fuel volume requested by the MINUSMA driver on the fuel pump display, photograph the displayed volume, and confirm it manually, via a scanning device. When entering the false fuel volume manually, the pump display would not show the price. The Vivo Energy employee would also fill out the transaction log sheets with the inflated fuel volume which the MINUSMA driver would sign.<sup>8</sup>

10. On some occasions, involved MINUSMA drivers would register a complete false transaction. Some drivers also used expired MINUSMA identity cards ("IDs") or expired driving licenses in identifying barcodes of the UN vehicles other than the one

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<sup>5</sup> Ibid., para. 25.

<sup>6</sup> Reply, annex 2, OIOS interview with Cheikne Kante on 31 August 2017; Issaka Kané on 4 September 2017; Madou Sangaré on 4 September 2017; Mamadou Niafo on 4 September 2017 and Seydou Diakté on 4 September 2017.

<sup>7</sup> Reply, para. 14 and documents referenced therein.

<sup>8</sup> OIOS Investigation report, paras. 26 and 27.

physically present at the fuel station.<sup>9</sup>

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 USD3.40) per 20 litres for the Vivo Energy employee.<sup>10</sup>

*Involvement of the Applicant in the fuel fraud scheme*

12. Two of the interviewed Vivo Energy employees, namely, Mr. Madou Sangaré and Mr. Issaka Kané, 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 driving.<sup>11</sup>

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 Bamako. 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

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<sup>9</sup> Ibid., para. 28.

<sup>10</sup> Ibid., para. 29.

<sup>11</sup> Ibid., para. 32.

poor quality or incomplete photograph.<sup>12</sup>

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 records.<sup>13</sup>

15. The Applicant was interviewed by OIOS on 7 March 2018, where he denied being implicated in any type of fuel fraud.<sup>14</sup> The Applicant was showed 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.<sup>15</sup>

16. On 30 November 2018, OIOS referred the investigations report to both the Office of Human Resources Management ("OHRM") and the Department of Field Support ("DFS").<sup>16</sup>

17. On 31 July 2019, OHRM, notified the Applicant of the formal allegations of misconduct against him and requested him to submit comments.<sup>17</sup> The Applicant provided his comments on 11 September 2019.<sup>18</sup>

18. By letter dated on 14 October 2019, the Applicant was notified of the contested decision. He was sanctioned for "on one or more occasions in February 2017 and May 2017" (a) participating in a scheme whereby the recorded volume of fuel dispensed during the refueling of UN vehicles was inflated in the records of Vivo Energy and MINUSMA, and (b) signing falsified Vivo Energy transaction log sheets as part of his participation in

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<sup>12</sup> Ibid., para. 37.

<sup>13</sup> Ibid., para. 39.

<sup>14</sup> Ibid., para. 40.

<sup>15</sup> Ibid., paras. 40-43.

<sup>16</sup> Reply, annex 3.

<sup>17</sup> Reply, annex 4.

<sup>18</sup> Reply, annex 6.

the fraudulent fuel scheme.<sup>19</sup>

### ***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 application should be dismissed in its 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;

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<sup>19</sup> Reply, annex 7.

- b. Whether the staff member's due process rights were observed;
- c. Whether the facts amount to misconduct;
- d. Whether the sanction is proportionate to the gravity of the offence and;

22. In response to the Applicant's arguments, below the Tribunal will first examine the contested elements of factual sufficiency and due process.

*Whether facts were established by clear and convincing evidence*

23. The Tribunal notes that the operation of the fraudulent scheme across Vivo Energy gas stations is undisputed and, in any event, well established by copious evidence assembled in the investigation.<sup>20</sup> Regarding the Applicant's averment that the Vivo Energy staff could have colluded among themselves to manipulate the scanners while the OIOS never checked for any manipulations or technical problems with the scanners, the Tribunal recalls that OIOS performed on-the-spot investigation, collected photographic evidence of the effects of the manual modification of volume of the dispensed fuel on the pump displays, which corroborates the testimony of Vivo Energy employees and MINUSMA drivers who admitted to having participated in the scheme, and compared such evidence against the photographs included in the Applicant's EFMS logs. Mr. Luc Nijs confirmed in the direct testimony before the Tribunal that he had ascertained the effect of manual modification of fuel volume on the pump display and that there was no technical failure affecting the Vivo Energy gas station network.<sup>21</sup>

24. Against this background, the Tribunal agrees that the EFMS transaction records where photographs of pump displays do not show the price of the dispensed fuel create a strong presumption that these transactions involved fraudulent manipulation.

25. The charges against the Applicant were moreover based upon specific entries in the records. The Applicant expressly stated that, at the time, he was using UN badge

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<sup>20</sup> Reply, annex 4; Reply, annex 2 (Investigation report))

<sup>21</sup> Luc Nijs testimony 17 November 2021.

LO 0839, which he had not given to a different driver and which he had never lost.<sup>22</sup> The records demonstrate that on 2, 9 and 16 February 2017, the Applicant used his badge LO-0839 five times for refueling of UN vehicles.<sup>23</sup> 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 16:09, with 95 litres; (ii) at 16:57, with 90 litres; and (iii) at 17:39, with 83 litres of fuel. It further shows that only 18 km was driven in between the three refuelings, all of which took place in Vivo Energy gas stations. The Tribunal agrees with the Respondent that it is impossible for a car to consume 268 litres of fuel (95+90+83) within the span of only one and a half hour for a distance of 18 km, and that it reconfirms clearly and convincingly that the fuel volumes in the transactions were inflated.

27. The record further demonstrates that on 17 May 2017, the Applicant refueled vehicle UN 27414, a Toyota Landcruiser 4x4 with maximum tank capacity of 145 litres, three times: (i) at 16:26, with 57 litres; (ii) at 17:27, with 92 litres; and (iii) at 18:27, with 75 litres of fuel. The first refueling took place at a gas station of the Supreme network, which does not belong to Vivo Energy. There is no evidence on the record to suggest that transactions performed at Supreme were fraudulent; therefore, the 16:26 transaction at Supreme is considered genuine. The two other refuelings took place at Vivo Energy stations and the photos taken at the pump display as part of the EFMS records show the fuel volume but not the price. The meter reading of the UN vehicle 27414 only recorded six kilometers driven between these two transactions and

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<sup>22</sup> Trial Bundle, pp. 7, 99 (Sidibe OIOS interview, qq. 374-406).

<sup>23</sup> Reply, annex RS 1 to the Respondent's submission of 10 November 2021 (*Tableau recapitulatif*) and documents referenced therein, RS 2 and RS 3.

the standard consumption of that vehicle is 22 litres/100 kilometers.<sup>24</sup> 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 fuel scheme and his submission of falsified documents.

30. The Applicant contests the photo identification conducted by OIOS during the investigation on the ground that they were improper and unreliable. On this score, the Respondent maintains that both witnesses, independently and separately from each other, identified the Applicant to the SIU as one of the MINUSMA drivers who had, on at least one occasion, asked them to inflate the volume of the fuel recorded as having been dispensed their vehicle, in exchange for money.<sup>25</sup> The arrays, presented independently and separately to the witnesses, contained unnamed photos of 110 MINUSMA drivers of Malian and non-Malian nationality, all taken against the same background. The Applicant did not stand out on the photo array nor were the photo arrays unfairly suggestive against the Applicant – as testified by Mr. Nijs, numbers on the photos had been altered from one witness to another to prevent collusion or suggestion. When the two witnesses were asked about the photo arrays during their interview with OIOS, in September 2017, they were merely asked to confirm their first identifications of the Applicant done by SIU. They were shown the same unnamed

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<sup>24</sup> Ibid.

<sup>25</sup> Reply, annex 2, Doc. 2503, Issaka Kane interview (audio recording), 4 September 2017, at 15:40-15:43, wherein the investigator asks about the frequency of participation of "LO 839" and Mr. Kane responds "fréquentment"; Doc 109 and Doc.065, Madou Sangaré interview transcript, 4 September 2017, lines 181-182, 275-276, to be read in conjunction with reply annex 2, Madou Sangaré photo arrays, Doc. 065.

photos as the ones used during their interview with SIU, were allowed time to review the photos and again confirmed their identification of the Applicant. The procedure applied was confirmed by Mr. Nijs in his testimony before the Tribunal whereas there is no evidence that either the photo arrays or the questioning of the witnesses by OIOS were handled improperly

31. The Applicant's assertion that Mr. Kane had only serviced the Applicant on three occasions, which were not the dates of the impugned transactions in February and May 2017, and that Mr. Sangare never serviced him, is unsubstantiated. The Vivo Energy ACI 2000 transaction log sheets, including for the four transactions of the Applicant that OIOS identified as fraudulent<sup>26</sup>, do not include the name of the gas refueling attendant. Moreover, the Tribunal agrees with the Respondent that whether the witnesses serviced the Applicant on the dates of the four fraudulent transactions is inapposite; what is relevant is that both identified the Applicant as a participant in the fraudulent fuel transaction scheme. The Tribunal has no reason to expect high ethics from these witnesses; however, the Applicant did not provide any reason for which any one of them would want to falsely implicate him.

32. The Tribunal will not entertain other arguments of the Applicant, such as the lack of video footage of him receiving money from Vivo Energy employees, lack of price indication for each transaction in the Vivo Energy ACI 2000 transaction log sheets, or his assertion that during refueling he would go out to buy chewing gum and thus did not follow the process, other than noting their obvious irrelevance or lack of credibility.

33. Finally, the Applicant questions the attribution to him of the challenged transactions that took place between January and August 2016, maintaining that on the indicated dates, he had not yet joined MINUSMA. As proof, the Applicant provides a

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<sup>26</sup> The four transactions referred pertain to ACI 2000; two more transactions identified as fraudulent for February and May 2017 had been in other Vivo Energy filling stations (RS 1, Tableau recapitulatif).

personnel action indicating his date of entry on duty on 22 August 2016, as of which point only was he provided with the UN badge.<sup>27</sup>

34. On this point, the Respondent submits that the argument is irrelevant because fraudulent transactions forming the basis for the Applicant's disciplinary measure were all performed in 2017. Moreover, the statement is misleading as the Applicant had been working in MINUSMA since 2014, having first joined as contractor and worked in dispatch, vehicles and transportation.<sup>28</sup>

35. The Tribunal finds that the matter is relevant, in as much as it goes into the credibility of records relied upon by the Respondent. It notes that the issue lies in the method of recording the date of fuel intake, which varies between DD-MM-YYYY and MM-DD-YYYY. Analysis of the relevant documents<sup>29</sup>, especially comparison of adjacent entries with their relative chronology, discloses that the dates questioned by the Applicant have been recorded as MM-DD and, when inverted, fall within the period of his appointment as staff member. As such, notwithstanding that the concrete impugned transactions were in 2017, the 2016 fueling on dates contested by the Applicant does raise doubts and does not undermine the record's accuracy.

36. In summing up, the Tribunal is satisfied that relevant facts have been established by clear and convincing evidence.

*Whether due process was observed*

37. The Applicant faults the conduct of the investigation on the basis that the investigation was conducted under an obsolete administrative instruction ("AI"), that is ST/AI/371 Amend.1 (*Revised disciplinary measures and procedures*), whereas it had been abolished and replaced by ST/AI/2017/1 (*Unsatisfactory conduct, investigations and the disciplinary process*) on 26 October 2017. The only exception when the investigation could be done under the obsolete ST/AI/371 is when investigations and

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<sup>27</sup> Applicant's closing submissions filed on 9 December 2021.

<sup>28</sup> Respondent's closing submissions, p.5, para. 10.

<sup>29</sup> Reply, annex RS2 and RS3.

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 13.2 of ST/AI/2017/1, the case fell properly under the regime of ST/AI/371 Amend.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 offence*

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 through 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 10.3(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 as 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.<sup>30</sup>

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 irreconcilable 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 10.2(a).<sup>31</sup> Therefore, the Tribunal finds that the disciplinary measure of separation

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<sup>30</sup> *Akello* 2013-UNAT-336, para. 41, citing *Sanwidi* 2010-UNAT-084, para. 39.

<sup>31</sup> See e.g., *Aghadiuno* 2018-UNAT-81; *Djidda* UNDT/2020/014; *Branglidor* UNDT/2021/004; *Mulongo* UNDT/2019/001; see moreover, ST/IC/2016/26, ST/IC/2015/22, ST/IC/2008/41, ST/IC/2005/51 and ST/IC/2002/25 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior).

from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii) was proportionate to the offence committed.

**JUDGMENT**

47. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 15<sup>th</sup> day of February 2022

Entered in the Register on this 15<sup>th</sup> day of February 2022

*(Signed)*

Eric Muli, Legal Officer, for  
Abena Kwakye-Berko, Registrar, Nairobi