



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/054
Judgment No.: UNDT/2013/117
Date: 25 September 2013
Original: French

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

KONDOMBO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Fabrizio Mastrogirolamo, UNDP

Application

1. In an application dated 22 August 2011, the Applicant challenged the decision to impose the disciplinary measure of separation from service for the allegedly false authentication of a claim for reimbursement of medical expenses to the insurer Garantie Médicale et Chirurgicale (GMC) and the submission of an allegedly fraudulent invoice relating to another medical expenses claim to GMC.
2. He asks the Tribunal to order the revocation of the decision and his reinstatement in his former functions.

Facts

3. The Applicant entered on duty with the Office of the United Nations Development Programme (UNDP) in Burkina Faso in 1984. At the time of separation from service on 28 July 2011, the Applicant was working as a Finance Assistant G-5, step 13, at UNDP Burkina Faso.
4. In 1996 he was awarded custody of his deceased brother's four children. These children were then declared to UNDP as dependents of the Applicant for purposes of compensation.
5. In February 2007, the Applicant filed two claims with GMC for reimbursement of medical expenses for two of the four children, Miss S. K. and Mr. M. K.
6. In an email dated 7 February 2007, GMC asked the Applicant to provide a report on Miss S. K.'s hospitalization and operation.
7. In an email dated 28 February 2007, the Applicant admitted that he had sent the invoices for the two children by mistake and asked GMC to send them back so that he could tender them for reimbursement by his late brother's insurance fund.
8. After conducting a field mission to Burkina Faso in May 2009, the Office of Audit and Investigations (OAI) published an investigative report on 29 January 2010 in which it concluded that the invoices submitted by the Applicant in support

of those claims were not genuine. The Applicant was invited to submit his comments, which he did on 5 March 2010.

9. In a letter dated 19 July 2010, the Applicant was accused of misconduct under article 3 (24) (e) of the UNDP Legal Framework for Addressing Non-compliance with Violations of United Nations Standards of Conduct (the “UNDP Legal Framework”) on account of:

(a) False authentication of a claim on behalf of Miss S. K. for reimbursement of medical expenses in the amount of CFA 766,000 (approximately US\$ 1,800). In support of that application, dated 18 January 2007, the Applicant submitted an invoice from “Cabinet de Soins Médicaux Kand”, dated 14 January 2007 and signed by two doctors, I. and S., indicating that Miss S. K. had undergone surgery;

(b) Filing on behalf of Mr. M. K. of a fraudulent invoice, dated 27 January 2007, in the amount of CFA 721,905 (approximately US\$ 1,700), issued by the “Clinique de l’Amitié” and signed by a Dr. I. K. That invoice was enclosed with the claim for reimbursement of medical expenses dated 1 February 2007.

10. On 21 August 2010, the Applicant stated in his response to the allegations, *inter alia*, that the investigative report did not take into account the medical certificate provided by Dr. Y. J. O. and sent by the security office of the United Nations system in Burkina Faso on 6 August 2010. Attached to his reply, the Applicant submitted a certificate issued by the same physician on 19 August 2010. In the certificates, Dr. Y. J. O. attests that he treated Miss S. K. and Mr. M. K. at the medical offices shown on the January 2007 invoices, namely, “Cabinet de Soins Médicaux Kand” and “Clinique de l’Amitié”.

11. Following that correspondence, the Applicant was informed that further checks would be done on the facts as presented and the new supporting documentation. To do so, OAI conducted a field trip to Burkina Faso from 17 to 20 November 2010.

12. On 31 January 2011, OAI sent the Applicant a copy of its draft supplementary investigation report and invited him to comment. Given the short 10-day lead time for a response from the Applicant, the latter’s counsel requested an extension until

23 February, which was authorized by the deputy director of OAI. OAI duly received the Applicant's response on 23 February 2011.

13. The auditor concluded that there was sufficient evidence that the employee had submitted false invoices to the medical insurance plan, contrary to article 1.2 (b) of the Staff Regulations.

14. The irregularities cited by the auditor are:

(a) The invoice for Miss S. K. from the "Cabinet de Soins Médicaux Kand" is stamped "Cabinet de Soins Médicaux Les Grâces";

(b) Neither of the medical offices' identification numbers are in compliance with the standards for authorized clinics in Burkina Faso;

(c) The header of the invoice from "Cabinet de Soins Médicaux Kand" is identical to that of an invoice submitted by another UNDP staff member who was treated at "Cabinet de Soins Médicaux Les Grâces";

(d) "Cabinet de Soins Médicaux Kand" is not on the Burkina Faso Ministry of Health's official list of clinics;

(e) The invoice from "Cabinet de Soins Médicaux Kand" bears the same telephone number as the one from "Clinique de l'Amitié". The number was not in service;

(f) An authentic invoice from "Clinique de l'Amitié" obtained by the auditor has several points of difference with the invoice submitted by the Applicant, purportedly from that clinic.

15. In a letter dated 19 July 2010, the UNDP Management Office informed the Applicant that two allegations had been brought against him under article 3 (24) (e) of the UNDP Legal Framework. The Applicant was invited to respond to the charges within 10 days in accordance with chapter III article 1.1 (77) of the said Legal Framework. The Applicant submitted his reply by email on 21 August 2010.

16. After reviewing the record, in a letter dated 24 June 2011 the UNDP Associate Administrator decided to impose the disciplinary action challenged by the Applicant. The Applicant acknowledged receipt of that letter on 28 July 2011.

17. The Applicant filed his application with the Tribunal on 22 August 2011. That application was officially communicated to the Respondent on 27 September 2011. The Respondent submitted its reply on 25 October 2011.

18. In a joint response to preparation order No. 107 (NBI/2012) dated 14 August 2012, the Applicant and the Respondent asked for the ruling on the case to be based solely on the documentation already on file.

Parties' contentions

19. The Applicant's contentions are:

(a) The disciplinary measure imposed on the Applicant is out of proportion to his alleged misconduct. No consideration was given to his excellent past behaviour and the quality of his work from 1984 to 2011 inclusive;

(b) The conduct of the auditor, Mr. Alfred Zebi, was unfair in that he drew hasty and erroneous conclusions from certain facts (such as the absence of Dr. Y. J. Ouédraogo and Miss Samiratou during the investigation) and his approach betrayed a strategy of confirming a preconceived notion as regards penalty;

(c) The local UNDSS office physically identified Dr. Y. J. Ouédraogo through the security assistant;

(d) The irregularities found in the documents submitted to GMC are not the Applicant's responsibility, as they were explained by Dr. Y. J. Ouédraogo in an additional medical certificate dated 19 August 2010;

(e) The conditions of the hearing were inhumane in that the auditor insisted on meeting the Applicant while he was on sick leave;

(f) The dismissal procedure was not followed. Although the letter of the UNDP Associate Administrator containing the decision is dated 24 June 2011, it reached him only on 28 July 2011;

(g) The Applicant affirmed the real existence of the Cabinet de Soins Médicaux in Burkina Faso, contrary to the contention in the supplementary investigative report by OAI. As proof, the Applicant adduced the 2005 and 2010–2011 Burkina Faso telephone directories, which do have a listing for that office.

20. The Respondent's contentions are:

(a) The allegations against the Applicant are concerned with misconduct. The Applicant has made contradictory statements about his reasons for submitting, then withdrawing, claims to the GMC. His attempted fraud is evidenced by the irregularities in the supporting documents;

b) The disciplinary measure taken against him is proportionate to the misconduct and in keeping with a consistent line of authority;

(c) The Respondent followed the investigative and disciplinary procedure set out in the UNDP Legal Framework.

Judgment

21. The Applicant challenges the decision of 24 June 2011 whereby the UNDP Administrator imposed the disciplinary sanction of separation from service with three months' pay in lieu of notice, plus one month's severance pay.

22. Chapter X of the Staff Regulations provides that the Secretary-General may impose disciplinary measures on staff members who engage in misconduct.

23. When the Tribunal considers an application challenging the legality of a disciplinary measure, it must determine, first, whether the proper procedure was followed; second, whether the allegations are substantiated; third, whether the alleged actions constitute misconduct; and finally, whether the sanction imposed is proportionate to the misconduct (rulings in *Mahdi* 2010-UNAT-018, *Abu Hamda*

2010-UNAT-022, and *Maslamani* 2010-UNAT-028 by the United Nations Appeals Tribunal).

Due process

24. The Tribunal must examine the Applicant's allegations, to wit, that the investigative procedure and the disciplinary proceedings were improper.

25. In chapter II of the UNDP Legal Framework "Investigation", section 3 (Roles, rights and responsibilities of the investigators) provides that: "All investigators, or persons designated to conduct a preliminary assessment or an investigation, shall be independent. They have a duty of objectivity, thoroughness, ethical behaviour, and observance of legal and professional standards."

26. The Tribunal considers that the auditor did observe the standards of conduct laid down in the UNDP Legal Framework.

27. In this case, the Tribunal considers that the auditor took all necessary steps to verify the exhibits' authenticity. Even though he was given advance notice by the auditor, Dr. Y. J. Ouédraogo was not available for an interview in Ouagadougou. Although the auditor was able to reach Dr. Ouédraogo by phone, and the latter did provide an explanatory medical certificate, the Tribunal is not convinced of the veracity of his statements and writings.

28. Furthermore, the irregularity invoked by the Applicant regarding the auditor's insistence on interviewing him while he was on sick leave is unfounded. The interview transcripts show that the Applicant never raised that issue with the auditor; indeed, in his email of 10 November 2010, the auditor went so far as to ask after the Applicant's health before his arrival for the interview.

29. As regards the Applicant's contention that the penalty was premeditated by the auditor, the Tribunal concludes that it is unfounded. The investigation was continued by order of the Medical Claims Unit because there were serious doubts

as to the authenticity of the invoices following two other similar cases of fraudulent claims to UNDP for medical reimbursement.

30. In disciplinary matters, the amendment of 11 May 2010 to Administrative Instruction ST/AI/371 (Disciplinary measures and procedures) of 2 August 1991 sets out the procedure for communicating disciplinary measures in the following terms:

“9. Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General, shall proceed as follows:

...

[...](b) Should the preponderance of evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General. [...] Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.”

31. First, the applicant claims that the late notification of the decision is contrary to the disciplinary procedure set forth by the administration. The administrative instruction cited does not provide that notification of the disciplinary measure must take place immediately. The Applicant’s argument is therefore legally unsound. The Tribunal regrets the delay of more than a month between the decision and its notification to the Applicant, but in this case it cannot conclude that the Administration was at fault.

32. Rule 10.3 in chapter X of the Staff Rules sets out the procedure for the imposition of disciplinary measures. Thus, a disciplinary measure may not be imposed following an investigation “unless [the staff member] has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges”.

33. Pursuant to Administrative Instruction ST/AI/371 and chapter IV of the UNDP Legal Framework for Addressing Non-compliance with Violations of United Nations Standards of Conduct, the Administration sent a letter to the Applicant, detailing the charges, on 19 July 2010, giving him 10 days after receipt of the email to reply.

34. The Tribunal considers that lead time is reasonable given the complexity of the case.

35. As regards the staff member's rights in the context of the disciplinary proceedings, the Tribunal finds, in light of the entire dossier, that the Applicant's rights have been respected in compliance with Administrative Instruction ST/AI/371.

36. Thus, since the Applicant has failed to establish any irregularities in the procedure followed to impose the disciplinary measure on him, the Tribunal must now rule on whether the alleged facts have been established.

Establishment of the alleged facts

37. The Tribunal notes that according to the President of the National Council of the Order of Physicians, Dr. Y. J. Ouédraogo, Dr. K. I., and Dr. O. M. are not listed on the rolls of the Burkina Faso Order of Physicians and were therefore not authorized to provide medical treatment.

38. Meanwhile, it has become clear from the investigation that there are several irregularities in the supporting documents submitted by the Applicant. Doubt is cast on the merits of these claims for reimbursement of medical expenses by new evidence brought to light by the auditor during his field mission in Burkina Faso. The Tribunal considers that these irregularities are sufficiently disturbing to strongly suggest that the said invoices were falsified.

39. The Tribunal lends no credence to the assertion that the invoices were submitted to the GMC in error, given that the Applicant completed the claim form

specifically for GMC and that the two invoices were not submitted by the Applicant together with others.

40. The Tribunal therefore finds that the facts on the basis of which the Applicant was sanctioned are established.

Actions constituting professional misconduct?

41. In the Tribunal's judgement, the Applicant's actions constitute professional misconduct within the meaning of the regulations in effect at the time of the alleged facts.

42. Section 3, paragraph 24 (e), of the UNDP Legal Framework sets out the categories of misconduct. The third of these consists of: "misrepresentation, forgery, or false certification, such as, but not limited to, in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit".

43. The Administration accuses the Applicant of "misrepresentation or false certification in connection with any United Nations claim or benefit" pursuant to Administrative Instruction ST/AI/371, section II, paragraph 2 (c).

44. Section 6.5 of the Medical Insurance Plan (MIP) Rules states that: "Signing the GMCS MIP Refund Claim Form signifies the subscriber's certification of the truth and accuracy of the information provided". Having signed the claims at issue, the Applicant is therefore accountable for the truth and accuracy of the supporting invoices. As a medical plan subscriber, the Applicant was required to comply with the relevant regulations as well as the rules and regulations applicable to United Nations staff members. He cannot claim that the wrongful act was the physician's responsibility, as according to the regulations the Applicant is responsible for checking all supporting documents submitted.

45. The Applicant's alleged misconduct, namely attempted fraud, constitutes non-compliance with the standards of conduct expected of an international civil servant

under staff rule 10.1, which gives the following definition of misconduct deserving of disciplinary measures:

“Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant.”

46. The submission of fraudulent supporting documents to claim reimbursement in the amount of US\$ 3,500, even though the claim was later dropped, constitutes serious misconduct given the integrity expected of an international civil servant. Under staff regulation 1.2 (b): “The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

47. In light of the entire dossier, the Tribunal finds sufficient evidence to establish that the applicant’s conduct has been contrary to the provisions of staff rule 10.1 and staff regulation 1.2 (b), and that he has therefore been guilty of misconduct.

Proportionality of the sanction

48. Staff regulation 10.1, which provides that “The Secretary-General may impose disciplinary measures on staff members who engage in misconduct”, leaves the Secretary-General with broad discretion regarding the appropriate sanction. According to staff rule 10.3 (b) (Due process in the disciplinary process): “Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. It is now up to the Tribunal to consider whether the disciplinary measure imposed by UNDP is manifestly disproportionate to the offence.

49. Article 8.5 of the MIP Rules states that: “Neither abuse or fraud will be tolerated. The Subscriber will be held responsible and subject to disciplinary measures for any false or incorrect information submitted. Submission of [a] fraudulent MIP claim is ground for dismissal.”

50. In the case under advisement, the Applicant's submission of false invoices to GMC constitutes professional misconduct justifying dismissal for serious under the MIP Regulations.

51. The Tribunal considers the sanction imposed in this case to be proportionate, given that under staff regulation 1.2 (b) the integrity of international civil servants must be unimpeachable.

52. Given the 27 years of faithful service performed by the Applicant flawlessly, the Administration has chosen the measure of separation from service with compensation rather than dismissal.

53. In judgement No. 1011 of the former United Nations Administrative Tribunal, the Tribunal held that the actions of an applicant who had sought reimbursement of medical expenses of US\$ 411 on the strength of fraudulent certificates clearly constituted misconduct that should be condemned and punished without the slightest hesitation.

54. The former United Nations Administrative Tribunal also supported the decision to impose separation from service with compensation in *Patel* (UNAT-850, 1997), in view of the Applicant's 18 years of flawless service, for attempted fraud more serious than in this case.

55. Hence, the Tribunal considers that the sanction imposed on the Applicant is in no way disproportionate given the seriousness of his alleged misconduct.

Decision

80. In view of the foregoing, the Tribunal DECIDES:

(a) That the decision taken on 24 June 2011 by UNDP and received by the Applicant on 28 July 2011 is well founded;

(b) The appeal is dismissed.

(Signed)

Judge Vinod Boolell

So ruled this 25th day of September 2013

Entered in the Register on 25 September 2013

(Signed) ____

Abena Kwakye-Berko, Acting Registrar, Nairobi
