



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NB/2009/013

Judgment No. UNDT/2010/010

Date: 25 January 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ANDATI-AMWAYI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

UNDT/2010/010

Counsel for applicant:
Self-represented

Counsel for respondent:
HRMS, UNON

Introduction

1. On 21 April 2009, the Applicant submitted an incomplete statement of appeal to the Nairobi Joint Appeals Board (JAB) in which he contested a “denial of medical services on 9 January 2009”. On 1 July 2009, this matter was transferred to the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11.
2. Following an order of the Tribunal dated 30 October 2009, the Applicant filed an application on 13 November 2009, in which he challenges “UNON’s instructions to hospitals in Kenya not to provide medical services to any staff member who produced an expired Medical Insurance Plan (MIP) Card and Grounds Pass”.
3. The Applicant prays the Tribunal to find that:
 - a. The Respondent “engaged in prohibited conduct as defined in ST/SGB/2008/10 and seriously threatened and endangered the life of the Applicant; and that this is an exceptional case”;
 - b. The Respondent should compensate the Applicant, above the two-year salary limit, in the sum of USD 40, 000 for mental anguish, general damages, as well as Kenyan Shillings (KSH) 235,098 for medical costs and related expenses¹.

Facts

4. The Applicant joined UN-HABITAT in April 1992 as a messenger at the GS-1 level. In October 1998, he was promoted to the position of clerk at the GS-2

¹ Approximately USD 3200 at the exchange rate applicable in January 2010.

level. In March 2003, the Director of the Programme Support Division (PSD) recommended the promotion of the Applicant to the GS-4 level.

5. Thereafter, owing to unsatisfactory performance, the Applicant's contract was extended on shorter than the usual duration, namely six months, from 1 January to 30 June 2006. He was again extended for three months until 30 September 2006, pending the resolution of completion of the Applicant's Performance Appraisal System (PAS).
6. In the course of 2006, the Applicant challenged the fact that his contract had been extended for a shorter duration. He filed his claim with the Secretary-General and subsequently with the Nairobi Joint Appeals Board.
7. At the end of September 2006, the Applicant's contract was renewed for six months, until 31 March 2007. His contract was again extended until 31 September 2007.
8. On 12 October 2007, the Applicant was notified that a letter of appointment with a start date of 1 October 2007 until 31 December 2007 was ready for his signature. Despite several attempts to contact the Applicant, the latter failed to sign his contract.
9. The Applicant requested the Secretary-General to review the decision to offer him a contract of a shorter duration. The Administrative Law Unit wrote to the Director of PSD on 26 October 2006, who explained that the shorter duration of the Applicant's contracts was due to his unacceptable behaviour at the workplace. Yet, an extension of six months had been granted to show the Organization's good faith.
10. By memorandum (memo) of 18 December 2007, the Chief of Human Resources Management Services (HRMS) advised the Applicant that he was

given a deadline of 21 December 2007 to sign his new letter of appointment. He was also informed that failure to comply by this deadline would mean that his ground pass would be withdrawn and that he would be prevented from accessing the UN premises.

11. By letter dated 21 December 2007, the Applicant replied that it was a “manifest deliberate distortion of facts and circumstances, discrimination, intimidation, coercion, duress, and retaliation. Such tendencies [were] tyrannical and actually undermine the spirit of promoting ethics, integrity and accountability within the United Nations”. He concluded by suggesting the Chief of HRMS “respect the rule of law by respecting matters that are before the Joint Appeals Board, the Administrative Tribunal of the United Nations, or other legal mechanisms established to sustain the Internal Justice System of the United Nations”.
12. By memo dated 6 March 2008, the Under-Secretary-General and Executive Director of UN-HABITAT confirmed that the Applicant agreed to sign a new three month contract on 25 February 2008 to work in the Human Settlement Financing Division and that another three month contract would be offered to him subject to satisfactory performance and behaviour.
13. The Applicant submitted an incomplete statement of appeal on 21 April 2009 to the Nairobi Joint Appeals Board (JAB) to challenge a “denial of medical services on 9 January 2009”. The Applicant was granted an extension of time to file a complete statement of appeal on the same day. On 20 May 2009, the Applicant requested another extension of time to complete his appeal. His request was granted and he had until 23 June 2009 to do so.
14. On 18 June 2009, the Applicant informed the JAB that he could not file his complete statement of appeal as he was on sick leave. The JAB Presiding

Officer granted a further extension of time and ordered the Applicant to file his claim with the UNDT that would become operational as of 1 July 2009.

15. On 8 July 2009, the Applicant was informed that his appeal, then pending before the Nairobi JAB, had been transferred to the UNDT.
16. On 14 October 2009, the UNDT Registry advised the Applicant that it had still not received his application and that he would have a deadline until 29 October 2009 to enter an application to pursue his claim.
17. By a written motion of 28 October 2009, the Applicant moved the Tribunal to grant him an extension of time due to his extended sick leave. By order dated 30 October 2009, the Tribunal requested the Applicant to file his application by 13 November 2009.
18. On 13 November 2009, the Applicant entered the present application to contest “UNON’s instructions to hospitals in Kenya not to provide medical services to any staff member who produced an expired Medical Insurance Plan (MIP) Card and Grounds Pass”, as notified to him on 14 January 2009.

Applicant’s submissions

19. In support of his Application, the Applicant avers that two authorised hospitals in Nairobi, Kenya refused to give him critical medical services by citing instructions issued by UNON on an unspecified date. The effect of the said instructions was to direct hospitals in Nairobi not to provide medical services to any staff member who produced expired MIP Card and Ground Pass. The Applicant argues that, as a result of such policy, he has suffered and continues to suffer irreparable damage to his health and that of his family to the extent that his life was seriously threatened due to the deliberate acts of the Respondent.

20. The Applicant claims that this situation is the result of the delayed contract extensions and/or failure on the part of the Respondent to inform the Applicant about his contract extension in a timely manner causing actual mental anguish, bodily harm, and other damages to the life and person of the Applicant.
21. The Applicant further argues that the Respondent has refused to disclose to the Applicant the impugned instructions. Applicant avers that the Respondent has ignored and/or neglected to respond to at least two of his requests on this issue, and through its senior management, is responsible for this situation. He argues that this action is in clear violation of Section 1.2 of ST/SGB/2008/5 and amounts to harassment “to the extent of attempting to kill him through denial of timely and critical medical services”.
22. The Respondent is in further clear violation of Section 1.4 of the same ST/SGB by improperly using his authority to influence the career, assignment, contract renewal, performance evaluation and promotion of the Applicant, which is a serious abuse of authority.

Respondent’s Reply

23. In his Reply, the Respondent explains that the shorter contracts granted to the Applicant in 2006 were the result of inappropriate behaviour and non-performance. The Respondent notes that the Applicant tried to challenge the situation with the JAB, the Office of Internal Oversight Services and the Ethics Office but failed in his attempts.
24. According to the Respondent, the Applicant wanted longer contract extensions and has, over the past years, repeatedly refused to participate in the

Performance Appraisal process and to sign Letters of Appointments (LOAs) that were prepared by HRMS/UNON upon request by UN-HABITAT.

25. The Respondent states that, further to internal discussions at UN-HABITAT, the Applicant was granted an extension of contract and, subject to satisfactory performance, his contract would be renewed for a period of two years. Nevertheless, the Applicant refused to sign the LOAs that were prepared on 16 April 2008 for the period of 1 April to 30 June 2008 and on 11 August 2008 for the period of 1 July to 31 December 2008. However, the practice of issuing LOAs for extension was discontinued by HRMS/UNON in September 2008. Staff members now receive copies of the Personnel Action that is recorded in the electronic staff management system, namely the Integrated Management Information System (IMIS).
26. The Respondent avers that the Applicant continued to discuss the duration of his contract extensions with his managers in UN-HABITAT, which led repeatedly to situations where the Applicant did not have valid contractual documents or MIP Card. This was also the case at the end of December 2008 and the beginning of 2009.
27. On 9 January 2009, the Mater Hospital refused to extend credit facilities to the Applicant as he did not have a valid MIP Card and could not provide proof that he was a staff member of UNON. However, on 20 January 2009 HRMS UNON issued a Personnel Action showing an extension of appointment for the month of January 2009, pending a decision from UN-HABITAT concerning the duration of the Applicant's contract extension. This allowed the Joint Medical Service (JMS) to issue a letter of guarantee as an exception to standard procedures on 3 February 2009. Eventually, the Applicant's contract was extended for two months effective the beginning of February 2009 to keep the staff member on the payroll.

28. On 21 February 2009, the Applicant contacted the JMS at UNON requesting another Letter of Guarantee, this time for the Nairobi Hospital. JMS ascertained that the Applicant had a valid contract and requested the Applicant on 24 February 2009 to request that a new MIP Card be issued to him. The Applicant said that he was too ill to do this. A letter of guarantee was issued by JMS and a colleague of the Applicant delivered it to him. JMS faxed this letter on 24 February 2009 to the accounts department. The Applicant was admitted to the Nairobi Hospital on 27 February 2009.
29. On 4 March 2009, the Applicant's contract with UN-HABITAT was extended to 31 April 2009. Yet, on 17 March 2009, after he had been discharged from the Nairobi Hospital, the Applicant had still not made arrangements for a MIP Card to be issued to him and requested another letter of guarantee. On 4 April 2009, the Applicant was advised by email to make arrangements to obtain the MIP Cards for himself and his family as per the established procedures. The Applicant did not make any effort to get the MIP Cards issued to himself and his family. Two months later, he requested another letter of guarantee from JMS. The latter requested the Applicant to come to their office and have a MIP Card issued to himself and his family.
30. The Applicant did not contact JMS thereafter. The record shows that he collected the MIP Cards for himself and his family members in October 2009.
31. The Respondent argues that this application is not receivable within the purview of Article 2 of the UNDT Statute, according to which a staff member may file an application against an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.
32. The decision challenged by the Applicant relates to "UNON's instructions to hospitals in Kenya not to provide medical services to any staff member who

produced an expired MIP Card and Grounds Pass”. The Respondent submits that the Applicant’s submission does not allege non-compliance with the staff member’s terms of appointment. He has failed to show how the agreement is not in compliance with his terms of appointment or other rules of the Organization.

33. Should the Tribunal deem UNON policy not to extend credit to staff members not holding valid MIP cards as an administrative decision, the Respondent avers that the Applicant has failed to abide by the rules which regulate the access to medical care on credit. He did not make arrangements for the issuance of the MIP Card when he was able to do so and deprived himself of the possibility to receive medical treatment on credit.
34. Finally, the Applicant has failed to show how he suffered any prejudice by the agreement between JMS and the Medical Service Providers in his rights as a staff member. He has the right to receive health insurance on the terms negotiated with the Medical Service Providers. He is, however, not entitled to extraordinary treatment that is not available to all staff members who carry the MIP Card. He should have carried one but failed to do so.
35. The critical issue is that staff member who wants to benefit of this facility need to be able to demonstrate that he is indeed a staff member and – this can be done either through a valid Identity Card (ID) or through a valid Letter of Appointment/Contract.
36. In order to support staff access to care in situations where staff members are unable to make deposit or pay up-front for treatment, UNON issued in 2003 photo ID cards which allow staff to benefit from direct billing arrangements between selected service providers and, based on these arrangements, service is given free of charge and bills are sent directly to UNON for settlement. 20 per cent of the salary is deducted directly from the staff member’s payroll.

Review of the Case by the Tribunal

37. The Respondent challenges the jurisdiction of this Tribunal to entertain this application. The Respondent has submitted that the impugned decision was not an administrative decision falling within the purview of Article 2 of the UNDT Statute and Staff Rule 11.4 (a).

38. This argument of the Respondent is in line with the reasoning in the case of *Andronov*² in which the United Nations Administrative Tribunal (UNAT) stated that in order for an administrative decision to be open for appeal under Chapter XI of the Staff Rules,

- “(i) it must have been unilaterally taken by the Administration;
- (ii) it must be of an individual application; and
- (iii) it must have created direct legal consequences for the terms of employment of a particular individual.”

38. The opening words of Article 11.4 of the Staff Rules read, *A staff member may file an application against a contested administrative decision.*

39. Further, Article 2.1 (a) of the UNDT Statute reads:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an Application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

² UNAT Judgment No. 1157, *Andronov* (2003).

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

40. What constitutes an administrative decision would depend on a number of factors like the status of the decision maker, the nature of the act, the law or regulation under which the act was performed and the nature of the consequences of the act on one or more individuals. In the case of *Teffera v Secretary General of the United Nations*³, it was stated that, *Given the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken.*

41. In the present case, the Applicant is challenging UNON’s instructions to hospitals in Kenya not to provide medical services to any staff member who produced an expired Medical Insurance Card and Grounds Pass”. The Applicant is a staff member in the General Service Category whose medical coverage was planned under the MIP. The Applicant is a beneficiary of the MIP and challenges the applicable rules, which have allegedly affected him.

42. As a general rule, the provisions of ST/AI/343 on the “Rules Governing the Medical Insurance Plan” state that the MIP membership is predicated upon a valid contract.

³ UNDT Judgment 2009/090 dated 17 December 2009.

43. Participation in the MIP is automatic for all staff members holding a contract of three months or more in the General Service and National Officer categories who serve at the designated duty station away from one of the relevant Headquarters location. The MIP enables the concerned staff members to pay medical service providers and then claim reimbursement through the JMS that administers the MIP.
44. The provisions of ST/AI/343 also clearly states even though participation is automatic, staff members must complete a form, obtainable from the JMS, in respect of his or her own participation and eligible family members.
45. Because the MIP is a reimbursement scheme, the Applicant is required, under the normal procedure, to pay the expenses of his medical services and claim reimbursement through the MIP. When a subscriber or eligible family member has incurred expenses for services reimbursable under MIP, the subscriber is to file a claim under the Plan with the administering office as soon as possible after treatment or care has been provided, normally within 60 days.
46. A staff member may be issued letters of guarantee in order to be provided medical services on credit. If a staff member does not possess a valid MIP card, he or she may produce a copy of their contract along with some form of ID card. In other words, the staff member must bring evidence that he or she is a subscriber of the MIP.
47. Based on the documentation submitted by the Parties, evidence shows that the JMS contacted the Applicant on various occasions to ask him to proceed with his MIP Card for himself and his family. The Applicant systematically excused himself stating that he could not come to the JMS for medical reasons.

48. However, when the Applicant was awaiting the extension of his contract, he received a letter of guarantee in order to be provided medical services on credit from five specific hospitals in Nairobi with whom UNON had finalized credit agreements.
49. The crux of this matter is whether a staff member can be provided medical services without showing evidence that he is a subscriber of the MIP, by means of a MIP Card, a Ground Pass or a valid contract.
50. The MIP system works on the basis of contributions by subscribers. If a staff member no longer contributes to the scheme, or fails to show a MIP Card or any evidence showing that he or she is employed by the UN and participate in the MIP, the Tribunal is of the view that UNON's instructions not to provide medical services to any staff member who cannot show their MIP Card or Grounds Pass do not represent an abuse of authority. Such instructions would be as a matter of fact in accordance with ST/AI/343 on the Rules Governing the MIP.
51. The records show that the Respondent actually made an exception for the staff member to issue him a letter of guarantee when he did not collect his MIP Card or was waiting for an extension of contract, using its discretionary authority, in a sympathetic effort given the Applicant's contractual troubles.
52. There is nothing on record to show that the administration gave specific instructions to the hospitals in Kenya not to provide medical services to the Applicant. On the contrary it was the Applicant himself who by a systematic course of conduct put himself outside the purview of the facilities to which he would have been entitled by neglecting or deliberately refusing to collect his MIP card.

53. In the light of the foregoing, it is the finding of the Tribunal that there was no administrative decision taken by the administration within the meaning of Article 2 of the UNDT Statute and as explained above.

54. The Tribunal notes that it is the staff member's responsibility to show diligence and make the necessary arrangements to obtain his MIP Card. There is no evidence in the file showing that the Applicant tried to make any arrangements to collect his MIP Card, despite the repeated requests from the Administration. Instead, the Applicant arranged to have a letter of guarantee collected by a colleague in order to be provided medical service on credit.

55. The application is therefore rejected in its entirety.

56. In the view of the Tribunal, the Applicant has made an abuse of the process of the Tribunal and is ordered to pay USD 100 as costs, pursuant to Article 10.6 of the UNDT Statute.



Judge Vinod Boolell

Dated this 25th day of January 2010

Entered in the Register on this 25th day of January 2010



For
Jean-Pelé Fomété, Registrar, UNDT, Nairobi