



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MEYO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Duke Danquah, OSLA

Counsel for the Respondent:

Josianne Muc, UNDP

Introduction

1. The Applicant contests the termination of his employment with the United Nations Development Programme (“UNDP”) made on grounds of fraudulent medical claims that he submitted to the Garantie Médicale et Chirurgicale (“GMC”). The Applicant requests the Dispute Tribunal to find that the impugned decision was disproportionate to the offence, that the imposed disciplinary measure be rescinded and a less onerous disciplinary measure like a written censure or demotion within grade be substituted for the imposed disciplinary measure.

2. Article 16.2 of the Dispute Tribunal Rules of Procedure states that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. However in this case, the Applicant has admitted the misconduct and the facts are not in issue.

3. In response to a Case Management Order No. 105 (NBI/2012), both Parties agreed that an oral hearing of the case was not necessary and submitted a list of agreed facts, legal issues and the remedies sought. The Tribunal has sufficient evidence from the pleadings and submissions of the Parties to make a decision and finds that this case is suitable for determination based on the pleadings without an oral hearing.

Issues

4. The main legal issues to be resolved in this case are:
- a. Whether misconduct was established.
 - b. Whether in the light of mitigating factors the imposed disciplinary measure is disproportionate to the offence.

Facts

5. The Applicant joined the UNDP Country Office in Gabon in 1988. At the time of his separation from service on 2 June 2011 he was employed as a driver holding a fixed term appointment at the G-3 step 10. In July 2009, the Applicant made a claim for reimbursement of medical expenses to the GMC for West African CFA Franc (“XOF”) 940,501 (approximately USD 2,000). GMC is an independent brokerage firm to whom UNDP outsources the administration of its Medical Insurance Plan (“MIP”). UNDP locally recruited staff members subscribe to this plan. The Applicant was a subscriber during his time as a staff member.

6. In support of his claim to GMC the Applicant submitted an invoice for treatment allegedly received by his wife at the Fondation Docteur Chambrier, a hospital in Gabon. The invoice indicated that his wife had been hospitalized there for five days from 16 May 2009 and was treated by a Dr. Lemaba. The Applicant also provided a receipt dated 21 May 2009 from the hospital acknowledging payment of “XOF” 940,501 and a report dated 21 May 2009 signed by the same Doctor.

7. While processing the Applicant’s claim, the GMC discovered a discrepancy between the total amount in the invoice and the amounts shown in the itemized breakdown of costs. This discrepancy prompted them to review the Applicant’s claim further. In the resulting report (“GMC Report”) they concluded that “...invoice sent...is a fake invoice.” The report was submitted to the Office of Audit and Investigations (“OAI”) on 27 October 2009.

8. Based on the information in the GMC Report, the OAI wrote to the Applicant on 30 November 2009 (“notification letter”) to notify him that he was the subject of an investigation.

9. On 2 December 2009, the OAI interviewed the Applicant who admitted to submitting the claim for reimbursement, the invoice, the hospital report and the receipt of the cost incurred to the GMC. He also admitted that his wife had never been hospitalized at the Fondation Docteur Chambrier. The Applicant explained that

he did this because he needed money and it was the first time he had tried to defraud GMC. GMC confirmed that before this investigation, the Applicant had submitted only few claims none of which were suspicious.

10. The Applicant's first explanation to the investigators was that around June/July 2009, he met someone in a bar in Libreville, Gabon who introduced himself as Mr. Ague. At the time of meeting, the Applicant, who was wearing his UNDP driver uniform, told Mr. Ague that he was a UNDP employee. Mr. Ague claimed to be a medical doctor working at the Fondation Docteur Chambrier. The Applicant said that Mr. Ague told him he had a business proposal for him and that he could provide the Applicant with a fake invoice for medical treatment for a total payment of XOF 100,000 (approximately USD 220). He asked the Applicant to make an advance payment of XOF 50,000 (approximately USD 110).

11. After receiving the fake documents from Mr. Ague, the Applicant submitted the fraudulent claim to GMC. By, email dated 31 August 2009 GMC informed the Applicant that it would not reimburse his claim. The Applicant did not reply.

12. In the course of investigation by OAI, the Fondation Docteur Chambrier confirmed that Mr. Ague was actually a nurse working at the hospital in the operation room. The hospital had also conducted an internal investigation into the involvement of Mr. Ague during which both the Applicant and Mr. Ague admitted, in writing, that it was the Applicant who had requested the assistance of Mr. Ague to generate fake documents.

13. In a letter dated 2 December 2009 the Applicant admitted the allegations in the notification letter. He agreed that he had submitted a claim for the reimbursement of medical expenses to GMC for treatments that were never received by his wife. He also confirmed that the invoice, the hospital report and the receipt from Fondation Docteur Chambrier were not genuine.

14. On 7 October 2010 the OAI sent a copy of the draft investigation report to the Applicant for comments. On 22 October 2010 the Applicant confirmed that "... the allegations mentioned in the official investigation notification letter were true..."

15. Both Parties agree that during the period of investigation, the Applicant was incarcerated by the Gabonese authorities in relation to other alleged fraudulent activities.

16. On 12 November 2010, the Applicant was formally charged in writing with misconduct for having submitted a fraudulent medical claim for treatment allegedly received by his wife. In his response on 19 November 2010, the Applicant stated that;

[he has] already admitted that the allegations mentioned in the official investigation notification letter [were] true and, therefore, "take on [his] responsibility" and accuse [his] misconduct.

17. On 29 April 2011, the Associate Administrator of UNDP informed the Applicant that upon review of his response and the evidence, she had come to the conclusion that the Applicant's actions warranted the imposition of a disciplinary measure of separation from service with one month notice and one month termination indemnity, pursuant to the former staff rules Rule 10.2(a) (viii).

18. In her letter to the Applicant the Associate Administrator stated:

In reviewing your case, I have taken into consideration the specific facts concerning your case, the reason you provided for your actions as well as similar precedents and jurisprudence. The fact that you tried to justify your actions by stating that you were in need of money cannot be considered as a mitigating factor. While I have taken note of your 23 years of good service with the organization and the fact that you have not been found to have transmitted a fraudulent claim to GMC previously, I find your action inconsistent with your continued service with UNDP

19. UNDP informed the Applicant of his right to challenge the disciplinary measure imposed and the right to legal assistance from the Office of Staff Legal Assistance (OSLA).

20. On 26 July 2011, the Applicant filed his Application at the Tribunal.

Applicant's submissions

21. The Applicant's principal contentions may be summarised as follows:

- a. That the Applicant's actions did not amount to fraud rather it was an act of attempted fraud;
- b. That the Organization did not take into consideration mitigating factors relevant to the Applicant including: the incompleteness of the alleged act of fraud; the fact that the Applicant was victimized by the misrepresentation of a third party who claimed to be a medical doctor; the fact that the Applicant was swindled out of XOF 50,000; and the fact that the Applicant had no means of verifying the validity of the invoice;
- c. The Organization did not suffer any financial harm since the act of fraud was not completed and no financial benefit accrued to the Applicant;
- d. The Applicant's act of approaching Dr. Argue in the bar with the proposal was reprehensible however owing to the fact that the ill-conceived fraudulent act was not consummated, it legally amounts to "harmless error" or a mere *delict*, i.e. a wrong that is substantially less atrocious than a crime or a tort;
- e. The disciplinary measure of separation from service was disproportionate to the offence.

Respondent's submissions

22. The Respondent's principal contentions may be summarized as follows:
- a. Misconduct against the Applicant had been established;
 - b. The Organization took into account all the relevant factors surrounding the case in reaching its decision;
 - c. The disciplinary measure imposed was proportionate to the offence and in line with the Tribunal's jurisprudence.

Considerations

Issue 1: Was misconduct established?

23. The former staff regulation 1.2 and staff rule 10.1¹ set out the common standards of conduct expected of UN Staff members. The Medical Insurance Plan Rules² ("MIP rules") and the UNDP Legal Framework for Addressing Non-compliance with UN Standards of Conduct³ ("UNDP Legal Framework") define misconduct in the specific circumstances of this case.

MIP Rules 6.2

Forms and supporting documentation

Claim Form

Signing the GMCS MIP Refund Claim Form signifies the subscriber's certification of the truth and accuracy of the information provided.

The subscriber will be held responsible and subject to disciplinary measures for any false or incorrect information submitted.

Submission of fraudulent MIP claims is grounds for dismissal

¹ ST/SGB/2010/6; Staff Regulations of the United Nations and Provisional Staff Rules

² United Nations Development Programme, Medical Insurance Plan Rules, Office of Human Resources Management, 1 January 2004

³ United Nations Development Programme Legal framework for addressing Non-Compliance with UN Standards of Conduct, May 2008

8.5 Abuse or Fraud

Neither abuse nor fraud will be tolerated. The subscriber will be held responsible and subject to disciplinary measures for any false or incorrect information submitted. *Submission of fraudulent MIP claims is grounds for dismissal.*

UNDP Legal Framework

23. Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:

(e) 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;

24. The Applicant has never denied making a false certification. He admitted the misconduct as soon as he was confronted with it and, apart from initially and wrongly accusing the nurse of making the suggestion, was forthcoming with a full confession. This was all he could do in the circumstances, faced as he was with irrefutable evidence of his offending.

25. The fact that the attempt to obtain money by making this false claim was not successful to him is a reflection of the vigilance of GMC but does not diminish the Applicant's responsibility for making the false claim in connection with an official claim or benefit as defined in 23(e) of the UNDP Legal Framework.

26. Whether or not the Applicant's actions would have been found to have amounted to a crime is not within the purview of this Tribunal and is irrelevant in the face of clear and convincing evidence, supported by the Applicant's admissions that he was responsible for making the false claims.

27. There is no doubt that the acts of the Applicant amounted to misconduct.

Issue 2: Whether in the light of mitigating factors the imposed disciplinary measure is disproportionate to the offence.

28. The Applicant accepts he acted fraudulently. He submits that had he completed all the steps of the offence and caused the Organization to actually make financial payment then separation from service would have been warranted. However he points to what he considers should have been considered as mitigating factors to justify the imposition of a less onerous disciplinary measure.

29. In undertaking a judicial review of a disciplinary measure the Tribunal may determine if the administrative decision under challenge is reasonable, fair, legally and procedurally correct, and proportionate.⁴

30. In considering the proportionality of a disciplinary measure the starting point is that the Secretary-General has a wide margin of discretion in imposing disciplinary measures against staff members who have committed misconduct provided those actions follow the law and lawful procedure and that the outcome is proportionate to the degree of misconduct.⁵

31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered.⁶

32. In general, however, the Tribunal will not interfere with the exercise of a discretionary authority unless the Applicant can establish evidence of illegality, irrationality and procedural impropriety⁷ or violation of an Applicant's due process rights.⁸ A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

⁴ See: *Sanwidi* 2010-UNAT-084

⁵ See: *Applicant* UNDT/2010/171

⁶ See: *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022

⁷ *Ibidem*

⁸ See: *Haniya* 2010-UNAT-024

33. The UNDP Administrator produces an annual report entitled “UNDP Annual Report of the Administrator on Disciplinary Measures and Other Actions Taken in Response to Fraud, Corruption and Other Wrongdoing.” The 2011 Report included a description of cases which had resulted in the imposition of disciplinary measures.

34. UNDP listed cases where three former staff members and two contractors had made false claims for reimbursement of medical expenses. In each case the fraudulent act was detected before the claim was processed. The Organization terminated the employment of the staff members and the contracts of the contractors in a similar way as it did to the Applicant. This demonstrates an admirable consistency in the imposition of disciplinary measures for similar misconduct and supports the UNDP claim that it acted rationally. Although comparisons between other, even similar, cases should be treated with caution as every case turns on its own facts, in this case the facts speak for themselves.

35. The Tribunal also notes that the Administrator expressly considered the mitigating factors of the length of the Applicant’s service with the Organization and that he had not previously submitted a fraudulent claim to GMC.

36. The other factors submitted to the Tribunal by the Applicant do not amount to mitigation. The misconduct committed by the Applicant was the submission of a false claim. That he made nothing out of it and in fact lost money through the duplicity of a co-offender are not mitigating factors. The act of attempting to defraud the medical claims system was sufficient to destroy the faith of the Organization in him that was necessary for a continuing employment relationship.

37. The Applicant has not established that the Administration acted in an unlawful manner. The Tribunal finds that it followed the correct steps of investigation and as well received confirmation of the offending from the hospital enquiry and from the Applicant’s own frank admissions. There was no breach of due process.

Conclusion

38. In all of the circumstances the Tribunal finds that the sanction of separation from service with one month notice and one month termination indemnity was proportionate to the misconduct of the Applicant.

39. The Application is dismissed.

(Signed)
Judge Coral Shaw

Dated this 17th day of September 2012

Entered in the Register on this 17th day of September 2012

(Signed)
Legal Officer for :
Jean-Pelé Fomété, Registrar, Nairobi