



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Alexandre Tavadian, OSLA

Counsel for Respondent:
Elizabeth Brown, UNHCR

Introduction

1. The Applicant was formerly a Senior Finance Clerk in Khartoum, Sudan, on a fixed-term contract at the G-5 level with the United Nations High Commissioner for Refugees (UNHCR). She is contesting the High Commissioner's decision of 13 October 2011 to dismiss her for serious misconduct following an investigation by the Inspector General's Office (IGO) into allegations that she had submitted a fraudulent claim to the United Nations Medical Insurance Plan (MIP) Programme.

Procedural History

2. On 23 January 2012, the Applicant submitted her Application to the Registry of the United Nations Dispute Tribunal ("the Tribunal") in Nairobi, which was served on the Respondent on 26 January 2012. The Respondent submitted a Reply on 27 February 2012.

3. The Tribunal heard the case at an oral hearing on the merits on 8, 9 and 10 April 2013. The following witnesses, including the Applicant, were heard: the Human Resources (HR) Assistant, the HR Officer, the Finance Officer, the UNHCR Representative, the Investigator, the Manager of the Khartoum Dental Clinic as well as the Receptionist of the Clinic.

4. The Parties submitted their closing submissions on 9 April 2013.

5. On 24 April 2013, the Respondent submitted the carbon copies of the receipts from the Khartoum Dental Centre as directed during the hearing. These were received by the Registry in hardcopy, sent via DHL, on 25 April 2013.

Issues

6. At the commencement of the hearing, Counsel for the Applicant advised the Tribunal that the Applicant accepted that if the misconduct occurred as alleged, the response of the Administration was proportionate. Proportionality of the contested

decision was no longer in issue although the Applicant continued to maintain that she was not guilty of any misconduct.

7. The issues for determination by the Tribunal are:
 - a. Were there any substantive or procedural irregularities in the investigation?
 - b. Did the facts as presented to the investigators establish that there was misconduct?
 - c. Was the suspension of the Applicant lawful?
 - d. What, if any, remedies should be awarded to the Applicant?

Facts

8. The Applicant requested the Tribunal not to publish her name. This request is granted. In the light of this none of the persons involved in this case will be named in this Judgment.

9. The Applicant was employed by UNHCR at Khartoum, Sudan, as a senior secretary since June 2006. In May 2009 she joined the Finance Section as Senior Finance Assistant and held that position on a fixed term contract at the G5 level until her separation. Her duty in that position was the preparation of payment vouchers with regard to any kind of payments due to a staff member. In July 2010, at the time of the alleged incident, her supervisor was the Finance Officer.

10. The Applicant's duties involved processing of payments with two other colleagues in her team: they ensured that the documents pertaining to the payments were correct and complete; prepared the vouchers for review by a colleague; sent the payment vouchers and all documents to the Finance Officer for finalising the payment; printed payment documents and returned them to the Finance Officer to be reviewed and sent to the bank for payment. With regard to the UNHCR MIP claims, the

Applicant was responsible for the preparation of the payment voucher i.e. the 80% due to the staff member.

11. The Applicant had two appointments with a dentist at Khartoum Dental Clinic Centre (“the Clinic”) in April and May 2010. On 3 June 2010, she presented a claim for Sudanese Pounds (SDG)1,295 for reimbursement by the MIP. The claim was supported by 2 receipts. One (no 05665) was dated 27 April 2010 for SDG935, the second (no 05664) was dated 3 June 2010 and was for SDG360.

12. The HR Assistant who received the claim from the Applicant on 3 June noticed that it was an unusually large claim. She also noticed that the handwriting on parts of the receipts were different. She informed the HR Officer who asked her to visit the Clinic to find out when the Applicant had visited.

13. The HR Assistant told the Tribunal that on her first visit she spoke with the Receptionist from the Clinic. The Receptionist provided the Registration Book which showed that the Applicant had visited the Clinic on 23 April and 3 June. The Manager of the Clinic also showed her the receipt book with the carbon copies of the receipts with the amounts. The HR Assistant reported this to the HR Officer who then instructed her to return and obtain photocopies of the carbon copy receipts. The HR Assistant made a second visit to the clinic to do this.

14. The HR Officer compared the claim submitted by the Applicant to MIP with the Clinic’s receipts and found the fees claimed for specific treatments were abnormal. She reported this to the then UNHCR Representative of Sudan Operations in the first week of July as a case of possible fraud which needed urgent attention. She showed the Representative the relevant documents, the medical claim and the carbon copies from the Clinic with what seemed to be the correct figures. The HR Officer told the Tribunal that when she discussed this with the Representative:

[he] thought that maybe we should request [the Applicant] to stay away from her financial duties until we get more instruction from HQ. Not only did she have access to the cheque book and the MFRPA, the financial programme where she would also be issuing payment vouchers. We

thought that, we did not know what would come to her mind knowing that she could be risking maybe...maybe even her job, after the discussion in the Representative office, so we thought that it would be risky to let her continue her financial duties after we talk to her.

15. On 6 July 2010, the Representative called a meeting with the Applicant, the HR Officer, and the Finance Officer who was the Applicant's supervisor. The HR Officer said that in order to ensure that the office was not put at risk she and the Representative decided the Applicant was not be told in advance of the purpose for the meeting.

16. The meeting was held in the Representative's office. The Representative said it lasted 30 to 40 minutes. The Finance Officer stated that it took place from 14:00pm to 15:00pm and might have lasted longer than an hour.

17. There is a dispute between the Applicant and the Respondent about much of what happened and what was said at the meeting. The Respondent's witnesses said that no written notes or record was taken of the meeting. As there were no verbatim notes taken at the meeting it is necessary for the Tribunal to assess the evidence from those who were in attendance.

18. It is not disputed that the Applicant was requested to explain the discrepancies between the receipts she submitted for her MIP claim, the copies of the Clinic's receipts and the difference between the Clinics prices for the treatments she received and the amounts she claimed for the treatment. She was shown the documents about 20 minutes into the interview and then was subjected to lengthy and repetitive questioning for a further 40 minutes or so by the Representative. She was stressed, shaking and crying through the interview.

19. The Representative's evidence was that he chaired the meeting and the other two asked supporting questions. This was the first time he had spoken to her about this issue, that she had no representative with her. He told the Tribunal that at the meeting the Applicant admitted that she had falsified the receipts submitted with her claim. His evidence of this admission was that initially after showing her the claim forms and the

attached receipts she had submitted versus the Clinic's receipts, she denied the whole thing. It was only after several questions on the issue that she confessed and pleaded that since this was her first time she would not do it again.

20. The Representative said that at the end of the meeting, he informed her that the matter would result in a formal investigation. He told the Tribunal that as she was one of the finance staff:

I had no option at that time but to have her leave the office, have her escorted out of the office and to request her to stay home for the duration of the investigation. We did put this in writing, a detailed note for the file which was sent up to HQ. I cannot recall whether we wrote a note to the staff member. The decision for her to be escorted out of the office was mine. Immediately after the meeting, we received instruction from the Director of Division of Human Resources, further decision and the placement of the Applicant on administrative leave with full pay came from HR Division HQ.

21. The Finance Officer told the Tribunal that he was called to attend a short meeting and to escort the Applicant into the Representative's office. When the documents were shown to the Applicant, he asked her to confirm that these were the documents she had submitted. She confirmed this. The Representative then told the Applicant that she had falsified the claims and wanted an explanation as to why she would do this. The Finance Officer said that at the end of the meeting, the Representative verbally informed the Applicant that she was to be suspended for an indefinite time while an investigation was carried out. She was escorted by the HR Officer and a security officer to her office where she collected her personal possessions before being sent home on full pay to wait for a decision by UNHCR HQ.

22. The HR Officer told the Tribunal that the Applicant confessed by saying "please forgive me, this is my first time". She then told them that the dentist at the Clinic asked her to alter the claim to get the reimbursement. The meeting stopped when they obtained what they wanted to hear from her. They told the Applicant that they would report the misconduct to HQ who would be advising on the appropriate

course of action. In the interim, she was instructed to stay home till they heard from HQ.

23. The Applicant denies that she made any admission at the meeting. She agreed that she was informed of the discrepancies between the receipts she submitted for her MIP claims and the records of the Clinic and asked for time to go to the clinic to get evidence that would explain what happened.

24. The Applicant told the Tribunal that when she was escorted to her office she was not allowed to log off her computer and before she could take her personal money from the safe another staff member was asked to verify that it was in fact her money. The HR Officer confirmed this in testimony saying that she had to make sure that the Applicant only left with her personal belongings and nothing from UNCHR. The HR Officer was convinced that the case, at that time, needed to be reported to HQ as the Applicant had confessed during the meeting. The Finance Officer organised for the Applicant's details to be deactivated from the Finance system.

25. Directly after the meeting, the UNCHR Representative sent a memorandum to the Director of the Division of Human Resource Management (DHRM). The subject matter was, "Submission for fraudulent Medical Insurance Plan (MIP) claims-Request for disciplinary measure". In that memo, the Representative described the steps taken by his office to look into the false receipts and then described the meeting:

I met [the Applicant] in my office this afternoon with [the HRO] and the [Finance Officer]. We presented the facts, as described above, showing the attached documentation. She initially denied, however after further provoking some explanation on the variance of the figures from the documents, [the Applicant] admitted she had falsified the receipts to benefit from a higher reimbursement from the MIP

26. He also stated in the memorandum that:

I consider the matter as a clear violation of MIP rules, which warrants possible disciplinary measures. Considering that the staff member occupied sensitive functions in the Finance Unit and that there is a risk that she may further misuse UNHCR tools, I recommend that [the

Applicant] is suspended from her duties with immediate effect pending the outcome of any further investigation from Headquarters. Meanwhile, I advised her to wait at home until we receive any further instruction from your office.

27. That memo was not copied to the Applicant.

28. On 8 July 2010, the Applicant sent a memorandum to the Chairperson of the UNHCR Staff Association in Khartoum, entitled, "Subject-Suspension of duty over MIP claims". She expressed her opinion that the way in which she was suspended was improper and had unfairly caused her integrity and credibility to be called into question.

29. On 29 July 2010, the Applicant wrote to the Representative and other officers requesting an update, since there had been no communications since her suspension on 6 July 2010. She said she was not in the possession of the report that had been sent to the Director of DHRM on her suspension and attached a detailed statement on the events and the allegations.

30. In that statement she gave her version of what happened at the meeting. She said that after being shown the discrepancy between the receipts she had submitted and those of the clinic:

I was naturally surprised and could not understand why that could be so, since it was the same clinic who gave me the receipt for my treatment and could not fathom how the clinic records could differ from my receipt... I then requested the Representative at least give me the chance or opportunity to find out from the clinic what was going on to enable me understand or explained the difference (*sic*), as it is the first time I submit the Medical claim, but the Representative refused totally and told me that he had already referred the case to the DHRM in headquarters.

31. On 23 August 2010, the Director of DHRM wrote to the Applicant and offered her a post of Receptionist at the GL2 level in the same office with a starting date of 1 September 2010 while the investigation was on-going. He also stated that if she refused this offer, she would be placed on administrative leave for one month, subject to renewal. The Applicant rejected this offer noting that it was two levels below her

previous post of Senior Finance Clerk and as she had no functional or professional competencies for that position it would not be appropriate. She expressed a willingness to take up any other position that was near her current post and level.

32. On 3 September 2010, the Director of DHRM officially placed the Applicant on Administrative Leave with full pay. This lasted until the Applicant was dismissed.

Investigation

33. On 7 July 2010, the Inspector General's Office (IGO) received a report of misconduct involving the Applicant alleging that she submitted a fraudulent MIP claim of SDG1,295 for dental treatment. The IGO commenced an investigation.

34. The Investigator interviewed the Representative, the HR Officer and the HR Assistant about the steps taken by them before the matter was referred to IGO for investigation. The Preliminary investigation report records their responses. The Senior Investigation Specialist and an Investigation Officer conducted telephone interviews with the HR Assistant, the HR Officer, the Finance Officer and the UNHCR Representative between Thursday 25 November 2010 and 30 December 2010. The Manager and the receptionist of the Khartoum Dental Clinic were interviewed on behalf of the IGO by another IGO investigator in January 2011.

35. The HR Officer stated that initially the Applicant did not answer the questions being put to her or said that she did not know why the figures were different. However she then told them that she had been "encouraged" by the Clinic "to trick with the figures as she would be reimbursed by the medical Insurance of the UN".

36. The Finance Officer was asked by the investigator if the Applicant had actually admitted that she had deliberately falsified the MIP claim. He responded:

Definitely it was my understanding that she took full responsibility. Also you could tell her demeanour changed when the photocopies were presented, If she had not taken full responsibility she would have challenged the allegation at the first instance but we could tell by her

change to her demeanour and her repeated request to the Representative to give her another chance.

37. The Representative told the investigator that initially the Applicant said she could not explain and said that maybe it had something to do with the Clinic. After repeating the question a few times in different ways to her the Applicant stated that the people in the Clinic told her to change the figures. She apologised and asked to be given a second chance since this was her first time. He told the investigator that in his view she clearly admitted that she had deliberately falsified the MIP claim. He later said that “after rephrasing the question and asking her again she told us that it was her who had changed it”.

38. The IGO investigator interviewed the Applicant by telephone on 21 December 2010. On 22 December 2010, she was presented with a record of the interview and her comments were received by e-mail. A follow-up interview was set up and conducted with the Applicant on 17 February 2011. A record of that interview was shared with her on the same date. The Applicant’s comments on this record of interview were received on 19 February 2011.

39. On 1 March 2011, the investigator’s draft findings were emailed to the Applicant by the IGO to which she provided a response on 5 March 2011.

40. In her response, the Applicant denied falsifying the receipts or making a fraudulent claim. She denied making any admissions at the 6 July meeting. She said that she had told the meeting it was the first time she had made a medical claim and she wanted a chance to prove what had happened as she suspected the Clinic. After she was suspended she went back to the Clinic and obtained a statement about her treatment. She also provided the investigator with evidence that at the time she paid the Clinic she had withdrawn an equivalent sum of money from her bank account.

41. The Preliminary Investigation Report (PIR) dated 7 June 2011 with 20 annexes was transmitted to the Director of DHRM. The annexes comprised the 6 July memorandum from the Representative to DHRM; the records of interview by IGO

investigators; the emails from the Applicant to the investigator; and the documentary evidence of the receipts and claim form. The report reached the following conclusions:

- a. The Applicant submitted a fraudulent MIP claim for SDG1,295 for dental treatment.
- b. Following the discovery of the fraudulent claim, the UNHCR Representative in Sudan convened a meeting attended by him, the HR Officer, the Finance Officer, and the Applicant. During the course of the meeting, the Applicant was asked about the fraudulent MIP claim.
- c. The Representative, the HR Officer and the Finance Officer all recall the Applicant admitting that she altered the figures on the receipts from the Clinic that were attached to the MIP claim and that she knowingly submitted the fraudulent claim.
- d. The Applicant denied having made any admissions during the course of the meeting. She also denied having altered the receipts that she received from the clinic or that she knowingly submitted a fraudulent MIP claim. She maintained that she paid the full amount shown on the receipt to the clinic.
- e. Staff at the Clinic confirmed that the amount shown on the two receipts submitted to UNHCR by the Applicant did not reflect the amounts shown on the carbon copies of the receipts retained by the Clinic.
- f. The Clinic staff maintained that the receipts submitted by the Applicant had been altered after they had been issued by the Clinic. They further maintained that the Applicant's treatment had neither cost her that much nor had she paid the amounts shown on the receipts that she had submitted with her MIP claim.

42. The investigator stated that, on the basis of the facts, the IGO believed that there was a preponderance of evidence to support the allegations that the Applicant

knowingly submitted a fraudulent MIP claim.

43. A charge letter forwarding the PIR was sent to the Applicant on 14 July 2011. Her comments were sought.

44. On 17 August 2011, a reminder was sent to the Applicant to provide her comments and on the same day she responded that she had sought legal assistance from the Office of Staff Legal Assistance (OSLA). Subsequently, OSLA requested the Director of DHRM for an extension of the deadline to provide comments on behalf of the Applicant. This was granted until 7 September 2011 but no further comments were provided by the Applicant.

45. The Applicant herself acknowledges in her submission that she was interviewed twice by the IGO in “appropriate circumstances.”

46. By memorandum of 7 October 2011, the DHRM recommended to the High Commissioner the dismissal of the Applicant for serious misconduct. The High Commissioner approved the recommendation on 13 October 2011.

47. On 25 October 2011, the Applicant received a letter informing her that she had been found guilty of misconduct and that the sanction imposed was dismissal.

Applicant’s submissions

48. The Administration obtained incriminating evidence through egregious violations of the staff member’s due process procedural rights.

49. Her due process rights have been infringed on the basis that:

- a. The staff members who initially received the MIP claim exceeded their authority by carrying out investigatory functions amounting to an unlawful investigation and that the subsequent IGO investigation was essentially a “rubber stamping” exercise;

b. The Representative conducted an “ambush interrogation” of the Applicant when his role should have been limited to reporting the matter to the IGO. He further “suspended” the Applicant in violation of the UNHCR regulations;

c. There was no contemporaneous record of the meeting. She was not told of any right to have an observer of her choice. It is to be further observed that this interrogation took place before the Representative notified the IGO of the allegation.

d. Nowhere in the IGO report is the credibility of the Clinic staff questioned or considered. It is noted that the Clinic’s manager stated, “[the Applicant] has been here a number of times ... she was pleading with us to help by changing the receipts but we refused”. It seems odd that the Clinic staff did not mention this when the MIP Administrator was conducting her freelance investigation. It is equally perplexing that the Clinic would welcome back a client that persistently requested they engage in illegal activities. The Clinic staff ought to have been subjected to a reasonable line of questioning.

e. The Investigator was completely oblivious to the procedural irregularities surrounding the alleged confession. In his Preliminary Investigation Report, the investigator did not mention anything about the manner in which the alleged confession was obtained yet he heavily relied on it.

50. The Representative exceeded his jurisdiction and authority, as it was not his prerogative to suspend the Applicant. He usurped the powers of the then Director, DHRM. The suspension was unwarranted, unlawful and disproportionate. The Administration suspended the Applicant in an extremely humiliating manner. She was treated like a threat and notorious thief.

51. The Applicant was placed on administrative leave for a period exceeding one year whereas staff members should normally be placed on administrative leave for a

period not exceeding three months. The duration of the Applicant's suspension was therefore excessive.

52. The carbon copy of the falsified receipts cannot be taken into account because the Respondent obtained them in circumstances unknown to anyone; no contemporaneous record of the steps undertaken by the Administration exists. There was no attempt made by the person obtaining a carbon copy of the receipt to ascertain that it was not altered or created after the fact by the staff of the Clinic.

53. The Applicant prays for the disciplinary charges and sanction to be set aside; monetary compensation amounting to two years net base salary for material and moral damages. Material damages result from the fact that she was unlawfully or wrongfully deprived of her employment. Moral damages stem from the humiliation and stress.

Respondent's submissions

54. The visit of the HR Assistant to the Clinic was not an "unlawful investigation" into alleged misconduct. Such verification fell within the authority of the Administration in Khartoum and in particular of the MIP Administrator in the verification of the MIP claims.

55. The MIP claim form explicitly authorises the Administration to obtain access to records relating to, *inter alia*, the Applicant's medical expenses.

56. The Applicant's statement that she was immediately accused of engaging in misconduct is incorrect and hereby refuted.

57. In light of the Applicant's admission to the Representative that she had altered the receipts in her MIP claim, the Representative requested her to leave the premises while he reported the matter to Headquarters to seek further instructions. After further instructions between Counsel for Respondent, DHRM, the IGO and the Representative regarding a potential redeployment, about which the Applicant was informed in

writing, she was subsequently placed on administrative leave with full pay pending the conclusion of the investigation.

58. The investigation conducted by the IGO was fully in line with its procedures as set out in IOM/FOM/54/2005 (Role, functions and *modus operandi* of the Inspector General's Office) of 3 November 2005. There is documentary evidence available which forms the basis of the conclusion that the Applicant submitted a fraudulent MIP claim.

59. Any breaches of the Applicant's due process rights at the time her actions came to light and were reported to the IGO in accordance with established procedures were remedied by the subsequent investigation by the IGO, which was conducted in a full and fair manner.

60. The staff members of the UNHCR office in Khartoum did not act beyond their authority or in breach of the Applicant's due process rights. The investigation of the IGO was conducted in a fair and transparent manner and fully respected the presumption of innocence. The remedy of summary dismissal was proportionate to the established misconduct.

61. The Respondent requests that the application be dismissed.

Considerations

Were there were any substantive or procedural irregularities

62. The procedures for the handling and investigation of allegations of misconduct in UNHCR are prescribed by IOM/FOM/54/2005, which incorporates by reference parts of ST/AI/371 (Revised disciplinary measures and procedures).

63. The investigation which followed the allegations in this case occurred after ST/AI/371/Amend. 1 came into force on 11 May 2010. IOM/FOM/54/2005 was not amended to reflect the changes in ST/AI/371/Amend.1 but section 5.1.3 of the IOM/FOM states that the obligation to undertake a preliminary investigation is

implemented through the Inspector General who is the responsible officer. Furthermore, section 5.1.4 states: “the decision to institute disciplinary proceedings is made by the Director of DHRM in accordance with the procedure set out in ST/AI/371.”

64. UNHCR also had a prescribed procedure dated 10 May 2004 which described the steps that the heads of offices should take in the case of suspected fraudulent claims. It advised that suspicious claims should be reviewed by visiting the office of the physician to verify the validity of the claim. The memo ends: “In the event of suspected fraud the office must inform immediately and fully of the facts in hand ... IGO so that an investigation may be conducted. Where there is sufficient evidence that fraud took place, this will trigger the appropriate disciplinary action.”

65. Section 5.7 of IOM/FOM/54/2005 stipulates that there should be an initial assessment of possible misconduct by the manager who is to inform the IGO. Initial assessments are defined in section 5.7.1. They include an assessment of whether the source of the report of possible misconduct is prima facie credible, and whether the alleged misconduct has possibly resulted in material, financial or reputational loss to the Office.

66. These provisions show a clear demarcation of roles and responsibilities between the Representative, the IG and the Director of DHRM to provide “the necessary checks and balances for the proper administration of justice.”

67. The Representative’s responsibility under IOM/FOM/54/2005 is to establish if he had reason to believe that the Applicant had engaged in conduct for which a disciplinary measure could be imposed. The IG is to conduct the investigation and the Director DHRM is to institute disciplinary action, if necessary.

68. The Tribunal finds that that the Representative’s responsibility was well met at the stage that the HR Officer showed him the claim form, the receipts, the Clinic process list and the photocopies of the Clinic’s receipt book entries. That evidence demonstrated obvious discrepancies between the receipts attached to the Applicant’s

claim form and their originals and gave reason enough to believe that misconduct may have occurred. No further enquiry or investigation by the Representative was required by the IOM/FOM.

69. The next stage is for the Representative (or appropriate manager) to immediately inform the IGO of the report of misconduct, as per section 5.7.1 of IOM/FOM/54/2005. Pursuant to section 5.10.1 possible misconduct reported or revealed to the IGO will initially be examined by the investigation unit. It is the responsibility of that unit to assess for credibility and to determine if it falls within the competence of the IGO. In this case however the Representative incorrectly assumed that role.

70. The Tribunal finds that the Representative's hour-long interview with the Applicant about the allegations exceeded the requirements of section 5.7. It was investigatory in nature and outside the competence and role of the Representative who had no previous investigation experience or training. The Representative told the Tribunal that he wasn't carrying out an investigation as he only wanted to clarify the facts and give the Applicant the chance to give a possible explanation. The Tribunal finds that although his desire may have been well intentioned it was misguided and did amount to an investigation.

71. There were fundamental errors in the conduct of the interview. The Applicant was deprived of all of the protections that are usually afforded to a suspect by the IGO when that office conducts an investigation in compliance with the IGO Guidelines on Conducting Investigations and Preparing Investigation Reports. These guidelines are intended to be used by Responsible Officers, staff of the Division of Human Resources Management or by IGO staff as a practical guide on how to conduct investigations. The guidelines provide that:

- a. Investigations must be conducted in a fair and equitable manner.
- b. Investigations should be conducted with strict regard for the presumption of innocence and due process of the person accused of the

wrongdoing.

c. Interviews with UNHCR staff members are to be recorded in a Record of Interview as soon as possible. After the interview record has been completed, the interviewee should be allowed to review it.

d. Evidence should be collected in such a way as to ensure that all relevant material is obtained, the chain of custody is preserved, and the evidence admissible in subsequent proceedings.

72. The particular breaches in this case are:

(i) The Representative did not formally communicate to the Applicant that she was under investigation as required by section 5.10.3. The evidence established that a deliberate decision was made not to advise the Applicant.

(ii) The Representative did not immediately inform the IG about the possible misconduct as required by section 5.11.1. He waited until after he had conducted the interview. Although that section provides for managers to perform certain limited investigatory functions, this is to be done under IGO oversight. It is to be expected that such oversight would ensure the integrity of the process.

(iii) The meeting was not recorded. No contemporaneous or verbatim notes were taken by any of the three representatives of the Administration who were present. The Applicant was not given the opportunity to check a record of the interview and make changes. The Representative made a note shortly after the interview but that was not shown to the Applicant for comment. In spite of this, the note was transmitted to the Director of DHRM and became part of the evidence considered by the decision maker.

73. The Tribunal finds that the interview by the Representative did not meet the section 5.12.2 requirement that investigations should respect the individual rights and

obligations of all staff and be conducted with strict regard for fairness, impartiality and the presumption of innocence. The Tribunal finds that the interview of the Applicant conducted by the Representative seriously breached the due process requirements in IOM/FOM/54/2005.

74. Further, the Representative's memo to the Director of DHRM reporting the possible misconduct misrepresented the alleged admission by the Applicant. None of the Administration's witnesses told the investigator that "she admitted that she had falsified the receipts to benefit from a higher reimbursement from the MIP". Each had a different description of the words she had used. The Representative and the HR Officer told the investigator that she said that the Clinic had suggested that the receipts be falsified. The Finance Officer told the investigator that she made no mention of falsifying the documents and did not give them a reason why she falsified the records. He said it was his understanding that her apology and request for another chance was an admission of full responsibility.

75. The memo to the Director of DHRM was based on an interview that had been conducted in clear breach of the required procedures. It did not accurately represent the statements of the Applicant allegedly made at the meeting.

76. The Tribunal concludes that the Representative's memo to the Director of DHRM was an inaccurate and overstated summary of what was allegedly said by the Applicant, and she had no opportunity to comment on it. It was extremely prejudicial.

77. The investigation by IGO was conducted in a procedurally correct manner. All relevant witnesses were interviewed. The Applicant was afforded fair and thorough interviews. She was advised of matters that were adverse to her and given every opportunity to comment on them. In the end, the due process defects of the first interviews conducted by the Representative were cured by the IGO investigation.

78. However, the recommendations of the IGO were tainted by its reliance on the reports of the so-called admissions given by the Representative, the HRO and the Finance Officer based on their unlawful interview of the Applicant.

79. Disciplinary investigations are not criminal in nature and the evidential standards that apply to criminal investigations do not apply. The decision maker cannot exclude the evidence obtained by an unlawful interview from consideration but the weight of the evidence obtained in unfair or unlawful circumstances should be treated with the utmost caution.

Did the facts as presented by the investigators establish that there was misconduct?

80. The facts presented to the decision maker by the Investigation report are those set out at para 41 above.

81. The investigator referred to two sources of evidence, the evidence of the meeting and the documentary evidence. He said that there were two versions of the meeting, one version being independently verified by three persons.

82. The evidence of the meeting must be treated with great caution as it was unfairly obtained in breach of the required procedures and its reliability is in question.

83. The remaining evidence comprised the receipts submitted by the Applicant with her claim and the carbon copies of the receipts issued by the Clinic. Although the Applicant questioned the reliability of the carbon copies, the Tribunal had the opportunity to inspect the originals and finds that they showed no sign of having been tampered with. The Applicant accepted there were obvious discrepancies between the receipts she submitted and the carbon copies from the Clinic.

84. The witnesses from the Clinic inevitably denied to the investigator and to the Tribunal that they had played any part in the alteration of the receipts although an aura of suspicion hangs over the Clinic. The Clinic did not explain why the two receipts which were apparently issued for treatment received and paid for on two separate days over a month apart had consecutive numbers. There are outstanding questions about who actually altered the receipts.

85. However the irrefutable facts are that the Clinic records show that the

Applicant paid SDG 135 (receipt no 05665) and SDG 60 (receipt no 05664) and that the receipts she submitted with her claim to MIP had been altered to show larger sums than she actually paid (935 and 360 respectively). The only reasonable inference is that whether or not she altered them herself, by submitting them she intended to get a refund from MIP that was far greater than the amounts she paid to the clinic. If, as is far from certain, the Clinic were implicated in the plot that cannot excuse the Applicant from her part in submitting the false receipts.

86. The Tribunal has considered the impact on the decision maker of the submission of the so-called facts from the 6 July meeting on the decision maker. As there was nothing in the report to alert the decision maker to its potential unreliability, the decision maker must have taken it into account. However, on the balance of probabilities, the Tribunal finds that, apart from this, there was sufficient supplementary documentary evidence that the Applicant did submit false receipts with her MIP claim and sufficient facts from which to reasonably infer that she knew that they were false. There was therefore clear and convincing evidence that her actions amounted to misconduct.

Was the suspension of the Applicant lawful?

87. The first question is whether the Representative suspended the Applicant. The Representative told the Director DHRM that he placed the Applicant on home leave until suspension could be arranged. He told the Tribunal that he had requested her to stay home for the duration of the investigation. The Finance Officer told the Tribunal that the Representative verbally informed the Applicant that she was to be suspended for an indefinite time while an investigation was carried out.

88. Whatever the Representative labelled the removal of the Applicant from the office it was to all intents and purposes a suspension by the Representative as he said it was for the purposes of the investigation. The Applicant certainly believed she had been suspended as evidenced by her subsequent requests for updates and information about her status.

89. Section 5.13.1 of IOM/FOM/54/2005 states that while the staff member under investigation for alleged misconduct should normally continue his/her official functions, “circumstances may require that he/she not continue exercising these functions.” In such cases, the IG may recommend to the Director of DHRM the temporary redeployment of the staff member “if a temporary redeployment within the same office is not possible or appropriate and/or the circumstance require barring the staff member from further access to the office, it may recommend to temporarily redeploy the concerned staff member on missions.”

90. If the alleged misconduct is of such gravity that redeployment would not sufficiently protect the interests of UNHCR, section 5.13.2 states that:

The IG may recommend to the Director, DHRM the suspension of the implicated staff member(s) in accordance with [former] staff rule 110.2 and paragraph 4 of ST/AI/371. As a general principle, suspension may take place if the continued presence of the concerned staff member poses a danger to other staff members, to UNHCR or the United Nations, or if there is risk of evidence being destroyed or concealed. Suspension does not constitute a disciplinary measure, should normally not exceed three months and shall be with full pay unless, in exceptional circumstances, the Director, DHRM decided, upon the recommendation of the IG, that suspension without pay is appropriate.

91. Former staff rule 110.2 (reflected in the applicable staff rule 10.4¹) states that:

- (a) If a charge of misconduct is made against a staff member and the Secretary-General so decided, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months.
- (b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reason for the suspension and its probable duration.

92. Based on these provisions it is the Director of DHRM who has the authority to place a UNHCR staff member on administrative leave/suspension. This is the type of suspension referred to by UNAT in *Cabrera*² based on the UNDT decision in

¹ Referred to as administrative leave pending investigation and the disciplinary process.

² 2012-UNAT-215.

*Kamunyi*³. It is, in effect, a suspension during investigation and disciplinary proceedings as contemplated in former staff rule 110.2.

93. In *Cabrera* it was held that “a suspension with or without pay is altogether a different matter [from special leave] as a charge of misconduct is a pre-requisite for suspending a staff member.”⁴ In *Kamunyi* it was held that based on the applicable law, if a suspension is to occur “it should follow two events: a charge of misconduct and a decision of the Secretary-General or his delegate. The staff member should also be given a written statement of reasons and the likely duration of the suspension.”⁵

94. The Tribunal finds that there was a breach of the Staff Rules, IOM/FOM/54/2005, and ST/AI/371 with regard to the suspension. It was not made in conjunction with a charge of misconduct and was not made by the Director of DHRM who was the properly delegated person at the time. Additionally, the Applicant was verbally suspended and not given the prerequisite written statement of reasons for the suspension and the duration. Her receipt of the written notice of placement on administrative leave does not validate the earlier breach.

95. As the interview that led to the removal of the Applicant from the office and the United Nations compound was both unlawful and unfair it cannot be used as a proper justification for the peremptory suspension of the Applicant in contravention of the policy and procedures.

96. Without underestimating in any way the seriousness of the concerns held by the HR Officer and the Representative when they became aware of the falsified receipts submitted by the Applicant, and notwithstanding their need to ensure the security of the Finance department, the Tribunal finds that they overreacted to the situation. If they had reported the matter to the IG and complied with IOM/FOM/54/2005 by submitting the documentary evidence in their possession to DHRM without delay, DHRM could have taken the matter in hand and dealt with the

³ UNDT/2010/214.

⁴ 2012-UNAT-215 at para 47.

⁵ *Kamunyi* at para 28.

question of suspension in accordance with the correct procedure and on the basis of a considered recommendation by the IGO.

97. The Tribunal notes that since submitting her claim on 3 June 2010, the Applicant had been working as usual for over a month. There is no suggestion that she had not conducted herself properly in the performance of her duties during that time. The Applicant's supervisor, the Finance Officer could have been alerted and a close watch placed on her until DHRM could respond.

98. The length of the suspension was well in excess of the recommended 3 months and was in a breach of IOM/FOM/54/2005 and staff rule 110.2. However, the Applicant received her full entitlements during that time and has suffered no monetary loss as a result.

Remedies

99. The Tribunal finds that the Applicant suffered from the unlawful suspension and removal. She told the Tribunal that she was escorted by the Field Safety Advisor (FSA) to her office in full view of her office colleagues and then to the gate where the escort waited for her to get into a taxi. She stated that she felt very humiliated by this treatment. After all the years of service to UNHCR, in just 30 min she was treated like a thief. This resulted in significant stress and humiliation to her at a time when there were no formal charges and no proven allegations against her.

100. The Tribunal finds that the action of escorting the already upset and stressed Applicant out of the office under surveillance and in the presence of her colleagues was an assault on her dignity that entitles her to compensation. In the normal course of events she would be awarded USD5000. However in view of her contribution to the situation that she found herself in this will be reduced by 50% to USD2500.

Conclusion

101. There was clear and convincing evidence of facts upon which the decision

maker could conclude that the Applicant had submitted false receipts in support of her MIP claim and that this amounted to misconduct.

102. The suspension of the Applicant by the Representative was unlawful.

Order

103. The Respondent is ordered to pay the Applicant the sum of USD2500.

104. The above amount shall be paid within 60 days of the date that this Judgment becomes executable. Interest will accrue on the above amount from the date of this Judgment at the current US Prime rate until payment. If the above amount is not paid within the 60 days period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 06th day of June 2013

Entered in the Register on this 06th day of June 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi