



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/053

Judgment No.: UNDT/2023/037

Date: 29 May 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ABDRABOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Angela Arroyo, UNDP

Introduction

1. The Applicant, a former Security Assistant at the G-5-level, working with the United Nations Development Programme (“UNDP”) in Hodeidah, Yemen, is challenging a disciplinary measure of separation from service with compensation in lieu of notice, pursuant to staff rules 10.1(a) and 10.2(a)(viii), and without termination indemnities.¹

Factual background

2. Locally recruited staff members holding a UNDP letter of appointment who are stationed outside Headquarters, like the Applicant, are provided with health insurance under the medical insurance plan (“MIP”), which is a self-insurance plan. The MIP provides health insurance for eligible staff members and their family members. Cigna International Health Service (“Cigna”) administers the MIP on behalf of UNDP, reviews claims submitted and processes reimbursements for insured claimants. UNDP funds Cigna’s payments to insured claimants and is ultimately responsible for covering the costs of any reimbursements processed by Cigna. Therefore, any loss attributable to reimbursements by Cigna represents a direct loss to UNDP.²

3. At the time of the contested decision, the Applicant, his spouse and his three children were insured under Cigna.³

4. On 22 December 2019, the Applicant submitted a claim to Cigna seeking reimbursement of medical expenses which he stated were incurred between 13 and 21 November 2019.⁴ To the claim, the Applicant attached an invoice dated 28 November 2019 and a medical report dated 13 November 2019 showing that his son, BB, was hospitalised at the University of Science and Technology Hospital (“USTH”), a care provider in Sana’a, Yemen. The invoice indicated that BB was hospitalised in the

¹ Application, section V; application, Annex 23.

² Reply, section B, para. 6.

³ Application, annex 19, section I, para. 2; reply, annex 1, para. 7.

⁴ Reply, annex 2, exhibit 13, at p. 110.

children's section of USTH from 13 to 21 November 2019 and the incurred charges included accommodation in the emergency room, x-rays, laboratory tests and surgery.⁵

5. The Applicant sought reimbursement from Cigna of the expenses totalling Yemen Rial ("YER")3,451,649 (then equivalent to USD6,167.06).⁶

6. On 17 February 2020, Cigna reimbursed the Applicant the sum of USD6,108.⁷

7. After the reimbursement, Cigna developed concerns about the Applicant's invoice. Cigna's concerns were based on: (i) the high amount paid by the Applicant from his pocket, yet Cigna had a direct payment agreement with USTH; (ii) the invoice seemed to have been digitally altered; and (iii) the amount claimed was not reasonable and customary for the region, nor in line with the rates usually charged by USTH.⁸

8. Accordingly, Cigna conducted an investigation, and among others, established that the Applicant had submitted a fraudulent medical claim.⁹

9. On 20 May 2020, the Cigna Fraud Investigator referred the Applicant's investigation file (F20063) to UNDP's Office of Audit and Investigations ("OAI").¹⁰

10. On 11 August 2020, UNDP provided the Applicant with a letter ("options letter") proposing two options, either for the OAI to conduct a full investigation of the alleged misconduct or to immediately resign.¹¹ The Applicant chose option one and the OAI proceeded with the investigations.¹²

11. On 16 November 2020, the Applicant was informed by OAI that he was the subject of an investigation into allegations of entitlement fraud, forgery and false

⁵*Ibid.*, exhibit 5.

⁶*Ibid.*, p. 29.

⁷*Ibid.*, p. 39.

⁸ *Ibid.*, p. 29.

⁹Reply, annex 1, para. 3.

¹⁰*Ibid.*

¹¹Reply, annex 2, exhibit 20, p. 141.

¹²Application, annex 18, para. 24.

certification related to the submission of a fraudulent invoice to Cigna.¹³

12. The Applicant was interviewed by OAI on 19 November 2020.¹⁴ During the interview, the Applicant acknowledged having sent the invoice to Cigna but maintained that he sent it as it was received, he had no reason to doubt its authenticity.

13. On 26 March 2021, OAI provided a draft report of its investigation to the Applicant for his review and comments¹⁵ and the Applicant provided comments on 5 April 2021.¹⁶ The OAI produced its final investigations report on 22 April 2021.¹⁷

14. On 12 November 2021, the Applicant received a charge letter from Ms. Angelique M. Crumbly, the Assistant Administrator and Director, Bureau for Management Services, UNDP, informing him that the Organization was charging him with engaging in entitlements fraud by submitting a forged invoice and medical report to Cigna for reimbursement for medical services that were not received.¹⁸ The Applicant was given 10 days to respond to the charges and submit exculpatory evidence.¹⁹

15. After requesting for an extension of time on three occasions, the Applicant submitted his response to the charges on 6 February 2022, where he denied the charge and maintained that when he submitted the invoice to Cigna, he had no reason to believe that it was fraudulent, altered or in any way inaccurate.²⁰

16. On 28 March 2022, the Applicant received the sanction letter.²¹

¹³ Reply, annex 2, exhibit 6, p. 48.

¹⁴ Reply, annex 2, p. 256.

¹⁵ Reply, annex 2, exhibit 37, p. 212.

¹⁶ *Ibid.*, exhibit 38, p. 215.

¹⁷ Reply, annex 1.

¹⁸ Application, annex 19.

¹⁹ *Ibid.*

²⁰ Application, annex 18.

²¹ Application, annex 23.

Procedural background

17. On 25 June 2022, the Applicant filed the present application. The Respondent filed a reply on 29 July 2022.

18. On 17 February 2023, the Applicant filed a motion for interim measures requesting the Tribunal to: (i) suspend implementation of the contested decision; (ii) order his immediate reinstatement until the finalization of the proceedings; and (iii) award him compensation equivalent to two and a half months' net base salary.

19. The Respondent filed a response to the Applicant's motion on 1 March 2023.

20. By Order No. 060 (NBI/2023), the Tribunal dismissed the Applicant's motion for interim measures.

21. By Order No. 039 (NBI/2023) on case management, the Tribunal found that the case could be adjudicated based on the case record without holding a hearing and the parties were invited to file closing submissions, which they did on 9 and 10 March 2023.

Standard of review and burden of proof.

22. The Appeals Tribunal's jurisprudence establishes the following principles. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.²²

23. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him or otherwise "substitute its own decision for that of the Secretary-General". In this regard,

²²*Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

“the Tribunal is not conducting a merit-based review, but a judicial review” explaining that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.²³

24. The role of the Tribunal is “to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, whether the staff member’s due process rights were guaranteed during the entire proceeding and whether the sanction is proportionate to the offence”.²⁴

25. The Administration bears the burden of establishing that the misconduct has occurred,²⁵ and the misconduct must be established by clear and convincing evidence.²⁶ This has been interpreted to mean that the truth of the facts asserted is highly probable.²⁷

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence.

Applicant’s submissions

26. The Applicant admits that he made a mistake while submitting the claim to Cigna. He states:

I understand that I made a mistake by submitting the invoice for reimbursement without first verifying with USTH directly that it was accurate in all respects, given that I was not present for my son’s treatment. This was my first time submitting a medical claim for reimbursement, and I did not read carefully the online attestation. While the attestation required me to certify that the claim was “*to the best of my knowledge and belief* correct and true” – which it was – I take responsibility, and apologise, for not exercising greater care in this regard. Moving forward, I understand that I bear responsibility for

²³*Sanwidi, op. cit.*, para. 42.

²⁴*Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidi op. cit.*, para. 43; *Masri* 2010-UNAT-098, para. 30; *Portillo Moya* 2015-UNAT-523, paras. 17 and 19-21; *Ibrahim* 2017-UNAT-776, para. 48; see also *Mbaigolmem* 2018-UNAT-890, paras. 15 and 16.

²⁵*Diabagate* 2014-UNAT-403.

²⁶*Molari* 2011-UNAT-164.

²⁷*Appellant* 2013-UNAT-302.

verifying that any benefit or entitlement claim is true and correct in all respects. I am prepared to reimburse Cigna fully and to accept a proportionate administrative or disciplinary measure so as to bring this unfortunate matter to a close.²⁸

27. In line with the above averment, the Applicant maintains that he did not intentionally or knowingly submit forged documents to Cigna for reimbursement, nor was he aware that the medical services in question were not provided to his son.²⁹

28. He elaborates that towards the end of November 2019 or at the beginning of December 2019, he received a telephone call from one of his former brothers-in-law called Hana Abdulla Al Hussain (“Hussain”) informing him that BB received an abdominal operation at USTH. Hussain further stated that they had paid all the medical expenses and demanded a refund from the Applicant.³⁰ It was then agreed that Hussain would send the hospital invoice and the medical report to the Applicant via WhatsApp. However, since the Applicant did not have a telephone that supports WhatsApp, he provided to Hussain another telephone line that belonged to his distant relative called Hussain Addulrahman Saleh (“Saleh”).

29. A few days later, Mr. Saleh informed the Applicant that he had received several mixed documents on his phone. However, on reviewing them, the Applicant established that they were only the hospital invoice and the medical report sent in JPEG format.

30. The Applicant further avers that:

When revising and checking both documents, they appeared to me normal showing NO irregularities neither in its overall format and shape (holding an official letterhead which vividly shows that it is for the USTH) nor in contents, details, and official signatures (as it is signed and stamped as any other normal official document and holds a signature from the treating physicians/specialized doctors).³¹

²⁸Application, annex 18, para. 11.

²⁹*Ibid.*, para. 4.

³⁰Application, section VII, paras., 1 and 2.

³¹*Ibid.*, para. 9.

31. The Applicant maintains that he had no reason to doubt the authenticity of the documents. He states that:

There was NO single reason to treat the documents otherwise and there was NOTHING to invoke any suspicions in me so that they should be further checked up, verified and authenticated with extra diligence. There were even NO imagination that such document could (in anyways or by any means) be tampered with; a matter which I would have never ever thought of and thus could have never ever been anticipated!³²

32. The Applicant further submits that he believed in the authenticity of the documents because his son had had recurrent abdominal/gastric problems for years before.

33. Following receipt of the medical documents, the Applicant arranged to refund his brother-in-law as he had been requested. Accordingly, he sent the money totalling to YER3,400,000 via a distant relative called Fuad Ahmed Baidhani Al Doubani (“Al Doubani”). A few days later, Al Doubani confirmed to the Applicant that he had delivered the money and he had even seen his son, who was then doing fine.³³

34. Having refunded his brother-in-law, the Applicant then submitted a reimbursement claim to Cigna. He submitted the documents in their “shape, format, and size, as had been received from the source”.³⁴

35. In view of the above, the Applicant submits that the Administration did not clearly establish that his son did not receive treatment at USTH. The hospital lost all patients’ and billing data covering the period in question. The loss of data relates to the political situation in Yemen. The hospital did not confirm or deny whether his son was indeed a patient on the dates reflected on the invoice.³⁵ Therefore, since the Administration cannot confirm that his son did or did not receive the treatment from USTH, then the count of the allegation of “medical services that were not received”

³²*Ibid.*, para. 10.

³³*Ibid.*, paras. 13-15.

³⁴*Ibid.*, para. 16.

³⁵Application, annex 18, paras. 31-33.

was not established by clear and convincing evidence.³⁶

36. Furthermore, the Applicant contends that the Administration did not establish that he knowingly submitted a forged invoice or medical report. He admits that while he should have exercised more caution in ascertaining the authenticity of the documents, he did not notice any visual irregularities with the documents.³⁷

Respondent's submissions

37. The Respondent's position is that there is clear and convincing evidence that the Applicant engaged in fraud by submitting false medical claims to Cigna for reimbursement of the cost of medical services that had not been received and costs that had not been incurred.³⁸

38. He submits that the evidence establishes that the invoice and medical report are not authentic and, as a result, that the medical services claimed to have been received by the Applicant's son were not in fact received, nor any of the associated costs incurred. In this respect, USTH provided an official stamped letter dated 19 October 2020³⁹ from the USTH Admissions Office, Patient Accounts. The letter stated that the invoice and medical report at issue were not authentic, pointing to five discrepancies in the documents. USTH stated that the invoice included items not normally included in USTH invoices, including itemized charges for "surgery" and "emergency room". USTH also pointed out that the various itemized charges were miscalculated for the total due – the amounts should have totalled to YER3,451,499, not YER3,451,649 – which would not occur in an authentic USTH invoice which is generated using a computerized system to account and calculate invoices.

39. The Respondent submits further that USTH stated that it was irregular that the invoice did not reflect a deduction for an advance payment from Cigna. USTH

³⁶*Ibid.*, para. 36.

³⁷*Ibid.*, para. 37.

³⁸Reply, para.3.

³⁹Reply, annex 2, exhibit 26, p. 175.

indicated that it has an agreement with Cigna and, as a result, patients only pay USTH the amount not covered by the insurance.⁴⁰ USTH further indicated that the stamp on the invoice submitted by the Applicant of 2 December 2019, differed from the date that the invoice was issued, 28 November 2019, and that this is not consistent with USTH's practice in issuing invoices, as it normally stamps an invoice on the same date that it is issued.⁴¹ USTH also indicated that the medical report was not issued by USTH.⁴²

40. In view of the above, the Respondent asserts that because the Applicant certified to Cigna that the information he was submitting was "*correct and true*", he was acknowledging that he was aware of the content of the medical claim and attesting to its authenticity. If he was not sure or had doubts about the authenticity, he had no basis for certifying otherwise. In any event, the evidence clearly demonstrates that the Applicant was in fact aware of the false nature of the invoice and medical report when he submitted them to Cigna. In a conversation the Applicant had with two colleagues, Mr. Tareq Gholasi, Operations Analyst, UNDP Yemen, and Ms. Samar Bustanji, Human Resources Analyst, UNDP Yemen, the Applicant admitted that his son had not received the treatments reflected in the invoice and medical report that he submitted to Cigna.⁴³

41. During the investigation, Mr. Gholasi stated that the Applicant called him after receiving the options letter. Mr. Gholasi asked Ms. Bustanji to join that discussion, so that he was not speaking with the Applicant alone. Mr. Gholasi informed the investigators that during this conversation, the Applicant told him that his son had not undergone surgery at USTH, but that the Applicant was submitting the medical claim in advance for some future treatment that his son might receive. Ms. Bustanji confirmed the Applicant's admission to the investigators, stating that, during this discussion, the Applicant admitted that someone at the hospital had provided him with the invoice and medical report, which he knew were not correct.

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²Reply, annex 2, exhibit, 32, 198.

⁴³*Ibid.*, exhibit 19, para. 10, p.129 and exhibit 23, p. 162.

42. The Respondent maintains that the Applicant's awareness of the fraudulent nature of the invoices is also supported by the fact that he provided inconsistent and inaccurate information during the investigation about how he received the invoice and medical report. In this respect, during the investigation, the Applicant claimed that he received the invoice and medical report from his former brother-in-law who sent them via WhatsApp to a distant family member, Mr. Saleh, who in turn gave them to the Applicant. In his interview with OAI, Mr. Saleh did not confirm the Applicant's version of events. Mr. Saleh indicated that he had received "*photos regarding some medical treatments and an invoice from the Applicant's brother-in-law*", but the documents he received were "*in English and hard to read because of small font*".⁴⁴ The documents at issue, which the Applicant claimed he received through Mr. Saleh, were in Arabic, not English, and therefore could not be the ones referred to by Mr. Saleh. Mr. Saleh had no record of his receipt of the English documents, nor could he recall when they had been received.⁴⁵

43. The Respondent further contends that there are contradictions between the statements of Mr. Saleh and the Applicant's. Mr. Saleh stated that the Applicant gave him the phone number of the Applicant's former brother-in-law, so that Mr. Saleh could receive the documents from him. However, when OAI asked the Applicant for his former brother-in-law's phone number, or any contact information for his ex-wife, the Applicant stated that he did not "*have any contact with him*" and repeatedly told OAI that he did not "*have any number*" for his former brother-in-law or ex-wife.⁴⁶ The Applicant's statement in this respect calls into doubt both the statement of Mr. Saleh, as Mr. Saleh claimed to have been given the former brother-in-law's phone number by the Applicant, as well as the Applicant's version of events, as it is unclear how he could have become aware of his son's medical treatment, received the invoice and medical report, and transferred the money reimbursed to him by Cigna if he had no contact or even a phone number for his ex-wife or her family.

⁴⁴Reply, annex 2, exhibit 34, para. 4, p. 206.

⁴⁵*Ibid.*, exhibits 34, 30 and 5.

⁴⁶*Ibid.*, exhibit 10, para. 254, p. 99.

44. Similarly, the Applicant claims that he sent the money reimbursed to him by Cigna to his ex-wife through a family friend, Mr. Al-Doubani, did not support the Applicant's version of events. When questioned by OAI, Mr. Al-Doubani indicated that he had only sent USD1,000 on the Applicant's behalf in the year prior to his interview with OAI, which took place on 17 March 2021, but to the Applicant's brother, Faris and not to the Applicant's ex-wife or her family.⁴⁷ Further, Mr. Al-Doubani did not recall making any transfer for USD6,000 or any amount close to that, to anyone, nor did he confirm that he had provided any amount to the Applicant's ex-wife or former brother-in-law. Indeed, Mr. Al-Doubani stated that he did not even know the name of the Applicant's former brother-in-law.⁴⁸

45. Based on the above account of events, the Respondent maintains that there is clear and convincing evidence, which is unrebutted by the Applicant, and which supports the fact that the Applicant engaged in misconduct through his submission of a fraudulent medical claim for medical services that had never been incurred.

Considerations

46. It has to be preliminarily noted that the Applicant in his final submissions insisted on having a hearing session, notably to hear from Fuad, Hussain and Mohammed Abdulraqueeb. The Tribunal confirms that a hearing is not necessary, for the reasons specifically indicated below and also because the facts to be assessed are in the case record, in particular the submitted medical invoices and medical report on which the reimbursement request by the Applicant was based.

47. The application is ill-founded.

48. The Applicant admits that he submitted the invoice and the medical report in question to Cigna for reimbursement, but denies that the documents were forged and, seemingly in the alternative, that if they were forged, he was unaware of it when he

⁴⁷*Ibid.*, exhibit 34, para.10, p.207.

⁴⁸*Ibid.*

submitted them to Cigna.

49. The evidence establishes that the invoice and the medical report are not authentic.

50. Indeed, the USTH, the hospital where the purported medical services were received by the son of the Applicant, stated through a formal letter from the USTH Admissions Office, Patient Accounts, that the invoice and medical report at issue were not issued by USTH and were not authentic. The letter outlined a number of discrepancies between the documents submitted by the Applicant to Cigna and authentic USTH invoices and medical reports.

51. The Applicant certified to Cigna that the information he was submitting was “correct and true” and was therefore, acknowledging that he was aware of the contents of the medical claim and attesting to its authenticity.

52. This is enough to substantiate the accusation of having used false documents to receive improper and undue economic benefits from Cigna.

53. Indeed, if not by the Applicant, the forgery should have purportedly been committed by other people interested in receiving the reimbursement, the ex-wife or the ex-brother-in-law of the Applicant who gave the documents to the Applicant: even if the Applicant did not himself commit the forgery nor cooperate in it, he took the responsibility for the improper use of documents received by other people, even if the forgery was made at his unbeknownst.

54. In any case, by the declaration to Cigna on the veracity of the documents and by certifying that the documents were correct and true, the Applicant assumed full responsibility for the documents.

55. The Applicant claimed he was not aware of the lack of authenticity of the documents, because the invoice was related to a surgery treatment received by his son, and he was not present; he also claims that his ex-wife and former brother-in-law

provided him with the invoice and the medical report he further submitted to Cigna for reimbursement.

56. Beside any consideration that the information given by the Applicant on how he received the invoice and medical report from his ex-brother-in-law was not confirmed to the investigators, the situation, even if true, would not exclude the responsibility of the Applicant for the reasons mentioned above.

57. To mitigate his responsibility, the Applicant should have demonstrated that the medical intervention occurred, that the hospital requested payment by a real invoice, and that he paid the costs of the intervention.

58. The Respondent doubts all these facts and the Tribunal shares his view.

59. As to the medical intervention: no evidence was offered of the effectiveness of the medical treatment; excluding the fake invoice and the fake medical report, no other documents or evidence were provided on the specific pathology suffered by the Applicant's son and on the type and date of the surgery; no statements were provided from the medical practitioners or nurses or even the hospital's other staff members; not even by the ex-wife of the Applicant and her brother, who were allegedly present at the intervention, nor by the Applicant's son; and there was not any medical report generated after the alleged surgery.

60. The Applicant generically affirmed, time after time, that his son suffered from gastric problems, intestinal problems, a pancreatic disease, abdominal problems, without specifying why his son underwent surgery; he also stated to OAI (see answer to question, line 100 of the interview in the Investigation Report) that he "did not know that (his son) had been admitted to the hospital".

61. It also sounds uncommon that the involvement of the Applicant in the history happened only weeks after the alleged surgery occurred (in order to claim a reimbursement of the costs of the intervention) and not before the intervention itself.

62. The Applicant, in his final submissions, insisted on having a hearing session to hear from Mohammed Abduraqeeb, the practitioner who followed the Applicant's son, who could testify in general on the medical problems of the latter. The Tribunal finds the requested testimony irrelevant because it is not related specifically to the surgery, but to a generic state of health which is not at stake.

63. The Respondent stresses that the Applicant admitted that he knew that the medical claim was false when he submitted it to Cigna, stating in a conversation with two colleagues, Mr. Gholasi, Operations Analyst, UNDP Yemen, and Ms. Bustanji, Human Resources Analyst, UNDP Yemen, that his son had not received the treatments reflected in the invoice and medical report.

64. The Tribunal finds that the statements of Mr. Gholasi and Ms. Bustanji are credible, as neither had any motive to lie and both provided separate and consistent statements about their conversation with the Applicant and his admission to the conduct at issue, which corroborates the statements of each. The statements confirm the evidence already collected in the case.

65. As to the costs of the alleged intervention, if we exclude the fake documents, on one hand no other documents were provided on any request of payment by the hospital; on the other hand, no evidence (and even no allegation) by the Applicant was provided on the payment itself to the hospital, an element which is crucial in a dispute concerning a reimbursement claim; heard by OAI (see para. 51 of the Investigation Report) the Applicant himself admitted that he does not "know how they paid the invoice or what they did".

66. Finally, the Applicant alleged having borne the costs of the surgery, referring to the amount shown by the fake invoice, but the evidence offered on this payment is not convincing at all.

67. It could be difficult to imagine a father not interested in the health of his son (living with the mother's family) at the moment of the intervention (see para. 50 of the OAI report, in particular, where the Applicant recalls at that time he could not "even

reach his son or speak with his ex-wife family” and that “he has not seen his son in three year” because “they do not let him see the son”) and instead was prompt to pay his costs after weeks.

68. Moreover, there are difficulties in believing a payment in cash of such a large amount of money (more than USD6,000 to be carried by third parties in a far area of a country facing many security problems). Apart from any doubt about the fact that the Applicant was requested by OAI to provide evidence to show that he took the money from his savings alleged to have more than YER3 million in cash “not in a bank” (the bank where he receives the United Nations wage) but “kept at home collected over time” (as the Applicant declared to OAI: see Investigation Report para. 49), the Tribunal notes that Mr. Al-Doubani (the person who should have carried and delivered the money) did not confirm to the investigators the facts; given the large sum of money at issue, it is highly unlikely that if such a transfer had been made, Mr. Al-Doubani would fail to remember the transaction.

69. The Tribunal, considering the statements given by this person to OAI, finds it not useful to hear him as a witness as requested by the Applicant. Moreover, the Tribunal notes that the Applicant would have liked to cross examine the witness, while the latter (considering the interest of the parties in hearing him and the burden to prove the payment on the Applicant) would have been in theory called by the Applicant to be examined in-chief.

70. The United Nations Appeals Tribunal (“UNAT”) in *Asghar*⁴⁹ laid down the essential elements to establish the charge of fraud and the applicable standard of proof:

A finding of fraud against a staff member of the Organization is a serious matter. Such a finding will have grave implications for the staff member’s reputation, standing and future employment prospects. For that reason, the UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to

⁴⁹*Asghar* 2020-UNAT-982, paras. 35-36.

deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words, the commission of fraud must be shown by the evidence to have been highly probable. Fraud consists in the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.

71. In sum, there is a clear and convincing evidence that the Applicant engaged in misconduct through his submission of a fraudulent medical claim for medical services that had not been occurred.

Whether the established facts qualify as misconduct

Applicant's submissions

72. The Applicant does not specifically address whether his actions qualify as misconduct or not. Equally, there is no contest in his application to the fact that if the alleged actions had been proven they would amount to misconduct. He, however, admits that his actions may amount to an unknown, unexpected and unintentional mistake pertinent to the medical claim he submitted to Cigna.⁵⁰

Respondent's submissions

73. The Respondent's position is that the Applicant engaged in serious misconduct that warranted the imposition of the sanction of separation from service without termination indemnities.⁵¹ The Applicant committed fraud, prohibited conduct under UNDP's policies and rules.⁵²

Considerations

74. The Tribunal is of the view that the Applicant's behaviour entails what the UNDP Policy against Fraud and other Corrupt practices (approved in October 2018)⁵³ defines as fraud, which includes any act or omission whereby an individual knowingly

⁵⁰ Application, section IX, para. 7.

⁵¹ Reply, para. 33.

⁵² Reply, para. 12.

⁵³ Reply, annex 3.

misrepresents or conceals a fact to obtain an undue benefit or advantage. The Fraud Policy also provides as an example of fraud: “providing information in relation to a medical insurance claim or another entitlement that the claimant knows to be false.”

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

Applicant’s submissions

75. The Applicant contends that he was denied procedural fairness in the investigation process.⁵⁴He submits that UNDP committed multiple due process violations before and during the investigation. The sequence of violations started with the options letter, which was based entirely upon Cigna’s report of possible fraud. In the United Nations regulatory framework, third-party administrators of medical insurance plans such as Cigna are not competent to investigate fraud, they merely highlight and refer potential fraud to the Administration. Yet, in his case, based on Cigna’s referral alone, he was sent an options letter requiring him to decide, within a matter of three days, whether to resign immediately and be barred from any future United Nations employment or be subject to a full investigation. The options letter did not advise him of his right to seek legal assistance.

76. The Applicant also faults the statements given by Mr. Gholasi and Ms. Bustanji during the investigation. He states that he contacted Mr. Gholasi to inquire about availability of a legal counsel in the United Nations to assist him when he received the options letter. Instead of assisting him in securing legal counsel, Mr. Gholasi tried to get information out of him. Mr. Gholasi also pressured Ms. Bustanji to do the same. The Administration treats his alleged comments to Mr. Gholasi and Ms. Bustanji, which he denies, as an admission of guilt. It should be noted that Ms. Bustanji refused to sign her witness statement. Her statement is, thus, not only unsworn, but unadopted by the witness herself, and has no probative value. Mr. Gholasi’s statement thus stands

⁵⁴Application, annex 18, para. 10.

on its own, and the Applicant maintains that Mr. Gholasi is lying and has ulterior motives.

77. The Applicant further claims that he was denied due process because OAI “*refused [his] repeated requests to interview a third witness (Mohammed Abdurqaeeb)*” who has detailed knowledge of his son’s health issues.⁵⁵ The OAI justified its refusal on the ground that Mr. Abdurqaeeb did not have any knowledge of the Applicant’s insurance claim submission. As a remedy, the Applicant requested the Tribunal to approve his request to interview Mr. Abdurqaeeb.⁵⁶

78. The Applicant also avers that he suffered due process violations because, on 25 March 2021, OAI sent him the draft investigation report for his comments. Neither the covering email nor the covering letter to the draft investigation report advised him of his right to seek legal representation. The covering letter only stated that the report was “strictly confidential” and could not be discussed with other persons.

Respondent’s submissions

79. The Respondent’s position is that the Applicant’s due process rights were respected during the investigation and disciplinary process. Relying on *Applicant*⁵⁷, he submits that the key elements of a subject’s due process rights are met when “the subject was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defence and to call into question the veracity of their statements”. In this case, this requirement was fully complied with.

80. In response to the Applicant’s claim that OAI refused to interview Mr. Abdurqaeeb, the Respondent states that in naming Mr. Abdurqaeeb as a witness, the Applicant described to OAI that this witness was a “*relative and a friend*” and had “*detailed knowledge*” of the Applicant’s son’s health issues. However, the issue is not whether the Applicant’s son had health issues, but whether the specific medical claims

⁵⁵Application, annex 24, para. 64.

⁵⁶Application, section IX, para. 4.

⁵⁷*Applicant*2013-UNAT-302, para. 39.

and invoices were genuine. The Applicant did not indicate that Mr. Abdulraqueeb had any specific knowledge of the medical claims at issue or was present when his son was hospitalized at USTH during the hospital stay indicated in the invoice and medical report.⁵⁸ Accordingly, given that the Applicant did not even allege a relevant basis for Mr. Abdulraqueeb to be interviewed, it was reasonable for OAI to determine that he was not a relevant witness and need not be interviewed. The Respondent maintains that pursuant to *Belkhabbaz*⁵⁹, OAI only has a duty to interview relevant witnesses and may limit the witnesses interviewed on reasonable and proper grounds.

Considerations

81. The Applicant's due process rights were respected during the investigation and disciplinary process and there is no merit to the Applicant's claim that his due process rights were denied because OAI did not interview one witness he named (Mr. Mohammed Abdulraqueeb), who allegedly had some knowledge of the Applicant's son's health issues. OAI considered whether Mr. Abdulraqueeb had information that could be relevant to the investigation based on what the Applicant said he had knowledge of and determined that because Mr. Abdulraqueeb was not presented as having any knowledge of the Applicant's insurance claim submission, OAI did not interview him. Given that the Applicant did not even allege a relevant basis for Mr. Abdulraqueeb to be interviewed, it was reasonable for OAI to determine that he was not a relevant witness and need not be interviewed.

Whether the sanction was proportionate to the offence

82. The Applicant submits that the sanction is extremely blatant, biased, and unfair.⁶⁰ However, depending on the finding of the Tribunal, he is prepared to accept a proportionate administrative or disciplinary measure for any unknown, unexpected,

⁵⁸Reply, para. 32.

⁵⁹*Belkhabbaz* 2018-UNAT-873, para. 77.

⁶⁰Application, section VIII, p. 7.

and unintentional mistake pertinent to the claim he submitted to Cigna.⁶¹

83. The Respondent contends that the measure imposed was reasonable and not disproportionate. In any event, the sanction is consistent with UNDP's practice in respect to other cases involving fraud. In addition, in deciding on this measure, UNDP considered all relevant mitigating and aggravating circumstances.

Considerations

84. The Tribunal finds that the measure imposed was reasonable and not disproportionate. The Tribunals have consistently ruled that misconduct involving intentional and deceptive conduct, particularly for personal gain, merit the most severe sanctions such as separation from service or dismissal. Such measures have been found proportionate in cases of fraudulent conduct as "fraud undermines the very integrity of the Organization".⁶²

85. The practice of the Organization in cases involving staff submitting false claims for reimbursement of medical expenses is consistent in that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a).⁶³

JUDGMENT

86. In light of the foregoing, the application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 29th day of May 2023

⁶¹*Ibid.*, section IX, para. 7, p. 10.

⁶²*Jaber et al.* 2016-UNAT-634, para.27.

⁶³*Diallo* UNDT/2021/064, para. 63; see also *Madhi* 2010-UNAT-018.

Entered in the Register on this 29th day of May 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi