UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/068
Judgment No.: UNDT/2014/122
Date: 13 October 2014
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TSHIKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Sophie Parent, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)[1].

2. On 17 September 2010, she filed an Application with the United Nations Dispute Tribunal (the Tribunal) challenging the decision to impose on her the sanction of summary dismissal for attempting to defraud the Organization by making a false claim for medical expenses.

Facts

3. The Applicant, a national of the Democratic Republic of the Congo, joined MONUC on 9 June 2005 as a Security Clerk on a contract governed by the former 300 series of the Staff Rules. Effective 1 July 2009, as a result of the contractual reforms, the Applicant was separated and reappointed on a fixed-term contract.

4. In February 2007, following numerous consultations at the Regional Military Hospital in Kinshasa, the Applicant's spouse, Mr. Lokangu, was diagnosed by Dr. Nzale Monga with *vesical lithiasis* and surgical intervention was recommended.

5. According to the Applicant and her spouse, on 7 March 2007, the surgery was performed at a private clinic called Ingende Medical located in Kalamu by Dr. Monga who was assisted by Dr. David Gbamo. Mr. Lokangu remained hospitalized at Ingende Medical until 14 March 2007.

6. On 17 September 2007, the Applicant submitted a claim for reimbursement of medical expenses on behalf of her husband for the 7 March 2007 surgery.

[1] As of 1 July 2010, MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

7. Upon receiving the claim, Mr. Christian Ignasse, a Human Resources Officer at MONUC, concluded that the invoices appeared "strange" and accordingly decided to visit Ingende Medical. He was advised that the name of Mr. Lokangu did not appear in the records of Ingende Medical. He subsequently requested the MONUC Special Investigation Unit (SIU) to start an investigation and handed over all the documents that he received from the Applicant.

8. On 12 November 2007, the Applicant was interviewed by the SIU investigator, Mr. Marnix Debusschère. A hand-written record of the interview was read out to the Applicant before she signed it.

9. On 14 November 2007, the Applicant was presented with a typed version of her interview which she refused to sign. On 26 November 2007, Mr. Debusschère took a further statement from the Applicant.

10. The Investigation Report was finalized on 28 November 2007 and concluded that Mr. Lokangu did not undergo surgery at Ingende Medical and that the Applicant attempted to obtain USD1,180 by submitting a fraudulent claim.

11. The Investigation Report was communicated to the MONUC Conduct and Discipline Unit (CDU) on 19 December 2007. It was referred to the Director of Mission Support (DMS) on 9 January 2008 for review. On 21 February 2008, the DMS recommended that disciplinary action should be instituted against the Applicant.

12. In a memorandum dated 25 February 2008, referring to the SIU Investigation Report and the comments of the DMS, the Special Representative of the Secretary-General (SRSG), MONUC, recommended that the Department of Field Support (DFS) commence disciplinary proceedings against the Applicant.

13. In a memorandum dated 14 March 2008, DFS concluded that the Applicant had violated United Nations Staff Regulations and Rules and recommended that the

Office of Human Resources Management (OHRM) initiate disciplinary proceedings against her.

14. In a Memorandum dated 25 April 2008, OHRM charged the Applicant with misconduct namely attempting to defraud the Organization by submitting a false medical claim. The Memorandum stated that the Applicant "failed to provide the Organization with credible evidence to prove that surgery was performed on [her] husband on 7 March 2007 at "Ingende Medical" by Dr. Gbamo or any other doctor". In her response dated 1 July 2008, the Applicant denied the accusations.

15. In a Memorandum dated 5 May 2010, the Under-Secretary-General for Management (USG/DM) decided to impose on the Applicant the sanction of summary dismissal for attempting to defraud the Organization by making a false claim for medical expenses. The Applicant received this Memorandum on 18 June 2010 and was dismissed from service.

16. On 17 September 2010, she filed an Application before the Tribunal challenging the decision.

17. The Respondent submitted his Reply on 19 October 2010.

18. On 3 June 2014, the Tribunal sitting in Nairobi held an oral hearing into the merits. Counsel for the Applicant attended in person whereas Counsel for the Respondent, the Applicant and the witnesses participated via video conference from New York and Kinshasa. The Applicant and her three witnesses testified as well as one witness for the Respondent.

Testimony of the Applicant

19. The Applicant was interviewed twice by Mr. Debusschère on 12 and 26 November 2007. In his report, he wrote that he took "voluntary statements" from her.

20. On 7 November the Applicant was interviewed in an open area during a training she was undergoing. At the hearing, Mr. Debusschère stated that he could not remember: (i) the circumstances under which he interviewed the Applicant; (ii) whether he called her before to inform her she would be interviewed, (iii) whether he drove to the place where he interviewed her or whether he went on foot; (iv) whether he interrupted her training session; and (v) whether the interview took place in a parking lot, near his car.

21. The Applicant told Mr. Debusschère that her husband underwent surgery at Ingende Medical on 7 March 2007. Dr. Gbamo, who worked at the University of Kinshasa (UNIKIN) campus, treated her husband. The Applicant met the doctor once while her husband was still in the hospital. She expressed surprise that Ingende Medical gave information that her husband did not undergo surgery. She also believed that her husband had the phone contact of Dr. Gbamo. Her statement was recorded in writing and she signed it. On 14 November she was asked to sign a typed version of the statement. She refused and told the investigator that she had never stated that Dr. Gbamo worked at UNIKIN or that he had performed surgery on her husband. She also stated that when she signed the written statement on 7 November it was read to her and she did not read it.

22. Mr. Debusschère had, on 14 November, made arrangements for the Applicant's husband to be examined by the MONUC medical officer subject to the consent of the husband. The Applicant expressed the view that her husband would not refuse such an examination. On 21 November and 23 November, Mr. Debusschère contacted the Applicant about the whereabouts of her husband. He was told that Mr. Lokangu was in the East and had not yet returned to Kinshasa. The Applicant could not contact him as he had lost his phone a few hours before travelling to the East.

23. On 26 November, Mr. Debusschère asked the Applicant the following questions, which appear in the investigation report:

> Q. *Le docteur Lipekene, superviseur médecin à Ingende Medical m'a confirmé q'une intervention chirurgicale, telle que lithiase*

vesicale n'a pas pu avoir lieu à Ingende Medical à cause d'une absence d'une infrastructure et de I'équipement adéquat. Quelle est votre réaction à cette information? [Dr. Lipekene, the supervisor at Ingende Medical, confirmed to me that a surgical intervention, such as vesical lithiasis could not be performed at Ingende Medical due to a lack of adequate infrastructure and proper equipment. What is your reaction to this information?]

A. *Moi étant au travail, j'ai trouvé que mon mari a eu l'opération. Quand à I 'infrastructure du centre et la hauteur de l'opération, je ne saurais pas vous donner des précisions.* [I was at work and I have found that my husband had the operation. As for the infrastructure existing at the center and the standard of the operation, I would be unable to furnish any details.]

Q. *Le nom de votre époux ne se retrouve pas dans les registres de présence à Ingende Medical et iI n'y a aucune trace dans les registres financiers de I'hôpital Quel est votre commentaire*? [The name of your spouse does not appear in the attendance records of Ingende Medical and there is no trace of his name in the financial records at the hospital. Do you have any commentary?]

A. *C'est un dossier médical qui est venu est venu d'ailleurs. II aurait fallu la présence de mon mari pour avoir toutes les précisions, d'autant plus que quand je lui ai donné plus tard nos formulaires à remplir, il est allé les faire remplir tout seul à l'hôpital*. [It is a medical record that came from elsewhere. The presence of my husband would have helped in getting all the details the more so as I later gave him all the documents to fill out and he went alone to the hospital to have them filled.]

Q. *Expliquez-moi la différence entre la facture de 1180 US$ et les trois reçus qui totalisent 2210 US$.* [Explain to me the difference between the invoice in the amount USD1,180 and three receipts totaling USD2,210.]

A. *J'ai récupéré les reçus et la facture que je les ai déposés au bureau de MIP. Je n'avais pas du tout parcouru les reçus, ni fait des copies. Je déclare que c'est mon mari qui a fait faire cela pour que nous puissions enter dans nos droits*. [I retrieved the invoice and the receipts and bills, which I left at the MIP office. I did not check all receipts, or make copies. I said that it was my husband who did this so that we could invoke our rights.]

> Q. *Est-ce que votre époux est déjà de retour de l'Est? Si non, il reviendra quand?* [Is your spouse already back from the East? If not, when will he be back?]
>
> A. *Mon époux n'est pas encore de retour. Moi je dépends de lui pour qu'il nous éclaircisse sur ce dossier (parce que il n'a pas de téléphone).* [My husband is not back yet. I need him so that I can clarify the situation (because he did not phone).]

24. In her testimony at the hearing, the Applicant explained that her husband retrieved all the invoices and receipts for her to fill a Medical Insurance Plan (MIP) claim and that she submitted one for reimbursement in the amount of USD1,180. Although she had spent much more, she had been told that the limit for reimbursement in her professional series was USD1,180. All these documents were produced after the operation took place and after Dr. Monga had passed away because she did not know until later that her husband was considered her dependent under the United Nations Rules and that his medical expenses were reimbursable under the MIP.

25. At one stage her spouse was requested to visit the MONUC Medical Officer presumably to confirm whether he had undergone surgery. Her spouse did not do so because he was away and when he came back to Kinshasa from the field in January 2008 the case was already closed. She was also told that the Medical Officer needed an official request to examine her husband and she did not have one.

26. She could not explain why she refused to sign the typed version of her first statement she gave to the SIU investigator. She never visited Ingende Medical. She only went there to see her husband the evening after the surgery. On that occasion, she met with Dr. Gbamo who told her "we operated on your husband". That was the first time she ever saw that doctor. Still, she could not confirm that he operated on her husband.

Testimony of Applicants' Witnesses

Testimony of Lieutenant Jean-Pierre Balingia

27. Lieutenant Jean-Pierre Balingia is an administrator at the Military Hospital of Kinshasa. He confirmed that Dr. Monga was Mr. Lokangu's usual doctor who used to examine him at the Military Hospital.

Testimony of Dr. Tshienda Tshizubu

28. The second witness for the Applicant, Dr. Tshienda Tshizubu, is a military doctor who used to be at the Military Hospital and is now based in Morocco. He knew Mr. Lokangu having seen him on two occasions at the Military Hospital. He remembered Mr. Lokangu because he underwent a serious operation at Ingende Medical. The witness conceded that surgeries could not be performed there as it was a "small centre" but nonetheless Dr. Monga, who was one of his supervisors, had performed numerous serious operations at Ingende Medical. He himself attended two or three operations at that clinic. He was present when Dr. Monga operated on Mr. Lokangu on 7 March 2007 at Ingende Medical as he had been called by the doctor. Dr. Monga passed away about two and half years ago.

Testimony of Mr. David Lokangu

29. The third witness for the Applicant, Mr. Lokangu, is the Applicant's spouse. He was never interviewed by Mr. Debusschère. Mr. Lokangu stated in court that he was treated by Dr. Monga at the Military Hospital in Kinshasha. Dr. Monga was a well-known doctor with a good reputation. The doctor advised him that he should undergo surgery for the condition for which he was being treated. On account of financial difficulties he chose to be operated in a private clinic. Dr. Monga picked Ingende Medical and he was satisfied with it because he could settle the bills for the surgery by installments.

30. Mr. Lokangu stated that Ingende Medical was not a big clinic. It was just a house with many rooms designated for specific purposes. But there was staff working there. He also saw a few patients when he attended the clinic. When it was put to him that Dr. Lipekene had stated that major surgeries could not be performed at Ingende Medical owing to the lack of proper facilities, Mr. Lokangu conceded that fact. However, he explained that Dr. Monga, who was an experienced military surgeon and accustomed to practicing in harsh conditions in the field, brought "his complete kit" to the clinic for the surgery.

31. The witness underwent surgery on 7 March 2007 at Ingende Medical. The surgery lasted two hours and was performed under general anaesthesia. Dr. Monga operated on him, assisted by Dr. Gbamo. He assumed that Dr. Gbamo was Dr. Monga's assistant. He could not explain why Dr. Gbamo's name did not appear on the Roll of the Medical Association in DRC. He believed Dr. Gbamo was a lawfully registered doctor who assisted Dr. Monga. Dr. Gbamo was the one who signed all the invoices because Dr. Monga was always in the field during that time of internal war. The documents were gathered after Dr. Monga passed away. He learned later that two other doctors also attended the operation.

32. Mr. Lokangu explained that his name was not on the medical records of Ingende Medical because he was actually treated at the Military Hospital where his file was registered. The surgery was performed at Igende Medical through a private arrangement as a result of his financial difficulties. From November 2007 to January 2008, he was in the field and could not be contacted as he had lost his cellular phone in a taxi.

Testimony presented by the Respondent

Testimony of Mr. Debusschère

33. Mr. Debusschère is the SIU Officer who investigated the allegation of fraud and wrote a report dated 28 November 2007. The investigation started on 7

November 2007. The investigator examined a number of documents; he interviewed the Applicant and Dr. Lipekene; he tried unsuccessfully to locate Dr. Gbamo; he visited Ingende Medical.

The documents examined by Mr. Debusschère

34. The witness examined the following documents:

(a) Invoice 0011/2007 from Ingende Medical for the amount of USD1,180. He concluded that the "invoice from Ingende medical amounting to US$ 1,180 appears to be very amateurish. The heading and stamp both read Ingende Medical, while the text on the invoice reads as "Ingende Medicale" ("e" added to medical)";

(b) A medical certificate from Ingende Medical bearing No. 0077/07 certifying that the Applicant's spouse had undergone surgery there, signed by Dr. Gbamo. According to Mr. Debusschère "the medical certificate from Ingende Medical appears to be too professional compared to the dilapidated state of Ingende Medical. The heading and stamp both read Ingende Medical, while the text on the certificate reads as "Ingende Medicale" ("e" added to medical)".

(c) A prescription for drugs signed by Dr. Gbamo, dated 25 February 2007, and an MIP claim for reimbursement dated 27 February 2007 and bearing the stamp of Ingende Medical. The conclusion of Mr. Debusschère was the following: "The handwriting of the person that wrote the prescription reappears on the MIP (column "generic name of drug", "mg" and "quantity"); while it is obvious the other two columns have been filled out by the pharmacist";

(d) Mr. Debusschère found it suspicious that the total amount claimed as it appears on the invoice from Ingende Medical was USD1,180 while the total amount shown on the various receipts came to USD2,210. The other area of

> suspicion related to the fact that "receipt 0068/07 is handed over on 26 February 2007, while receipt 00271/07 is handed over on 20 March 2007. This implicates that over 200 persons settled their bills with Ingende Medical in three weeks' time".

Visit to the "Ingende Medical"

35. Mr. Debusschère visited Ingende Medical on 12 November 2007. He found the whole facility to be in a dilapidated state. The facility was located within a compound, which consisted of five or six houses. In front of the main entrance there was a small wooden table that was used as a reception. To the left were the patients' rooms, consisting of a few beds "in a similar state as the whole facility". On the right there was a filthy curtain and behind that curtain there was a door that led to the surgery. He also saw a man who appeared to be a nurse at the reception. That nurse was not in possession of any records of patients who attended the hospital. Mr. Debusschère requested that he be allowed to see the surgery but the man told him he did not have the key to unlock the door. He did not take any pictures of Ingende Medical to support his observations that the clinic barely had any facilities for surgery.

Interview of the Applicant

36. The SIU investigator interviewed the Applicant on 12 and 26 November 2007.

Interview of Dr. Lipekene

37. On 21 November 2007, Mr. Debusschère met with Dr. Lipekene at Ingende Medical. The meeting was in a place that "has been described as the 'surgery room'". This room was about six square metres with the doctor's desk, two chairs, a patient's bed and a stand for intravenous drips. There was no air conditioning or medical equipment.

38. Dr. Lipekene informed Mr. Debusschère about the following:

(a) He took over Ingende Medical from his late brother in February 2007;

(b) His brother used to work in cooperation with doctors unknown to him. He had heard of Dr. Gbamo from the nurses at Ingende Medical but had never met him personally;

(c) There were no records that Mr. Lokangu ever underwent surgery at the facility on 7 March 2007. His name was not reflected anywhere in the attendance books and financial records;

(d) Ingende Medical did not have the infrastructure or equipment for *vesical lithiasis* (urolithiasis) surgery. A patient can be followed at Ingende Medical but surgery was impossible;

(e) The medical certificates and invoices produced by the Applicant were unknown to him and he could not identify the signatures on them though the stamps on the documents confirmed that they came from Ingende Medical;

(f) It is common practice in the DRC that doctors owning hospitals or other medical facilities put these facilities at the disposal of colleagues in exchange of 40% of their honorarium.

39. The investigator took notes of Dr. Lipekene's interview but did not record any written and signed statement from him. He did not inform Dr. Lipekene he could be called as a witness.

Attempt to locate Dr. Gbamo

40. On 27 November 2007, Mr. Debusschère received a memo from the President of the Conseil National de l'Ordre des Médecins (CNOM) in which it was mentioned that only Dr. Lipekene could be traced in the records of CNOM. As for Dr. Gbamo,

he should "justify he performs the profession legally by providing his CNOM number or enrolment with the CNOM".

41. Mr. Debusschère had a meeting with the vice president of the Conseil Urbain de l'Ordre des médecins (CUOM) on 27 November 2007. The investigator was informed that there was no trace at all of a Dr. Gbamo, at the CUOM and that if such a person did exist he was illegally practicing as a doctor. He was informed that both the CNOM and the CUOM face many difficulties with people illegally practicing as doctors.

Applicant's submission

42. The Administration has attempted to reverse the burden of proof by arguing that she had to prove her innocence by producing evidence in response to the letter containing the allegations of misconduct. Yet, it was the Administration's duty to establish, through a proper investigation, the alleged facts on the basis of clear and convincing evidence.

43. At the time of issuing the Charge Letter, the Administration had not established any of the alleged facts. In this Letter, the Administration merely made a series of unfounded allegations, inaccurate assumptions and conjectures and requested that she respond to them. A staff member has no obligation to respond to speculative allegations of misconduct. The only obligation staff members have is to cooperate with the investigation, which she did.

44. The Administration became aware of some historical facts at a later stage after her dismissal. That many facts were unknown to the Administration at the time of imposing the disciplinary sanction only confirms her argument that the investigation was conducted in a sloppy and hasty manner. It was not her fault that the Administration jumped to conclusions without conducting a complete investigation.

45. To justify the disciplinary sanction, the Administration relies heavily on some alleged inconsistencies in the statements she provided to the investigator. The investigator interrupted a training session and interrogated her in plain view of her colleagues. During his cross examination, the investigator did not contradict that fact as he had no recollection of where the interview had taken place. The investigator failed to give her fair notice of the interview and therefore an opportunity to come to the interview fully prepared. During his cross examination, he had no recollection of either calling her or writing to her beforehand. Therefore, she may have given information which, at a later stage, proved to be inconsistent or incomplete. Naturally, the information she provided was of limited value as she was not the patient and had no personal knowledge of her husband's surgery. Consequently, the investigator had an obligation to await her spouse's return to Kinshasa before concluding the investigation. In cross-examination, he conceded that there was no urgency to conclude the investigation and that he could have waited for her spouse's return.

46. As regards the investigation report, the investigator's conclusions were conjectural and speculative. He provided eight reasons in support of his conclusion that the invoices and receipts were false but none of them are cogent. Moreover, he alleged that the owner of Ingende Medical, Dr. Lipekene, purportedly informed him that a complex surgery could not have taken place in the clinic, for it lacks proper medical facilities. The investigator did not ask Dr. Lipekene to either sign or provide a written statement, he did not appear as a witness for the Respondent and the Applicant was unable to cross-examine him. Hence, the probative value of this statement is extremely low.

47. Further, in cross-examination, the investigator admitted that Dr. Lipekene did not know that the surgery was performed by a reputable surgeon, Dr. Monga, who was also a military surgeon accustomed to performing surgeries in challenging environments. Dr. Tshizubu, who attended the surgery on her spouse, confirmed that although Ingende Medical was not the ideal location for such a surgery, Dr. Monga

easily performed it there. Lastly, the investigator drew a negative inference from the fact that Dr. Gbamo who was not on the national list of physicians was illegally practising medicine. This fact does not establish any misconduct from the Applicant.

Respondent's Submissions

The investigation

48. The contested decision is not that of the investigator, but that of the Under-Secretary-General for Management, made on behalf of the Secretary-General. The focus should therefore be on the letter informing the Applicant of the decision to dismiss her, not on the investigation. While the decision of the Under-Secretary-General for Management takes into account the investigation report, the decision that there has been misconduct is made independently and does not endorse all the findings of the investigation. This is evident in two ways: (a) the decision letter does not premise its decision on all the findings of the investigation; and (b) the Under-Secretary-General for Management has the benefit of the response of the Applicant to the allegations of misconduct. It is therefore misconceived to unduly focus on aspects of the investigation that were not the basis of the contested decision, as the Applicant does.

49. Dr. Lipekene stated that the clinic was not equipped to perform surgery such as that performed on the Applicant's husband. Both the Applicant and her husband accepted, in their evidence, that Dr. Lipekene was being truthful when making this statement, noting that Ingende Medical was merely a house with few facilities. Indeed, this is in accord with the investigator's own observations of Ingende Medical. The evidence before the Respondent was that the operation could not have been carried out at Ingende Medical.

50. During the investigation, all the relevant records of Ingende Medical, along with all the documents relating to the clinic, were examined. There were no records relating to the Applicant's husband found at Ingende Medical.

51. Dr. Gbamo signed all the documents relating to the alleged operation without exception. The investigator therefore sought to locate Dr. Gbamo. Dr. Lipekene initially stated that he was away but would return. He mentioned that Dr. Gbamo worked at the UNIKIN campus. However, on discussing the matter again with Dr. Lipekene, he clarified that he had only heard of Dr. Gbamo and never met him personally. After the investigator's initial enquiries, Dr. Lipekene had enquired about Dr. Gbamo, but was never able to get in touch with him. Yet, the investigator did not stop there. He made enquiries of the relevant medical body to see if they knew of Dr. Gbamo. They did not. The Applicant stated that Dr. Gbamo did not, in fact, work at UNIKIN. There was therefore no other reasonable avenue of enquiry for the investigation to pursue. Dr. Gbamo could not be located.

52. It is not possible to say what impact the evidence from the Applicant's husband would have had on this case if it had been forthcoming. At no point did the Applicant put forward any evidence from her husband neither during the investigation (noting that the Applicant did not know that the investigation had been concluded), and, more importantly, nor in her response to the allegations of misconduct (by which time her husband was definitely available to provide clarifications to her). It therefore does not matter that the investigation was concluded after making further enquiries about the possibility that Dr. Gbamo had performed an operation on her husband at Ingende Medical. Even months after the conclusion of the investigation, the Applicant did not provide the information that could have led to further enquiries being made.

53. The documents produced by the Applicant appeared to be irregular and continue to appear so. However, not all the aspects mentioned in relation to the documents by the investigator were considered by the decision maker to be irregular. Indeed they are not recited in the allegations of misconduct. It is therefore futile to take issue with each and every conclusion of the investigator. However, it is noted that the amounts on the receipts added up to more than those shown on the invoices. While the Applicant's husband sought to explain this, his explanation raises

questions. The Applicant could not explain this anomaly during the trial, and more importantly, did not provide an explanation for it during the disciplinary process.

54. The Applicant's own conduct during the investigatory and disciplinary process raised doubts as to her honesty with regard to her claim.

55. The Applicant changed her account repeatedly, and in fact, has continued to do so. In her first interview, she stated that her husband was operated upon by Dr. Gbamo, whom she had met during her husband's hospitalization and was affiliated to UNIKIN. She subsequently refused to sign that account as, according to her, it was untrue and obtained under pressure. Yet, the account in her first interview is similar to her evidence to the Tribunal. It is therefore unclear why she refused to sign that account or why she then provided a different account.

56. On 14 November 2007, the Applicant claimed she could not sign the interview as it was not Dr. Gbamo but another doctor, whose name she did not know (and which she did not provide in her comments on the allegations of misconduct), who had operated on her husband, and it was not true that Dr. Gbamo was a doctor at UNIKIN. In her response to the allegations of misconduct, she went back, partially, to her initial account: it was Dr. Gbamo who performed the surgery.

57. Although these were not facts before the Respondent at the relevant time, it is further noted that, in her Application, the Applicant claimed she did not sign her first interview record, not because Dr. Gbamo had not operated on her husband, but because it was not true to say she knew him, a statement which did not form part of her first interview, and once again does not, therefore, explain why she refused to sign the record of her first interview.

58. In her application, and later in her evidence to the Tribunal, the Applicant and her husband came forth with a new account: Dr. Gbamo was only an intern, and assisted Dr. Monga. In fact, other doctors were also present.

59. It is also noted that in her response to the allegations of misconduct, the Applicant stated, apparently as an explanation, that her husband had used Ingende Medical because "people are suffering from various diseases, and they have to go where they find competent physicians and surgeons". Yet, in her evidence to the Tribunal, she stated that her husband had to be operated upon at Ingende Medical because it enabled him to pay by installment, an entirely new explanation.

60. Prior to the dismissal decision, the Applicant's husband was never available to provide an account of his operation. He had lost his phone and was away in a far off place. He did not return when he was due back. The Applicant never made her husband or any other evidence available when requested by the investigator or in response to her interview or in response to the allegations of misconduct. For example, the Applicant submitted pictures to the Tribunal. This was a course of action easily available to her in responding to the allegations of misconduct but she did not provide such evidence. Once again, the Respondent cannot be faulted for not considering evidence that was entirely within the Applicant's knowledge to provide but which she chose not to provide.

61. At the hearing, the Applicant provided new evidence, namely the testimony of Dr. Tshizubu and Lieutenant Balingia that Dr. Monga operated on her husband. Once again, no reason was provided as to why this information came forth only after the decision to dismiss her. The Respondent could never have identified these possible witnesses without the Applicant providing information as to the involvement of Dr. Monga and the Regional Military Hospital. There would have been no reason for the investigator, or the Respondent, to seek further information from Ingende Medical as to whether a doctor other than Dr. Gbamo had operated on the Applicant's husband, absent such an indication from the Applicant which she did not provide. While this information was clearly easily available to the Applicant when responding to the allegations of misconduct, she did not provide it.

62. The Applicant submitted in her Application that she did not provide the full facts when responding to the allegations of misconduct because she thought she

would have another chance to say more, and moreover, that she did not think the matter was sufficiently serious. This position is disingenuous.

63. The allegations of misconduct were clear, and unambiguously serious, as they originated from OHRM and called into question her integrity. The Applicant clearly understood the issues at hand, as she was able to respond to them in some detail, clearly asserting she had not sought to defraud the Organization.

64. If the Applicant was not familiar with the disciplinary process, as she claimed under cross-examination, there would have been no basis for her to believe that there would be another opportunity to put a further account forward. Indeed, there was no indication in her response to the allegations that she had more information to provide. Further, if she was not familiar with the disciplinary process, she could not have been counting on a Joint Disciplinary Committee (JDC), as claimed in her Application (although not under cross-examination), as not every disciplinary case was referred to a JDC under the previous system.

65. The Applicant and her husband's evidence are that, once they discovered they could claim reimbursement for the operation some months after the operation, they obtained documents in support of their claim. These were therefore largely post-facto documents, although her husband's evidence was unclear as to which documents may have been contemporaneous and which was post-facto. These backdated documents were tailored to reflect the maximum the Applicant could claim, although the amount was not, in fact, what she had spent (having spent, according to her, more). It is submitted, on the following grounds, that her husband's evidence was less than satisfactory as to the accuracy of the documents submitted:

(a) The Applicant's husband testified that the reason the receipts amounted to more than the invoice was because they were not receipts of individualized items on the invoice, but receipts capturing his total payments to date. This account conflicts with the fact that the receipts reflect some of the itemized costs as listed on the invoice.

(b) The Applicant's husband was clear under cross-examination that he had never been to Ingende Medical before his operation on 7 March 2007, yet one of the receipts issued by Ingende Medical pre-dates his operation.

(c) The evidence relating to the receipt for USD1,180 lacks credibility. According to the Applicant's husband's, this would be a receipt for his earlier payments of USD80, then USD870 (amounting to a total of USD950) and, on 20 March 2007, another USD230 (amounting to a total of USD1,180). This would appear to be: (i) inconsistent with his account that the sole purpose of being treated at Ingende Medical, was to be able to settle the bills in installments; (ii) an extraordinary coincidence bearing in mind the amount of his cumulative payments as of 20 March 2007 is the same as the total on the invoice; and (iii) another extraordinary coincidence as, according to the Applicant and her husband, the amount paid on that date was exactly the maximum they could claim to be reimbursed by the Organization.

(d) Indeed, on the Applicant's husband's own evidence, the invoice for USD1,180 was created in order to meet his need for a receipt in the amount that could be claimed, rather than being a true receipt of the cost of the operation.

(e) According to the Applicant's husband, not only did he have to obtain new documents post-facto to support a claim for reimbursement, but he was not able to obtain them from Dr. Monga, as he was either away on mission or deceased. It is not clear how Dr. Gbamo was in any position to create the documents post-facto, bearing in mind, on the Applicant's husband's evidence, his medical file was at the Regional Military Hospital, the Applicant's husband usually paid Dr. Monga, and Dr. Gbamo was just an intern assisting Dr. Monga.

66. In other words, the Applicant and her husband were not able to provide, even to the Tribunal, evidence of the actual cost of the operation. It is clear, on their own account that the operation did not cost USD1,180, although that is the amount they claimed. Instead of explaining their difficulties in obtaining accurate documents, they cobbled receipts and invoices together and the Applicant submitted them as accurate and contemporaneous documents. Such conduct in itself lacks integrity. Moreover, bearing in mind the lack of reliability and candour exhibited by the Applicant and her husband in their evidence, and the unreliability of the documents submitted by them as to the cost of the operation, it is not possible to know that the operation in fact cost more than the USD1,180 claimed.

67. At the time of reaching the impugned decision, the evidence that was placed before the decision-maker justified the conclusions reached. The Applicant failed to submit evidence when she was invited to provide her comments to the allegations of misconduct. The Applicant brought up, after the disciplinary sanction, facts that the Administration was unaware of. Without the Applicant providing this evidence, the Respondent could not have imagined the entirely new factual picture now being presented to the Tribunal. Nothing in what the Applicant provided at the time required further investigation nor suggested this new narrative. The Respondent cannot therefore be reproached for not having taken account of facts he could not have known. The onus was on the Applicant to volunteer this information, and while it would have been easy for her to provide this information, she failed to do so.

68. In the circumstances, the Respondent submits that he was entitled to dismiss the Applicant on the facts before him at the time, and, even if the Tribunal was to have regard to the new evidence of the Applicant, the Respondent would still be entitled to take such disciplinary action against the Applicant.

69. Should the Tribunal find against the Respondent on the merits in this case and consider awarding compensation to the Applicant, due account should, in the Respondent's submission, be taken of the Applicant's evidence on efforts to mitigate her losses. Specifically, the Applicant stated in cross-examination that she submitted

six or seven applications for employment with national institutions. Under re-examination, the Applicant stated that she meant she had applied for six or seven positions in the United Nations system and had, in fact, made many more applications for employment outside the United Nations system. This answer was disingenuous, as her evidence under cross-examination was unequivocal. Aggrieved staff members have a duty to mitigate their losses by demonstrating that they have made reasonable efforts to obtain other employment to limit their income loss during the relevant time period *(Mmata* 2010-UNAT-092; *Tolstopiatov* UNDT/2011/012). While in *Appleton* 2013-UNAT-347 it was decided that a staff member should not be denied compensation for failing to completely mitigate his or her loss, an award of compensation may be reduced proportionately to a staff member's mitigation efforts. Any compensation awarded should therefore be accordingly reduced to reflect the Applicant's failure to mitigate her losses.

Considerations

Role of the Tribunal in Disciplinary Matters

70. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is in no way bound by the findings of the JDC or the Secretary-General on the facts disclosed[2].

71. The United Nations Appeals Tribunal (UNAT) has held that in exercising judicial review in disciplinary cases, the Dispute Tribunal has to examine "(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the […] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence"[3].

[2] *Diakite* UNDT/2010/024.
[3] *Abu Hamda* 2010-UNAT-022.

72. 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[4].

73. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and OHRM[5].

74. UNAT further observed in *Hallal* 2012-UNAT-207 that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

75. In *Nyambuza* 2013-UNAT-364, UNAT stated: "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration[6].

76. The submission of the Respondent is that it is not the investigation that is under scrutiny before the Tribunal. This submission is referred to at paragraph 48 above.

77. It stands to reason that no charges can be preferred against a staff member in a case of misconduct without the conclusion(s) of an investigation. The facts gathered during and the conclusions of the investigation are the triggering factors in the preferring of charges or not against a staff member. In the present case, as in all cases

[4] *Sanwidi* 2010-UNAT-084.
[5] *Sanwidi* UNDT/2010/036.
[6] *Nyambuza* 2013-UNAT-364, para. 30, citing *Messinger* 2011-UNAT-153.

involving misconduct, the filing of charges was based on the facts gathered in the course of the investigation. It was based on the evidence gathered in the course of the investigation that the DMS recommended that disciplinary proceedings be initiated against the Applicant.

78. Even the letter charging the Applicant with misconduct refers to the facts gathered in the course of the investigation. The investigation was focused on the premise that the husband of the Applicant never underwent any surgery as claimed by the Applicant and that she had submitted claims for a surgery that was never performed. It was as a result of these facts that the DMS recommended that disciplinary action should be instituted against the Applicant on 21 February 2008 in accordance with ST/AI/371 (Revised disciplinary measures and procedures)[7], a recommendation that was eventually approved by OHRM.

79. The Tribunal does not agree with the submission of the Respondent which goes against the established jurisprudence and considers that by virtue of the powers of judicial review of decisions of the Secretary-General conferred upon it the Tribunal is not bound by the specifics of decisions taken by the Administration or the charges only. The role of the Tribunal is to look at all the facts including the facts that came up during the investigation.

80. The Tribunal is therefore entitled to look at the manner in which the investigation was conducted; the facts gathered; the testimony of witnesses; and the documentary evidence. Whatever the practice adopted by the different actors within the former internal justice system, parties would do well to bear in mind that the process currently in force is a full and formal judicial mechanism, so that any material brought before it must be capable of withstanding the eagle eyes of judicial scrutiny.

[7] This Administrative Instruction was amended on 11 May 2010 by ST/AI/Amend 1 but the amendment is not applicable in the present case as the investigation started in 2007.

The investigation

81. On the issue of the conduct of the investigation, Meeran J. made the following observation in the case of *Mmata* UNDT/2010/053:

> It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred.

82. The Tribunal will also refer to what Izuako J. stated in *Borhom* UNDT/2011/067,

> Clearly, an investigator who at the outset of carrying out her assignment to investigate the allegations against any person is convinced of that person's guilt for any reason, is not competent to undertake such an assignment. It is an elementary principle of law and a rule of natural justice that one cannot be a judge in his/her own cause. By the same token, it stands to reason that an investigator, just like the judge, must be neutral, without bias and must approach the case he/she is mandated to investigate from the stand of a presumption of the innocence of the subject of the investigation.

83. In the present matter, the investigation started on a mere hunch by Mr. Ignasse, a MONUC Human Resources Officer. He obtained what he considered to be confirmation of that hunch from a visit to Ingende Medical where he was told that the name of the spouse of the Applicant did not appear in the clinic's records. Whether that hunch was objectively confirmed is not for the Tribunal to speculate on in view of the course of events that followed.

84. Mr. Debusschère did not ascertain the reasons why the name of the Applicant's husband did not appear in the records of Ingende Medical given the poor medical facilities that existed generally in the DRC at the time as explained by the Applicant and her spouse.

85. It was crucial to establish whether patients who were being treated in one facility, here the Military Hospital, could undergo surgery in another medical facility, here Ingende Medical, without the appropriate records of each medical facility recording that fact. This fact was all important especially as a witness interviewed by Mr. Debusschère had stated that this was the practice.

86. Mr. Debusschère interviewed the Applicant but he did not interview the Applicant's spouse as he could not contact him. Thus, the investigator closed his investigation without the benefit of the spouse's statement.

87. When told by Dr. Lipekene that the surgery undergone by the Applicant's husband could not have been performed there, Mr. Debusschère simply contented himself with taking notes of the conversation he had with the doctor. He did not, as an experienced investigator should do, record a statement from the doctor. He also did not pursue his investigation further in respect of the fact that Dr. Lipekene had mentioned to him that at times Dr. Monga did, in fact, perform surgeries at the clinic.

88. Mr. Debusschère failed to take a written statement from Dr. Lipekene on the state of the hospital, the type of operations that were carried out at Ingende Medical, the use made of the hospital by other doctors and the frequency at which surgeries were being performed there.

89. Without any medical expertise, Mr. Debusschère concluded hastily that Mr. Lokangu's surgery could not have been performed at Ingende Medical in view of its dilapidated state without making an effort to reconcile Dr. Lipekene's conflicting oral statements.

90. He also jumped to conclusions on the different handwriting on some documents although he was not a handwriting expert.

91. He found it strange that given the dilapidated stated of Ingende Medical that the documents produced by the Applicant were too neat and therefore were suspicious.

92. He found fault with the spelling of the French word "medical" on two documents but could not explain what conclusion he wanted to be drawn from that finding.

93. He focused on the fact that the same handwriting appeared on a prescription and the document issued by the pharmacist but without explaining how and why this was relevant.

94. On a number of matters, he either remained content with adopting a very superficial approach in the conduct of the investigation or remained content with very tenuous facts without probing further so as to rebut the assertion of the Applicant that a surgery had indeed taken place. On other occasions he hastily jumped to conclusions suggesting that he did not approach the investigation with an independent and open mind, free of bias. It is of the utmost importance that an investigator considers his/her role as an independent fact gathering agent. His/her role is not to pin down a staff member by any means possible.

95. The Tribunal finds that the investigation was poorly conducted. It was carried out in a slipshod and unprofessional manner. The investigator also overstepped his mandate by recommending that disciplinary proceedings be initiated against the Applicant. He should have limited himself to gathering the facts in a proper and rational manner instead of substituting himself for the DMS and OHRM.

96. This Tribunal reiterates the conclusion in *Mushema* UNDT/2011/162, that:

> […] since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted. […] Since the preliminary

> investigation is the harbinger of a disciplinary proceeding it is vital that it be conducted in a rational, lawful and judicious manner. It should not be the gateway to a foregone decision to the establishing of a disciplinary committee or a finding of guilt.

97. Investigators should be reminded that there is nothing voluntary during interviews with staff members. They are compelled to cooperate and answer the questions of investigators even if the consequences may be dire for them.

The recommendation that disciplinary proceedings be initiated against the Applicant

98. Under ST/AI/371 it is the responsibility of the head of office or responsible officer to undertake a preliminary investigation where there is reason to believe that a staff member has engaged in unsatisfactory conduct[8]. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of the office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management[9]. On the basis of the evidence presented it is then up to the Assistant Secretary-General ("ASG/OHRM"), on behalf of the Secretary-General, to decide whether the matter should be pursued[10]. It was based on the evidence gathered in the course of the investigation that the DMS and subsequently the SRSG recommended that disciplinary proceedings be initiated against the Applicant in accordance with ST/AI/371.

99. What evidence should satisfy a head of office or a responsible officer that a report of misconduct is well founded? The all-important words are "well-founded". The head of office or responsible officer appears to be vested with wide discretion at this initial stage. That discretion, however, is to be exercised judiciously in the light of what the investigation has revealed. In the exercise of that discretion the head of office or responsible officer is compelled to carefully scrutinize the facts gathered

[8] ST/AI/371, 2 August 1991, Section 2.
[9] ST/AI/371, 2 August 1991, Section 3.
[10] ST/AI/371, 2 August 1991, Section 5.

during the investigation; see if there are any flaws or omissions in the facts gathered that need to be remedied; assess whether all available and relevant witnesses have been interviewed; and call for supplementary investigation or clarification if need be.

100. In the present matter, the Tribunal finds that responsible officers within MONUC did not carefully scrutinize the Investigation Report so as to identify the flaws in the facts gathered. Consequently, the threshold of "well-founded" was not reached because the conclusion was based on an investigation report that was flawed.

Whether the facts on which the disciplinary measure was based have been established

Burden and Standard of Proof

101. In *Liyanarachchige* 2010-UNAT-087, UNAT held that "[…] the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".

102. In *Molari* 2011-UNAT-164, UNAT held that, "[w]hen the termination or dismissal of a staff member is a possible sanction, the 'misconduct must be established by clear and convincing evidence,'" which "means that the truth of the facts asserted is highly probable".

103. The former United Nations Administrative Tribunal concluded that in disciplinary matters, the Respondent bears both the legal and evidentiary burden to provide evidence that raises a reasonable inference that misconduct has occurred[11] and that once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question[12].

104. The Tribunal will here open a parenthesis to refer to the submission of the Respondent on the issue that the evidence presented by the Applicant and her

[11] Judgment No. 897, *Jhuti* 1998.
[12] Judgment No. 1023, *Sergienko* (2001).

husband was not available during the investigation stage and that the Respondent cannot be faulted for acting on evidence available to him following the conclusion of the investigation. Two observations are called for here.

105. First it is the Administration that initiates an investigation in a case of alleged misconduct. The Administration will take action when some 'reason to believe' exists that a staff member has engaged in unsatisfactory conduct. A mere hunch is not enough. Once that decision to initiate an investigation has been taken it is for the Administration, through its investigators, to gather all evidence in support of the act of misconduct without failing to also gather facts that may be in favour of the impugned staff member. The role of the staff member is to answer all questions and queries put to him/her by the investigators and point out to facts that he/she may raise in his/her defence.

106. To argue that a charge or an investigation should not be criticized on the ground that facts were not put forward by a staff member during an investigation is to reverse the respective role of an investigator and that of the staff member. It is also a blatant attempt by the Administration to reverse the burden of proof in disciplinary cases and force that staff member to establish his/her innocence. The staff member's active role starts when there is a prima facie case raised against him/her. The submission of the Respondent that the Applicant should take the blame for not having referred to facts that she and her husband referred to during the hearing is simply preposterous. An accused staff member cannot be made to shoulder the flaws of a badly conducted investigation.

107. Secondly, the Tribunal can well understand the predicament of the Respondent when facts that were not elicited during the investigation began to unfurl in front of the Tribunal. The Respondent, if he were so minded, could well have asked for a stay of proceedings to consider his stand in the light of the new facts or to request for a reopening of the investigation or embark on a new investigation. Instead the Respondent submits that the failure of the Applicant to mention the additional evidence must be taken into account to find her guilty. But there is more. The

Respondent then embarked on another track and proceeded to cross-examine the Applicant and her husband on the receipts and invoices that they produced to claim a reimbursement by attempting to establish that they were fraudulent thus making an impasse on the fact that the charge against the Applicant was that she was claiming reimbursement for a surgery that never took place. This matter is dealt with below.

The facts relied on by the Respondent

108. In *Diakite* UNDT/2010/024, this Tribunal laid down the legal principle that should guide it in assessing the evidence in disciplinary matters. The Tribunal had this to say:

> The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinize the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may

109. OHRM accepted the evidence that given the dilapidated condition of Ingende Medical no surgery could be performed there and therefore the Applicant's husband did not undergo surgery. The Respondent relied on the mere word of Mr. Debusschère and the hearsay statement of Dr. Lipekene at their face value.

110. The Tribunal has not followed the strict common law rules of evidence on hearsay and admits such evidence. However, caution should nonetheless be exercised before acting on such evidence, more particularly in a disciplinary matter which is

quasi criminal in nature. In the case of *Aleksovski*[13] the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) held that that hearsay evidence is admissible but that the weight or probative value to be afforded to such evidence will usually be less than that given to the testimony of a witness given under oath and cross examined.

111. The Tribunal has on the other hand the direct testimony of the Applicant and her husband as well as that of Dr. Tshibuzu, which evidence was tested in court by examination in chief and cross examination, that the surgery in fact took place at this medical facility. It was performed by Dr. Monga. Dr. Tshibuzu assisted the doctor during that operation. Doctor Tshibuzu explained that, though there were no facilities for major surgeries to be performed at Ingende Medical, Dr. Monga would perform surgeries there very often and he was present at these surgeries. Very often Dr. Monga would come with "his kit" and all his paraphernalia to perform the surgeries.

112. The Tribunal is therefore faced with hearsay evidence coupled with the opinion of a non-expert in medical matters that Ingende Medical was not properly equipped to perform major surgeries and the testimony of the Applicant, her husband as well as Dr. Tshizubu who all gave evidence and were cross examined that the surgery did take place in the circumstances that Dr. Tshizubu and the Applicant's husband described.

113. The Tribunal holds that the evidence of Dr. Lipekene as related in court by Mr. Debusschère is "solely hearsay and insufficient"[14] to establish even on a preponderance of probabilities that the surgery could not have taken place at Ingende Medical. At one time Dr. Lipekende stated that no surgeries could take place at Ingende Medical. Then he qualified that statement by saying that it is common practice for doctors to use the clinic for surgeries and that Dr. Monga would often perform surgeries at Ingende. The Tribunal does not consider this evidence to be clear and convincing so as to warrant an adverse finding against the Applicant. The

[13] Appeals Chamber Decision on Admmissibility of Evidence, February16, 1999.
[14] *Diagabate* 2014-UNAT-403, paragraph 34.

Tribunal also rejects as totally unreliable the opinion expressed by Mr. Debusschère that Ingende Medical was ill equipped for surgeries.

114. It was submitted on behalf of the Respondent that the Applicant contradicted herself a number of times by giving different versions. This is correct. However, the contradictions of a staff member facing a charge of misconduct are only relevant and decisive in the overall evaluation of the evidence if and only if a solid prima facie case of misconduct has been made out by clear and convincing evidence. This has not been the case here and the contradictions of the Applicant, whether minor or substantial, cannot come to the rescue of the Respondent.

115. The Respondent cross examined the Applicant and her husband about the receipts and invoices that were submitted for the claim of the expenses incurred for the surgery. The Respondent attempted to establish that all the receipts and invoices were fraudulent.

116. The charge against the Applicant was that she attempted to defraud the Organization by submitting a false claim in September 2007. The charge was based on the following determinations as they appear in the letter dated 25 April 2008 that was forwarded to the Applicant. The determinations were the following:

(a) Ingende Medical does not have the infrastructure or the equipment to perform the surgery in question (*vesical lithiasis*);

(b) Dr. Gbamo is not a licensed and registered medical doctor either at Ingende Medical or with the National Medical Council; and

(c) The surgery in question was not performed on the Applicant's husband on 7 March 2007 at Ingende Medical as indicated in her medical claim.

117. The whole investigation centered on the fact that no surgery was ever performed on the Applicant's husband. Nowhere in the charge sheet is there any mention that the Applicant attempted to manipulate the amounts to which she

believed she was entitled to as reimbursement. Notwithstanding the above the Applicant's husband, Mr. Lokangu was lengthily examined and cross examined on the amounts appearing on the invoices that were submitted in support of the claim of USD1,180.

118. His testimony boils down to the following on the issue of the invoices and the mode of payment. In DRC, for financial reasons, it is common practice to have a private agreement between doctors and patients to be operated on in medical facilities other than where they usually go for treatment. Payment to the doctors is not made all at once but in installments. Therefore, the amount of USD1,180, that could not be paid all at once, was the total of different cumulative bills that were paid as installments. There was no separate invoice for every bill that was paid which means that at the time of submitting the MIP claim, they did not have all the invoices. That is why he went to collect all the invoices after the operation took place to be reimbursed which explains why some of them are antedated.

119. The charge of submitting fraudulent documents was never put to her specifically in the charge sheet. It was canvassed during the hearing and she was lengthily cross examined on them. Both the Applicant and her husband provided detailed explanations and clarification on how the documents were drawn up, including an explanation as to why they were obtained much after the surgery had taken place. The Tribunal has perused the documents and considered the testimony of the Applicant and that of her husband and is not persuaded that the Respondent has discharged the standard of proof required to establish that they were fraudulent. The Tribunal cannot and should not embark on analysis of what appears to be clearly a new charge that was not the subject of an investigation. In *Kamara* 2014-UNAT-398, UNAT observed that a "sanction based on charges that are more numerous than those initially imposed would be illegal".

120. The Tribunal would therefore be acting *ultra petita* if it assumed jurisdiction on allegations relating to that new aspect of the case.

Conclusion

121. The Tribunal therefore concludes that the Respondent has failed to establish the charge leveled against the Applicant by clear, cogent and convincing evidence. Since the established facts in this case do not legally amount to misconduct, the Tribunal concludes that the disciplinary measure imposed on the Applicant was unlawful *ab initio* and therefore, a violation of her rights.

Compensation

122. In her application, the Applicant is praying for a rescission of the decision of the summary dismissal and compensation in the amount of two years net base salary under article 10.5 of the Statute of the Tribunal. She further claims moral damages in the amount of two years net base salary for loss of career prospects and loss of reputation under article 10.5(b) of the Statute.

123. The Tribunal has already pointed out that the investigation in the present case was carried out on a mere hunch because the Human Resources Officer at MONUC found the claim submitted by the Applicant to be suspicious. The decision to dismiss her was premised on the conclusions of an incomplete and flawed investigation and, therefore, was inconsistent with the minimum standards of due process, fairness, due diligence, professionalism amd impartiality.

124. Consequently, the Tribunal makes an award of one year's net base salary[15] in favour of the Applicant as provided for under article 10.5 of its Statute for monetary loss arising out of the unfair dismissal and for loss of opportunity to secure another job owing to the oppobrium of the dismissal hanging over her head.

[15] Based on the salary that the Applicant was receiving on the date of her separation from service.

125. In regard to additional damages the UNDT held in the case of *Kasmani*[16]

> In calculating the compensation awarded, the Tribunal has considered the provision in the Statute limiting compensation to two years net base salary unless there are exceptional circumstances to go above that figure. From a reading of that provision, the Tribunal takes the view that the framers had in mind only a breach of the contract of employment and therefore provided for compensation on that basis alone. However, in the process of a termination of a contract of employment, there are other considerations that come into play in addition to the strictly monetary compensation that results from the loss of employment.
>
> The present case is a clear illustration of this. In these circumstances, the Tribunal by virtue of its powers under Article 19 of the Rules of Procedure is mandated to make any order for the fair and expeditious disposition/determination of the case, and can therefore go over and above the strict monetary compensation provided for by the Statute. This approach would also be totally consonant with the principles of the rule of law that guide the Tribunal as provided for in resolution 63/258 of the General Assembly. One of the basic principles of the rule of law is that any individual, including an employee, must be compensated for any harm he/she suffers at the hands of the employer, provided there is a causal link between the loss of the employment and actions of the employer.

126. The Tribunal will therefore consider whether the Applicant is also entitled to moral damages.

127. UNAT gave the following guidelines on the award of moral damages in *Asariotis* 2013-UNAT-309.

> To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

[16] *Kasmani* UNDT/2012/049

> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee[17].
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

128. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages[18]. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

129. In her testimony, the Applicant stated that socially everybody in DRC knew that she had been dismissed. She became an object of mockery. As a social consequence all her former colleagues and agents of MONUC with whom she had worked looked upon her as somebody who had been dismissed from her employment for misconduct.

130. All those involved in the higher echelon of the Administration, namely the then Director of Mission Support, the then Special Representative of the Secretary-General, the Director of the Department of Field Support, the Administrative Law Section, the ASG for Human Resources and the Under-Secretary-General for Management merely rubber stamped the conclusions of the investigation without an

[17] *Abubakr* 2012-UNAT-272; *Charles* 2012-UNAT-233; *Appellant* 2011-UNAT-143.
[18] *Cieniewicz* 2012-UNAT-232; *Morsy* 2012-UNAT-298 and *Wu* 2010-UNAT-042.

objective and honest review of the evidence. Had this been done, the Applicant would have been spared the humiliation, stress and distress she has been made to undergo following the decision to dismiss her summarily.

131. In addition the Tribunal makes an award in the amount of USD5,000 as moral damages in favour of the Applicant.

(Signed)

Judge Vinod Boolell
Dated this 13th day of October 2014

Entered in the Register on this 13th day of October 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi