UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/145
Judgment No.: UNDT/2016/198
Date: 3 November 2016
Original: English

Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

BLAIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Philippe Larochelle

Counsel for Respondent:
Kong Leong Toh, UNOPS

Introduction

1. On 16 July 2015, the Applicant, who worked for the United Nations Office for Project Services ("UNOPS"), filed an application contesting the termination of his employment with one month's compensation in lieu of notice.

2. The Respondent filed his reply on 21 August 2015.

Facts

3. The Applicant is a former Information and Communications Technology Security Officer (P-3) of UNOPS in Valencia, Spain, who, although employed under a UNOPS contract, operationally worked for the United Nations Department for Field Services.

4. In early May 2012, the Applicant's wife, Ms. P., contacted *Ma chirurgie,* a Clinic in Tunis, specialising in plastic surgery, indicating that she was seeking liposuction, botox to her face and corrective abdominal plastic surgery. She also requested help regarding her navel, which was still seeping due to a previous abdominoplasty. After some exchanges with the Director of *Ma chirurgie*, on 14 May 2012 the Applicant's wife inquired by email about the feasibility of conducting liposuction on several parts of her body, stating that she wanted treatment to her arms, back, hips, stomach and thighs, as well as teeth whitening and botox injections to her face. In her email, she also mentioned that she had tried to get the report of the surgery performed earlier by another Clinic called *Esthetika*, but that this had been unsuccessful. Following further exchanges the Applicant's wife went to Tunis on 21 May 2012, and underwent surgery on that date. The procedures she underwent included treatment contracted via *Ma chirurgie* and an umbilicoplasty by a Medical Doctor from another Clinic, *El Amen la Marsa*.

5. After surgery, the Applicant's wife stayed for two nights at Clinic *El Amen*, in a single room, and four nights at the five star Carthage Thalasso Resort.

6. On 25 July 2012 the Applicant filed a claim for reimbursement under the Vanbreda medical insurance scheme, for treatment which his wife, Ms. P. had allegedly received at Clinic *El Amen La Marsa* for "repair of the abdominal hernia". He claimed 6,512.500 Tunisia Dinars ("TND"), which was equivalent to EUR3,450, plus the cost of a plane ticket in the sum of EUR344.55. Together with his claim, the Applicant submitted an invoice from Clinic *El Amen* dated 27 May 2012 (Facture No. 12008006), which included a pharmacy bill and fees for blood analysis. He did not mention Clinic *Ma chirurgie*.

7. The Respondent refers to evidence showing that the amount claimed by the Applicant included other treatments which he did not disclose, and which were not reimbursed under the applicable reimbursement rules of *Vanbreda medical, hospital and dental insurance programmes for staff members away from Headquarters*, namely botox treatment for the Applicant's wife's face, liposuction for cosmetic reasons (and which were not for lipofilling as claimed by the Applicant), a four nights stay at a five star resort, as well as teeth whitening.

8. Upon receipt of the claim, Vanbreda requested the Applicant to provide a copy of the operation summary. The Applicant sent an operation report (*Compte rendu opératoire*) dated 20 November 2012, allegedly from Clinic *El Amen*, and allegedly signed by the surgeon Dr. D. who performed the surgery. Upon inquiry by Vanbreda, Dr. D. confirmed that she performed surgery on Ms. P. However, she stated that she did not write the operation summary that the Applicant filed with Vanbreda. She further stated that she had given Ms. P. a handwritten letter explaining the surgery she had performed on her.

9. The then Administrative and Financial Director of Clinic *El Amen* also confirmed in an email of 28 December 2012 to Vanbreda that the invoice submitted by the Applicant was falsified.

10. Upon receipt of a report of possible misconduct on the part of the Applicant, the Internal Audit and Investigations Group ("IAIG"), UNOPS, commenced their investigation on 12 September 2013. The investigation included a mission to Tunis in September 2014, and interviews of witnesses both at Clinic *El Amen* and *Ma chirurgie*, as well as the review of medical reports, bills and correspondence.

The witnesses were not asked to give sworn testimony nor were they asked to sign any written report of their testimony. Such a shortcoming in the investigative process may well, in other circumstances, give rise to questions being raised about the integrity of the investigation, particularly given the potentially serious consequences for the staff member. However, the interviews were recorded and there was a significant degree of consistency and corroboration in the accounts given by the witnesses and the documents produced in the course of the investigation.

11. By letter dated 14 March 2014 , the Applicant was informed by the Director, IAIG, that he was considered the subject of an investigation into allegations of medical fraud. IAIG attached a copy of Vanbreda's report, along with the attachments, and the Applicant was informed about his right to respond to the allegations by 4 April 2014. The Applicant acknowledged receipt of the letter on 17 March 2014, and by email dated 28 March 2014, he denied the allegations.

12. The written summary of the operation obtained by the investigators from Clinic *El Amen* is dated 22 May 2012. It mentions liposuction in six areas (hips, upper outer thighs, inner thighs, waist and arms), as well as an "umbilicoplasty" on the navel. The original bill obtained from Clinic *El Amen* was different from the one filed by the Applicant.

13. The Applicant was interviewed initially on 8 July 2014. The interview was recorded, and a verbatim transcript was provided for his review.

14. During their mission to Tunis, the investigators interviewed the Administrative and Finance Director, Mr. H., the Medical Director, Dr. S. C. and the Chief, Executive Officer, Dr. G., of Clinic *El Amen*, on 9 September 2014. On 10 September 2014 they interviewed the Director of *Ma chirurgie*, Ms. D. in Tunis. She confirmed that her agency arranged for the provision of certain medical services and billed Ms. P. for the following : liposuction, botox and filler injections, hyaluronic acid treatment, two nights stay at Clinic *El Amen* in a single room, four nights stay at the five star Carthage Thalasso Resort on half board, and daily visits by nurses who administered anticoagulant injections and changed her dressings. Clinic *El Amen* billed the Applicant separately for the umbilicoplasty

and related procedure. Further, the Carthage Thalasso Resort confirmed to the investigators that *Ma chirurgie* paid for the Applicant's wife to stay there from 23 to 27 May 2012.

15. By memorandum dated 13 November 2014, the Applicant was notified by the Director, IAIG, of the new material that IAIG found during its mission to Tunis. He was also provided with copies of the additional evidence for his review and comments. The Applicant was interviewed by IAIG on this evidence on 26 November 2014. The interview was recorded and a verbatim transcript was provided to the Applicant for his review. He also provided a written statement dated 27 November 2014 to IAIG, stating that all documents he had submitted to Vanbreda were documents that were provided to him, and that he "did not make up these documents". He stressed that he submitted them in good faith, "thinking and trusting they were prepared appropriately by *Ma chirurgie*". He and his wife stated they had never seen the official medical report and invoice the IAIG received from Clinic *El Amen*, and denied having falsified the invoice which they had submitted in support of their claim for reimbursement.

16. The IAIG issued its report on 17 February 2015. The Report included the comment that it became apparent during the investigation that the Applicant's wife received treatment that was mainly for cosmetic surgery, which she had arranged through a third party agency, *Ma chirurgie*, which is an all-inclusive cosmetic surgery business. Ms. P. paid *Ma chirurgie* directly. In addition to the cosmetic treatment, the surgeon also performed an umbilicoplasty on Ms. P. This part of the surgery was not part of the package arranged by *Ma chirurgie*. On 23 May 2012, she paid for this by credit card directly to Clinic *El Amen*, in the sum of Tunisian Dinnar 886.527. Clinic *El Amen* provided the investigators with copies of the invoice, operation summary and related documents for the umbilicoplasty procedure, which was found by the investigation report to be different from the ones filed by the Applicant. The Applicant and his wife informed the IAIG investigators that the reconstructive procedure at *El Amen* was necessary as a result of previous cosmetic surgery.

17. By email dated 17 March 2015 from the Legal Specialist, UNOPS, the Applicant was requested to provide his comments on the IAIG report within ten working days. On 24 March 2015, the Applicant sent his comments.

18. By email of 16 April 2015, the Applicant received a charge letter dated 15 April 2015, signed on behalf of the Deputy Executive Director, UNOPS, requesting the Applicant to submit comments. The letter also noted that pursuant to para. 96 of Organizational Directive ("OD") No. 36, the Applicant had a right to counsel to assist him, and stated that any such counsel would be at the Applicant's own expense.

19. By email dated 30 April 2015 in response to the charge letter, the Applicant stated:

> Although I was not able to provide much evidence to support our testimonies, in the end I have submitted the claim and the supporting documentation that are not representative of the services my wife received. And the fact that I have not been diligent enough to carefully prepare the claim and review the supporting documentation is not an excuse. Therefore, the charges I am facing are understandable and fair. I am truly sorry if my actions have caused any reputational damages to UNOPS.

20. By letter dated 5 June 2015, signed by the Legal Specialist, UNOPS, on behalf of the Deputy Executive Director, and delivered to the Applicant on 8 June 2015, the Applicant was informed that his appointment was terminated for misconduct, with one month's compensation in lieu of notice (and without termination indemnity), in particular, for:

a. submitting a fraudulent insurance claim; and

b. submitting fraudulent documents in support of the aforementioned insurance claim.

in breach of staff regulation 1.2(b) and UNOPS OD No. 10, as well as staff rule 1.2(h).[1]

[1] The Respondent referred to staff rule 1.2(h), both in the charge letter and the decision letter, while—in the charge letter—quoting the text of staff rule 1.2(i).

Procedure before the Tribunal

21. By Order No. 170 (GVA/2016) of 23 August 2016, the parties attended a case management discussion ("CMD") on 30 August 2016.

22. Both parties made additional filings, pursuant to Order No. 177 (GVA/2016) of 30 August 2016, issued after the CMD. In that order, the parties were asked, *inter alia*, to inform the Tribunal whether they would be content with a decision being rendered on the papers. While Counsel for the Respondent confirmed he would, Counsel for the Applicant stated that he would prefer to be given more time before advising the Tribunal of his preference. He added that, in any event, the dates tentatively scheduled for the hearing were far too close.

23. By Order No. 191 (GVA/2016), the Tribunal granted the Applicant's motion for disclosure of documents, and asked the Respondent to disclose several documents referred to in the footnotes contained in Annex 17 to the Respondent's Reply. The parties were further informed of the Tribunal's decision to cancel the hearing on the merits, and that subject to any representation of substance, the case would be decided on the basis of the documents on file. They were also ordered to make closing submissions, which they did on 10 October 2016.

24. On 13 October 2016, the Respondent filed a motion for leave to submit detailed comments on new factual claims raised in the Applicant's closing submission, and the Applicant filed a response to the motion on the same day.

25. Pursuant to Order No. 191 (GVA/2016), the Applicant filed comments on the Respondent's closing submission on 17 October 2016.

Parties' submissions

26. The Applicant's principal contentions are:

a. He had no intention of commiting fraud by submitting the medical claim, the invoices and supporting documentation;

b. Since he was not sure that lipofilling would be covered and in accordance with page 17 of the Medical, Hospital and Dental Plan, he did not specifically mention lipofilling on the claim, since the intention was to let Vanbreda determine if it was covered or not. Therefore, he listed all invoices and supporting documentation with their respective amounts;

c. Based on an exchange of emails between the Director, *Ma chirurgie*, and his wife, dated 31 May 2012, the former confirmed that the original invoice from Clinic *El Amen* was sent to her via regular mail;

d. Since he is not a doctor, he has limited knowledge of medical terms. The information contained in the invoices and supporting documentation appeared to him to be correct;

e. The majority of medical services received by his wife during her surgery in May 2012 was for corrective purposes. Lipofilling was clearly agreed on. It is a process of taking fat from one part of the body using special techniques (i.e., liposuction), processing it, and injecting it into other areas of the body;

f. He and his wife were victims of a "scam" by *Ma chirurgie* and they submitted the documents they received in good faith;

g. Some of the evidence used by the IAIG should be rejected:

i. the treatment plan and costing is not the original or even a copy of the original that his wife agreed to accept. It was generated by *Ma chirurgie* at the investigators' request and does not contain anything about lipofilling;

ii. extract of messages from the website of *Ma chirurgie*, since the website administrator allows multiple users to use the same account, and some messages appear to be missing;

h. The UNOPS legal framework was breached:

i. under OD No. 36, to ensure sufficient segregation in the process, the Executive Director delegated his responsibilities to the Deputy Executive Director, and clear responsibilities have been assigned to the Deputy Executive Director, the Director of IAIG and the Human Resources Legal Officer. However, in his case, both the charge letter and the administrative decision letter were signed by the HR Legal Officer, on behalf of the Deputy Executive Director;

ii. the Charge letter did not contain information on how to obtain assistance from the Office of Staff Legal Assistance ("OSLA"). On the contrary, while he was informed that he was entitled to counsel, he was told that it would be at his own expense;

iii. According to para. 8 of annex I to the OD No. 36, he was entitled to all his benefits during the 30 days of compensation in lieu of notice, including medical and dental insurance coverage. However, he was informed by the Legal Officer, UNOPS, that he did not have such coverage during this period;

iv. He requests to be re-instated into his functions retroactively to the day the decision was taken without any service breaks.

27. The Respondent's principal contentions are:

a. The Applicant submitted a fraudulent insurance claim, dated 25 July 2012, to Vanbreda International and fraudulent documents in support of the claim, which shows that he knew that he was submitting a fraudulent claim;

b. The Applicant's claim for reimbursement dated 25 July 2012 indicated only "repair the abdominal hernia" incurred by his wife, and claimed an amount of TND6,512.500. Although the total amount on the invoice was TND8,213.772 the Applicant sought reimbursement only for part of that amount (TND 6,512.500)—as he said by mistake—which pertained to consultation and surgery fees;

c. However, the treatment undergone by his wife was mostly, if not entirely, for purely cosmetic procedures, which the Applicant did not disclose and which were excluded from the UN reimbursement rules, such as botox treatment to his wife's face, liposuction that was not part of any lipofilling but was for purely cosmetic reasons, a four nights stay at a five star resort and teeth whitening. The Applicant did not disclose the fact that his wife had these cosmetic treatments, nor did he mention the stay at the five star resort;

d. Under the applicable rules, cosmetic surgery is not eligible for reimbursement. However, there is an exception for reconstructive surgery necessary as the result of an accident. The liposuction performed on the Applicant's wife did not fall within the exception. Even if the abdominoplasty was reconstructive surgery necessary as the result of an accident for which coverage is provided, it was a relatively minor part of the Applicant's claim;

e. The evidence shows that the Applicant submitted a fabricated invoice and an operation summary purportedly from Clinic *El Amen*. All officials interviewed from Clinic *El Amen*, namely its Chief Executive Officer, its Financial and Administrative Director and its Medical Doctor, stated that the invoice submitted by the Applicant was not a genuine invoice from *El Amen*. The Medical Doctor noted that the charges contained thereon were excessive. He added that although the Applicant's wife was an external patient, room rates quoted in the invoice did not exist at Clinic *El Amen* and, in any event, the Applicant's wife did not spend six nights at Clinic *El Amen*. Further, the invoice submitted by the Applicant listed items not contained in the original invoice, such as laboratory costs and the stamp on the Applicant's version of the invoice is different from that used by Clinic *El Amen* for its invoices;

f. The Director of *Ma chirurgie* also confirmed that the invoice submitted by the Applicant concerning treatment at Clinic *El Amen* did not correspond to the copy she had obtained from the Clinic for the umbilicoplasty on the Applicant's wife and sent to her on 30 May 2012 upon her request;

g. As the Applicant's wife paid Clinic *El Amen* by credit card upon her release from the clinic, in an amount of TND886,527, rather than TND6,512.500 claimed by the Applicant from Vanbreda, it is obvious that the Applicant knew or would have known that the invoice he submitted was fraudulent;

h. The operation summary submitted by the Applicant to Vanbreda, which he claimed to have received from Clinic *El Amen* and which was purportedly written and signed by Dr. D., was equally fabricated. Dr. D. stated that she had not written the operation summary dated 20 November 2012, but that she had given the Applicant's wife a handwritten letter detailing the procedure performed. In addition, the original operation summary from Clinic *El Amen* referred to liposuction in six areas (hips, upper outer thighs, inner thighs, thighs, waist and arms) as well as an umbilicoplasty on the navel, though no fistula tract was found;

i. Dr. C. from Clinic *El Amen* stated that the format for operation summaries submitted by the Applicant did not correspond to the one used by the Clinic, and that it contained several misspellings. He noted that the Applicant's wife had not been treated for a hernia, but for a fistula. Further, according to Dr. D.'s operation summary, the patient had been treated for corrective cosmetic surgery due to a previous operation, including a neo-umbilicoplasty and lipoaspiration in six areas. The Director of *Ma chirurgie* also noted that the operation summary submitted by the Applicant was not the one she had transmitted to the Applicant's wife, and that she had not seen it before;

j. The Applicant's main factual argument, namely that his wife did undergo lipofilling in May 2012 is contradicted by evidence showing that his wife wrote in June 2012 that she did not undergo any lipofilling, but rather liposuction for purely cosmetic reasons, that is, to remove fat completely, without an intention to insert it back into her body to correct any deformity;

k. Even if she had undergone lipofilling, which is contested, this would still have been cosmetic surgery and, would have been excluded from reimbursement;

l. The Applicant's argument that he did not specifically mention lipofilling as his intention was to let Vanbreda determine if it was covered or not is absurd, and such deliberate non-disclosure shows intent to fraud;

m. The treatment of the navel by umbilicoplasty for which the Applicant could lawfully claim reimbursement is irrelevant. The claim under the medical insurance policy was challenged on the basis that, in addition to umbilicoplasty, most of the reimbursement claimed by the Applicant was for botox treatment, teeth whitening and liposuction (not for lipofilling);

n. In the absence of any evidence of forgery or alteration by or improper motivation of any of the other users of *Ma chirurgie*'s website or bad faith on behalf of *Ma Chirurgie* or Clinic *El Amen*, the Applicant's argument that the website has multiple users is irrelevant;

o. In light of the emails showing that the Deputy Executive Director instructed the HR Legal Officer to sign the charge letter and the letter informing the Applicant of the administrative decision, and that he had approved its content, the Applicant's claim that the UNOPS Legal Framework was breached should be rejected. Further, the Applicant was aware of the existence of the OSLA and was not prevented from seeking its assistance or that of any other lawyer;

p. The Applicant's conduct breached staff regulation 1.2(b), UNOPS OD No. 10/Rev.2, paras. 6, 8 and 9, and staff rule 1.2(h);

q. Even if it were assumed, in the Applicant's favour and contrary to the Respondent's views, that he was somehow unaware that the expenses he was claiming reimbursement for included expenses for botox treatment to the face, teeth whitening and liposuction not for the purpose of lipofilling, his certification of the accuracy of the information provided means that his actions constituted misconduct nevertheless; and

r. The facts on which the sanction was based were established and qualified as misconduct. The sanction of termination was proportionate to the proven disciplinary offence. The application should be dismissed.

Consideration

Procedural matters

Respondent's motion of 13 October 2016

28. The Tribunal notes that it has sufficient information at its disposal to dispose of the case and rejects the Respondent's motion for leave to submit detailed comments on new factual claims raised in the Applicant's closing submission.

Hearing

29. According to art. 16, para. 2, of the Tribunal's Rules of Procedure, "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary matter".

30. During the case management discussion, the Tribunal asked the parties whether they would agree to the matter being decided on the papers. While Counsel for the Respondent agreed thereto, Counsel for the Applicant requested, in a subsequent submission, to be given more time to give his views on the matter. Both parties were given the opportunity to file further submissions The

Applicant's request for disclosure of documents was granted, and he was given the opportunity to file comments on the additional documents filed by the Respondent. Both parties were also given the opportunity to file closing submissions.

31. Having reviewed the whole case file, the Tribunal is satisfied that on the basis of the written submissions and the ample documentary evidence on file, there is no need for a hearing.

Receivability

32. It is part of the Applicant's claim that the denial of medical and dental insurance coverage during the thirty days of compensation in lieu of notice was unlawful. Since the Applicant failed to seek management evaluation of that decision, it is not receivable, *ratione materiae* (*Egglesfield* 2014-UNAT-402).

Relevant law and jurisprudence

33. Article X of the United Nations Staff Regulations provides in regulation 10.1(a) that "the Secretary-General may impose disciplinary measures on staff members who engage in misconduct".

34. Staff rule 10.1(a) states that:

> Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances or to observe the standards of conduct expected from an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

35. Additionally, staff rule 10.1(c) provides that:

> The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

36. Staff regulation 1.2(b) provides that "[s]taff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status."

37. Finally, UNOPS OD No. 10 (Policy to address fraud) defines fraud as involving "the use of deception such as manipulation, falsification or alteration of records or documentation, intentional misrepresentation or omissions of facts … forgery or alteration of any document or account belonging to UNOPS, misappropriation of assets, among others".

38. The approach to be adopted by the Tribunal in disciplinary cases has been sufficiently clarified in a number of cases since 2010. The Appeals Tribunal held that it is the role of the Tribunal in reviewing disciplinary cases 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 Regulations and Rules of the United Nations; and (3) whether the disciplinary measure applied was proportionate to the offence (see *Mahdi* 2010-UNAT-018; *Abu Hamda* 2010-UNAT-022; *Haniya* 2010-UNAT-024; *Aqel* 2010-UNAT-040; *Maslamani* 2010-UNAT-028; *Nasrallah* 2013-UNAT-310; *Walden* 2014-UNAT-436; *Diabagate* 2014-UNAT-403). The Tribunal will examine these elements in turn.

39. In *Abu Hamda* 2010-UNAT-022 (para. 37), the Appeals Tribunal ruled that it is a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule Courts and Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality or procedural impropriety.

40. The Appeals Tribunal further clarified in *Sanwidi* 2010-UNAT-084

> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may

> find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. 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. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

41. In *Hallal* 2012-UNAT-207 (para. 28) the Appeals Tribunal held that in a system of administration of justice governed by law, the presumption of innocence has to be respected, and that "[c]onsequently, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred".

42. With respect to the standard of proof applying in disciplinary cases, the Appeals Tribunal held in its Judgment *Molari* 2011-UNAT-164 that:

> 30. Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt – it means that the truth of the facts asserted is highly probable.

Were the Applicant's due process rights respected?

43. In applying the test set out in *Sanwidi*, the Tribunal will first examine whether the procedural requirements of OD No. 36 (UNOPS Legal Framework for addressing non-compliance with UN standards of conduct) were followed.

44. The investigation was initiated on the basis of concerns regarding the claim filed by the Applicant on 25 July 2012, and after Vanbreda had contacted Clinic *El Amen* obtaining confirmation that the clinic could not authenticate the invoice submitted by the Applicant (invoice No. 1200886), and that, in their view, it was a fake document. Further, Dr. D., the surgeon concerned, stated by email of

7 December 2012 that although she carried out the surgical procedures, the report submitted by the Applicant, together with the invoice, was not hers.

45. Under OD No. 36 (para. 65), Investigations shall be launched only after the Director, IAIG, establishes that the complaint, if true, will constitute misconduct and is accompanied by information specific enough to be investigated. The Tribunal is satisfied that in light of the information obtained from the Clinics by Vanbreda, IAIG launching an investigation was in full compliance with the applicable rules.

46. When the matter was referred to IAIG, and an investigation panel was set up, the Applicant was informed by letter from the Director, IAIG, dated 14 March 2014, that he was the subject of an investigation with respect to the submission of what appeared to be a fraudulent insurance claim (para. 40 of OD No. 36). In the notice, the Applicant was also informed about his right to provide documentation and a statement, or other evidence in support of any explanation he would wish to give to the IAIG (para. 41 of OD No. 36), and was invited to identify any witnesses. The Applicant signed and acknowledged receipt of that notice on 17 March 2014, and filed comments on 28 March 2014.

47. Further, the Tribunal notes that under para. 66 of OD No. 36, the failure to provide a subject of an investigation with the opportunity to comment on evidence and other information that UNOPS relies on constitutes a violation of due process. In this case, the Applicant was interviewed twice, namely on 8 July 2014 and on 26 November 2014. After the investigators' mission to Tunis, the Applicant was provided with a second letter from the Director, IAIG, on 13 November 2014, and was invited to provide comments. He was further informed that the IAIG would like to interview him on the new evidence they obtained during their mission to Tunis. The interview was held on 26 November 2014. He was invited to provide a written statement, and did so on 27 November 2014. The Tribunal is satisfied that in the course of a detailed and lengthy investigation, the Applicant was given ample opportunity to comment on all the available evidence, which he did.

48. The Tribunal was at first troubled by the fact that witnesses did not give sworn testimony nor were they asked to sign the written record to attest to its accuracy. However, it noted that under OD No. 36, the investigators may record the interview, both with the subject of an investigation, and with witnesses ("investigation participants"), who are to be given a record of the interview, and invited to sign that record. They may also choose to provide a signed statement (paras. 79 and 82 of OD No. 36).

49. The investigators chose to record the interviews they held, both with the Applicant and his wife, and the main witnesses. By Orders Nos. 177 (GVA/2016) and 191 (GVA/2016), the Tribunal ordered the Respondent to provide copies of some of the transcripts and recordings that had not been provided by the Respondent with his reply. Those, as well as verbatim transcripts, translations and recordings previously filed by the Respondent were fully shared with the Applicant. Further, the Applicant was given the opportunity to provide a written statement, which he did (statement of 27 November 2014). An analysis of the entirety of the documentation shows that there was consistency and coherence in the account given by the various interviewees, and that there was a significant degree of corroboration in the oral and documentary evidence provided to the investigators. However, in stark contrast, the accounts given to the interviewers by both the Applicant and his wife were characterised by evasive, misleading and incredulous explanations.

50. The Applicant was also provided with a charge letter, in which he was asked to provide comments and informed of his right to counsel. With respect to the argument that the Applicant was not advised of his right to Counsel from OSLA, but was allegedly only informed of his right to (external) counsel, at his own expense, the Tribunal notes that OD No. 36, in sec. 4.1 (para. 114) not only provides the contact details of OSLA but also clearly spells out, with respect to representation by Counsel once a staff member is charged with misconduct and during disciplinary proceedings, that "[a] staff member who wishes to obtain the assistance of the Office of Staff Legal Assistance may contact this Office". Thus, while the charge letter itself did not make reference to counsel from OSLA, it referred to para. 96 of OD No. 36, which, in turn, specifically refers to both

counsel from OSLA and external counsel, and clarifies that only the latter is at the staff members own expense. Paragraph 96 also states that "staff members *may* also be informed as to how to obtain the assistance of OSLA", which shows that a specific reference to OSLA in the charge letter is not mandatory under the applicable rules. Therefore, the Tribunal is satisfied that the Applicant was informed about his right to counsel at the time he was given the charge letter. In this respect, his argument with respect to a material irregularity of procedure fails.

51. The Applicant further argues that the process was conflated, in violation of OD No. 36, since an HR Legal Officer signed both the charge letter and the letter informing him of the administrative decision, on behalf of the Deputy Executive Director. The Tribunal is satisfied that the HR Legal Officer was not the actual decision-maker, and that in signing the charge letter he acted on behalf of the Deputy Executive Director. The evidence shows that the Deputy Executive Director had previously agreed, by email of 15 April 2015, to the content of the charge letter and had asked the HR Legal Officer to sign the letter on his behalf. The Deputy Executive Director was the person vested with the authority to issue that letter under the OD No. 36. Further, the decision letter of 5 June 2015 was also signed by the HR Legal Officer, on behalf of the Deputy Executive Director. The evidentiary record shows that prior to the signing of the letter on behalf of the Deputy Executive Director, both the Deputy Executive Director and the Executive Director had agreed, by email of 8 May and 3 June 2015 respectively, to the recommendation made by the HR Legal Officer to separate the Applicant from service for misconduct, with compensation in lieu of notice but without termination indemnity. The Applicant's argument that the process was conflated and this constituted a material irregularity is not well founded.

52. The Tribunal is satisfied that the Applicant's due process rights were fully respected in the course of the investigation and of the disciplinary proceedings.

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

53. With the foregoing in mind, the Tribunal will now examine the grounds for dismissal, in light of the standard set by the jurisprudence and by the above-quoted legal provisions, and whether these grounds were established.

Charge one: Submitting a fraudulent insurance claim

54. The Applicant filed a claim with Vanbreda for treatment provided to his wife, which he described on the insurance claim form as "repair the abdominal hernia". In his claim, no mention was made of services received from Clinic *Ma chirurgie*.

Charge two: Submitting fraudulent documents in support of an insurance claim

55. In support of the claim, the Applicant submitted documents that purportedly were from Clinic *El Amen*. Clinic *El Amen* found the documents to be fake, and the Applicant himself does not contest that. He admits, indeed, that the claim he submitted to Vanbreda was not representative of the services provided to his wife.

56. The Applicant's argument that he was the victim of a scam from Clinic *Ma chirurgie* is not supported by any evidence. The Applicant did not provide any evidence of bad faith or other evidence of a motive for Clinics *El Amen* or *Ma chirurgie* to provide him with false documentation. Such production of fake documents by either clinic could in no way benefit either of them. To engage in such conduct would risk damaging their professional standing and reputation. For the clinics to get paid, there was no need for them to falsify the documents. They were entitled to payment for the treatment given to the Applicant's wife. The Applicant, on his part, could benefit from the fraudulent reimbursement claim and fake supporting documents, since the major part of the treatment provided to his wife was explicitly excluded from reimbursement under the applicable UN Medical insurance plan. In other words, had he submitted genuine documents, he would have received considerably less reimbursement under the applicable UN Medical insurance plan.

57. Even if one were to believe that it was only upon receipt of the charge letter that the Applicant realized that a substantial portion of his claim was *Ma chirurgie*'s commission rather than medical fees for his wife's operation, the fact of the matter is that in his claim to Vanbreda he did not make any reference to the treatment that *My chirurgie* arranged for his wife. The Tribunal notes that it is clear from *Ma chirurgie*'s website that it is a clinic that provides aesthetic treatment and surgery. In his claim to Vanbreda, the Applicant, simply noted "repair for abdominal hernia". No reference was made to botox, liposuction, and/or teeth whitening.

58. It is inconceivable that the Applicant could not have known, or noticed, that his wife underwent treatment such as botox to her face. The Applicant would have known that such treatment, which clearly was cosmetic in nature, would not be covered under the UN insurance scheme. Failure to indicate such treatment on the claim form in itself, while attesting to its correctness, was properly regarded by the decision-maker as being evidence of a fraudulent intent.

59. It is significant that in his application, the Applicant himself stated that he was not sure if lipofilling would be covered and that he did not specifically mention it in the claim but left it to Vanbreda to determine if it was covered or not. This is an admission that he intentionally omitted information that was relevant for Vanbreda to make an informed decision.

60. In light of the foregoing, the Tribunal is satisfied that the facts on which the disciplinary measure was based have been established.

Did the facts amount to misconduct?

61. The Tribunal notes that OD No. 10/Rev.2 (26 August 2010), UNOPS Policy to Address Fraud, defines fraud as involving "the use of deception such as manipulation, falsification or alteration of records or documentation, intentional misrepresentation or omissions of facts … forgery or alteration of any document or account belonging to UNOPS, misappropriation of assets, among others".

62. The Tribunal further notes that OD No. 36 defines misconduct under para 6(p) and provides relevant examples of misconduct under paras. 27(c) and (f) (sec. 3 *Misconduct*).

63. As OD No. 36 clarifies, in order to constitute misconduct, misrepresentation, forgery or false certification in connection with an official claim or benefit—which can include failure to disclose a fact material to that claim or benefit—can be "wilful, reckless or grossly negligent". Gross negligence is defined as "an extreme or aggravated failure to exercise the standard of care that a reasonable person would have exercised with respect to a reasonable foreseeable risk" (para. 6(p) of OD No. 36).

64. The Tribunal is satisfied that the Applicant submitted an insurance claim with false and misleading information, supported by documents that were properly found to be fake. His admissions were sufficient for the Tribunal to conclude that he was at the very least grossly negligent, as per the above definition, when he failed to disclose facts that were material to his insurance claim and submitted fake documents in support of his claim.

65. The Applicant's conduct is in clear violation of the Staff Rules and administrative issuances, and constitutes misconduct under Chapter X of the Staff Rules and Regulations.

Whether the disciplinary measure was proportionate

66. According to the established case law of the Appeals Tribunal in disciplinary matters, if misconduct is established, the Secretary-General has a broad discretion to determine the appropriate sanction. It is not for the Tribunal to decide or consider what sanction or punishment would have been fair or—in the Court's view—more appropriate (see *Sanwidi* 2010-UNAT-084, *Cabrera* 2010-UNAT-089).

67. Staff rule 10.2 provides that "disciplinary measures may take one or more of the following forms … (ix) dismissal", whereas staff rule 10.3(b) requires that any

disciplinary measure imposed on a staff member be proportionate to the gravity of his or her misconduct.

68. The recent practice of the Secretary-General indicates that separation from service, with compensation in lieu of notice and without termination indemnity, is considered a proportionate sanction in cases of submission of insurance claims that contained false information (ST/IC/2016/26).

69. The Tribunal does not find that there are any mitigating circumstances in the present case, and is satisfied that the sanction of termination, with notice but without termination indemnity, is proportionate to the proven disciplinary offence.

Judgment

The application is dismissed.

(*Signed*)
Judge Goolam Meeran
Dated this 3rd day of November 2016

Entered in the Register on this 3rd day of November 2016
(*Signed*)
René M. Vargas M., Registrar, Geneva