UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/024
Judgment No.: UNDT/2017/021
Date: 20 March 2017
Original: English

Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

KAMUGISHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Adrien Meubus, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the termination of his fixed-term appointment with the United Nations Mission in Afghanistan ("UNAMA"), notified to him by letter dated 1 December 2015 from the Assistant Secretary-General for Human Resources Management ("ASG/OHRM").

2. The Applicant requests the rescission of the contested decision or, alternatively, compensation of 12 months' net base salary.

Facts

3. The Applicant served as a United Nations Volunteer ("UNV") at the United Nations Mission in Liberia ("UNMIL") from 3 November 2006 to 30 June 2014. He was covered by the Organization's health insurance provider Vanbreda International ("VBI").

4. Between May 2010 and August 2013, the Applicant submitted eight claims for reimbursement in respect of medical treatment received while serving as a UNV. These claims were related to invoices, dated between March 2010 and July 2012, for self-funded admissions and treatments at a medical centre in Kampala, Uganda, the Applicant's home country. The total amount claimed, and paid by VBI, was USD12,210.80.

5. In December 2013, VBI initiated an inquiry into the claims. The local VBI representative spoke to the chief physician and co-founder of the medical centre in question—which had been closed sometime in 2013. According to VBI's written record of the conversation, the chief physician and co-founder stated that the medical centre was an unregistered out-patient clinic that was not equipped for in-patient admissions, and that the invoices in question were not authentic and had not been issued by the centre. He added that he had given blank receipt and billing forms to a person who had never been treated at the centre and whom he believed to have been a United Nations employee. He did not explain why he had taken

such an extraordinary and highly questionable step. However, he did not state that the recipient in question was the Applicant.

6. VBI issued an investigation report dated 16 December 2013, indicating that evidence pointed to the Applicant having submitted false claims for reimbursement.

7. By email of 14 January 2014, VBI informed the Applicant that it considered his claims to be "an intentional attempt to deceive [VBI] in order to obtain payments for non-incurred medical expenses" and requested him to return the payments he received by 14 February 2014. The request to refund these payments was repeated by email dated 17 February 2014.

8. The Applicant responded by email dated 3 March 2014, denying the allegations and stating that he had in fact received, and paid for, treatment at the centre in question, and that the centre had a capacity for up to five in-patient admissions at the time, while it outsourced procedures that it could not handle. The Applicant did not identify the claims relating to treatment that was outsourced nor did he identify any clinic that treated him as an in-patient.

9. On 11 March 2014, VBI advised the Applicant that his response did not provide grounds to justify a review of the findings reached, and he was asked to reimburse the payments received. On 16 March 2014, the Applicant reiterated his position and, in response to the observation that he had not taken any sick leave during these periods of sickness, he stated that he did not request sick leave because he received the treatment while on planned leave.

10. In March 2014, VBI once again contacted the chief physician and co-founder of the medical centre, who, through a series of email exchanges with VBI from late-March to early April 2014, confirmed that the centre was able to offer some in-patient admissions for infectious diseases and minor surgical procedures, whereas major surgical services were outsourced, although the billing was done as a lump sum in one invoice by the centre. The chief physician and co-founder further indicated that, while he could not retrieve data from the centre due to its closure, "from recall", his opinion was that "probably" three out of

seven treatments claimed by the Applicant were admitted and treated at the centre, whilst four were outsourced. Upon receipt of these answers from the doctor, a member of the Fraud Investigation Unit of VBI stated, in an email of 28 March 2014 to the doctor, the following:

> This is a bit of an unfortunate situation as we had already reported the findings … and the fact that [the clinic] was an out-patient facility only to [the Applicant]'s employer. As you now confirm that inpatient admissions were possible, this is a cause for reasonable doubt on the possible admissions of [the Applicant].

11. In the same email, the VBI Fraud Investigation Unit sought from the doctor concerned further information in relation to seven instances of four to ten days of in-patient treatment "to possibly refute [VBI's] conclusion as well as to guarantee a correct reporting towards [the Applicant]".

12. The doctor clarified, in subsequent exchanges, that he had no agreements with the centres where complex treatments were outsourced, nor could he recall the particular medical establishment(s) to which the Applicant had been referred to.

13. On 4 April 2014, the Applicant left UNV.

14. In March 2014, the matter was referred to the Advisory Panel on Disciplinary Measures ("APDM") for UNVs. By email of 1 July 2014, i.e., after the Applicant's UNV service ended, APDM sent him the VBI's investigation report, inviting him to comment on its findings.

15. On 7 July 2014 the Applicant responded calling into question the factual findings of the investigation, and submitting that VBI arrived at its conclusion prematurely and without a full investigation. He stressed that the report was completed in January 2014, while he had been corresponding with VBI as of March 2014, and asserted that he had rebutted several points in his communications with VBI and reiterated that all invoices submitted were duly paid by him and were legitimate.

16. On 21 August 2014, the Applicant joined UNAMA as an Engineer (P-3), on a fixed-term appointment.

17. By letter dated 27 March 2015, the Executive Coordinator, UNV, forwarded VBI's investigation report, dated 16 December 2013, to the Department of Field Support ("DFS") at Headquarters. DFS was advised that, after review of the investigation and the Applicant's comments, APDM found the allegations to be "convincingly substantiated"; the case was, therefore, considered as one of serious misconduct as defined in the Code of Conduct for UNVs, and in violation of the Conditions of Service for UNVs 2008. Based on APDM's recommendations, the Executive Coordinator concluded that summary dismissal would have been the appropriate disciplinary measure to have taken had the Applicant still been serving as a UN Volunteer.

18. On the same day, the Executive Coordinator, UNV, sent a letter to the Applicant conveying these conclusions.

19. By memorandum dated 15 June 2015, the Assistant Secretary-General for Field Support ("ASG/DFS") referred the matter to the ASG/OHRM recommending the termination of the Applicant's contract on the basis of facts anterior to his appointment with UNAMA. The referral included the letter of 27 March 2015 to DFS and the VBI's investigation report.

20. By letter dated 22 September 2015, the ASG/OHRM, set out the preliminary findings regarding the allegations of medical insurance fraud, and informed the Applicant that consideration was being given to separating him for facts anterior to his appointment. He was invited to respond to this letter, which he did by submitting written comments, dated 4 October 2015, reiterating that he did not commit fraud against VBI and stating that the conclusions of VBI and UNV were flawed. Apart from asserting his innocence and elaborating on perceived shortcomings of the investigation, he did not provide any fresh evidence or explanation. In particular, he did not identify the medical establishments at which he claimed to have received in-patient treatment.

21. By letter dated 1 December 2015, delivered to the Applicant two days later, the ASG/OHRM informed the Applicant of the decision to terminate his appointment pursuant to staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) for facts anterior to his contract which, if they had been known at the time, would have precluded his appointment, particularly the submission of medical insurance claims containing false information. The Applicant was informed that the decision was to take effect on 2 January 2016.

22. On 20 December 2015, the Applicant requested management evaluation of the termination of his appointment.

23. On 11 April 2016, this application was filed. The Respondent replied on 13 May 2016. A case management discussion took place on 14 February 2017.

Parties' submissions

24. The Applicant's principal contentions are:

a. The contested decision is based on VBI's investigation report, which suffered from a number of deficiencies; in particular, it was issued before further investigatory steps had been conducted in response to the Applicant's comments that the clinic did in fact carry out some medical procedures;

b. He submitted claims, supported by invoices, and there was no evidence indicating that the treatment he received was impossible, implausible or unreasonably expensive; the clinic existed, had a specified address and the clinic's chief physician verified the likelihood of the treatment; the clinic was capable of administering the treatments as well as referring and billing for the referrals; the clinic was subsequently closed, preventing the provision of written records;

c. If the Administration is entitled to terminate a staff member's appointment based on unlawful activity committed prior to his appointment, and without an investigation conducted by the Secretariat, such a decision, in the absence of an established alternative standard, must be premised on

the same standard of proof applicable to disciplinary proceedings, that is, clear and convincing evidence. At no point was the evidence assessed against this standard. Had this been done, at least the email of 28 March 2014 from VBI's Investigation Unit would have cast doubt on the Applicant's culpability; and

d. Taking a non-UN investigation report at face value without considering exculpatory evidence undermines the fairness of the entire process. The Administration owed the Applicant a duty to assess the evidence in its entirety prior to separating him from service. A decision to terminate a staff member for anterior facts requires the Administration to act in good faith.

25. The Respondent's principal contentions are:

a. The decision to terminate the Applicant's appointment was proper under staff regulation 9.3(a)(v) and staff rule 9.6(c)(v). Had it been known that on several occasions from May 2010 to August 2013, while serving as a UNV, the Applicant submitted medical claims to VBI containing false information, he would not have been appointed at UNAMA. This is in line with art. 101.3 of the Charter, pursuant to which integrity is a fundamental attribute of employment in the Organization;

b. The Administration was entitled to accept the APDM's findings of fact which were properly based on the evidence. The Applicant did not avail himself of the UNV's internal procedures to challenge the findings;

c. The evidence supports a rational finding that the Applicant engaged in the alleged conduct. He has not provided evidence or an explanation that displaces the conclusion that he submitted false claims. The following elements are relevant:

i. It is not credible that the Applicant would have sought medical treatment for a number of medical conditions—each requiring

hospitalization and, twice, surgery—that arose on eight separate occasions in the span of three years during periods of planned leave;

ii. The documentation submitted by the Applicant to VBI appears to be suspicious. The serial numbers of the receipts purportedly issued to him are all contained, in non-ascending order, between 101 and 152, suggesting that in the span of three years, fewer than fifty receipts would have been issued by the centre in question but not following a numerical sequence;

iii. It is not credible that the chief physician of the centre could not remember the institution to which the centre outsourced treatment it could not handle, whereas in each of the eight claims the medical bills were prepared and signed by him personally, and all but one of the receipts for payment were signed personally by him as well;

iv. At no time did the chief physician of the centre attest to the authenticity of the documentation submitted by the Applicant, despite having been provided with copies of it;

v. It is hard to believe that the chief physician had no records relating to the administration of the medical service, where he signed receipts and bills;

vi. The credibility of the chief physician is undermined by his own inconsistent statements about the scope of services that were offered by the centre, as well as by his admission that he had knowingly aided an individual in committing insurance fraud by giving him blank receipts and billing forms;

d. The Applicant has not provided information to displace the findings although he had been given the chance to present countervailing evidence and information. He provided no credible information on the treatment received at the medical centre concerned or at an "outsourced" medical institution, nor any detail on the circumstances in which he sought medical

care or the conditions that, purportedly, required emergency medical interventions. He did not explain the unlikely coincidence that a series of serious medical conditions arose precisely during times of planned leave. Also, it is not credible that the Applicant would have no recollection of the medical institutions where he received treatment, including surgery, and was hospitalized for extended periods. Lastly, he provided no independent evidence of payment of the medical fees, such as cheques, bank transfers or concomitant cash withdrawals;

e. No particular standard of proof has been prescribed in the legal framework relevant to termination for facts anterior. It is appropriate to apply a standard lower than "clear and convincing evidence" where the means of inquiry of the Organization are limited. In this respect, the Organization has no means of compelling outside entities to provide evidence. In any event, even if a higher standard of proof were applicable, the available evidence meets the standard of clear and convincing evidence; and

f. The Applicant was afforded an opportunity to respond to adverse findings before the contested decision was made, and after having had access to the materials relied upon. It was incumbent on the Applicant to submit exculpatory information and evidence. He failed to do so.

Consideration

Nature, scope and management of the case

26. At the case management discussion, Counsel for the Applicant was asked to clarify whether it was part of the Applicant's case that the ASG/OHRM, who signed the notification to the Applicant, lacked authority to make the impugned decision, given that the Respondent stated that the decision was actually made by the Under-Secretary-General for Management, and the ASG/OHRM merely conveyed it. Counsel replied that the Applicant was not raising this as an issue in the case. Instead, his case was that the investigation upon which the decision was

based suffered from shortcomings and, as a result, there were no proper grounds to terminate the Applicant's appointment.

27. The parties stated that their respective contentions were fully covered in the documents and that an oral hearing was not necessary.

28. This case does not concern disciplinary action, but rather termination under staff regulation 9.3 and staff rule 9.6. These provisions, which set out the circumstances under with the Secretary-General may lawfully terminate the appointment of a staff member, explicitly contemplate the possibility of termination on the grounds of facts anterior to the appointment that call into question the suitability of a staff member under the standards established in the Charter.

29. The relevant provisions read as follows:

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> …
>
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;
>
> **Rule 9.6**
> **Termination**
>
> …
>
> **Reasons for termination**
>
> …
>
> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

> …
>
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

30. It is common ground that the Tribunal is not required, or expected, to carry out its own investigation and/or to make a finding on the guilt or innocence of the Applicant, but to examine whether the Administration applied the above-cited provisions on "facts anterior" procedurally correctly, arriving at a decision that was not affected by improper considerations and was, in all the circumstances, a permissible option for a reasonable decision-maker to have reached. Three questions arise for consideration:

a. Was the Applicant afforded due process?

b. Was there sufficient evidence to support a factual finding that the Applicant had engaged in the alleged fraudulent claim for medical treatment?

c. Were these facts directly relevant to an assessment of the suitability of the Applicant under the standards established in the Charter, and was it reasonable to conclude that, had these facts been known at the time of his appointment, they should have precluded him from obtaining such appointment?

Due process

31. The Applicant's key argument is that the contested decision was essentially based on the results of an investigation that was deficient and, accordingly, could not be relied upon. In particular, the Applicant claims that the decision-maker did not give proper weight to the Applicant's comments and rebuttals in that he had pointed to exculpatory evidence that was ignored.

32. The VBI's investigation report was dated 16 December 2013, which was before the Applicant was contacted by the VBI investigators. However, this was

an initial report, and the investigatory activity did not stop when it was issued. On the contrary, the record shows not only that the Applicant was given a chance to provide his version of events after that, but also that VBI took additional investigatory steps to test the veracity and/or plausibility of the additional information provided by the Applicant. VBI again contacted the chief physician of the medical centre where the Applicant claimed to have been treated, and he contradicted his earlier account of facts. In view of this, the investigator sought further clarification. The exchanges between VBI, the Applicant and the chief physician demonstrate that the investigator took steps to test, to the extent possible, the veracity of what the Applicant regards as exculpatory evidence notwithstanding the paucity of particulars he had provided.

33. The exchange of correspondence between VBI, the Applicant and the chief physician were included in the record of the investigation, and show that the Applicant's claim that the exculpatory evidence was ignored is not substantiated.

34. The Applicant suggests that the Organization ought to have conducted its own investigation, and that failure to do so undermines by itself the integrity of the investigation. Insofar as the Applicant may be advancing this as a proposition of law, he is mistaken in that the legal framework applicable to termination for facts anterior to an appointment do not place an obligation on the Administration to do so. Each case turns on its own facts. In some circumstances such an investigation may be necessary or prudent but failure to do so in a case that has a sufficient basis in fact does not, without more, impugn the findings and the decision that has to be made pursuant to staff regulation 9.3(a)(v) and staff rule 9.6(c)(v).

35. In this case, in the absence of any apparent gap or shortcoming in the information and evidence gathered, it was reasonable for the Administration to consider the matter based on the material provided by VBI via UNV. The reference in the applicable norms to facts coming to light envisages a range of possibilities, including reports from third parties. What is important is that there has to be a sufficiency of evidence to support the findings being relied upon.

36. In such circumstances, the Administration is required to examine the information received in a fair and balanced manner, and to provide the staff member with an adequate opportunity to comment on the information received and to adduce any further explanation or facts.

37. The Tribunal notes that the Respondent has produced the documents transmitted by UNV to DFS. This material includes information and exchanges both before and after 13 December 2013 and, particularly, the Applicant's email to VBI challenging the findings in its report.

38. By letter dated 22 October 2015, the ASG/OHRM set out the facts as reported to DFS, and informed the Applicant that it could lead to the termination of his appointment for acts anterior to his appointment, indicating the legal basis for this. She gave the Applicant an opportunity to comment. The Applicant provided a response, by letter dated 4 October 2015. However, in this letter he made no representations of substance, nor did he provide fresh evidence that could have caused the Administration to reconsider its proposed course of action to terminate his appointment.

39. The Tribunal finds that the Applicant was treated in accordance with procedural fairness and that his due process rights were respected.

Evidence supporting the factual findings on the Applicant's involvement in fraud

40. The parties disagree as to the proper standard of proof applicable in cases related to facts anterior. The Respondent submits that the test of the "balance of probabilities" is applicable, and the Applicant submits that the applicable standard for termination by reason of misconduct should apply, which according to the Appeals Tribunal's case-law is that of clear and convincing evidence (*Molari* 2011-UNAT-164, para. 30; *Applicant* 2013-UNAT-302, para. 29; *Masri* 2010-UNAT-098, para. 30; *Liyanarachchige* 2010-UNAT-087, para. 17; *Onifade* 2016-UNAT-668, para. 32).

41. This is not a disciplinary case, but one concerning termination for facts anterior. Accordingly, in the absence of a clear applicable legal norm or ruling of the Appeals Tribunal, it should not be assumed, without question, that the standard of proof required is the same as that applicable to separations based on misconduct. In any event, even if one were to conclude that the standard of proof required in cases of termination for facts anterior is "clear and convincing evidence", the Tribunal is satisfied that, in this case, the evidence supporting the allegations of health insurance fraud on the part of the Applicant does meet that threshold for the reasons outlined below.

42. The evidence included eight claims based on invoices with non-consecutive orders between number 101 and 152, dated over a span of three years, and in the same hand-writing. These invoices referred to treatments for eight different conditions that all arose while the Applicant was on planned leave in his home country, and were apparently delivered by the same doctor, who acknowledged that he co-founded and headed an unregistered medical centre and that he provided an unidentified individual with blank receipt and billing forms. This doctor initially stated that the centre in question dealt with out-patient care exclusively, but upon being confronted with a different version provided by the Applicant, he contradicted his own previous account, stating that the centre had limited capacity for in-patient treatment, whereas the more complex care was outsourced.

43. Moreover, the Tribunal finds it striking that neither the chief physician and co-founder of the centre, who practiced there for at least three years, nor the Applicant, who claims to have received emergency care on eight occasions for relatively serious conditions—including two surgical interventions and several days of hospitalization—had any recollection of the institutions to which he had been referred. Nor was the chief physician able to produce any written record of the medical interventions after the closure of the centre.

44. The Applicant was given sufficient opportunity to comment, first, at the request of APDM, UNV, which he did by letter dated 7 July 2014 and, subsequently, by letter of 22 September 2015, in response to a request to comment

by the ASG/OHRM. He failed to provide credible information to assist in the assessment of his claim and to identify further lines of enquiry not already explored. For example, he could have provided a list, with names and/or addresses of medical establishment(s) at which he received treatment. He could even have offered to submit himself to an independent medical examination to prove, if that were possible, that he had in fact received the treatment in respect of which he claimed reimbursement. Since he received treatment in his home country he could have requested time to make further enquiries for the purpose of obtaining relevant and persuasive exculpatory evidence.

45. Clear and convincing evidence "means that the truth of the facts asserted is highly probable" (*Molari* 2011-UNAT-164). The Tribunal finds that this standard was met in this particular case.

46. The Applicant refers to the email of the VBI investigator, dated 28 March 2014, stating that the change in the doctor's statement should cast doubt on the findings regarding the Applicant's behaviour. This is a mere expression of opinion on the part of the VBI investigator. The statement does not carry the weight which the Applicant submits it should, especially in light of the unreliable nature of the doctor's responses and the evidence which casts serious doubt on the doctor's credibility. In any event, it does not alter the Tribunal's view that the facts that were relied upon to support the contested decision were established, after a fair procedure and to a sufficient standard appropriate to a termination on the basis of facts anterior within the meaning of staff regulation 9.3(a)(v) and staff rule 9.6(c)(v).

Conclusion that the facts, if known, would have precluded appointment

47. Pursuant to art. 101.3 of the United Nations Charter—i.e., the instrument at the top of the Organization's internal legal system—integrity is one of the paramount considerations that should be taken into account in hiring United Nations staff.

48. The Tribunal observes that established facts relating to multiple instances of health insurance fraud, totalling several thousands of United States Dollars, are directly relevant in assessing the suitability of staff. The facts of this case are sufficiently serious that they would in all probability have resulted in disciplinary action against, and separation of, a staff member in active service with the United Nations (see *Blais* UNDT/2016/198). As the Appeals Tribunal held in *Jaber et al.* 2016-UNAT-634 (para. 27), "[f]raud undermines the very integrity of the Organization".

49. The Applicant has failed to show a material error of procedure or of fact on the part of the decision-maker. The Tribunal finds that there is nothing unreasonable in the decision-maker's assessment that, if the Administration had been aware that the Applicant had engaged in fraudulent health insurance claims at the time that he was being considered for selection, he would not have been appointed. There is nothing in the documents on the record to suggest that such a conclusion was far-fetched, capricious, arbitrary or ill-motivated.

Judgment

50. The Application is dismissed.

(*Signed*)
Judge Goolam Meeran
Dated this 20th day of March 2017

Entered in the Register on this 20th day of March 2017
(*Signed*)
René M. Vargas M., Registrar, Geneva