



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/172
Judgment No.: UNDT/2017/027
Date: 26 April 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NZEGOZO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Miryong An, ALS/OHRM

Introduction

1. The Applicant is a former Transport Assistant, at the FS-4 level, with the United Nations Mission in Liberia (UNMIL). On 25 November 2015, he filed an application with the United Nations Dispute Tribunal (the Tribunal) contesting the disciplinary measure to separate him from service with compensation in lieu of notice and without termination indemnity.

2. The Applicant is seeking reinstatement to his former position or, in the alternative, to be paid a termination indemnity.

Facts

3. On 12 February 2006, the Applicant joined the Organization as a vehicle mechanic with the former United Nations Mission in Sudan (UNMIS). In February 2011, he was reassigned to UNMIL as a Transport Assistant. At the time of his separation, he held a continuing appointment and performed the same functions, at the FS-4 level, in UNMIL.

4. On 27 February 2014, the Investigations Division of the Office of Internal Oversight Services (OIOS) received a report of possible misconduct from the Insurance and Disbursement Service of the United Nations Office of Programme Planning, Budget and Accounts. It was reported that in September 2013, the Applicant, who was enrolled in the United Nations medical insurance programme, submitted suspected fraudulent reimbursement claims with a total value of USD29,365 to Van Breda International (VBI). The claims were rejected by VBI following verification checks. No money was actually paid to the Applicant.

5. In July 2014, OIOS conducted an investigation in which several witnesses were interviewed and relevant documents were reviewed. The Applicant, who was interviewed by OIOS on 14 July 2014, admitted attempting to defraud the United Nations medical insurance programme. Upon conclusion of its investigation, OIOS

prepared an investigation report dated 17 February 2015. OIOS concluded that the Applicant failed to observe the standards of conduct expected of a United Nations civil servant and recommended that the Department of Field Support (DFS) take appropriate action against him.

6. By memorandum dated 28 April 2015, DFS referred the Applicant's case to the Office of Human Resources Management (OHRM) for appropriate action.

7. By memorandum dated 11 June 2015, the Chief of the Human Resources Policy Service, OHRM, informed the Applicant of the allegations against him and provided him with a copy of the investigation report and supporting documentation. The Applicant was requested to respond to the formal allegations of misconduct. Specifically, it was alleged that in September 2013, the Applicant engaged in misconduct by submitting various medical insurance claims to VBI containing false information.

8. On 25 June 2015, the Applicant submitted his comments on the allegations of misconduct expressing remorse for the wrongs that he committed.

9. By letter dated 5 October 2015, delivered on 12 October 2015, the Applicant was informed that based on a review of the record, including his comments, the Under-Secretary-General for Management (USG/DM) had concluded that the allegations against the Applicant were established and that they amounted to serious misconduct. The USG/DM decided to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity in accordance with staff rule 10.2(a)(viii).

10. On 12 October 2015, the Applicant was separated from service.

11. On 14 October 2015, the Applicant requested management evaluation of the decision to separate him from service with compensation in lieu of notice and without termination indemnity.

12. By letter dated 24 November 2015, the Officer-in-Charge of the Management Evaluation Unit (MEU) replied to the Applicant noting that his request was not receivable as his case involved the imposition of a disciplinary measure.

13. On 25 November 2015, the Applicant filed an application with the Tribunal.

14. On 31 December 2015, the Respondent filed his reply to the application.

15. By Order No. 002 (NBI/2017), the Tribunal instructed the parties *inter alia* to inform the Tribunal by 30 January 2017 whether or not they considered that a hearing on the merits of the case was required. The parties were also instructed to submit a list of potential witnesses and their sworn written statements by 3 February 2017.

16. On 24 January 2017, the Tribunal held a case management discussion to discuss and clarify the issues in contention with the parties.

17. On 27 January 2017, the Respondent informed the Tribunal that, in his view, a hearing on the merits was not required and that the case could be decided on the papers. The Applicant did not submit his views on this issue.

18. On 3 February 2017, the Respondent filed a motion requesting an extension of time to submit a final list of potential witnesses and their sworn written statements.

19. By Order No. 026 (NBI/2017) dated 6 February 2017, the Tribunal granted the Respondent's motion and instructed him to submit a final list of potential witnesses and their sworn written statements by 17 February 2017. The Applicant was also ordered to submit his own sworn written testimony by the same deadline.

20. On 15 February 2017, the Respondent filed a list of potential witnesses and their sworn written statements, namely: Mr. Daniel Thomas Dale, then UNMIL's Chief Human Resources Officer; Ms. Anne Muthiani, an UNMIL Human Resources Officer and Mr. Muhammad Sajjad, an UNMIL Security Officer. The Applicant did not submit a list of potential witnesses or his own sworn written statement.

21. By Order No. 054 (NBI/2017) dated 10 March 2017, the Tribunal informed the parties of its decision to determine the matter on the papers without a hearing. The Tribunal noted the Respondent's submission that there was no need for a hearing and the Applicant's failure to submit his views on the issue. Under the circumstances, the Tribunal found that the Applicant had waived his right to have a hearing.

Applicant's contentions

22. The Applicant's contentions may be summarized as follows:

- a. The decision of termination was unlawful, improper and extreme.
- b. His termination was disproportionate particularly in view of his 17 years of service in the United Nations system and his continuous satisfactory performance. Furthermore, VBI is not part of the United Nations but an external company.
- c. The relevant legal framework does not provide for the dismissal of a staff member in case of fraud.
- d. He did not take any money from VBI.
- e. He was mistreated on 13 October 2015 when he was notified of the contested decision. He was harassed and intimidated by the Human Resources team. He was "locked up in a room from morning to 5pm [without being allowed] to use the toilet, eat, drink or see anybody as criminal or rebel." He was "left in Liberia with no status" until the time he travelled home.

Respondent's contentions

23. The Respondent's contentions may be summarized as follows:

- a. The facts on which the disciplinary measure was based were established by clear and convincing evidence. The Applicant

submitted ten medical insurance claims to VBI containing false information. The Applicant repeatedly and consistently admitted to falsifying the claims.

- b. The facts amount to misconduct. Although VBI is a third party company that administers the plan, the costs are born in part by the Organization and any provision of false information may lead to disciplinary measures in accordance with the Staff Regulations and Staff Rules of the United Nations.
- c. Whether or not the Applicant was successful in defrauding the medical insurance plan provided by VBI is irrelevant. The mere submission of falsified claims reflects a lack of “honesty and truthfulness in all matters affecting [his] work,” contrary to staff regulation 1.2(b).
- d. The disciplinary measure of separation with compensation in lieu of notice and without termination indemnity was proportionate to the misconduct committed and consistent with the practice of the Secretary-General in similar cases. Mitigating factors were considered. The Secretary-General has wide discretion in determining the appropriate disciplinary measure.
- e. The Applicant’s procedural rights were respected throughout the investigation and disciplinary process. He was interviewed in connection with the investigation. He was informed of the allegations against him and his right to seek the assistance of counsel. He provided comments on the allegations and was fully informed of the reasons for his separation.
- f. The delivery of the sanction letter and the subsequent check-out process was handled in accordance with the normal practice with the Applicant’s rights being respected.

g. Compensation is not appropriate.

24. The Respondent requests that the Tribunal dismiss the application in its entirety.

Applicable law

25. The Tribunal recalls the applicable legal framework and the existing jurisprudence.

26. Staff regulation 1.2(b) states:

Staff 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.

27. Staff regulation 10.1(a) states: “[t]he Secretary-General may impose disciplinary measures on staff members who engage in misconduct.”

28. Staff rule 10.1(a) states:

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 relevant administrative issuances or to observe the standards of conduct expected of 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.

29. Staff rule 10.2(a) provides that disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;

- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

30. ST/AI/371 (Revised disciplinary measures and procedures), as last amended by ST/AI/371/Amend.1, provides guidelines and instructions on the application of chapter X of the Staff Rules, disciplinary measures and procedures, and outlines the basic requirements of due process to be afforded a staff member against whom misconduct is alleged. This Administrative Instruction provides, in relevant part, as follows:

Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

...

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

Decisions on recommendations for the imposition of disciplinary measures shall be taken by the Under-Secretary-General for Management on behalf of the Secretary-General... Staff members shall be notified of a decision to impose a disciplinary measure by the Assistant Secretary-General for Human Resources Management.

31. In disciplinary cases, the United Nations Appeals Tribunal (Appeals Tribunal) has specified the scope of judicial review (see *Applicant* 2013-UNAT-302, *Nyambuza* 2013-UNAT-364, *Dibagate* 2014-UNAT-403, *Toukolon* 2014-UNAT-407, *Jahnsen Lecca* 2014-UNAT-408, *Khan* 2014-UNAT-486) as follows:

... 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 [reference in footnote made to *Messinger* 2011-UNAT-123]. In this context, [the Dispute Tribunal] is ‘to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence’ [reference in footnote made to *Masri* 2010-UNAT-098, *Sanwidi* 2010-UNAT-084, *Haniya* 2010-UNAT-024, and *Mahdi* 2010-UNAT-018]. And, of course, ‘the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred’ [reference in footnote to *Liyanarachige* 2010-UNAT-087]...

32. The Appeals Tribunal also held in *Abu Hamda* 2010-UNAT-022 that: “[a]s a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.”

Considerations

33. In the present case, the Applicant contests whether the established facts legally amount to misconduct, the proportionality of the imposed disciplinary sanction and the manner in which he was treated when the disciplinary sanction was implemented. Accordingly, those are the only issues before the Tribunal.

34. The Tribunal notes that the Applicant does not contest the facts on which the disciplinary measure was based nor has he raised any procedural claims regarding the disciplinary process.

35. At the outset, the Tribunal recalls that in September 2013, the Applicant consistently admitted to having submitted ten medical insurance claims for himself and his dependents to VBI that contained false information. The Applicant requested reimbursement for medical treatments and admissions at a medical center in Liberia, occurring between July 2013 and September 2013, for a total value of USD29,365.

36. The Applicant admitted to falsifying the claims in his statement to OIOS dated 14 July 2014 whereby he stated that what he had done regarding the claims to VBI was “not correct.” He also “express[ed] [his] sincere regrets on [his] actions which were against the UN rules and regulations” in his comments to the allegations of misconduct dated 25 June 2015. Furthermore, the Applicant did not contest the facts in his application or at any stage during the proceedings before this Tribunal.

Whether the established facts amount to misconduct?

37. The Applicant argues that VBI is not part of the United Nations but a third party company and that he did not take any money from VBI.

38. Paragraph 6 of ST/IC/2013/18 (“Renewal of the United Nations Headquarters-administered health insurance programme”), effective 1 July 2013, sets out how the VBI insurance plan is funded in the following terms:

All plans administered by United Nations Headquarters ... are self-funded health benefit plans; they are not insured programmes. The cost of the programme is entirely based on the medical services provided to plan participants and directly reflects the level of utilization of the plan by its participants. The yearly contributions paid by the participants and the portion of the premium paid by participating United Nations entities are used to cover claim costs plus a fixed administrative fee per primary subscriber (i.e. staff member or retiree), which represents less than 5 per cent of the total programme cost. Costs are calculated as follows: [...]

(b) All costs of the Vanbreda plan are borne by the United Nations and by plan participants collectively through a 50/50 cost-sharing arrangement approved by the General Assembly.

39. Furthermore, paragraph 20 of ST/IC/2013/18 provides that provision of false information in respect of medical insurance claims may lead to disciplinary measures as follows:

Fraud or abuse of the plan by any member (i.e. active staff member or retiree and their covered family members) will result in immediate recovery of monies and disciplinary measures in accordance with the Staff Regulations and Staff Rules of the United Nations and other

administrative directives. Such measures may include the forfeiture or suspension of participation in any health insurance plan of the Organization or suspension from receiving any subsidy from the Organization.

40. The Tribunal considers that while VBI is a third party entity that administers the plan, the costs are born in part by the Organization and any fraud or abuse of the plan by any member may lead to disciplinary measures in accordance with the Staff Regulations and Staff Rules of the United Nations.

41. While it is true that the Applicant did not receive any money from VBI in respect of his falsified claims, the mere fact that the Applicant attempted to defraud the health benefit plan by knowingly submitting false information to VBI constitutes a violation of staff regulation 1.2(b) and amounts to misconduct. Indeed, the submission of falsified claims reflects the Applicant's lack of integrity, which is one of the core values of the United Nations. As the Appeals Tribunal held in *Jaber et al.* 2016-UNAT-634, "[f]raud undermines the very integrity of the Organization" and an attempt to defraud has the same impact not only on the integrity of the staff member but on the integrity of the United Nations system.

42. The Applicant further argues that he obtained the falsified supporting documents through a third party so as to claim for some past unrelated expenses for which he had lost the invoices. In this regard, the Tribunal finds that any claim based on falsified information would have the effect of misleading VBI even if the intention was to request the reimbursement of legitimately incurred medical claims and in such circumstances, the Applicant's conduct would still be contrary to staff regulation 1.2(b).

43. Based on the foregoing, the Tribunal finds that the Applicant's intentional actions amount to misconduct in accordance with staff rule 10.1(a).

Whether the sanction is proportionate to the offence?

44. The jurisprudence on proportionality of disciplinary measures is well-settled. The Tribunal will give due deference to the Secretary-General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary. Should the Dispute Tribunal establish that the disciplinary measure was disproportionate, it may order imposition of a lesser measure. However, it is not the role of the Dispute Tribunal to second-guess the correctness of the choice made by the Secretary-General among the various reasonable courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General (see *Doleh* 2010-UNAT-025; *Aqel* 2010-UNAT-040; *Sanwidi* 2010-UNAT-084; *Said* 2015-UNAT-500; *Hepworth* 2015-UNAT-503; *Portillo Maya* 2015-UNAT-523; *Ogorodnikov* 2015-UNAT-549).

45. The Applicant contends that his termination was disproportionate particularly in view of his 17 years of service in the United Nations system and his continuous satisfactory performance. He also argues that the legal framework does not provide for the dismissal of a staff member in case of fraud.

46. The Respondent submits that the disciplinary measure of separation with compensation in lieu of notice and without termination indemnity was proportionate to the fault committed and consistent with the practice of the Secretary-General in similar cases. The Respondent notes that mitigating factors were considered in determining the disciplinary measure to be imposed.

47. The evidence, notably the decision letter dated 5 October 2015, shows that the USG/DM considered the nature of the Applicant's actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating facts applied to the case at hand. The nature of the Applicant's actions,- an attempt to defraud- constituted misconduct, as noted above. The past practice of the Organization in cases involving staff submitting false claims for reimbursement of medical expenses shows that disciplinary measures have been

imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a). In the present case, the evidence shows that the USG/DM considered, as mitigating factors, the Applicant's full cooperation with the investigation and his length of service with the Organization in determining the disciplinary measure to be imposed. Contrary to the Applicant's claim, his continuous satisfactory performance is of little weight in determining a disciplinary measure.

48. While ST/IC/2013/18 does not specifically provide for the dismissal of a staff member in case of fraud, it provides at paragraph 20 that "[f]raud or abuse of the plan by any member ... will result in ... disciplinary measures in accordance with the Staff Regulations and Staff Rules." The disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity is in accordance with staff rule 10.2(a)(viii).

49. In light of the above, the Tribunal finds that the decision to impose on the Applicant the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity was proportionate to the offence committed and consistent with the practice of the Secretary-General in similar cases.

Whether the implementation of the disciplinary sanction was in breach of the Applicant's rights?

50. The Applicant submits that he was mistreated on 13 October 2015, when he was notified of the contested decision. He claims that he was harassed and intimidated by the Human Resources team. He argues that he was "locked up in a room from morning to 5pm [without being allowed] to use the toilet, eat, drink or see anybody as criminal or rebel. He submits that he was "left in Liberia with no status" until the time he travelled home.

51. The Respondent submits that the delivery of the sanction letter and the subsequent check-out process was handled in accordance with the normal practice with the Applicant's rights being respected. The Applicant was handed the letter

dated 5 October 2015 by the Chief Human Resources Officer and asked to read the letter and sign receipt of delivery of the document. The Applicant then commenced the check-out process. He was in the Chief Human Resources Officer's office for approximately five hours and he was not restricted from using the bathroom or requesting something to eat or drink but he did not avail himself of either. The Respondent clarified that the door of the office was not locked and remained open for most of the period, with different staff members from the Human Resources Management Section entering and leaving in order to assist the Applicant in completing necessary forms in order to process his separation entitlements. A security officer was present during the check-out process in order to ensure the safety of staff, the Applicant and United Nations property. The Respondent clarifies that the Applicant was exceptionally permitted to remain in Liberia for one week to settle his personal affairs and was provided with documentation to facilitate his stay and a signed, stamped letter from UNMIL to facilitate his travel from Liberia.

52. The Tribunal notes that apart from the Applicant's allegations in his application, he did not provide any evidence of the alleged mistreatment. The Applicant failed to provide his own sworn written statement or any other witness statement to substantiate his allegations. The Tribunal is satisfied with the evidence¹ submitted by the Respondent to demonstrate that the Applicant's allegations are unfounded. The Applicant has failed to show an error of procedure on the part of the Administration.

¹ Letter dated 15 December 2015 from the Officer-in-Charge, Mission Support to the Administrative Law Section, OHRM on the UNMIL comments in the case of the Applicant and sworn written statements of Mr. Daniel Thomas Dale, then UNMIL's Chief Human Resources Officer; Ms. Anne Muthiani, Human Resources Officer and Mr. Muhammad Sajjad, Security Officer.

Decision

53. In light of the Tribunal's conclusions, the application is dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of April 2017

Entered in the Register on this 26th day of April 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi