



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Maître Sekou Koundiano

Counsel for the Respondent:

Angela Arroyo, UNDP

Introduction

1. On 3 June 2019, the Applicant, a former senior National Officer (“NO”) at the C-level, working with the United Nations Development Programme (“UNDP”) in Conakry, Guinea, filed an application before the Dispute Tribunal.¹ She contests a disciplinary measure of dismissal imposed on her.²

2. The Respondent filed a reply on 9 July 2019.

Facts and procedure

3. The Applicant joined UNDP in Conakry, Guinea, in 1988 as a Programme Specialist. On 15 January 2004, her position changed to Administrative Specialist. On 14 October 2011, she was granted a permanent appointment effective 30 June 2009. At the time of her separation, the Applicant was an Administrative Analyst at the NO-C Grade, Step 10.³

4. As of 1 July 2013, the Applicant was insured under Cigna International Health Service (“Cigna”).⁴ On 13 January 2017, two invoices bearing the Applicant’s name and supported by two payment receipts were submitted to Cigna by mail, for medical expenses allegedly incurred at Clinique Ambroise Pare (“Clinique”), a medical provider in Conakry, Guinea. The Applicant sought reimbursement of the expenses totalling to Guinean Franc 10,707,800 (then-USD1,142.63).⁵ The Applicant did not submit a signed Cigna claim form.⁶

5. On 19 January 2017, Cigna reimbursed the Applicant the sum of USD914.11.⁷

¹ Application, section I.

² Application, section V; Application annex 2.

³ Reply, annex 3, section I.

⁴ Reply, annex 2, p. 44.

⁵ Ibid, p. 45.

⁶ Ibid. p. 52.

⁷ Ibid, p. 59.

6. In November and December 2017, Cigna conducted an investigation into claims for reimbursement of medical expenses filed by UNDP Guinea staff members, including the Applicant. In reviewing the Applicant's claims, Cigna became concerned by the fact that the Applicant had apparently paid in full notwithstanding that Cigna had a direct payment agreement with the Clinique.⁸ Accordingly, the Cigna Fraud Investigations Unit ("FIU") conducted an investigation, and among others, determined that the Applicant's invoices submitted for reimbursement were not authentic.⁹

7. On 14 December 2017, the FIU referred the Applicant's investigation file to UNDP's Office of Audit and Investigations ("OAI").¹⁰

8. On 12 January 2018, Cigna contacted the Applicant and requested her to refund the amount equivalent to USD914.11. On 26 January 2018, the Applicant complied and refunded the money. On 30 January 2018, Cigna acknowledged receipt of the money and informed the Applicant that her file had been closed.¹¹

9. On 26 March 2018, the Applicant was informed by OAI that she was the subject of an investigation into allegations of entitlement fraud related to the submission of the two invoices and supporting receipts for the reimbursement of medical expenses.¹²

10. The Applicant was interviewed by OAI on 28 March 2018 and on 30 March 2018.¹³ During the interview on 28 March 2018, the Applicant acknowledged to have sent the invoices and receipts to Cigna, but maintained that she had paid what the Clinique had invoiced, without much inquiry. During the subsequent interview on 30 March 2018, however, the Applicant admitted that the invoices and receipts were falsified but maintained that it had been done by her Finance Associate colleague, MK, who had sent the said documents to Cigna on her behalf, as she was going on vacation. The Applicant also stated that after she had received the notification from Cigna, she

⁸ Ibid.

⁹ Ibid, p. 47.

¹⁰ Reply, annex 1, para. 3.

¹¹ Ibid, p. 191.

¹² Reply, annex 3.

¹³ Reply, annex 1.

approached MK, who explained to her that he had added the two invoices as he had usually done for himself.¹⁴

11. MK no longer serves with the Organization.¹⁵

12. On 2 July 2018, OAI provided a draft report of its investigation to the Applicant for her review and comments¹⁶ and the Applicant provided the comments on 12 July 2018.¹⁷

13. On 16 January 2019, the Applicant received a charge letter from Ms. Susan McDade, the Assistant Administrator and Director Bureau for Management Services, UNDP, informing her that the Organization was charging her with knowingly submitting false invoices for the reimbursement of medical expenses and knowingly failing to report a breach of the Organization's regulations and rules.¹⁸

14. The Applicant submitted her response to the charges on 8 February 2019, where she reiterated that her mistake was that she had left an unsealed envelope with her colleague, who perpetuated the fraud. The Applicant did not address the charge that she failed to report MK's breach of the Organization's regulations and rules.¹⁹

15. On 8 March 2019, the Applicant received the sanction letter.²⁰

16. In her rejoinder filed with the Tribunal on 30 July 2019, the Applicant submitted a handwritten note authored by MK and sent to Ms. Susan McDade, the Assistant Administrator and Director Bureau for Management Services, UNDP, on 8 April 2019, stating that during the investigations in March 2018 relating to forged receipts, he had made false statements accusing the Applicant of the acts which he had

¹⁴ Ibid, paras. 24-27.

¹⁵ Reply, annex 6.

¹⁶ Reply, annex 2, p. 194.

¹⁷ Ibid.

¹⁸ Reply, annex 3.

¹⁹ Reply, annex 4.

²⁰ Application, annex 2.

committed himself. MK acknowledged that the actual culprit of the wrong act, was him, but not the Applicant.²¹

17. The Tribunal scheduled a hearing to take place on 24-25 March 2021 to take testimony from the Applicant, MK, AD - the UNDP investigator, and BY, the latter proposed by the Applicant as her character witness. The hearing was to take place via Kudo Platform, with interpreters arranged at the request of the Applicant and her attorney. On 17 March 2021 and on 22 March 2021, all the participants to the hearing, including the Applicant and Counsel, were trained on the functioning of Kudo. Before the commencement of the hearing on 24 March 2021, the Applicant, her Counsel and her two witnesses were all in attendance. However, as the hearing proceedings commenced, the Applicant and her Counsel became disconnected from the platform. The witnesses remained. When contacted through a telephone by the Registry, the Applicant's Counsel informed the Tribunal that their internet connection was so bad that she could not continue with the proceedings.

18. In view of the internet connection challenge encountered by the Applicant, four options were proposed to her:

- a. that the Tribunal adjourns the hearing to allow the Applicant and her Counsel time to secure a more stable internet connection;
- b. that she resigns of hearing and the case be decided on the papers only;
- c. that the hearing proceeds, and the Applicant later listens to the recording; and
- d. that the Tribunal assists the Applicant and Counsel to gain access to the UNDP Office in Guinea Conakry for the purpose of the hearing.

19. Both on the telephone and by an email sent to the Registry on 24 March 2021, through Counsel, the Applicant opted that the case be decided on papers only. She

²¹ Applicant's rejoinder filed on 30 July 2019; Respondent's trial bundle, p. 224.

categorically refused going to the UNDP premises. Instead, the Applicant requested to file a final brief of her case by 26 March 2021.

20. The Respondent's Counsel concurred with the Applicant. She requested for an opportunity to respond to the Applicant's final brief once it was filed.

21. The Applicant filed the brief as she had committed to, on 26 March 2021. The Respondent filed a response to the Applicant's brief on 24 May 2021.

Submissions

Applicant's submissions

22. The Applicant's position is that the charges against her are not well founded. According to her, some among the receipts submitted to Cigna were valid and merited reimbursement. As she was proceeding on leave, she left an unsealed envelope with her colleague, MK, to send the invoices and the receipts to Cigna on her behalf. Without her knowledge, MK manipulated her invoices or replaced them with other ones prior to sending them to Cigna.²²

23. The Applicant seeks to rely on a handwritten note sent by Mr. MK to Ms. McDade stating that:

with regrets and after reflection and being a believer and a pastor in my church, I request you to consider the following: During the investigations in March 2018 relating to forged receipts, I made false statements accusing [the Applicant] of the acts which I did myself. I hereby inform you that the actual culprit of the wrong act, was me. [The Applicant] is a victim of my wrong actions and I abused her trust. [The Applicant] had requested me to seal the envelop and send it to CIGNA. Without her knowledge, I added other documents, invoices and receipts which came from Ambroise Clinic in Conakry. She did not have any knowledge of them because she did not have copies. My conscience

²² Applicant's rejoinder filed on 30 July 2019.

cannot allow me to keep silent anymore. I take days without sleeping for I was the cause of my colleague's dismissal.²³

24. In line with the above, the Applicant maintains that her matter is a case of negligence in that she had entrusted processing her documents to another person. She, therefore, deserves a more lenient sanction than a dismissal.

25. As remedies, the Applicant requests the Tribunal to find that her dismissal was unjustified and order her reinstatement.

26. The Applicant does not question that her due process rights were fully observed throughout the investigation stage and the disciplinary procedure.

Respondent's submissions

27. The Respondent's position is that there is clear and convincing evidence that the Applicant committed the misconduct.

Submission of false invoices

28. The Respondent submits that it is uncontested that the invoices and receipts forming the basis of the charge are fraudulent.

29. Regarding the question of the Applicant's involvement, the Respondent points out that: (1) there is no record of the legitimate claims the Applicant alleges were in the envelope she gave to MK even though the affidavit she submitted reflects that MK only added documents to the envelope; (2) there is no record of Cigna receiving, or reimbursing, legitimate claims to the Applicant in addition to the illegitimate ones; (3) there is no record of the Applicant having been treated at the Clinique for the alleged legitimate claims; (4) the Applicant has not provided any reason that would explain why illegitimate documents were added to her envelope by MK for her sole benefit; (5) the Applicant accepted the undue reimbursement; (6) the receipts sent to Cigna

²³ Reply, annex 6.

were signed by the Applicant; and (7) the Receptionist at the Clinique admitted that he provided the Applicant with the false documents.

30. The Respondent seeks to rely on MK's interview with OAI, where he admitted that the Applicant knew and was involved in the fraud.²⁴ The Respondent further observes that although the Applicant provided the Tribunal with a statement from MK, where he admits that he is the one who had manipulated the documents, the Applicant has not produced any evidence that would suggest that she had taken any action against MK for allegedly adding the false documents to her envelope.

31. The Respondent submits that it is uncontested that during her 28 March 2018 interview with OAI investigators, the Applicant stated that: she had put claims in an envelope for reimbursement by Cigna; she recognized invoices FA 198636 and FA 198661 as being the ones sent to Cigna; these invoices reflected payments that she had made resulting in the Clinique issuing receipts on record; she knew that she only had to pay 20% of her medical expenses to the hospital but it was her choice to pay 100% of the expense and then seek reimbursement from Cigna.

32. The Respondent further submits that during her second interview with the OAI on the morning of 30 March 2018, the Applicant still maintained that: she had certified and put the documents that were provided to her by the Clinique in the envelope; she had paid a cashier at the Clinique for the invoiced treatments while she had failed to pay attention to what was listed on the invoices; and that one of the procedures she received was related to an unexpected pregnancy. The Applicant also admitted that after Cigna contacted her, she tried to contact Mr. S, a Receptionist at the Clinique.

33. In addition, the Respondent submits that it is uncontested that during her third interview with the OAI investigators, the afternoon of 30 March 2018, the Applicant admitted that: she prepared the documents for reimbursement and left them in an envelope with MK for his onward transmittal. The Applicant further stated that after Cigna contacted her, she reached out to MK to understand what happened and that he

²⁴ Reply, annex 2, p. 184-185.

stated that he thought he was helping her out by adding invoices to the pouch. The Applicant also stated that she had not brought this up in prior interviews because she did not want to create problems for MK and that MK had not asked her for anything for sending invoices to Cigna for reimbursement for her benefit.

34. Finally, it is uncontested that Mr. S admitted that he had provided the Applicant with the invoices and receipts submitted to Cigna, and that MK stated that the Applicant “*was involved and “cannot put all the blame on [him]”*”.²⁵

Applicant’s failure to report MK’s breach of the staff regulations and rules

35. The Respondent submits that the Applicant admitted, during her OAI interview, that she went to see MK to discuss Cigna’s request for reimbursement, and that MK told her that he had done it routinely.²⁶ The Applicant also admitted that she had seen MK submit similar requests for reimbursement in 2017.²⁷ Finally, the Applicant admitted that, even though she knew, and fully abided by the Staff Regulations and Rules to report potential misconduct, she chose to only tell MK that his actions were not proper and that he should also reimburse Cigna.²⁸ In this regard, the Respondent contends that as a staff member at NO-C level, the Applicant was a manager, expected to not only abide by the rules, but also to show other staff members how they should be conducting themselves.

Other matters

36. On the prong of due process, the Respondent submits that the Applicant’s due process rights were fully respected. In any case, the Applicant does not claim that her disciplinary process suffered from any due process violations.

37. On proportionality, the Respondent submits that the Applicant’s actions were inconsistent with her continued service with the Organization. The Respondent took

²⁵ Reply, annex 2, p. 66

²⁶ Reply, annex 2, p. 36.

²⁷ Ibid, p. 40.

²⁸ Ibid, p. 39.

into account all relevant mitigating circumstances, including the fact that the Applicant refunded the amount to Cigna, as well as that she was a staff member with a 25-year record of serving UNDP who was nearing retirement, with no prior record of misconduct. However, the Respondent maintains that the Applicant's conduct is aggravated by the fact that, as an NO-C, the Applicant was a senior staff member who had heightened responsibilities, especially in respect to MK, a G-6 staff member. In addition, the Applicant failed to express remorse for her actions, continued to maintain that her expenses and her actions were legitimate, even in the face of evidence to the contrary, and engaged in conduct with someone whom she admitted she knew had previously committed the same misconduct in 2017.

38. On damages, the Respondent contends that the Applicant has not made any claim, nor provided any evidence in support of damages. Accordingly, no damages may be awarded by the Tribunal in this case.

39. In view of the foregoing, the Respondent contends that the application should be dismissed in its entirety.

Considerations

Scope of review

40. A review carried out by the UNDT in disciplinary cases encompasses the following elements:

- a. Whether facts were established by clear and convincing evidence;
- b. Whether the facts amount to misconduct;
- c. Whether the sanction is proportionate to the gravity of the offence and;

d. If the staff member's due process rights were guaranteed during the entire proceeding.²⁹

41. The Appeals Tribunal has clarified that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General".³⁰ In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review", explaining that a "judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".³¹

Whether the facts on which the sanction was based have been established on clear and convincing evidence

42. In disciplinary cases, when termination is a possible outcome, the evidentiary standard is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".³²

Submission of false invoices for the reimbursement of medical expenses

43. The Tribunal notes that the evidence against the Applicant consists mainly in documents, starting with the ones received on 3 January 2017 by Cigna in an envelope, and consisting of two invoices (FA 198636; FA 198661), supported by two receipts (No. 605; No. 606), on letterhead of Clinique Ambroise Pare and bearing the name of the Applicant:

- a. Invoice FA 198636 and Invoice FA 198661, both dated 20 December 2016, were issued for medical treatments provided on 5 July 2016 and 4 October 2016, respectively.

²⁹ *Turkey* 2019-UNAT-955, para. 32; *Miyzed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

³⁰ *Sanwidi* 2010-UNAT-084, para. 40.

³¹ *Ibid.*, para 42.

³² *Turkey op. cit.*, para. 32.

- b. Receipt No. 605, dated 5 July 2016, was issued for the payment of GNF 4,908,100. The receipt reflects that the payment corresponds to invoice FA 198636.
- c. Receipt No. 606, dated 4 October 2016, was issued for the payment of GNF 5,799,700. The receipt reflects that the payment corresponds to invoice FA 198661.³³

44. The Tribunal shares the following, uncontested observations made by the Respondent:

- a. There is no record at the Clinique of the Applicant having been a patient, nor having made payments, to the Clinique around the dates reflected on these documents;
- b. The invoices reflect the sums due as of the date of the invoices, 20 December 2016. However, the receipts that were issued upon receipt of payment predate the corresponding invoices by several months;
- c. The receipts, despite having been issued three months apart, are numbered consecutively and do not reflect the stamps and signatures used by the Clinique;
- d. Invoice FA198636 reflects that the Applicant was the recipient of a “spermocytogramme”, a test that is only conducted on men, and an “Aspiration Intra-Uterine”, a procedure used to end a pregnancy (the Applicant was 54 years of age at the time); and
- e. The cost of the medical procedures and the tests do not correspond to the Clinique’s normal fee schedule.

45. The invoices and receipts, by all appearances, and admittedly by everyone concerned, are false.

³³ Reply, annex 2, p. 53-67

46. Other documents show that the Applicant accepted the undue reimbursement obtained on the basis of the said documents. Upon Cigna's inquest, she repaid it to them, without objection or inquiry on her part.

47. As concerns the Applicant's argument that the documents had been manipulated by MK, who, without her knowledge and assent, had added false invoices to her envelope containing otherwise legitimate claims - there is no record of Cigna receiving, or reimbursing, legitimate claims to the Applicant in addition to the illegitimate ones during the period concerned.

48. This evidence alone suffices for the high probability that the Applicant committed the misconduct attributed to her.

49. Regarding the exculpatory evidence offered by the Applicant in her last interview by OAI investigators, the Tribunal does not find it credible. The record demonstrates that the Applicant, first, blamed the obviously fallacious invoices on the Clinique while maintaining that she had paid them nevertheless; subsequently, maintained that they in part reflected procedures undergone by her; and eventually - blamed the submission of the false invoices for reimbursement on MK. The record moreover shows that she was evasive throughout her statements and gave illogical and/or contradictory answers as to details asked of her in either version. On the other hand, the Tribunal finds that the documented or otherwise undisputed actions of the Applicant, that is: acceptance of the reimbursement; repaying it to Cigna; not taking action against MK; furnishing shifting and improbable accounts of events - are all consistent with the Applicant's knowledge of being implicated in the fraud.

50. For the same reasons, plus contradiction with his own statements in the investigation, the Tribunal does not lend any credence to MK's written plea offered after the conclusion of the investigation and again before this Tribunal. The Tribunal does not exclude that MK, just as he admitted in the investigation, had facilitated the Applicant's contact with the person responsible for false invoices at the Clinique's side; had mailed the Applicant's invoices to Cigna; eventually - that he may have wanted to

benefit the Applicant who was his superior. The Tribunal, however, does not accept that in sending the invoices MK would have acted beyond the Applicant's knowledge and consent to generate financial gain for her as an anonymous "gift", as this is motivationally improbable. On the other hand, at present, not being United Nations staff member anymore, MK takes no risk in furnishing such statements as he pleases.

51. Based on the above, the Tribunal concludes that the Respondent has substantiated with clear and convincing evidence the factual basis of the contested decision.

Failure to report misconduct

52. The Tribunal recalls that on 16 January 2019, the Applicant was informed that the Organization was charging her also for knowingly failing to report MK's breach of the Organization's regulations and rules.³⁴ The Applicant submitted her response to the charges on 8 February 2019, but she did not address the charge that she failed to report MK's breach of the Organization's regulations and rules.³⁵ Neither did she do so during the proceedings before the Tribunal.

53. The charge is based on the fact during her third interview, in the afternoon of 30 March 2018, the Applicant admitted that MK had informed her that he had, on several prior occasions, submitted fraudulent claims to Cigna for reimbursement and that in 2017 she had seen MK submit similar fraudulent requests for reimbursement.³⁶

54. The Tribunal assumes that the charge is not meant to encompass MK's role in the submission of the false claims for the Applicant, including the alleged admission that he had done it before, as in this instance the Applicant's omission to report MK would be subsumed by her direct engagement in the commission of the misconduct.

³⁴ Reply, annex 3.

³⁵ Reply, annex 4.

³⁶ Reply, annex 2, p. 36.

55. As concerns the alleged instances in 2017, the Tribunal does not find it demonstrated that the Applicant had sufficient basis to report the misconduct of MK. The record of her interview reflects that she admitted to “have seen things”, but the investigators did not explore in any detail the question what she had actually seen and how she had concluded that MK had been submitting false claims. Given that it is not stipulated that the Applicant herself had been involved in the scheme at that time, the Tribunal considers that from a position of an onlooker it is difficult to ascertain whether someone submits a genuine or a false medical invoice in a private correspondence with the insurance provider. Furthermore, the Applicant’s self-incriminatory statement to this effect in the interview of 30 March 2018 is just as vague and unreliable as the remainder of her explanations, and may have been just another manoeuvre, consistent with her decision to, that afternoon, blame the responsibility on MK.

56. In conclusion, the charge of failure to report misconduct, although possible, is not supported by sufficient evidence.

Whether the established facts amount to misconduct?

57. The Tribunal recalls that staff regulation 1.2(b) states that staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but not limited to, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. Fraud is clearly irreconcilable with the concept of integrity.

58. UNDP defines fraud as a knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment.³⁷

59. The Tribunal notes that although Cigna administers the health insurance of staff members, the costs are borne in part by the Organization. Therefore, any fraud or abuse of the insurance plan by any member may lead to disciplinary measures in accordance with the Staff Regulations and Staff Rules of the United Nations. While it is true that

³⁷ UNDP Policy against Fraud and other Corrupt Practices, section III, p.3.

the Applicant reimbursed Cigna the money that had been given to her, the mere fact that she knowingly submitted unauthentic invoices and receipts constitutes a violation of staff regulation 1.2(b) and amounts to misconduct.

60. The Applicant's case is aggravated by the fact that she occupied a senior position, where she was expected to exhibit the highest level of integrity, and not to connive with the junior staff to defraud the Organization.

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

Whether the sanction is proportionate to the offence.

62. The Tribunal's review of proportionality of disciplinary measures is done with deference to discretionary powers of the Secretary-General in this field.³⁸ The Tribunal reviews whether the measure in question is legal and remains in a rational connection with the gravity of the offence and the objective of disciplining.³⁹

63. The Tribunal finds that the sanction letter dated 8 March 2019 demonstrates a proper consideration of the nature of the Applicant's actions as well as the mitigating and aggravating factors. In this respect, contrary to the Applicant's claim, her 25-year service, with continuous respect of the Organization's regulations and rules, is of little weight in the face of the gravity of the offence. The Tribunal concurs that retaining the Applicant in service would be irreconcilable with the values of the Organization. It recalls that the practice of the Organization in cases involving staff submitting false claims for reimbursement of medical expenses is consistent in that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a).⁴⁰

³⁸ *Portillo Moya* 2015-UNAT-523, paras 20-21.

³⁹ *Samandarov* 2018-UNAT-859, para. 21.

⁴⁰ Practice of the Secretary-General in disciplinary matters and cases of possible criminal behavior, 1 July 2011 to 30 June 2012; report of the Secretary-General to General Assembly, 24 July 2012, paras. 36-39.

64. The Tribunal's finding on the insufficiency of basis for the charge of failure to report misconduct does not alter this conclusion.

65. In view of the above, the Tribunal finds that the disciplinary measure of dismissal was proportionate to the offence committed.

JUDGMENT

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

(Signed)

Agnieszka Klonowiecka-Milart

Dated this 7th day of June 2021

Entered in the Register on this 7th day of June 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi