



**Before:** Judge Francesco Buffa

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ABDULRASOOL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Angela Arroyo, UNDP

## **Introduction**

1. The Applicant, a former Radio Communications Associate at the G-6-level, working with the United Nations Development Programme (“UNDP”) in Sana’a, Yemen, contests the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities, imposed on him by the Administration pursuant to staff rules 10.1(a) and 10.2(a)(viii).<sup>1</sup>

## **Factual background**

2. Locally recruited staff members holding a UNDP letter of appointment who are stationed outside Headquarters, like the Applicant, are provided health insurance under the Medical Insurance Plan (“MIP”), which is a self-insurance plan. The MIP provides health insurance for eligible staff members and their family members. Cigna International Health Service (“Cigna”), an insurance provider, administers the MIP on behalf of UNDP and reviews claims submitted by, and processes reimbursements to, insured claimants. UNDP funds Cigna’s payments to insured claimants and is ultimately responsible for covering the costs of any reimbursements processed by Cigna. Therefore, any loss attributable to reimbursements by Cigna represents a direct loss to UNDP.<sup>2</sup>

3. At the time of the contested decision, the Applicant, his spouse and his three children were insured under Cigna International Health Service (“Cigna”).<sup>3</sup>

4. On 19 June 2019, the Applicant submitted a claim to Cigna seeking reimbursement of medical expenses which he stated were incurred from 2 to 8 June 2019.<sup>4</sup> To the claim, the Applicant attached an invoice dated 17 June 2019 totalling to Yemen Rial (“YER”) 3,520,000 and a medical report dated 8 June 2019 showing that his spouse, Ms. AA was hospitalised from 2 to 8 June 2019 at the University of Science

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<sup>1</sup> Application, annex, 1.

<sup>2</sup> Reply, section B, para. 6.

<sup>3</sup> Reply, annex 2, exhibit 5, p. 43.

<sup>4</sup> *Ibid.*, p.54.

and Technology Hospital (“USTH”), a health care provider in Sana’a, Yemen. The invoice indicated that she had been hospitalised in the emergency room and had undergone x-rays, laboratory work, a diagnostic cardiac catheterization, and the insertion of a coronary stent.<sup>5</sup> The medical report indicated that Ms. AA had suffered from a blockage of her coronary aorta and was recommended a cardiac catheterization and a heart stent operation.<sup>6</sup>

5. The Applicant sought reimbursement from Cigna of the expenses totalling to YER3,520,000 (then equivalent to USD6,834.02).<sup>7</sup>

6. On 11 July 2019, Cigna reimbursed the Applicant the sum of USD5,474.15 by direct deposit to his bank account.<sup>8</sup>

7. After the reimbursement, Cigna initiated what it terms as a “targeted data mining exercise” on past reimbursement claims originating from USTH after discovering irregularities in another claim involving another UNDP staff member.<sup>9</sup> Accordingly, Cigna investigated, and among others, established that the Applicant had submitted a fraudulent medical claim.<sup>10</sup>

8. On 30 July 2020, the Cigna Fraud Investigator referred the Applicant’s investigation file (F20211) to UNDP’s Office of Audit and Investigations (“OAI”).<sup>11</sup>

9. Upon receipt of Cigna’s investigation file, on 8 September 2020, UNDP provided the Applicant with a letter (“options letter”) informing him of Cigna’s findings. In the options letter, the Applicant was provided three business days to choose either, the OAI to conduct a full investigation of the alleged misconduct or to voluntarily resign. Under option two, the Applicant would also agree to not seek future contracts or employment with UNDP or any other organization of the United Nations

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<sup>5</sup> *Ibid.*, exhibit 5.

<sup>6</sup> *Ibid.*, exhibit 9, p. 102.

<sup>7</sup> *Ibid.*, exhibit 5, p. 51.

<sup>8</sup> *Ibid.*, p. 54.

<sup>9</sup> *Ibid.*, p.44.

<sup>10</sup> Reply, annex 1 (investigation report), para. 22.

<sup>11</sup> *Ibid.*, para. 3.

system and would not engage in activities that allow him to be a recipient of UNDP funds as a staff member, vendor, contractor or grant recipient.<sup>12</sup>

10. On 10 September 2020, the Applicant responded to UNDP and chose option one. Accordingly, the OAI proceeded with the investigations.<sup>13</sup>

11. On 9 November 2020, the Applicant was informed by OAI that he was the subject of an investigation into allegations of fraud relating to the submission of forged documents for reimbursement to Cigna.<sup>14</sup>

12. The Applicant was interviewed by OAI on 16 November 2020.<sup>15</sup> During the interview, the Applicant acknowledged to have sent the invoice to Cigna but maintained that there were no errors in the documents that he sent to Cigna.<sup>16</sup>

13. On 26 March 2021, OAI provided a draft report of its investigation to the Applicant for his review and comments<sup>17</sup> and the Applicant provided the comments on 5 April 2021.<sup>18</sup>

14. The OAI produced its final investigations report on 22 April 2021.<sup>19</sup> The OAI established that the Applicant had submitted an insurance claim to Cigna dated 19 June 2019, attaching an invoice and a medical report that were fraudulent.<sup>20</sup>

15. On 22 November 2021, the Applicant received a charge letter from Ms. Angelique Crumbly, the Assistant Administrator and Director, Bureau for Management Services, UNDP.<sup>21</sup> The Applicant was given 10 days to respond to the

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<sup>12</sup>Reply, annex 2, exhibit 13, pp. 117-122.

<sup>13</sup>Application, section VII, para. 3.

<sup>14</sup>Reply, annex 2, exhibit 6, p. 59.

<sup>15</sup>*Ibid.*, exhibit 8, p. 67.

<sup>16</sup>*Ibid.*, p. 77, line 122.

<sup>17</sup>Reply, annex 2, exhibit 25, p. 164.

<sup>18</sup>Reply, annex 1, para. 7.

<sup>19</sup>Reply, annex 1.

<sup>20</sup>*Ibid.*, para. 60.

<sup>21</sup>Reply, annex 3.

charges and submit exculpatory evidence.<sup>22</sup>

16. On 17 January 2022, the Applicant submitted his response, and he denied having knowingly submitted falsified documents and information to Cigna.<sup>23</sup>

17. On 25 March 2022, the Applicant received the sanction letter.<sup>24</sup>

### **Procedural background**

18. On 21 June 2022, the Applicant filed the present application.

19. The Respondent filed a reply on 29 July 2022.

20. On 15 February 2023, by Order No. 040 (NBI/2023), the Tribunal found that the case could be adjudicated on the basis of the case record without holding a hearing and directed the parties to file closing submissions.

21. The Respondent complied and filed the closing submissions on 9 March 2023. The Applicant did not comply with the order, and he did not file the submissions.

### **Standard of review and burden of proof.**

22. The Appeals Tribunal's jurisprudence establishes the following principles. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.<sup>25</sup>

23. 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". In this regard,

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<sup>22</sup> *Ibid.*, section III.

<sup>23</sup> Application, annex 2, paras. 26-35.

<sup>24</sup> Application, annex 1.

<sup>25</sup> *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

“the 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”.<sup>26</sup>

24. The role of the Tribunal is “to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, whether the staff member’s due process rights were guaranteed during the entire proceeding and whether the sanction is proportionate to the offence”.<sup>27</sup>

25. The Administration bears the burden of establishing that the misconduct has occurred,<sup>28</sup> and the misconduct must be established by clear and convincing evidence.<sup>29</sup> This has been interpreted to mean that the truth of the facts asserted is highly probable.<sup>30</sup>

**Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence.**

*Applicant’s submissions*

26. The Applicant submits that, during the period in question, he and his wife were not living together due to marital strife and other family issues.<sup>31</sup> During that time of their separation, he received a phone call from one of his wife’s brothers informing that the local doctors had advised that his wife needed to have a heart stent installed urgently and based on that recommendation, they proceeded to have the procedure carried out at USTH.<sup>32</sup>

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<sup>26</sup> *Sanwidi, op cit.*, para. 42.

<sup>27</sup> *Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidi, op. cit.*, para. 43; *Masri* 2010-UNAT-098, para. 30; *Portillo Moya* 2015-UNAT-523, paras. 17, 19-21; *Ibrahim* 2017-UNAT-776, para. 48; see also *Mbaigolmem* 2018-UNAT-890, paras. 15 and 16.

<sup>28</sup> *Diabagate* 2014-UNAT-403.

<sup>29</sup> *Molari* 2011-UNAT-164.

<sup>30</sup> *Appellant* 2013-UNAT-302.

<sup>31</sup> *Ibid.*, para. 28.

<sup>32</sup> *Ibid.*, para. 31.

27. The Applicant further avers that his in-laws proceeded to share with him 11 documents, signed and stamped by the hospital. He states:

I did not even think for a moment that they might not be genuine. Moreover, the entire situation seemed reasonable in view of my knowledge of my wife's heart condition. Accordingly, I proceeded in good faith to file the medical claims on Cigna's online reimbursement portal based on the documentation I had received from my wife's family and their assurances that all was in order.<sup>33</sup>

28. The Applicant takes issue with Cigna which transferred the money on his account without first verifying the authenticity of the documents. He maintains that had Cigna alerted him about the documents, he would have immediately checked with USTH and informed his in-laws.

29. The Applicant, however, admits that he made a mistake while submitting the claim to Cigna. He states:

Although I have not committed fraud, I can honestly say that I should have done more to verify the accuracy of the documents given to me by my wife's family. This was my failing, and I am truly and deeply sorry. I recognise now, upon prolonged reflection, that this lack of diligence has brought grief upon me and has brought disrepute upon the Organization. I can hope that the decision-makers will recognise that I am truly remorseful and recognise my failing to exercise the requisite duty of care, while at the same time accepting that I did not knowingly submit false documentation and thus have not committed a fraud.<sup>34</sup>

30. The Applicant further challenges the source of the information relied upon by OAI. He claims that the information received by OAI from USTH is not accurate, arguing that the individual who provided it, Mr. Zayed Saleem, did not have authority to provide such information.<sup>35</sup> The Applicant claims that Mr. Saleem "*is not the Head of Claim Division and is not the Head of Accountants Section, as stated by OAI*", which he argues is supported by a document that he states to be Mr. Saleem's LinkedIn

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<sup>33</sup> *Ibid.*, paras. 32-33.

<sup>34</sup> Application, annex 2, para. 36.

<sup>35</sup> Application, section VIII, part II.

Profile.<sup>36</sup>

31. Furthermore, in its investigations, the OAI established that after receiving the options letter, the Applicant called Mr. Tareq Gholasi, the Operations Analyst, UNDP, Yemen, and confided in Mr. Gholasi that he had committed fraud with regards to the invoice he submitted by paying someone at the hospital to obtain the invoice.<sup>37</sup> The Applicant, however, denies having called Mr. Gholasi in relation to this matter. He maintains that he never spoke with him or made any of the statements Mr. Gholasi attributed to him in his witness statement to OAI. It is a complete and malicious fabrication.<sup>38</sup>

32. The Applicant equally explains that the claim he submitted to Cigna was authentic as it was driven by good faith to assist his wife. He states that he paid the money reimbursed to him by Cigna to his brother-in-law, who had paid it to USTH for services provided to his wife.<sup>39</sup> To support his contention, the Applicant submits what he refers to as “*a legal and official document issued by a judge in the Yemeni Ministry of Justice, Courts and Documentation Sector, in which my brother-in-law testifies that he received the full amount of treatment for his sister at the University of Science and Technology Hospital Ms. AA , which is YER3,520,900.00 and with the testimony of two witnesses*”.<sup>40</sup>

33. In view of the above arguments, the Applicant contends that the evidence on record does not establish, by clear and convincing evidence, that he knowingly submitted false documentation to Cigna.<sup>41</sup> Accordingly, he cannot be found to have committed fraud as defined in UNDP’s Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct (“UNDP Legal Framework”) and Fraud Policy. Therefore, the Administration has not established that he committed

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<sup>36</sup> Application, annex 6.

<sup>37</sup> Reply, annex I, paras. 27-29.

<sup>38</sup> Application, section VIII, part I.

<sup>39</sup> *Ibid.*, part III.

<sup>40</sup> Application, annex 4.

<sup>41</sup> *Ibid.*, para. 27.

fraud.<sup>42</sup>

*Respondent's submissions*

34. The Respondent's position is that there is clear and convincing evidence that the Applicant engaged in fraud by submitting false medical claims to Cigna for reimbursement of the cost of medical services that had not been received.<sup>43</sup>

35. The Respondent submits that the evidence establishes that the medical invoice and report were not authentic and that medical services claimed to have been received by the Applicant's spouse were not in fact received. In this respect, USTH provided an official stamped letter dated 28 October 2020 from the USTH Admissions Office, Patient Accounts stating that the invoice and medical claim at issue were not authentic invoices issued by the hospital and pointing to six discrepancies in the invoice and medical claim at issue.<sup>44</sup> USTH stated that the invoice included items not normally included in USTH invoices, including itemized charges for an "echo", "emergency room" and for an "electrocardiogram". USTH also indicated that the patient number on the invoice did not correspond to the patient named on the invoice, Ms. AA. USTH also pointed to the fact that the various itemized charges were miscalculated for the total due, the amounts should have totalled to YER3,250,500, not YER3,520,000, which would not occur in an authentic USTH invoice as it uses a computerized system to account and calculate invoices. USTH similarly indicated that the medical report that the Applicant submitted to Cigna, dated 8 June 2019, was not issued by the hospital.<sup>45</sup>

36. In response to the Applicant's averment that the information provided by Mr. Saleem to OAI is not accurate, the Respondent submits that there is no merit to the Applicant's claims. First, the Applicant never challenged the authority of Mr. Saleem to provide OAI with information about the invoices during the investigation. In

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<sup>42</sup> *Ibid.*, para. 35-36.

<sup>43</sup> Reply, para.3.

<sup>44</sup> Reply, annex 2, exhibits 16, 19 and 20.

<sup>45</sup> *Ibid.*

addition, Cigna, which regularly contacts hospitals regarding claims, provided OAI with Mr. Saleem's contact information and title as "Accounts Supervisor at USTH" when submitting the allegations of possible fraud to OAI. OAI then separately confirmed Mr. Saleem's role at USTH by locating his LinkedIn Profile, which indicated that he had been "An Accountant" at USTH from July 2008 to present at the time of the investigation.<sup>46</sup> The title of Mr. Saleem's position at USTH and the dates of his employment indicated in that document are consistent with the information in the unidentified screen shot provided by the Applicant. Further, Mr. Saleem was identified as "Head of Claims" on USTH's own website in an article dated 25 May 2018, shortly before OAI corresponded with him as Head of Claims in November 2020.<sup>47</sup>

37. The Respondent further contends that since the Applicant certified to Cigna that the information he was submitting was "*correct and true*", he was acknowledging that he was aware of and responsible for the content of the medical claim. If he was not sure or had doubts about the authenticity, he had no basis for certifying otherwise. There is accordingly no merit to his claim that he was unaware of the lack of authenticity of the medical invoice and report.<sup>48</sup>

38. The Respondent also seeks to rely on the evidence provided by Mr. Gholasi. He maintains that the Applicant in fact knew that the medical claim was false. The Applicant admitted to a colleague, Mr. Gholasi, that he had submitted a false invoice and medical report. Mr. Gholasi informed the OAI that the Applicant called him in respect to the options letter that he had received on 8 September 2020. Mr. Gholasi stated to OAI that the Applicant admitted to him that he had committed fraud by submitting a false invoice and medical report for reimbursement. He further recalled that the Applicant informed him that he was considering "*saying that his wife was the one who went to the hospital and received the hospital report*".

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<sup>46</sup> Reply, annex 2, exhibit 17.

<sup>47</sup> *Ibid.*, exhibit, 5.

<sup>48</sup> *Ibid.*, exhibit 10.

39. The Respondent maintains that although the Applicant denies having made this admission to Mr. Gholasi, the Applicant has not submitted any evidence to support his contention that Mr. Gholasi provided a false statement to the OAI. On the contrary, the evidence supports that Mr. Gholasi's statement is credible based on the fact he has no motive to lie, he has no stake in the matter or any personal connection to the Applicant.<sup>49</sup>

40. Regarding the Applicant's claim that the medical claim was authentic because he paid the money reimbursed to him by Cigna to his brother-in-law, who had allegedly paid USTH for services provided to his wife; the Respondent highlights that any evidence that the Applicant had given money to his brother-in-law does not rebut the evidence on record, that the invoice and medical report were false and not issued by USTH. Further, the document that the Applicant submits to support his brother-in-law's statements is not credible. During the investigation, the Applicant provided OAI with contact information for his brother-in-law. OAI contacted him, and the Applicant's brother-in-law initially confirmed his identity, but once the investigators introduced themselves, indicated he would call OAI back. He never called OAI back, and he stopped answering OAI's calls.<sup>50</sup> The Respondent submits that it is not credible that the Applicant's brother-in-law would refuse to speak to investigators during the investigation or to provide a statement during the disciplinary process but would do so nearly three years later after the investigation.

41. Based on the above, the Respondent contends that there is clear and convincing evidence, which is unrebutted by the Applicant, and which supports the fact that the Applicant engaged in misconduct through his submission of a fraudulent medical claim for medical services that had not been incurred.

### **Considerations**

42. The application is ill-founded.

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<sup>49</sup> Reply, para. 21.

<sup>50</sup> Reply, annex 2, exhibit 24.

43. The Applicant admits that he submitted the invoice and medical report in question to Cigna for reimbursement, but denies that the documents were forged and, seemingly in the alternative, that if they are forged, he was unaware when he submitted them to Cigna.

44. The evidence establishes that the invoice and medical report are not authentic. Indeed, the USTH in Sana'a, Yemen, which was the hospital where the purported medical services were received by the Applicant's wife, stated through a letter from the USTH Admissions Office, Patient Accounts, that the invoice and medical report at issue were not issued by USTH and were not authentic. In support of that conclusion, the letter outlined several discrepancies between the documents submitted by the Applicant to Cigna and authentic USTH invoices and medical reports, including errors and different formatting. In addition, USTH advised that the medical report at issue contained a patient number that corresponded to another real patient who was not the Applicant's spouse, who was the purported patient in that report.

45. The Applicant claims that the information received by OAI from USTH is not accurate, arguing that the individual who provided it, Mr. Saleem, did not have authority to provide such information. The claim is without merit. Indeed, apart from any consideration of the formal capacity of Mr. Saleem (whose name as "Accounts Supervisor at USTH" was provided to OAI by Cigna), which regularly contacts hospitals regarding claims, was also identified as "Head of Claims" on USTH's own website<sup>51</sup>), the discrepancies in the invoice and in the medical report are objective data, which result clearly and are not even contested by the Applicant.

46. The Applicant certified to Cigna that the information he was submitting was "correct and true" and was therefore, acknowledging that he was aware of the contents of the medical claim and attesting to its authenticity.

47. This is enough to substantiate the accusation of having used false documents to receive improper and undue economic benefits from Cigna.

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<sup>51</sup> Reply, annex 2.

48. Indeed, if not by the Applicant, the forgery should have purportedly been committed by other people interested in receiving the reimbursement, his wife or her brother or a third person; even admitting that the Applicant did not commit himself the forgery nor cooperate in it, he took the responsibility for the improper use of documents received by other people, even if the forgery was made at his unbeknownst.

49. In any case, by the declaration to Cigna on the veracity of the documents, by certifying that the documents were correct and true, the Applicant assumed full responsibility for the documents.

50. The Applicant claims that he was not aware of the lack of authenticity of the documents, because the invoice was related to a surgery treatment received by his wife, and he was not present; he also claims that he was later provided with the invoice and the medical report he further submitted to Cigna for reimbursement.

51. The Tribunal is of the view that the situation, even if true, would not exclude the responsibility of the staff member for the reasons mentioned above.

52. To mitigate his responsibility, the Applicant should have demonstrated that the medical intervention occurred, that the Hospital requests payment by a real invoice, and that he paid the costs of the intervention.

53. The Respondent doubts all these facts and the Tribunal shares his view.

54. As to the medical intervention, no evidence was offered of the effectiveness of the medical treatment: excluding the fake invoice and the fake medical report, except two certifications issued in March 2019<sup>52</sup> on some pathologies suffered by the Applicant's wife, no documents or evidence were provided on the type, the scope and date of the surgery, which was in June 2019<sup>53</sup>; no statement by the doctors or nurses or

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<sup>52</sup> Reply, annex 2, exhibits 19 and 20.

<sup>53</sup> *Ibid.*

even the hospital's other staff members were provided; not even by the Applicant's wife or her brother; nor any medical report after the alleged surgery.

55. The Applicant submits a document that he purports to be a letter from USTH, which states that there was a system break down between 26 January 2020 and 1 April 2020 resulting in a loss of "all hospital documents". In any event, regardless of the veracity of the fact and whether USTH lost hospital records, such a loss of records does not rebut the evidence that the invoice and medical report were false, while the evidence of the surgery and the payment of the related costs remain undemonstrated.

56. As to the costs of the alleged intervention: if we exclude the fake documents, on one hand no other documents were provided on any request of payment by the hospital; and on the other hand, no evidence by the Applicant was provided on the payment itself to the hospital (direct costs, allegedly covered by the Applicant's brother-in-law), an element which is crucial in a dispute concerning a reimbursement claim.

57. The doubts above mentioned about the effectiveness of the intervention are corroborated by the statements given to OAI by a colleague of the Applicant, Mr. Gholasi, who stated that the Applicant admitted in a conversation with him that he knew that the medical claim was false when he submitted it to Cigna. The Applicant denies that he ever spoke to Mr. Gholasi about this issue and denies that he made any such admission. The Applicant, however, does not provide any credible reason why Mr. Gholasi, who did not know or work with the Applicant prior to this issue, would have any motive to lie to OAI.

58. Finally, the Applicant alleged having borne the costs of the surgery, referring to the amount shown by the fake invoice, but the evidence offered on this payment is not convincing at all.

59. There are indeed difficulties in considering a payment in cash of a large amount of money (more than USD6,800) instead of using a wire transfer that is more secure and swift. The withdrawal of a big amount of cash (not corresponding to the amount

of the invoice, however) from the Applicant's account one month after the alleged surgery does not prove the payment. Also the statement by the Applicant's brother-in-law before a judge of the Yemeni Ministry of Justice, Courts and Documentation Service, on the fact that he received from the Applicant the money for the medical treatment in question, is generic, as no indication is given on how and when the payment occurred; moreover, the statement is not corroborated by the author, who, whatever were the justifications provided, did not confirm it before OAI, did not answer the investigators' phone calls or call them back, or provide a written statement during the disciplinary or judicial proceedings.

60. The United Nations Appeals Tribunal ("UNAT") in *Asghar*<sup>54</sup>, laid down the essential elements to establish the charge of fraud and the applicable standard of proof:

A finding of fraud against a staff member of the Organization is a serious matter. Such a finding will have grave implications for the staff member's reputation, standing and future employment prospects. For that reason, the UNDT generally should reach a finding of fraud only on the basis of sufficient, cogent, relevant, and admissible evidence permitting appropriate factual inferences and a legal conclusion that each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. In other words, the commission of fraud must be shown by the evidence to have been highly probable. Fraud consists in the unlawful making, with the intent to defraud or deceive, of a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.

61. In sum, there is clear and convincing evidence that the Applicant engaged in misconduct through his submission of a fraudulent medical claim for medical services that had not occurred.

62. **Whether the established facts qualify as misconduct**

*Applicant's submissions*

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<sup>54</sup> 2020-UNAT-982, paras. 35-36.

63. The Applicant submits that his actions do not qualify as misconduct. He had no knowledge that the medical claim he submitted to Cigna contained false information. Accordingly, he cannot be held responsible for having committed fraud. It therefore follows that he cannot be held to have violated staff regulation 1.2(b) as cited by UNDP.<sup>55</sup> He, however, acknowledges that he failed to take requisite care to verify the documents provided to him by his wife's family and for that, he is prepared to accept responsibility.<sup>56</sup>

*Respondent's submissions*

64. The Respondent's position is that the Applicant engaged in serious misconduct that warranted the imposition of the sanction of separation from service without termination indemnities.<sup>57</sup>

**Considerations**

65. The Tribunal is of the view that the Applicant's behaviour entails what the UNDP Policy against Fraud and other Corrupt practices (approved in October 2018)<sup>58</sup> defines as fraud, which includes any act or omission whereby an individual knowingly misrepresents or conceals a fact to obtain an undue benefit or advantage. The Fraud Policy also provides as an example of fraud: "providing information in relation to a medical insurance claim or another entitlement that the claimant knows to be false."

**Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.**

*Applicant's submissions*

66. The Applicant submits that his due process rights were violated during the investigation and, as a result, the whole disciplinary process is tainted. He avers that

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<sup>55</sup> Application, annex 2, para. 24.

<sup>56</sup> *Ibid.*, at paras. 1 and 2.

<sup>57</sup> Reply, para. 33.

<sup>58</sup> *Ibid.*, at annex 4.

on multiple occasions throughout the investigation process, he pleaded with OAI to allow him to consult with a lawyer. OAI informed him that he did not have the right to have legal representation when interacting with OAI Investigators. Representation by counsel would be permitted only once he was charged with misconduct.<sup>59</sup>

67. He further states that as a result of OAI's advice, he was led to believe that he was not allowed to even consult with a lawyer, which he has subsequently learned not to be true. Had OAI advised that he was free to consult with a legal counsel, even if a lawyer could not formally represent him before OAI investigators, he would have obtained legal advice that would have preserved his essential due process rights. However, due to OAI's misrepresentation and directing him away from consulting with a lawyer, his due process rights were not observed.<sup>60</sup>

#### *Respondent's submissions*

68. The Respondent's position is that the Applicant's due process rights were respected during the investigation and disciplinary process. Relying on *Applicant*<sup>61</sup>, the Respondent submits that the key elements of a subject's due process rights are met when "the subject was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements". In this case, this requirement was fully complied with.

69. The Respondent also seeks to rely on *Akello*<sup>62</sup> and submits that UNAT has specifically considered the provisions regarding a right to counsel in UNDP's Legal Framework, which provides that a staff member only has a right to be notified of his or her right to counsel once the disciplinary process commences, i.e., when the charge

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<sup>59</sup> Application, section VIII.

<sup>60</sup> *Ibid.*

<sup>61</sup> 2013-UNAT-302, para. 39.

<sup>62</sup> *Akello* 2013-UNAT-336, paras 27-38.

letter is sent to the staff member.<sup>63</sup> The UNAT found these provisions to be consistent with the due process required by the Tribunal's jurisprudence.

70. Accordingly, in response to the Applicant's claim that his due process rights were not respected because he was not allowed to be represented by counsel during the OAI investigation, the Respondent contends that the information provided to the Applicant was consistent with UNDP's Legal Framework, which establishes that a staff member does not have a right to be represented by counsel until the disciplinary process commences.

71. The Respondent further submits that OAI's communication with the Applicant clearly informed him that he was not allowed to have representation by counsel when interacting with OAI investigators, while OAI did not address or limit the Applicant's ability to otherwise seek legal advice. To the extent that the Applicant was unclear about the meaning of OAI's reply, he could have sought clarification, but he did not do so. He cannot rely on his mistaken understanding of OAI's reply or the provisions of UNDP's Legal Framework to support his claim that his due process rights have not been respected.

### **Considerations**

72. The Applicant's due process rights were respected during the investigation and disciplinary process. There is no merit to his claim that his due process rights were not respected because he was not allowed to be represented by counsel during the OAI investigation. In particular, in the email dated 6 April 2021,<sup>64</sup> OAI informed the Applicant that he did not have legal representation when interacting with OAI investigators and that representation by counsel is permitted only once and if (he) was charged with misconduct.

73. The UNDP Legal Framework provides that, in compliance with the jurisprudence of UNAT, a staff member does not have a right to be represented by counsel until the disciplinary process commences.<sup>65</sup>

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<sup>63</sup> Reply, annex 5, para. 78.

<sup>64</sup> Application, section VIII, at p.7.

<sup>65</sup> *Akello* 2013-UNAT-336, paras. 27-38.

74. Similarly, there is no merit to the Applicant's claim that OAI made him believe that he "was forbidden to even talk to a lawyer", which reflects only his alleged personal understanding of the situation; indeed, OAI did not address or limit the Applicant's ability to otherwise seek legal advice, but only sent him the email stated in the preceding paragraph.

### **Whether the sanction was proportionate to the offence**

75. The Applicant has not specifically addressed the issue of proportionality of the disciplinary measure.

76. The Respondent contends that the measure imposed was reasonable and not disproportionate. The measure is consistent with UNDP's practice in respect to other cases involving fraud. In addition, the UNAT has consistently upheld imposition of separation measures in cases involving fraud, finding that "[f]raud undermines the very integrity of the Organization."<sup>66</sup> Finally, UNDP, in deciding on this measure, considered all relevant mitigating and aggravating circumstances.

### **Considerations**

77. The Applicant has not challenged the proportionality of the measure. The Tribunal finds that the measure imposed was reasonable and not disproportionate.

78. The Tribunals have consistently ruled that misconduct involving intentional and deceptive conduct, particularly for personal gain, merit the most severe sanctions such as separation from service or dismissal. Such measures have been found proportionate in cases of fraudulent conduct as "*fraud undermines the very integrity of the Organization.*"<sup>67</sup>

79. The practice of the Organization in cases involving staff members submitting false claims for reimbursement of medical expenses is consistent in that disciplinary

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<sup>66</sup> *Madhi* 2010-UNAT-018; *Jaber et al* 2016-UNAT-634; *Abu Jarbou* 2013-UNAT-292.

<sup>67</sup> *Jaber et al* 2016-UNAT-634, 27.

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).<sup>68</sup>

## **JUDGMENT**

80. In light of the foregoing, the application is dismissed.

*(Signed)*

Judge Francesco Buffa

Dated this 29<sup>th</sup> day of May 2023

Entered in the Register on this 29<sup>th</sup> day of May 2023

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>68</sup>*Diallo* UNDT/2021/064, para. 63; see also *Mahdi* 2010-UNAT-018.