Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KAMUGISHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Mylène Spence, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 21 December 2015, the Applicant seeks to suspend, pending management evaluation, the implementation of the decision to terminate his fixed-term appointment, as notified to him by letter of the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") dated 1 December 2015.

Facts

2. 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. As such, he was covered by the Organization's health insurance provider Vanbreda International ("VBI").

3. Between May 2010 and August 2013, the Applicant submitted eight claims for reimbursement of medical treatment purportedly received while serving as a UNV. These claims were related to invoices for self-funded admissions and treatment at a medical centre in Kampala, Uganda—the Applicant's home country—dated between March 2010 and July 2012.

4. In December 2013, VBI initiated an inquiry on the above-mentioned claims. The local correspondent of VBI spoke with the chief physician and co-founder of the medical centre in question—which closed by mid-2013. According to VBI's written record of the conversation, he stated that said medical centre was an unregistered out-patient clinic not equipped for in-patient admissions, that the litigious invoices were not authentic and had not been issued by the centre, and that he had given blank receipt and billing forms to a person who had never been treated at the centre who he believed to likely be a United Nations employee.

5. By email of 14 January 2014, VBI conveyed to the Applicant its conclusion that his claims were "an intentional attempt to deceive [VBI] in order to obtain payments for non-incurred medical expenses" and requested him to return the unduly received payments by 14 February 2014.

6. By reply emails of 3 and 16 March 2014, the Applicant denied the attempt of deception allegations, holding that he had received medical treatment at the medical centre in question, that he had paid the submitted invoices, and that the medical centre had a capacity for up to five in-patient admissions at a time while outsourcing procedures that it could not handle. He also stated that he never requested sick leave during the alleged treatments because he received them while being on leave.

7. In March 2014, VBI re-contacted the above-mentioned chief physician and co-founder of the medical centre, who, through a series of email exchanges with VBI from mid-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 would be outsourced, although the billing was done as a lump sum in one invoice by the centre. The doctor further indicated that, while he could not retrieve data from the centre due to its closure, "from recall" his opinion was that "probably" three of seven treatments claimed by the Applicant were admitted and treated at the centre, whilst four were outsourced. He added that he had no agreements with the centres where complex treatments were outsourced, nor could he personally recall the specific site of referral.

8. The matter was referred to the Advisory Panel on Disciplinary Measures ("APDM") for UNVs in March 2014. By email of 1 July 2014, i.e., the day after the Applicant's service as UNV ended, APDM transmitted him VBI's investigation report and invited him to comment on its findings.

9. The Applicant responded on 7 July 2014, calling into question the factual findings of the investigation and submitting that VBI "concluded too early before any investigation". He stressed that the report was completed in January 2014, while he had been corresponding with VBI as of March 2014, and pointed out several points of fact that he had rebutted in his communications with VBI. He reiterated that all invoices submitted were duly paid by him and were, thus, legitimate.

10. On 21 August 2014, the Applicant joined the United Nations Assistance Mission in Afghanistan ("UNAMA") as an Engineer (P-3), on a fixed-term appointment.

11. By letter dated 27 March 2015, the Executive Coordinator, UNV, shared VBI's investigation report into alleged fraud by the Applicant, dated 16 December 2013, with the Department of Field Support ("DFS") at Headquarters, and advised that, after review of the investigation and the Applicant's comments, the APDM had 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, in violation of the Conditions of Service for UNVs 2008. Based on the APDM's recommendations, the Executive Coordinator "subsequently decided that summary dismissal would have been the appropriate disciplinary measure to take had [the Applicant] still been serving as a UN Volunteer".

12. On the same date, the Executive Coordinator, UNV, sent a letter to the Applicant conveying identical conclusions.

13. By memorandum dated 15 June 2015, the Assistant Secretary-General for Field Support ("ASG/DFS") referred the matter to the ASG/OHRM for the termination of the Applicant's contract for "facts anterior to his appointment with UNAMA", making reference to the letter of 27 March 2015 to DFS and VBI's investigation report attached thereto.

14. Following a letter of 22 September 2015 from the ASG/OHRM, the Applicant submitted written comments, dated 4 October 2015, reiterating that he did not commit fraud against VBI.

15. By letter of the ASG/OHRM, dated 1 December 2015 and delivered to the Applicant two days later, the Applicant was informed 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 known at the time of his appointment, should have precluded same, in particular the submission of medical insurance

claims containing false information. It was also indicated that the decision was to take effect on 2 January 2015.

16. The Applicant requested management evaluation of his termination on 20 December 2015.

17. After its filing, the application was served on 22 December 2015 to the Respondent for reply, while also requesting the Respondent and the Applicant to submit additional information. The Applicant met this request on 22 December 2015, and the Respondent filed his reply on 23 December 2015. Upon the Tribunal's instructions, the Respondent filed specific documents requested on 28 December 2015.

Parties' contentions

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

Prima facie unlawfulness

a. Under sec. 3.2 of ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules), the delegated authority to terminate an appointment rests with the USG/DM. Nevertheless, the termination letter originates from and is signed by the ASG/OHRM, following earlier correspondence on the matter between the Applicant and the ASG/OHRM. There is no indication that the USG/DM exercised discretion in this case, and this cannot be presumed;

b. The decision was a veiled disciplinary measure; the grounds for termination were facts that the Administration repeatedly characterized as "fraud" and constitutive of "misconduct". However, the disciplinary procedures under Chapter X of the Staff Rules or ST/AI/371 (Revised disciplinary measures and procedures) were not followed, no investigation was conducted by the Organization and no clear and convincing evidence of facts was gathered;

c. Even assuming that the termination was based on facts anterior to the Applicant's appointment, the requirements of staff regulation 9.3(a)(v) were not fulfilled:

i. The letter of the Executive Coordinator, UNV, communicating that the hypothetical disciplinary measure to be applied had the Applicant remained as a UNV (i.e., summary dismissal) did not precede his appointment with UNAMA, but actually followed it by seven months;

ii. Mere suspicion of turpitude—*a fortiori* suspicion by another employer—is not a ground for termination. Clear and convincing evidence is required to take the most serious kind of measure. The decision letter itself does not contain any assessment of evidence, and no review of recommendation by the APDM, if there was any, was shared with the Applicant;

Urgency

d. The Applicant is scheduled for separation on 2 January 2016;

e. The urgency was not self-created, as the Applicant was notified of the decision on 3 December 2015 and sought legal assistance within ten days. The application could not be filed sooner due to staffing shortages in OSLA;

Irreparable damage

f. Loss of employment has to be seen not merely in terms of financial loss, but also of loss of career opportunities, particularly regarding employment within the United Nations, which is highly valued. Once out of the system, the prospect of return to a comparable post is significantly reduced;

g. In the Applicant's case, the decision seems to effect a permanent exclusion from employment with the Organization. Also, the reputational harm associated with dishonesty allegations may be dramatic and lasting;

h. Since the notification of the decision, the Applicant is experiencing professional isolation, inability to sleep and important loss of weight owing to emotional distress. The Applicant is the sole breadwinner for his spouse and six young children.

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

Prima facie unlawfulness

a. The decision was taken by the USG/DM, in accordance with ST/SGB/2015/1. As stated in the termination letter, the USG/DM reviewed the Applicant's case, including his comments, and decided that the fact that the Applicant submitted medical insurance claims with false information, if known at the time of his appointment with UNAMA, would have precluded the same;

b. The challenged decision is an administrative decision that complied with the requirements of all applicable legislative instruments;

c. Staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) allow for the Secretary-General to terminate a staff member's fixed-term appointment if facts anterior to his or her appointment and relevant to his or her suitability come to light that, if they had been known at the time of the appointment, should have precluded it, under the standards set in the Charter. In line with these provisions, the facts in existence prior to the Applicant's appointment are that from May 2010 to August 2013, while being a UNV, he submitted various medical insurance claims to VBI containing false information; they are not, as the Applicant argues, the subsequent decision of the Executive Coordinator, UNV. Had these facts been known, the Applicant would not have received his appointment with UNAMA;

d. The Applicant's submission of false medical insurance claims impugns his integrity, which, according to art. 101 of the Charter, is of fundamental importance;

e. Chapter X of the Staff Rules and ST/AI/371 apply only when disciplinary measures are imposed. The aforementioned staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) envisage termination in circumstances other than disciplinary. The Applicant received the level of due process appropriate for termination for facts anterior; he was given the opportunity to provide comments, which he did on 5 October 2015;

f. Contrary to the Applicant's contention that the underlying conduct on which the Administration's decision was based was not proven, the evidence against him is largely contained in the initial January 2014 statement of the chief physician of the medical centre. While he later stated that the treatments allegedly received by the Applicant could hypothetically have been undertaken in that centre or at a referred clinic, he did not change his initial assertion that the invoices submitted were not authentic;

Urgency

g. There is no urgency, since the legality of the contested termination may be fully determined in the framework of a substantive application on the merits;

h. Any urgency is self-created, the Applicant having waited two weeks to contest the decision;

Irreparable damage

i. There is no risk of irreparable harm. The challenged termination, if later found to be unlawful, can be adequately compensated through a monetary award. Article 10(5)(a) of the Tribunal's Statute provides that, where rescission of termination is ordered, an amount of compensation shall be set that the Administration may elect to pay as an alternative to rescission.

Consideration

20. According to art. 2.2 of its Statute and art. 13 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where implementation of the decision would cause irreparable damage to the concerned staff member. The three aforementioned requirements are cumulative and must all be met for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)). Each of them will be analysed in turn.

Prima facie unlawfulness

21. The Tribunal has consistently held that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 /GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

22. Regarding the authority to terminate the Applicant's appointment on the basis of staff rule 9.6(c)(v), the Tribunal notes that, pursuant to sec. 3.2 of ST/SGB/2015/1, termination of staff members' appointments is generally delegated to the USG/DM, who may in turn delegate such authority further. However, as emphasised by the Applicant, the termination letter as well as the previous letter inviting the Applicant to comment on the matter emanated from the ASG/OHRM.

23. It appears that the USG/DM has not delegated the authority to make the contested decision to the ASG/OHRM. First, the decision letter itself states that the USG/DM reviewed the Applicant's case, including his comments, and decided to terminate his appointment. Second, the Respondent, in his reply, far from claiming that the contested decision was taken by the ASG/OHRM by virtue of a delegation of authority, reiterates that the decision was made by the USG/DM. In

addition, both the decision letter and the Respondent's reply unambiguously invoke the discretionary power of the Secretary-General and "the delegated authority of the Under-Secretary-General for Management".

24. However, as a matter of fact, the decision was conveyed by a letter signed by the ASG/OHRM, which is in itself an important element in determining the authorship of the decision (see *D'Hooge* 2010/UNDT/044). It should be added that all correspondence on this matter, including internal correspondence not addressed to the Applicant—such as the ASG/DFS' correspondence of 15 June 2015—was addressed to the ASG/OHRM and not to the USG/DM.

25. Further, the Tribunal notes that no indication can be found in the documents on file of the USG/DM's involvement in the decision, or—at least—that he had been kept informed of the related procedures.

26. Lastly, the Respondent, although confronted with the explicit contention that the decision-maker was not vested with the authority to terminate the Applicant, adduced no evidence of any kind of participation of the USG/DM in the decision-making process. In such a situation, it is not sufficient to simply refer to the wording of the ASG/OHRM's letter; rather, the Respondent should have provided the Tribunal with convincing material showing that, indeed, it was the USG/DM, and not the ASG/OHRM, who took the contested decision.

27. The competence of the decision-maker is a cornerstone of the legality of any administrative decision. When the exercise by the Administration of its discretionary power is under judicial review, any lack of authority leads inevitably to the rescission of the contested decision (*Ademagic et al.* UNDT/2012/131; see also *Kompass* Order No. 99 (GVA/2015)).

28. In the absence of any evidence that the competent authority made the contested decision, serious and reasonable doubts arise as to its legality. If any such proof exists, the Administration will have ample opportunity to introduce it in the on-going management evaluation process.

29. In addition, other issues raise serious questions as to the lawfulness of the decision under consideration. Since it is based on staff rule 9.6(c)(v), there needs to be "facts anterior" to the Applicant's appointment of such nature as to prevent his appointment. The Administration has clarified that these facts are not the determination by the Executive Coordinator, UNV, that the Applicant had engaged in serious misconduct deserving summary dismissal, but the alleged conduct itself, namely attempt of medical fraud by submitting false invoices to BVI. It is questionable to hold that the Organization did not know these facts at the time of the Applicant's appointment, since BVI had long before submitted its investigation report, and disciplinary procedures had been engaged as per the rules applicable to UNVs. In this context, it is doubtful that the Organization may hold against one of his employees the fact that a relevant piece of information was not timely transmitted from one given department to another.

30. Moreover, it is not clear whether the underlying facts characterised as fraud have been duly established. The Applicant has contested the relevant allegations from the beginning; from the case file, it is unclear whether the APDM found the evidence before it sufficient. In any event, the Tribunal notes that the Organization has not investigated the allegations and that the VBI report was finalised before it re-contacted the sole witness interviewed. It is further noteworthy that, when re-contacted by VBI, this witness altered his initial statement in various respects, which led VBI to ask further questions and one of its employees to write:

> This is a bit of an unfortunate situation as we had already reported … the fact that [the concerned medical centre] was an out-patient facility only to [the Applicants]'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]*. (emphasis added)

31. While conceding that there are reasons to doubt the credibility of both the Applicant and the witness, the Tribunal is not satisfied that the Administration takes as a fact that the Applicant committed fraud on the basis of what might be an incomplete or inadequate investigation.

32. For all the above, it is the Tribunal's view that the pre-requisite of *prima facie* unlawfulness of the impugned decision is met in the case at hand.

Urgency

33. If not suspended, the Applicant's termination will become effective on 2 January 2016. It is thus quite obvious that urgency exists.

34. Although it would have been advisable to act more promptly, the Tribunal does not share the Respondent's view that urgency was self-created. Given the complexity of the case, the Applicant understandably first had to seek legal assistance; therefore, it took the Applicant approximately two weeks to submit his request for management evaluation, and one more day to file the instant application following his notification on 3 December 2015. In any case, the time span did not prevent the Tribunal to serve the application to the Respondent, give him the usual time to reply and render its decision in due course.

Irreparable damage

35. It is settled law that loss of career opportunity with the Organization amounts to harm that cannot be adequately made good through financial compensation (*Saffir* Order No. 49 (NY/2013), *Farrimond* Order No. 200 (GVA/2013), *Moise* Order No. 208 (NY/2014)). Also, the Tribunal has repeatedly ruled that harm to professional reputation and career prospects, as well as harm to health, or sudden loss of employment, may constitute irreparable damage (*Calvani* UNDT/2009/092, *Villamoran* UNDT/2011/126, *Ullah* UNDT/2012/140).

36. Bearing in mind that the Applicant's current fixed-term appointment is the first he obtained with the United Nations, and perhaps more importantly, that it is terminated for reasons regarding his integrity, that will foreseeably durably tarnish his professional reputation, the Tribunal is of the view that the implementation of the decision would cause the Applicant irreparable damage.

Conclusion

37. In view of the foregoing, it is ORDERED that the decision to terminate the Applicant's contract for facts anterior to his appointment based on staff regulation 9.3(a)(v) and staff rule 9.6(c)(v) be suspended pending the outcome of the management evaluation.

(*Signed*)
Judge Thomas Laker
Dated this 30th day of December 2015

Entered in the Register on this 30th day of December 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva