



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/039

Judgment No.: UNDT/2012/138

Date: 17 September 2012

Original: English

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**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

## **Introduction**

1. The Applicant contests the termination of his employment with the United Nations Development Programme (“UNDP”) made on grounds of fraudulent medical claims that he submitted to the Garantie Médicale et Chirurgicale (“GMC”). The Applicant requests the Dispute Tribunal to find that the impugned decision was disproportionate to the offence, that the imposed disciplinary measure be rescinded and a less onerous disciplinary measure like a written censure or demotion within grade be substituted for the imposed disciplinary measure.

2. Article 16.2 of the Dispute Tribunal Rules of Procedure states that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. However in this case, the Applicant has admitted the misconduct and the facts are not in issue.

3. In response to a Case Management Order No. 105 (NBI/2012), both Parties agreed that an oral hearing of the case was not necessary and submitted a list of agreed facts, legal issues and the remedies sought. The Tribunal has sufficient evidence from the pleadings and submissions of the Parties to make a decision and finds that this case is suitable for determination based on the pleadings without an oral hearing.

## **Issues**

4. The main legal issues to be resolved in this case are:
- a. Whether misconduct was established.
  - b. Whether in the light of mitigating factors the imposed disciplinary measure is disproportionate to the offence.

## Facts

5. The Applicant joined the UNDP Country Office in Gabon in 1988. At the time of his separation from service on 2 June 2011 he was employed as a driver holding a fixed term appointment at the G-3 step 10. In July 2009, the Applicant made a claim for reimbursement of medical expenses to the GMC for West African CFA Franc (“XOF”) 940,501 (approximately USD 2,000). GMC is an independent brokerage firm to whom UNDP outsources the administration of its Medical Insurance Plan (“MIP”). UNDP locally recruited staff members subscribe to this plan. The Applicant was a subscriber during his time as a staff member.

6. In support of his claim to GMC the Applicant submitted an invoice for treatment allegedly received by his wife at the Fondation Docteur Chambrier, a hospital in Gabon. The invoice indicated that his wife had been hospitalized there for five days from 16 May 2009 and was treated by a Dr. Lemaba. The Applicant also provided a receipt dated 21 May 2009 from the hospital acknowledging payment of “XOF” 940,501 and a report dated 21 May 2009 signed by the same Doctor.

7. While processing the Applicant’s claim, the GMC discovered a discrepancy between the total amount in the invoice and the amounts shown in the itemized breakdown of costs. This discrepancy prompted them to review the Applicant’s claim further. In the resulting report (“GMC Report”) they concluded that “...invoice sent...is a fake invoice.” The report was submitted to the Office of Audit and Investigations (“OAI”) on 27 October 2009.

8. Based on the information in the GMC Report, the OAI wrote to the Applicant on 30 November 2009 (“notification letter”) to notify him that he was the subject of an investigation.

9. On 2 December 2009, the OAI interviewed the Applicant who admitted to submitting the claim for reimbursement, the invoice, the hospital report and the receipt of the cost incurred to the GMC. He also admitted that his wife had never been hospitalized at the Fondation Docteur Chambrier. The Applicant explained that

he did this because he needed money and it was the first time he had tried to defraud GMC. GMC confirmed that before this investigation, the Applicant had submitted only few claims none of which were suspicious.

10. The Applicant's first explanation to the investigators was that around June/July 2009, he met someone in a bar in Libreville, Gabon who introduced himself as Mr. Ague. At the time of meeting, the Applicant, who was wearing his UNDP driver uniform, told Mr. Ague that he was a UNDP employee. Mr. Ague claimed to be a medical doctor working at the Fondation Docteur Chambrier. The Applicant said that Mr. Ague told him he had a business proposal for him and that he could provide the Applicant with a fake invoice for medical treatment for a total payment of XOF 100,000 (approximately USD 220). He asked the Applicant to make an advance payment of XOF 50,000 (approximately USD 110).

11. After receiving the fake documents from Mr. Ague, the Applicant submitted the fraudulent claim to GMC. By, email dated 31 August 2009 GMC informed the Applicant that it would not reimburse his claim. The Applicant did not reply.

12. In the course of investigation by OAI, the Fondation Docteur Chambrier confirmed that Mr. Ague was actually a nurse working at the hospital in the operation room. The hospital had also conducted an internal investigation into the involvement of Mr. Ague during which both the Applicant and Mr. Ague admitted, in writing, that it was the Applicant who had requested the assistance of Mr. Ague to generate fake documents.

13. In a letter dated 2 December 2009 the Applicant admitted the allegations in the notification letter. He agreed that he had submitted a claim for the reimbursement of medical expenses to GMC for treatments that were never received by his wife.eafofe.13.19 0k

14. On 7 October 2010 the OAI sent a copy of the draft investigation report to the Applicant for comments. On 22 October 2010 the Applicant confirmed that "... the allegations mentioned in the official investigation notification letter were true..."

15. Both Parties agree that during the period of investigation, the Applicant was incarcerated by the Gabonese authorities in relation to other alleged fraudulent activities.

16. On 12 November 2010, the Applicant was formally charged in writing with misconduct for having submitted a fraudulent medical claim for treatment allegedly received by his wife. In his response on 19 November 2010, the Applicant stated that;

[he has] already admitted that the allegations mentioned in the official investigation notification letter [were] true and, therefore, "take on [his] responsibility" and accuse [his] misconduct.

17. On 29 April 2011, the Associate Administrator of UNDP informed the Applicant that upon review of

19. UNDP informed the Applicant of his right to challenge the disciplinary measure imposed and the right to legal assistance from the Office of Staff Legal Assistance (OSLA).

20. On 26 July 2011, the Applicant filed his Application at the Tribunal.

### **Applicant's submissions**

21. The Applicant's principal contentions may be summarised as follows:

a. That the Applicant's actions did not amount to fraud rather it was an act of attempted fraud;

b. That the Organization did not take into consideration mitigating factors relevant to the Applicant including: the incompleteness of the alleged act of fraud; the fact that the Applicant was victimized by the misrepresentation of a third party who claimed to be a medical doctor; the fact that the Applicant was swindled out of XOF 50,000; and the fact that the Applicant had no means of verifying the validity of the invoice;

c. The Organization did not suffer any financial harm since the act of fraud was not completed and no financial benefit accrued to the Applicant;

d.

## **Respondent's submissions**

22. The Respondent's principal contentions may be summarized as follows:
- a. Misconduct against the Applicant had been established;
  - b. The Organization took into account all the relevant factors surrounding the case in reaching its decision;
  - c. The disciplinary measure imposed was proportionate to the offence and in line with the Tribunal's jurisprudence.

## **Considerations**

### *Issue 1: Was misconduct established?*

23. The former staff regulation 1.2 and staff rule 10.1<sup>1</sup> set out the common standards of conduct expected of UN Staff members. The Medical Insurance Plan Rules<sup>2</sup> ("MIP rules") and the UNDP Legal Framework for Addressing Non-compliance with UN Standards of Conduct<sup>3</sup> ("UNDP Legal Framework") define misconduct in the specific circumstances of this case.

### **MIP Rules 6.2**

#### **Forms and supporting documentation**

##### **Claim Form**

Signing the GMCS MIP Refund Claim Form signifies the subscriber's certification of the truth and accuracy of the information provided.

***The subscriber will be held responsible and subject to disciplinary measures for any false or incorrect information submitted.***

Submission of fraudulent MIP claims is grounds for dismissal

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<sup>1</sup> ST/SGB/2010/6; Staff Regulations of the United Nations and Provisional Staff Rules

<sup>2</sup> United Nations Development Programme, Medical Insurance Plan Rules, Office of Human Resources Management, 1 January 2004

<sup>3</sup> United Nations Development Programme Legal framework for addressing Non-Compliance with UN Standards of Conduct, May 2008

### **8.5 Abuse or Fraud**

Neither abuse nor fraud will be tolerated. The subscriber will be held responsible and subject to disciplinary measures for any false or incorrect information submitted. *Submission of fraudulent MIP claims is grounds for dismissal.*

### **UNDP Legal Framework**

23. Misconduct may include, but is not limited to, the following categories whether wilful, reckless or grossly negligent:

(e) Misrepresentation, forgery, or false certification, such as, but not limited to, in connection with any official claim or benefit, including failure to disclose a fact material to that claim or benefit;

24. The Applicant has never denied making a false certification. He admitted the misconduct as soon as he was confronted with it and, apart from initially and wrongly



*Issue 2: Whether in the light of mitigating factors the imposed disciplinary measure is disproportionate to the offence.*

28. The Applicant accepts he acted fraudulently. He submits that had he completed all the steps of the offence and caused the Organization to actually make financial payment then separation from service would have been warranted. However he points to what he considers should have been considered as mitigating factors to justify the imposition of a less onerous disciplinary measure.

29. In undertaking a judicial review of a disciplinary measure the Tribunal may determine if the administrative decision under challenge is reasonable, fair, legally and procedurally correct, and proportionate.<sup>4</sup>

30. In considering the proportionality of a disciplinary measure the starting point is that the Secretary-General has a wide margin of discretion in imposing disciplinary measures against staff members who have committed misconduct provided those actions follow the law and lawful procedure and that the outcome is proportionate to the degree of misconduct.<sup>5</sup>

31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered.<sup>6</sup>

32. In general, however, the Tribunal will not interfere with the exercise of a discretionary authority unless the Applicant can establish evidence of illegality, irrationality and procedural impropriety<sup>7</sup> or violation of an Applicant's due process rights.<sup>8</sup>

33. The UNDP Administrator produces an annual report entitled “UNDP Annual Report of the Administrator on Disciplinary Measures and Other Actions Taken in Response to Fraud, Corruption and Othe

**Conclusion**

38. In all of the circumstances the Tribunal finds that the sanction of separation from service with one month notice and one month termination indemnity was proportionate to the misconduct of the Applicant.

39. The Application is dismissed.

*(Signed)*  
Judge Coral Shaw

Dated this 17<sup>th</sup> day of September 2012

Entered in the Register on this 17<sup>th</sup> day of September 2012

*(Signed)*  
Legal Officer for :  
Jean-Pelé Fomété, Registrar, Nairobi