



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/054

Judgment No.: UNDT/2013/117

Date: 25 September 2013

Original: French

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

KONDOMBO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Fabrizio Mastrogirolamo, UNDP

Application

1. In an application dated 22 August 2011, the Applicant challenged the decision to impose the disciplinary measure of separation from service for the allegedly false authentication of a claim for reimbursement of medical expenses to the insurer Garantie Médicale et Chirurgicale (GMC) and the submission of an allegedly fraudulent invoice relating to another medical expenses claim to GMC.
2. He asks the Tribunal to order the revocation of the decision and his reinstatement in his former functions.

Facts

3. The Applicant entered on duty with the Office of the United Nations Development Programme (UNDP) in Burkina Faso in 1984. At the time of separation from service on 28 July 2011, the Applicant was working as a Finance Assistant G-5, step 13, at UNDP Burkina Faso.
4. In 1996 he was awarded custody of his deceased brother's four children. These children were then declared to UNDP as dependents of the Applicant for purposes of compensation.
5. In February 2007, the Applicant filed two claims with GMC for reimbursement of medical expenses for two of the four children, Miss S. K. and Mr. M. K.
6. In an email dated 7 February 2007, GMC asked the Applicant to provide a report on Miss S. K.'s hospitalization and operation.
7. In an email dated 28 February 2007, the Applicant admitted that he had sent the invoices for the two children by mistake and asked GMC to send them back so that he could tender them for reimbursement by his late brother's insurance fund.
8. After conducting a field mission to Burkina Faso in May 2009, the Office of Audit and Investigations (OAI) published an investigative report on 29 January 2010 in which it concluded that the invoices submitted by the Applicant in support

of those claims were not genuine. The Applicant was invited to submit his

16. After reviewing the record, in a letter dated 24 June 2011 the UNDP Associate Administrator decided to impose the disciplinary action challenged by the Applicant. The Applicant acknowledged receipt of that letter on 28 July 2011.

17. The Applicant filed his application with the Tribunal on 22 August 2011. That application was officially communicated to the Respondent on 27 September 2011. The Respondent submitted its reply on 25 October 2011.

18. In a joint response to preparation order No. 107 (NBI/2012) dated 14 August 2012, the Applicant and the Respondent asked for the ruling on the case to be based solely on the documentation already on file.

Parties' contentions

19. The Applicant's contentions are:

(a) The disciplinary measure imposed on the Applicant is out of proportion to his alleged misconduct. No consideration was given to his excellent past behaviour and the quality of his work from 1984 to 2011 inclusive;

(b) The conduct of the auditor, Mr. Alfred Zebi, was unfair in that he drew hasty and erroneous conclusions from certain facts (such as the absence of Dr. Y. J. Ouédraogo and Miss Samiratou during the investigation) and his approach betrayed a strategy of confirming a preconceived notion as regards penalty;

(c) The local UNDSS office physically identified Dr. Y. J. Ouédraogo through the security assistant;

(d) The irregularities found in the documents submitted to GMC are not the Applicant's responsibility, as they were explained by Dr. Y. J. Ouédraogo in an additional medical certificate dated 19 August 2010;

(e) The conditions of the hearing were inhumane in that the auditor insisted on meeting the Applicant while he was on sick leave;

as to the authenticity of the invoices following two other similar cases of fraudulent claims to UNDP for medical reimbursement.

30. In disciplinary matters, the amendment of 11 May 2010 to Administrative Instruction ST/AI/371 (Disciplinary measures and procedures) of 2 August 1991 sets out the procedure for communicating disciplinary measures in the following terms:

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

...

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

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

31. First, the applicant claims that the late notification of the decision is contrary to the disciplinary procedure set forth by the administration. The administrative instruction cited does not provide that notification of the disciplinary measure must take place immediately. The Applicant’s argument is therefore legally unsound. The Tribunal regrets the delay of more than a month between the decision and its notification to the Applicant, but in this case it cannot conclude that the Administration was at fault.

32. Rule 10.3 in chapter X of the Staff Rules sets out the procedure for the imposition of disciplinary measures. Thus, a disciplinary measure may not be imposed following an investigation “unless [the staff member] has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges”.

specifically for GMC and that the two invoices were not submitted by the Applicant together with others.

40. The Tribunal therefore finds that the facts on the basis of which the Applicant was sanctioned are established.

Actions constituting professional misconduct?

41. In the Tribunal's judgement, the Applicant's actions constitute professional misconduct within the meaning of the regulations in effect at the time of the alleged facts.

42. Section 3, paragraph 24 (e), of the UNDP Legal Framework sets out the categories of misconduct. The third of these consists of: "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".

43. The Administration accuses the Applicant of "misrepresentation or false certification in connection with any United Nations claim or benefit" pursuant to Administrative Instruction ST/AI/371, section II, paragraph 2 (c).

44. Section 6.5 of the Medical Insurance Plan (MIP) Rules states that: "Signing the GMCS MIP Refund Claim Form signifies the subscriber's certification of the truth and accuracy of the information provided". Having signed the claims at issue, the Applicant is therefore accountable for the truth and accuracy of the supporting invoices. As a medical plan subscriber, the Applicant was required to comply with the relevant regulations as well as the rules and regulations applicable to United Nations staff members. He cannot claim that the wrongful act was the physician's responsibility, as according to the regulations the Applicant is responsible for checking all supporting documents submitted.

45. The Applicant's alleged misconduct, namely attempted fraud, constitutes non-compliance with the standards of conduct expected of an international civil servant

under staff rule 10.1, which gives the following definition of misconduct deserving of disciplinary measures:

“Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant.”

46. The submission of fraudulent supporting documents to claim reimbursement in the amount of US\$ 3,500, even though the claim was later dropped, constitutes serious misconduct given the integrity expected of an international civil servant. Under staff regulation 1.2 (b): “The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status”.

47. In light of the entire dossier, the Tribunal finds sufficient evidence to establish that the applicant’s conduct has been contrary to the provisions of staff rule 10.1 and staff regulation 1.2 (b), and that he has therefore been guilty of misconduct.

Proportionality of the sanction

48. Staff regulation 10.1, which provides that “The Secretary-General may impose disciplinary measures on staff members who engage in misconduct”, leaves the Secretary-General with broad discretion regarding the appropriate sanction. According to staff rule 10.3 (b) (Due process in the disciplinary process): “Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. It is now up to the Tribunal to consider whether the disciplinary m

