

e: Judge Agnieszka Klonowiecka-Milart

gistry: Nairobi



BACKGROUND

7. On 13 October 2018, the Applicant submitted a claim to Cigna for reimbursement of dental charges. On 15 October 2018, Cigna requested that the Applicant submit panoramic X-rays/orthopantomograms (“OPGs”) for the treatment claimed.² Between 18 October and 8 November 2018, Cigna and the Applicant communicated about the submission of original OPGs for the treatment received.

8. In December 2018, the Cigna Investigation Unit informed the Applicant that if he did not provide the correct OPGs by 14 January 2019, he would have to refund USD2,144 relating to “dental irregularities.”³ In a 15 February 2019 response, the Applicant admitted that there was “a difference between the services claimed in the past and the X-RAY” and that “one of the previous dental claims back in June 2017, was for a relative of [his] who was in need for the dental services and could not afford it”. He explained that this was not fraud but rather “a mistake” and he was willing to accept their “judgment.”⁴

9. On 21 March 2019, Cigna informed the Applicant that two invoices from Dr. RFB, dated 9 April 2016 and 29 June 2017, and one invoice from Dr. MM, dated 4 February 2018, had been examined by their dental consultant who had concluded that the irreversible treatments described on the invoices had not occurred as they did not show on the OPGs that he had submitted. Consequently, Cigna demanded reimbursement of USD2,144 for payments made based on these three invoices.⁵ Applicant reimbursed Cigna the USD2,144 on 13 April 2019.

10. Cigna forwarded a fraud report to the Office of Internal Oversight Services (“OIOS”) implicating the Applicant on 19 March 2019.⁶ After a preliminary

² Reply, annex R/2, pp. 96 & 97.

³ Reply, annex R/2, pp. 93 to 96.

⁴ Reply, annex R/2, p. 88.

⁵ Reply, annex R/2, p. 86.

⁶ Reply, annex R/2, p. 80.

⁷ Reply, annex R/2, pp. 77 - 79.

⁸ Reply, annex R/2, p. 18.

Applicant was placed on administrative leave without pay (“ALWOP”).

14. In a response dated 15 January 2020, the Applicant: (a) admitted to misusing the health insurance plan but attributed his conduct to a need to assist sick family members who were in dire financial circumstances; (b) apologized for his “misjudgments”; (c) undertook to not misuse the MIP again; and (d) denied having an agreement with the two dentists. The Applicant requested that the following be taken into consideration as mitigating factors when imposing a disciplinary sanction: (a) his employment with UNIFIL since 2007 and his good conduct during his years of service; (b) his successful performance of his duties; (c) his wife and three minor children who depend on him solely for financial support and health insurance coverage; and (d) substantial loans he had taken to purchase a house and a car for his family. He expressed his willingness to accept any disciplinary measure that would allow him to continue working with the Organization.

15. By a memorandum dated 4 February 2020 (“sanction letter”), the Assistant Secretary-General for Human Resources informed the Applicant that the USG/DMSPC had concluded that the allegations against him had been established by clear and convincing evidence and that she had decided to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity.¹⁹ The Applicant acknowledged receipt of the sanction letter on 6 February 2020²⁰ and was separated from service on 7 February 2020²¹.

SUBMISSIONS

Applicant’s submissions

16. The Applicant’s case is that the contested decision should be rescinded and he should be restored to service for the following reasons:

¹⁹ Reply, annex R/6.

²⁰ Reply, annex R/7.

²¹ Application, annex 2.

²² Reply, annex R/9.

²³ Application, p. 2.

a. The measure imposed was too severe, especially since he was denied termination indemnity after working for the Organization for 13 years.

b. In imposing the contested disciplinary measure, the Respondent failed to take into consideration that: he was under pressure to assist family members in need; he readily admitted his mistake to Cigna; he reimbursed the USD2,144 that was paid to him for the three claims in question; cooperated with the investigation although other staff members had encouraged him to lie/deny all the charges; he is unemployed and unable to support his family.

c. The SIU investigator interviewed him for three hours during Ramadan. He submits that several of his answers were recorded wrongly due to the investigator misunderstanding and/or misinterpreting what he said. He also did not re-read the whole interview before signing it because he was exhausted from fasting. Additionally, he did not think that he would be sanctioned so harshly.

17. The Respondent submits that it was established by clear and convincing evidence that between 2016 and 2018, on one or more occasions, the Applicant submitted false information in support of MIP claims for reimbursement for dental expenses to Cigna. The Respondent points to the following facts in support of his position:

a. The MIP claims submitted by the Applicant on 11 April 2016, 29 June 2017 and 8 February 2018 did not relate to dental treatment received by him; and he received a total of USD2,144 in reimbursement by Cigna.

b. During the Applicant's interview with the SIU investigators, and later in his comments to the allegations of misconduct, he admitted that the medical reports/invoices he submitted in support of the MIP claims for reimbursement did not relate to dental treatment received by him or his wife.

18. The Respondent submits that the Applicant's conduct amounted to serious misconduct under Chapter X of the Staff Rules because by submitting MIP claims that

22. 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”²⁶

23. The Tribunal will examine the three claims for which the Applicant was

paid the Applicant USD584 for this claim²⁸. The Applicant indicated in the claim form that his wife, HS, was the patient but the report and invoice from Dr. RFB indicated that the Applicant was the patient.

27. The Applicant admitted during his 27 May 2019 SIU interview that the 11 April 2016 claim was for dental services provided to one of his male relatives, IS. He explained that although he had not received the dental services, Dr. RFB put his name on the report and invoice because he was the Cigna plan member who was “doing the favor” for IS. He put his wife’s name on the form because he did not want to “put all the claims on one name”. He stated that Dr. RFB made a mistake by putting his name instead of his wife’s name on the documents. He confirmed that the dental work listed in the report did not conform with his OPG²⁹. The Applicant confirmed during the CMD that there had been concern about putting all claims in his name, while maintaining however, that his wife had indeed received the treatment in April 2016.

28. It is worth noting that Cigna informed SIU on 20 May 2019 that “the claim form of 11 April 2016 did indicate the name of the staff member’s spouse, however we consider it an error because the invoice was issued in the name of [the Applicant] and when we informed him of the irregularities detected, he did not dispute but returned the refund requested automatically. This invoice was listed in our report as invalid because the crown on tooth no. 25 could not have been performed as it was not shown on [the Applicant’s] post-OPG”. Cigna stated that it was not in possession of the Applicant’s spouse’s OPG³⁰.

29. At Section VIII, para. 6 of the application and during the 19 May 2021 CMD, the Applicant averred that the 11 April 2016 claim was genuine. He averred that although the dental service was provided to his wife, Dr. RFB made a mistake by issuing the invoice in his name instead of his wife’s name. He denied that Dr. RFB had, in fact, provided the dental treatment to IS. In support of this contention, he submitted: (a) an undated OPG that had his wife’s name and date of birth; and (b) a

²⁸ Reply, annex R/2, pp. 41-43.

²⁹ Application, annex 3, pp. 1-2.

³⁰ Reply, annex R/2, p. 59.

letter, dated 24 May 2021, from Dr. RFB stating that the Applicant's wife had been the patient on 9 April 2016 and that he had put the Applicant's name on the invoice and report because it was him who was the insured.

30. The Respondent urged the Tribunal to reject the Applicant's assertions in his application and at the CMD with respect to the 11 April 2016 claim due to the

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Proportionality of the sanction

40. In *Sanwid*⁸⁷ the United Nations Appeals Tribunal (“UNAT”) stated:

... In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if a course of action is reasonable, but not if the course of action is excessive. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails

The proportionality principle limits the discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired outcome.

42. In *Rajar*⁴⁰, UNAT stated:

The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable

43. In the present case the Tribunal agrees with the Respondent that retaining the Applicant in service would be irreconcilable with the values of the Organization. The measure applied was in line with the past cases involving submitting false information in relation to a medical claim or abusing the medical insurance provided by the Organization which have resulted in dismissal or separation compensation in lieu of notice but without termination indemnity⁴¹. Removing one specific event from the scope of confirmed charges, that is, the claim dated 11 April 2016, does not alter this conclusion. The Tribunal further finds that the Respondent correctly identified and weighed all the mitigating circumstances.

44. In conclusion, the Tribunal finds no basis to interfere with the disciplinary measure.

JUDGMENT

45. The application is dismissed.

⁴⁰ 2017-UNAT-781, para. 47.

⁴¹ See Practice of the Secretary-General in disciplinary matters and cases of possible criminal behavior, 1 July 2016 to 30 June 2017 (A/72/209), paras. 32-37 and 42; and Practice of the Secretary-General in disciplinary matters and cases of possible criminal behavior, 1 July 2015 to 30 June 2016 (A/72/209), paras. 40, 42 and 46.

(Signed)
Judge Agnieszka Klonowiecka-Milart

Dated this 18 day of June 2021

Entered in the Register on this 18 day of June 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi