
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/068

Judgment No.: UNDT/2014/122

Date: 13 October 2014

Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

TSHIKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Susan Maddox, ALS/OHRM
Sophie Parent, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)¹.

2. On 17 September 2010, she filed an Application with the United Nations Dispute Tribunal (the Tribunal) challenging the decision to impose on her the sanction of summary dismissal for attempting to defraud the Organization by making a false claim for medical expenses.

Facts

3. The Applicant, a national of the Democratic Republic of the Congo, joined MONUC on 9 June 2005 as a Security Clerk on a contract governed by the former

7. Upon receiving the claim, Mr. Christian Ignasse, a Human Resources Officer at MONUC, concluded that the invoices appeared “strange” and accordingly decided to visit Ingende Medical. He was advised that the name of Mr. Lokangu did not appear in the records of Ingende Medical. He subsequently requested the MONUC Special Investigation Unit (SIU) to start an investigation and handed over all the documents that he received from the Applicant.

8. On 12 November 2007, the Applicant was interviewed by the SIU investigator, Mr. Marnix Debusschère. A hand-written record of the interview was read out to the Applicant before she signed it.

9. On 14 November 2007, the Applicant was presented with a typed version of her interview which she refused to sign. On 26 November 2007, Mr. Debusschère took a further statement from the Applicant.

10. The Investigation Report was finalized on 28 November 2007 and concluded that Mr. Lokangu did not undergo surgery at Ingende Medical and that the Applicant attempted to obtain USD1,180 by submitting a fraudulent claim.

11. The Investigation Report was communicated to the MONUC Conduct and Discipline Unit (CDU) on 19 December 2007. It was referred to the Director of Mission Support (DMS) on 9 January 2008 for review. On 21 February 2008, the DMS recommended that disciplinary action should be instituted against the Applicant.

12. In a memorandum dated 25 February 2008, referring to the SIU Investigation Report and the comments of the DMS, the Special Representative of the Secretary-General (SRSG), MONUC, recommended that the Department of Field Support (DFS) commence disciplinary proceedings against the Applicant.

13. In a memorandum dated 14 March 2008, DFS concluded that the Applicant had violated United Nations Staff Regulations and Rules and recommended that the

Office of Human Resources Management (OHRM) initiate disciplinary proceedings against her.

14. In a Memorandum dated 25 April 2008, OHRM charged the Applicant with misconduct namely attempting to defraud the Organization by submitting a false medical claim. The Memorandum stated that the Applicant “failed to provide the Organization with credible evidence to prove that surgery was performed on [her] husband on 7 March 2007 at “Ingende Medical” by Dr. Gbamo or any other doctor”. In her response dated 1 July 2008, the Applicant denied the accusations.

15. In a Memorandum dated 5 May 2010, the Under-Secretary-General for Management (USG/DM) decided to impose on the Applicant the sanction of summary dismissal for attempting to defraud the Organization by making a false

vesicale n'a pas pu avoir lieu à Ingende Medical à cause d'une absence d'une infrastructure et de l'équipement adéquat. Quelle est votre réaction à cette information? [Dr. Lipekene, the supervisor at Ingende Medical, confirmed to me that a surgical intervention, such as vesical lithiasis could not be performed at Ingende Medical due to a lack of adequate infrastructure and proper equipment. What is your reaction to this information?]

A. Moi étant au travail, j'ai trouvé que mon mari a eu l'opération. Quand à l'infrastructure du centre et la hauteur de l'opération, je ne saurais pas vous donner des précisions. [I was at work and I have found that my husband had the operation. As for the infrastructure existing at the center and the standard of the operation, I would be unable to furnish any details.]

Q. Le nom de votre époux ne se retrouve pas dans les registres de présence à Ingende Medical et il n'y a aucune trace dans les registres financiers de l'hôpital Quel est votre commentaire? [The name of your spouse does not appear in the attendance records of Ingende Medical and there is no trace of his name in the financial records at the hospital. Do you have any commentary?]

A. C'est un dossier médical qui est venu est venu d'ailleurs. Il aurait fallu la présence de mon mari pour avoir toutes les précisions, d'autant plus que quand je lui ai donné plus tard nos formulaires à remplir, il est allé les faire remplir tout seul à l'hôpital. [It is a medical record that came from elsewhere. The presence of my husband would have helped in getting all the details the more so as I later gave him all the documents to fill out and he went alone to the hospital to have them filled.]

Q. Expliquez-moi la différence entre la facture de 1180 US\$ et les trois reçus qui totalisent 2210 US\$. [Explain to me the difference between the invoice in the amount USD1,180 and three receipts totaling USD2,210.]

A. J'ai récupéré les reçus et la facture que je les ai déposés au bureau de MIP. Je n'avais pas du tout parcouru les reçus, ni fait des copies. Je déclare que c'est mon mari qui a fait faire cela pour que nous puissions enter dans nos droits. [I retrieved the invoice and the receipts and bills, which I left at the MIP office. I did not check all receipts, or make copies. I said that it was my husband who did this so that we could invoke our rights.]

Q. Est-ce que votre époux est déjà de retour de l'Est? Si non, il reviendra quand? [Is your spouse already back from the East? If not, when will he be back?]

A. Mon époux n'est pas encore de retour. Moi je dépends de lui pour qu'il nous éclaire sur ce dossier (parce que il n'a pas de téléphone). [My husband is not back yet. I need him so that I can clarify the situation (because he did not phone).]

24. In her testimony at the hearing, the Applicant explained that her husband retrieved all the invoices and receipts for her to fill a Medical Insurance Plan (MIP) claim and that she submitted one for reimbursement in the amount of USD1,180. Although she had spent much more, she had been told that the limit for reimbursement in her professional series was USD1,180. All these documents were produced after the operation took place and after Dr. Monga had passed away because she did not know until later that her husband was considered her dependent under the United Nations Rules and that his medical expenses were reimbursable under the MIP.

25. At one stage her spouse was requested to visit the MONUC Medical Officer presumably to confirm whether he had undergone surgery. Her spouse did not do so because he was away and when he came back to Kinshasa from the field in January 2008 the case was already closed. She was also told that the Medical Officer needed an official request to examine her husband and she did not have one.

26. She could not explain why she refused to sign the typed version of her first statement she gave to the SIU investigator. She never visited Ingende Medical. She only went there to see her husband the evening after the surgery. On that occasion, she met with Dr. Gbamo who told her “we operated on your husband”. That was the first time she ever saw that doctor. Still, she could not confirm that he operated on her husband.

Testimony of Applicants' Witnesses

Testimony of Lieutenant Jean-Pierre Balingia

27. Lieutenant Jean-Pierre Balingia is an administrator at the Military Hospital of Kinshasa. He confirmed that Dr. Monga wa

November 2007. The investigator examined a number of documents; he interviewed the Applicant and Dr. Lipekene; he tried unsuccessfully to locate Dr. Gbamo; he visited Ingende Medical.

The documents examined by Mr. Debusschère

34. The witness examined the following documents:

(a) Invoice 0011/2007 from Ingende Medical for the amount of USD1,180. He concluded that the “invoice from Ingende medical amounting to US\$ 1,180 appears to be very amateurish. The heading and stamp both read Ingende Medical, while the text on the invoice reads as “Ingende Medicale” (“e” added to medical)”;

(b) A medical certificate from Ingende Medical bearing No. 0077/07 certifying that the Applicant’s spouse had undergone surgery there, signed by Dr. Gbamo. According to Mr. Debusschère “the medical certificate from Ingende Medical appears to be too professional compared to the dilapidated state of Ingende Medical. The heading and stamp both read Ingende Medical, while the text on the certificate reads as "Ingende Medicale" (“e” added to medical)”.

(c) A prescription for drugs signed by Dr. Gbamo, dated 25 February 2007, and an MIP claim for reimbursement dated 27 February 2007 and bearing the stamp of Ingende Medical. The conclusion of Mr. Debusschère was the following: “The handwriting of the person that wrote the prescription reappears on the MIP (column "generic name of drug", "mg" and "quantity"); while it is obvious the other two columns have been filled out by the pharmacist”;

(d) Mr. Debusschère found it suspicious that the total amount claimed as it appears on the invoice from Ingende Medical was USD1,180 while the total amount shown on the various receipts came to USD2,210. The other area of

38. Dr. Lipekene informed Mr. Debusschère about the following:

(a) He took over Ingende Medical from his late brother in February 2007;

(b) His brother used to work in cooperation with doctors unknown to him. He had heard of Dr. Gbamo from the nurses at Ingende Medical but had never met him personally;

(c) There were no records that Mr. Lokangu ever underwent surgery at the facility on 7 March 2007. His name was not reflected anywhere in the attendance books and financial records;

(d) Ingende Medical did not have the infrastructure or equipment for *vesical lithiasis* (urolithiasis) surgery. A patient can be followed at Ingende Medical but surgery was impossible;

(e) The medical certificates and invoices produced by the Applicant were unknown to him and he could not identify the signatures on them though the stamps on the documents confirmed that they

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51. Dr. Gbamo signed all the documents relating to the alleged operation without exception. The investigator therefore sought to locate Dr. Gbamo. Dr. Lipekene initially stated that he was away but would return. He mentioned that Dr. Gbamo worked at the UNIKIN campus. However, on discussing the matter again with Dr. Lipekene, he clarified that he had only heard of Dr. Gbamo and never met him personally. After the investigator's initial enquiries, Dr. Lipekene had enquired about Dr. Gbamo, but was never able to get in touch with him. Yet, the investigator did not stop there. He made enquiries of the relevant medical body to see if they knew of Dr. Gbamo. They did not. The Applicant stated that Dr. Gbamo did not, in fact, work at UNIKIN. There was therefore no other reasonable avenue of enquiry for the investigation to pursue. Dr. Gbamo could not be located.

52. It is not possible to say what impact the evidence from the Applicant's husband would have had on this case if it had been forthcoming. At no point did the Applicant put forward any evidence from her husband neither during the investigation (noting that the Applicant did not know that the investigation had been concluded), and, more importantly, nor in her response to the allegations of misconduct (by which time her husband was definitely available to provide clarifications to her). It therefore does not matter that the investigation was concluded after making further enquiries about the possibility that Dr. Gbamo had performed an operation on her husband at Ingende Medical. Even months after the conclusion of the investigation, the Applicant did not provide the information that could have led to further enquiries being made.

53. The documents produced by the Applicant appeared to be irregular and continue to appear so. However, not all

questions. The Applicant could not explain this anomaly during the trial, and more importantly, did not provide an explanation for it during the disciplinary process.

54. The Applicant's own conduct during the investigatory and disciplinary process raised doubts as to her honesty with regard to her claim.

55. The Applicant changed her account repeatedly, and in fact, has continued to do so.

59. It is also noted that in her response to the allegations of misconduct, the Applicant stated, apparently as an explanation, that her husband had used Ingende Medical because "people are suffering from various diseases, and they have to go where they find competent physicians and surgeons". Yet, in her evidence to the Tribunal, she stated that her husband had to be operated upon at Ingende Medical because it enabled him to pay by installment, an entirely new explanation.

60. Prior to the dismissal decision, the Applicant's husband was never available to provide an account of his operation. He had lost his phone and was away in a far off place. He did not return when he was due back. The Applicant never made her husband or any other evidence available when requested by the investigator or in response to her interview or in response to the allegations of misconduct. For example, the Applicant submitted pictures to the Tribunal. This was a course of action easily available to her in responding to the allegations of misconduct but she did not provide such evidence. Once again, the Respondent cannot be faulted for not considering evidence that was entirely within the Applicant's knowledge to provide but which she chose not to provide.

61. At the hearing, the Applicant provided new evidence, namely the testimony of Dr. Tshizubu and Lieutenant Balingia that Dr. Monga operated on her husband. Once again, no reason was provided as to why this information came forth only after the decision to dismiss her. The Respondent could never have identified these possible witnesses without the Applicant providing information as to the involvement of Dr. Monga and the Regional Military Hospital. There would have been no reason for the investigator, or the Respondent, to seek further information from Ingende Medical as to whether a doctor other than Dr. Gbamo had operated on the Applicant's husband, absent such an indication from the Applicant which she did not provide. While this information was clearly easily available to the Applicant when responding to the allegations of misconduct, she did not provide it.

62. The Applicant submitted in her Application that she did not provide the full facts when responding to the allegations of misconduct because she thought she

six or seven applications for employment with national institutions. Under re-examination, the Applicant stated that she meant she had applied for six or seven positions in the United Nations system and had, in fact, made many more applications for employment outside the United Nations system. This answer was disingenuous, as her evidence under cross-examination was unequivocal. Aggrieved staff members have a duty to mitigate their losses by demonstrating that they have made reasonable efforts to obtain other employment to limit their income loss during the relevant time period (*Mmata* 2010-UNAT-092; *Tolstopiatov* UNDT/2011/012). While in *Appleton* 2013-UNAT-347 it was decided that a staff member should not be denied compensation for failing to completely mitigate his or her loss, an award of compensation may be reduced proportionately to a staff member's mitigation efforts. Any compensation awarded should therefore be accordingly reduced to reflect the Applicant's failure to mitigate her losses.

Considerations

Role of the Tribunal in Disciplinary Matters

70. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is in no way bound by the findings of the JDC or the Secretary-General on the facts disclosed².

71. The United Nations Appeals Tribunal (UNAT) has held that in exercising judicial review in disciplinary cases, the Dispute Tribunal has to examine “(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the [...] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence”³.

² *Diakite* UNDT/2010/024.

³ *Abu Hamda* 2010-UNAT-022.

72. 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 perverse⁴.

73. The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and OHRM⁵.

74. UNAT further observed in *Hallal* 2012-UNAT-207 that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

75. In *Nyambuza* 2013-UNAT-364, UNAT stated: "Judicial review of a disciplinary case requires the Dispute Tribunal to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration⁶."

76. The submission of the Respondent is that it is not the investigation that is under scrutiny before the Tribunal. This submission is refe0 Tc0 Tw(5)Tj1

The investigation

81. On the issue of the conduct of the investigation, Meeran J. made the following observation in the case of *Mmata*

85. It was crucial to establish whether patients who were being treated in one facility, here the Military Hospital, could undergo surgery in another medical facility, here Ingende Medical, without the appropriate records of each medical facility recording that fact. This fact was all important especially as a witness interviewed by Mr. Debusschère had stated that this was the practice.

86. Mr. Debusschère interviewed the Applicant but he did not interview the Applicant's spouse as he could not contact him. Thus, the investigator closed his investigation without the benefit of the spouse's statement.

87. When told by Dr. Lipekene that the surgery undergone by the Applicant's husband could not have been performed there, Mr. Debusschère simply contented himself with taking notes of the conversation he had with the doctor. He did not, as an experienced investigator should do, record a statement from the doctor. He also did not pursue his investigation further in respect of the fact that Dr. Lipekene had mentioned to him that at times Dr. Monga did, in fact, perform surgeries at the clinic.

88. Mr. Debusschère failed to take a written statement from Dr. Lipekene on the state of the hospital, the type of operations that were carried out at Ingende Medical, the use made of the hospital by other doctors and the frequency at which surgeries were being performed there.

89. Without any medical expertise, Mr. Debusschère concluded hastily that Mr. Lokangu's surgery could not have been performed at Ingende Medical in view of its dilapidated state without making an effort to reconcile Dr. Lipekene's conflicting oral statements.

90. He also jumped to conclusions on the different handwriting on some documents although he was not a handwriting expert.

91. He found it strange that given the dilapidated stated of Ingende Medical that the documents produced by the Applicant were too neat and therefore were suspicious.

92. He found fault with the spelling of the French word “medical” on two documents but could not explain what conclusion he wanted to be drawn from that finding.

93. He focused on the fact that the same handwriting appeared on a prescription and the document issued by the pharmacist but without explaining how and why this was relevant.

94. On a number of matters, he either remained content with adopting a very superficial approach in the conduct of the investigation or remained content with very tenuous facts without probing further so as to rebut the assertion of the Applicant that a surgery had indeed taken place. On other occasions he hastily jumped to conclusions suggesting that he did not approach the investigation with an independent and open mind, free of bias. It is of the utmost importance that an investigator considers his/her role as an independent fact gathering agent. His/her role is not to pin down a staff member by any means possible.

95. The Tribunal finds that the investigation was poorly conducted. It was carried out in a slipshod and unprofessional manner. The investigator also overstepped his mandate by recommending that disciplinary proceedings be initiated against the Applicant. He should have limited himself to gathering the facts in a proper and rational manner instead of substituting himself for the DMS and OHRM.

96. This Tribunal reiterates the conclusion in *Mushema* UNDT/2011/162, that:

[...] since a *prima facie* case of unsatisfactory conduct is based on the outcome of the investigation, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted. [...] Since the preliminary

husband was not available during the inves

Respondent then embarked on another track and proceeded to cross-examine the Applicant and her husband on the receipts and invoices that they produced to claim a reimbursement by attempting to establish th

quasi criminal in nature. In the case of

Tribunal also rejects as totally unreliable the opinion expressed by Mr. Debusschère that Ingende Medical was ill equipped for surgeries.

114. It was submitted on behalf of the Respondent that the Applicant contradicted herself a number of times by giving different versions. This is correct. However, the contradictions of a staff member facing a charge of misconduct are only relevant and decisive in the overall evaluation of the ev

believed she was entitled to as reimbursement. Notwithstanding the above the Applicant's husband, Mr. Lokangu was lengthily examined and cross examined on the amounts appearing on the invoices that were submitted in support of the claim of USD1,180.

118. His testimony boils down to the following on the issue of the invoices and the mode of payment. In DRC, for financial reasons, it is common practice to have a private agreement between doctors and patients to be operated on in medical facilities other than where they usually go for treatment. Payment to the doctors is not made all at once but in installments. Therefore, the amount of USD1,180, that could not be paid all at once, was the total of different cumulative bills that were paid as installments. There was no separate invoice for every bill that was paid which means that at the time of submitting the MIP claim, they did not have all the invoices. That is why he went to collect all the invoices after the operation took place to be reimbursed which explains why some of them are antedated.

119. The charge of submitting fraudulent documents was never put to her

Conclusion

121. The Tribunal therefore concludes that the Respondent has failed to establish the charge leveled against the Applicant by clear, cogent and convincing evidence. Since the established facts in this case do not legally amount to misconduct, the Tribunal concludes that the disciplinary measure imposed on the Applicant was unlawful *ab initio* and therefore, a violation of her rights.

Compensation

122. In her application, the Applicant is praying for a rescission of the decision of the summary dismissal and compensation in the amount of two years net base salary under article 10.5 of the Statute of the Tribunal. She further claims moral damages in the amount of two years net base salary for loss of career prospects and loss of reputation under article 10.5(b) of the Statute.

123. The Tribunal has already pointed out that the investigation in the present case was carried out on a mere hunch because the Human Resources Officer at MONUC found the claim submitted by the Applicant to be suspicious. The decision to dismiss her was premised on the conclusions of an incomplete and flawed investigation and, therefore, was inconsistent with the minimum standards of due process, fairness, due diligence, professionalism and impartiality.

124. Consequently, the Tribunal makes an award of one year's net base salary¹⁵ in favour of the Applicant as provided for under article 10.5 of its Statute for monetary loss arising out of the unfair dismissal and for loss of opportunity to secure another job owing to the opprobrium of the dismissal hanging over her head.

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(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a

objective and honest review of the evidence. Had this been done, the Applicant would have been spared the humiliation, stress and distress she has been made to undergo following the decision to dismiss her summarily.

131. In addition the Tribunal makes an award in the amount of USD5,000 as moral damages in favour of the Applicant.

(Signed)

Judge Vinod Boolell

Dated this 13th day of October 2014

Entered in the Register on this 13th day of October 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi