



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Isaac Endeley

RIZQY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Isavella Maria Vasilogeorgi, AS/ALD/OHR, UN Secretariat
Miryoung An, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Mission for the Referendum in Western Sahara (“MINURSO”), filed an application with the Tribunal contesting the decision to impose on her the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity.
2. The Respondent in his reply submits that the application is not receivable and that the contested decision is lawful.
3. For the reasons stated below, the Tribunal finds the application receivable and the contested decision lawful. Consequently, it rejects the application.

Facts

4. The Applicant joined the Organization on 21 August 2006 as a Team Assistant at MINURSO’s Guard Force Unit in Laayoune, Western Sahara, at the G-3 level, a position she held until her separation from service.
5. On 6 June 2018, the Applicant submitted to Cigna, the Organization’s global health insurance provider, a claim for reimbursement of expenses under the Medical Insurance Plan (“MIP”). Attached to the claim were three type-written invoices purportedly issued by Al Hidaya Pharmacy (“AHP”) in Laayoune, totalling 5,377.20 Moroccan Dirham (“MAD”), equivalent to approximately USD578.13.
6. Cigna processed a payment of USD462.51 to the Applicant in settlement of her medical expenses.
7. Cigna’s Fraud Investigation Unit (“FIU”) inquired with AHP about the authenticity of the three invoices the Applicant submitted on 6 June 2018. By email of 21 May 2019, AHP informed FIU that none of the invoices that the Applicant had submitted were authentic and that they had not been issued by AHP. AHP further indicated that any genuine invoices issued by them are handwritten, not printed or copied, and that the Applicant was unknown to the pharmacy as her name was not recorded in the pharmacy’s system. FIU thus concluded that the three

invoices the Applicant had submitted were not authentic and requested her to return the payments made to her in relation to her claims of 6 June 2018.

8. On 9 July 2019, the Investigations Division of the Office of Internal Oversight Services (“OIOS”) received from the Finance Division of the Department of Management Strategy, Policy and Compliance (“DMSPC”) at the United Nations Headquarters (“UNHQ”) in New York, a report of possible misconduct implicating several staff members at MINURSO. The Applicant was one of those staff members.

9. OIOS investigated the reported issue and interviewed the Applicant on 24 September 2019.

10. On 30 April 2020, OIOS issued its investigation report. OIOS found, *inter alia*, that “the evidence adduced [was] supportive of Cigna’s FIU findings that [the Applicant] had submitted three false invoices to Cigna, totalling [USD]578.13”.

11. By memorandum dated 18 March 2021, the Director, Administrative Law Division, Office of Human Resources informed the Applicant of the allegations of misconduct against her. She was invited to provide her comments in response to said allegations within one month.

12. On 11 June 2021, following an extension of the initial time limit, the Applicant submitted her comments on the allegations of misconduct against her.

13. By letter dated 3 December 2021, the Assistant Secretary-General for Human Resources (“ASG/HR”), on behalf of the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance (“USG/DMSPC”) informed the Applicant of the decision to impose on her the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity. The disciplinary sanction was effective upon the Applicant’s receipt of the letter on 6 December 2021. The Applicant was also informed that she must reimburse the Organization the amount of USD462.51, representing the financial loss to the Organization attributable to her misconduct.

14. The Applicant was separated from service on 6 December 2021.
15. By email of 2 March 2022 addressed to the UNDT Nairobi Registry, the Applicant filed her application against the contested decision. The Registry acknowledged receipt of said application and instructed the Applicant to file her application using the eFiling portal.
16. On 16 April 2022, the Applicant refiled her application via the eFiling portal which routed her case to the UNDT New York Registry.
17. On 13 May 2022, the Respondent filed his reply challenging mainly the receivability of the application.
18. On 27 May 2022, the Applicant filed a motion addressing the Respondent's arguments on receivability indicating, *inter alia*, that she had filed her application on 2 March 2022 with the UNDT Nairobi Registry.
19. On 1 June 2022, the Respondent filed his reply to the Applicant's motion.
20. By Order No. 38 (NY/2023) of 1 May 2023, the Tribunal informed the parties that it would decide on the receivability of the application in its final judgment. The Respondent was ordered to file a submission developing further his position on the merits of the application by 11 May 2023 and the Applicant was granted the opportunity to file a rejoinder on the Respondent's submission by 22 May 2023. The parties filed their respective submissions as instructed.

Consideration

Receivability

21. In accordance with staff rule 11.4(b) and art 8.1(ii) of the Tribunal's Statute, where management evaluation of the contested decision is not required, an application should be directly filed with the Tribunal within 90 calendar days of the applicant's receipt of the contested administrative decision.
22. It is not disputed that the Applicant was informed of the contested decision by letter dated 3 December 2021, which the Applicant received on

6 December 2021. Therefore, the deadline for the Applicant to file her application before the Tribunal was 6 March 2022.

23. The evidence on record shows that the Applicant filed her application via email on 2 March 2022 with the UNDT Nairobi Registry indicating that “due to a technical error” she did not have access to the eFiling portal. On 3 March 2022, the UNDT Nairobi Registry acknowledged receipt of the Applicant’s email indicating the following: “We note the date of filing of your application as 2 March 2022 but please note that we shall not process your application further until it is filed in our [e]Filing portal, CCMS”. The Registry also advised the Applicant to contact the eFiling service support for any technical questions concerning the eFiling portal.

24. The Applicant then filed her application via the eFiling portal on 16 April 2022. Her application was received by the New York Registry.

25. According to para. 10 of Practice Direction No. 4 “[a]ll applications shall be submitted electronically through the eFiling portal unless the filing party does not have access to it”. The same Practice Direction further provides at para. 11 that “[i]f the filing party does not have access to the eFiling portal, the filing may be made by email”.

26. The Tribunal notes that the application filed on 2 March 2022 via email is essentially the same as that filed on 16 April 2022 via the eFiling portal. Consequently, in line with Practice Direction No. 4, para. 11, the Tribunal finds that the present application is receivable. To rule otherwise would breach the Applicant’s fundamental right to access to justice.

The scope of judicial review in disciplinary cases

27. The Appeals Tribunal has held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision (see *Sanwidi* 2010-UNAT-084 and *Santos* 2014-UNAT-415).

28. The Appeals Tribunal has also determined what the role of this Tribunal is when reviewing disciplinary cases (see *Mahdi* 2010-UNAT-018 and *Haniya*

2010-UNAT-024). In the case at hand, this Tribunal considers that the issues to be examined are:

- a. Whether the facts on which the disciplinary measure was based have been established according to the applicable standard;
- b. Whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. Whether the disciplinary measure applied is proportionate to the offence; and
- d. Whether the Applicant's due process rights were respected during the investigation and the disciplinary process.

Have the facts on which the disciplinary measure was based been established?

29. According to the jurisprudence of the Appeals Tribunal, when the disciplinary sanction results in separation from service, the alleged misconduct must be established by clear and convincing evidence. This standard of proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. In other words, it means that the truth of the facts asserted is highly probable (see *Molari* 2011-UNAT-164).

30. It is not contested that on 6 June 2018, the Applicant submitted a request for reimbursement of medical expenses from the MIP to Cigna, attaching three type-written invoices purportedly issued by AHP totalling MAD5,377.20 equivalent to approximately USD578.13. At the time of the submission, the Applicant certified the accuracy of the information she had filed. Based on that submission, Cigna reimbursed the Applicant USD462.51.

31. Following FIU's inquiry with AHP about the authenticity of the three invoices the Applicant submitted on 6 June 2018, AHP informed FIU that none of the invoices that the Applicant had submitted were authentic and that they had not been issued by AHP. AHP indicated that genuine AHP invoices were handwritten, not printed. AHP stated that the false invoices were inflated, and the prescribed

medication was not consistent with the diagnosis on the invoices. Further, it noted that the name of the MIP member on the false invoices was unknown to AHP. FIU thus concluded that the three invoices the Applicant had submitted were not authentic and requested her to return the payments made to her in relation to her claims of 6 June 2018.

32. The evidence shows that when OIOS started its investigation, it contacted AHP who provided a written statement on 4 October 2019. AHP's statement was consistent with that previously provided to FIU/CIGNA. AHP confirmed that the invoices submitted by the Applicant to Cigna on 6 June 2018 were not issued by AHP. AHP clarified that neither the stamp nor the signature on the submitted invoices were used by AHP; AHP also stated that the Applicant was not recorded as a client in AHP's system and that AHP only issued handwritten invoices.

33. While the Applicant requests an expert analysis of the authenticity of the stamp used on the invoices she submitted on 6 June 2018, the Tribunal considers that there is no need for an expert opinion because AHP did not recognize the stamp and, in any event, it would not have changed the fact that said invoices were not handwritten as was AHP's practice.

34. The Tribunal notes that during her interview with OIOS, the Applicant stated that she received the three disputed invoices from AHP. However, she was not able to explain why these invoices were printed whereas AHP only issued handwritten invoices. The Applicant stated that, on two occasions, she bought the medication herself at the pharmacy and that on a third occasion, her sister bought the medication for her.

35. However, in her communications with the Office of Staff Legal Assistance ("OSLA") that took place between 10 December 2021 and 3 February 2022, the Applicant stated that she had received the invoices from Mr. KB, who was an intermediary between herself and AHP. As OSLA pointed out at the time, this

material change in the Applicant's narrative undermines her credibility, particularly given that she provided testimony to OIOS under oath during the investigation¹.

36. The Tribunal also notes that in her memorandum dated 25 April 2022, the Applicant recanted her previous statement to OIOS that she had obtained two invoices herself and one invoice via her sister. In her 25 April 2022 submission, the Applicant acknowledged that her statement to OIOS was not truthful. She alleged that she was misled by Mr. KB, who was also a MINURSO staff member, and that she did not disclose his identity to OIOS because she was under threat and could not afford to take any risk at that time. However, she did not provide any evidence regarding her allegations.

37. In any event, regardless of the Applicant's change in the narrative of the facts which seriously undermines her credibility before the Tribunal, it remains that on 6 June 2018, she submitted three false invoices for reimbursement to Cigna.

38. In light of the above, the Tribunal finds that the facts on which the disciplinary measure was based have been established through clear and convincing evidence and will now turn to the analysis of other elements subject to judicial review.

Do the established facts amount to misconduct?

39. The Tribunal agrees with the Respondent in that by submitting false invoices, the accuracy of which she certified, in order to obtain reimbursement for medical expenses from Cigna, the Applicant violated staff regulations 1.2(b) and 1.2(q), and section 10.1 of ST/AI/2015/3 (Medical insurance plan for locally recruited staff at designated duty stations away from Headquarters).

40. In this respect, the Tribunal refers to the sanction letter which correctly indicates that by submitting the invoices that contained false information to Cigna, the Applicant failed to uphold the highest standards of integrity (staff regulation

¹ The Tribunal notes that the use of a statement made to counsel that is being used against the client (Applicant) could be unjust and a breach of lawyer/client privilege communications. However, this information was contained in an attachment to the application.

1.2(b)) and failed to exercise reasonable care in utilizing the MIP, a property and asset of the Organization (staff regulation 1.2(q)).

41. The Applicant also failed to ensure that all the claims submitted, including those relating to services for family members, were accurate, complete, and complied with MIP rules (section 10.1 of ST/AI/2015/3).

42. Consequently, the Tribunal finds that the Applicant's behaviour as per the established facts amounts to misconduct.

Was the disciplinary measure applied proportionate to the offence?

43. It is well-established jurisprudence that the Secretary-General has wide discretion in applying sanctions for misconduct and that at all relevant times, he must adhere to the principle of proportionality (*Applicant* 2013-UNAT-280). Once misconduct has been established, the level of sanction can only be reviewed in cases of obvious absurdity or flagrant arbitrariness (*Aqel* 2010-UNAT-040).

44. In *Rajan* 2017-UNAT-781, the Appeals Tribunal held that:

The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

45. In *Payenda* 2021-UNAT-1156, the Appeals Tribunal reiterated that "dishonest conduct by definition implies an element of intent or some element of deception. Deliberate false statements, misrepresentations and a failure to disclose required information are invariably dishonest". The Appeals Tribunal further held in *Rajan* that "[a]s a general rule, any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal".

46. The sanction letter indicates that in determining the appropriate sanction, the USG/DMSPC considered the nature of the Applicant's actions, the past practice of the Organization in matters of comparable misconduct as well as mitigating or

aggravating factors. The USG/DMSPC deemed that there were no aggravating factors and considered the Applicant's approximately 14 years of service in a hardship duty station as a mitigating factor in her case.

47. The USG/DMSPC then decided to impose on the Applicant the disciplinary measure of separation from service with compensation in lieu of notice and with termination indemnity in accordance with staff rule 10.2(a)(viii).

48. The Tribunal consulted the Compendium of Disciplinary Measures from 1 July 2009 and 31 December 2021² and noted that in cases of fraud, misrepresentation, and false certification of information, the Administration usually imposed disciplinary measures at the stricter end of the spectrum (e.g., separation or dismissal).

49. The Tribunal notes that in similar cases involving the submission of false medical insurance claims, staff members were often separated from service without termination indemnity whereas the Applicant received termination indemnity as her past long service was properly considered as a mitigating factor.

50. In her application, the Applicant claims that other staff members who engaged in similar misconduct as hers were not separated. She refers to a case from the Compendium (reference No. 588) involving false medical insurance claims in which the sanction imposed was demotion by one grade, with deferment for three years of eligibility for promotion and financial recovery.

51. Nevertheless, each case is determined on its own merits, including regarding applicable aggravating and mitigating circumstances and the Compendium shows that in most of the cases involving comparable misconduct, the sanction imposed was separation from service. Therefore, the Tribunal considers that there is no need to order the production of any additional evidence in this respect.

² The Compendium of Disciplinary Measures is available at the following link: <https://hr.un.org/materials/compendium-disciplinary-measures>

52. The Applicant also alleges that given the small monetary value of the false invoices, she should not have been separated. However, the amount involved in a case of fraud is irrelevant as any staff member of the Organization is expected to uphold the highest standards of integrity.

53. In light of the above, the Tribunal finds that the disciplinary measure imposed on the Applicant was proportionate to the offence committed.

Were the Applicant's due process rights respected during the investigation and the disciplinary process?

54. According to the Appeals Tribunal's jurisprudence, due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated (*Akello* 2013-UNAT-336), whereas at the preliminary investigation stage, only limited due process rights apply (*Powell* 2013-UNAT-295).

55. After having carefully reviewed the case record, including the investigation stage and the disciplinary process, the Tribunal is satisfied that the Applicant's due process rights were fully respected throughout both phases.

56. The Tribunal notes that OIOS informed the Applicant about the nature of the allegations against her prior to her interview, she was interviewed by OIOS in connection with the investigation and was presented during her interview with documentary evidence against her. She was also given the opportunity to provide additional information to the investigators but did not avail herself of that opportunity.

57. During the disciplinary process, the Tribunal notes that the Applicant was informed of the charges against her and was provided with all the supporting documentation. She was informed of her right to be assisted by counsel and was also given the opportunity to provide her comments on the allegations against her. She was, furthermore, granted an extension of time for the submission of her comments, which were properly considered as reflected in the sanction letter.

58. In her application, the Applicant claims that her due process rights were violated because OIOS did not seek to cooperate with the Moroccan authorities in

the investigation as per art. 50 of the Status of Forces Agreement (“SOFA”) between MINURSO and Morocco. However, since the Applicant’s status and conditions of employment are only regulated by the Organization’s legal framework, including the Staff Regulations, Staff Rules, and other internal administrative issuances and procedures, her claim is without merit.

59. The Applicant also alleges that “the principle of the freedom of the evidence was not respected because Cigna did not recognize the invoices”. The Tribunal considers that this argument is unclear and, as such, the Tribunal will not speculate on the Applicant’s intention in this respect.

60. The Applicant further asserts that the investigation violated the presumption of innocence because she was not allowed to confront AHP’s owner and because the doctor who prescribed the medication was not required to testify as a witness.

61. The Tribunal notes that ST/AI/2017/1 titled “Unsatisfactory Conduct, investigations and the disciplinary process”, does not provide for a direct confrontation between the subject and witnesses. Instead, it provides that the subject of the investigation should be given the opportunity to provide her or his comments during the investigation and the disciplinary process, which was done in the present case.

62. Furthermore, the Tribunal considers that the testimony of the Applicant’s doctor is irrelevant to establish the authenticity of the invoices that were purportedly issued by AHP.

63. The Applicant also claims that her due process rights were violated because she was not assisted by counsel during the investigation. In this respect, the Tribunal recalls that this right only kicks in with the initiation of the disciplinary process, that is, once the staff member received the Allegations Memorandum. It is clear from the content of the Allegations Memorandum that the Applicant was duly informed of her right to avail herself of the services of counsel, including OSLA.

64. Lastly, the Tribunal considers that the Applicant's argument that a "debtor's liability to a creditor" is extinguished after a certain amount of time is misplaced and has no basis in the Organization's legal framework.

65. For the above-mentioned reasons, the Tribunal finds that the Applicant's allegations of procedural irregularities are unsubstantiated and that her due process rights were respected during the investigation and the disciplinary process.

66. Consequently, the Tribunal finds that the contested decision was lawful.

Conclusion

67. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 14th day of June 2023

Entered in the Register on this 14th day of June 2023

(Signed)

Isaac Endeley, Registrar, New York