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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/055

Judgment No.: UNDT/2021/064

Date: 7 June 2021

Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

DIALLO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Maître Sekou Koundiano

## **Introduction**

1. On 3 June 2019, the Applicant, a former senior National Officer (“NO”) at the C-level, working with the United Nations Development Programme (“UNDP”) in Conakry, Guinea, filed an application before the Dispute Tribunal.<sup>1</sup> She contests a disciplinary measure of dismissal imposed on her.<sup>2</sup>

2. The Respondent filed a reply on 9 July 2019.

## **Facts and procedure**

3. The Applicant joined UNDP in Conakry, Guinea, in 1988 as a Programme Specialist. On 15 January 2004, her position changed to Administrative Specialist. On 14 October 2011, she was granted a permanent appointment effective 30 June 2009. At the time of her separation, the Applicant was an Administrative Analyst at the NO-C Grade, Step 10.<sup>3</sup>

4. As of 1 July 2013, the Applicant was insured under Cigna International Health Service (“Cigna”).<sup>4</sup> On 13 January 2017, two invoices bearing the Applicant’s name and supported by two payment receipts were submitted to Cigna by mail, for medical expenses allegedly incurred at Clinique Ambroise Pare (“Clinique”), a medical provider in Conakry, Guinea. The Applicant sought reimbursement of the expenses totalling to Guinean Franc 10,707,800 (then-USD1,142.63).<sup>5</sup> The Applicant did not submit a signed Cigna claim form.<sup>6</sup>

5. On 19 January 2017, Cigna reimbursed the Applicant the sum of USD914.11.<sup>7</sup>

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<sup>1</sup> Application, section I.

<sup>2</sup> Application, section V; Application annex 2.

<sup>3</sup> Reply, annex 3, section I.

<sup>4</sup> Reply, annex 2, p. 44.

<sup>5</sup> Ibid, p. 45.

<sup>6</sup> Ibid. p. 52.

<sup>7</sup> Ibid, p. 59.

6. In November and December 2017, Cigna conducted an investigation into claims for reimbursement of medical expenses filed by UNDP Guinea staff members, including the Applicant. In reviewing the Applicant's claims, Cigna became concerned by the fact that the Applicant had apparently paid in full notwithstanding that Cigna had a direct payment agreement with the Clinique.<sup>8</sup> Accordingly, the Cigna Fraud Investigations Unit ("FIU") conducted an investigation, and among others, determined



committed himself. MK acknowledged that the actual culprit of the wrong act, was him, but not the Applicant.<sup>21</sup>

17. The Tribunal scheduled a hearing to take place on 24-25 March 2021 to take testimony from the Applicant, MK, AD - the UNDP investigator, and BY, the latter proposed by the Applicant as her character witness. The hearing was to take place via Kudo Platform, with interpreters arranged at the request of the Applicant and her attorney. On 17 March 2021 and on 22 March 2021, all the participants to the hearing, including the Applicant and Counsel, were trained on the functioning of Kudo. Before the commencement of the hearing on 24 March 2021, the Applicant, her Counsel and her two witnesses were all in attendance. However, as the hearing proceedings commenced, the Applicant and her Counsel became disconnected from the platform. The witnesses remained. When contacted through a telephone by the Registry, the Applicant's Counsel informed the Tribunal that their internet connection was so bad that she could not continue with the p

categorically refused going to the UNDP premises. Instead, the Applicant requested to file a final brief of her case by 26 March 2021.

20. The Respondent's Counsel concurred with the Applicant. She requested for an opportunity to respond to the Applicant's final brief once it was filed.

21. The Applicant filed the brief as she had committed to, on 26 March 2021. The Respondent filed a response to the Applicant's brief on 24 May 2021.

### ***Submissions***

#### *Applicant's submissions*

22. The Applicant's position is that the charges against her are not well founded. According to her, some among the receipts g

cannot allow me to keep silent anymore. I take days without sleeping for I was the cause of my colleague's dismissal.<sup>23</sup>

24. In line with the above, the Applicant maintains that her matter is a case of negligence in that she had entrusted processing her documents to another person. She, therefore, deserves a more lenient

were signed by the Applicant; and (7) the Receptionist at the Clinique admitted that he provided the Applicant with the false documents.

30. The Respondent seeks to rely on MK's interview with OAI, where he admitted that the Applicant knew and was involved in the fraud.<sup>24</sup> The Respondent further observes that although the Applicant provided the Tribunal with a statement from MK, where he admits that he is the one who had manipulated the documents, the Applicant has not produced any evidence that would suggest that she had taken any action against MK for allegedly adding the false documents to her envelope.

31. The Respondent submits that it is uncontested that during her 28 March 2018 interview with OAI investigators, the Applicant stated that: she had put claims in an envelope for reimbursement by Cigna; she recognized invoices FA 198636 and FA 198661 as being the ones sent to Cigna; these invoices reflected payments that she had made resulting in the Clinique issuing receipts on record; she knew that she only had to pay 20% of her medical expenses to the hospital but it was her choice to pay 100% of the expense and then seek reimbursement from Cigna.

32. The Respondent further submits that during her second interview with the OAI on the morning of 30 March 2018, the Applicant still maintained that: she had certified and put the documents that were provided to her by the Clinique in the envelope; she had paid a cashier at the Clinique for the invoiced treatments while she had failed to pay attention to what was listed on the invoices; and that one of the procedures she received was related to an unexpected pregnancy. The Applicant also admitted that after Cigna contacted her, she tried to contact Mr. S, a Receptionist at the Clinique.

33. In addition, the Respondent submits that it is uncontested that during her third interview with the OAI investigators, the afternoon of 30 March 2018, the Applicant admitted that: she prepared the documents for reimbursement and left them in an envelope with MK for his onward transmittal. The Applicant further stated that after Cigna contacted her, she reached out to MK to understand what happened and ~~ed~~ ed



stated that he thought he was helping her out by adding invoices to the pouch. The Applicant also stated that she had not brought this up in prior interviews because she did not want to create problems for MK and that MK had not asked her for anything for sending invoices to Cigna for reimbursement for her benefit

into account all relevant mitigating circumstances, including the fact that the Applicant refunded the amount to Cigna, as well as that she was a staff member with a 25-year record of serving UNDP who was nearing retirement, with no prior record of misconduct. However, the Respondent maintains that the Applicant's conduct is aggravated by the fact that, as an NO-C, the Applicant was a senior staff member who had heightened responsibilities, especially in respect to MK, a G-6 staff member. In addition, the Applicant failed to express remorse for her actions, continued to maintain that her expenses and her actions were legitimate, even in the face of evidence to the contrary, and engaged in conduct with someone whom she admitted she knew had previously committed the same misconduct in 2017.

38. On damages, the Respondent contends that the Applicant has not made any claim, nor provided any evidence in support of damages. Accordingly, no damages may be awarded by the Tribunal in this case.

39. In view of the foregoing, the Respondent contends that the application should be dismissed in its entirety.

## **Considerations**

### *Scope of review*

40. A review carried out by the UNDT in disciplinary cases encompasses the following elements:

- a. Whether facts were established by clear and convincing evidence;
- b. Whether the facts amount to misconduct;
- c. Whether the sanction is proportionate to the gravity of the offence and;

d. If the staff member's due process rights were guaranteed during the entire proceeding.<sup>29</sup>

41. The Appeals Tribunal has clarified that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General".<sup>30</sup> In this regard, "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review", explaining that a "judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".<sup>31</sup>

- b. Receipt No. 605, dated 5 July 2016, was issued for the payment of GNF 4,908,100. The receipt reflects that the payment corresponds to invoice FA 198636.
- c. Receipt No. 606, dated 4 October 2016, was issued for the payment of GNF 5,799,700. The receipt reflects that the payment corresponds to invoice FA 198661.<sup>33</sup>

44. The Tribunal shares the following, uncontested observations made by the Respondent:

- a. There is no record at the Clinique of the Applicant having been a patient, nor having made payments, to the Clinique around the dates reflected on these documents;
- b. The invoices reflect the sums due as of the date of the invoices, 20 December 2016. However, the receipts that were issued upon receipt of payment predate the corresponding invoices by several months;
- c. The receipts, despite having been issued three months apart, are numbered consecutively and do not reflect the stamps and signatures used by the Clinique;
- d. Invoice FA198636 reflects that the Applicant was the recipient of a “spermocytogramme”, a test that is only conducted on men, and an “Aspiration Intra-Uterine”, a procedure used to end a pregnancy (the Applicant was 54 years of age at the time); and
- e. The cost of the medical procedures and the tests do not correspond to the Clinique’s normal fee schedule.

45. The invoices and receipts, by all appearances, and admittedly by everyone concerned, are false.

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<sup>33</sup> Reply, annex 2, p. 53-67

46. Other documents show that the Applicant accepted the undue reimbursement obtained on the basis of

benefit the Applicant who was his superior. The Tribunal, however, does not accept that in sending the invoices MK would have acted beyond the Applicant's knowledge and consent to generate financial gain for her as an anonymous "gift", as this is motivationally improbable. On the other hand, at present, not being United Nations staff member anymore, MK takes no risk in furnishing such statements as he pleases.

51. Based on the above, the Tribunal concludes that the Respondent has substantiated with clear and convincing evidence the factual basis of the contested decision.

*Failure to report misconduct*

52. The Tribunal recalls

55. As concerns the alleged instances in 2017, the Tribunal does not find it demonstrated that the Applicant

the Applicant reimbursed Cigna the money that had been given to her, the mere fact that she knowingly submitted unauthentic invoices and receipts constitutes a violation of staff regulation 1.2(b) and amounts to misconduct.

60. The Applicant's case is aggravated by the fact that she occupied a senior position, where she was expected to exhibit the highest level of integrity, and not to connive with the junior staff to defraud the Organization.

61. Based on the foregoing, the Tribunal finds that the Applicant's actions amount to misconduct in accordance with staff rule 10.1(a).

*Whether the sanction is proportionate to the offence.*

62. The Tribunal's review of proportionality of disciplinary measures is done with deference to discretionary powers of the Secretary-General in this field.<sup>38</sup> The Tribunal reviews whether the measure in question is legal and remains in a rational connection with the gravity of the offence and the objective of disciplining.<sup>39</sup>

63. The Tribunal finds that the sanction letter dated 8 March 2019 demonstrates a proper consideration of the nature of the Applicant's actions as well as the mitigating and aggravating factors. In this respect, contrary to the Applicant's claim, her 25-year service, with continuous respect of the Organization's regulations and rules, is of little weight in the face of the gravity of the offence. The Tribunal concurs that retaining the Applicant in service would be irreconcilable with the values of the Organization. It recalls that the practice of the Organization in cases involving staff submitting false claims for reimbursement of medical expenses is consistent in that disciplinary measures have been imposed at the strictest end of the spectrum, namely, separation from service or dismissal in accordance with staff rule 10.2(a).<sup>40</sup>

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<sup>38</sup> *Portillo Moya* 2015-UNAT-523, paras 20-21.

<sup>39</sup> *Samandarov* 2018-UNAT-859, para. 21.

<sup>40</sup> Practice of the Secretary-General in disciplinary matters and cases of possible criminal behavior, 1 July 2011 to 30 June 2012; report of the Secretary-General to General Assembly, 24 July 2012, paras. 36-39.



64. The Tribunal's finding on the insufficiency of basis for the charge of failure to report misconduct does not alter this conclusion.

65. In view of the above, the Tribunal finds that the disciplinary measure of dismissal was proportionate to the offence committed.

### **JUDGMENT**

66. In light of the Tribunal's conclusions, the application is dismissed.

*(Signed)*

Agnieszka Klonowiecka-Milart

Dated this 7<sup>th</sup> day of June 2021

Entered in the Register on this 7<sup>th</sup> day of June 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi