Case No.: UNDT/NBI/2023/055
Judgment No.: UNDT/2024/084
Date: 24 October 2024

Introduction

1. The Applicant, a former Construction and Maintenance Worker at the United Nations Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO"), filed an application contesting a decision of 1 May 2023 to separate him from service with compensation *in lieu* of notice and without termination indemnity.

Factual background

2. The Organization operates a health insurance scheme, the Medical Insurance Plan ("MIP"), for the benefit of active staff members who serve at designated duty stations and their eligible family members.

3. Cigna International Health Service ("Cigna") administers the MIP on behalf of the Organization, reviews claims submitted, and processes reimbursements for insured claimants.

4. At the time of the contested decision, the Applicant and his spouse were insured under Cigna.

5. On 6 April 2018, Cigna wrote to the Applicant via email informing him that they had received a payment request from Centre Hospitalier Saint Michel ("CHSM") in Kanya Bayonga, a remote city in North Kivu Province, Democratic Republic of Congo, for hospitalisation of the Applicant's wife at CHSM on 5 April 2018. By the same communication, Cigna requested the Applicant to confirm that his wife was actually hospitalised at CHSM on 5 April 2018.

6. On the same day, a reply was received from the Applicant's United Nations email account stating "Bien sur que oui…", thus confirming that his spouse was hospitalised at CHSM.

7. On 17 April 2018, Cigna received a claim of USD1,533.00 from CHSM for the hospitalisation of the Applicant's wife at CHSM from 5 to 12 April 2018, including treatment and medication. The claim was supported by an invoice

14. On 23 December 2022, the Applicant received allegations of misconduct from the Director, Administrative Law Division, Office of Human Resources, informing him as follows:

> On the basis of the Investigation Report, the supporting documentation and the additional information obtained by OHR, it has been decided to initiate a disciplinary process, pursuant to Staff Rule 10.1(c), by issuing written allegations of misconduct against you pursuant to Section 8.3 of ST/AI/2017/1 ("Unsatisfactory conduct, investigations and the disciplinary process"), in accordance with Section 8.2(a) of ST/AI/2017/1 and Chapter X of the Staff Rules.

15. The Applicant submitted his response to the allegations on 28 December 2022.

16. On 1 May 2023, the Applicant received the sanction letter imposing the discipline mentioned in para. 1.

Procedural background

17. On 10 July 2023, the Applicant filed the present application. The Respondent filed a reply on 10 August 2023.

18. The Tribunal held a hearing on the merits on 22 August 2024, at which the testimony of four witnesses, including the Applicant, was taken.

19. The parties filed their closing submissions on 23 September 2024. The Applicant filed a rebuttal to the Respondent's submission on 30 September 2024. There was a delay due to the need to translate the Applicant's closing submissions from French to English. The translations were received on 18 October 2024.

Consideration

Standard of review and burden of proof

20. The Tribunal's Statute, as amended on 22 December 2023, provides that in reviewing disciplinary cases:

para. 45). UNAT clarified that clear and convincing evidence can either be "direct evidence of events" or may "be of evidential inferences that can be properly drawn from other direct evidence." *Id.*

25. In this case, there is really only one factual dispute. It is agreed by the parties that:

a. On 6 April 2018, Cigna sent an email to the Applicant's official UN address informing him that they had received a request from CHSM to pay for a hospitalization of Applicant's wife at CHSM on 5 April 2018 and requesting the Applicant to confirm whether that hospitalization occurred.

b. Within 47 minutes, a reply was sent from the Applicant's email account stating "Bien sur que oui…", ("yes, of course."), thereby confirming that his spouse was hospitalised at CHSM on that date.

c. Subsequently, Cigna received a claim of USD1,533.00 from CHSM for hospitalisation of the Applicant's wife during the period in question. However, investigation revealed that CHSM did not exist.

26. The sole disputed fact is whether the Applicant sent the confirmation email. The Organization concluded that he had, while the Applicant said he did not. Instead, the Applicant stated that the email probably was sent by a former MONUSCO colleague, "RB"[1], who used the Applicant's official United Nations email account.

27. In fact, in another investigation into Cigna fraud at MONUSCO (OIOS case number 0955/18), OIOS investigated claims made in the name of the Applicant. During his interview in that investigation, the Applicant stated that certain documents were "from my computer but is not me who did this." Ultimately, OIOS found that "[RB] admitted two people at *Centre Medical Club des Enseignants*,

[1] The pseudonym "RB" is used because this individual has not had the allegations of misconduct adjudicated against him as yet.

Goma and fraudulently submitted claims for reimbursement in the name of Mr. Kisumiro."

28. In this instant case, the Applicant was interviewed twice by OIOS. The first time he stated that he and his family all resided in Goma, and that he had no family members residing in Kanya Bayonga. He said his wife had never received treatment at CHSM and, upon being shown the invoice submitted for her treatment there, he denied ever submitting the invoice. During this interview, he explained that he had previously been the victim of identity theft by RB in connection with a Cigna claim and that he assumed that RB had impersonated him again in this instance.

29. The Applicant was re-interviewed months later and reiterated that he had not exchanged emails with Cigna regarding the CHMS invoices. When shown the 6 April 2018 email, he said that it appeared to come from his email address, but that it was not sent by him.

30. The Applicant's testimony at the Tribunal hearing was consistent with these statements given to OIOS.

31. Additionally, a former pre-fabrication technician at MONUSCO testified that his construction colleagues would often use computers assigned to national staff to check for job offers and emails. He said that he had seen RB use the Applicant's computer when the Applicant was not present, although he could not remember precisely when that occurred.

32. The OIOS investigator in this case testified that he had investigated another case of Cigna fraud and in that case (OIOS case number 0955/18) the finding was "the metadata showed that [RB] had used the Applicant's computer... but this happened at different times."

33. The investigator also testified that he did nothing to investigate the possibility that RB had again impersonated the Applicant. He also said he did not try to contact RB regarding this case because "he was not mentioned in the Cigna report". In fact, OIOS never interviewed RB in either investigation.

34. According to the investigator, he concluded that the Applicant had sent the confirmation email because "it was from his email account and responsibility lies with him, as far I'm concerned". He further noted that the Applicant "did not give any evidence that he didn't send it."

35. When asked how the Applicant would have benefited from this claim, the investigator said, "the Applicant might or might not benefit depending on whoever is receiving the money… because sometimes there is collusion between whoever acted as a provider and the individual." However, the investigator admitted that he found no evidence of collusion in this case.

36. In sum, the evidence that the Applicant sent the 6 April email essentially consists of the fact that it was sent from his email account and that he did not give any evidence that he did not send it, at least according to the investigator.

37. Contrary to the investigator's view, the Applicant's consistent and repeated denials that he sent the email are, in fact, evidence that he did not send it. Those denials are supported by a prior finding by OIOS that RB had used the Applicant's computer at another time to impersonate the Applicant in connection with a fraudulent Cigna claim.

38. This finding was buttressed by the technician's testimony that construction workers would often use the computers of national staff to check emails, and that RB had been seen using the Applicant's computer when the Applicant was not present.

39. Additionally, since the investigator conceded that there was no evidence of collusion involving the Applicant in this case, there is no evidence that he would have benefited from the fraudulent Cigna claim. Thus, there also is no evidence that the Applicant had a motive to send the confirmatory email or to lie about it later.

40. The Respondent argues that the style of the 6 April email (including consistent use of "…".at the end of phrases) was similar to the style the Applicant used in three other emails.

41. The Tribunal does not find that the use of ellipses at the end of phrases in an email is so distinct as to identify the author. Thus, that argument is unworthy of consideration.

42. The Respondent also argues that the Applicant's theory, that RB sent the email from the Applicant's computer, is implausible. Nobody knew Cigna would send a request for confirmation (or when), yet the response was sent within 47 minutes.

43. While it is certainly coincidental that the email response was sent from the Applicant's email account within 47 minutes, it is not entirely implausible that RB was the sender. He may have been checking the computer regularly and just happened to do so soon after the Cigna request for confirmation came in. Or it may be that RB had remote access to the email account (on his mobile phone for example) and received real time alerts of incoming mail.

44. The coincidence may raise a bit of suspicion that the Applicant was involved somehow. However, mere suspicion does not amount to evidence, and it is the Respondent's burden to establish by clear and convincing evidence that the Applicant sent the subject email.

45. The Tribunal finds that the evidence is neither clear nor convincing on this point. That is to say, the Tribunal finds that the Respondent has failed to show that it is highly probable that the Applicant sent the email and thus has failed to meet its burden of proof. As result the contested decision to separate him from service must be rescinded.

Compensation in lieu of recission

46. Article 10.5 of the Dispute Tribunal Statute requires that, where the rescinded decision concerns appointment, promotion or termination, the Tribunal must set an amount of compensation that the Organization may elect to pay instead of implementing the rescission.

47. The Appeals Tribunal has held that "the purpose of *in lieu* compensation is to place the staff member in the same position he or she would have been in, had the unlawful decision not been made." *Saleh,* 2023-UNAT-1368 para. 69. (citing *Ashour*, 2019-UNAT-899, para. 18).

48. Calculating the amount to set as compensation *in lieu* must be done on a case-by-case basis. *Saleh, supra* para.69; *Mwamsaku* 2011-UNAT-265. The determination depends on the circumstances of each case, considering the grounds upon which the termination decision was rescinded, the nature of the post formerly occupied, the remaining time to be served by a staff member on their appointment, and their expectancy of renewal. (*Siddiqi*, UNDT/2018/086, para. 86, *Saleh*, para. 70; and *Krioutchkov* 2017-UNAT-712, para. 164).

49. In analysing those factors for this case, the Tribunal notes that the decision to terminate the Applicant is rescinded because the facts upon which the discipline was based were not established. Moreover, the record shows that the investigation was woefully inadequate in failing to pursue the possibility that RB had again impersonated the Applicant, having already found that RB had done so in another Cigna fraud case.

50. The Applicant was a G5/Step10 Construction and Maintenance Worker, who had been employed at MONUSCO since 14 January 2015 on a series of fixed term appointments. His current fixed term appointment was due to expire on 30 June 2023, meaning that he had just 58 days remaining on that appointment.

51. The record is silent as to any express promise of renewal, and the principle is well-established that fixed-term appointments carry no expectation of renewal. (*Kule Kongba* 2018-UNAT-849, paras. 25-27; *Muwambi* 2017-UNAT-780, para. 25; 2017-UNAT-721, para. 15; *Pirnea* 2013-UNAT-311, para. 32.)

52. Even renewals on successive contracts do not, themselves, give rise to an expectancy of subsequent renewal. *Saleh*, para. 7 and *Kule Kungba* para. 25. However, it is worthy of note that the Applicant served over eight years and progressed to Step 10 in his Grade over that period, which indicates that he was performing well in his job.

53. It is recalled that the UNDT Statute has been interpreted as imposing a general maximum for *in lieu* compensation at two years net base salary. See *e.g. Mushema* 2012-UNAT-247; *Liyanarachchige* 2010-UNAT-087; *Cohen* 2011-UNAT-131; *Harding* 2011-UNAT-188; and *Siddiqi*, UNDT/2018/086, para. 86.

54. In setting the appropriate amount of compensation *in lieu* of rescission for this case, the Tribunal has surveyed the facts and amounts set in other cases. The observations of the Appeals Tribunal in *Lucchini* 2021-UNAT-1121 seem apt:

> He has lost his employment, his reputation has been unjustifiably sullied and his future employment prospects… undoubtedly harmed. In any other legal system, the only fair remedy to properly vindicate his rights would be retrospective reinstatement on full benefits to the date of his dismissal. *Id.* para. 62.

55. Like Mr. Lucchini in that case, the Applicant has been the victim of a substantial injustice in this case. This injustice arose from the theft of his identity by a former colleague and then an inadequate investigation by OIOS despite knowing that RB had impersonated the Applicant previously in connection with another fraudulent Cigna claim.

56. In Lucchini, the Appeals Tribunal found, given the maximum that can be awarded, "[t]he evident unfairness of the termination in this case justifies payment of the maxim compensation *in lieu* equivalent of two years' net base salary." *Id.*, para. 64.

57. The Tribunal finds that the facts and analysis in *Lucchini* are strikingly similar to those here and thus that the amount of compensation *in lieu* is a reliable guide

59. In the preamble to the United Nations Charter, the founding States created this Organization "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person…and to establish conditions under which justice …can be maintained."

60. When it created the current internal justice system, the General Assembly echoed the Charter's goals by reiterating that an "effective system of administration of justice is a necessary condition for ensuring fair and just treatment of United Nations Staff…[and] affirming the importance of the United Nations as an exemplary employer." A/RES/61/261 p.1.

61. Eight years ago, this Tribunal, sitting in panel, noted with respect to the concept of compensation *in lieu* of recession:

> the reality is that in cases where the Tribunal found that a staff member had been wrongly separated, through no fault of his/her own but rather as a result of managerial error, the decision was systematically taken to pay compensation, instead of considering the reintegration of the staff member… The Tribunal is of the view that

approach … may not always meet the standards of justice owing to the incomplete redressal of staff members' grievances." A/79/121, para. 34.

64. The report went on to say that the Council

> underscores the critical need to restrict the use of compensation in lieu of reinstatement, owing to its potentially detrimental and irreversible effects on wrongfully terminated staff members. The option of compensation in lieu should not become the default means of resolution for all cases of wrongful termination. The alleged challenges in implementing reinstatement should not preclude its consideration…. The mere existence of difficulties in implementation does not justify a blanket avoidance of reinstatement, which remains a fundamental aspect of justice under the legal framework of the United Nations. *Id*. para. 36.

65. These long-standing observations by the three pillars of the internal justice system, the Dispute Tribunal, the Appeals Tribunal and the Internal Justice Council, are worthy of particular consideration in this case.

66. The Applicant was clearly victimized by his colleague, RB, revictimized by OIOS with an inadequate investigation, and then victimized a third time by the Administration which seems to have blindly accepted the OIOS conclusions.

67. It would be yet another victimization, and contrary to the stated "importance of the United Nations as an exemplary employer", for the Organization to opt for an *in lieu* payment instead of reinstating the Applicant. Merely paying two years net base salary would not place the Applicant anywhere near the same position he would have been in, had the unlawful termination decision not been made. Thus, doing so would violate the principles upon which the Organization and its internal justice system were founded. The Tribunal thus implores the Administration to refrain from paying compensation in lieu rather than reinstating the Applicant to his prior position.

Claim for Other Damages

68. In his application the Applicant wrote "[t]he remedy I'm looking for is to return to my normal activities at MONUSCO as an unconditional staff member." In other words, the Applicant was seeking to rescind the decision to separate him

from service. A motion to amend the application was never filed requesting any other remedy.

69. However, in his closing submissions the Applicant requested "reinstatement or, failing that, full compensation of two years plus one year for abusive investigations." Reinstatement was the remedy he had earlier requested, and "failing that, full compensation of two years" seems to be a request for the maximum compensation

Other Issues

73. The Applicant's other submissions amount to a nearly breathless litany of alleged failings by everyone associated with this litigation: the investigator, his supervisor, Office of Staff Legal Assistance ("OSLA"), the software platform transcript (generated using artificial intelligence), the hearing interpreters, Respondent's Counsel, and the Registry staff. These allegations are unfounded and need no further analysis, in light of the findings above as to the failure to establish the facts upon which the disciplinary action was taken.

Conclusion

74. In view of the foregoing, the Tribunal DECIDES:

a. To rescind the decision to separate the Applicant from service;

b. To set the amount of compensation that the Respondent may elect to pay *in lieu* of implementing the rescission at two years net salary with interest at the US prime rate from the date of the improper termination;

c. To implore the Administration not to elect payment of compensation *in lieu* of reinstating the Application to the position from which he was wrongfully terminated; and

d. To deny all other claims for relief.

(Signed [illegible] Tm [illegible]e reate fro