

ADMINISTRATIVE TRIBUNAL

Judgement No. 484

Case No. 499: OMOSOLA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman,
Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Martin Kayode Omosola, a former
staff member of the United Nations, the President of the Tribunal,
with the agreement of the Respondent, successively extended to
31 March, 31 July and 30 November 1986, the time-limit for the
filing of an application to the Tribunal;

Whereas, at the request of the Applicant, the Tribunal
suspended, under article 7, paragraph 5 of its Statute, the
time-limit for the filing of an application to the Tribunal, first,
until 30 June 1987 and then, until 30 September 1988;

Whereas, on 16 September 1988, the Applicant filed an
application that did not fulfil all the formal requirements of
article 7 of the Rules of the Tribunal;

Whereas, on 26 January 1989, the Applicant, after making the
necessary corrections, again filed an application, containing the
following pleas:

"II. PLEAS

On 22 August 1983, the Secretary-General dismissed me 'for
misconduct' (...). I rejected this decision and appealed to
the Joint Appeals Board. The Board's recommendation fell
short of my expectation. I hereby urge the United Nations
Administrative Tribunal to adjudicate on the case by:

(a) Rescinding the Secretary-General's decision;

- (b) Ordering the payment of compensation exceeding the equivalent of my two years' net base salary for the injuries sustained as a result of the termination of my appointment;
- (c) Further ordering the Respondent to pay my arrears of within-level increment, G.6/V, 1 August 1982 to 31 July 1983 and 1 to 22 August 1983 for G.6/VI; and
- (d) Compelling the Secretary-General to pay me a Special Post Allowance (SPA) from 1 April 1982 to 22 August 1983."

Whereas the Respondent filed his answer on 15 September 1989;
Whereas, on 25 April 1990, the Applicant filed written observations;

Whereas, on 31 May 1990, the Tribunal informed the parties that it adjourned its consideration of the case until the Tribunal's Autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Information Centre (UNIC), Department of Public Information (DPI), in Lagos, Nigeria, on 1 August 1971, as a Senior Clerk/Projectionist at the G-5 level. During the course of his employment with the U.N., he was granted a permanent appointment on 1 August 1974 and was promoted to the G-6 level on 1 April 1979. At the time of the events that gave rise to the present proceedings, the Applicant worked as a Senior Information Clerk/Senior Projectionist.

On 22 March 1982, the Assistant Administrator, Bureau for Finance and Administration, of the United Nations Development Programme (UNDP) informed the Chief, Centres Administrative Unit, Field Operations Division, DPI, that UNDP had discovered that "virtually all UNDP locally recruited staff members in [the UNDP] office in Lagos, Nigeria, [had] been submitting over the past several years fraudulent medical claims and improperly receiving reimbursement therefor under Appendix E to the Staff Rules (Medical

Expense Assistance Plan)". UNDP found that a large number of staff had sought reimbursement under the Plan for services rendered by non-existent physicians, as confirmed by the Nigeria Medical Council, with whom physicians in Nigeria are required to register. Accordingly, UNDP decided to suspend nine staff members without pay and charged all staff involved with misconduct. As a "precautionary measure", UNDP instructed the Resident Representative, who acted as Director of UNIC, to suspend processing all medical claims, including medical claims filed by U.N. locally recruited staff, pending completion of their investigation.

On 29 March 1982, the Executive Officer, DPI, wrote to the competent Personnel Officer, to inform her that, as a result of an investigation of all medical claims submitted by UNIC staff during 1980-1981, it appeared that seven staff members, including the Applicant, had submitted claims for reimbursement of medical expenses incurred for services rendered by non-existent physicians.

In line with the disciplinary measures taken by UNDP against UNDP staff involved in the same scheme, he recommended that UNIC staff involved be suspended without pay pending the outcome of the investigation.

In a letter dated 2 April 1982, the Executive Officer, DPI, informed the Applicant that he was being charged with serious misconduct arising from his submission of false medical claims. The Applicant was asked to provide his version of the facts. In a reply dated 21 April 1982, the Applicant explained that he had personally paid the doctors in question before claiming reimbursement; that he was surprised to learn that those doctors were not registered with the Nigeria Medical Council and that it was not the practice in Nigeria to ask for a doctor's credentials. He also pointed out that one of the physicians, Dr. Da Silva, was listed as a "U.N. Designated Physician".

On 29 April 1982, the Executive Officer, DPI, wrote to the Resident Representative, UNDP, and Acting Director, UNIC, Lagos, attaching copies of the different explanations provided by UNIC

staff charged with serious misconduct, including the Applicant, and requested his views and recommendations on their cases. As a result of a further investigation and inquiries with the Nigeria Medical Council, UNDP concluded that except for four doctors who did not appear on claims by UNIC staff members, all the other doctors were "considered fictitious".

At the request of the Under-Secretary-General, DPI, the Office of Personnel Services (OPS), directed a Personnel Officer from Headquarters to conduct an investigation in Lagos, pursuant to personnel directive PD/1/76 concerning Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva. In his report dated 3 December 1982, addressed to the Director of Personnel Administration, the Personnel Officer found that:

"... the charge of misconduct against Messrs ... Omosola ... is supported by the fact that the medical claims in question were made fraudulently, the principal proof being that the physicians and hospitals whose names were used by the claimants have been found to be fictitious and non-existent ...".

On 22 February 1983, the Applicant wrote to the UNIC Acting Director, submitting his comments on the Personnel Officer's report and explained that the impossibility to locate the doctors for whose services he had sought reimbursement could be attributed to the fact that they "had absconded from the Lagos area to the country's interior where the authorities would find it difficult to trace them, as the unregistered doctors were aware of the illegality of their actions".

On 23 June 1983, the Assistant Secretary-General for Personnel Services submitted to the Secretary-General his recommendations for disciplinary action to be taken against the seven UNIC staff members, including the Applicant, found to have submitted several fraudulent medical claims. He stated in this regard:

"...

13. It is my understanding that the UNDP used level of post as one of the criteria for determining whether a staff member was to be summarily dismissed or given a letter of censure...
14. My recommendations as to disciplinary measures are based on the seriousness of the misconduct by the staff member. In cases where there was a pattern of misconduct extending over a period of time, I have recommended dismissal. In the case where there was only one fraudulent submission, I have recommended suspension from duty without pay for one year.
15. I also wish to emphasize that, although the whole situation was examined from an over-all standpoint for consistency purposes, the case of each UNIC, Lagos staff member was individually examined by the Administrative Review Unit with utmost care. I am satisfied that both the provisions of personnel directive PD/1/76 and the fundamental requirements of due process were fully observed in each and all cases..."

He recommended that six UNIC staff members, including the Applicant, be dismissed for misconduct under staff rule 110.3(b). The Under-Secretary-General for Administration and Management approved the recommendation on the Applicant's case on 19 July 1983.

On 28 July 1983, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss him for misconduct as a disciplinary measure under staff rule 110.3(b). He stated in this regard:

"...

The Secretary-General's decision was taken upon his finding that you submitted under the Medical Expense Assistance Plan four fraudulent medical claims thereby receiving improper reimbursement of [Nigerian naira] 1094.95 or US\$1979.89. The Secretary-General concluded that such behaviour constituted seriously unsatisfactory conduct warranting disciplinary action.

..."

On 29 August 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 3 December 1984. Its conclusions and recommendations read as

follows:

"CONCLUSIONS AND RECOMMENDATIONS"

139. The Panel finds that the documentation contained in the disciplinary file was not sufficient to support the findings of fact on the basis of which the Secretary-General made his determination of the appellant's misconduct.
140. Having reviewed the investigations carried out by UNDP and OPS of the medical claims submitted between 1980 - 1981 by the local staff of Lagos, and having received additional documents and testimony with regard to these investigations, the Panel finds that there was very significant circumstantial and indirect evidence to support the findings of fact that the names of doctors and hospitals appearing in four insurance claims submitted by the appellant during the period under review were fictitious and non-existent.
141. The Panel therefore concludes that the Secretary-General had been furnished with sufficient evidentiary elements to enable him to make his determination of the appellant's misconduct with a reasonable degree of certainty.
142. Having carefully considered the appellant's observations after he had the opportunity to examine that evidence during the appeal proceedings, the Panel further concludes that there were no reasons to believe that the outcome of the case would have been different had he been given that opportunity during the disciplinary proceedings.
143. The Panel further concludes that the disciplinary measure of dismissal imposed on the appellant appeared justified on the basis of the criterion applied to this case as explained by the Assistant Secretary-General, OPS.
144. However, the Panel notes that the UNDP administration had applied a different criterion as a result of which those staff members whose cases were similar to the appellant's from the point of view of the seriousness of the misconduct and also from the point of view of their official status, had received written sanctions.
145. The Panel therefore, without entering into the intrinsic merits of the different sanctions imposed, concludes that the application of different criteria by two authorities within the United Nations system had resulted in manifest injustice and inequity to the appellant because of the drastically different treatment of staff members in essentially similar situations.

146. The Panel does not consider that the unevenness of the situation alone could justify changing the disciplinary measure of dismissal to a less severe sanction unless there was a clear error of judgement in imposing that sanction. However, the Panel does think that the resulting inequity called for acknowledgement and, to the extent possible, relief.
147. The Panel therefore recommends that the Secretary-General grant the appellant monetary compensation in an amount equivalent to three months net base salary in recognition and mitigation of this inequity."

On 30 April 1985, the Assistant Secretary-General, OPS, informed the Applicant that the Secretary-General, having re-examined his case in light of the Board report, had decided:

- "(a) To maintain the contested decision, and
- (b) To reject the Board's recommendation for payment of compensation ..."

On 26 January 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent, in applying to UNIC staff different sanctions from those applied by UNDP to its staff, discriminated against UNIC staff and violated the principle of equal treatment.
2. The decision to dismiss the Applicant was unfair and arbitrary.
3. The Applicant was deprived of due process.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant was justified by the evidence against him and was arrived at after due investigation and proper procedure.
2. The Secretary-General's decision to dismiss the Applicant and to refuse to accept the JAB recommendation to pay three months' compensation was a valid exercise of his discretion to

impose disciplinary measures.

3. Claims which have not been previously submitted to the JAB may not be presented to the Tribunal except where the Secretary-General and the Applicant have so agreed.

The Tribunal, having deliberated on 8 May 1990 in Geneva, and from 9 October to 19 October 1990 in New York, now pronounces the following judgement:

I. The Applicant served at the United Nations Information Centre in Lagos, Nigeria, from 1971 until 1983, when he was dismissed for misconduct. He challenges the 30 April 1985 decision of the Secretary-General maintaining his decision to dismiss the Applicant under staff rule 110.3(b) for misconduct, and the Secretary-General's rejection of the Joint Appeals Board (JAB) recommendation for payment of compensation. The misconduct consisted of the Applicant having submitted fraudulent claims for medical treatment under Appendix E to the Staff Rules and improperly having received reimbursement therefor. In reliance on an investigation of its own, and following one conducted by UNDP, the Administration concluded that some staff members in Nigeria had submitted and collected on medical claims for treatment by doctors who, it was subsequently discovered, were non-existent. The Applicant had submitted and collected on false medical claims, the amount of US\$1,979.89 over a two year period.

II. The JAB, which very carefully and thoroughly analyzed the evidence, found that the Respondent, in dismissing the Applicant, did so on the basis of very significant circumstantial and indirect evidence that the Applicant had submitted insurance claims based on medical receipts from fictitious physicians. Thus, the JAB considered that the Respondent's conclusion that the Applicant had been guilty of misconduct was "justified and reasonable". The Tribunal, having reviewed the evidence, is likewise satisfied that,

where numerous staff members, allegedly without communicating with one another with respect to medical doctors, (1) turned out to be using the same doctors; (2) the doctors were allegedly located in unusually distant and difficult-to-reach locations; (3) there was no objective evidence that the doctors or their clinics, hospitals or offices were ever there or that they ever existed; (4) the doctors and their clinics, hospitals or offices allegedly vanished without a trace once efforts to verify their existence were undertaken; and (5) some of the individuals involved in such medical claims admitted that they were fraudulent, the Respondent could not reasonably be said to have been mistaken in his evaluation of the facts. This does not mean, however, that the Tribunal is necessarily in accord with all of the views of the JAB as regards the burden of proof. The Tribunal notes that in prior cases where staff members have applied for and received benefits from the Organization and questions of fraudulent conduct have arisen, the Tribunal has held that once a prima facie case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question. The Tribunal recognizes, as did the JAB, the need for presentation by the Respondent of adequate evidence (documentary or otherwise) with respect to the details of investigations in support of the conclusions and recommendations of those conducting the investigations.

III. As the Tribunal has emphasized in other recent cases involving fraudulent medical claims, e.g. Judgement No. 394, Armijo (1987), paragraph XII, the Secretary-General has:

"... wide discretion ... for dealing forcefully with cases of fraud against the Organization, to make it clear to all concerned that they act at their peril when they engage in such reprehensible conduct.

The Tribunal recalls also that it has in its jurisprudence consistently recognized that the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process ...".

IV. In this case, in addition to the Respondent having justifiably assessed the evidence with respect to the alleged misconduct, there is no showing at all that the Applicant was deprived of due process. The procedures under personnel directive PD/1/76 were followed satisfactorily, with the Applicant being duly informed of the alleged misconduct and given ample opportunity to respond. In this regard, the Tribunal notes the repeated assertion by the Applicant that he was being condemned for having utilized a doctor who was on the list of those recommended by the U.N. The Applicant also claims a denial of due process in not having been furnished with a list of approved doctors. These contentions are groundless. The Administration has made it abundantly clear that the Applicant was not charged with misconduct for having obtained reimbursement of payments to the named doctor or for having utilized doctors not on the approved list. While it probably would have been desirable for a list of approved doctors to have been made available to the staff, the misconduct involved only non-existent doctors.

The Tribunal also notes and rejects the Applicant's claim that the investigator's report was flawed because his findings and recommendations were allegedly based on the absence of remorse by the Applicant. While the Tribunal, like the JAB, sees some ambiguity in the language used by the investigator, it finds that the comment as to remorse related not to whether there was fraud, but whether there were mitigating factors relating to the discipline to be imposed.

V. The Applicant claims that he was treated unfairly by comparison with the less severe disciplinary action taken by UNDP against staff members guilty of the same offences under circumstances similar to those of the Applicant. Although it is true that a number of UNDP staff members in Nigeria received less severe discipline for essentially the same misconduct, it is also true that the Applicant's dismissal was consistent with the

discipline criteria applied in six other cases of U.N. staff who were guilty of similar misconduct.

VI. The JAB, in considering this aspect of the case, concluded that it represented manifest injustice and inequity and, though it did not deem this sufficient to recommend cancellation of the Applicant's dismissal, thought it warranted the payment of an additional three months of net base salary, a recommendation not accepted by the Respondent.

VII. The Tribunal does not agree with the JAB on this point. Although it may be desirable, as a matter of personnel administration, to strive for consistency in disciplinary action by different organs of the Organization, the Respondent has reasonable discretion in determining the discipline to be imposed, and it is not the function of the Tribunal to substitute its views for those of the Respondent. This is particularly true where, as here, the Tribunal is being asked to compel the Respondent to impose a lenient penalty for fraud even though there was no differentiation among similarly situated U.N. staff members who were subject to disciplinary action by the Respondent. Nor was there any evidence of improper or extraneous factors motivating the Respondent's decision.

VIII. The Applicant's appeal also includes claims for within-grade salary increments and Special Post Allowance payments. The Respondent asserts that, as these claims were not among those submitted by the Applicant to the JAB, and the latter did not consider them, they are not receivable by the Tribunal pursuant to article 7.1 of the Tribunal's Statute. That appears to have been the case with respect to the claim for special post allowance since the appeal to the JAB made no mention of the subject and there appears to have been no administrative decision regarding it. Nor did the JAB address it in its report. As to the claim for

within-grade salary increment, an attachment to the appeal to the JAB made reference to it only by way of illustrating punishment already visited upon the Applicant for his alleged misconduct. The JAB report did not deal specifically with that issue. It is, however, implicit in its report that, under the circumstances, withholding of a within-grade salary increment was entirely proper and that is also the conclusion of the Tribunal.

IX. For the reasons set forth above, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 19 October 1990

R. Maria VICIEN-MILBURN
Executive Secretary