

ADMINISTRATIVE TRIBUNAL

Judgement No. 485

Case No. 521: AKERELE

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 Felicia A. Akerele, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 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, first, until 25 September 1987 and then, until 15 May 1989;

Whereas, on 11 May 1989, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 September 1989, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"II. PLEAS

8. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

- (a) To find that it is competent to hear and pass judgement upon the present application under article 2, para. 2(a) of its Statute;

- (b) To find that the present application is receivable under article 7, para. 2(a) of its Statute;

9. On the merits, the Applicant requests the Tribunal:

- (a) To find that the disciplinary measure of dismissal for misconduct was tainted by (1) the existence of two separate investigations and (2) considerations of administrative convenience and not of law;
- (b) To find that said measure was also arbitrary and discriminatory;
- (c) To find that the Joint Appeals Board was correct in stating that the Applicant had suffered 'manifest injustice and inequity';
- (d) To order that as a consequence the dismissal for misconduct be voided, that a lesser disciplinary measure be applied and the Applicant be now reinstated;
- (e) To order that the amount of compensation to be paid to the Applicant, in the event that the Secretary-General exercises the option offered him in article 9, para. 1 of the Statute, be set at one year of remuneration."

Whereas the Respondent filed his answer on 11 October 1989;

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 on 1 March 1971, as a Clerk/Typist at the G-4 level, at the United Nations Information Center (UNIC), Department of Public Information (DPI), Lagos, Nigeria. During the course of her employment with the U.N., she was offered a permanent appointment on 1 April 1975 and was promoted to the G-6 level on 1 April 1979. Her functional title was Senior Secretary.

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.

The Applicant had been reimbursed in the amount of US\$2,354.16 for claims filed for 1980 and 1981. 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 she was being charged with serious misconduct arising from her submission of false medical claims. The Applicant was asked to provide her version of the facts. In a reply dated 21 April 1982, the Applicant explained that she had "never been dishonest" in her life and that she had consulted those physicians "for less serious cases because their charges are moderate". She added that she was not in a position to know whether the doctors in question were registered or not because they did not show her their medical certificates before providing treatment.

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 ... and Mrs. Akerele 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 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 her 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] 931.56 or US\$1567.93. 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 29 November 1984. Its conclusions and recommendation read as follows:

"Conclusions and recommendation

130. 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.
131. 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.

132. 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.
133. Having carefully considered the appellant's observations after she 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 she been given that opportunity during the disciplinary proceedings.
134. 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.
135. 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.
136. 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.
137. 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.
138. 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 the Applicant's case in light of the JAB report, had decided:

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

On 14 September 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 Respondent should have provided an explanation for rejecting the JAB recommendation.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant was justified by the evidence against her and was arrived at after due investigation and the observance of 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.

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

I. The Applicant served at the United Nations Information Centre (UNIC) in Lagos, Nigeria, from 1971 until 1983, when she was dismissed for misconduct. She challenges the 30 April 1985 decision of the Secretary-General maintaining his decision of 28 July 1983, to dismiss the Applicant under staff rule 110.3(b) for misconduct and rejecting the recommendations of the Joint Appeals Board (JAB) for payment of compensation. The nature of the misconduct with which the Applicant was charged, the various contentions of the parties and the JAB report are essentially the same as those in Judgement No. 484, Omosola (1990), rendered by the Tribunal today. As in that case, the Tribunal rejects the application here. However, because a few of the Applicant's contentions here are not formulated in the same terms as the contentions in Omosola, the Tribunal will address them.

II. The Applicant's main different contention appears to be that her dismissal for misconduct, in having submitted fraudulent claims for medical treatment, and improperly having received reimbursement therefor, was tainted by the existence of two separate investigations and alleged considerations of administrative convenience and not of law. The contention rests on the fact that the investigation leading to the Applicant's dismissal followed an investigation by UNDP of similar practices by a number of its staff members, and that for its own reasons, UNDP imposed less severe discipline than the U.N. in a number of cases. In essence, the Applicant is contending that her situation should have been included in the UNDP investigation, rather than having been the subject of a separate investigation, and that she should have been disciplined on the basis of UNDP criteria.

III. The record shows that the Applicant was not a UNDP employee. The UNDP investigation, therefore, could properly exclude the Applicant and any other UNIC employee, despite the indications that similar fraudulent practices were being followed by employees of

both bodies. It was entirely within the authority of the U.N. to conduct its own investigation with respect to its staff members, and to act independently on the basis of that investigation, as it did.

Whether, as the Applicant argues, poor management or elements of administrative convenience were involved is irrelevant to the issues in this case. Contrary to the Applicant's contention, the separate investigation by the U.N. was not iniquitous and was not the beginning of unlawful discriminatory treatment.

IV. The Applicant also points out that she, along with three other staff members, "recognized her offence and apologized for it".

She argues that she therefore showed remorse, contrary to the findings of the investigator. The Tribunal does not read the letter of appeal of 29 August 1983, which she and others, including Mr. Omosola, signed as an admission of guilt or a statement of remorse. The "offence" referred to in the letter was not fraud, but the alleged use of unregistered doctors. Hence, her apparent belief that this should have been taken into account in the severity of the discipline to be imposed is unfounded. But even if the letter of appeal reflected remorse, it was for the Secretary-General -- not the Tribunal -- to decide in his reasonable discretion, as he did, what disciplinary action should be imposed.

V. With respect to all of the other contentions advanced by the Applicant, the Tribunal rejects them, for the reasons set forth in the Tribunal's Judgement in Omosola with respect to similar contentions in that case.

VI. In view of the foregoing, 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