



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1036

Case No. 1098: QUDDUS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 24 February and on 18 June 1999, Abdul Quddus, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 August 1999, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

"II. PLEAS

- (a) The UNICEF Representative, Islamabad, Pakistan vide his letter dated 9 October 1997 (...) informed the Applicant that the case of his MIP [Medical Insurance Plan] claim of 1 August 1997 in respect of his son - Mohammad Siddique, was under investigation of allegation[s] of misconduct. In this *investigation*, the Applicant was not asked to participate and respond to queries, if any. No copy of investigation report ... was shared with the [A]pplicant or his Counsel even at the time of formal hearing by the *Ad-Hoc* JDC [Joint Disciplinary Committee].

- (b) In February 1998, the Respondent verbally constituted an informal committee to conduct a preliminary investigation. This Committee met on 12 February, 1998 and [its] recommendations to the Representative were never shared with the Applicant or his Counsel. (...).
- (c) The decision being contested by the Applicant is ... the order by the Executive Director, UNICEF ... conveyed by [Ms. Karin Sham Poo,] the Deputy Executive Director, UNICEF ... vide her letter ... dated 26 January, 1999 (...) whereby the Applicant was informed of his [summary] dismissal from service of UNICEF [with effect from] 5.2.1999. This decision was put into effect by UNICEF, Islamabad vide their letter dated 4 February 1999 (...).
- (d) The within-grade-increment due on 1 April, 1998 which was forfeited vide [i]nteroffice [m]emorandum dated 30 June 1998 from ... Personnel Officer, Islamabad (...), be restored.
- (e) The Applicant humbly requests reinstatement in his service with all the benefits.
- (f) Compensation of two years [net base] salary as compensation [for the tarnished] image of the Applicant, mental agony, torture and depriving him/his family of their livelihood."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent answer until 31 January 2000 and periodically thereafter until 29 June 2001;

Whereas the Respondent filed his Answer on 15 June 2001;

Whereas the Applicant filed Written Observations on 31 August 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on a short-term appointment, as a Driver at the G-2, step I level, on 2 April 1989, in the UNICEF Office, Peshawar, Pakistan on 2 April 1989. At the material time, he was serving as a Driver at the G-2, step VIII level, UNICEF, Lahore, Pakistan.

On 1 August 1997, the Applicant submitted a MIP claim for reimbursement of dental expenses in the amount of 35,300 Pakistan rupees, which he claimed had been incurred by him for treatment of his son. He provided three invoices with the corresponding receipts, dated

7 July, 21 July and 1 August 1997, respectively. The cash receipts were in sequential order, numbered 21, 22 and 23.

On 9 October 1997, the Representative of UNICEF in Pakistan (the Representative) wrote to the Applicant and advised him, *inter alia*, that his claim was being investigated pursuant to Chapter 15, Section 4, paragraph 7 of the UNICEF Policy and Procedures Manual. The Representative asked the Applicant for further information on the treatment, including a copy of the dentist's report and x-rays, and requested an explanation from both the Applicant and the dentist as to why the cash receipts were in sequential order when the dates of treatment were claimed to be 7 July, 21 July and 1 August 1997.

The Applicant replied on 31 October 1997, explaining that the treatment had yet to be carried out but that the dentist required payment in advance. He advised that the dentist was accustomed to treating UNICEF staff members and was familiar with the MIP procedures. On 18 November 1997, the dentist provided a "To Whom It May Concern" letter, stating that no treatment had been provided, but that, as the Applicant could not afford to pay for the proposed treatment, "three advance bills were prepared ... enabling him to get reimbursement from the office and pay [the dentist's] professional charges accordingly".

In early February 1998, the Representative "verbally" constituted an *ad hoc* JDC (later referred to as "informal committee") to conduct a preliminary investigation to determine if misconduct had occurred. In its report of 12 February 1998, the "informal committee" concluded that there was "clear evidence of intent to defraud the Organization" and recommended "appropriate disciplinary action ... be taken".

Since the Applicant had not been informed that his case was being referred to a JDC, it was determined that the "informal committee" was improperly constituted. Consequently, on 22 June 1998 the Applicant was informed that an "informal committee" had reviewed his MIP claim and that his case was now being referred to an *ad hoc* JDC (which constituted the same membership as the "informal committee"). He was further informed that he had the right to submit written observations, to seek counsel and to suggest witnesses.

On 5 October 1998, the Representative informed the *ad hoc* JDC that he intended to replace the management-selected member of the Panel, as the staff member currently in that position had been involved in the initial investigation of the Applicant's claim.

On 14 December 1998, the JDC submitted its report. Its findings, conclusion and recommendation read as follows:

"4) *Findings and conclusion:*

4.1 After carefully examining the charges, evidence and counsel's statements, the JDC is unanimous in concluding that the [staff member] has committed an MIP fraud in violation of the standards of integrity required for international civil servants, as set forth in the [United Nations] Charter, and Staff Regulations.

4.2 [The Applicant's] action constitutes ... serious misconduct as set forth in [staff rule 110.1]

...

Furthermore, paragraph 15.2.2 [c] of the UNICEF Human Resources Manual on Policy & Procedure clearly states that unlawful acts such as fraud constitute misconduct.

Not only has [the Applicant] acted in violation of the highest standards of integrity he was expected to uphold, but his fraudulent actions are also an affront to UNICEF Guiding Principles and standards...

4.3 The ad hoc JDC feels that [the Applicant] did submit inaccurate MIP claims with the intention of profiting personally from these actions, and that this did constitute MIP fraud. As per [administrative instruction] CF/AI/1998-005 dated 5 March 1998, [entitled 'Submission of Fraudulent MIP Claims'] 'MIP fraud will result in summary dismissal'.

5) *JDC's Recommendation:*

The ad hoc JDC unanimously recommends summary dismissal of [the Applicant] for committing MIP fraud."

On 26 January 1999, the Deputy Executive Director, UNICEF, transmitted a copy of the JDC report to the Applicant and informed him as follows:

" ...

After a careful review of the facts, including all available documentation, the Executive Director concurs with the findings and conclusions of the *ad hoc* JDC that

you engaged in fraud. Consequently, she has decided to endorse the *ad hoc* JDC's unanimous recommendation that you be summarily dismissed, which will take place with immediate effect on the date of receipt of this letter. In making this decision, she is satisfied that the *ad hoc* JDC carefully considered the points raised in your defence by your counsel. The *ad hoc* JDC concluded that the procedural flaws brought to its attention 'did not in any way infringe upon [your] rights of due process, nor do they mitigate the charges of the serious act of misconduct.'

..."

On 17 August 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's due process rights were violated when the "informal committee" did not provide the Applicant the opportunity to participate in its proceedings and did not give him a copy of its report.
2. The composition of the *ad hoc* JDC and of the "informal committee" was essentially the same, hence the former cannot be considered impartial.
3. The *ad hoc* JDC did not have the competence to make findings regarding the proposed dental treatment.
4. No fraud was committed since the Applicant did not have the intent to defraud the Organization.
5. There was no actual damage to the Organization as the Applicant did not actually receive any money regarding the MIP claim.
6. The disciplinary measure imposed was disproportionate.

Whereas the Respondent's principal contentions are:

1. The facts on which the disciplinary measure was based have been established and the offence constituted serious misconduct
2. The Applicant's due process rights were fully respected and there was no substantive or procedural irregularity.
3. The disciplinary measures imposed were not disproportionate or excessive.

4. Fraud was committed whether the Applicant actually received money or not.

The Tribunal, having deliberated from 30 October to 29 November 2001, now pronounces the following Judgement:

I. The Applicant was summarily dismissed for serious misconduct. The dismissal was based not only on a finding that he had fraudulently made a claim for reimbursement of dental expenses to the Medical Insurance Plan (MIP) by falsely claiming that dental treatment had actually been carried out on his son (which it had not) and that he had already discharged dental fees as claimed (which he had not) but also on a finding that he intended to personally profit from this claim. The clear implication is (a) that he had never intended that the treatment in respect of which the money was claimed would ever be carried out or (b) alternatively never intended that it would be carried out in the manner or at the cost set forth in the vouching documents or (c) that the Applicant would not have to pay the amount being claimed to the dentist named in the said documentation.

This is important, for the Applicant admitted from the time when the claim was first queried, that the treatment had not been carried out and admitted that money had not actually been paid but claimed that he, the Applicant, had not the means to pay for the required treatment for his son, so that the dentist had provided "advance" or "premature" invoices or receipts for payment for treatment which it was intended would be carried out on receipt of the money required to do it. The Applicant claims that what he had done was a commonplace practice so as to secure payment in advance (or a deposit) for treatment which it was intended would be carried out by the dentist concerned, at the actual cost set forth in the said "advance invoices" which were actually worded as if they were reports of work which had been carried out.

In essence the Applicant admitted that his claim was what might at the most be called "irregular" but that he never intended to charge for work which would not actually be done nor did he intend to benefit financially himself from the claim and in effect he was merely seeking an advance payment for work which would eventually be done but for which the MIP would

have eventually become liable. He claims that the monies which he would have received had his claim been successful would have been paid to the dentist on receipt of same so that the treatment would then be carried out. In essence he says that what he sought to do was not intended to put the MIP to any expense for which it would not have been liable, had he gone about his claim in the appropriate and proper way.

There is ample evidence to establish that at a minimum, the Applicant's behaviour was culpable and was at least irregular. He cannot excuse his conduct, which was clearly designed to mislead the MIP Manager. The Applicant's excuse that he could not afford the money and that the dentist required payment in advance or at least a substantial deposit, rings hollow, since the MIP provided for payments in advance in respect of certain treatments, a facility which the Applicant knew of and had taken up some years earlier in respect of treatment for his daughter.

II. There was total conflict between the parties as to whether the Applicant had intended to benefit financially himself. An *ad hoc* JDC concluded that there was such an intention, presumably influenced at least in part by a letter sent by the Representative to the Members of the JDC dated 22 June 1998 (referred to in greater detail later on in this Judgement). This letter purported to confirm authoritatively that dental work could not have been carried out within the timeframe or in the manner set forth in the dental documentation as "the legitimacy of the dental treatment to be received as specified in the receipts is highly in question. The fact is that no one has four root canal procedures done in one sitting on one day, and shortly thereafter has four wisdom teeth extracted."

III. The events which concluded in the decision to summarily dismiss the Applicant read as a story of the triumph of errors over good intentions. The Tribunal believes that those concerned with the events in question were well intentioned and that their intentions were to seek to grant to the Applicant a procedurally fair investigation of the suspicions raised against him. However for a variety of reasons including a failure on their part to distinguish between actual fairness and the appearance of fairness, there was such a departure from the norms of fair play and there was such a manifest failure to vindicate the Applicant's due process rights that the findings against him and

the consequent decision to summarily dismiss him as a consequence of the said findings, must be considered to be null and void.

IV. This sorry odyssey commenced with the Respondent's decision to set up a local *ad hoc* JDC alternatively referred to as "an informal committee" to investigate the suspicion of fraud in relation to the Applicant's claim for reimbursement of the alleged dental expenses. To this "informal committee" he appointed as one of its members the Officer-in-Charge, UNICEF, Lahore, being the very Official whose suspicions had been first aroused by the Applicant's claim and who had already concluded and stated his conclusion that the claim was a fraudulent one. This in itself was a remarkable appointment and an unfortunate one for it gave rise at least to the reasonable appearance that the composition of the "informal committee" was unfair in that it contained a member who had already judged the issue and who had concluded that a fraudulent claim had been made. This was akin to appointing an investigator or a policeman who had already made an investigation and reached a conclusion of guilt, to now sit as an impartial judge on the self same issue. Clearly such a decision would offend against the principle that not only should justice be done but it should be seen to be done.

V. The "informal committee" then commenced to go about its investigation without notice to the Applicant. It did not afford him any opportunity of being heard nor did it afford him any opportunity either by himself or through counsel to participate in the investigation in any way or to seek to refute allegations which were being made against him. The "informal committee" concluded that "[t]here is clear evidence of intent to defraud the Organisation" and it recommended that "appropriate disciplinary action should be taken in accordance with policies and precedents".

Following the findings and the recommendation of the "informal committee", it occurred to the Respondent that the "informal committee" had been improperly convened because the Applicant had not been informed that his case was going to be referred to a JDC. In an effort to ensure that the Applicant was fairly treated or at least that it would appear that he had been given fair treatment, a new *ad hoc* JDC was constituted. The three members who were initially appointed to the "informal committee" were initially also nominated to serve on the new

ad hoc JDC. This composition was later changed in that the Officer-in-Charge, UNICEF, Lahore, was replaced by the UNICEF Resident Project Officer, Lahore, the Representative giving as one of his reasons for the replacement that the Officer-in-Charge was the Officer who had investigated the case against the Applicant in the first instance.

Notwithstanding the said replacement of one of the members, the fact remains that the two other persons who were to remain as members of the *ad hoc* JDC were the self same persons who had already adjudicated upon the issues without affording the Applicant due process and were persons who had presumably already discussed the case with the Officer-in-Charge, UNICEF, Lahore, on the occasion when they first investigated the case. Those members were probably influenced by whatever views he had expressed on the matters or alternatively it must be presumed that they had been so influenced by him. In effect, this was a case of appearing to afford fair procedures rather than affording procedures which were demonstrably fair as what was being asked was that the remaining two members go through the motions of appearing to judge a matter *de novo* when they had already formed and expressed their views thereon. When it was appreciated that the first JDC had been tainted and irregular for the reasons identified, the appropriate thing to have done would have been to have formed a new JDC to hear the case *de novo* in accordance with fair procedures and to have it comprised of persons who were not already tainted or persons who could not be said to have already prejudged the issues.

VI. Further serious concern arises from another matter which preceded the findings of the second JDC. On 22 June 1998 the Representative wrote to the then three members of the second JDC. This letter was written at a time prior to the replacement of the Officer-in-Charge, UNICEF, by the Resident Project Officer. In the course of that letter the Representative clearly made known his own views and forcefully expressed them to the members of the said JDC which were then waiting to go through the exercise of giving the Applicant a fair hearing. In the said letter the Representative firstly wrote erroneously that the Applicant had admitted to having engaged in fraud. The Representative then effectively dismissed the Applicant's contention and claim of confusion or unfamiliarity with the nature of the claims system and his defence that he was in effect claiming payment in advance for treatment which would have

been later carried out. The Representative expressed the view that the dentist could not carry out treatment in accordance with the schedule of treatments set out in the dental documentation, in the manner already quoted at paragraph II hereof. The Representative stated as a matter of unqualified fact that "Mr. Quddus's fraudulent actions constitute serious misconduct as set forth in Article 101 [intended to be staff rule 110.1]". He then went on to identify other breaches of obligation and clearly disclosed that in his view the Applicant had been guilty of a very serious act of misconduct. The letter in effect indicated the Representative's belief that the *ad hoc* JDC should or was in effect required to recommend the Applicant's summary dismissal.

In the view of the Tribunal the very act of writing this letter by the Representative, to the members of the JDC from his position of power and influence was quite improper and again negates the principle that not only should justice be done but it should appear to be done. The Tribunal is unaware of what dental qualifications or expertise or experience (if any) the Representative may have enjoyed but clearly if the JDC was to make findings of fact in relation to what was or was not possible or appropriate to do by way of dental treatment, or to engage in the sort of enquiries which the Representative had suggested they undertake, it should have been done by the JDC on proper consideration of appropriate expert evidence and not on the say so of the Representative.

VII. It appears to the Tribunal that the manner in which the second JDC went about its investigations and recommendations was likewise flawed in other respects. Certainly its report does not indicate in any clear or cogent manner why the JDC found the Applicant intended to benefit personally from the claim which clearly implied a finding that it did not accept his assertion that he proposed to have the range of treatments set out in the dental documentation carried out and to pay the full amount obtained from the MIP (had his claim been successful) over to the dentist for the said treatment.

It is incumbent for the JDC to base its findings on adequate and relevant evidence. The nature of that evidence varies from case to case. In some instances it will be documentary, in others testimonial, sometimes a combination of these two and at other times a different type

of relevant and credible information, such as a site visit by the JDC panel or advice from an expert. The link between that evidence and the findings of the JDC must be explained.

In this case the JDC failed to support its important finding that the Applicant intended to benefit personally from the claim. The basis for this finding is not self-evident and the Tribunal does not understand how it was reached, particularly when it appears that the JDC neither sought to investigate or to secure an expert opinion on (i) whether the treatment in respect of which payment was claimed was necessary or desirable or (ii) whether the price claimed in respect thereof was reasonable or excessive. The Tribunal considers that the answers to those questions would have been highly relevant, if not fundamental to the issue, but it appears that they were never even considered by the JDC.

It is clear that the conduct of the Applicant was at least irregular. However, the Tribunal considers that the qualification of such conduct as serious misconduct has not been arrived at in accordance with the regular administrative procedures. In all of the circumstances, the Tribunal is satisfied that the finding that the Applicant had been guilty of serious misconduct and the decision to summarily dismiss him must be set aside as having been reached in a patently unfair manner and without affording the Applicant due process and for the other reasons stated.

VIII. In view of the foregoing, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 26 January 1999, to summarily dismiss the Applicant;
2. Orders that the Applicant be reinstated in a position with the same grade and at the same step which he held when he was separated, with full payment of salary and emoluments from the date of his separation from service; or
3. Should the Respondent, within 30 days of the notification of this Judgement decide, in the interest of the Organization, that the Applicant should be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary, at the rate in effect on the date of his separation from service.

IX. All other pleas are rejected.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Brigitte STERN
Member

New York, 29 November 2001

Maritza STRUYVENBERG
Executive Secretary