

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL**Judgement No. 1240**

Case No. 1326

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Brigitte Stern; Mr. Dayendra Sena Wijewardane;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 April 2003 and periodically thereafter until 30 November;

Whereas, on 28 November 2003, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, re-filed the 28 November 2003 on 6 January 2004, requesting the Tribunal, *inter alia*:

“8. ... *to find* that the Applicant’s rights to due process were violated by the prosecutorial, rather than investigative, nature of the [Office of Internal Oversight Services (OIOS)] investigation

9. ... [and] *to order*:

(a) that the recommendations of the *ad hoc* [Joint Disciplinary Committee (JDC)] be implemented;

or failing that:

(b) the payment of compensation to the Applicant.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 12 May 2004 and once thereafter until 31 May;

Whereas the Respondent filed his Answer on 31 May 2004;

Whereas the Applicant filed Written Observations on 10 September 2004;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 February 1994 on a fixed-term appointment under the 300 Series as an Electrician at the FSL-3/I level with the United Nations Assistance Mission in Rwanda (UNAMIR), in Kigali. His contract was regularly extended thereafter. At the time of his separation from service in September 2002, the Applicant held the position of Radio Operator/Electrician at the FSL-4A level and was serving in Kinshasa with the United Nations Mission in the Democratic Republic of Congo (MONUC).

The Applicant had enrolled for "family coverage" under the United Nations health insurance plan administered by Van Breda. On 11 May 1996, the Applicant submitted claim forms to Van Breda in respect of medical treatment his wife had undergone on five separate occasions, requesting that he be reimbursed either directly or through his bankers. Apparently, Van Breda declined to process the reimbursement on the basis that the invoices and claim forms had been altered without the authorization of the issuing physician.

On 5 November 1997, OIOS was advised that the Applicant had submitted inflated medical bills to Van Breda.

On 26 February 2000, the Applicant was contacted by investigators of the Investigations Section, OIOS, who asked to meet with him. The following day, the investigators interviewed the Applicant. According to their report dated 15 March, their objective was to "[s]eek confession". A "narrative of interview" prepared by the investigators and included in their report states that they "let [the Applicant] know that they had an old matter which ... required to be resolved and which pertained to him", as OIOS "had evidence to the effect that he falsified medical bills issued by a physician ... for his wife's treatment ... to the end that the bills were inflated [and he had submitted them to Van Breda in order] to receive inflated reimbursements". The Applicant initially denied the allegation, stating that he had not altered or submitted the

invoices but suggesting that his wife may have done so. According to the investigators' "narrative",

"[the Applicant] was told that this was an opportunity - in fact the only opportunity - to resolve this issue. He was also told that he may have made a mistake and that he was expected to take responsibility for the falsification and attempted fraudulent submission of the medical invoices. ... [The Applicant], at this time, admitted that he had altered the medical bills of his wife by entering additional figures and, thus, inflating the amounts reimbursable."

At the end of the interview, the Applicant wrote a confession which he signed in the presence of the investigators.

On 21 March 2000, OIOS produced its report in the case. The report characterised the Applicant's behaviour as forgery, for having falsified three medical invoices by altering the amounts paid to reflect a total increase of US\$ 4,300, and attempted fraud, for submitting the forged documents in a claim for reimbursement. OIOS recommended that disciplinary proceedings be instituted against the Applicant.

On 23 August 2000, the Applicant was charged with committing forgery and attempting to defraud the Organization. His counsel replied on 24 October, responding not to the substantive charges but stating that the Applicant's rights of due process had been violated; that his confession "was obtained through intimidation, coercion and the threat of sanctions"; and, that "where the interviewing officers had acted *ultra vires*, their findings and recommendation cannot be used as the basis for further review and action by any administrative or judicial body".

On 21 March 2001, the Assistant Secretary-General for Human Resources Management referred the Applicant's case to the MONUC JDC.

On 16 February 2002, the JDC submitted its report. Its recommendations and conclusion read as follows:

"Recommendations:

- (a) The Committee believes that the [Applicant] is solely responsible for all his actions. However, it should be noted that he has admitted his mistakes, first by requesting his spouse to call Van Breda asking forgiveness and secondly his refusal to resubmit the bills that were requested by Van Breda.
- (b) The OIOS reports made under such a situation are naturally bound to be biased and do not reflect the truth, as to what really happened. This situation is the result of the discrepancies of that act.

(c) In light of the above, the Committee recommends that the [Applicant] should be warned of the seriousness of his act. However, due to the nature of the case we recommend that [the Applicant] be cleared from all counts and ... given an official warning.

(d) The Committee recommends that [the Applicant] should officially request Van Breda's forgiveness and understanding with a copy to be submitted to the Committee.

Conclusion:

In view of this incident, the Committee notes that the spouse was the one who did the falsification on the bills from the doctor. This could not have happened if the [Applicant] understood the procedures and requested his spouse to send all documents to him first for verification and checking before forwarding them to Van Breda. This basic principle was not met in this case.

Therefore, the Committee recommends that the Administration bring to the attention of the staff member this basic principle. Original doctor's sealed and stamped bills with signature attached to the original Medical Claim Form, and officially signed by the staff member and [properly] certified ... should be submitted to Van Breda. In doing so, similar incidents could be avoided in the future."

On 15 September 2002, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

"The Secretary-General does not find credible your explanation that the investigator had 'agitate[d] and excited [your] anger in a manner that [you] could no longer control [your] temper' and that '[i]t was there and then that [you] took the paper and pen and wrote the statement [of admission of guilt]'. ... In any event, your explanation that your admission of guilt was due to 'loss of temper and anger' does not amount to a coerced confession, and therefore does not invalidate it.

Furthermore, the Secretary-General does not find credible your statement, which was accepted by the JDC, that it was your wife who inflated the invoices. ... In any event, even if it was your wife who forged the invoices, it was your responsibility to ensure that the invoices you submitted to Van Breda under cover of your memorandum were accurate.

The Secretary-General considers that you have not provided satisfactory and exculpatory evidence to justify your conduct in this case and that your conduct speaks for itself. Accordingly, your submission of the altered and inflated invoices to Van Breda, and the absence of a reasonable and credible explanation for those-invoices amount to sufficient evidence that your conduct constituted a serious violation of the [United Nations] standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization. In the light of this conclusion, the Secretary-General cannot accept the JDC's recommendation for an 'official warning'. Pursuant to his discretionary

authority to impose an appropriate disciplinary measure for misconduct, the Secretary-General has decided to separate you from service with compensation in lieu of notice under staff regulation 10.2, para. 1, and staff rule 110.3(a)(vii), with effect from close of business on the day you receive this letter. ...”

On 28 November 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s rights of due process were violated by the OIOS investigation panel.
2. The OIOS investigators acted in a prosecutorial fashion and coerced the Applicant into signing a confession which they had dictated.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s fraudulent conduct - as opposed to any extraneous factor - is the sole motive for his separation from service.
2. The OIOS investigation was conducted in accordance with the requirements of due process.

The Tribunal, having deliberated from 23 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant was an electrician who was employed with various United Nations Missions on a series of fixed-term contracts. He entered the service of the Organization in February 1994 with UNAMIR, Kigali, after which his contract was regularly extended. He had family coverage under the United Nations health insurance programme administered by Van Breda when, on 11 May 1996, he submitted claim forms to Van Breda in respect of medical treatment his wife had undergone on five separate occasions, requesting that he be reimbursed either directly or through his bankers.

On 5 November 1997, OIOS was informed that the Applicant had submitted inflated medical bills to Van Breda. On 27 February 2000, the Applicant met with OIOS investigators, in the course of which interview he confessed to submitting altered documents. At the end of the interview, he wrote and signed a confession. On 21 March, OIOS produced its report in the case: it characterised the Applicant’s

behaviour as forgery, for having falsified three medical invoices by altering the amounts paid to reflect a total increase of US\$ 4,300, and attempted fraud, for submitting the forged documents in a claim for reimbursement. OIOS recommended that disciplinary proceedings be instituted against the Applicant and, in fact, he was subsequently formally charged with committing forgery and attempting to defraud the Organization.

On 21 March 2001, the case was referred to the MONUC ad hoc JDC, which noted due process concerns with the OIOS investigation. It concluded that the Applicant was solely responsible for his actions but that he had admitted his mistakes, and recommended that he be given an official warning. The Secretary-General did not accept this recommendation and, on 15 September 2002, informed the Applicant that he had decided to separate him from service with compensation in lieu of notice under the provisions of staff regulation 10.2, paragraph. 1, and staff rule 110.3(a)(vii).

II. In his response to the charges lodged against the Applicant, counsel stated that the Applicant's rights of due process had been violated by OIOS; that his confession "was obtained through intimidation, coercion and the threat of sanctions"; and, that "where the interviewing officers had acted *ultra vires*, their findings and recommendation cannot be used as the basis for further review and action by any administrative or judicial body". In this regard, the Tribunal wishes to note that it appears from the file of the case that OIOS presented their interview to the Applicant as his "only opportunity" to resolve the matter and it was under these conditions that the Applicant admitted to altering his wife's medical bills by entering additional figures and, thus, inflating the amounts reimbursable. The circumstances of this interview and "confession" create some concerns for the Tribunal, which takes matters of due process seriously. (See Judgements No. 983, *Idriss* (2000); No. 984, *Abu Ali* (2000); No. 1022, *Araim* (2001); No. 1036, *Quddus* (2001); and, No. 1058, *Ch'ng* (2002).)

However, it is important to note that, at the time of the interview, the Applicant did not attempt to seek the protection of his rights of due process, such as requesting the presence of counsel, and the Tribunal finds no evidence whatsoever in the file to substantiate the allegations made later by his legal counsel that he was subjected to intimidation, coercion or threat of sanctions. Moreover, the Applicant subsequently provided contradictory explanations, accusing his wife of having forged the statements.

The Applicant continues to cast the blame for the wrongdoing upon his wife, however for all intents and purposes the identity of the forger is not relevant. Whether he personally forged the invoices; conspired with his wife in forging them; or, was the unwitting victim of his wife's actions, as the staff member who certified the request for reimbursement, the Applicant bears ultimate responsibility for the submission. In Judgement No. 424, *Ying* (1988), the Tribunal found

“In matters of [fraudulent] nature, it is no answer that a staff member acted in good faith by trusting another, no matter what the apparent justification for the trust. If good faith and trust are misplaced in such a situation, it is not the Organization that must bear the consequences, but the staff member whose certification turns out to be false or inaccurate. It would be an invitation to ... fraud if staff members could shift responsibility from themselves to the Organization merely by showing that they had mistakenly relied on or trusted another.”

III. In Judgement No. 583, *Djimbaye* (1992), the Tribunal found that

“despite many minor irregularities and a regrettable major delay ..., the Applicant's rights were by and large protected and ... his separation was carefully considered before it was given effect by the Respondent. The Applicant apparently felt that much was due to him ... and that his willingness to pay back whatever he had received by his false claim ... should close the case. The Tribunal cannot accept such a contention, nor is it able to see how an attempt to defraud can be exonerated by ... the [Applicant's contentions]”.

In the instant case, regardless of whether the Applicant or his wife forged the invoices in question, the Applicant knew or at least should have known that the documents produced by him personally for reimbursement were forged. Indeed, he admitted his knowledge despite the fact that he produced various explanations about how exactly the forgery took place. Moreover, while appreciating the Applicant's attitude in asking his wife to beg forgiveness from Van Breda, the Tribunal does not consider that such a gesture of goodwill exonerates the Applicant. It wishes to reiterate its consistent approach that the Secretary-General has discretion in establishing, and enforcing, the standards of conduct expected of international civil servants:

“In its jurisprudence, the Tribunal has ‘consistently recognized 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 to the affected staff

member before reaching a decision.’ (Judgements No. 300, *Sheye*, para. IX (1982); and No. 210, *Reid*, para. III).” (Judgement No. 941, *Kiwanuka* (1999).)

In Judgment 1222, *Othigo*, (2004) the Tribunal stated:

“The Respondent is clearly entitled to take the view that a person who engages in the perpetration of fraud against the Organization is unfit to remain in service. Such conduct is quite incompatible with the high standards which the Respondent is entitled to expect from a staff member of the United Nations.”

The Tribunal finds this statement equally applicable in the case now disposed of.

IV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Spyridon **Flogaitis**
Vice-President, presiding

Brigitte **Stern**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary