



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/056

Judgment No.: UNDT/2021/051

Date: 7 May 2021

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BAMBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Lee, OSLA

Robbie Leighton, OSLA

Counsel for the Respondent:

Lucienne Pierre, AAS/ALD/OHR,

Romy Batrouni, AAS/ALD/OHR

Background

1. The Applicant commenced service with the Organization in 2004. Prior to her separation from service, on 1 March 2018, she held a fixed-term appointment as a Nurse at the GL-4 level, with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).
2. On 7 May 2018, she filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Respondent's decision to dismiss her from service.
3. The Respondent filed his reply to the application on 8 June 2018.
4. The Tribunal heard the case on 7, 14, 17 and 21 December 2020, on 29 January 2021 and on 4, 5 and 19 February 2021 when oral testimony was received from:
 - a. the Applicant;
 - b. Dr. Pontife Isanda Isalimya (the Applicant's treating physician at the Centre Psychiatrique Sosame); and
 - c. Ms. Lesa Brittain, then Office of Internal Oversight Services ("OIOS") Investigator who investigated the Applicant's case;
5. The Respondent and Applicant filed closing submissions on 10 and 12 April 2021 respectively. On 14 April 2021, the Applicant filed a motion seeking to amend her closing submissions. On 16 April 2021, the Respondent filed a response to the Applicant's motion.

Summary of the relevant facts

6. On 4 May 2015, the Applicant attended the Centre Hospitalier Biopharm to undergo a pregnancy check-up. This medical test confirmed that she was four and a

half months pregnant.¹

7. On or around June 2015, six months into her pregnancy, the Applicant suffered a miscarriage. She became depressed as a result of the miscarriage, was admitted to the Centre Psychiatrique Sosame in Bukavu and received treatment for major depressive disorder.²

8. On 30 September 2015, the Applicant's maternity leave request for the period 5 October to 24 January 2016 was approved by her immediate supervisor.³

9. On 17 December 2015, the Investigations Division of OIOS received a report implicating the Applicant in child trafficking. In or around December 2015, OIOS opened an investigation under case no. 0572/15, to investigate the allegations of child trafficking implicating the Applicant. Specifically, there were four allegations: i) child trafficking; ii) knowingly obtaining a medical certificate for maternity leave without being pregnant; iii) submitting fraudulent medical insurance claims; and iv) accepting money from colleagues to assist with a pregnancy.⁴

10. The Applicant was interviewed in connection with these allegations on 1 July 2016.⁵

11. On 29 September 2016, OIOS informed the Applicant that the alleged misconduct was not substantiated and that the case was closed. She was also informed that a further investigation might be considered if new evidence was discovered.⁶

12. On 19 December 2016, OIOS finalized its Investigation Report in Case No. 0495/16 which found that, in 2015, the Applicant had fraudulently sought and was

¹ Application, annex 2.

² Application, paras. 5 and 6.

³ Application, annexes 7(2) and 7(4).

⁴ Application, para. 4 and annex 4.

⁵ Application, annexes 7(7) and 7(29).

⁶ Application, annex 4 and reply, annex 1.

granted maternity leave using a medical certificate obtained by deceit. OIOS referred the report to the Department of Field Support for its consideration.⁷

13. On 13 July 2017, the Applicant received a memorandum from the Chief, Human Resources Policy Service, Office of Human Resources Management (“OHRM”) charging her with misconduct. Specifically, it was alleged that on 25 September 2015, she misrepresented to Dr. Mubalamba Cizungu that she was pregnant to obtain a medical certificate attesting to her pregnancy, and based on this certificate, she sought and obtained maternity leave from the Organization from 5 October 2015 to 24 January 2016 to which she was not entitled.⁸

14. The Applicant responded to the allegations on 4 October 2017. She did not deny them but instead proposed to compensate for the maternity leave days she took by replacing them with her unutilized annual leave and certified sick leave for the period she was admitted to the Centre Psychiatrique Sosame.⁹

15. On 9 February 2018, the Applicant was informed that based on a review of the entire dossier, including her comments, the Under-Secretary-General for Management had concluded that the allegations against her were established by clear and convincing evidence, and that she had decided to impose the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, and to recover the loss to the Organization equal to 78 days’ maternity pay, by way of financial recovery pursuant to staff rule 10.1(b).¹⁰

16. Effective 1 March 2018, the Applicant was separated from service. The loss to the Organization equal to 78 days’ maternity pay was recovered from the Applicant’s final entitlements.¹¹

⁷ Application, annexes 6 and 7 and reply, annex 2.

⁸ Application, annex 5.

⁹ Application, annex 8, reply, annex 4.

¹⁰ Application, annex 9, reply, annex 5.

¹¹ Application, annexes 10 and 11.

Considerations

Legal issues

The role of the UNDT in disciplinary cases

17. In keeping with UNAT jurisprudence¹² the Tribunal will examine:
- a. whether the facts on which the sanction is based have been established;
 - b. whether the established facts qualify as misconduct under the Staff Regulations and Rules; and
 - c. whether the sanction is proportionate to the offence.

18. Part of the test in reviewing decisions imposing sanctions is whether due process rights were observed.¹³ The Tribunal will therefore, in addition examine the issue of whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

Whether the facts on which the sanction is based have been established

19. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.¹⁴

20. The Tribunal is cognizant of the principle that when termination is a possible outcome, the Administration must prove the facts underlying the alleged misconduct by “clear and convincing evidence”, which requires more than a preponderance of evidence but less than proof beyond reasonable doubt, and “means that the truth of the facts asserted is highly probable”.¹⁵

¹² *Majut* 2018-UNAT-862, para. 48; *Ibrahim* 2017-UNAT-776, para. 234; *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29; see also *Diabagate* 2014-UNAT-403, paras. 29 and 30; and *Molari* 2011-UNAT-164, paras. 29 and 30.

¹³ *Applicant* 2012-UNAT-209, para. 36.

¹⁴ *Nyambuza* 2013-UNAT-364.

¹⁵ *Molari* 2011-UNAT-164.

21. The impugned decision relates to a complaint that on 25 September 2015, the Applicant misrepresented to Dr. Cizungu that she was pregnant and obtained a medical certificate attesting to her pregnancy. Further, that based on this certificate, she sought and obtained maternity leave from the Organization from 5 October 2015 to 24 January 2016 to which she was not entitled.

22. In her testimony before the Tribunal, the Applicant was evasive when asked about whether she had lied to the Organization in order to secure maternity leave. In her response to the question; “Can you admit that you lied to the Organization and falsely claimed maternity leave when you weren’t pregnant...?”, she testified thus;

Well, it’s difficult to answer this that I’d – I’d lied. It’s very, very difficult to say that I lied, because I know I made a mistake in taking this leave as maternity leave -- that’s what I know. I’d taken it for a reason.... I consider that I made a mistake instead of informing the organization. I couldn’t also tell the organization everything that was happening, all the problems that I had. These are private matters. But I did it -- it’s an error that I did in taking this maternity leave, because I took this leave with a great many things in my head burdening me, and I simply didn’t even know if I would go back. All I knew is that I wanted to die...

23. While the Applicant’s testimony falls short of constituting an admission of the material particulars of the allegation, she made several admissions in the Transcript of audio-recorded interview with the investigators. In the interview, she admitted that on 25 September 2015 she sought and obtained from Dr. Cizungu a medical certificate attesting to being pregnant while, in fact, she knew that she was not pregnant.¹⁶

24. She admitted that before issuing to her the medical certificate, Dr. Cizungu did not conduct a medical examination but instead relied on her false representation that she was pregnant.¹⁷ She further admitted that knowing that she was not pregnant, she used the fraudulently obtained certificate to request and receive maternity leave from

¹⁶ Annex R/2, Doc. 007, Transcript of audio-recorded interview with the Applicant, 1 July 2016, part 1, pp. 149-151, 153.

¹⁷ Ibid, pp. 154-155.

the Organization.¹⁸

25. The above admissions are corroborated by Dr. Cizungu's statement in which he maintains that on 25 September 2015, the Applicant requested for a medical report to enable her to take maternity leave. Dr. Cizungu said that he did not conduct a medical examination on her, but instead relied, in good faith, on her statement that she was pregnant, and that she was receiving prenatal care in Kigali, and on the fact that she was a nurse collaborator.¹⁹

26. Further corroboration is supplied by the 25 September 2015 medical certificate which was issued by Dr. Cizungu attesting to the Applicant's pregnancy, including the due date²⁰, and the Applicant's maternity leave request, which shows that she used the fraudulently obtained medical certificate to request for maternity leave from 5 October 2015 to 24 January 2016.²¹ There is evidence that maternity leave for 5 October 2015 to 24 January 2016 was approved on 29 September 2015.²² The Applicant's United Nations Leave Card indeed shows that she was on maternity leave from 5 October 2015 to 24 January 2016 (78 working days).²³

27. The above evidence supports a finding that there is clear and convincing evidence that the Applicant misrepresented to Dr. Cizungu that she was pregnant and obtained a medical certificate attesting to her pregnancy, further that based on this certificate, she sought and obtained maternity leave from the Organization from 5 October 2015 to 24 January 2016 to which she was not entitled.

28. For the Applicant, it was argued that the elements constituting misconduct are not established since just two months after the alleged misconduct she was hospitalized at the psychiatric hospital with a major depression, and that she therefore lacked the

¹⁸ Ibid, pp. 156-161).

¹⁹ Annex R/2, Doc. 008, Statement of Dr. Cizungu, 7 March 2016.

²⁰ Annex R/2, Doc. 003, Medical Certificate, 25 September 2015.

²¹ Annex R/2, Doc. 002, UNFSS maternity leave request, 30 September 2015 (date of approval).

²² Annex R/2, Doc. 004, Maternity leave approval, 29 September 2015.

²³ Annex R/2, Doc. 009, United Nations leave card.

mental capacity to commit the act of fraud.

29. In the Tribunal's view, the submission and evidence that the alleged mental incapacity occurred two months after the misconduct does not provide nexus between the two occurrences. More significant though is that the Applicant's conduct over the relevant days suggests that she was actually present in mind and made deliberate and calculated decisions throughout that time.

30. In this regard, the Tribunal considered the uncontroverted evidence that she attended the Saint Luc Clinic, Bukavu, Democratic Republic of Congo, for an appointment with Dr. Cizungu (her professional acquaintance), with the intention of obtaining from him a false medical certificate, knowing that she was not pregnant. Dr. Cizungu provided her the medical certificate confirming her pregnancy and due date, without first conducting a physical medical examination on her, upon reliance on her statement that she was pregnant, and, in his words, upon "good faith with a nurse collaborator."²⁴ This evidence suggests that her decision as to which Doctor to obtain the certificate from was calculated and deliberate.

31. The evidence that she informed Dr. Cizungu that she followed prenatal care with her doctor in Kigali, Rwanda, and that the planned delivery date was 19 October 2015²⁵ similarly shows presence of mind on her part.

32. That on 26 September 2015, on the basis of the false medical certificate she made a *maternity* leave request (and not any other type of leave) using the United Nations Field Support Suite ("UN FSS") system after obtaining her supervisor's approval and arranging for someone to replace her in her functions as a nurse²⁶ is further evidence of presence of mind, being that these were deliberate and premeditated steps.

²⁴ Reply, Annex R/2, Doc. 008, Statement of Dr. Cizungu, 7 March 2016.

²⁵ Ibid.

²⁶ Reply, Annex R/2, Doc. 002, UNFSS maternity leave request, and Reply, Annex R/2, Doc. 007, Transcript of audio-recorded interview with the Applicant, lines 3553-3593.

33. The fact that a few weeks after her 25 September 2015 visit to Dr. Cizungu's clinic, she visited him again, this time with two babies who she claimed were hers and lied to him again that she had given birth to triplets, and that one of the triplets was in an incubator in Kigali, leaves no doubt that she was present in mind throughout the period in issue.

34. Crucially though, is that the credibility of the whole account about the Applicant's pregnancy, miscarriage and mental incapacity allegedly resulting from her loss of a pregnancy and her partner's violence and subsequent desertion was put into question by the grave contradictions and inconsistencies in her evidence, as highlighted by Counsel for the Respondent.

35. In this regard, the Tribunal agrees with Counsel for the Respondent that the fact that the purported result of a pregnancy test issued by the "Centre Hospitalier Biopharm" on 4 May 2015 refers to a 32-year-old female²⁷ when the Applicant was born on 30 April 1976 and was therefore 39 years old at the time²⁸, can only mean that she could not have been the subject of that test.

36. It is also true that the Applicant contradicted herself when she asserted that her partner left her in September 2015 and that she has not heard from him since²⁹, yet she claims that on 25 September 2015 she went to the hospital and pretended to be pregnant, so that her partner would not leave her.³⁰ This also contradicts her statement that her partner is responsible for the loss of her alleged pregnancy, and that when she allegedly lost her pregnancy, her partner did not permit her to leave the house and arranged for two of his friends/doctors to perform a curettage on her at home using medical equipment he had purchased.³¹

37. The Tribunal fully agrees with the Respondent's assertion that if the

²⁷ Annex R/2, Doc. 010, Result of pregnancy test, 4 May 2015.

²⁸ Annex R/1, Personnel Action Form, 29 June 2016.

²⁹ Reply, Annex R/2, Doc. 007, Transcript of audio-recorded interview with the Applicant, 1 July 2016, part 1, page 72.

³⁰ Ibid., pp. 152, 154.

³¹ Ibid., pp. 86-87.

Applicant's partner had indeed orchestrated her alleged forced abortion in September 2015, and gone to the length of arranging for his doctor friends to perform a curettage, he would have known that she was no longer pregnant, and she would not need to obtain a false medical certificate to convince him that she was still pregnant.

38. It is also logical to say that even if the Applicant's claim that her partner wanted to leave her and that is the reason she pretended to be pregnant were accepted, it does not explain why, after obtaining a false medical certificate from Dr. Cizungu, she made a request for maternity leave based on the fraudulently obtained medical certificate.

39. The other contradiction is in Applicant's assertion in her application that she applied for maternity leave because she was ashamed of having lost a child³² yet she claims that she was ashamed to say that she had miscarried *because* she had already been given maternity leave.³³

40. It is noteworthy that the Applicant is silent about the above contradictions. She offers no explanation for them and yet they go to the root of her claim. The Tribunal finds the Applicant's account of events very unreliable, thereby leaving the Respondent's contention and evidence that on 25 September 2015 the Applicant misrepresented to Dr. Cizungu that she was pregnant and obtained a medical certificate attesting to her pregnancy, further that based on this certificate, she sought and obtained maternity leave from the Organization from 5 October 2015 to 24 January 2016 to which she was not entitled, uncontroverted. On this ground, the Tribunal finds that there is clear and convincing evidence that the Applicant committed the misconduct complained of.

³² Application, para. 42.

³³ Reply, Annex R/2, Doc. 007, Transcript of audio-recorded interview with the Applicant, 1 July 2016, part 1, p. 90.

Whether the established facts qualify as misconduct under the Staff Regulations and Rules

41. Staff regulation 1.2(b) provides that “staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.”

42. The MONUSCO Code of Conduct provides that “MONUSCO personnel should not [...] make false claims or accept benefits to which they are not entitled”.

43. That the Applicant misrepresented to Dr. Cizungu that she was pregnant and obtained a medical certificate attesting to her pregnancy, and that based on that certificate she sought and obtained maternity leave from the Organization from 5 October 2015 to 24 January 2016 to which she was not entitled evidences a serious lack of integrity/dishonesty on the Applicant’s part, in contravention of the above Rules and Regulations. On that basis, the Tribunal finds that the established facts qualify as misconduct under the Staff Regulations and Rules.

Whether the sanction is proportionate to the offence

44. The legal principle is that the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.³⁴

45. Other relevant principles are that; the Secretary-General has wide discretion in determining the appropriate disciplinary measure, due deference should be shown to

³⁴ *Samandarov* 2018-UNAT-859.

the Secretary-General's disciplinary decisions, it is not the role of the Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him, and that the Tribunal is more concerned with how the decision-maker reached the impugned decision, not the merits of the decision.³⁵

46. It is also important to remember that only if the sanction imposed appears to be blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity that the judicial review would conclude in its unlawfulness and change the consequence.³⁶

47. The Applicant raised three arguments in support of the assertion that the sanction is disproportionate to the offence, the first of which was that since the Organization did not suffer any loss from her misconduct, the sanction should have been less severe than what was meted out.

48. Bearing in mind that the investigation and judicial processes which the Respondent employed in order to recover the money entail investment of resources, the fact that the Respondent made the financial recoveries as a result of an investigative process means that the loss was only mitigated. This is in addition to the unnecessary loss of the Applicant's services during the period she went on the undue maternity leave.

49. The argument that the decision-maker did not consider the context in which the alleged misconduct occurred as a mitigating factor falls on its face given the finding that there is no credible evidence that the Applicant ever labored under any violence, mental incapacity and trauma during the material time.

50. On the other hand, factors such as the existence of trust which is fundamental to the relationship between an employer and employee and which the Applicant breached when she knowingly defrauded the Organization and obtained a benefit to

³⁵ *Sanwidi* 2010-UNAT-084.

³⁶ *Portillo Moya* UNAT-2015-523; *Aqel* UNAT-2010-040; *Konaté* UNAT-2013-334.

which she was not entitled, was an aggravating factor which justified the imposition of the sanction in issue.

51. Moreover there is evidence that the totality of the circumstances, including mitigating factors such as the Applicant's long service with the Organization and her admission, albeit only after the Organization's discovery of her fraud, were considered in keeping with set principles.³⁷ It is understood that it was because of the due consideration of the mitigating factors that the sanction was not the most severe one available to the Respondent, i.e. a sanction of dismissal, in accordance with staff rule 10.2(a)(ix).

52. The mere fact that in the cases which were cited by Counsel for the Applicant there were more favorable outcomes is not evidence of unfairness or otherwise, since the differences may be explainable on the basis of various distinguishing factors.

53. Suffice it to say, and in full agreement with the Respondent, there is basis for the assertion that the practice of the Secretary-General in disciplinary matters shows that measures at the stricter end of the spectrum have normally been imposed by the Organization in cases involving falsification of documentation to obtain entitlements, absent compelling mitigating circumstances.³⁸

54. Absent evidence that the sanction which was imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity, and in keeping with the set principles³⁹, the Tribunal finds that the sanction is proportionate to the offence and lawful, and finds no basis for interfering with the decision maker's discretion.

³⁷ *Yisma* UNDT/2011/061.

³⁸ e.g., *ST/IC/2017/33*, paras 29-32; 38-40. See also Compendium of disciplinary measures, ref. nos. 333, 334, 335, 338, 339, 340, 341 (from 1 July 2016 to 30 June 2017).

³⁹ *Portillo Moya* UNAT-2015-523; *Aqel* UNAT-2010-040; *Konaté* UNAT-2013-334.

Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant

55. The Tribunal is cognisant of the requirement that an internal disciplinary process complies with the principles of fairness and natural justice.⁴⁰ In this regard, it is not disputed that the Applicant was interviewed in connection with the investigation and her interview was audio-recorded. In the Allegations Memorandum, the Applicant was informed of her right to seek the assistance of counsel and was given the opportunity to comment on the allegations which she did. Her comments were duly considered. To that extent, the Applicant's fairness rights were respected throughout the investigation and the disciplinary process.

56. The Applicant however points to some translation flaws during the OIOS interview to assert that the OIOS failed to conduct a proper investigation. These included the fact that the word "curettage" is neither properly translated nor transcribed in the transcript, the fact that the word "complot" or "plot" is neither translated nor transcribed in the transcript, and the alleged confusion which is said to have been created by the Translator's failure to properly translate verb tenses, which is said to have resulted in a complete misunderstanding of the Applicant's state of mind on whether she knew the two Zambian doctors to be actual doctors at the time they performed the curettage procedure on her.

57. The above complaints form part of a general complaint that the investigators did not sufficiently investigate the assertion that the Applicant did not have the necessary intent (which must be established by clear and convincing evidence) to commit fraud on account of her mental illness. This, it is argued, was exacerbated by the fact that the Transcript of the Applicant's OIOS interview omits to include the most salient information, which renders the Applicant's narrative confusing and incomplete, and the investigator's (Ms. Brittain's) failure to grasp the Applicant's evidence due to

⁴⁰ *Mmata* UNDT/2010/053.

the inaccurate translation that she received from Mr. Oscar Motabazi, her Administrative Assistant.

58. While it is true that the translation flaws high-lighted above exist, it is an established principle that only substantial procedural irregularities will render a disciplinary measure unlawful. Even a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct.⁴¹

59. The Tribunal does not agree that the translation flaws in this case amount to a failure by the OIOS to conduct a proper investigation, since sufficient uncontroverted evidence that the Applicant was not labouring under mental incapacity when she committed the misconduct was obtained during the investigation. The fact that that evidence does not support the Applicant's narrative does not mean that the investigations were insufficient.

60. Most important is the fact that the investigation was balanced since the Applicant was given sufficient opportunity to present her account and all indication is that the investigators intended to obtain corroborative evidence but for the insufficient leads, such as the lack of the full addresses and other contact details of key witnesses such as the Applicant's partner and the two doctors who allegedly performed the medical procedure she outlined.

61. It is instructive that the Applicant has not commented on key aspects of material evidence which formed the basis for the Tribunal finding that the unexplained contradictions in the Applicant's evidence render her account over her alleged pregnancy, violence by her partner, miscarriage and trauma and mental illness unreliable. Such evidence includes the purported result of a pregnancy test issued by the "Centre Hospitalier Biopharm" on 4 May 2015 which refers to a 32-year-old

⁴¹ *Sall* 2018-UNAT-889.

female.⁴²

62. Based on the above, the Tribunal finds that the alleged translation mistakes and discrepancies between her OIOS interview and the transcript thereafter produced didn't have a material impact on the established facts that the Applicant knowingly and wilfully misrepresented her pregnancy to Dr Cizungu in order to fraudulently obtain a medical certificate attesting to her pregnancy and subsequently used that certificate to claim a benefit to which she was not entitled. The alleged translation mistakes didn't have a material impact on either her due process rights or on the established facts relevant to the proportionality of the sanction imposed.

63. In the result the Tribunal finds that that there is clear and convincing evidence that the Applicant committed the misconduct complained of, and that the established facts qualify as misconduct under the Staff Regulations and Rules, further that the sanction is proportionate to the offence and therefore lawful. The Tribunal also finds that there were no due process violations in the investigation and in the disciplinary process leading up to the disciplinary sanction against the Applicant.

Judgment

64. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 7th day of May 2021

Entered in the Register on this 7th day of May 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁴² Annex R/2, Doc. 010, Result of pregnancy test, 4 May 2015) yet the Applicant was born on 30 April 1976 and was therefore 39 years old at the time (Annex R/1, Personnel Action Form, 29 June 2016).