



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Jacob van de Velden, AAS/ALD/OHR, UN Secretariat

Andrea Ernst, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 10 February 2020, the Applicant, a former Political Affairs Officer, at the P-4, step 9 level, working with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”) in Laayoune, filed an application before the Dispute Tribunal.¹ He contests a decision of the Under-Secretary-General for Management Strategy, Policy and Compliance dated 11 November 2019 imposing on him a disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity.² The decision also ordered recovery of monies due to the Organization, which part is not challenged by the application.

2. The Respondent filed a reply on 28 February 2020.

Facts

3. The undisputed facts are that for the years 2014 to 2017, the Applicant’s two children were studying in Canada. Child KD attended the West Island College (“WIC”), Inc. in Quebec, Canada, while Child DD was a student of CDI College in Quebec, Canada from 15 September 2015.³ For the academic year 2017-2018, KD changed schools and went to a private school in Senegal, Ecole Saint Marie.⁴ During the same academic year, 2017-2018, DD was not a full-time student: he studied part-time at Concordia University and was taking some courses at CDI.⁵ It is undisputed that the Applicant submitted claims for Education Grant (“EG”) for years 2014-2015, 2015-2016, and 2016-2017 and for EG advances for the year 2017-2018.

¹ Application, section I.

² Application, section V; Application annex 1.

³ Reply, annex R/6 (audio recording-interview of the Applicant’s wife, Ms. FMS, 8 February 2018 Application, annex 1).

⁴ Ibid.

⁵ Ibid.

Claims submitted for KD

4. It is undisputed that the Applicant submitted EG claims for KD for three academic years, 2014-2015, 2015-2016, and 2016-2017.⁶

5. For the time KD was at WIC, Ms. Simard was the Director of Student Services⁷ and Ms. Lise Lafontaine was the Director of Finance and Operations at WIC.⁸ Both the two school principals confirm that KD was a student at WIC for the academic years 2014-2017. On 18 August 2017, Ms. Simard explained to the investigators that she had received the P.41 forms in person from the Applicant's wife, Ms. FMS (anonymized for confidentiality). Ms. Simard stated that for three times Ms. FMS had dropped by her office unexpectedly at the end of the day and asked her to sign the forms to confirm KD's enrollment at WIC. Ms. Simard stated that there were no other parts of the form that she personally completed and that for the 2015, 2016 and 2017 forms, she only signed and dated them and "the school seal was applied by the (WIC) receptionist".⁹ Ms. FMS confirms having taken the forms to the school when they were already filled.¹⁰

6. In her email to the investigators, dated 21 August 2017, Ms. Lafontaine also stated that "the amounts that appear on the two 'certificates of attendance' forms that the investigators sent to WIC were not completed by an official of the school". She provided a spreadsheet of mandatory fees which had been required by the school and indeed received by them and those that were not.¹¹ On this basis, the Respondent compared the claimed and the actual expenses.

⁶ Reply, annex R/1, Doc. No. 000043, p. 51 (Request for payment of Education Grant) and Doc. No. 000039, p. 21 (Copies of Education Grant claims).

⁷ Application, annex 3.

⁸ Reply, annex R/1, para. 18.

⁹ Ibid, p. 98.

¹⁰ Reply, annex R/6 (Ms. FMS audio recording); Reply, annex 1, p. 140, lines 149-151 (Ms. FMS interview transcript).

¹¹ Reply, annex R/1, Doc. No. 000056, p. 71 (Email from Ms. Lafontaine).

a. For the 2014-2015 academic year, the claims for EG that the Applicant submitted for KD on 4 July 2015 present inflated or non-existent positions as in the following table.¹²

2014-2015 Academic Year	Actual amount paid to WIC (Canadian dollars (CAD))	Claim (CAD)	Excess
Tuition	11,155	11,155	0
Admission fee	300	1,400	1,100
Registration fee	200	200	0
Technology fee	175	0	-175
School Supplies (text books and work books)	Not Applicable (N/A)	450	450
Uniforms	N/A	958	958
Tutorial	N/A	1,950	1,950
<i>Materiel Didactique</i>	N/A	1,800	1,800
Sport Activities	N/A	408	408
TOTAL	11,830	18,321	6,491

b. For the 2015-2016 academic year, the claims for EG that the Applicant submitted for KD on 22 July 2016, present excess as in the following table:¹³

2015-2016 Academic Year	Actual paid to WIC (CAD)	Claimed (CAD)	Excess
Tuition (plus registration)	11,670 (Tuition and registration)	11,970 (for tuition only)	300
Registration	N/A	1,700	1,700
Admission fee	300	1,400	1,100
School Supplies (text books and work books)	N/A	1,200	1,200
Uniforms	N/A	1,460	1,460
Tutorial	N/A	2,460	2,460
<i>Materiel Didactique</i>	N/A	2,370	2,370
Sports activities and equipment	N/A	1,360	1,360
Total	11,970	23,920	11,950

c. For the 2016-2017 academic year, the claims for EG that the Applicant submitted on 26 July 2017 for KD also present excess claimed expenses as the following table summarizes.¹⁴

¹² Ibid.

¹³ Ibid, Doc. No. 000044, p.55.

¹⁴ Reply, annex 1, Doc. No. 000060, p. 78 (The Applicant's Education Grant Claims, 2016-2017).

2016-2017 Academic Year	Actual paid to WIC (CAD)	Claimed (CAD)	Excess
Tuition (plus registration)	11,900 (tuition plus registration)	11,900 (tuition only)	0
Registration	N/A	1,700	1,700
Admission fees	300	1,400	1100
Uniforms	N/A	1,258	1,258
Tutorial	N/A	2,150	2,150
<i>Materiel Didactique</i>	N/A	2,300	2,300
Sports activities and equipment	N/A	558	558
TOTAL	12,200	21,266	9,066

Claims submitted for DD

7. The Applicant submitted two EG claims for DD for two academic years, 2015-2016¹⁵ and 2016-2017.¹⁶

8. At the time, Ms. Nicole Quenneville was the Financial Coordinator at College CDI. Ms. Quenneville explained to the investigators that the Applicant's wife brought the EG claim form to CDI and asked her to sign it. She stated that, she did not complete any part of the form other than her signature.¹⁷ The Applicant's wife, Ms. FMS confirms that she brought the form to CDI already completed to be signed.¹⁸

9. Ms. Quenneville further elaborated to the investigators that the P.41 form for DD for academic year 2016-17, the charges entered in section 10 and the supposed payments made by the Applicant to CDI, were "completely erroneous" as the entire program had been paid for the previous year. Ms. Quenneville provided an image showing all payments made to CDI by the Applicant and the total was USD13,560 (thought to be CAD) as opposed to the Applicant's claimed total of CAD50,600. Ms. Quenneville emphasized that CDI does not have any additional mandatory fees for *materiel informatique*, school supplies, tutorial, sportive activities, transport or *frais de*

¹⁵ Reply, annex R/1, p. 31 (Request for education grant and certificate of attendance).

¹⁶ Ibid.

¹⁷ Ibid, Doc. No. 000066, p. 88 (Ms. Quenneville email to OIOS, 27 September 2019).

¹⁸ Reply, annex R/6 (Ms. FMS audio recording of the interview); Reply, annex R/1 p. 140, lines 149-151 (Ms. FMS interview transcript).

subsistence.¹⁹ Ms. Quenneville stated that the Applicant completed paying for the total tuition (CAD13,560) in 2016 and there were no more payments made in the subsequent years.²⁰

10. It is uncontested that the Applicant submitted claims for EG as follows:

a. In the EG claim that the Applicant presented for DD on 22 July 2016 for the 2015-2016 academic year, there are excess claimed expenses as the table summarizes.²¹

2015-2016 Academic Year	Actual paid to CDI (CAD)	Claimed (CAD)	Excess
Tuition	13,400	13,440 (tuition only)	40
Registration fee	160	160	0
<i>Materiel informatique</i>	N/A	3,200	3,200
school supplies	N/A	500	500
Tutorial	N/A	2,900	2,900
Sports activities	N/A	1,100	1,100
Transport	N/A	900	900
<i>Frais de subsistence</i>	N/A	1,600	1,600
TOTAL	13,560	23,800	10,240

b. The EG claim which the Applicant presented for DD on 26 July 2017 for the 2016-2017 academic year was unsupported as the expenses for the course of study, that is, the program in which he was enrolled, were to be paid in full at the beginning of the program. The Applicant paid for the entire program with payments totaling USD13,560 in 2015 and 2016 as indicated in the spreadsheet provided by CDI. There were no subsequent payments to CDI.²²

2016-2017 Academic Year	Actual paid to CDI (CAD)	Claimed (CAD)	Excess
Tuition	0	13,440	13,440
Registration fee	0	160	160
<i>Materiel informatique</i>	N/A	3,400	3,400
school supplies	N/A	700	700
Tutorial	N/A	3,900	3,900
Sports activities	N/A	1,200	1,200
Transport	N/A	1,400	1,400
<i>Frais de subsistence</i>	N/A	2,600	2,600
TOTAL	0	26,800	26,800

¹⁹ Reply, annex R/1, Doc. No. 000066, p. 89 (Ms. Quenneville email to OIOS, 26 September 2019).

²⁰ Ibid.

²¹ Reply, annex R/1, Doc. No. 0000 44, p. 55.

²² Ibid., p. 89 (Ms. Quenneville email to OIOS, 27 September 2019).

11. Based on the foregoing, the Applicant claimed an excess amount of CAD37,040 between 2015 and 2017 for DD, as the following table demonstrates. The table also shows the total disbursements in United States Dollars made to the Applicant as EG claims for DD for the two academic years from 2015 through 2017.²³

Academic year	Total actual paid to CDI (CAD)	Total claimed (CAD)	Excess Claimed (CAD)	Amount Disbursed by Organization (USD)
2015-2016	13,560	23,800	10,240	13,134.51
2016-2017	0	26,800	26,800	11,633.10
Grand total	13,560	50,600	37,040	24,767.61

Advances

12. As indicated in the preceding paragraphs, during the 2017-2018 academic year, KD attended a private school in Senegal, Ecole Saint Marie, while DD, during the 2017-2018 academic year, was a part-time student at Concordia University and was not a full-time student at CDI but was taking some courses there.

13. It is uncontested that on 12 September 2017, the Applicant submitted a P.45 form request for EG Advances for the academic year 2017-2018, for both KD and DD, at WIC and CDI respectively.²⁴ On 25 September 2017, USD8,160, (75% of USD10,880), was paid to the Applicant as EG Advance for KD.²⁵ On the same day, on 25 September 2017, USD8,160, (75% of USD10,880), was also paid to the Applicant as EG Advance for DD.²⁶ It is also uncontested that the Applicant did not inform the Organization that KD had moved to another school in Senegal and that DD was attending Concordia on a part-time basis and only taking some courses at CDI.²⁷

14. Subsequently, in October 2018, the Organization recovered USD16,320 from the Applicant.²⁸ This was a result of the Organization having established that KD did

²³ Reply, annex R/1, doc. No. 000094, p. 133.

²⁴ Ibid., Doc. No. 000080, p. 96.

²⁵ Reply, annex R/1, Doc. No. 000077, p. 93 (2017-2018 EG Advance for KD).

²⁶ Reply, annex R/1, Doc. No. 000078, p. 95 (2017-2018 EG Advance for KD).

²⁷ Reply, annex R/1, p. 148 (Ms. FMS interview transcript), lines 318-327, and p. 152, lines 424-425.

²⁸ Sanctioning letter, p.2 (i).

not attend the claimed schools whereas DD was not a full-time student at all.²⁹

Administrative proceedings

15. On 23 June 2017, the Investigations Division of the Office of Internal Oversight Services (“OIOS”) received, from the Internal Audit Division (“IAD”) of OIOS, a report of possible misconduct involving the Applicant for the EG claims that he had submitted for his two children, KD and DD.³⁰ Specifically, IAD reported that, during their conduct of an audit, no supporting documentation could be found for the EG grant claim submitted by the Applicant.³¹ OIOS, accordingly invited the Applicant for an interview which took place on 7 November 2017.³² OIOS produced a report of its investigation on 30 April 2018, indicating that the Applicant had intentionally misrepresented the information he submitted to the Organization.³³ It was found that the Applicant submitted to the Organization EG claims for two children which contained false information and he submitted a request for EG advances for his two children, to which he was not entitled.

16. On 3 July 2019, the Applicant was informed of the allegations of misconduct and requested to submit his comments, if any, within a period of one month.³⁴ On 26 September 2019, the Applicant submitted his comments.³⁵

17. On 25 August 2019, the Applicant took certified sick leave to run until 7 October 2019³⁶ and was authorized to travel to Montreal, Canada for medical treatment.³⁷ Later, the Applicant submitted to MINURSO Human Resources and the United Nations Medical Unit a request for the extension of his sick leave through 20

²⁹ Admittedly, there is an error in accounting the debt subject to recovery in the sanctioning letter, in that the USD16,320 was mistakenly deducted from the overall sum remaining due from the Applicant. It follows that the recovery decision at present is in the Applicant’s favour.

³⁰ Reply, annex R/2.

³¹ Reply, annex R/1, para 2.

³² Reply, annex R/1, p. 103.

³³ Ibid.

³⁴ Reply, annex R/3.

³⁵ Reply, annex R/4.

³⁶ Application, annex R/7, pg. 9.

³⁷ Application, annex 2, pg. 9.

November 2019.³⁸ On 11 November 2019, however, prior to the approval of the sick leave extension request, the Applicant was informed of the imposition of the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity.³⁹

Pleadings

18. The Applicant's case is that he did not commit fraud but rather an error of judgment; that the investigation against him was biased and incomplete; and that there were errors in his separation which was carried out without awaiting an approval of extension of his sick-leave.

19. As remedies, the Applicant requests the Tribunal to:

- a. rescind the contested decision and order for his reinstatement;
- b. order regularization of his status as staff on sick leave in accordance with medical certificates; and
- c. award him compensation for the psychological damage he suffered.

20. The Respondent's case is that relevant facts were properly established and amount to misconduct; there was no violation of due process and the sanction is proportionate. He, accordingly, moves for the application to be dismissed.

Considerations

Scope of judicial review

21. It is well-established case law that the role of the UNDT in disciplinary cases is to assess the following elements:

- a. Whether there is clear and convincing evidence that the facts have occurred.

³⁸ Ibid.

³⁹ Application annex 1.

- b. Whether the facts amount to misconduct.
- c. Whether staff member's due process rights were observed.
- d. Whether the sanction is proportionate to the gravity of the offence.

22. Below the Tribunal will consider each of these points, in addressing the parties' specific submissions.

Whether relevant facts were established on clear and convincing evidence

23. The Applicant explains that he entrusted the processing of EG to his wife, who is not a United Nations employee and is not familiar with the regulations. They relied upon the schools and the Mission to check the information for accuracy and eligibility for reimbursements. To this end, his wife had made appointments with Ms. Lafontaine the Director of Finance and Operations at WIC and the Registrar of CDI to obtain certifications relevant for the EG. The school officials signed with full knowledge of the cause, without obligation on their part, and without influence from the Applicant or his spouse. No figures were altered after signature. The Applicant admits to using the ED since 2009 but he claims ignorance of the procedures regarding EG reimbursement. He, however, maintains that he always acted in good faith and communicated directly with the EG department, on whom he counted to review the propriety of the claim and make such adjustments as necessary. Certain positions, such as registration and admission fees for KD or tuition for his son for 2016-2017, may have been entered in the forms mistakenly by his wife; they, however, became certified by the schools. All the other expenses that he claimed had been incurred had been required for the success of the children's academic program and did not involve inflation of the cost (for example, in reality they were spending more on private tuition than claimed). As such, the Applicant does not dispute that recoveries are due from

him in principle, he however maintains that, because of the legitimate goal of the expenses, the balance is incorrect.⁴⁰

24. As regards advance payments for 2017/18, the requests were made in the interim, however, there was an unforeseen relocation of both children to Senegal where they were enrolled in different schools. Adjustments to the due level of EG have already been made in accordance with certifications submitted by the Applicant in 2018.

25. The same was confirmed by the testimony of the Applicant's wife, Ms. FMS, who claimed to have held exclusive responsibility for attending to their children's education, including submission of the forms to the schools. She however asserted that she had no knowledge of United Nations forms and just took what her husband had sent her and copied information from previous years. Ms. FMS did not answer whether she had proof of paying the claimed tuition, admission and registration fees that were denied by the schools. She nevertheless maintained that in reality they had borne expenses for genuine school needs of the children, even though these were not claimed on a proper form.

26. The Respondent's position is that there is clear and convincing evidence that between 2014 and 2017, for KD, the Applicant claimed an excess of CAD27,507⁴¹ and between 2015-2017, for DD, the Applicant claimed an excess amount of CAD37,040.⁴² The Applicant has not provided any evidence which would contradict the findings of the investigation or the conclusions of the disciplinary process.⁴³

27. The Respondent submits that the Applicant, while he acknowledged a lack of care in handling the issue of EG, has not produced any evidence that he attempted to ensure the accuracy of his claims and requests for benefits. His wife's claims as to the expectation that officials with the respective schools should not have "certified" the

⁴⁰ The Applicant did not make a showing of legitimate expenses, see para. 30 below.

⁴¹ Reply, para 10.

⁴² Ibid., para 15.

⁴³ Ibid., para 28.

documentation had they been inaccurate, are misguided, as the schools would not be expected to be familiar with the policies of the Organization. It is the responsibility of the staff member to ensure the accuracy of his or her submissions to the Organization and the Applicant attested to this accuracy.

28. With regard to advances, the Respondent submits that the Applicant submitted EG advances for the 2017-2018 academic year for both KD and DD, at WIC and CDI respectively, while the children did not attend these schools. The Applicant did not inform the Organization that KD was in school in Senegal, while DD was attending Concordia University on a part-time basis and only taking some courses at CDI. As a result of these misrepresentations, on 25 September 2017, USD8,160 was paid to the Applicant as EG advance for KD and other USD8,160 was also paid to the Applicant as EG advance for DD.⁴⁴

29. Primarily, the Tribunal notes that the Applicant has not offered any statement, or evidence, which would contradict the fundamental findings of the disciplinary process regarding the objective element of the impugned conduct, that is, that requests were made largely based upon incorrect information, to which the Applicant attested.

30. Some of the claims are obviously fallacious, such as non-existing or inflated school fees (tuition, registration, admission), which were denied by school officials and for which no receipts were offered. As regards other claims, as to which the Applicant maintained would have constituted legitimate reimbursable expenses had they been submitted on a proper form, the Tribunal repeatedly requested the Applicant to demonstrate the particulars, i.e., the list of expenses, receipts and an indication of how they were required by the schools.⁴⁵ The Applicant filed an inchoate collection of receipts; otherwise he did not comply with the order. The Tribunal, however, observes that, apart from a certificate attesting generally that undefined handbooks had been required by WIC, there are no receipts for expenses that would be *prima facie* reimbursable under the controlling ST/AI/2011/4 (Education grant and special

⁴⁴ Ibid., para 19.

⁴⁵ See Order No. 240 (NBI/2020) and Order No. 243 (NBI/2021).

education grant for children with a disability), even if properly and timely claimed. On the contrary, the receipts were for items and services that could not be expected to be admissible by common sense standard, such as clothing (including underwear), gym gear, iPads and multiple laptops per child, and even registration for dance classes.⁴⁶

31. In conclusion, the Tribunal finds that submission of false and otherwise improper claims has been proven by clear and convincing evidence.

Whether the facts amount to misconduct

32. The Applicant's main contention is the lack of serious fault in his conduct.

33. The Applicant maintains that he never submitted false claims or knowingly submitted requests for reimbursement of expenses as to which he knew that he was not entitled to, and that submitting a claim that may not be covered under EG is not an evidence of making a false claim.⁴⁷ He admits that he made errors, but such errors were due to lack of proper diligence in verifying the information that he submitted, but not for knowingly making false claims. The Applicant concludes, therefore, that this is an issue of judgment of his part, which is to be properly addressed by recovery of overpayment, but not of fraud and misconduct.⁴⁸

34. The Respondent's case is that the Applicant violated staff regulations 1.2(b) and 1.2(q), and staff rule 1.7. The Applicant acted, at minimum, with gross negligence.

35. The Tribunal recalls that for staff members applying for education grant the administrative issuance applicable at the time of the Applicant's requests, established a duty of special diligence:

9.1 When submitting a request for education grant advance or for payment of the education grant, staff members shall ensure the accuracy and completeness of the information being provided to the United Nations, and promptly correct any erroneous information or estimates

⁴⁶ Trial bundle, pages 283-284, lines 164-182.

⁴⁷ Application, annex 2, pg. 5, para. 10.

⁴⁸ Ibid., para. 11, Applicant's testimony on 19 November 2021

that they may have previously submitted. Documentation provided by an educational institution may not be altered by the staff member. Incorrect, untrue or falsified information, as well as misrepresentation or partial disclosure, may result not only in the rejection of a claim and/or recovery of overpayments but also in disciplinary measures under the Staff Rules and Regulations (see ST/SGB/2011/1).

9.2 Staff members shall retain, for a period of five years counting from the date of submission of the education grant settlement claim, all substantiating documentation, such as invoices, receipts, cancelled cheques and bank statements documenting expenditures. Such documentation shall be produced if requested by the Organization.⁴⁹

36. Clearly, thus, the obligation to verify accuracy and completeness of the information provided in the EG request rests upon the staff member irrespective of the corresponding duties of various officials involved in certifying, processing and disbursement. As such, error or negligence on the part of any - or all – of these officials, no matter how regrettable, does not alleviate the staff member’s responsibility for the lack of accuracy. With respect to sanctions available for the lack of accuracy, indeed, as outlined in the administrative instruction, they include administrative measures aimed at restoring the financial balance, and a submission of inaccurate data needs not amount to a disciplinary case. The matter for disciplinary liability under staff regulations 1.2(b) and 1.2(q), and staff rule 1.7 will turn on the presence of the subjective element, intent or negligence, on the part of the staff member.

37. In the instant case, there is no question that the Applicant neither filled out the forms nor obtained school officials’ signatures on them; rather, that part was executed by his wife. For the following reasons, nevertheless, the Tribunal accepts that in submitting the claims the Applicant acted with, at minimum, an indirect intent, that is, in acceptance of the eventuality that some of the claims were false.

a. Outright fallacy of the non-existing fees while concealing other improper claims under concocted terms, e.g., “*matériel informatique*”, indicate intent.

⁴⁹ ST/AI/2011/4, see also section 10 of ST/AI/2018/1 (Education grant and related benefits).

b. The systematic way in which improper claims were being made - over the period of three years, in relation to both children in schooling, and in relation to all types of expenses possible - excludes a chance misrepresentation. Except one insignificant exception of USD175, all of them financially benefited the Applicant;

c. The fact of claiming advance education grant for KD and DD in 2017 indicate disingenuity. The Applicant personally filed the request on 12 September 2017⁵⁰ and received the advance totaling USD16,320 on 25 September 2017.⁵¹ Whereas already in August 2017, Ms. Lafontaine from WIC had been advised by Ms. FMS that KD would not be returning for the 2017-2018 school year.⁵² This indicates that the removal of KD from WIC must have been decided much earlier than the Applicant and his wife are ready to admit. At minimum, the Applicant failed to promptly inform and reimburse the Organization, even though admittedly, he knew, mid-October 2017 at the latest⁵³ that KD would not be returning to WIC.

d. There is a strong presumption that the Applicant remained informed of the actions of his wife. Despite the claimed alienation from matters of the children's schooling and preoccupation with the work for the Mission, the hearing confirmed that Applicant was not distant from his family. He would go home every three months for Rest and Recuperation ("R&R")⁵⁴; moreover, the children went to visit him in Laayoune.⁵⁵

e. The proportion of claimed expenses to the family income speak to their significance and thus imply knowledge on the Applicant's part. The

⁵⁰ P.45 form submitted by the Applicant, p. 218 of the trial bundle.

⁵¹ Reply, annex R/1, doc 77 and 78.

⁵² Reply, annex R/1, p. 71 (doc. 56).

⁵³ Doc. 7.2 of the Joint Bundle, transcript of OIOS interview with the Applicant on 7 November 2017, lines 399/400 "We told WIC on maybe 15 or 10th of October".

⁵⁴ Applicant's and Ms. FMS's testimony on 19 November 2021.

⁵⁵ Applicant, *ibid.*

Applicant's net salary was USD10,447.30⁵⁶ and was a sole source of income for the family of five.⁵⁷ Despite assurances at the hearing as to how well-off the family had been, only the amount of CAD13,440 (equivalent of tuition claimed for DD 2016-2017 and approximately one month's salary) must have mattered for the household, while, as noted by the Respondent, false EG claims reimbursements amounted to the equivalent of two additional monthly salaries per year: for instance, USD19,332.29 in 2017.⁵⁸ The record, moreover, shows that the Applicant paid close attention to his finances and cited "big consequences to [his] mortgage" as his bank would not show any more flexibility when he urged Human Resources to pay him a few days ahead of schedule in December 2018.⁵⁹ He thus must have been aware of the surplus of funds in his account.

f. The Applicant, as noted by the Respondent, has wrongly presented himself as a rather naïve person lacking any knowledge of or control over the false claims he certified as true. The picture is not credible. The Applicant was at the time of his false claims a P-4 international staff member with 24 years' experience at the United Nations. On his own admission, he had been using EG since 2009, in accordance with the dynamics of his children's educational status. The Applicant, therefore, not only should have known the rules but is presumed to have known them, at least in the general terms.

38. In conclusion, the Tribunal agrees that the Applicant acted in violation of staff regulations 1.2(b) and 1.2(q), and staff rule 1.7.

Whether due process was observed

39. The Applicant submits that the OIOS investigator, Mr. Carlos Zapata, was lax with the officials of the two colleges (WIC and CDI) while strict and formal with his

⁵⁶ Application, annex 4, p. 3.

⁵⁷ Ms. FMS's testimony on 19 November 2021.

⁵⁸ Respondent's closing submission para. 12.

⁵⁹ Applicant's email to Human Resources, November 2018, doc 6, trial bundle p. 37.

wife and himself. To emphasize this point, the Applicant contends that, on 18 August 2017, the investigator, without any one witnessing, or a warrant, and without recording the conversation, contacted WIC on the details of the schooling of KD for the academic year 2014-2017. The investigator collected the information based on well prepared and precise questions regarding KD's enrolment and the fees paid for her. On the issue of laxity and familiarity, the Applicant states that the investigator, reached a point of stating to the interviewees that "I am a West-Islander myself (born and raised in Kirkland)". This he did in order to create a relationship of trust and belonging in order to convince Ms. Simard, Ms. Lafontaine and Ms. Quenneville to respond according to his instructions.⁶⁰

40. On the score of an incomplete investigation, the investigator seems to have condemned him directly, without verifying the credibility of the statements made by representatives of the two colleges. The Applicant also submits that he had no opportunity to re-read the transcript of his interview, nor to cross-examine the college officials in the presence of witnesses, which caused him prejudice. The Applicant further avers that his spouse was neither informed nor questioned about the information collected from the colleges in order to allow her to defend herself against the accusations and to explain herself.

41. The Respondent maintains that the investigation and disciplinary processes were fair and in compliance with relevant rules.⁶¹ With regard to the Applicant's claim that he was not given the opportunity to re-read his interview transcript and other claims related there to, the Respondent maintains that the Applicant was interviewed in connection with the investigation and was provided with an audio-recording and the transcription of the interview. In the allegations memorandum, the Applicant was informed of the allegations against him, his right to seek assistance of counsel and the opportunity to comment on the allegations. The Applicant was provided with the Investigation Report and all supporting documents. The Applicant's comments on the

⁶⁰ Application, annex 3.

⁶¹ Reply, para 35.

allegations of misconduct, made with the assistance of counsel, were duly considered.

42. The Tribunal notes that prior to the interview of his wife, the Applicant was informed in detail what were the disputed positions of the EG and agreed to facilitate contact with her.⁶² The manner of interviewing Ms. FMS was approved by her as correct and, on her own words, “relaxed”.⁶³ Further, as concerns the Applicant’s reservations regarding the investigator’s remark on being himself a Canadian “Westlander”, which the Applicant perceives as an improper attempt at building a personal rapport with the school officials and contrasts it with a formal manner of interviewing his wife, the Tribunal notes that the investigator made the same remark when interviewing the Applicant’s wife. Finally, in her testimony before the Tribunal, Ms. FMS confirmed that she was comfortable with the inquiry conducted by Mr. Zapata, including that his familiarity with the Quebecois education system facilitated their interaction.

43. As concerns the lack of opportunity to cross-examine the school officials, the Applicant does not allege that the officials’ statements made on email, whereby they denied the applicability of fees claimed by the Applicant, were untrue. Moreover, the basis for the impugned decision is not the denial of applicability of the fees alone, but, equally, the lack of any demonstration that such fees had ever been paid. As such, reliance on written representations was neither unreasonable nor unfair.

44. The Tribunal finds the remaining Applicant’s arguments unreasonable and, in any event, rendered moot by the virtue of the hearing.

Whether the sanction was legal and proportionate

45. The Applicant considers that he was treated unfairly. On 13 November 2019, MINURSO sent him a strictly confidential document for separation without severance pay. The Human Resources Office (“HRO”) immediately proceeded to carry out the separation without allowing him time to arrange his personal stuff in the office that he

⁶² Applicant’s interview, 7 November 2017, lines 542-659.

⁶³ Ms. FMS’s interview, 8 February 2018, lines 448-459.

had been occupying for 15 years. The Applicant submits that the HRO was aware of his sick leave but decided to obstruct its extension in order to execute the separation from MINURSO, showing disregard for its duty of care towards staff members.

46. On the prong of proportionality, the Respondent contends that the sanction was not blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. It accords with the practice of the Secretary-General in similar cases. In addition, the Applicant's service of more than 15 years with the Organization was found to constitute a mitigating factor.

47. The Tribunal considers that the Applicant was separated with compensation in lieu of notice, which is a legitimate sanction under staff rule 10.2. Protection afforded to staff under section 3.9 of ST/AI/2005/3 (Sick leave)⁶⁴ is not applicable to the Applicant's case. The measure imposed was in line with the prevailing practice in the Organization⁶⁵ and was not disproportionate.

JUDGMENT

48. The application is dismissed.

(Signed)

Agnieszka Klonowiecka-Milart

Dated this 2nd day of December 2021

⁶⁴ Section 3.9. When a staff member on a fixed-term appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension of the appointment, after consultation with the Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay and half pay under staff rules [...].

⁶⁵ See e.g. *Aghadiuno* 2018-UNAT-811; ST/IC/2016/26, ST/IC/2015/22, ST/IC/2008/41, ST/IC/2005/51 and ST/IC/2002/25 (Practice of the Secretary-General in disciplinary matters and cases of criminal behavior).

Entered in the Register on this 2nd day of December 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi