



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

COLEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Edward Patrick Flaherty

Counsel for Respondent:

Alister Cumming, UNICEF

Chinonyelum Esther Uwazie, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF"), contests the decision to uphold the Office of Internal Audit and Investigation's ("OIAI") determination that the Applicant's supervisor did not engage in harassment and abuse of authority against her.

Facts

2. The Applicant joined the Pakistan Country Office ("PCO") of UNICEF in September 2014 as Chief of the Child Protection Section at the P-5 level. She held a fixed-term appointment that expired on 30 September 2018.

3. The Government of Pakistan granted visas to the Applicant for the following periods: 8 September 2014 to 7 September 2015; 15 October 2015 to 13 December 2015 and 28 January 2016 to 11 October 2017. The Applicant was also issued with a Ministry of Foreign Affairs ("MOFA") accreditation card that was last renewed for the period from 4 August 2015 to 30 September 2016.

4. On 1 August 2017, the Administration, on behalf of the Applicant, submitted the renewal request of her accreditation card to the MOFA in Islamabad. Her request was denied, and she was advised by the MOFA to leave Pakistan, which she did on 26 August 2017.

5. In October 2017, while the Applicant was in the United Kingdom, her place of residence, she personally approached the Pakistan High Commissioner in London and obtained an assignment visa for another three months, namely from 13 October 2017 to 12 January 2018, for her to return to Islamabad. She returned to Pakistan on 19 October 2017.

6. On 16 January 2018, the MOFA in Islamabad informed UNICEF PCO that it would not renew the Applicant's accreditation card and expressly requested that she be advised to leave Pakistan. An exit visa was approved, and she left Pakistan on 9 February 2018.

7. On 5 March 2018, the Applicant made a complaint to the OIAI alleging that her supervisor, the former Deputy Representative, PCO, UNICEF, engaged in harassment, abuse of authority and unethical behaviour against her.

8. By memorandum dated 17 July 2019, the Chief of Investigations, OIAI, informed the Director, Division of Human Resources (“DHR”), UNICEF, of its review of the Applicant’s complaint. The Chief of Investigations noted *inter alia* the following:

32. OIAI noted that PCO explored many options to accommodate [the Applicant] in finding a new position within the Organization, including placing her on the list of abolished posts, which gave priority to her and staff in similar situations, but [the Applicant] refused their suggestions.

....

36. The PCO attempted to have [the Applicant’s] [v]isa and accreditation card renewed so she could stay in Pakistan, but MOFA refused, as she had stayed in the country for several days without the required MOFA card.

...

38. Other than [the Applicant’s] assertions that there was seemingly a conspiracy against her, no evidence to that effect has been adduced by OIAI.

9. As a result, the Chief of Investigations, OIAI, considered the case closed.

10. By email dated 19 July 2019, the Chief, Policy and Administrative Law, DHR, UNICEF, informed the Applicant of the following:

OIAI found no evidence to substantiate harassment or abuse of authority. OIAI found that the difficulties with the Pakistani authorities were triggered by your failure to renew your MOFA accreditation card in accordance with protocol, which was clearly your responsibility. The Pakistan Country Office made every effort to remedy the situation, including through sending a Note Verbale with apologies for your as well as another staff member’s failure to renew your accreditation cards as required by the authorities.

11. The Director, DHR, UNICEF, determined, based on the above, that OIAI's findings did not warrant administrative or disciplinary action against the Applicant's supervisor, and that "the Pakistan Country Office made sufficient efforts to 'undo' the situation [the Applicant] had created with [her] failure to renew [her] MOFA accreditation card". She then decided that no further action be undertaken.

12. On 26 July 2019, the Applicant requested management evaluation of the conclusion of the Director, DHR, UNICEF.

13. By letter dated 9 September 2019, the Deputy Executive Director, Management, UNICEF, responded to the Applicant's request upholding the contested decision.

14. On 6 December 2019, the Applicant filed the present application and on 13 January 2020, the Respondent filed his reply.

15. On 3 April 2020, with the Tribunal's leave, the Applicant filed a rejoinder to the reply.

16. On 8 December 2020, the Tribunal held a case management discussion with the participation of the Applicant, her Counsel and Counsel for the Respondent.

17. By Order No. 128 (GVA/2020) of 9 December 2020, the Tribunal ordered the Respondent *inter alia* to submit additional documents relevant to the consideration of the case. It also ordered the Applicant *inter alia* to elaborate further on her claim for moral damages and on her request for a hearing.

18. On 21 December 2020, the parties complied with Order No. 128 (GVA/2020) and the Applicant withdrew her request for a hearing in the present case.

19. On 12 January 2021, the parties filed their respective closing submission.

Parties' submissions

20. The Applicant's principal contentions are:

- a. The Organization did not analyse the case properly, it failed to provide reasons for its decision, and it did not address the totality of her complaints including whether a Note Verbale with apologies was sent to the Pakistani Government;
- b. There were several procedural errors in the OIAI investigation that affected her due process rights namely:
 - i. OIAI failed to interview her as required by section 5.14 of CF/EXD/2012-007;
 - ii. A decision on her complaint was unduly delayed as it took 16 months for OIAI to complete the investigation;
 - iii. The OIAI investigator failed to timely reply to the Applicant's multiple inquiries on the investigation; and
- c. The contested decision is tainted by prejudice against her.

21. The Respondent's principal contentions are:

- a. The application is not receivable;
- b. Whether OIAI substantiated that the PCO, UNICEF, had sent a note verbal to the local authorities was irrelevant for the purpose of the Applicant's complaint;
- c. The communication of the Chief, Policy and Administrative Law, DHR, UNICEF, was clear about the basis for the decision;
- d. There was no nexus between the time it took OIAI to complete its preliminary assessment of the complaint and the non-renewal of the Applicant's appointment. She had already left the country by the time she made the complaint;

- e. Although there was a procedural irregularity caused by the failure to interview the Applicant, this did not vitiate the decision;
- f. The failure to respond to the Applicant's email inquiries did not amount to a procedural irregularity; and
- g. The Applicant has failed to identify any personal prejudice against her.

Consideration

22. After a careful review of the case file and the evidence provided by the parties, the Tribunal has identified the following legal issues to be determined in the case at hand:

- a. Whether the application is receivable;
- b. Whether the contested decision was lawful;
- c. Whether the contested decision was tainted by bias or improper motives; and
- d. Whether the Applicant is entitled to any remedies.

Whether the application is receivable

23. The Respondent claims that the application is not receivable *ratione materiae* because the outcome of the management evaluation is not a reviewable decision and the agreement of the Director, DHR, UNICEF, with OIAI's findings is not an administrative decision.

24. It is well-settled internal case law that the Tribunal has the power to interpret and identify the "contested administrative decision" at stake, even if the party or parties have failed to do so (*Massabni* 2012-UNAT-238):

25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant the requested judgment.

25. In the current case, the Applicant identified the contested decision as "the decision to uphold the [OIAI's] determination that [her] supervisor did not engage in harassment or abuse of authority against her".

26. Therefore, the Tribunal is of the view that the Applicant does not contest the outcome of the management evaluation but, instead, the decision taken by the Director, DHR, UNICEF, not to take further action following OIAI's decision to close the case. This is an administrative decision subject to review and, consequently, the Tribunal finds the application receivable.

Whether the contested decision was lawful

27. The Tribunal will now assess the lawfulness of the contested decision in light of the legal arguments raised by the parties.

The alleged procedural errors in the OIAI investigation

28. The Applicant claims that there were several procedural errors in the OIAI investigation, which negatively affected her due process rights.

OIAI alleged failure to interview the Applicant

29. The Applicant argues that OIAI failed to interview her as required by section 5.14 of CF/EXD/2012-007.

30. The UNICEF Executive Directive CF/EXD/2012-007 Amend.1 on Prohibition of discrimination, harassment, sexual harassment and abuse of authority provides, in its relevant part, as follows:

Preliminary assessment

5.13 Upon receipt of a formal complaint, the Director, [OIAI] will conduct a preliminary assessment of the complaint and discuss with the complainant the benefits of considering an informal resolution.

5.14 The complainant will be interviewed by the [OIAI] or another person designated by the Director, [OIAI] in order to:

- (a) clarify the allegation(s);
- (b) ensure that the complaint pertains to allegations of discrimination, harassment, sexual harassment or abuse of authority;
- (c) ensure that all available evidence is submitted; and
- (d) consider the possibility of informal resolution.

31. The Respondent has conceded in his reply that the proper procedure was not followed as the Applicant was not interviewed by OIAI. However, he claims that such procedural irregularity did not vitiate the decision as the Applicant had submitted a detailed complaint to OIAI.

32. The Tribunal is aware of the jurisprudence of the Appeals Tribunal in that “not every irregularity in itself will necessarily lead to vacating an administrative decision” (see *Ncube* 2017-UNAT-721 and *Mansour* 2018-UNAT-881). However, the procedural irregularity in this case not only constitutes a serious breach of the applicable framework but it also violates the Applicant’s due process rights as a complainant.

33. The Tribunal notes that while investigators enjoy a certain margin of discretion in the way investigations are conducted, this does not mean that they can decide not to interview the complainant during the preliminary assessment of the complaint when the applicable law explicitly requires to do so.

34. Indeed, the complainant's interview is a mandatory and essential step in the preliminary assessment of the complaint as it prompts the staff member to clarify the allegations, to ensure all available evidence is submitted or eventually added to the initial complaint and to explore the possibilities of informal resolution.

35. The Tribunal finds that a link exists between the procedural irregularity, i.e., the failure to interview the Applicant, and the outcome of the preliminary assessment of her complaint. Indeed, the record shows that OIAI made assumptions about the completeness of her claim and her willingness to engage in informal resolution, which resulted in the breach of her due process rights.

36. The Tribunal finds that the Respondent's assertion that the Applicant had "apparently" provided all available evidence and informal resolution "did not appear" to be appropriate, is mere speculation.

37. The Tribunal highlights that it is incumbent on the Organization to comply with its own regulatory framework and to ensure the complaint is properly assessed. This is particularly important when the Organization decides, as in the present case, to close the case following a preliminary assessment of the complaint.

38. In light of the above, the Tribunal finds that the contested decision was unlawful.

OIAI's investigator alleged failure to answer the Applicant's queries

39. The Applicant claims that the OIAI investigator failed to timely reply to her multiple inquiries on the status of her complaint.

40. The Respondent argues that the Applicant has not identified any such right to have emails responded to promptly and that while the failure is unfortunate, it cannot amount to a procedural irregularity vitiating the decision.

41. The Applicant filed her complaint with OIAI on 5 March 2018 and, according to the evidence on record, between May 2018 and April 2019 she sent ten emails to the OIAI investigator inquiring about the status of her complaint. The investigator answered her questions by emails dated 6 November 2018 and 2 May 2019. In her

6 November 2018 email, the investigator clarified that she had not received the Applicant's previous emails due to technical issues with Outlook. The Tribunal is of the view that the OIAI investigator's explanation is plausible.

42. While the Organization has a duty of care towards the Applicant, the Tribunal finds that the failure of the OIAI investigator to timely reply to her multiple requests for information on the assessment of her complaint is not, in and of itself, a procedural irregularity.

The alleged delay of OIAI's assessment of the complaint

43. The Applicant claims that a decision on her complaint was unduly delayed as it took 16 months for OIAI to complete the investigation, which negatively impacted her employment status by preventing her from going back to Pakistan to resume her functions.

44. The Respondent argues that there was no nexus between the time it took OIAI to complete its preliminary assessment of the complaint and the non-renewal of the Applicant's appointment. He further asserts that while the length of time that OIAI took to assess her complaint was unfortunate, the Applicant has not provided any evidence that such a delay had any impact on the non-renewal decision.

45. The Tribunal notes that UNICEF Executive Directive CF/EXD/2012-007 Amend.1 does not foresee any time limit to conclude an investigation into a complaint.

46. Having said the above, the Tribunal notes that the Secretary-General bulletin ST/SGB/2008/5 on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, applicable in the United Nations Secretariat, provides in para. 5.17 that:

The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence[...] This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

47. While the time limit indicated in ST/SGB/2008/5 is not binding on UNICEF, it serves as an indicator of a reasonable time period for the completion of a fact-finding investigation. Certainly, the time to complete an investigation may depend on the complexity of the case but, in the present case, the case record shows that following a preliminary assessment of the Applicant's complaint, UNICEF decided not to initiate an investigation as it did not find any evidence of harassment or abuse of authority, and closed the case without further action.

48. The Respondent does not provide any explanation for the length of time that it took OIAI to review the Applicant's complaint and simply argues that it did not cause her any damage.

49. The Tribunal is not satisfied by the Respondent's argument and finds that a period of 16 months to complete the review of the Applicant's complaint, without even interviewing her, is unreasonable.

Whether the contested decision was tainted by bias or improper motives

50. It is well settled jurisprudence that the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450 and *Matadi et al.* 2015-UNAT-592) and that if an applicant claims that the decision was ill-motivated, the burden of proving any such allegation rests with said applicant (see, for instance *Azzouni* 2010-UNAT-081 and *Obdeijn* 2012-UNAT-201).

51. While the Applicant argues that the contested decision was tainted by prejudice against her, she has not provided any evidence, apart from her own assertions, to substantiate her allegations of improper motives. Consequently, her claim in this respect fails.

Whether the Applicant is entitled to any remedies

52. The Applicant requests the rescission of the contested decision and that a new investigation into her complaint be conducted. She also requests compensation for moral harm.

53. The Tribunal's power regarding the award of remedies is delineated in art. 10.5 of its Statute, which states:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

54. The Tribunal has found in para. 38 above that the contested decision is unlawful. Consequently, pursuant to art. 10.5(a) of its Statute, it decides to remand the case to the Organization so that the proper procedure is followed.

55. In relation to the Applicant's claim for moral damages, the Tribunal refers to *Kebede* 2018-UNAT-874, para. 20, in which the Appeals Tribunal stated that:

It is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a *nexus* between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien (...) If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.

56. In her rejoinder, the Applicant claims that “the failure to engage [her] in her complaint and the undue delay created by OIAI’s failure or refusal to complete its assessment within a reasonable amount of time caused her great physical and mental distress”. However, in her latest submission on moral damages, in response to the Tribunal’s Order No. 128 (GVA/2020), the Applicant maintains that she “suffered moral damages specifically related to the injury she suffered at the hands of her supervisor”.

57. In support of her request for moral damages, the Applicant submits an email dated 27 April 2020 from the Stress Counsellor, Critical Incident Stress Management Unit (“CISMU”), United Nations Department of Safety and Security (“UNDSS”) Somalia, who was previously serving in Pakistan. This email indicates, in its relevant part, as follows:

[I] remember you well and [I] do remember you availed stress counselling services in first week of February 2018 as you were in high stress and anxiety due to conflict and harsh behaviour of one of your [managers], you shared with me the incident of abuse of authority, harassment, anger and aggression towards you repeatedly, you burst into tears and were trembling, the anxiety and stress had disturbed your normal life, sleep, focus and concentration on work, and even you had physical symptoms, it took couple of sessions to bring you back to normal condition, as you were extremely disturbed, I joined my new position in May 2018 and had no contact with you[.]

58. The Tribunal notes that the above-mentioned email refers to the alleged prohibited conduct, i.e., the alleged harassment and abuse of authority, but does not serve to prove that the Applicant suffered moral damages directly caused by the contested decision as identified in para. 1 above or by the undue delay in the investigation process.

59. The Applicant has failed to prove that a nexus exists between the illegality of the contested decision and the alleged harm suffered. Whether the Applicant was the victim of prohibited conduct remains to be determined and the Tribunal cannot award compensation for harm that has not been caused by the contested decision. Therefore, the Applicant is not entitled to any compensation for moral harm.

Conclusion

60. In view of the foregoing, the Tribunal DECIDES:

- a. The application is granted, and the case is remanded to OIAI, UNICEF, for a renewed assessment of the Applicant's complaint undertaken in compliance with the applicable procedure; and
- b. The Applicant's request for compensation for moral harm is rejected.

(Signed)

Judge Teresa Bravo

Dated this 2nd day of March 2021

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

(Signed)

René M. Vargas M., Registrar, Geneva