



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SAMUEL THAMBIAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Edward Patrick Flaherty
Ford Shanahan

Counsel for Respondent:

Jorge Ballesterro, UNICEF

Introduction

1. By an application filed with the Registry of the United Nations Dispute Tribunal on 15 December 2010, the Applicant contests the United Nations Children's Fund ("UNICEF") investigation into allegations of misconduct filed against him; the fact that the Director, Human Resources, UNICEF, did not take any administrative actions following the 18 November 2008 completion of the Office of Internal Audit ("OIA") investigation report and the fact that the findings of the report were not provided to him until 15 June 2010. The Applicant has requested compensation for: the pain, humiliation and stress caused to him and his family as a result of the excessive delays in providing him with the OIA investigation report; the breach of his due process rights; the harm to his reputation and career; and two years of salary and benefits he would have received had his contract not been improperly allowed to expire on account of the fact that he was the subject of a false harassment allegation, as well as the fact that the Respondent did not complete his Performance Evaluation Report ("PER") for the time period during which he was employed by UNICEF in Kabul, Afghanistan. The Applicant also requests that he be notified of the outcome of his complaint for physical assault; that the Respondent be ordered to conduct an investigation into the alleged abuses; and that the Respondent also return to him certain personal belongings that were removed without his permission from his residence. Finally, the Applicant requests the removal of all adverse materials from his Official Status File ("OSF"), including any references to the OIA investigation report.

2. The Respondent submits that the application is not receivable as the issues raised in the Applicant's submission are either time-barred, moot or are not adverse administrative decisions.

Relevant facts

3. On 22 October 2007, the Applicant was appointed as Chief of Operations, UNICEF Afghanistan Country Office, on a fixed-term contract at the P-4 level due to expire on 31 October 2008.

4. On 5 August 2008, the Director, Division of Human Resources (“DHR”), was informed by the Deputy Regional Director of a 10 February 2008 containing allegations of sexual harassment concerning the Applicant. The Director, DHR, referred the case to OIA.

5. On 26 October 2008, an OIA fact-finding panel was established to conduct an investigation into allegations that the Applicant had sent an inappropriate email in February 2008. The panel informed him that he was “the subject of a preliminary investigation” the purpose of which was to establish facts and that “having knowledge that [his] contract will expire on 31 October 2008 ... the investigation was in no relation to the contract status”.

6. On 27 October 2008, the Applicant received an email titled “Letter” which “attached the letter regarding [his] separation from UNICEF Afghanistan, effective 31 [October] 2008”. On 31 October 2008, the Applicant’s contract expired and he was separated from service.

7. On 18 November 2008, OIA completed its investigation into the allegations of sexual harassment filed against the Applicant. The Applicant having separated from service, the Director, DHR proceeded to close the case. As a result of the closure of the case by the Director, DHR, no disciplinary proceedings or other actions were taken regarding the findings contained in the OIA report. The OIA investigation report was not added to the Applicant’s OSF.

8. On 24 August 2009, the Applicant received a copy of his PER for the period 22 October 2007 to 31 October 2008. Following a review of its content, the Applicant

requested a copy of the OIA's investigation report which was referred to in sec. 5.6(a) of the PER.

9. On 15 June 2010, the Applicant received a redacted copy of OIA's investigation report into the allegations filed against him.

10. On 10 August 2010, the Applicant requested management evaluation of, *inter alia*, UNICEF proceeding with an investigation six months after the alleged events occurred; the investigation being carried out four days prior to the end of his contract; the failure of the Director, DHR, to take a decision based on the investigation panel's findings; the failure to share the findings of the investigation panel with him upon the completion of its investigation as well as the failure to provide him with a copy of the report prior to 15 June 2010. The Applicant also raised issues related to the completion of his PER.

11. On 24 September 2010, the Chief, Policy and Administrative Law Section, DHR, informed the Applicant that he had reviewed his request for management evaluation and that he had determined that the submissions contained therein were "either time barred, moot, have already been addressed in previous correspondence or are not adverse administrative decisions, hence UNICEF is not in a position to carry out a management evaluation".

12. On 19 November 2010, the Applicant filed an application with the Dispute Tribunal contesting the content of his PER; UNICEF's failure to complete a PER during his appointment, their failure to adhere to ST/AI/2002/3 (Performance Appraisal System) and the effect these failures had on the non-renewal of his contract. The application was assigned Case No. UNDT/NY/2010/095.

13. On 6 December 2010, the Applicant filed a submission in Case No. UNDT/NY/2010/095 seeking to add additional issues for consideration by the Tribunal. Following the issuance of Order No. 320 (NY/2010), this submission was re-filed as a new and separate application on 15 December 2010 and was assigned Case No. UNDT/NY/2010/104 (the present case).

14. On 4 June 2012, the undersigned judge was assigned to the present case.
15. On 11 December 2012, the Tribunal held a hearing for the purpose of discussing facts at issue in this case. The Applicant and his Counsel participated via telephone and Counsel for the Respondent was present in person.
16. On 3 April 2013, the Tribunal rendered Judgment *Samuel Thambiah* UNDT/2013/063 in Case No. UNDT/NY/2010/095 whereby it found that the Applicant had not contested the non-renewal of his contract or the content of his PER within the imparted time limits. The Tribunal also found that the 15 June 2010 transmittal of the OIA investigation report did not extend the Applicant's time limit to contest either the non-renewal of his contract or the content of his PER.
17. On 5 April 2013, the Tribunal issued Order No. 86 (NY/2013) whereby it requested that the Respondent provide it with additional information as to whether the OIA investigation report was contained, directly or by reference, in the Applicant's OSF. On 15 April 2013, the Respondent stated that the Applicant's OSF did not contain any references to the OIA report or the allegations of misconduct that triggered the investigation.

Consideration

Applicable law

18. Article 2 of the Dispute Tribunal's Statute states that:
 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
 - (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

19. CF/AI/2009-004 (Disciplinary Process and Measures) states that:

Section 8

Investigation

...

8.7 Following his/her determination that no further investigative steps are required, he/she shall forward the dossier and the relevant evidence to the Director, Division of Human Resources, for further action.

8.8 The Director, Division of Human Resources, shall communicate a copy of relevant parts of the investigation dossier to the staff member and invite the staff member to submit his/her comments in writing in a reasonable timeframe (normally within 15 calendar days). If the staff member does not comment within the time limit, the matter shall nevertheless proceed. Exceptionally, an extension to submit comments may be granted.

...

Section 10

Disciplinary Process

10.1 On the basis of a review of the investigation dossier and the staff member's written comments, the Director, Division of Human Resources, shall take any of the following actions:

(a) **No grounds warranting disciplinary action:** If the Director, Division of Human Resources, is satisfied that there are no grounds warranting disciplinary action, he or she:

(i) shall inform the staff member and the UNICEF manager or the Executive Head of the organization to which the staff member is assigned, accordingly;

...

(iv) may request that documents related to the investigation be expunged from the staff member's official status file, except those referred to in the preceding bullet point.

...

10.2 If the Director, Division of Human Resources, is satisfied, on the basis of the staff member's response to the formal charges, that there are no grounds warranting disciplinary action, he/she shall proceed in accordance with paragraph 10.1(a) above.

Object of the case

20. The claims in the present case relate mainly to issues that stem from the completion of the OIA's investigation report in November 2008. However, the Applicant also puts forward claims related to the completion of his PER, the non-renewal of his contract, the lack of administrative action regarding a complaint of physical assault against him, the removal of personal items from his residence without his consent and the removal of any and all adverse material contained in his OSF. The Tribunal notes that the claims related to the completion of his PER and the non-renewal of his contract are duplicative of those addressed by the Tribunal in *Samuel Thambiah* UNDT/2013/063 and are therefore *res judicata*.

21. The Tribunal therefore hereby adopts the findings of *Samuel Thambiah* UNDT/2013/063 with regard to the non-receivability of claims related to the non-renewal of the Applicant's contract and the rebuttal of the content of his PER.

Receivability rationae temporis

22. On 18 November 2008, OIA completed its investigation into the allegations of sexual harassment filed against the Applicant. Due to the Applicant having already been separated from service, no further actions were taken with regard to OIA's findings. Furthermore, in response to Order No. 86, the Respondent informed the Tribunal that neither the investigation report, nor any of its findings were referred to, whether directly or by reference, in the Applicant's OSF.

23. The Respondent contends that the Applicant's request for management evaluation was out of time due to the fact that: "[p]ursuant to Chapter 16 of the UNICEF Human Resources Manual and Procedures, had the Applicant wished to contest any of the above mentioned decisions, he should have filed a request for review within two months of having been informed of the administrative decision. Thereafter, if he so decided, the Applicant could have appealed before a Joint Appeals Board and eventually before the [former] Administrative Tribunal".

24. In the present case, the Applicant was aware at the time of his separation from service that an investigation was being conducted into allegations filed against him. Thereafter, as stated by the Chief, Policy and Administrative Law Section, in his 24 September 2010 response to the Applicant's request for management evaluation, no further action was taken by UNICEF with regard to the report's findings due to the Applicant having separated from service.

25. In the present case the Applicant only became aware of the completion of the investigation report upon receiving a copy of his PER on 24 August 2009. However, the PER did not include a copy of the full OIA report, nor any additional details regarding the investigation itself such as witness testimony or facts relied upon. More importantly, there is no information before the Tribunal that would indicate that the Applicant was aware that the contested findings were not included or referred to in his OSF or that he had been notified of an administrative decision taken in relation to the completion of the OIA investigation.

26. Consequently, in contrast to the findings in *Zhouk* UNDT/2011/102 and *Samuel Thambiah* UNDT/2013/063, the Applicant did not have "more than a sufficient amount of information, as well as all the necessary elements, to either rebut or appeal the content of the [investigation report] upon receiving [the PER]". Rather, the Applicant was only put in that position upon being provided with the full OIA investigation report on 15 June 2010. As stated in *Applicant* UNDT/2010/069/Corr.2, "the right to comment on a note [that is considered] placed in the staff member's file must survive the termination of the contract and a condition to that effect may readily be implied".

27. The Applicant's request for management evaluation was submitted on 10 August 2010, within 60 days of receiving the OIA investigation report. The Applicant received the management evaluation decision on 24 September 2010 and appealed it to the Tribunal on 15 December 2010. The applicable time limits were therefore respected and the Tribunal will review the Applicant's appeal

regarding the claims pertaining to the investigation conducted by OIA and its resulting investigation report.

28. The Tribunal notes that the Applicant's requests that he be notified of the outcome of his complaint regarding his physical assault, that the Respondent be ordered to conduct an investigation into the alleged abuses and that the personal belongings that were removed from his residence in Kabul are related to events which occurred in 2007 and 2008, however no action was taken by the Applicant related thereto until 2010, despite him being fully aware of them at the time. Consequently, these claims are not receivable as they are out of time.

Receivability rationae materiae

29. For an administrative decision to be contestable it has to, in the first place, be a decision taken by the Organization or one of its representatives that negatively impacts the rights of the concerned staff member. More specifically, in *Andati-Amwayi* 2010-UNAT-058, the Appeals Tribunal stated that for a decision to be contestable pursuant to art. 2.1(a) of the Statute of the Dispute Tribunal it has to have "a direct impact on the terms of appointment or contract of employment of the individual staff member". The Appeals Tribunal also emphasized the fact that not all administrative decisions "necessarily affect [a staff member's] terms of appointment or contract of employment".

30. As a result of the 31 October 2008 non-renewal of the Applicant's appointment, no disciplinary procedure was initiated by UNICEF with regard to the findings of OIA's investigation report of 18 November 2008 into the allegations filed against the Applicant. However, as discussed in *Samuel Thambiah* UNDT/2013/063, direct references to the findings of that investigation appeared to be contained in the Applicant's PER.

31. The Tribunal, by Order No. 86 requested that the Respondent inform it as to whether the OIA investigation report was contained, either directly or by reference, in the Applicant's OSF. On 15 April 2013, the Respondent stated that the Applicant's

“OSF, contains neither the [OIA] investigation report nor any documents, including [PER], referring to such report or the allegations of misconduct that triggered the investigation”. The Applicant has not provided the Tribunal with any information that would lead it to find otherwise.

32. Considering that the OIA report, or any related reference, were never part of the Applicant’s OSF, there is no evidence before the Tribunal that would suggest that UNICEF took an administrative decision which negatively impacted the Applicant's contractual rights. Similarly, there is no evidence before the Tribunal that would suggest that, other than not informing the Applicant of the closure of the OIA investigation, the Director, DHR, failed to take any decision based on the report’s findings.

33. The Applicant’s submissions contesting the conduct and the outcome of the OIA investigation completed on 18 November 2008 are not receivable *ratione materiae*.

Breach of due process

34. The Respondent also submitted that considering that, at the time in question, the Applicant was no longer a staff member, they were under no obligation to inform him of the closing of the investigation or that no disciplinary action had been taken with regard to the findings contained in the investigation report.

35. CF/AI/2009-004 states that once the Director, DHR receives an investigation report from the Director, OIA, he “shall communicate a copy of the relevant parts of the investigation dossier to the staff member and invite the staff member to submit his/her comments in writing in a reasonable timeframe(normally 15 calendar days)”.

36. Article 10.1(a) of CF/AI/2009-004 states that if the Director, DHR determines that no further disciplinary action should be taken, he shall so inform the staff member and he may also request that any document related to the investigation be expunged from the staff member’s OSF.

37. The procedure to be followed with regard to current staff members regarding the outcome of an investigation into allegation of misconduct is clear. However, CF/AI/2009-004 does not address which actions, if any, should be taken by the Director, DHR with regard to the outcome of an investigation into allegation of misconduct of a former staff member. The Tribunal therefore has to determine whether a former staff member has the right to be informed of the result of an investigation of which he was the subject during his employment with the Organization, and any actions related thereto, taken by the Director, DHR.

38. In *Saddik Ben Omar* UNDT/2011/182, the Tribunal found that the same criteria apply to the rights and obligations of an Organization with regard to its former staff members “because the prejudicial effect of the adverse material continues as long as it remains on the former staff member’s file and will have a bearing on the future prospects of that former staff member should they wish to be reemployed by the Organization or even by outside employers if they become aware of the adverse Note”.

39. The fact that a staff member is no longer employed by the Organization does not mean that the Organization is not required to notify him or her of the completion of an administrative proceeding related to his or her current or past employment. Proceeding otherwise would result in former staff members being caught in a situation whereby the Organization would not be required to notify them of an administrative decision and yet the staff member would be considered on notice of the administrative decision for purpose of time limits, even though they were not actually notified of it.

40. If a former staff member already received a copy of an investigation report which has an adverse content (even if the disciplinary case was closed) and the Administration decides to place it in his or her file, the former staff member must be immediately informed of this decision and the Administration must respect the former staff member’s right to comment on the adverse material before implementing the decision to add such a document in the OSF.

41. Consequently, with respect to such procedures as in the present case, a former staff member benefits from the same rights as a current staff member, including that of being informed of any decision taken by the Director, DHR related to an investigation of which he was the subject and, as stated in *Applicant* UNDT/2010/069/Corr.2, “the right to comment on a note [that is considered] placed in the staff member’s file” as such a right must survive a staff member’s separation from service.

42. Based on the foregoing, the Tribunal considers that the Director, DHR did not follow the applicable procedures upon determining to close the disciplinary process without either informing the Applicant or providing him with a copy of the OIA’s investigation report in a timely manner.

43. Nevertheless, not every violation will necessarily result in an award of compensation. As stated by the Appeals Tribunal in *Antaki* 2010-UNAT-095, “[c]ompensation may only be awarded if it has been established that the staff member actually suffered damages”. The Applicant has not provided the Tribunal with any evidence that would suggest that the decision to close the disciplinary proceedings resulted in him suffering any professional and/or moral damages, that UNICEF made representations to other parties regarding the findings in OIA’s report or that the report was contained in his OSF. Consequently, and as expressed in *Sina* 2010-UNAT-094, the Tribunal “will not approve the award of compensation when absolutely no harm has been suffered”. The Applicant’s claims for compensation are rejected.

44. In light of the Tribunal’s findings in *Samuel Thambiah* UNDT/2013/063 paras. 7 and 35, the Applicant’s claims for compensation related to the non-renewal of his contract and the completion of his PER are also rejected.

45. The Tribunal notes that the Respondent has stated that the Applicant’s OSF does not contain any references, direct or other, to the investigation report.

Consequently, his request that any and all adverse material regarding the investigation report be removed from his OSF is moot.

In view of the foregoing the Tribunal DECIDES:

46. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 17th day of May 2013

Entered in the Register on this 17th day of May 2013

(Signed)

Hafida Lahiouel, Registrar, New York