



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Federica Midiri, UNFPA

Introduction

1. On 16 March 2014, the Applicant, a former Procurement Assistant (G-5) in the United Nations Population Fund (“UNFPA”) based in Copenhagen, filed an application contesting the decision of 23 September 2013 to place her on special leave with full pay (“SLWFP”).

Facts

2. On 28 January 2013, the Applicant entered the service of UNFPA, in the Africa team of the Procurement Services Branch (“PSB”), on a one-year temporary appointment.

3. The Applicant contends that in March 2013, she had a discussion with one of her team colleagues, during which the latter raised her voice. Following that event, a meeting took place between the Applicant and the colleague in question, in the presence of the Applicant’s First Reporting Officer (“FRO”), in an attempt to solve the issue.

4. On 16 April 2013, another incident occurred that made the Applicant worry about her health: someone left acetic acid-used for cleaning-in the office water boiler, without any note, and she drank water from it. The Applicant brought this incident to the attention of her FRO and to the other team members at their team meeting; she also reported it in writing to her superiors. Indeed, she sent an e-mail on the same day to all UNFPA staff in Copenhagen reporting the incident and suggesting that such cleaning substances be used only after working hours to avoid any further problems.

5. On 21 April 2013, the FRO wrote to the Chief, PSB, expressing his concerns about the Applicant’s reactions by stating that “the way she [was] interpreting things [was] so strange”, reporting that she had been sending e-mails on the kettle incident to other members of the team, and that “her approach might damage the relationships and also sometimes might damage the goodwill of PSB”.

6. Between 10 and 14 May 2013, in an exchange of e-mails between the Chief, PSB, and the Applicant, the latter asked the former not to demonstrate any negative attitude towards her, and referred in that context to the negative perception that other staff members might have about her. The Applicant further reported yet another incident about a fire alarm in the kitchen, apparently linked to the kettle as well. The Chief, PSB, replied that the Applicant's perception of a negative attitude of management towards her was false. He forwarded his reply to the Applicant's FRO as well as to her Second Reporting Officer ("SRO"), stating that the Applicant was "really displaying a paranoid attitude" and that he needed to discuss with them how to deal with this situation.

7. On 14 June 2013, the FRO had a meeting with the Applicant in order to discuss her performance, as well as relationship management and communication-related matters. He followed-up on that meeting by email of 17 June 2013 addressed to the Applicant, in which he listed "Points of Actions" for her to follow, noting at the same time that she should work on her relationship management ability, particularly that she should refrain from sending emails to complain about the attitudes of other staff members, and from making conclusions which are not based on facts.

8. By e-mail of 18 June 2013, sent in reply to another e-mail from the Applicant in which she gave details about errors allegedly made by other team members during a work assignment, the SRO indicated the following to the Applicant:

I understand from [your FRO] that the quality of your work is acceptable but that it could improve if you were more willing to take advice from colleagues around you.

However, I am more concerned about your performance as a team member. I have observed that you inflate small comments or mistakes from your colleagues into issues when there is no need for this. Please note that this is very unfortunate as it creates a "blame" atmosphere which hampers cooperation and trust.

With this email, I am requesting that you make every effort to address this matter as this impacts negatively the efficiency and the moral of the group.

Thanks for your understanding and for working on a behaviour change.

9. The Applicant replied on 23 June 2013 that she would comply with the request. She indicated however that some other team members should also be advised to demonstrate a different attitude towards her.

10. On 9 July 2013, the Chief, PSB, received an e-mail from the SRO requesting the early termination of the Applicant's contract in view of her demonstrated inability to work in a team without creating big disruptions to the work atmosphere. The SRO described the situation as being severe since colleagues around the Applicant were fearing having interactions with her. On the same day, the Chief, PSB, contacted the UNFPA Division of Human Resources ("DHR") to solicit advice as to how to proceed to terminate the Applicant's contract.

11. During the month of July 2013, the Applicant sent various emails to staff members of the Africa team and to her SRO, alleging that she was not being treated well by others, a situation which she stated had started to affect her physically and had also an impact on her efficiency at work.

12. On 11 July 2013, the UNFPA Administration contacted the Director, United Nations ("UN") Medical Services Division in New York, to schedule a meeting to discuss the Applicant's case, which was convened on 12 July 2013. By e-mail of 15 July 2013, the Director, UN Medical Services Division, provided a brief summary of the meeting, with suggestions for a strategy to deal with the situation. Among others, it was suggested to invite the Applicant to seek "support and proper medical referral".

13. On 17 July 2013, a meeting was held between the Applicant, the Deputy Chief, PSB, and the SRO. According to the minutes of the meeting, the reason for it was “a concern from management’s side that [the Applicant] was feeling stressed and management thus wanted to ask for [her] perspective and suggest that [she] work from home for a period of 2-3 weeks”. The Applicant was encouraged, among others, to “seek outside perspectives on her situation with for example family members, friends, a sports coach or a doctor”.

14. On 18 July 2013, a second meeting took place between the Applicant, the Deputy Chief, PSB, and the SRO, during which—according to the minutes of that meeting—the Applicant agreed to work from home for a week. It was also agreed that upon her return to the office, she would move to another office and her future work duties would be further discussed.

15. On 5 August 2013, the Applicant wrote an email to the HR Assistant for UNFPA in Copenhagen, copying the Chief and Deputy Chief, PSB, as well as her FRO and SRO, filing a complaint about the “unethical behaviour” of the Africa team towards her and in particular of one specific team member, a behaviour which had allegedly started already at the beginning of her employment with UNFPA.

16. On 6 August 2013, the FRO contacted the Deputy Chief, PSB, indicating that the conduct of the Applicant could damage the reputation of PSB. The Deputy Chief, PSB, immediately contacted DHR by an email stating the following:

Although we have had countless of meetings, have reduced the aforementioned staff member’s workload with 90%, have spoken nice to her as well as given her clear managerial instructions, she is completely refusing to cooperate. She is not reacting to the instructions I, as OIC for PSB, [am] giving her, nor is she reacting to [her FRO] or any other staff members who are all really trying to help her.

She has been, and still is, refusing to seek medical help from the UN doctor or any other doctor.

We have also had her working from home [for] two weeks, which she is no longer willing to do. All in all the situation is getting worse and worse and is now highly demoralising not only for Africa team staff, but also for the rest of PSB staff.

17. On 7 August 2013, the Deputy Chief, PSB, sent an e-mail to the Applicant, copied to her FRO, SRO, the Chief, PSB, and the UNFPA Human Resources Assistant, containing “Managerial Instructions” and requesting the Applicant to “not, under any circumstances, contact Africa team [herself]”, but to send “any questions, comments or anything (regardless of the content of [her] e-mail) to Africa team” to him, copying her FRO and SRO. He further indicated that at the meeting planned on the same day, the Applicant’s workload and tasks would be discussed, in order to “move towards a positive, workable and productive solution ASAP”.

18. Following the meeting that was held on the same day, that is, on 7 August 2013, the Applicant wrote to the Deputy Chief, PSB, and mentioned the behaviour of another staff member of the Africa team that she deemed was interfering with her work. In the same email, she indicated, however, that she would “try to calm down” and not to write any further long emails.

19. On 10 September 2013, the FRO held a meeting with the Applicant during which her performance was discussed as part of the mid-term review.

20. By e-mail of 11 September 2013 sent to the Chief, PSB, the Applicant complained against her FRO about the “very lengthy meeting” he held with her to discuss her mid-term performance review.

21. On 13 September 2013, the Applicant sent an email to the UNFPA HR Assistant, copied to her SRO and to the Chief and Deputy Chief, PSB, complaining against one of her team colleagues.

22. On 18 September 2013, the Chief, PSB, asked for a meeting with the Applicant to discuss performance issues; it took place on 23 September 2013, with the participation of the SRO. At that meeting, the Applicant was given a letter signed by the Chief, PSB, notifying her of her immediate placement on SLWFP “in the interest of the Organization” and in accordance with staff rule

5.3(iii), in view of the fact that “recently, [her] behavior ha[d] again become upsetting and disruptive”. The Applicant was encouraged to contact the UN Medical Service, and reminded that the Organization “st[ood] ready to work with the Medical Service to find a solution to this ongoing issue”. Following the meeting, her access to her UNFPA e-mail account was restricted to a “read-only” access.

23. By e-mail of 30 September 2013 addressed to the Chief, PSB, the Applicant requested clarification for the terms “disruptive behaviour” and “undermining performance of other staff members” mentioned in the letter placing her on SLWFP, as well as for the reasons of the involvement of the UN Medical Services Division. She also stated that she did “accept the [SLWFP] and accept to see the medical support for the reason that the stress was caused by the work environment that [she] was put on”. In a subsequent e-mail of 6 October 2013, the Applicant contested the allegation of her behaviour being “disruptive”, and asked for clarifications as to why there had been no follow-up to her complaints.

24. By letter dated 13 November 2013, the Applicant requested management evaluation of her placement on SLWFP. In the same request, under “remedies sought”, she mentioned that due to her exhaustion and the stress she had suffered, she was not contesting the placement on SLWFP as such, but the grounds on which the decision was taken, namely that she wanted to be cleared from all accusations contained in the letter placing her on SLWFP.

25. By memorandum dated 11 December 2013, sent to the Applicant on 20 December 2013, the Executive Director, UNFPA, upheld the contested decision.

26. On 26 January 2014, the Applicant was separated from the Organization upon the expiration of her temporary appointment.

27. On 16 March 2014, the Applicant filed with the Dispute Tribunal her application contesting her placement on SLWFP.

28. On 17 April 2014, the Respondent filed his reply to the application.

29. Following a case management hearing held on 1 April 2014 and further submissions by the parties, by Order No. 150 (GVA/2014) of 18 September 2014, the Tribunal requested the Respondent to provide additional information, which he did on 1 October 2014.

30. A hearing on the merits of the case was held on 20 November 2014, during which the Applicant and Counsel for the Respondent participated by videoconference.

Parties' submissions

31. The Applicant's principal contentions are:

a. When she entered the service of UNFPA, she made every effort to become part of the team; however, her colleagues started to bully her by making false accusations and spreading bad rumours about her to isolate her in the team; according to her, part of their bullying was triggered by her ethnical origin;

b. She considers herself mentally healthy and denies all allegations made by the Administration that she was disturbing the team; rather, it was the team that was harassing her, as were her supervisors; for instance, her FRO abused his authority by holding a 2-hour meeting with her during which he only made negative comments; similarly, her superiors did not handle her complaint about the kettle incident and her further complaints on the bullying by her colleagues seriously; her placement on SLWFP was therefore made on invalid grounds and is unlawful;

c. Despite her repeated requests, while still in UNFPA service, to seek the intervention of a mediator to solve the problems encountered in the team, the UNFPA Administration refused to engage in such efforts;

d. Because of her placement on SLWFP and the order issued by UNFPA to bar her from admission into the UN city building, she was prejudiced in her search for a new post; this had an impact on her personal situation as she was denied permanent residency status in Denmark due to her lack of employment; she also felt humiliated when she was not allowed to enter the UN city building to attend an interview for a new position in another Organization;

e. In view of the above, she asks the Tribunal to rescind the contested decision, and that all negative information, in particular of her allegedly “disruptive” behaviour, be retrieved from her UNFPA file; she also requests an amount corresponding to two years of net-base salary as compensation for the moral damage she suffered, due to the breach of her rights, the humiliation endured, and the damage caused to her reputation;

f. Finally, she requests that her name not be quoted in the judgment.

32. The Respondent’s principal contentions are:

a. A decision to place a staff member on SLWFP in exceptional cases and in the interest of the Organization rests within the Administration’s discretionary authority, pursuant to staff rule 5.3(f);

b. In the present case, the contested decision was motivated by rational and verifiable considerations, and was reasonable due to the fact that the Applicant’s case was exceptional; such a decision was also in the interest of the Organization, and was hence lawful;

c. The Applicant’s behaviour had indeed disruptive effects, since it had created an extremely tense atmosphere in the team, due to the numerous e-mails she had sent, also outside working hours, making false accusations against her colleagues and spreading a sense of distrust among the team; her repeated behaviour, despite express instructions to stop it, also affected not only her performance but also that of the team;

d. With regard to the Applicant's complaint that she was subject to acts of "bullying" or harassment by her colleagues and FRO, the acts that she perceived as such can hardly be defined as typical conducts of bullying, but rather as typical of a daily work routine *i.e.* coordinating with other staff, ordinary correction of mistakes, lack of final signatures in emails, long meetings. The Applicant was invited on several occasions to work on her self-management and her ability to work in a team, by not inflating small comments or mistakes made by her colleagues, and by refraining from sending non-work related e-mails to team members. She was also listened to by managers who discussed with her about solutions that would make her feel at ease within the team;

e. The Applicant's case has been seriously considered and efforts have been made to resolve the situation before considering placing her on SLWFP;

f. Notwithstanding the efforts of her managers, the Applicant seemed to be ignoring any type of instruction or measure taken in order to protect her and the team she was working for; she even started sending e-mails to third parties—donors of the Organization—by copying them in emails sent to her colleagues, which could have led to a negative effect on the image of the Organization;

g. The Applicant was adequately informed about the reason of her placement on SLWFP, there was no violation of her due process rights and her reputation was not damaged; she did not suffer any economic loss as a result of the contested decision, as she continued to be fully paid during SLWFP, and she did not discharge the burden of proof of showing that she suffered any damage from the decision;

h. The fact that the contested decision was not signed by the Executive Director, UNFPA, but by the Chief, PSB, does not constitute a procedural flaw because it had been duly discussed with higher-level management before it was taken; also, the reply to the Applicant's request for management evaluation, signed by the Executive Director, UNFPA, fully confirmed the initial decision;

i. In view of the above, the application should be rejected.

Consideration

33. In this case, only the decision to place the Applicant on SLWFP is under judicial review. This decision was signed by the Chief, PSB.

34. As a preliminary and crucial question, the Tribunal has to determine whether the decision was taken by a competent official, *i.e.* whether the decision-maker had the authority to do so. This Tribunal and other international administrative tribunals have emphasized the outstanding importance of the issue of competence and delegation of authority (see *Gehr* UNDT/2011/178 quoting Judgment No. 3016 (2011) of the Administrative Tribunal of the International Labour Organization; see also *Hubble* UNDT/2014/069 and *Bastet* UNDT/2013/172). Competence of the decision-maker is a cornerstone of the legality of any administrative decision. When the exercise of discretionary power is under judicial review, any lack of authority leads inevitably to the rescission of the contested decision.

35. In this respect, the Tribunal takes note that the memorandum of 23 September 2013 quotes staff rule 5.3(iii) as the legal basis of the decision. While this reference—which should read 5.3(a)(iii)—alludes to a previous version of the Staff Rules no longer in effect at the time of the contested decision (see ST/SGB/2011/1, in effect until 1 January 2013), the relevant provision is also contained in the version of the Staff Rules in force at the material time, namely in staff rule 5.3(f) of ST/SGB/2013/3 (implemented as of 1 January 2013). Hence, this error initially made by the Administration, but duly corrected by Counsel for the Respondent in his pleadings, bears no consequence on the outcome of the

case. In its further considerations, the Tribunal will therefore refer to staff rule 5.3(f) of ST/SGB/2013/3, which reads:

In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he or she considers such leave to be in the interest of the Organization.

36. Regarding the United Nations Secretariat, based on administrative instruction ST/AI/234/Rev.1 on the Administration of the Staff Regulations and Staff Rules and its Annex II, the authority to place a staff member on SLWFP “other than for jury service” was delegated to the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”), referring to former staff rule 105.2(a) which read, under its lit.(a):

Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe. In exceptional cases, the Secretary-General may, at his or her own initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization.

37. With respect to UNFPA, the Tribunal notes that by its decision DEC.58/555, adopted on 23 December 2003 (see A/58/PV.79 and A/58/588), the General Assembly decided that “formal authority in matters of personnel of the [UNFPA] shall be delegated by the Secretary-General to the Executive Director of the [UNFPA]”. With this in mind, the Tribunal considered whether the delegation of authority as per ST/AI/234/Rev.1, Annex II, from the Secretary-General to the ASG/OHRM has any impact on the authority of the Executive Director, UNFPA, to place a staff member on SLWFP within UNFPA.

38. Pursuant to sec. 2.3 of the Secretary-General’s bulletin on Procedures for the promulgation of administrative issuances (ST/SGB/2009/4), administrative issuances—like ST/AI/234/Rev.1—shall not apply to the separately administered funds, organs and programmes of the United Nations, unless stated otherwise therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability. Since UNFPA, a separately administered

fund, did not expressly accept the applicability of ST/AI/234/Rev.1, the authority to take a decision to place a staff member on SLWFP based on staff rule 5.3(f) rests with the executive head of UNFPA, *i.e.* with its Executive Director.

39. This is confirmed by the clarification from Counsel for the Respondent who stressed that UNFPA did not issue its own written policy governing special leave and applies, *mutatis mutandis*, the policy of the United Nations Development Programme (“UNDP”) on that matter, which provides in its para. 10(e) that the UNDP Administrator-the equivalent of whom within UNFPA is its Executive Director-“may, in exceptional cases, at his/her initiative, place a staff member on [SLWFP] if she/he considers such leave to be in the interest of the Organization”.

40. It follows from the above that only the Executive Director, UNFPA, has the authority to place UNFPA staff members on SLWFP and that that authority was not duly delegated to another UNFPA Official. The explanations put forward by the Respondent to mitigate this lack of authority are not convincing. Indeed, he submits that the placement of a staff member on special leave is a “management function” that in the present case falls within the scope of the authority granted to the Chief, PSB, (a position at the D-1 level) by way of his job description by the words ”management of procurement staff”. The Tribunal notes that in view of the above-mentioned rules and the lack of a clear written delegation of authority from the Executive Director, UNFPA, to another UNFPA Official, such reasoning cannot be sustained.

41. Therefore, the Chief, PSB, acted without competence when he placed the Applicant on SLWFP, since such a decision is exclusively reserved to the Executive Director, UNFPA. The Tribunal further notes that the fact that the decision to place the Applicant on SLWFP was taken by the Chief, PSB, “after consultation and consent of the Director of the Division of Human Resources”, as contended by the Respondent, does not heal the procedural flaw. The memorandum of 23 September 2013 indicates that “[m]anagement has decided” to place the Applicant on SLWFP, and it was only signed by the Chief, PSB.

42. Finally, the explanation that “any formal defect in the original administrative decision, if there was one, would have been cured by the Executive Director’s management evaluation”, *i.e.* post-facto, cannot be sustained either. Since the placement of a staff member on SLWFP is, by definition, a discretionary decision, it is not possible to predict what would have been the outcome on the Applicant’s situation if her case had been referred to the Executive Director, UNFPA, in the first place, in order for him to decide on her placement or not on SLWFP.

43. In view of the above, the Tribunal considers that the contested decision was unlawful due to a procedural flaw, namely the lack of authority of the decision-maker. In view of this conclusion, there is no need for the Tribunal to address any further contentions made by the Applicant, namely those with respect to the alleged reasons for which she was placed on SLWFP. There is also no need for the Tribunal to rule on the Applicant’s numerous motions asking for production of additional evidence in her case.

Remedy

44. Concerning the Applicant’s requests for remedy, the decision to place her on SLWFP must be rescinded. Moreover, since the Applicant was separated from UNFPA as of 26 January 2014, the Tribunal considers it appropriate and necessary to order the Respondent to place this judgment, once executable, in the Applicant’s official file at UNFPA.

45. Further, since the Applicant was fully paid during her SLWFP, she did not suffer any material damage and no compensation can be granted in this respect.

46. As for the Applicant’s claim concerning the moral damage caused to her by the decision, especially due to the grounds on which it was made, the Tribunal notes that in *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee. [footnote omitted]

47. The Tribunal considers that in view of the fact that the legality of any exercise of administrative discretion fundamentally depends on the competence of the decision-maker, a lack of authority of that decision-maker, once established, constitutes a fundamental breach of a staff member's due process rights. In the present case and as demonstrated above, the decision to place the Applicant on SLWFP was taken by an official who had no authority to make that decision. In addition, in view of the strong effects of such a decision, it can potentially damage a staff member's reputation.

48. In the determination of the amount of compensation to be granted, the Tribunal has to consider the fact that in at least two instances documented in the file (see paras. 23 and 24 above), the Applicant stated that while she did contest the reasons thereof, she was nevertheless satisfied with the SLWFP as such, which she felt came as a relief from the stress she was enduring at her workplace. In view of these statements from the Applicant, the Tribunal considers that the award for moral damages should be restricted accordingly, and that in the present case a sum of USD1,000 constitutes adequate compensation.

Request for confidentiality

49. With regard to the Applicant's request that her name not be quoted in the published judgment, the Tribunal is not persuaded that the Applicant in this case "displays a greater need than any litigant for confidentiality" (*Servas* Order No. 127 (UNAT/2013) and *Servas* 2013-UNAT-349, para. 25). She has failed to demonstrate that her case is of such a nature as to overcome the guiding principle of transparency in judicial proceedings and published rulings before this Tribunal. Indeed, as stated by the Appeals Tribunal in *Servas* Order No. 127 (UNAT/2013)

and later quoted again in *Williams* Order No. 146 (UNAT/2013), “[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability” (see also *Ahmed* Order No. 132 (UNAT/2013)).

Conclusion

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

- a. The decision to place the Applicant on SLWFP, dated 23 September 2013, is rescinded;
- b. The Applicant is to be compensated in the total sum of USD1,000 for moral damage due to the breach of her rights;
- c. This amount shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- d. The Respondent shall place this Judgment, once executable, in the Applicant’s official file at UNFPA; and
- e. All further pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 9th day of December 2014

Entered in the Register on this 9th day of December 2014

(Signed)

René M. Vargas M., Registrar, Geneva