



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Federica Midiri, UNFPA

Introduction

1. By application filed on 16 December 2014, the Applicant, a former Procurement Assistant (G-5) in the United Nations Population Fund (“UNFPA”), Procurement Services Branch (“PSB”), Africa team, based in Copenhagen, challenged UNFPA’s decision not to review her complaint of “misconduct” against two of her colleagues in PSB, namely a Procurement Assistant, Mrs. X., and an “SMC” Innovation Specialist, Mr. Y.

2. The Respondent submitted his reply on 21 January 2015. The Applicant filed a number of motions requesting, *inter alia*, the Tribunal to hear Mrs. X. as a witness and to submit additional documents, to which the Respondent responded. Also, upon the Tribunal’s instructions, the Respondent submitted additional documentation on the complaint filed by the Applicant with the Office of Audit and Investigations Services (“OAIS”) on 25 June 2015.

3. On 29 June 2015, the Tribunal informed the parties that the case would be decided on the papers, without further hearings or submissions. Subsequently, Judge Laker of the Dispute Tribunal in Geneva issued Judgment *Nielsen* UNDT/2015/060 (Case No. UNDT/GVA/2014/083), dismissing the application in its entirety. Judge Laker found that no contestable decision was ever taken with respect to Mr. Y. as OAIS had not received any complaint against him. As to the Applicant’s complaint against Mrs. X. to OAIS, the Tribunal found that it was time-barred and, therefore, not receivable.

4. The Applicant appealed the above-mentioned judgment and, by Judgment *Nielsen* 2016-UNAT-647 dated 24 March 2016 but publicly distributed on 24 May 2016, the Appeals Tribunal vacated the Judgment insofar as it rejected the application relating to Mrs. X. and affirmed the remainder of it. In respect of the application relating to Mrs. X., the Appeals Tribunal found that the Dispute Tribunal erred in not reviewing the “Closure Note” reporting the investigation and conclusions reached by OAIS in the course of its preliminary investigation with regard to the Applicant’s complaint (“OAIS Closure Note”). It remanded the

matter to the Dispute Tribunal for reconsideration “so that the application may be considered with the benefit of the full OAIS record”.

5. By Order No. 131 (GVA/2016) of 15 June 2016, the Tribunal ordered the Respondent to file the OAIS Closure Note by 24 June 2016, and the Applicant to file observations thereto by 8 July 2016. On 22 June 2016, the Respondent filed the OAIS Closure Note and, on the same day, the Applicant filed her observations.

6. By Order No. 146 (GVA/2016) of 19 July 2016, the Tribunal further ordered the Respondent to file thirteen exhibits referred to in the OAIS Closure Note. On 4 August 2016, the Respondent filed the requested documents.

7. On 5 August 2016, the Applicant submitted additional observations without leave from the Tribunal.

8. By motion filed on 11 August 2016, the Respondent sought leave to respond to the Applicant’s observations of 5 August 2016 (“Respondent’s Motion to file Additional Submissions”).

Preliminary matters

Respondent’s Motion to file Additional Submissions

9. The Tribunal finds that the Applicant did not bring any new information or issue in her observations filed on 5 August 2016 warranting allowing the Respondent to respond to them. The issues at stake in the present case have already been extensively covered by the Respondent’s submissions in Case No. UNDT/GVA/2014/083, as well as in the documents submitted in the present case; hence, it is not necessary for a fair disposal of the case to allow further submissions.

10. The Respondent’s Motion to file Additional Submissions is therefore rejected.

Hearing

11. Given that the present case was remanded by the Appeals Tribunal specifically for this Tribunal to consider the OAIS investigation file, which has now been submitted by the Respondent, and that the Tribunal is sufficiently informed by the submissions filed by the parties in Case No. UNDT/GVA/2014/083 and in the present one, the Tribunal does not find it necessary to hold a hearing to adjudicate the case, and will hereby decide on the application based on the written submissions and documentary evidence submitted by the parties.

Facts

12. On 28 January 2013, the Applicant entered the service of UNFPA in the Africa team, PSB, on a one-year temporary appointment (“TA”). Effective 23 September 2013, she was placed on Special Leave with Full Pay (“SLWFP”), and was separated from UNFPA upon the expiration of her TA on 26 January 2014.

13. On 18 July 2013, the Applicant submitted a complaint through the fraud hotline of OAIS, formerly the Division of Oversight Service (“DOS”), UNFPA, alleging “some work problems”.

14. On 1 August 2013, the Chief Investigator, DOS, had a phone conversation with the Applicant to clarify the nature of her complaint. The Applicant alleged that “she felt left out of the team, undervalued and believed that her colleague, [Mrs. X.], Procurement Assistant, PSB, negatively influenced her other colleagues in an attempt to undermine her”. After having conducted a preliminary assessment, OAIS concluded on 18 August 2013 that the matter was of a managerial nature and did not fall within its mandate. OAIS decided to close the case and informed the Applicant accordingly.

15. On 7 August 2013, the Applicant sent an email with the subject “report on unethical behaviour of [Mrs. X.]” to the newly appointed Human Resources Associate of UNFPA Copenhagen, copying her supervisors in PSB.

16. On 5 June 2014, the Applicant sent an email to the Chief of Investigations, OAIS, UNFPA, complaining about alleged harassment against her and unethical behaviour by Mrs. X., and asking for an investigation into her complaint.

17. By email of 23 July 2014, the Applicant addressed to an Investigations Analyst, OAIS, a complaint against Mrs. X. alleging harassment and non-professional behaviour. In her 43-page document, the Applicant generally alleged that Mrs. X. was constantly undermining her, discrediting her work in front of their supervisors, trying to destroy her career, refusing to perform her duties, trying to blame the Applicant for her own mistakes, threatening the Applicant to complain to their supervisors when the Applicant criticised her work, laughing at the Applicant with other staff members and being rude with the Applicant. The Applicant referred more specifically to:

- a. Mrs. X. inappropriately contacting suppliers and giving them contradicting and confusing instructions;
- b. Mrs. X. wrongly asserting that the Applicant omitted to pay invoices; and
- c. Mrs. X. “discussing nationalities together with other team members”, including Russian, and comparing Russians and Portuguese words.

18. On 10 September 2014, two OAIS investigators had a phone conversation with the Applicant to clarify the information she provided in her complaint against, *inter alia*, Mrs. X. The Applicant confirmed that all the instances she described in her complaint against her former colleagues, including Mrs. X., occurred prior to 22 September 2013. The Applicant was advised that the OAIS investigators would recommend the Director of OAIS to close the case.

19. On 12 September 2014, OAIS formally closed the Applicant’s case against Mrs. X. In its Closure Note, OAIS concluded that the complaint against Mrs. X. was irreceivable as the incidents described by the Applicant fell outside the 6-month time limit set forth in the 2013 UNFPA Policy on Harassment, Sexual Harassment and Abuse of Authority (“the Policy”) and her allegations of bullying

and harassment “[did] not fall within the scope of prohibited conduct and [did] not, prima facie, meet the reasonable threshold level for misconduct”.

20. By email of 16 September 2014, the Applicant was notified that OAIS would not be launching an investigation into her “complaints of harassment, bullying and abuse of authority against 12 staff members at PSB”, since OAIS had “concluded its preliminary review of the matter and [had] found that a full investigation [was] not warranted”, therefore considering the matter “closed”.

21. By email of 20 September 2014, the Applicant submitted a request for management evaluation against OAIS’s decision not to launch an investigation into Mrs. X.’s behaviour. She received a reply to her request on 31 October 2014 from the Executive Director, UNFPA, by which she was notified that OAIS decisions were “outside the scope of review by UNFPA management”.

Parties’ submissions

22. The Applicant’s principal contentions are:

a. The refusal of OAIS to launch the requested investigation is unfounded, as her complaint was duly documented and the improper behaviour of Mrs. X. against her is evident based on all the proof she already submitted on many occasions; and

b. Her case is not being treated seriously by UNFPA, and her managers treated her badly as well, instead of showing her support and integrating her into the PSB team.

23. The Respondent’s principal contentions are:

a. The contested decision of OAIS was taken in compliance with its UNFPA 2014 Charter, according to which OAIS has to operate independently and has discretionary authority with respect to the matters it investigates;

- b. The challenged administrative decision is furthermore lawful as it was taken in compliance with the requirements provided for in the Policy. Indeed, OAIS determined that the incidents described by the Applicant in her complaint related to “interpersonal relationships amongst colleagues involving criticism and disagreements”; hence, they did not fall under the scope of prohibited conduct and did not meet a *prima facie* reasonable threshold level of misconduct. Moreover, the complaint was time-barred as it was confirmed that it referred to incidents that occurred prior to 22 September 2013, which is not within the six-month deadline provided for by sec. 9.3.1 of the Policy;
- c. In addition to the above, the Applicant did not discharge the burden of proving that she suffered any damage from the contested decision; and
- d. Consequently, the Respondent asks for the application to be rejected.

Consideration

24. The Appeals Tribunal found in its Judgment *Nielsen* 2016-UNAT-647 that the Dispute Tribunal did not exercise sufficient judicial scrutiny in concluding that the Applicant’s complaint against Mrs. X. was time-barred as it did not review the full record of OAIS’s investigation, notably its Closure Note. In particular, the Appeals Tribunal held that:

41. In effect, the Dispute Tribunal’s Judgment reads as a first instance assessment of the receivability of Ms. Nielsen’s allegations of harassment when the proper function of the UNDT is to judicially review the decision of OAIS which is mandated under the 2013 UNFPA Policy to conduct such an assessment, particularly in circumstances where there was a written record capable of being disclosed to the UNDT. Thus, we are not satisfied that the conclusions reached by the Dispute Tribunal have a proper legal basis in the absence of the aforesaid documentary record. A perusal of the OAIS written record was the appropriate starting point from which the UNDT should have commenced its legal and factual review to determine whether OAIS’ conclusion not to trigger an investigation had a proper legal basis. Accordingly, we cannot be satisfied that the UNDT Judgment accords with the requirements of Article 11(1) of the UNDT Statute. For the foregoing reason, we will remand the matter to the Dispute

Tribunal so that the application may be considered with the benefit of the full OAIS record. We leave it to the discretion of the Dispute Tribunal as to how it wishes to access the relevant information.

25. Having reviewed the OAIS Closure Note and its exhibits, the Tribunal will examine whether the decision of OAIS not to pursue an investigation into the Applicant's complaint for misconduct against Mrs. X. complied with the Policy, as directed by the Appeals Tribunal. For the sake of completeness, the Tribunal will review, in turn, the two grounds raised by OAIS to conclude that the Applicant's complaint against Mrs. X. was irreceivable.

Legal framework

26. The Applicant's complaint against Mrs. X. for harassment and alleged unethical behaviour is governed by the Policy. The prohibited conduct falling under it is defined in its sec. 4 and is limited to harassment, sexual harassment and abuse of authority. Harassment, which is more directly linked to the present proceedings, is defined in sec. 4.1 as follows:

4.1 Harassment

4.1.1 Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may be present in the form of words, gestures, or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle or cause personal humiliation or embarrassment to another or that causes intimidating, hostile or offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. It can include a one time incident or a series of incidents. Harassment may be deliberate, unsolicited and coercive.

4.1.2. The mere expression of disagreement, admonishment, criticism or similar expressions regarding work performance, conduct or related issues within a supervisory relationship shall not normally be considered harassment within the meaning of this document.

27. The Policy establishes an informal and a formal process for dealing with complaints filed under it (see sec. 6 of the Policy). As to the formal process, sec. 6.2 provides that:

Personnel who believe that they were subject to Harassment, Sexual Harassment or Abuse of Authority may submit a complaint to the Director, Division for Oversight Services (“DOS”), alleging that they are or were the victim of Harassment, Sexual Harassment or Abuse of Authority. Section 9 provides further details on the Formal Process.

28. With regard to sec. 9 (“Formal Process”) of the Policy, its relevant parts for the present case read as follows:

9. Formal Process

9.1. Any Personnel and/or former Personnel may file a complaint of Harassment, Sexual Harassment or Abuse of Authority with the Director, DOS.

9.2. Should the Director, DOS, determine that the matter may appropriately be dealt with through an informal process, he or she may refer the matter to the Director, DHR, for an attempt at the informal resolution of the dispute, provided the complainant has given his/her consent to such referral.

9.3. Time limits

9.3.1 A formal complaint of Harassment, Sexual Harassment or Abuse of Authority may be addressed to the Director, DOS, by any Personnel within six (6) months from the date of the last incident of Harassment, Sexual Harassment or Abuse of Authority. These time limits may be extended by the Director, DOS, in exceptional cases (emphasis in original).

9.4 Formal requirements

9.4.1 The complaint shall:

(a) be in writing;

(b) state the identity of the alleged offender;

(c) state the date(s) and location(s) of the alleged incident(s) of Harassment, Sexual Harassment, or Abuse of Authority;

(d) render a description of the incident(s) in question as well as other relevant circumstances;

(e) indicate names of witnesses and physical and/or documentary proof.

9.4.2 The complaint shall not be:

(a) anonymous:

(b) submitted on behalf of another person.

9.5 Further action

9.5.1 If: (i) the complaint was submitted within the time limits (section 9.3); (ii) the complaint fulfils the formal requirements (section 9.4); and if (iii) the incident or incidents subject to the complaint, on its/their face, fall within the scope of prohibited conduct as described in this document (section 4) and, prima facie, meet a reasonable threshold level for misconduct; then the Director, DOS, may consider the complaint to be receivable.

(...)

9.5.5 If the Director, DOS, determines that the complaint will not be investigated, he or she shall advise the complainant accordingly in writing, and close the case.

Timeliness of the complaint against Mrs. X.

29. The Applicant sent an email on 7 August 2013 to a UNFPA Human Resources Assistant regarding Mrs. X.'s "unethical behaviour". Pursuant to secs. 6.2 and 9.1 of the Policy, such communication cannot be considered a formal complaint against Mrs. X. since it was not addressed to OAIS.

30. Likewise, the Applicant's complaint to the DOS fraud hotline on 18 July 2013 cannot be considered as a formal complaint against Mrs. X. under the Policy. Firstly, it appears that this complaint was of a general nature, namely about "some work problems", and not specifically directed at Mrs. X.. Secondly, it did not meet the requirements of a formal complaint under sec. 9.4.1 of the Policy, which requires, *inter alia*, that a formal complaint be made in writing to the Director, OAIS, and state the identity of the alleged offender.

31. The Applicant submitted her formal complaint against Mrs. X. to OAIS on 5 June 2014, and supplemented it on 13 July 2014. As recalled above, OAIS found that all incidents involving Mrs. X., described by the Applicant in her documents and conversations with OAIS, occurred prior to 22 September 2013. This conclusion was indeed confirmed by the Applicant in her conversation with the OAIS investigators on 10 September 2014, and accords with the fact that the Applicant was placed on SLWFP on 23 September 2013 and that she never returned to work afterwards. There is no indication that the Applicant had any contact with Mrs. X. after 22 September 2013. Absent any extension of time granted by the Director, OAIS, the Tribunal cannot but confirm OAIS's conclusion that the Applicant's complaint against Mrs. X., as expressed in her submissions of 5 June and 13 July 2014, was time-barred pursuant to sec. 9.3.1 and, therefore, irreceivable under sec. 9.5.1 of the Policy.

Sufficiency of the allegations to initiate an investigation

32. It is well established that “[a]s a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action” (*Oummih* 2015-UNAT-518, para. 31, referring to *Abbou* 2010-UNAT-100, para. 34). The Appeals Tribunal further held in *Oummih* that “[t]he Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations”.

33. A decision not to open an investigation, however, may be subject to judicial scrutiny (*Nwuke* 2010-UNAT-099). In reviewing such decision, the Dispute Tribunal shall examine if the Administration's act or omission in response to a request for investigation was taken in accordance with the applicable law (*Nwuke* 2010-UNAT-099, paras. 36 and 40). In this process, the Dispute Tribunal may examine whether the applicable procedure was followed, whether OAIS committed a manifest error in the exercise of its discretion and whether the decision not to initiate the investigation was tainted by ulterior motives (*Staedtler* UNDT/2014/123, para. 60).

34. In the instant case, it has been established that OAIS reviewed the Applicant's complaint against Mrs. X., as well as the documents attached thereto. OAIS investigators also contacted the Applicant by phone on 10 September 2014 to get further information and clarifications in respect of her complaint.

35. In its preliminary assessment, OAIS concluded as follows:

From OAIS' review of [the Applicant]'s eight individual complaints of bullying and harassment against her former PSB colleagues and the supporting information she provided, OAIS found that [the Applicant]'s primary concern was the lack of support she received from her colleagues when she reported to them an incident in April 2013 when allegedly acid had been accidentally been added to a tea kettle. Furthermore, [the Applicant] described feelings of isolation and not being part of her team. [The Applicant] also referred to a hostile working environment, which she specifically attributed to [Mrs. C.]. OAIS considers that the majority of the incidents described by [the Applicant] relate to interpersonal relationships amongst colleagues involving criticism and disagreements.

OAIS further identified an incident in which [the Applicant] described that she felt her two former colleagues, [Mrs. X. and Mrs. C.], made "undermining comments about her Russian culture". When asked to provide OAIS with an example of the "undermining comments about her Russian culture", [the Applicant] described an incident when, during a conversation regarding the disappearance of [Mrs. X.]'s bicycle, [Mrs. C.] made a comment that if [Mrs. X.]'s bicycle did not have a Russian name, it would not have disappeared. [The Applicant] believed that this comment was "weird" and could not understand what [Mrs. C.] meant by it. OAIS does not consider such comment to amount to harassment on the grounds of [the Applicant]'s ethnic origin.

36. Having reviewed the Applicant's complaint against Mrs. X., the documents attached to these and the OAIS investigation records, the Tribunal is of the view that the OAIS Closure Note accurately captures the substance of the Applicant's allegations. The complaint essentially describes incidents displaying disagreements between the Applicant and her colleague in the performance of their work, and otherwise makes vague and general allegations in respect of Mrs. X.'s attitude towards the Applicant which are not substantiated by any specific fact. Despite OAIS's efforts to obtain clarifications from the Applicant on her allegations, these remained unsubstantiated.

37. The same holds true for the Applicant's allegations in respect of discriminatory remarks made by Mrs. X. The complaint merely states that Mrs. X. "[discussed] nationalities together with other team members (including Russians)", and also discussed the meaning of Russian words and made comparison between words in Russian and Portuguese. When asked to provide examples of discriminatory comments, the Applicant referred to the stolen bicycle incident related in the OAIS Closure Note, which did not involve any remark made by Mrs. X..

38. The Tribunal recalls that in accordance with sec. 9.4 of the Policy, it is a staff member's responsibility to substantiate a complaint to OAIS with a solid description of the factual circumstances, to allow the investigator to have a clear picture of the alleged incident(s). The staff member shall clearly identify who were the people involved, where, when and how the events took place, and in which way they affected the staff member's working environment or the staff member's rights.

39. The Tribunal finds that OAIS properly exercised its discretion in concluding that the Applicant's allegations against Mrs. X. were insufficient to fall within the scope of the definition of harassment and to *prima facie* establish misconduct. The incidents reported by the Applicant about the payment of invoices and contacts with suppliers reflect diverging views between the Applicant and her colleague in respect of the accomplishment of certain tasks, as well as difficulties in working cooperatively; they do not display any "improper and unwelcome conduct [by Mrs. X.] that might reasonably be expected or be perceived to cause offence or humiliation" to the Applicant. As to the remainder of the complaint, it essentially contains general allegations which fail to identify any specific conduct that may be characterised as harassment. Accordingly, the complaint did not meet the receivability requirements of sec. 9.5.1 of the Policy.

40. The Tribunal finds that the decision of OAIS to close the Applicant's complaint against Mrs. X. as irreceivable was taken in compliance with the Policy.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 19th day of August 2016

Entered in the Register on this 19th day of August 2016

(Signed)

René M. Vargas M., Registrar, Geneva