



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

REHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Miles Hastie, UNICEF

Notice: this Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By application filed on 22 October 2016, the Applicant, a former staff member of the United Nations International Children's Emergency Fund ("UNICEF"), Islamabad, Pakistan Country Office ("PCO"), challenges the decision of the Office of Internal Audit and Investigation ("OIAI") to close the investigation into complaints of harassment, discrimination and abuse of authority, lodged by the Applicant against other staff members.
2. The Respondent filed his reply on 24 November 2016.

Procedural history

3. In September 2017, the Applicant's case was re-assigned to the undersigned Judge. By Order No. 173 (GVA/2017) of 11 September 2017, the Respondent was ordered to file additional documents and the parties were called to attend a case management discussion ("CMD") on 18 September 2017.
4. On 22 September 2017, the Respondent filed a motion for extension of time to comply with Order No. 173 (GVA/2017). The Tribunal, by Order No. 184 (GVA/2017) of 25 September 2017, ordered that the documents be filed by 26 September 2017, for which the Respondent complied.
5. On 29 September 2017, the Applicant filed a motion entitled "request to confine/direct the Respondent to provide remaining documents advised by [the Tribunal] in CMD and Order No. 173 (GVA/2017), 184 (GVA/2017) before schedule the hearing on merit of cases [sic]". On 2 October 2017, the Respondent filed a response to the Applicant's motion of 29 September 2017 and also filed *ex parte* the closure memo of OIAI into the allegations of entitlement fraud against the Applicant.

6. By Order No. 186 (GVA/2017) of 3 October 2017, the Tribunal *inter alia* rejected the Applicant's motion and ordered the Registry to make available to her the closure memo on an under seal basis. On the same date, by Order No. 187 (GVA/2017), the Tribunal set the date for a hearing on the merits in relation to the present case, which was held on 6 October 2017. The parties filed their closing submissions on 27 October 2017.

7. The Applicant has two other cases before this Tribunal:

a. In the first case (registered under Case No. UNDT/GVA/2016/007), she is challenging the decision not to renew her fixed-term appointment as Programme Assistant in the Education Section in the PCO, Islamabad, and;

b. In the second case (registered under Case No. UNDT/GVA/2016/017) she is challenging the decision not to select her to the post of Programme Assistant, GS-5, Polio Section, Peshawar.

8. While the Applicant joins issues of all cases in her three applications, the Tribunal will adjudicate each application and contested decision in a separate judgment. Therefore, this Judgment will only address the decision of OIAI concerning the Applicant's complaints of harassment and abuse of authority by her former supervisor and other staff members.

Facts

9. On 26 January 2016, the Applicant filed a complaint with OIAI against her former supervisor, the Chief of the Education Section at UNICEF, PCO, Islamabad ("Chief of the Education Section"), citing UNICEF's Executive Directive on Prohibition of discrimination, harassment, sexual harassment and abuse of authority ("CF/EXD/2012-007"). In her complaint, the Applicant listed various incidents of alleged ill treatment, discrimination, harassment, humiliation and abuse of authority that she allegedly suffered at the hands of the Chief of the Education Section.

10. The Applicant also complained that she believed she was a victim of a web of conspiracy and that she was being framed by certain staff members, including the former UNICEF Representative PCO and the Chief of the Education Section, especially in relation to the allegations raised against her with respect to the fraudulent payment of a hotel bill.

11. On 21 March 2016, the Applicant filed another complaint requesting an investigation into the former Chief of Human Resources of UNICEF, Islamabad, for abuse of authority and discrimination. The Applicant's complaint contained a list of incidents from 2015 to 2016.

12. On 22 March 2016, the Applicant wrote to OIAI seeking information about the status of her 26 January 2016 complaint.

13. In an email of 23 March 2016, OIAI replied to the Applicant confirming that her 26 January 2016 complaint would be examined and requesting her to provide additional information/clarifications and to complete a form.

14. On 12 April 2016, the Applicant wrote to OIAI inquiring about the status of her 21 March 2016 complaint. She received a response on the same day from the Chief of Investigations, OIAI ("COI") informing her *inter alia* that her 26 January 2016 complaint was time-barred.

15. On 13 April 2016, the Applicant replied to the COI expressing her disappointment and frustration with his reply, clarifying the different claims she had filed, explaining why she believed that her claims were not time-barred and asking him to reconsider his decision contained in his email of 12 April 2016.

16. On 14 April 2016, the COI replied to the Applicant expressing regret that she had misunderstood the question of time-limits and advising her that there was nothing that OIAI could do with respect to her complaints.

17. On 19 and 21 April 2016, the Applicant filed other complaints of harassment and abuse of authority against the former Chief of Human Resources, the Chief of Education Section, the Country Representative and three other staff members, all from UNICEF, PCO.

18. On 13 May 2016, the COI, OIAI, wrote to the Applicant regarding her complaints and made some observations on them. The Applicant responded on 17 May 2016 and later, on 8 June 2016, requested management evaluation of the decision of OIAI to close her complaints without conducting investigations.

19. On 13 July 2016, the COI wrote to the Applicant as a result of her management evaluation request *inter alia* informing her about OIAI's assessment of her complaints and explaining why OIAI did not find any basis for investigating them.

20. By letter dated 15 July 2016, the Deputy Executive Director, Management, UNICEF responded to the Applicant's request for management evaluation providing her with the reasons to uphold the contested decision, namely OIAI's decision to close and not to investigate her complaints.

Parties' submissions

21. The Applicant's principal contentions are that:

a. She was a victim of discrimination and subject to a very hostile work environment under her First Reporting Officer, the Chief of Education Section;

b. OIAI did not consider and address basic issues of the illegal payment to the hotel in Karachi such as whether her rights were protected, the processing of the payment, and why she was never informed of the payment being made;

c. The act of UNICEF PCO making the payment to the hotel in Karachi on her behalf, without her knowledge or without consulting her, was a procedural irregularity aimed at framing her to institute disciplinary proceedings; and

d. The action of OIAI of mixing her various complaints was aimed at creating confusion rather than acting in a transparent manner, all of which was intended to protect the persons she had complained against.

22. The Respondent's principal contentions are that:
- a. The Tribunal's task is to examine how the Organization responded to the complaints of harassment and abuse of office;
 - b. The head of the investigation department has discretion as to whether or not to call for a fact-finding investigation as long as the discretion is exercised in a lawful manner;
 - c. The Applicant's allegations of illegality are unclear and she has not provided any evidence of bias on the part of OIAI investigators;
 - d. OIAI's conclusion that the Applicant's complaint was time-barred was relevant because of the connection between the dates of the allegations and the alleged consequence of the harassment;
 - e. If OIAI determines that a complaint is unfounded and, thus, not credible, it is not bound to commence an investigation; and
 - f. The Applicant's complaint regarding payments made to a hotel in Karachi were found, after investigation, to be the result of an error made by the hotel and not orchestrated by the UNICEF PCO staff.

Consideration

23. The Tribunal takes note that the Applicant was a staff member of UNICEF, which has internal procedures that differ from those of the United Nations Secretariat on some administrative issues. Indeed, UNICEF promulgated Executive Directive CF/EXD/2012-007 on the Prohibition of discrimination, harassment, sexual harassment and abuse of authority which, in its relevant part, provides as follows:

Section 1

Definitions

1.1 For the purpose of this directive, the following definitions apply:

...

(b) Harassment is any improper and unwelcome conduct that has or might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an 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. Harassment normally involves a series of incidents.

...

(d) Abuse of authority is the improper use of a position of influence, power, or authority against another person. This is particularly serious when a person uses, or threatens to use, his/her influence, power, or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment, and such conduct can include (but is not limited to) the use of intimidation, threats, blackmail or coercion.

...

Filing a complaint

5.10 Any person may file a complaint. No anonymous complaints will be accepted.

5.11 The complaint should be submitted in writing, be signed and dated, to the Director, Office of Internal Audit and Investigations, with a copy to the Director, Division of Human Resources, within six months from the most recent alleged incident. The complaint should state:

- (a) the name of the alleged offender;
- (b) the date(s) and location(s) of the alleged incident(s) of discrimination, harassment, sexual harassment, or abuse of authority;

- (c) the names of witnesses and any physical and/or documentary proof in support of the allegation (e.g., e-mails, message recordings, photos, letters, medical exams); and
- (d) any other relevant information.

5.12 The filing of a complaint only upon notification of an administrative decision that the complainant wants to challenge may cast doubt on the credibility of the allegations of discrimination, harassment, sexual harassment or abuse of authority, if no documented informal resolution or formal reporting of harassment-related incidents was made prior to the decision.

Preliminary assessment

5.13 Upon receipt of a formal complaint, the Director, Office of Internal Audit and Investigations will do 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 Office of Internal Audit and Investigations or another person designated by the Director, Office of Internal Audit and Investigations 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.

5.15 If the Director, Office of Internal Audit and Investigations concludes that the complaint in question is credible and merits a comprehensive review, he/she will notify the alleged offender and will provide that person with the details of the complaint and the name of the complainant. The alleged offender will be invited to respond and will be given fifteen (15) calendar days to provide a written response, including any explanations, relevant materials and/or the names of witnesses who might be able to assist in a possible investigation.

5.16 Unless the Director, Office of Internal Audit and Investigations, concludes on the basis of the complaint, the response of the alleged offender, and the material submitted by both parties that the complaint is unfounded, the Office of Internal Audit and Investigations will proceed to investigate the complaint.

Scope of judicial review

24. Pursuant to art. 2.1(a) of the Tribunal's Statute, this Tribunal is competent to examine the legality of administrative decisions.

25. A staff member alleging to have been subject to harassment may challenge a decision not to investigate a claim of discrimination, harassment and or abuse of authority. In *Nwuke* 2010-UNAT-099, the Appeals Tribunal, *inter alia*, held that when a claim regards issues covered under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), a staff member is entitled to administrative processes and if dissatisfied, may request judicial review of administrative decisions taken under the bulletin. The scope of judicial review in harassment and abuse of authority cases is not limited to the ultimate decision to take no further action on a complaint of harassment, but may also encompass the overall handling of the complaint, and an examination by the Tribunal whether the steps preceding that decision were procedurally correct.

26. Further, in *Messinger* 2011-UNAT-123, the Appeals Tribunal held that it is clear that the Dispute Tribunal is not invested with jurisdiction to investigate harassment complaints under art. 2 of its Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment (see also *Dawas* 2016-UNAT-612).

27. With the above in mind, the Tribunal will now review how OIAI handled the Applicant's complaints.

28. On 26 January 2016, the Applicant filed a complaint against her former supervisor and on 1 February 2016, an investigation specialist at OIAI acknowledged receipt of the Applicant's complaint. On 22 March 2016, the Applicant wrote to the same investigation specialist to inquire about the status of her complaint.

29. On 23 March 2016, the investigation specialist responded to the Applicant, informing her that upon reviewing her complaint against her former supervisor, the investigation into the allegations of fraud that had been made against the Applicant had been closed. The investigation specialist further sought to have further details and information regarding the Applicant's complaint that her former supervisor had influenced other staff members against her with respect to these fraud allegations. She also requested the Applicant to explain how she had received the documentation or on what basis she believed that her former supervisor came up with a "scheme" to "set her up" with respect to the fraud allegations. She also noted that this was the first time that the Applicant was reporting being harassed by her former supervisor.

30. On 11 April 2016, the Applicant replied to the investigation specialist, providing her with an explanation to the requested information and with accompanying annexes.

31. In the meantime, on 21 March 2016, the Applicant filed another complaint of abuse of authority and discrimination, this time against the then-Chief of Human Resources. Not having received any communication regarding this second complaint, the Applicant, on 12 April 2016, wrote to OIAI, UNICEF, to inquire about its status.

32. On the same day, the COI responded to her as follows:

As you were notified by my colleague, [Investigation Specialist,] the case of allegations of entitlement fraud against you was closed in October 2015, with no further action against you. You have now made counter allegations that you were harassed by your supervisor ... since 2013 and by the evidence you have put forward in this complaint the matter has been time-barred as per the policy (excerpt below):

Filing a complaint

5.10 Any person may file a complaint. No anonymous complaints will be accepted.

5.11 The complaint should be submitted in writing, be signed and dated, to the Director, Office of Internal Audit and Investigations, with a copy to the Director, Division of Human Resources, within six months from the most recent alleged incident.

Thank you for being in touch and good luck with your future endeavours.

33. The Tribunal notes with concern that the Applicant was not provided with a reasoned decision as to why her complaint against her former supervisor was found to be time-barred. Rather, the email simply contained a quote of the provision of the above-cited Executive Directive with respect to time-limits, without any narrative about how it was applied to her case.

34. Further, with respect to her second complaint of 21 March 2016, it is evident that she was complaining about the acts of the then-Chief of Human Resources, UNICEF, PCO. Therefore, the reference in the response of the COI to the outcome of the case of allegations of entitlement fraud against the Applicant was irrelevant and did not have any bearing on the Applicant's complaint against the then-Chief of Human Resources. Understandably, on 13 April 2016, the Applicant wrote to the COI stressing that he had failed to analyse her complaint.

35. On 14 April 2016, the COI wrote to the Applicant as follows:

I am sorry that you have misunderstood the protocol on time limits regarding cases of harassment, because it is about when the last incident of alleged harassment took place that counts, not the date that you last reported it. The latest case that you have quoted in your emails was 7 October [2015] when you were told that your contract would not be renewed. OIAI can see nothing contrary to the fact that your contract was not renewed due to lack of funding.

36. Once again, a simple review of the Applicant's complaint shows that it contains several dates, including incidents that allegedly occurred in January 2016. From the 14 April 2016 email, it does not appear that the COI fully reviewed the Applicant's complaint. His finding that the complaint was time-barred, i.e., not submitted within six months from the most recent alleged incident, appears to be in error.

37. The Tribunal notes that in reviewing complaints for harassment, a reasonable level of care has to be applied by those entrusted to examine them. The apparent haste of the COI to dismiss the Applicant's two complaints without paying due regard to the totality of her claims is of great concern to the Tribunal. Furthermore, his actions forced the Applicant to re-file the same complaints against her former supervisor and the-then Chief of Human Resources on 19 and 21 April 2016.

38. On 13 May 2016, the COI wrote to the Applicant with regard to her complaint against the-then Chief Human Resources Officer. In the email, he indicated that:

Dear [Applicant],

With reference to your allegations of discrimination against [the Chief of Human Resources], who has been with UNICEF Pakistan since January 2015, I have now reviewed all of the documents you supplied and have the following observations:

1 You said that your salary grant and funds have been diverted from Gender Thematic Grant to facilitate other staff members who are on TA contracts and thereby discriminating against you as a programme assistant in the Education Section. Could this have been a legitimate operational decision?

2 On 13 November you had meeting with the Rep. Ms [X] concerning the renewal of your contract, with detailed discussions. Regardless of minutes not being provided, what was the outcome of that discussion as you understood it?

3 With regards to the positions that you have applied for, the responses to your queries appear to be as they would normally be during a recruitment process, and although I am not in a position to judge your candidacy against other applicants, but looking at the process it seems to have conformed to the usual standards. I see that you have submitted a request for a Management Evaluation of the recruitment process as you feel that your qualifications should have secured you an interview if not the job.

4 The fact that you blame [the then Chief of Human Resources] specifically for not informing you of the results of the recruitment processes in good time and consider that a deliberate discrimination seems unusual, because as you are aware, the successful applicant would be the first to be notified and only after that person has accepted would the other candidates be told that they were unsuccessful. That process can often take a few weeks.

5 The fact that you were selected to take part in varying stages of the recruitment process for different jobs, tends to suggest that you were assessed on your merits for each job and indeed not discriminated against.

39. The Applicant responded on 17 May 2016 offering explanations related to her complaint. She filed a request for management evaluation of the decision of OIAI to close her complaints without conducting investigations on 8 June 2016.

40. On 13 July 2016, the COI once again wrote to the Applicant informing her that OIAI had been contacted by the UNICEF Management Evaluation Unit in connection with her management evaluation request. It appears to the Tribunal that in light of the request for management evaluation, the COI took the Applicant's complaints a little more serious, as in his email of 13 July 2016 he sought to give an "assessment" for finding no basis for investigating the Applicant's complaints.

41. It follows from the above that the way in which OIAI, and specifically its COI, casually handled the Applicant's complaints was improper. If a staff member or a former staff member is expected to file a detailed complaint with proof, numbered annexes and a chronology of events in support of a complaint, it behoves the Organization, and in this instance OIAI, UNICEF, to respond in a detailed communication as to how they have reached a decision to reject and to officially close a staff member's complaint.

42. It is unequivocally incumbent upon the Organization to provide anyone who files a complaint with a properly reasoned decision, especially when the complaint is being rejected. This also enables the staff member to promptly exercise other available options including a challenge to that decision. Endless email communications do not provide staff members with finality of a determination, thus placing them in a precarious situation if they are to challenge such a decision taking note of statutory time-limits.

43. This Tribunal found that the decision of the former UNICEF Representative PCO not to renew the Applicant's contract was unlawful (see Judgment *Rehman* UNDT/2018/031) and that the failure of UNICEF PCO to notify the Applicant of her non-selection breached UNICEF rules and regulations

(see Judgment *Rehman* UNDT/2018/038). In light of all the available evidence within the context of the Applicant's three cases before the Tribunal, it is the Tribunal's view that the Applicant's complaints may have had some justification and merit, and it was upon OIAI, UNICEF to properly examine them and reach a detailed and reasoned decision on how to act upon them.

44. In *Nielsen* 2016-UNAT-647, the Appeals Tribunal found that a perusal of the written record by the investigation unit is an appropriate starting point from which the Tribunal should commence a legal and factual review to determine whether the investigation unit's conclusion not to investigate the Applicant's claims had a proper legal basis.

45. Since there is no report from OIAI to the Applicant informing her of how OIAI assessed her complaints and reached a conclusion that they did not warrant an investigation, thus summarily closing her cases, the Tribunal has no findings of fact by OIAI on which to base its assessment on whether the Applicant's complaints were established or not. Consequently, the Tribunal remands the Applicant's complaints back to the Director, OIAI, UNICEF, to have the Applicant's complaints properly analysed with the outcome of such assessment supported by factual findings. In this connection, the Tribunal is of the view that the COI and the Investigation Specialist who previously handled the Applicant's complaints are recused from dealing with these remanded complaints.

Is the Applicant entitled to remedies?

46. In *Nyakossi* 2012-UNAT-254, the Appeals Tribunal held that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member's legal rights under art. 10(5)(b) of the UNDT Statute. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.

47. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal *inter alia* held that a fundamental breach of a staff member's rights sufficed to justify an award of moral damages without further proof of harm. The OIAI, UNICEF, had an opportune moment to properly provide the Applicant with a reasoned decision about why it

would not investigate her complaints. Instead, her requests were not properly analysed thus leading to several incomplete, rushed and unreasoned communications that did not accurately address the totality of the Applicant's complaints.

48. The Applicant submitted that the handling of her complaints has caused her mental stress and anxiety. Additionally, the lack of receiving any official notification and analyses of her complaints of harassment created a very uncomfortable feeling that UNICEF had conspired to protect senior staff members by denying her a proper assessment of her complaints. Having found that OIAI improperly dealt with the Applicant's complaints of harassment and abuse of authority, the Tribunal awards the Applicant USD1,000 in moral damages.

49. The Applicant's claim for compensation for being the subject of an investigation into the allegations of fraud are rejected because she did not present any proof on how being a subject of the investigation affected her reputation or career or that it even caused symptoms of anxiety or depression.

Conclusion

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

- a. The application is granted in part;
- b. The decisions of the COI of 12 and 14 April 2016 are rescinded;
- c. The Applicant's complaints of 26 January and 21 March 2016 are remanded to the Director, OIAI, UNICEF, for a new thorough, proper, comprehensive and reasoned examination based on the rules governing complaints of harassment and abuse of authority;
- d. The COI and the Investigation Specialist who previously handled the Applicant's complaints shall be recused from dealing with the remanded complaints;

e. Considering the time that has elapsed, the re-examination of the Applicant's complaints must be completed within 60 days after this Judgment becomes executable;

f. The Tribunal finds that the Applicant is entitled to an award of moral damages in the sum of USD1,000 which 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 five percent shall be added to the US Prime Rate until the date of payment; and

g. All other pleas are rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 15th day of March 2018

Entered in the Register on this 15th day of March 2018

(Signed)

René M. Vargas M., Registrar, Geneva