



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bart Willemsen, UNICEF
Esther Uwazie, UNICEF

Introduction

1. On 19 January 2018, the Applicant, a staff member of the United Nations Children’s Fund (“UNICEF”), filed an application, further to her receipt of the response to her request for management evaluation, contesting UNICEF’s claim that

- a. Placing her on special leave without pay in October 2017 was an administrative error;
- b. UNICEF’s Ethics Office decision on her case was delayed due to the Applicant’s fault and that such delay did not prejudice the outcome of the review by the Ethics Office; and
- c. Her complaint of 8 April 2017 raised workplace issues rather than violations of her rights.

2. The application was registered under Case No. UNDT/GVA/2018/006 and served to the Respondent, who filed his reply on 16 February 2018, arguing, *inter alia*, that the application is not receivable *ratione materiae*.

3. On 22 February 2018, the Applicant requested leave to file an additional submission.

4. On 28 February 2018 the Respondent filed a response to the Applicant’s motion.

5. On 6 March 2018, the Applicant filed another motion for leave to file a submission, and the Respondent filed a response thereto on the same day.

Facts

6. The Applicant started service in October 2016 as a Corporate Research Officer (P-2), with the Private Fundraising and Partnerships Division (“PFP”), UNICEF, under a two year fixed term contract.

The Applicant's administrative status

7. After an incident on 17 May 2017, the Applicant was placed on certified sick leave (“CSL”) with full pay. Effective 9 August 2017, and following exhaustion of the Applicant’s entitlement to CSL with full pay, she was placed on CSL with half pay, combined with half annual leave to keep her on full pay status.

8. Upon exhaustion of her annual leave balance, the Applicant was placed on CSL with half pay effective 24 August 2017. However, due to an administrative error, she was paid full salary from 25 August to the end of September 2017. The Applicant exhausted all her leave entitlements on 8 November 2017.

9. By email of 17 October 2017, the Chief, Human Resources, PFP, UNICEF (“Chief HR”), informed the Applicant of the status of her leave entitlements, and notified her that based on her leave use she would be placed on SLWOP effective 9 November 2017.

10. By telephone conference held on 15 November 2017, the Chief HR and the Applicant discussed the “exhaustion of paid sick leave and the possibility to have her case submitted to the [United Nations] Medical Director and to the [United Nations Staff Pension Committee (“UNSPC”)], for consideration for medical termination and disability benefits from the United Nations Joint Staff Pension Fund [(“UNJSPF”)]”. The Chief HR also informed the Applicant that her health insurance coverage would expire in light of her being on SLWOP.

11. By application filed on 5 December 2017, the Applicant requested suspension of action, pending management evaluation, of the decision to place her on SLWOP effective 9 November 2017. On 12 December 2017, by Order No. 250 (GVA/2017), the Tribunal held that UNICEF was required to place the Applicant on partial pay pending a determination of whether she should be considered for a disability benefit.

12. By email dated 21 December 2017, from the Human Resources Manager, PFP, UNICEF, the Applicant was informed that UNICEF had taken action to implement the above Order, placing the Applicant back on payroll at half-pay status, and retroactively granting her half-pay, as if she had been on special leave

with half pay from the time of exhaustion of her paid leave, namely from October until December 2017.

The Applicant's request for whistleblower protection

13. By email dated 8 April 2017 to, *inter alia*, the Human Resources Manager, PFP, UNICEF, Geneva, and the Human Resources Learning and Development Specialist, PFP, Geneva, the Applicant complained about a “situation” she had with her first reporting officer. The Learning and Development Specialist responded to that email on 10 April 2017, suggesting a meeting between the Applicant, her direct supervisor and herself, which took place shortly thereafter.

14. By letter dated 9 September 2017, the Applicant requested whistleblower protection from the UNICEF Ethics Office, identifying the email of 8 April 2017 as the protected activity under the whistleblower policy and noting that her health situation was due at least partly to some actions of her supervisors after said email.

15. Several communications ensued between the Applicant and the Ethics Advisor, UNICEF, by which the latter requested additional information to substantiate the Applicant's request for retaliation. The Ethics Advisor informed the Applicant that in the absence of any further information from her, she would complete the preliminary review by early December.

16. The Principal Adviser, UNICEF Ethics Office, dismissed the Applicant's request by email of 6 December 2017, expressing her regret for the delay which she noted was partly due to the Applicant's failure to respond to the Ethics Office. The Principal Adviser informed the Applicant of her finding that she had not presented a credible *prima facie* case of retaliation.

17. On 13 December 2017, the Applicant filed a request for review of the UNICEF Ethics Office decision dismissing her request with the Chairperson of the Ethics Panel of the United Nations. The latter, by letter dated 16 February 2018, informed the Applicant that, after review, he concurred with the UNICEF Ethics Office conclusion that she had not established a case of retaliation. He noted, however, that he agreed with the Applicant's concern that the matter had been

unjustifiably delayed and that this delay did not nullify the preliminary determination on her request.

Management evaluation

18. On 5 December 2017, the Applicant requested management evaluation of:
 - a. The decision of 17 October 2017 to place her on special leave without pay, starting on 8 November 2017; and
 - b. The administrative situation by which one month and a half after the deadline set by the Ethics Office to reply to her whistleblower protection request of 9 September 2017, she had not received a response on whether UNICEF would recognize her status as a whistleblower.

19. By letter dated 12 January 2018, UNICEF informed the Applicant of the outcome of the management evaluation, stressing, *inter alia*, that
 - a. With respect to her placement on half-pay, UNICEF had complied with the Tribunal's Order; and
 - b. Her complaint of non-receipt of a response from the Ethics Office was not only moot but also that management evaluation was not the right mechanism to challenge it.

Parties' submissions

20. The Applicant's main contentions may be summarised as follows:
 - a. On 9 September 2017, she filed a complaint for retaliation against whistleblowers with the UNICEF's Ethics Office with respect to two UNICEF staff members;
 - b. The decision of 17 October 2017 to place her on SLWOP was not an administrative error but based on improper motives and of a retaliatory nature; although, upon the Tribunal's order, UNICEF returned her salary to her, the motive should be examined by the Tribunal also to prevent potential unlawful acts against her in the future; UNICEF is conducting an informal

investigation against her, using illegal means such as wiretapping her apartment; she invites the Tribunal to request from UNICEF any and all information about that investigation to prove that the suspension of her salary was not an administrative error;

- c. While she accepts that a management evaluation is not the channel to challenge an Ethics Office decision, she encourages the Tribunal to review the matter factually. Had the Ethics Office issued its decision in October 2017, the Applicant's complaint to the Office of Internal Audit and Investigations ("OIAI") would have been within time limits, and she would not have to potentially face a finding of inadmissibility by the OIAI; the Tribunal should seek evidence for the reasons of the delay by the Ethics Office;
 - d. The claim by the management evaluation that her complaint of 8 April 2017 covered workplace issues around performance, attendance, communication and administration is not correct. In fact, she complained about breaches of UNICEF rules and regulations, including in relation to her 2016 performance evaluation, which should be annulled and invalidated. In that complaint, the Applicant also brought up her supervisor raising her voice at her repeatedly, which constitutes abuse of authority, as well as her supervisor's attempt to put her on performance improvement plans while rating her "solid achievements", which may amount to harassment; the Tribunal should request evidence and review the substance of her complaint of 8 April 2017; and
 - e. By way of remedies, the Applicant asks the Tribunal to uncover the truth and punitive measures against the perpetrators; while initially she did not claim financial compensation, in her motion to file additional submissions, she requested financial compensation.
21. The Respondent's contentions can be summarised as follows:
- a. The only administrative decision reviewable by way of management evaluation and in an application to the Tribunal, identified in the Applicant's

submissions, is her placement on SLWOP; following Order No. 250 (GVA/2017), the decision was rescinded with full retroactive effect and, hence, the matter is moot;

b. UNICEF's Ethics Office's assessment of the Applicant's request for protection against retaliation was not unduly delayed and the fact that it took longer than the statutory 45-day period was mainly due to the Applicant's failure to respond to the email from the Principal Advisor; such delay did not impact the outcome of the review;

c. If OIAI were to rule that her complaint to it was time-barred, which it has not, the Applicant could request management evaluation of such a ruling;

d. After the Applicant submitted her request for management evaluation, at the time of the filing of the application, the Ethics Office had completed its review; hence, the matter is moot;

e. Alternatively, recourse with respect to the assessment by the UNICEF's Ethics Office, lies with the Chairperson of the UN Ethics Panel; the Tribunal is not competent to review such assessment, as was held by majority by the Appeals Tribunal in *Wasserstrom*;

f. The Applicant's assertion that UNICEF was incorrect to find that her complaint of 8 April 2017 to the Ethics Office raised workplace issues is a mere statement of fact without impact on the impugned decisions and, hence, requires no further address; and

g. The application is irreceivable *ratione materiae*.

Consideration

22. The Tribunal first has to consider whether the present application is receivable *ratione materiae*.

23. The Tribunal recalls that in her application, the Applicant refers to the contested decisions as being the findings in the management review dated 12 January 2018, that:

- a. Placing her on SLWOP in October 2017 was an “administrative error”;
- b. UNICEF’s Ethics Office decision of her case was delayed solely due to her fault and such delay did not prejudice the outcomes of the Ethics Office review;
- c. Her complaint of 8 April 2017 raised workplace issues rather than rights’ violations and breaches of UNICEF rules and regulations.

24. The Tribunal notes that the Administration’s response to a request for management evaluation is not a decision that can be subject to judicial review (*Kalashnik* 2016-UNAT-661). However, it also recalls what the Appeals Tribunal held in *Massabni*, 2012-UNAT-238, namely:

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

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

25. In light of *Massabni*, the Tribunal undertook to interpret the application in broad terms, understanding that what the Applicant wishes to contest are the decisions she challenged by way of management evaluation, namely the decision of 17 October 2017 to place her on SLWOP and “the administrative situation by which one month and a half after the deadline set by the Ethics Office to reply she had not received a response from the latter on whether UNICEF would recognize her status as a whistleblower, in light of her request dated 9 September 2017”. It will also address the Applicant’s challenge to the finding by management evaluation that her complaint of April was rather workplace related.

26. With respect to the decision of 17 October 2017, the Respondent argues that it is moot because the Tribunal did already decide on this matter and UNICEF complied with its decision. The Tribunal notes that, indeed, following Order No. 250 (GVA/2017), the decision to place the Applicant on SLWOP was rescinded and agrees with the Respondent that this matter is moot.

27. Concerning the alleged delay in the UNICEF Ethics Office's review of the Applicant's request for protection of 9 September 2017, the Tribunal notes that, on 6 December 2017, the UNICEF Ethics Office completed its review and informed the Applicant of its view that no prima facie case of retaliation had been established. As argued by the Respondent and agreed by the Applicant, the proper forum to request a review of that assessment is not management evaluation, but a request to the Chairperson of the Ethics Panel of the United Nations (cf. UNICEF's *Whistle Blower protection policy*, Executive Directive CF/EXD/2007-005 Rev. 2).

28. The Tribunal notes that on 13 December 2017, the Applicant availed herself of that possibility and requested the Chairperson of the Ethics Panel of the United Nations to review the UNICEF Ethics Office's initial assessment of 6 December 2017, regarding her request for protection against retaliation. The Chairperson of the Ethics Panel of the United Nations informed the Applicant on 16 February 2018 that he agreed with the assessment by the UNICEF Ethics Office.

29. The Tribunal recalls that the review by the Ethics Office cannot be subject to judicial review. Indeed, the Appeals Tribunal ruled in *Wasserstrom* (2014-UNAT-457) that:

41. (...) We agree with the Secretary-General that the Ethics office is limited to making recommendations to the Administration. Thus, the Appeals Tribunal, with Judge Faherty dissenting, finds that these recommendations are not administrative decisions subject to judicial review and as such do not have any "direct legal consequences". Hence, the Secretary-General's appeal on receivability is upheld.

30. Further, in *Nguyen-Kropp & Postica* 2016-UNAT-673, the Appeals Tribunal found that a finding by the Ethics Office after a preliminary review that there was

no credible case of retaliation does not constitute a decision carrying direct legal consequences and, hence, it is not subject to judicial review.

31. The findings of the Appeals Tribunal are binding for the Dispute Tribunal and are applicable in similar cases (*Igbinedion* 2014-UNAT-411, *Zeid* 2014-UNAT-401 and *Hepworth* 2015-UNAT-503).

32. In light of the jurisprudence of the Appeals Tribunal in *Wasserstrom* and *Nguyen-Kropp & Postica*, the Tribunal finds that since it cannot review the assessment and finding made by the UNICEF Ethics Office with respect to the Applicant's request for protection from retaliation, it cannot, either, examine the delays, if any, that occurred in the framework of that assessment. For that reason alone, the application insofar as it was addressed against the delay, if any, by the Ethics Office to review the Applicant's request for protection, is not subject to judicial review. The Tribunal observes, however, that the Applicant could and did seek review of the Ethics Office's assessment by the Chairperson of the Ethics Panel of the United Nations.

33. Finally, with respect to the Applicant's contestation of the finding by the management evaluation that her complaint of 8 April 2017 raised workplace issues rather than rights' violations and breaches of UNICEF rules, the Tribunal stresses that it could not identify any administrative decision subject to judicial review. It notes that after the Applicant sent the email of 8 April 2017, the Administration engaged in an informal process, in which the Applicant participated. In the absence of an administrative decision contested by the Applicant, the Tribunal concludes that this part of the application is equally not receivable *ratione materiae*.

34. In conclusion, the Tribunal finds that the application is partly moot, and partly not receivable *ratione materiae* and is to be rejected without further analysis of the grounds of appeal. In light of the foregoing, the Applicant's motions for leave to file additional submissions have to be rejected.

35. The Tribunal is aware that normally, and in the name of transparency, an Applicant's name shall be on the judicial decisions. However, in order to protect

the Applicant's health and reputation, the Tribunal finds it appropriate to redact her name from the present judgment.

Conclusion

36. In light of the foregoing, the Tribunal DECIDES that:

- a. The Applicant's motions for leave to file additional submissions are rejected;
- b. The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 20th day of March 2018

Entered in the Register on this 20th day of March 2018

(Signed)

René M. Vargas M., Registrar, Geneva