



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GUSAROVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Chinonyelum Esther Uwazie, UNICEF

Matthias Schuster, UNICEF

Background

1. At the time of application, the Applicant was serving as a Human Resource Manager at the UNICEF East-South Africa Regional Office (“ESARO”) in Nairobi, Kenya.
2. On 25 July 2018, the Applicant filed an application contesting the management evaluation decision, which in UNICEF is conducted by the Deputy Executive Director, Management (“DED/M”), to uphold the decision of the Office of Internal Audit and Investigations (“OIAI”) to dismiss her claim of abuse of authority and harassment (“the contested decision”).
3. The Respondent filed a reply to the application on 7 September 2018 in which the receivability of the application was challenged.
4. The Applicant filed her rejoinder to the reply on 25 February 2019.
5. On 15 November 2019, the Tribunal issued Judgment No. UNDT/2019/162 in which it held this matter to be receivable.
6. Pursuant to Order Nos. 210 (NBI/2019) and 054 (NBI/2020), the proceedings were suspended pending the parties’ attempt at mediation.
7. On 18 March 2020, the Ombudsman for United Nations Funds and Programmes informed the Tribunal that the parties had reached a partial settlement regarding one of the remedies sought by the Applicant but that the parties would continue pursuing the rest of their claims before the Tribunal.
8. For the reasons set out further below, the Tribunal concludes that the application lacks merit.

Summary of the relevant facts

9. On 26 December 2017, the Applicant submitted a complaint to OIAI of abuse of authority against Ms. Ancilla Kazirukanyo, Regional Chief of Human Resources, ESARO, who was her supervisor.¹ The Applicant alleged that Ms. Kazirukanyo abused her power with the intent to unjustly terminate or shorten her employment and damage her career, reputation and health in the process.

10. On 25 January 2018, the Applicant submitted an addendum to her complaint which detailed the reasons why she considered that the performance evaluation Ms. Kazirukanyo provided for the period January through August 2017 constituted an abuse of authority.²

11. On 17 April 2018, OIAI concluded that there was no evidence to support the allegation that Ms. Kazirukanyo abused her authority and closed the case.³

12. On 23 March 2018, the Applicant requested management evaluation of OIAI's decision to dismiss her claim.⁴

13. On 10 May 2018, the management evaluation response was transmitted to the Applicant. It concluded that there was no documentation or information to suggest that the procedure followed by OIAI was improper or that its finding was manifestly unreasonable or otherwise irrational and rejected her claims for remedies.⁵

Considerations

14. The issue arising for consideration in this case is whether the procedure followed by OIAI in assessing the Applicant's allegations was improper and whether the OIAI's conclusions were manifestly unreasonable.

¹ Application, annex 3.

² Reply, annex 2.

³ Reply, annex 1.

⁴ Application, annex 8.

⁵ Application, annex 10.

Whether the procedure followed by OIAI in assessing the Applicant's allegations was improper.

15. The Applicant maintains that the OIAI failed to observe the applicable procedures set out under paragraph 5.14 of CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority) which requires that she should have been interviewed for clarification. She maintains that the failure to interview her resulted in misdirection. Pointing to the fact that OIAI wrongly stated that she was put on a Performance Improvement Plan (“PIP”) although the records show that she was not, the Applicant maintains that the OIAI investigator should have interviewed her in the first place to be clear about her complaint. Her clarifications over this issue were moreover ignored.

16. The Tribunal is cognisant of the legal position that its jurisdiction is confined to examining the administrative activity (act or omission) followed by the Administration after a request for investigation and to decide if it was taken in accordance with the applicable law.⁶

17. Paragraph 5.14 of CF/EXD/2012-007 provides thus (emphasis added);

... 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.

The Tribunal notes that the relevant aspect of paragraph 5.14 is not crafted in mandatory terms, meaning that the requirement for interviewing a complainant is not mandatory. An interview will only be necessary for serving the outlined purposes, “a” to “d”. The United Nations Appeals Tribunal’s jurisprudence indeed emphasizes the

⁶ *Nwuke* 2010-UNAT-099, para. 36.

position that the Administration has a degree of discretion as to how to conduct its review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.⁷ Since the requirement for an interview is not mandatory, the Administration may base its decision on available information, once that information is sufficient for the investigators to arrive at an informed, reasonable and rational decision.

18. The Applicant's argument that the whole assessment of her complaint was improperly done is solely based on the fact that the Respondent wrongly stated that she was put on a PIP although records show that that she was not. While the Respondent concedes that they misrepresented the information relating to her placement or non-placement on PIP, that fact does not support the view that the procedure was violated, being that the relevant rules allowed the Investigator to base a decision on a review of availed documents as he did.

19. The Tribunal finds that the procedure followed by OIAI in assessing the Applicant's allegations was proper.

Whether the OIAI's conclusions were manifestly unreasonable.

20. Paragraphs 21 to 30 of the application outline the specifics of the Applicant's complaints which include: her supervisor's failure to comply with the provisions of CF/A1/2011-001 Amend. 2 (Performance management); the supervisor's insistence on issuance of a PIP when it was not justified; subjecting her to "matrix management"; her drafting of 2016 and 2017 Notes for the Record ("NFRs") with omissions and in a negative tone and misrepresenting the actual situation; her proposing an approach to the Applicant's contract extension which, in fact, was an attempt to establish a PIP; her rejection of the Applicant's application for training under false pretences; and her failure to provide guidance and to perform her supervisory functions in 2016 and 2017.

⁷ See for example in *Nadeau* 2017-UNAT-733/Corr.1, para. 33.

21. The Applicant maintains that her supervisor's behaviour and actions went far beyond the normal disagreement on work performance and in effect represented abuse of authority yet, in assessing her complaint, OIAI:

- a. did not take into consideration the above facts in their entirety;
- b. misunderstood her statements;
- c. one day was not sufficient for the review of the additional documents she sent to the investigator, and
- d. given that the volume of the documents she submitted to OIAI for review was quite large, the short turnaround time suggests that they did not sufficiently assess her claim.

22. In line with relevant jurisprudence, the Tribunal is not to conduct a *de novo* investigation into the complaint and will not substitute its own decision for that of the Administration. The Tribunal will only determine if the impugned decision is legal, rational, procedurally correct and proportionate, i.e., it will look into how the Administration responded to the complaint in question.⁸ This may entail considering whether relevant matters were ignored and irrelevant matters considered and whether the decision is absurd or perverse. To this end, the Tribunal will examine the same facts and the investigation report to determine the procedural and substantive issues presented by the application.⁹

23. In assessing the complaints which the Applicant structured under five heads, the OIAI Investigator reviewed the documents on record before arriving at the decision to reject the claim. It was determined that there was no evidence to support the Applicant's claim that the Division of Human Resources' ("DHR") team performance and staff satisfaction survey was conducted with the aim of providing negative feedback instead of pinpointing areas of interest and concern for staff, that

⁸ *Sarwar* 2018-UNAT-868, para. 40 citing to *Toure* 2016-UNAT-660, para. 30.

⁹ *Dawas* 2016-UNAT-612, paras. 21-35.

the survey was directed at the Applicant, or that her supervisor acted to discredit her. Further, the focus of the survey was on customer care as requested by the Regional Director, Ms. Leila Pakkala, which was in line with an action point arising out of minutes of a meeting on DHR common services¹⁰ and the final questions were in fact approved by Ms. Pakkala.

24. The Tribunal reviewed the documents submitted by the Applicant in this regard and determined that the survey clearly arose out of a need to clarify feedback from customers and the questions were approved by the Regional Director. The assertion that the survey was directed at the Applicant is not supported by evidence and is without merit. Those facts are clearly laid out in the documents the Applicant submitted and there is nothing the OIAI Investigator should have considered which was not considered. The Tribunal rejects the complaint that the OIAI Investigator did not take into consideration the facts in their entirety and misunderstood the Applicant's statements. There is no basis for the assertion that one day was not sufficient for the review of all documents since the assessment covered the whole span of documentation on record.

25. In relation to the Performance Evaluation Report ("PER") for 2016 processes and outcome, the Applicant's complaint concerned the absence of performance review meetings and non-receipt of performance feedback from Ms. Kazirukanyo. Also, that even when the Applicant needed Ms. Kazirukanyo's guidance for rating one of her team members, she could not schedule a meeting even after she had asked her twice.

26. The OIAI's conclusion that the example provided of Ms. Kazirukanyo's unavailability was during the period of only a week (31 January - 7 February), that the Applicant did not mention in her complaint that she herself also had some unavailable time that week and that she was limited in time as she was soon to go on leave was again based on information from documents on record. It is also true, as concluded by OIAI, that Ms. Kazirukanyo had in fact initiated a performance review

¹⁰ Application, annex 3 - Minutes of meeting on DHR common services.

meeting in January 2017. There is no other information which if considered would have changed the OIAI's decision. The Tribunal again rejects the complaint that the OIAI Investigator did not take into consideration the facts in their entirety and misunderstood her statements.

27. Regarding the complaint that Ms. Kazirukanyo unjustifiably insisted on the issuance of a PIP, it was noted that the Applicant's assertion that there was no justification for a PIP was based on her review of a write up from DHR.¹¹ Both Ms. Kazirukanyo and Mr. Ali Asghar, Chief of Operations Kenya Country Office ("KCO")/Officer-in-Charge Regional Chief of Operations, who was also involved in the Applicant's performance appraisal discussions, however, thought otherwise.

28. The OIAI noted that the Applicant's assertion that the PIP was not justified was based on the email of 7 September 2017 from the Applicant's colleague from DHR to the effect that she did not see any ground for issuance of a PIP. Given that the author of that email had no record of assessment of the Applicant's performance, the OIAI rightly found that the Applicant's colleague's opinion doesn't rule out the existence of justification for a PIP.

29. The evidence on record shows that the Applicant's views on the issue of PIP differed from that of two people, her supervisor and Mr. Asghar. The fact that the two held the view that a PIP was justified runs counter to the implied suggestion that it was only the Applicant's supervisor who was insisting on the issuance of a PIP and points to the fact that issues presented in the application are normal disagreements on work performance which do not amount to abuse of authority. The Tribunal finds that the information on record supports the OIAI's finding that there is no basis for the Applicant's assertion that the issuance of a PIP was not justified.

30. The next complaint was that though the deadline for establishment of the 2017 PER objectives was 15 April 2017, Ms. Kazirukanyo did not raise the issue and never

¹¹ Application, annex 3 - Applicant's claim on abuse of authority, page 45.

held a meeting to discuss the objective which is evidence of managerial incompetence.

31. The OIAI determined that performance management is a mutual responsibility of both the supervisor and staff (as the Applicant was informed) and that it requires active participation and proactive initiation of regular performance from the staff member. In this regard it was noted that the Applicant only took that initiative two days before the deadline. The Tribunal finds that all the facts in so far as they were relevant to this issue were considered and that there is no evidence that the OIAI Investigator misunderstood her statements in this regard.

32. Regarding the complaint that Ms. Kazirukanyo introduced changes to the Applicants' PER objectives which were aimed at setting her up for failure, the DED/M determined in the management evaluation that the Applicant's correspondence with Ms. Kazirukanyo with respect to the 2017 PER objectives commenced well before September 2017 and that in order to find common ground, Ms. Kazirukanyo in fact revised the objectives to an acceptable rate (80% of training completed for the whole year) once the Applicant brought the practical challenges to Ms. Kazirukanyo's attention. The DED/M determined that there is no evidence that Ms. Kazirukanyo's conduct reflects an abuse of authority.

33. The Tribunal finds and holds that information in the documents on record points to purely work related disagreements between the Applicant and her supervisor and rejects the complaint that the DED/M did not take into consideration the facts in their entirety and misunderstood her statements.

34. In relation to the "lift and shift" back to KCO, the Applicant challenges Ms. Kazirukanyo's record of the meeting of 15 August 2017 as a deliberate misrepresentation of the facts amounting to an abuse of authority.

35. The DED/M found no evidence of abuse of authority or that Ms. Kazirukanyo deliberately misrepresented the records of the meeting and instigated the directives complained of.

36. Having reviewed the documents on record, the Tribunal agrees with the finding that there is no evidence of abuse of authority or deliberate misrepresentation of facts by the Applicant's supervisor and rejects the complaint that the DED/M did not take into consideration the facts in their entirety and misunderstood her statements.

37. The Applicant's complaint about the "Matrix Management Arrangement" was that at the beginning of her service, she was verbally informed that she would report to the representative of KCO but when it came to her appraisal it appeared that Mr. Asghar was her matrix manager from the KCO side. She was never officially informed of that change.

38. In assessing this complaint, OIAI noted that Mr. Asghar was involved in meetings and emails relating to her appraisal discussions yet the Applicant did not question his involvement. Mr. Asghar's role as far as this application is concerned is well articulated in the management evaluation¹² where it was explained that under section 2.9 of CF/AI/2011-001 Amend .2, the second reporting officer is typically the supervisor's direct supervisor. However, deviations are permitted, for example to take into account matrix reporting lines or matters of practicality. It was determined by the DED/M that the institution of the Matrix Management Arrangement did not amount to abuse of authority by Ms. Kazirukanyo.

39. The Tribunal finds and holds that this complaint does not raise any impropriety issues on the part of Ms. Kazirukanyo and agrees with the DED/M's findings that there is no evidence of abuse of authority by the supervisor.

40. Lastly, the Applicant complained that she was denied development opportunities when she submitted an application for training and Ms. Kazirukanyo rejected it. The Applicant paid for the training and took annual leave for the week she needed to attend it. Upon her return she requested for a refund of monies she had used.

¹² Application, annex 10, para. 34.

41. The DED/M concluded that approval of learning activities and learning time is discretionary for supervisors, subject to the considerations that are specified under the policy on learning and development. Further that there is no evidence that the request was rejected under false pretences and that the refusal to approve the training does not constitute abuse of authority. The DED/M found that since the Applicant had no entitlement to attend the training without the approval by the supervisor or the RO management, she is not entitled to reimbursement of the training cost.

42. The facts and evidence relating to this complaint are clear and complete. Section 13 of DHR/PROCEDURE/2017/005, the UNICEF Administrative Issuance which is relevant to learning was given due consideration in assessing the complaint.¹³ The documentary record shows that Ms. Kazirukanyo gave reasons which were related to the issue of the Applicant's performance appraisal for rejection of the request. The OIAI sufficiently investigated this issue as their closure memorandum shows. In view of all the above considerations, the Tribunal rejects the complaint that the DED/M did not take into consideration the facts in their entirety and misunderstood her statements.

43. On the whole, upon reviewing the documents submitted by the Applicant, the Tribunal finds no evidence to support the Applicant's complaints. The contested decision was based on a careful assessment of all facts and evidence. There is nothing to suggest that the factual findings were manifestly unreasonable or otherwise irrational.

¹³ Ibid., para. 36.

Judgment

44. The application lacks merit and is rejected.

(Signed)

Judge Margaret Tibulya

Dated this 4th day of May 2020

Entered in the Register on this 4th day of May 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi