



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

BISSELL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Gary Stein, Schulte Roth & Zabel LLP

Counsel for Respondent:

Alister Cumming, UNICEF

Matthias Schuster, UNICEF

Introduction

1. The Applicant, a former Director of the Global Partnership to End Violence Against Children with the United Nations Children's Fund (“UNICEF”), contests the decisions (a) to issue a written reprimand against her and (b) not to renew her fixed-term appointment beyond 31 December 2018.

2. For the reasons stated below, the application is rejected.

Facts

3. In February 2017, the Applicant received an email from Mr. PN informing her that he was under investigation following an allegation of child sexual abuse. Mr. PN is a longtime acquaintance of the Applicant and of the Applicant’s spouse. The Applicant has known Mr. PN through his work for UNICEF.

4. In November 2017, Mr. PN sent an email to the Applicant and informed her that he was charged with sexual offenses against a boy under the age of 16 years in a domestic jurisdiction and that he would plead guilty. In response, the Applicant expressed her support and asked if there was anything her spouse and she could do for Mr. PN. Mr. PN asked if she could provide character reference/testimonial for mitigation of his sentence. The Applicant agreed to write a testimonial letter.

5. On 3 December 2017, the Applicant and her spouse provided a testimonial letter for Mr. PN. In the letter, the Applicant and her spouse provided information on their professional backgrounds, including her work at UNICEF, and the details of their long-standing collaborations with Mr. PN through UNICEF in various fields of child protection and Mr. PN’s many and positive contributions. The letter concluded that Mr. PN’s “longstanding commitment suggests deep and consistent remorse for the serious offences against a boy over a period in the 1960s, to which he is pleading guilty”.

6. According to Mr. PN's lawyer, testimonials, including the one from the Applicant and her spouse, were part of a mitigation bundle intended to assist a judge in reaching a decision on the appropriate sentence following Mr. PN's formal conviction. Testimonials were uploaded to a private intranet site that can be accessed only by a judge and lawyers for the defense and prosecution.

7. In February 2018, the case of Mr. PN became public while the Applicant was attending the "End Violence Solutions" summit. UNICEF was contacted by a journalist who asked for UNICEF's comments about Mr. PN's case, and a staff member at the UNICEF's Division of Communication contacted the Applicant to ask if she knew Mr. PN. The Applicant said that she was very upset that Mr. PN's case was becoming public knowledge and then told another United Nations staff member, who was also attending the summit and knew Mr. PN, about Mr. PN's case and mentioned that she prepared a testimonial letter for Mr. PN.

8. On 27 February 2018, the Office of the Executive Director was informed by a person, who requested anonymity, that the Applicant had submitted a testimonial letter on behalf of Mr. PN. This person said that the Applicant openly discussed this matter at a meeting and expressed her sympathies for Mr. PN. On the following day, the Office of Internal Audit and Investigations of UNICEF ("OIAI") informed the Applicant that it had begun an investigation into this matter.

9. On 1 March 2018, the Applicant was placed on Administrative Leave with Full Pay ("ALWFP") pending an OIAI investigation.

10. On 26 April 2018, OIAI forwarded the investigation report to the Director, Division of Human Resources ("DHR").

11. On 1 May 2018, the Director, DHR informed the Applicant that she received the investigation report and that she would determine what further steps were appropriate in the coming weeks. In the interim, Director, DHR decided to extend the Applicant's placement on ALWFP until 31 May 2018.

12. On 31 May 2018, the Director, DHR informed the Applicant that she would be placed on Special Leave with Full Pay for fifteen days.

13. On 22 June 2018, the Director, DHR informed the Applicant that she would not be charged with professional misconduct, but UNICEF would issue an administrative reprimand as it concluded that her decision to write the testimonial for Mr. PN without informing UNICEF amounted to serious negligence. The Director, DHR further informed the Applicant that her appointment would not be renewed upon its expiration on 31 December 2018 and in the interim she would remain on Special Leave with Full Pay. UNICEF explained that her retention in service “would not serve the best interest of the organization” since her “unilateral decision to support Mr. [PN] has placed UNICEF’s reputation at significant peril”.

14. On 21 August 2018, the Applicant requested the management evaluation of the decisions to issue an administrative reprimand and not to renew her appointment.

15. On 19 September 2018, UNICEF provided the response to the Applicant’s management evaluation request. In the response, UNICEF stated that the challenge to the decision to issue an administrative reprimand was not receivable since the decision had not been issued yet. In any event, even if the Applicant wrote the testimonial in her personal capacity with the understanding that the testimonial would remain confidential, her failure to inform and consult UNICEF deprived it of the opportunity to assess the risk associated with such testimonial. UNICEF concluded that given the potential to cause serious and irreparable harm to UNICEF’s reputation in the event the testimonial would surface in the public domain and the Applicant’s decision not to inform UNICEF prior to submitting the testimonial, the contested decisions were an appropriate exercise of discretion.

16. On 7 November 2018, the administrative reprimand was issued. The Director, DHR wrote that the Applicant’s “decision to write a testimonial for Mr. [PN], a convicted felon for [pedophilia], whilst [she was] the Director of the Global Partnership to End Violence Against Children, without informing UNICEF, amounts to serious

negligence, and has placed UNICEF's reputation at significant peril". The Director, DHR continued that the Applicant's "conduct falls short of that expected of an international civil servant". The Applicant was provided with an opportunity to provide comments which would then be placed in her official status file.

17. On 18 December 2018, the Applicant filed the application.

Consideration

Receivability and scope of review

18. The Respondent contends that the application is not receivable with respect to the decision to issue an administrative reprimand since the Applicant submitted the contested decision for management evaluation before the administrative reprimand was issued.

19. Under staff rule 11.2(c), the statutory time limit for requesting a management evaluation is within 60 days from the notification of the contested decision. Article 8.1 of the Dispute Tribunal's Statute provides that the application is receivable if the contested administrative decision has previously been submitted for management evaluation, where required.

20. The Appeals Tribunal's jurisprudence has established that "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine" (*Rosana* 2012-UNAT-273, para. 25, affirmed in *Newland* 2018-UNAT-820, para. 34).

21. In the letter dated 22 June 2018, UNICEF clearly notified the Applicant that it "will issue an administrative reprimand". Therefore, the management evaluation request, which was filed on 21 August 2018, was filed within 60 days from the notification of the contested decision on 22 June 2018 as required under staff rule 11.2(c). The eventual issuance of the administrative reprimand on 7 November 2018

constitutes the implementation of the contested decision, not the notification of the decision.

22. Accordingly, the application is receivable with respect to both contested decisions. The Tribunal will review whether the decisions (a) to issue an administrative reprimand and (b) not to renew the Applicant's fixed-term appointment are lawful.

Whether the decision to issue an administrative reprimand is lawful

23. Staff rule 10.2(b)(i) provides that a written reprimand is considered a non-disciplinary measure, and staff rule 10.2(c) provides that “[a] staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand”.

24. In *Elobaid* 2018-UNAT-822, at para. 27, the Appeals Tribunal held that a written reprimand imposed following a preliminary investigation without the disciplinary process is different from a disciplinary action and it is a matter of the exercise of the Administration's discretion (para. 27). See also *Yasin* 2019-UNAT-915, para. 42.

25. This discretion, however, is not unfettered. As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, at para. 40, when judging the validity of the exercise of discretionary authority,

... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

26. In this regard, “There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality

are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

27. The Appeals Tribunal further held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision” (see *Sanwidi*, para. 42).

28. The Tribunal notes that the facts on which the non-disciplinary measure is based are undisputed. The Applicant wrote and submitted a testimonial letter for Mr. PN, who was convicted in a domestic jurisdiction of sexual offenses against a boy under the age of 16 without previously informing or consulting UNICEF. It is also undisputed that in this testimonial letter, the Applicant referred to her position at UNICEF and her long-standing collaborations with Mr. PN through UNICEF. It is also undisputed that while this testimonial letter itself was not made public, the fact that she wrote a testimonial letter in support of Mr. PN, whose case became public knowledge, became known to some individuals as she discussed this matter openly at a meeting.

29. The question is whether the Administration exercised its discretion appropriately when it issued a written reprimand against the Applicant based on the above facts.

30. UNICEF stated that it decided to issue a written reprimand because the Applicant’s “decision to write a testimonial for Mr. [PN], a convicted felon for pedophilia, whilst [she was] the Director of the Global Partnership to End Violence Against Children, without informing UNICEF, amounts to serious negligence, and has placed UNICEF’s reputation at significant peril” and her “conduct falls short of that expected of an international civil servant”. In the response to the Applicant’s management evaluation request, UNICEF further explained that even if the Applicant wrote a testimonial in her personal capacity with the understanding that the testimonial would remain confidential, her failure to inform and consult UNICEF deprived it of the opportunity to assess the risk associated with such testimonial, and there was the

potential for this letter to cause serious and irreparable harm to UNICEF's reputation in the event the testimonial surfaces in the public domain.

31. The Tribunal notes that, during the interview with OIAI, the Applicant also acknowledged that if the fact that she wrote a testimonial for Mr. PN were to be made public, this information could cause a potential damage to UNICEF. She stated further that this was why she decided to remain discreet and not talk to anyone at UNICEF. The Applicant further stated that she wanted to keep it confidential to protect UNICEF.

32. The Tribunal notes that the Applicant served as a senior official in the area of child protection at UNICEF and she admits that she was aware of the potential risk to UNICEF's reputation in the event the testimonial letter in support of a person convicted of child sexual abuse became public. While the testimonial letter itself was confidential, the Applicant discussed this matter openly and at least some individuals became aware of her action in support of Mr. PN.

33. As the Appeals Tribunal held, the Dispute Tribunal's role is not "consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", nor "to substitute its own decision for that of the Secretary-General", but to decide if the contested decision is rational, reasonable, fair, procedurally correct, and proportionate. Under the circumstances described above, the Tribunal does not find any fault with UNICEF's conclusion that the Applicant's action amounted to serious negligence and potentially placed UNICEF's reputation at risk. There is no legal basis to interfere with the Administration's exercise of administrative discretion.

34. The Applicant argues that letters sent in an employee's private capacity should not serve as the basis for punishment by the employer, citing US caselaw on freedom of speech. The Applicant also argues that there is no staff rule or regulation requiring the Applicant to consult with UNICEF in advance before writing such a testimonial letter and emphasizes that the testimonial letter was filed under seal and has caused no reputational or other damage to UNICEF.

35. The Tribunal notes that national law is not applicable in this case. In addition, staff regulation 1.2(f) provides that “[w]hile staff members’ personal views and convictions ... remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations”.

36. The Tribunal notes further that, as set forth in staff regulation 1.1(b), all staff members sign a written declaration upon their appointments that they will “exercise in all loyalty, discretion and conscience the functions entrusted to [them] as an international civil servant of the United Nations, to discharge these functions and regulate [their] conduct with the interests of the United Nations only in view”. In this case, the Administration essentially decided that the Applicant did not exercise her discretion and regulated her conduct “with the interests of the United Nations only in view” and the expression of her personal views in support of Mr. PN adversely affected the interests of the United Nations. While there is no specific rule requiring the Applicant to consult with UNICEF before expressing her personal views in support of Mr. PN, that was the bare minimum she should have done to protect the interest of the United Nations as an international civil servant. Therefore, the Tribunal does not find any fault with the Administration’s conclusion that the Applicant’s conduct fell short of that expected of an international civil servant.

37. Accordingly, the Tribunal finds that the decision to issue a written reprimand is lawful.

Whether the non-renewal decision is lawful

38. A fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member’s request or the Tribunal’s order, and, as the Appeals Tribunal held in *Islam* 2011-UNAT-115, “when a justification is given by the Administration for the exercise of its discretion it

must be supported by the facts” (see *Islam* 2011-UNAT-115 (paras. 29-32), *Obdeijn* 2012-UNAT-201 (paras. 33-39), *Pirnea* 2013-UNAT-311 (paras. 33-34)).

39. The Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592), and the validity of the exercise of discretionary authority is judged under the legal principles as set forth in *Sanwidi* (see above).

40. In this case, the reason proffered by the Administration for not renewing the Applicant’s appointment was that her retention in service “would not serve the best interest of the organization” since her “unilateral decision to support Mr. [PN] has placed UNICEF’s reputation at significant peril”. This is the same reason that justified the decision to issue a written reprimand against the Applicant.

41. As explained above, this justification for a non-renewal decision is supported by the facts. In light of the legal principles set forth in *Sanwidi*, the question is whether the decision not to renew the Applicant’s appointment is rational, reasonable, and proportionate.

42. To answer this question, the Tribunal takes note of the Appeals Tribunal’s judgement in *Schook* 2012-UNAT-216. In this case, the Appeals Tribunal upheld the decision not to renew a senior official’s appointment based on “the negative impact that allegations then made against the Applicant could have on the Organization”. While the current circumstances are quite different from those in *Schook*, this case law nevertheless provides guidance in this case.

43. As the Tribunal already stated above, the Applicant was a senior official in the area of child protection at UNICEF. Yet, despite her acknowledgement that there was the potential risk to UNICEF’s reputation in the event the testimonial letter in support of a person convicted of child sexual abuse became public, she unilaterally decided to write a testimonial letter anyway. Subsequently, Mr. PN’s conviction of child sexual abuse and his association with UNICEF became public knowledge. Since the Applicant

openly discussed this matter, at least some individuals in her environment became aware of her action in support of a person convicted of child sexual abuse.

44. Under these circumstances, the Tribunal does not find any fault with the Administration's use of discretion in concluding that the Applicant's retention in service would not serve the best interest of the organization considering the potential reputational risk to UNICEF posed by the Applicant's action. Therefore, the Tribunal finds that the Administration's decision was rational, reasonable and proportionate.

45. Accordingly, the Tribunal finds that the decision not to renew the Applicant's fixed-term appointment is lawful.

Conclusion

46. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 4th day of June 2020

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

(Signed)

Nerea Suero Fontecha, Registrar, New York