



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/015
Judgment No.: UNDT/2021/072
Date: 22 June 2021
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

POPKINS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Rishi Gulati

Counsel for Respondent:
Alister Cumming, UNICEF
Matthias Schuster, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”), appealed the following alleged decisions: “UNICEF has unlawfully constructively dismissed the Applicant; breached its duty of care; breached [the Applicant’s] dignity; contravened her right to work; failed to address her harassment complaint in accordance with the applicable law and her legitimate expectations; and breached her right not to be harassed at work, with [the Applicant being] the victim of lengthy bullying and harassment at UNICEF [...]”.

2. The Respondent replied that the application is not receivable and, in any event, without merit.

3. For the reasons set out below, the Tribunal dismisses the application as not receivable.

Facts and procedural history

4. On 8 March 2019, the Applicant filed a complaint of misconduct concerning her supervisor and another UNICEF personnel.

5. On 15 March 2019, the Applicant’s legal representative emailed UNICEF’s administrative law unit stating that the Applicant “intends to resign because she has been harassed, with a serious breach of her contract and conditions of employment evident”. He further stated that the harassment the Applicant had endured constitutes “constructive dismissal” and that a “claim of constructive dismissal will be filed within the prescribed time limits”.

6. The Applicant’s representative added:

Acting in good faith, [the Applicant] has done everything possible including seeking a mediation through the Ombudsman to resolve her

claims. On the other hand, UNICEF has refused to even speak to her in the presence of the Ombudsman, essentially refusing a mediation. That is the reason why a conversation between us would have been useful. Be that as it may, I note UNICEF's position; and it will be made clear to [the Regional Director, UNICEF East Asia and Pacific Regional Office and UNICEF Director of Human Resources] that [the Applicant] has faced a constructive dismissal for the reasons stated above, which are well-known to both of them.

Thanks for clarifying the process based issues regarding securing employment rights upon [the Applicant's] imm[i]nent resignation; and trust that no impediment's will arise in that respect.

7. On the same day, 15 March 2019, the Chief of UNICEF's administrative law unit responded:

[The Applicant] may rest assured that [Office of Internal Audit and Investigations, "OIAI"] will assess her complaint in a prompt and independent manner, and that UNICEF's approach to workplace harassment and abuse remains one of zero-tolerance.

On [the Applicant's] intention to resign, I think it would be best for [the Applicant] to write to [the Regional Director, UNICEF East Asia and Pacific Regional Office and UNICEF Director of Human Resources].

A resignation must, as per policy, in writing, and in this communication, [the Applicant] has the opportunity to indicate the rationale for her decision.

Upon receipt, we will immediately inform UNICEF's shared services centre in Budapest, which will reach out to [the Applicant] and the [Human Resources] Business Partner, to ensure a smooth separation process, processing of [the Applicant's] entitlements, and repatriation from China.

...

8. On 17 May 2019, the Applicant requested management evaluation concerning the Applicant's "unlawful constructive dismissal".
9. On 22 March 2019, the Applicant submitted her resignation to UNICEF.
10. On 2 July 2019, UNICEF notified the Applicant that her request for management evaluation was not receivable.

11. The Applicant filed the present application on 26 September 2019 with the Geneva Registry of the Dispute Tribunal.
12. The Respondent filed his response on 11 November 2019 objecting to the receivability of the application.
13. On 23 March 2020, the Applicant filed additional submissions.
14. On 20 August 2020, the Applicant was notified that OIAI had reviewed her 8 March 2019 complaint and concluded that “there is insufficient evidence to prove that [the subject’s] conduct amounts to misconduct, and as such it has deemed that this matter does not warrant the commencement of a formal investigation. The allegations you have raised fall within the context of the Organization’s Performance Management framework and not within the workplace harassment policy”.
15. On 1 October 2020, the Applicant filed a request for management evaluation “in relation to the breaches of [the Applicant’s] rights due to the [OIAI] decision refusing ‘commencement of a formal investigation’ in response to her harassment and abuse of authority complaint lodged on 8 March 2019”.
16. On 11 November 2020, UNICEF responded that the Applicant’s request for management evaluation was upheld and that OIAI had been instructed to conduct a new initial assessment of the complaint.
17. On 11 December 2020, OIAI notified the Applicant that it had decided not to initiate an investigation of her 8 March 2019 complaint.
18. On 21 December 2020, the Applicant sought management evaluation of the decision not to take further action in relation to the complaint of 8 March 2019.
19. On 2 February 2021, UNICEF responded that it considered the 11 December 2020 decision to be in compliance with the applicable regulatory framework and therefore upheld the decision.

20. This case was transferred to the New York Registry on 1 April 2021.

21. On 18 April 2021, the Applicant filed an additional submission in these proceedings in which she reiterated the contentions laid out in the application and added references to the 20 August and 11 December 2020 decisions.

22. On 14 May 2021, at the Tribunal's direction, the Respondent responded to the Applicant's 23 March 2020 and 18 April 2021 submissions stating that the application was not receivable. On 21 May 2021, the Applicant responded, restating her position that the application is receivable.

23. Additional submissions on the merits were submitted by the Respondent on 11 June 2021 and by the Applicant on 17 June 2021.

Consideration

Applicant's main claims

24. The Applicant's main contention in her application is her alleged constructive dismissal, which was caused, in accordance with her submission, by UNICEF's failure to properly address her complaint of harassment.

25. The Respondent argues that the application is not receivable with respect of the Applicant's allegation of constructive dismissal. The Respondent recalls that the Applicant's separation was the result of her resignation and not of any administrative decision.

26. The Respondent relies on *Koda* 2011-UNAT-130 to submit that the Applicant did not show that there was a decision to "march her to the door". In the absence of such decision, he argues, this aspect of the application is not receivable.

27. The Respondent further states that the Applicant makes allegations of harassment but that those are not sufficient to prove that she was marched to the door.

28. In the Applicant's 23 March 2020 and 18 April 2021 submissions, she does not address the Respondent's challenges to the receivability of the application but focuses on the alleged delays in the handling of her complaint and challenges UNICEF's 20 August 2020 and 2 February 2021 reviews of her complaint.

29. In the Appeals Tribunal jurisprudence, an administrative decision capable of judicial review has most recently been defined as "a unilateral decision of an administrative nature taken by the administration involving the exercise of a power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences" (see, for instance, *Lloret Alcañiz et al.* 2018-UNAT-840, para. 61).

30. In the present case, the Applicant unilaterally decided to submit her resignation as is evidenced by the 22 March 2019 letter. The Tribunal notes that in the Applicant's resignation letter and in the previous communications between her legal representative and UNICEF's administrative law unit, she refers to harassment and abuse of authority as being the reason for her resignation.

31. Under the Appeals Tribunal jurisprudence, a staff member has a contractual entitlement to request that his or her allegations of harassment be addressed. To avail himself or herself of such entitlement, the staff member must follow the applicable mechanism for addressing harassment or abuse of authority complaints. The Appeals Tribunal recalled that the investigation of such allegations is not the preserve of the Dispute Tribunal given the specific nature of the judicial review reserved to it under its Statute, which is limited to reviewing how management responded, or not, to a complaint of harassment (*Luvai* 2014-UNAT-417, para. 62-64).

32. The Appeals Tribunal has further stated that the mechanism applicable to the review of complaints of harassment or abuse of authority, together with the jurisdiction vested in both the Dispute and Appeals Tribunal provide "a continuum of substantial

and procedural protection for both complainants and alleged offenders which must be respected” (*Luvai*, para. 65).

33. It follows that, in this case, the Tribunal cannot review the merits of the Applicant’s allegations of harassment or abuse of authority. Its jurisdiction is limited to the review of whether her resignation was caused by an action or inaction of Administration which was in violation of the applicable legal framework.

34. The record shows that the Applicant filed her complaint of harassment on 9 March 2019 and submitted her resignation 14 days later.

35. Secs. 5.13-5.15 of CF/EXD/2012-007 of 6 April 2018 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority) provide that upon receipt of a complaint of harassment, OIAI conducts a preliminary assessment of the complaint and discusses with the complainant the benefits of informal resolution. After interviewing the complainant, OIAI decides whether the complaint is credible and merits a comprehensive review or whether it is unfounded.

36. The Tribunal finds that it would obviously be unreasonable to expect OIAI to have completed this procedure within the mere 14 days that elapsed between the filing of the complaint and the Applicant’s resignation.

37. Therefore, the Tribunal concludes that the Applicant’s resignation was not caused by an action or inaction of the Administration but was her unilateral decision. Accordingly, this aspect of the application does not concern an administrative decision capable of judicial review and is not receivable.

Failure to address the Applicant’s complaint of harassment and right not to be harassed at work.

38. The Applicant claims that UNICEF failed to address her complaint in breach of the applicable framework and her legitimate expectations. She avers that this “concerns

how UNICEF addressed the Applicant's harassment claims, a matter independent from the outcome of the OIAI harassment investigation". She claims that UNICEF breached applicable rules to act promptly and concretely and "failed to comply with the Applicant's legitimate expectations in relation to addressing/handling of the Applicant's grievances concerning the harassment faced at UNICEF".

39. The Applicant further claims that the "legitimate expectation in administrative law demands that the Administration/Organisation must comply with the expectations of employees created by the employer".

40. The Tribunal notes that legitimate expectations in the context of the employment law of the United Nations has been defined as, "A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so" (*Sina* UNDT/2010/060, para. 35, affirmed in *Sina* 2010-UNAT-094).

41. Given that the Tribunal found that the Applicant's separation was not the result of an unlawful administrative decision, there can be no breach of the principle of legitimate expectation as described above.

42. Therefore, this aspect of the application is not receivable as it does not identify a challengeable administrative decision.

Other allegations set out in the application

43. In the application, the Applicant challenges the following: the breach of the duty of care; the breach of the Applicant's dignity; contravention of the Applicant's right to work.

44. In support of these claims, the Applicant restates her claims of harassment which, as already stated, the Tribunal is incapable of reviewing. Absent the

identification of any challengeable administrative decision, this aspect of the application is also not receivable (in line herewith, see the Appeals Tribunal in, for instance, *Planas* 2010-UNAT-049 and *Haydar* 2018-UNAT-821).

Additional submissions

45. From the outset, the Tribunal notes that in Order No. 69 (GVA/2019) of 23 September 2019, it allowed the Applicant to submit, after the application, “evidence contained [in the OIAI] investigation report”. Therefore, the Tribunal will review these additional submissions as presented in support of the original application.

46. In the Applicant’s 23 March 2020 submission, she reiterates the grounds of appeal laid out in the application. She adds a challenge to the “inordinate delay [in the handling of the complaint] and its legal consequences”.

47. The Applicant claims that UNICEF violated the Applicant’s employment rights by allowing several months to elapse from the date of the original claim without a resolution.

48. In the 18 April 2021 additional submissions, the Applicant further reiterates the grounds of appeal laid out in the application. She also contests the 20 August 2020 and 21 December 2020 decisions not to pursue her complaint.

49. The Respondent objects to the receivability of this submission given that it concerns new and separate administrative decisions not contained in the original application.

50. He further states that UNICEF is not obligated to carry out an investigation when it receives a complaint of possible misconduct and that OIAI’s decision to close the Applicant’s case was taken in accordance with UNICEF’s applicable legal framework.

51. The Respondent further argues that, in any event, there was no undue delay in the handling of the Applicant's complaint of misconduct.

52. The Applicant opposes UNICEF's interpretation of its obligation to process a complaint of misconduct.

53. As stated above, the Tribunal may only review an administrative decision which has an adverse impact on the Applicant's contractual rights. However, as the Applicant decided to separate from the Organization shortly after she filed her complaint of misconduct, she did not allow a reasonable time for UNICEF to handle her complaint. Once separated for reasons not imputable to the Organization, any actions or inactions taken on her complaint cannot be considered to have negatively impacted her contractual rights.

54. Therefore, this aspect of the application is not receivable.

Conclusion

55. In light of the foregoing, the application is rejected as not receivable.

(Signed)

Judge Joelle Adda

Dated this 22nd day of June 2021

Entered in the Register on this 22nd day of June 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York