



Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

GARAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, UNICEF

Introduction

1. On 10 February 2022, the Applicant, a former staff member with the United Nations Children’s Fund (“UNICEF”) filed an application in which she contests the “[d]ecision to place a note on Applicant’s official status file which states that “[i]f [she] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated”. This decision was taken on 16 August 2021 by the Chief, Administrative Law Unit, Office of the Executive Director, UNICEF.

2. On 18 February 2022, the Respondent filed a motion to have receivability be determined as a preliminary issue.

3. On 4 March 2022, by Order No. 024 (NY/2022), Judge Joelle Adda, as Duty Judge granted the Respondent’s motion to have the issue of receivability decided as a preliminary issue. The Duty Judge further instructed the Applicant to file a response to the Respondent’s submissions on receivability, which the Applicant duly filed.

4. On 20 December 2022, the case was assigned to Judge Joelle Adda.

Factual background

5. The Applicant joined UNICEF as a staff member on 7 February 2018 on a temporary appointment.

6. On 12 June 2019, UNICEF’s Office of Internal Audit and Investigations (“OIAI”) received a report of possible misconduct involving the Applicant. OIAI initiated an investigation and notified the Applicant that she was the subject of an investigation on 21 June 2019. OIAI interviewed the Applicant on 25 June 2019 and 23 January 2020.

7. The Applicant separated from service on expiration of her appointment on 5 February 2020, while the investigation was still pending.

8. On 9 July 2021, following the completion of the investigation, OIAI transmitted an Investigation Report to the Deputy Executive Director, Management.

9. On 16 August 2021, UNICEF's Administrative Law Unit wrote to the Applicant, enclosing a note to be placed on the Applicant's Official Status File, together with a copy of the Investigation Report. The letter informed the Applicant that,

... Effective 5 February 2020, you separated from UNICEF upon the expiration of your temporary appointment. Given that this matter had not been resolved at the time of your separation, the Deputy Executive Director, Management, has decided to place the attached note on your Official Status File, in accordance with DHR/POLICY/2020/001 UNICEF Policy on the disciplinary process and measures. You are requested to provide, within 14 days of receiving this letter, any comments you may wish to make in relation to the note. Please send such comments via e-mail to the address adminlawunit@unicef.org. Following receipt of your comments, the note will be placed on your Official Status File, together with your comments. No other documents relating to this matter will be placed on your Official Status File.

10. The note stated:

... [The Applicant] separated from service with UNICEF effective 5 February 2020, due to the expiration of her appointment. At the time of her separation, an investigation was pending. If [the Applicant] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated. Please contact the Director, Division of Human Resources, at Headquarters, in the event that [the Applicant] should become employed with UNICEF in future under any contractual arrangement.

11. This letter is the contested decision attached to the application.

12. On 14 September 2021, Counsel then representing the Applicant provided comments on her behalf. On 21 September 2021, the Administrative Law Unit notified Counsel that the note, together with the Applicant's comments, had been placed on her Official Status File.

13. On 14 October 2021, the Applicant requested management evaluation of the contested decision. UNICEF did not provide a response to this request.

14. On 10 February 2022, the Applicant filed the present application.

Consideration

The issue

15. The Appeals Tribunal has consistently held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, as affirmed in *Cardwell* 2018-UNAT-876.

16. In her application, the Applicant refers only to one decision, defined as the “[d]ecision to place a note on Applicant’s official status file which states that “[i]f [she] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated.”, that she attached to her application.

17. In her request for management evaluation, the Applicant refers to two decisions: “the decision to place a note on her official status file which states that “[i]f [she] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated.” She further contests the implied administrative decision (subsequently confirmed as an explicit decision by UNICEF’s Administrative Law Division) not to institute a disciplinary process following the conclusion of a prohibited conduct investigation in which she was a subject”. The Applicant also requests damages for harm to *dignitas*.

18. Although the Tribunal considers that only the first decision mentioned in the request for management evaluation is expressly challenged in the application, it will examine both decisions, as they are interlinked and, in fact, the first is the consequence of the second.

Receivability

19. The scope of the Tribunal’s jurisdiction is determined and limited by art. 2.1(a) of its Statute, which provides that “[t]he Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. Accordingly, staff members may only challenge “administrative decisions”.

20. Article 8 of the Dispute Tribunal’s Statute further requires the Tribunal to satisfy itself that an application is receivable.

21. In respect of what may constitute a “administrative decision”, the Appeals Tribunal has held that “an administrative decision is 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 *Lloret Alcañiz et al* 2018-UNAT-8400).

22. The Tribunal notes that the Applicant contests two decisions. The first being the decision to place a note on Applicant’s official status file. The second is the decision not to make a conclusive determination of misconduct following the completion of a prohibited conduct investigation. The Tribunal will examine the receivability of each contested decision in turn.

The decision to place a note on the Applicant’s official status file

23. The Tribunal notes that a note was placed on the Applicant’s official status file stating as follows:

... [The Applicant] separated from service with UNICEF effective 5 February 2020, due to the expiration of her appointment. At the time

of her separation, an investigation was pending. If [the Applicant] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated. Please contact the Director, Division of Human Resources, at Headquarters, in the event that [the Applicant] should become employed with UNICEF in future under any contractual arrangement.

24. The Respondent submits that the Applicant cannot challenge the decision to place the above note on her file as it has no direct consequences on the terms and conditions of the Applicant's appointment.

25. The Respondent states that the note in the Applicant's File was placed in accordance with sec. 56 of POLICY/DHR/2020/001 UNICEF Policy on the disciplinary process and measures, which permits UNICEF to place a note on a former staff member's official status file if he or she separates from service before the completion of an investigation and/or disciplinary process.

26. The Respondent notes that in the case of *Kennes*, UNDT/2020/001, the Dispute Tribunal held that the placement of a such a note is "not a separate decision that produces any direct legal consequences but merely a recording of the Administration's decision not to complete a disciplinary process". While the Dispute Tribunal considered that the note in that case was placed in the staff member's file in accordance with ST/AI/2016/1 (Staff selection and managed mobility system), which is not applicable to UNICEF, the Appeals Tribunal held that the Dispute Tribunal, "correctly put weight on the mere informative and instructive nature of the contested decision, which did not involve a certain and present adverse impact on Mr. Kennes' status as a former staff member".

27. The Applicant, on the other hand, contends that the Respondent is incorrect and that *Kennes* does not establish that the administration's exercise of discretion in such cases is not contestable. The Applicant argues that the issue of receivability has to be determined case by case and her case warrants a different conclusion than *Kennes* on receivability. The Applicant claims that the placement of the note on her official status

file has adverse impact on her as it may effectively bar her from ever working again for UNICEF or the United Nations.

28. Upon review of the record, it is apparent to the Tribunal that the note placed in the Applicant's official status file is intended to inform a reader that the Applicant separated from service while an investigation was pending, and that should the Applicant rejoin UNICEF, a disciplinary process would be initiated. The Tribunal finds that the note is in its nature and purpose is merely "informative and instructive". The note does not have any impact on the terms and conditions of the Applicant's appointment, and the Applicant has failed to demonstrate how it would have such impact. The Appeals Tribunal has clarified that a contested decision must have a "direct' impact and not a future injury" in order to amount to a challengeable administrative decision (*Lee* 2014-UNAT-481). The consequences that the Applicant alleges flow from the placement of the note are entirely hypothetical. In particular, the note does not state that the Applicant should not be considered for future employment opportunities at the United Nations. The Appeals Tribunal has held that hypothetical allegations do not amount to direct legal consequences.

29. In regard to the Applicant's arguments that her case should be distinguished from *Kennes*, the Applicant makes a number of submissions which are reviewed in turn below.

30. First, the Applicant states that the Dispute Tribunal in *Kennes* observed that in the context of that case, the note-to-file served to ensure compliance with sec. 6.5(d) of ST/AI/2016/1. This provision prohibits the Secretariat from employing former staff members of United Nations common system entities, who separated by "resignation during an investigation of misconduct or the initiation of a disciplinary process, unless the former staff member agrees to cooperate with an ongoing investigation or disciplinary process until its conclusion". The Applicant submits that sec. 6.5(d) and its equivalent in the UNICEF regulatory framework, sec. 9.6 of CF/ED/2012-005 (Disciplinary process and measures), are not applicable in the Applicant's case, as she

separated upon expiry of her appointment. Whereas the applicant in *Kennes* expressly resigned to avoid dismissal, the Applicant emphasises that she separated from UNICEF upon expiration of her appointment, which was not renewed, meaning that she did not voluntarily separate from the Organization to evade an investigative or disciplinary process.

31. The Tribunal finds this line of argument to be without merit. The decision to place such a note in the former staff member's file does not concern the reasons why the person concerned left the organization, rather it relates to the existence of a pending investigation concerning the staff member at the time of the separation. As noted above, the Tribunals have stated that such a note is merely "informative and instructive." In any event, the relevant legal basis for UNICEF placing the note on the Applicant's file does not stem from sec. 9.6 of CF/ED/2012-005 (Disciplinary process and measures), but rather sec. 56 of POLICY/DHR/2020/001 UNICEF (Policy on the disciplinary process) and measures which states (emphasis added in italics):

... **Separation before or pending a formal investigation or disciplinary process**

55. Staff members who have been separated or dismissed from service on grounds of misconduct may not work again for UNICEF under any contractual arrangement.

56. If a staff member has separated from service before or pending an investigation and/or disciplinary process, he/she:

56.1. may be invited to cooperate with the investigation and/or *disciplinary process*. *If the former staff member elects not to cooperate, a note will be included in his/her official status file indicating that he/she separated pending an investigation/disciplinary process and that he/she shall not be permitted to work again for UNICEF under any contractual arrangement. If the former staff member elects to cooperate, the investigation and/or disciplinary process shall be completed, and should the Deputy Executive Director,*

Management determine that a disciplinary measure would have been imposed had the former staff member still been in UNICEF's service, a note to that effect will be placed in the former staff member's official status file. If the disciplinary measure that would have been imposed is separation from service or dismissal, the former staff member shall not be permitted to work again for UNICEF under any contractual arrangement; or

56.2. may be informed that a note will be placed on his/her official status file. The note will indicate that a matter was pending at the time of the staff member's separation and that DHR should be notified if the former staff member rejoins UNICEF. The note may be accompanied by any relevant documentation. The former staff member shall have 14 (fourteen) days to comment in writing on the note. After the expiration of this period, the note may be placed on the staff member's official status file, together with any relevant documentation and any comments provided.

32. It follows that sec. 56 of POLICY/DHR/2020/001 therefore permits UNICEF to place a note on a former staff member's file if he or she separates from service before the completion of an investigation and/or disciplinary process. The note placed on the Applicant's file records that the Applicant separated from service while an investigation was pending, and that should the Applicant rejoin UNICEF, a disciplinary process would be initiated. The note therefore remains "informative and instructive". The POLICY/DHR/2020/001 UNICEF Policy (Disciplinary process and measures) does not distinguish whether the staff member was separated because s/he resigns or his/her contract expired.

33. As for the content of the note, and especially the sentence, "If [the Applicant] were to rejoin UNICEF as a staff member, a disciplinary process would be initiated", it does not imply that she could not be rehired, but only that the investigation report issued by OIAI on July 2021 would be used for a disciplinary process. This would be concluded after the relevant proceeding, following due process, without knowing what could be the conclusions of this process. It does not have a certain and present adverse

impact on the Applicant. In *Kennes*, the content of the note was similar to the Applicant's and stated as follows:

[The Applicant] resigned from the Organization effective 1 July 2017. At that time, a matter concerning [him] had not been resolved. Please contact the Administrative Law Section, Office of Human Resources Management, at Headquarters, if [the Applicant] should become employed as a staff member within the United Nations Common System in the future.

34. The Appeals Tribunal, upon its review of the above note, stated Kennes "we agree with and uphold [the Dispute Tribunal's] findings that the decision of the Administration not to complete the disciplinary process and instead resume it, should Mr. Kennes become staff member again in the future, did not constitute an appealable administrative decision for the purpose of Article 2(1) of [the Dispute Tribunal's] Statute, as it did not have a present and direct adverse impact on the terms and conditions of Mr. Kennes' employment".

35. Second, the Applicant argues that whereas the applicant in *Kennes* resigned during the disciplinary process, prompting the administration to halt that process, the Applicant and the two other staff members involved in the alleged outside activity all separated before the investigation was complete. UNICEF's decision to complete the investigation nevertheless and to place a note on the Applicant's official status file was purely discretionary. The Applicant argues that whereas the applicant in *Kennes* expressly resigned to avoid dismissal, the Applicant separated from UNICEF upon expiration of her fixed-term appointment, which was not renewed, meaning that she did not voluntarily separate from the Organization to evade an investigative or disciplinary process. UNICEF's decision to complete the investigation nevertheless and to place a note on the Applicant's file was purely discretionary

36. The Tribunal find the above lines of argument irrelevant to the issue at hand. What is at stake in the present case is receivability. The reason for a staff member's separation or the level the sanction which might follow in case the misconduct would

be established is irrelevant. The pertinent fact remains that the content of the note placed on the Applicant's file was only "informative and instructive".

37. Third, the Applicant attempts to argue that as the Dispute Tribunal in *Kennes* found that the applicant's management evaluation request was untimely, the case can be distinguished from the Applicant's case.

38. The Tribunal finds this argument to have no merit. In *Kennes*, the Tribunals reviewed the legality of a number of receivability grounds. While the Dispute Tribunal found that the application in *Kennes* was time-barred, it also found that Mr. Kennes' challenge to the decision not to complete the disciplinary process against him and the decision to place a note in the Applicant's Official Status File was not receivable *ratione materiae*. The fact that there was an untimely management evaluation request in the *Kennes* bears no relevance to the issues at hand in this case.

39. It follows that the Applicant's challenge of the decision to place a note on the Applicant's official status file is not receivable.

UNICEF's decision to not make a determination on whether or not the Applicant has committed misconduct

40. The Applicant challenges the decision of UNICEF to not make a determination on whether or not she has committed misconduct. The Applicant states that the Administration can reach a final determination of misconduct with respect to a former staff member, and its decision to do so, or not or do so, in any particular case is by definition a discretionary administrative decision. That means the decision enjoys presumption of regularity which the Applicant can rebut, for instance, by evidence of improper purpose. The Applicant submits that UNICEF made the discretionary decision to continue with its investigation into the Applicant's conduct beyond her separation from service upon expiry of her appointment. OIAI concluded that investigation a full year and a half after the Applicant's separation. Having committed substantial resources into finishing the investigation, the Applicant argues that

UNICEF cannot justify the decision not to commit the comparatively few resources required to reach a conclusive determination as an exercise of ‘prosecutorial discretion’. The Applicant submits that UNICEF’s decision is not merely unreasonable but raises question of extraneous considerations or improper motive.

41. The Respondent argues that such a challenge is not receivable as the Applicant fails to identify any direct legal consequences affecting the terms and conditions of her former appointment that she has suffered because of this decision.

42. The Tribunal finds that the issue is not if UNICEF does have the discretion to make a final determination on whether or not the Applicant has committed misconduct. The issue is whether a former staff member is entitled to the completion of a disciplinary process when an investigation is pending at the time of a staff member’s separation. The Applicant does not identify any direct legal consequences affecting the terms and conditions of her former appointment because of UNICEF’s decision to not make a final determination in the investigation. In the absence of any such consequences, there was no contestable administrative decision.

43. Accordingly, the Dispute Tribunal is not competent to hear the application.

Conclusion

44. In light of the foregoing, this application must therefore be dismissed as it does not concern any appealable administrative decision as per art. 2.1(a) of the Dispute Tribunal’s Statute (*receivable materiae*).

Case No. UNDT/NY/2022/008

Judgment No. UNDT/2023/007

(Signed)

Judge Joelle Adda

Dated this 31st day of January 2023

Entered in the Register on this 31st day of January 2023

(Signed)

Morten Michelsen, Officer-in-Charge, New York