



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

COLEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Edward Patrick Flaherty

Counsel for Respondent:

Alister Cumming, UNICEF

Introduction

1. The Applicant, a former Chief of Child Protection, UNICEF, Pakistan, contests the decision of the Office of Internal Audit and Investigations (“OIAI”) to close her complaint of harassment and abuse of authority without a comprehensive investigation.

Facts

2. On 5 March 2018, the Applicant made a complaint to OIAI alleging that the then Representative of the Pakistan Country Office (“PCO”), together with other staff members in the South Asia Regional Office (“ROSA”), engaged in a pattern of harassment and abuse of authority against her.

3. On 1 October 2018, following a period on special leave, the Applicant separated from service upon the expiration of her appointment.

4. On 17 July 2019, OIAI closed the Applicant’s complaint after a preliminary assessment.

5. On 6 December 2019, the Applicant filed an application contesting the decision to uphold the determination of OIAI that the Applicant’s supervisor did not engage in harassment and abuse of authority against her. The application was registered under Case No. UNDT/GVA/2019/071.

6. On 2 March 2021, this Tribunal issued Judgment *Coleman* UNDT/2021/016 in connection with Case No. UNDT/GVA/2019/071 *inter alia* finding that not interviewing the Applicant violated the applicable procedure at the time, i.e., CF/EXD/2012 007 Amend.1 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority). The Tribunal thus remanded the matter of the administrative decision that closed the Applicant’s complaint without a comprehensive review to OIAI for a renewed assessment of said complaint.

7. On 20 May 2021, OIAI interviewed the Applicant and reviewed the content of her complaint.

8. On 12 August 2021, OIAI closed the case stating that the matter did not warrant a comprehensive review. OIAI found, *inter alia*, insufficient information in the Applicant's assertions regarding the Representative, PCO, and the other staff members at ROSA, and concluded that the harassment allegations, if established, would not amount to misconduct. This is the current administrative decision under challenge.

9. On 23 August 2021, the Applicant requested management evaluation of the contested administrative decision.

10. On 6 October 2021, the Deputy Executive Director ("DED"), Management, UNICEF, found that the contested decision was fully consistent with the regulatory framework concerning the assessment of complaints of prohibited conduct.

11. On 14 December 2021, the Applicant filed the present application before this Tribunal.

12. On 14 January 2022, the Respondent filed his reply.

13. On 8 August 2022, the instant case was assigned to the undersigned Judge.

14. By Order No. 9 (GVA/2023) of 16 February 2023, the Tribunal requested the parties to file additional information. Namely:

a. The Applicant was instructed to explain how the alleged conflict of interest of the DED related to the contested decision, and to provide comments in relation to the receivability issue raised by the Respondent; and

b. The Respondent was instructed to provide evidence of the assessment of OIAI of the totality of the evidence in relation to the alleged bullying and aggressive behaviour during the incidents of 10 October 2017, 19 and 20 October 2017, and 26 January 2018, clarifying the reasons why OIAI decided not to call the Representative, PCO, to testify or provide comments on the referred incidents.

15. On 27 February 2023, the parties filed their written submissions in response to Order No. 9 (GVA/2023).

16. By Order No. 18 (GVA/2023) of 8 March 2023, the parties were informed that the Tribunal considered itself fully briefed and instructed to file closing submissions, if any.

17. On 20 March 2023, the parties filed their respective closing submission.

Consideration

18. After a careful review of the case and the evidence on record, the Tribunal has identified the following legal issues to be determined:

- a. Whether the application is receivable;
- b. Whether the contested decision was lawful;
- c. Whether the contested decision was tainted by bias or improper motives; and
- d. Whether the Applicant is entitled to any remedies.

Whether the application is receivable

19. The Respondent claims that a part of the application is not receivable *ratione materiae* as it challenges the management evaluation process and its outcome, particularly in relation to the alleged conflict of interest of the DED, UNICEF.

20. By Order No. 9 (GVA/2023) of 27 February 2023, the Tribunal asked the Applicant to explain how the alleged conflict of interest of the DED, UNICEF, related to the contested decision, and to comment on the receivability issues raised by the Respondent.

21. In her response, the Applicant explained that “there was a conflict of interest in having the DED [UNICEF] make a final determination on OIAI’s decision not to investigate [the] Applicant’s claims of harassment and abuse of authority and close the case because she had a predetermined opinion on the matter as she had already decided upon it previously”.

22. Furthermore, the Applicant argues that the request for the Tribunal to review the DED’s refusal to recuse herself in the second management evaluation is an issue of due process and not a mere challenge of administrative steps. The Applicant argues that it is important to review the substance of the DED’s conclusions to make a final determination on the lawfulness of the underlying decision.

23. Having examined the evidence on record, the Tribunal is of the view that the alleged conflict of interest of the DED, UNICEF, is not part of the administrative decision under challenge and thus cannot be the subject of a judicial review.

24. According to arts. 2(1)(a) and 8(1)(a) of the UNDT Statute, the UNDT is competent to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in “non-compliance with the terms of appointment or the contract of employment.”.

25. Accordingly, the scope of judicial review of an application is limited to administrative decisions that are allegedly in violation of a staff member’s terms of appointment or contract of employment.

26. The management evaluation process is not part of said challengeable administrative decision. Instead, it is a required step in the formal process of dispute resolution available to staff members in the United Nations, as well as an opportunity for the Administration to review and correct, when applicable, its previous decision. The management evaluation outcome does not add to, alter, or substitute the administrative decision.

27. As a result, it is not for the Tribunal to determine whether the DED, UNICEF, should have or should have not recused herself from making the second management evaluation decision, as said decision does not alter or impact the lawfulness of the actual contested decision, which is the closing of the Applicant's complaint of prohibited conduct after the preliminary assessment.

28. Accordingly, the application is receivable insofar as it challenges the contested administrative decision dated 12 August 2021, but not where it challenges the management evaluation outcome. The Tribunal will not determine itself on the Applicant's allegation of conflict of interest in the management evaluation decision.

Whether the contested decision is lawful

29. The Tribunal will now assess the lawfulness of the contested decision.

30. The Organization has a degree of discretion on how to conduct a review and assessment of a complaint of prohibited conduct (*Oummih* 2015-UNAT-518/Corr.1, para. 31, *Benfield-Laporte* 2015-UNAT-505, para. 38). Only cases of a serious and reasonable accusation does a staff member have a right to an investigation against another staff member, which may be subject to judicial review (*Nadeau* 2017-UNAT-733/Corr.1, para. 33). A fact-finding investigation may only be undertaken if there are "sufficient grounds" or, respectively, "reasons to believe that a staff member has engaged in unsatisfactory conduct" (*Nadeau*, para. 34). Similarly, a complaint must have "meaningful indicia" of "prohibited conduct" (*Osman* 2013-UNAT-301, para. 23).

31. The Dispute Tribunal has determined that it is the responsible official's duty to assess whether there is a "reasonable chance" that the alleged facts described in a complaint, if indeed they occurred, would amount to prohibited conduct (*Ostensson* UNDT/2011/050, para. 30).

32. The complainant has the burden of satisfying the responsible official that there are sufficient grounds to warrant a formal fact-finding investigation (*Parayil* UNDT/2017/055, para. 48). The Dispute Tribunal does not step into the shoes of the responsible official and substitute its own views (*Sanwidi* 2010-UNAT-084, para. 40, *Kebede* UNDT/2018/018, para. 14).

33. Judicial review of an administrative decision involves a determination of the validity of the contested decision on grounds of legality, reasonableness and procedural fairness (*Sanwidi*, para. 42, *Belkhabbaz* 2018-UNAT-873, para. 62)

34. In the case at hand, the Applicant claims that there were several procedural errors in the assessment of OIAI that negatively affected her due process rights. Namely, the Applicant claims that said assessment was flawed because it did not take into consideration the totality of the evidence that she presented, and that OIAI was biased and applied an illusory standard to the level of gravity involved in the alleged harassment and abuse of authority, which resulted in a procedural error and violation of the Applicant's rights.

35. Contrarily, the Respondent argues that the Organization is entitled to decide when it should or should not proceed to carry out a formal investigation, and that such decision is reviewable only on the grounds of legality, reasonableness, or procedural fairness. According to the Respondent, a preliminary assessment was made to determine whether the complaint was credible and merited a comprehensive review, after which OIAI concluded that it was not.

36. Indeed, OIAI found that the efforts made by the Organization to obtain the renewal of the Applicant's Ministry of Foreign Affairs ("MOFA") accreditation card after its expiration are well documented, and that such efforts contradict the Applicant's allegation that the Representative, PCO, alongside other staff members of ROSA, used the non-renewal of her accreditation card as an opportunity to remove her from the post she encumbered.

37. In addition, OIAI found that it was reasonable on the part of the Country Office to deploy efforts to assist the Applicant in finding another position in UNICEF should she be unable to return to her duty station as a result of the MOFA card issue, and that there was no evidence to support a reasonable belief that misconduct may have occurred on the part of the Representative, PCO, and other staff members of the Country and Regional Offices. OIAI also noted that the communications received by the Applicant and used to support her complaint were reasonable in substance and in form.

38. In relation to the Applicant's allegations pertaining to the alleged aggressive behaviour of the Representative, PCO, OIAI concluded that, even if established, the alleged conduct would not rise to the level of misconduct.

39. The Tribunal recalls that it is incumbent on the Applicant to provide evidence of the alleged illegality and/or procedural flaws and identify the corresponding legal grounds.

40. However, notwithstanding the number of allegations made by the Applicant, the Tribunal notes that no evidence was provided to support a finding that the contested decision is illegal, unreasonable or improper, nor that the preliminary assessment was flawed.

41. As per UNAT's jurisprudence, the decision to close a complaint of alleged prohibited conduct is discretionary in nature. Indeed, in *Sanwidi* 2010-UNAT-804, para. 42, one reads the following:

[W]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal considers 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.

42. In this regard, it is recalled that UNAT has clearly established the limits of judicial review in similar cases as follows (*Nadeau* 2017-UNAT-733, para. 33):

As a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations. Only in particular situations, i.e., in a case of a serious and reasonable accusation, does a staff member have a right to an investigation against another staff member which may be subject to judicial review under Article 2(1)(a) of the UNDT Statute and Article 2 of the Statute of the Appeals Tribunal. We take this opportunity to clarify that the discretion of the Administration can also be confined in the opposite direction. There are situations where the only possible and lawful decision of the Administration is to deny a staff member's request to undertake a fact-finding investigation against another staff member.

43. The applicable legal framework in UNICEF concerning discrimination, harassment, sexual harassment, and abuse of authority is Executive Directive CF/EXD/2012-007, which provides in its section 5 a distinction between a preliminary assessment and a full investigation:

Preliminary assessment

5.13 Upon receipt of a formal complaint, the Director, Office of Internal Audit and Investigations will do a preliminary assessment of the complaint and discuss with the complainant the benefits of considering an informal resolution.

5.14 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.

5.15 If the Director, Office of Internal Audit and Investigations concludes that the complaint in question is credible and merits a comprehensive review, he/she will notify the alleged offender and will provide that person with the details of the complaint and the name of the complainant. The alleged offender will be invited to respond and will be given fifteen (15) calendar days to provide a written response, including any explanations, relevant materials and/or the names of witnesses who might be able to assist in a possible investigation.

5.16 Unless the Director, Office of Internal Audit and Investigations, concludes on the basis of the complaint, the response of the alleged offender, and the material submitted by both parties that the complaint is unfounded, the Office of Internal Audit and Investigations will proceed to investigate the complaint.

44. The Tribunal agrees with the Respondent when he claims that OIAI did not initiate an investigation on the complaint but, instead, performed a preliminary assessment based on the available evidence, which included the testimony of the Applicant and the documents she provided to the investigators.

45. A preliminary assessment is, indeed, the first step of the formal process dealing with complaints of harassment and abuse of authority, as per the above-mentioned applicable rules. OIAI is not obliged to interview the alleged offender unless it finds the complaint credible, well-founded and meriting a comprehensive review.

46. Based on the available evidence, the Tribunal finds lack of sufficient evidence of the alleged harassment and abuse of authority to justify the need of a full investigation. It is not within the scope of the Tribunal's judicial review to perform a *de novo* investigation on the allegations made, but rather to assess whether the conclusions of OIAI were irrational, blatantly illegal, or manifestly unreasonable. In the Tribunal's view, they were not.

47. The Applicant argues that OIAI did not take into consideration the totality of the evidence that she presented, that OIAI applied a non-existent standard to the level of gravity involved in the alleged harassment and abuse of authority under Staff Rule 1.2(f) and POLICY/DHR/2020/001, para. 1, and that a full investigation into her complaint was in fact needed.

48. Having reviewed the evidence on record, the Tribunal notes that all the documentary evidence submitted by the Applicant does not corroborate her account of alleged harassment and abuse of authority as to render the conclusion of OIAI absurd or perverse.

49. Firstly, the emails between the Applicant and the Representative, PCO, and other staff members of the Country and Regional Offices do not include aggressive language or malicious content that one could reasonably conclude cause offense or reasonably interpret as humiliating or bullying. Indeed, documentary evidence shows that the communications submitted by the Applicant, which she claims as offensive, were, indeed, reasonable in substance and in form.

50. Secondly, the alleged aggressive behaviour by the Representative, PCO, is vaguely described by the Applicant without supporting and corroboratory evidence, including the specific circumstances of the conduct at issue. In fact,

a. Regarding the incident of 10 October 2017, the Applicant told the investigators that she no longer had the phone on which she received the allegedly aggressive call from the Representative, PCO, during which she was allegedly “screamed at”;

b. Regarding the incident of 19 and 20 October 2017, the Applicant told the investigators that the Representative addressed her in a “highly combative tone”, without describing what said tone and/or language actually entailed or how it was offensive to her;

c. Regarding the incident of 26 January 2018, the Applicant claims that the Representative, PCO, “abruptly and aggressively” interrupted the discussion during which the Applicant communicated her intention not to continue her employment with UNICEF beyond the expiration of her contract, and then “accused her of recording the conversation on her phone”. OIAI analysed the information and documentation obtained and did not find evidence that the Representative’s alleged reaction to the Applicant leaving the Organization reached a level of gravity that would, if established, rise to the level of misconduct;

51. Thirdly, regarding the inclusion of the Applicant in an upcoming mobility exercise, OIAI analysed the emails submitted by the Applicant and concluded that they did not reveal any conduct that could amount to harassment or abuse of authority. The Tribunal is of the view that this evidence supports the Respondent's position that the Representative, PCO, was in fact trying to support the Applicant in finding an alternate position given her situation with the host country. Indeed, the Applicant's claim that staff members were using this situation to "get rid of her" is not only lacking in evidence, but also not credible given the documented efforts by the Organization to secure her a new position.

52. Equally, there is no evidence that the lack of a message of appreciation by the new Country Representative upon the Applicant's departure from the PCO was a form of bullying, especially considering that the Country Representative was new to the PCO, and that nothing suggested she had a habit of thanking outgoing staff from their service and purposefully treated the Applicant differently.

53. As a result, it is well within reason to conclude that it was unlikely that an investigation would reveal sufficient evidence to sustain, as a matter of law, a finding of misconduct on any of the allegations.

54. Therefore, it is clear to this Tribunal that OIAI did in fact take into consideration the totality of the evidence presented by the Applicant, lawfully and reasonably concluding that her allegations were either unsubstantiated or not serious enough to rise to the level of misconduct.

55. It is well within the discretionary authority of OIAI to weigh relevant and irrelevant evidence, and to decide on the level of gravity of the conduct investigated or assessed. The Tribunal reminds the Applicant that the investigator had an obligation to assess whether the overall circumstances of the case offered at least a reasonable chance that the alleged facts could amount to misconduct. The result of this assessment was that, they did not merit further investigation, which was well within the authority of OIAI to determine.

56. The subsequent conclusion of OIAI was that, even if established, the alleged conduct of harassment and abuse of authority would not rise to the level of

misconduct. This conclusion falls within the above-mentioned discretionary authority.

57. Since the Applicant did not present sufficient evidence to sustain that the Representative's conduct did, in fact, amount to misconduct, and that OIAI erred in its interpretation of the facts and of the evidence, the Tribunal has no grounds to find that the conclusion of OIAI was absurd, irrational, blatantly illegal or unreasonable.

58. As a consequence, the Tribunal finds no procedural flaw or wrongdoing in the preliminary assessment made by OIAI.

Whether the contested decision was tainted by bias or improper motives

59. It is well settled jurisprudence (*Hersh* 2014-UNAT-433, para. 17, *Matadi et al.* 2015-UNAT-592, para. 17) that the Administration has the duty to act fairly, justly and transparently in dealing with staff members, and that if an Applicant claims that the decision was ill-motivated, the burden of proving any such allegation rests with said Applicant (*Azzouni* 2010-UNAT-081, *Obdeijn* 2012-UNAT-201, para. 40, para. 26).

60. The Applicant claims that the DED's refusal to recuse herself from deciding on the second management evaluation request resulted in prejudice against her, as the DED had a conflict of interest from having previously reviewed the same decision. She further claims that this alleged conflict of interest vitiated the contested decision.

61. As established above, the management evaluation decision does not substitute, add to or alter the administrative decision under challenge. Any hypothetical irregularity in the outcome of a management evaluation request, even if established, does neither create an underlying new decision, nor it vitiates the impugned decision.

62. Furthermore, while the Applicant argues that the contested decision was tainted by prejudice against her, she did not provide any evidence, apart from her own unsubstantiated assertions, to corroborate her allegations of improper motives.

63. Consequently, the Applicant's claim that the contested decision was motivated by bias or improper motive is meritless.

64. As for due process rights, the Tribunal is satisfied that the Applicant's due process rights were respected throughout the assessment by OIAI. Namely, the applicable legal framework was applied and respected, including where OIAI was not obliged to interview the witnesses identified by the Applicant, and the Applicant was notified of the outcome of her complaint and provided with a summary of the reasons for the closure of her complaint.

Whether the Applicant is entitled to any remedies

65. As a result, the Applicant failed to establish that the contested decision is unlawful and that it has caused her any harm. She is not entitled to any of the requested remedies, including that of moral damages.

Conclusion

66. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 28th day of April 2023

Entered in the Register on this 28th day of April 2023

(Signed)

René M. Vargas M., Registrar, Geneva