Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Wanda L. Carter

CASTELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Policy and Best Practices Officer, at the P-4 level, working with the United Nations Interim Force in Lebanon ("UNIFIL"), filed an application contesting the 9 June 2023, UNIFIL decision to not convene a fact-finding panel and to close his 4 May 2023, complaint of unsatisfactory conduct against Mr. J, his former first reporting officer ("FRO"), for having denied two requests for a flexible work agreement ("FWA") and delayed in approving others, which constituted abuse of authority and created a hostile work environment.

Historical and procedural facts

2. On 3 May 2023, the Applicant submitted a complaint of prohibited conduct to the UNIFIL Head of Mission/Force Commander, pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority), alleging that Mr. J, Principal Coordinator and his FRO, abused his authority against him when, on several occasions, he either denied his requests for FWA or delayed their approval.

3. On 4 May 2023, UNIFIL referred the matter to the Office of Internal Oversight Services ("OIOS") pursuant to section 4.6 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

4. On the same day, 4 May 2023, the OIOS informed UNIFIL that "the complainant's report does not reveal any possible unsatisfactory conduct warranting referral to OIOS as per ST/Al/2017/1." The OIOS also pointed out that the complaint revealed that the Applicant appeared to consider FWA as a right/entitlement, "whereas the provisions of ST/SGB/2019/3 (Flexible working arrangements) clearly state to the contrary, namely that FWA arrangements are purely voluntary."

5. Upon receipt of the OIOS response, the UNIFIL Head of Mission tasked the Regional Conduct and Discipline Section ("RCDS") to conduct an assessment on his behalf.

6. On 1 June 2023, the Applicant was informed by the RCDS, on behalf of the Head of Mission, that his complaint against Mr. J did not reveal possible unsatisfactory conduct and, therefore, the matter was considered closed.

7. On 28 July 2023, the Applicant requested management evaluation, challenging the decision to close his complaint of prohibited conduct against Mr. J "after a preliminary assessment without opening a fact-finding investigation and without providing any rationale for reaching such decision."

8. On 7 September 2023, the Management Evaluation Unit (currently the Management Advice and Evaluation Section) issued its decision, upholding UNIFIL's decision.

9. On 5 December 2023, the Applicant filed the application mentioned in para. 1.

10. On 9 January 2024, the Respondent filed a reply, requesting the Tribunal to dismiss the application. In particular, the Respondent contends that the contested decision was lawful asserting that the Head of Mission properly determined that the Applicant did not complain of a conduct that could amount to misconduct, and that there were no sufficient grounds to convene a fact-finding panel.

11. By Order No. 23 (NBI/2024), the Duty Judge respectively allowed the Applicant to file a rejoinder and asked the parties to explore resolving the dispute amicably and revert to the Tribunal.

12. The Applicant filed a rejoinder on 20 March 2024.

13. On 27 March 2024, the Respondent informed the Dispute Tribunal that there have been discussions between the Applicant and UNIFIL regarding this claim, but the parties were unable to reach a settlement agreement.

14. The case was assigned to undersigned Judge on 5 August 2024.

15. By Order No.111 (NBI/2024), the parties were invited to file closing submissions, which they did on 13 September 2024.

Submissions

Applicant's submissions

16. The Applicant contends that as a staff member, he has the duty to report prohibited conduct and holds a right to have his request for a review of a prohibited conduct fairly and competently considered. The response he received by email from RCDT on behalf of the Head of Mission does not contain any explanation as to why the matter did not reveal possible unsatisfactory conduct.

17. The Applicant states that he followed up with the Chief of RCDT twice by email on 1 June and then on 30 June 2023. Neither of the two emails were acknowledged by either the Chief of RCDT or by the Head of Mission.

18. The Applicant thus opines that:

> it is my belief that the decision-maker did not consider the conduct of the FRO in the broader context and this procedural shortcoming has negatively influenced the decision since relevant aspects have not been considered.

19. In view of the foregoing, the Applicant believes that his report for a prohibited conduct was not fairly and competently considered.

20. The Applicant also has an issue with the time spent reviewing his complaint. He narrates that pursuant to Reply annex 1, the Chief of Conduct and Discipline in UNIFIL, upon receipt of the Applicant's report, forwarded it to the Deputy Director of OIOS seeking to have a Teams Call "in the next 30 minutes". The OIOS response came the same day within 90 minutes after the initial email was submitted at 12.31 hours. Taking into account that the Teams call took place within these 90 minutes, there was not sufficient time to give due attention to the case.

21. Further, the Applicant submits that a closer look at the email sent by the Conduct and Discipline Team ("CDT") to OIOS on 4 May 2023, indicates that OIOS did not receive his complaint as there is no attachment to the email (ref. R/1). It follows that OIOS could not assess the case in full since it did not receive it. Communication between CDT and OIOS appears to be only verbal and no minutes of what was said is on record.

22. In view of the above, the Applicant maintains that from the onset, procedures set out in ST/AI/2017/1 were not followed. Under Section 5 of ST/AI/2017/1, OIOS is required to "determine whether the information of unsatisfactory conduct received merits any action". Evidence provided in Reply annex 1 indicates that OIOS did not receive his complaint. It is, therefore, unclear on which basis OIOS made its conclusions. Moreover, the OIOS preliminary assessment was made in less than 90 minutes.

23. As remedies, the Applicant requests the Tribunal to:

a. Determine whether the principle of equality was applied in the review of his report for the possible case of misconduct;

b. Determine if not providing any explanation for the contested decision is line with the policies and regulations of the Organisation;

c. Determine if the decision taken by the FRO not to approve his FWA request was supported by an explanation which meets the maximum standards set in the rules and regulations of the Organization;

d. Determine whether the FRO has the delegated authority to impose a certified sick leave at the time when the medical specialist only recommended avoiding walking or driving but determined that the Applicant was perfectly capable of working;

e. Determine the discretional boundaries for the FRO to approve or reject his request for FWA;

f. Rescind the contested decision;

g. Referral for accountability (although the Applicant does not state who should be referred)-; and

h. Compensation (although the Applicant does not explain compensation for which damages).

The Respondent's submissions

24. The Respondent's position is that the contested decision was lawful. The UNIFIL Head of Mission, as the responsible official, conducted a preliminary assessment of the Applicant's complaint in line with section 5.5 of ST/AI/2019/8 and section 5.5 of ST/AI/371. The Head of Mission properly determined that the Applicant did not complain of conduct that could amount to misconduct and that there were no sufficient grounds to convene a fact-finding panel.

25. Relying on the Tribunal's jurisprudence, the Respondent submits that a fact-finding investigation may only be undertaken "if there are 'sufficient grounds' or, respectively, 'reason[s] to believe that a staff member has engaged in unsatisfactory conduct' (*Okwir* 2022-UNAT-1232, para. 55; *Yavuz*, 2022-UNAT-1291). Similarly, there must be "meaningful indicia" in the complaint of prohibited conduct (*Osman*, 2013-UNAT-301, para. 23).

26. The Respondent further contends that, in this case, the Applicant does not demonstrate that the alleged conduct in his complaint provided sufficient grounds to pursue a fact-finding investigation. At best, he claims that the FRO incorrectly applied the rules regarding FWA. Even assuming that to be true, the Responsible Official reasonably concluded there was no reasonable chance that the FRO's actions were prohibited conduct. The Applicant has cited no standard of conduct, rule, or regulation

he claims the FRO violated. Rather, he invites the Dispute Tribunal to undertake an independent investigation or review of other matters to determine whether the contested decision breached the "principle of equality".

27. In view of the foregoing, the Respondent requests the Tribunal to reject the application.

28. With regard to the remedies, the Respondent submits that the Applicant is not entitled to the requested remedies. He has not established that the contested decision was unlawful. Further, the Applicant has adduced no evidence warranting a referral for accountability or compensation.

Consideration

29. The Applicant recalls his four different instances of FWA, unduly denied by his FRO, or whose approval was unduly delayed: in particular, the Applicant's first instance was denied without justification; a second instance was approved with a delay of 6 weeks; a third instance was rejected without reason and inviting the Applicant to take sick leave days; the fourth instance was disregarded because submitted too early.

30. The Tribunal is of the view that the assessment of the lawfulness of the Administration's decision not to convene a fact-finding panel on the Applicant's claim that the FRO incorrectly applied the rules regarding flexible work agreements requires necessarily, as a preliminary step, an assessment of the right of the staff member to be allowed FWA.

31. On this point, the Tribunal notes that the staff member is not entitled to have FWA allowed by the Administration, and that FWA in not an entitlement and is not the object of a right.

32. Secretary-General's Bulletin ST/SGB/2019/3 (Flexible working arrangements) provides the legal framework applicable to telecommuting and provides in relevant parts as follows:

Section 2 Guiding principles 2.1. Flexible working arrangements may be authorized subject to the following guiding principles: (a) While there is no right to flexible working arrangements, such arrangements are in line with the efforts of the Organization to be responsive and inclusive and achieve gender parity, and therefore should be viewed favourably as a useful tool by staff and managers alike, where exigencies of service allow; (b) Flexible working arrangements are voluntary arrangements agreed between staff and managers, such as first reporting officers; (c) Managers should discuss the appropriate possibilities for staff members to avail themselves of flexible working arrangements. It is recognized that flexible working arrangement options may not be possible for some jobs and/or at certain periods of time; (d) Staff members should seek written approval from their managers to avail themselves of the flexible working arrangements. When denying such requests, managers shall provide the basis for the non-approval in writing. Managers may suspend or cancel previously approved flexible working arrangements at any time due to exigencies of service or unsatisfactory performance. Staff members shall be informed of the basis for suspension or cancellation in writing. The Office of Human Resources shall monitor the implementation of the present bulletin and report on a regular basis to the Secretary-General on the Organization's usage of the different flexible working arrangements options; (e) Approved flexible working arrangements shall be incorporated into an agreement between the staff member and manager. The agreement shall specify the duration and specifics related to the flexible working arrangement. A combination of one or more flexible working arrangements modalities may be authorized. One-time, ad hoc arrangements do not require the establishment of an agreement; It is the responsibility of all parties to the agreement to optimize the benefits of flexibility while minimizing potential problems. When staff members avail themselves of flexible working arrangements, their productivity and quality of output must be maintained at a satisfactory level, as assessed by their managers. First reporting officers should clearly communicate to staff their responsibilities and agreed deliverables. First reporting officers and staff are reminded of their performance management obligations, outlined in administrative instruction ST/AI/2010/5; (g) No extra costs may be incurred by the Organization as a result of any of the flexible working arrangements; (h) The use of flexible working arrangements requires careful planning and preparation on the part of all concerned. The relevant administrative office, with overall guidance from the Office of Human Resources, shall provide assistance to managers and staff, as required. 2.2. Certain components of the flexible working arrangements may be advised by the Medical Director or a duly authorized Medical Officer as being suitable to accommodate medical restrictions or limitations as part of a

> time-limited return-to-work programme. In line with the general principles of reasonable accommodations for short-term disability, if that advice is rejected, the manager would be required to establish that the requested accommodations represent a disproportionate or undue burden on the workplace. … Working away from the office (telecommuting) 3.5. Staff members may be authorized, upon written request, to work from an alternative work site at their official duty station when such an arrangement is consistent with the nature of the work involved. Care should be taken to ensure that telecommuting does not result in additional demands on other colleagues. 3.6. Authorization for staff members to work from an alternative work site at their official duty station may be given if the relevant staff members shall be reachable by telephone or email during the core working hours set for their duty station, and if they have, or obtain at their own expense, the necessary office equipment to discharge their official functions. Such equipment shall normally include a computer, access to the Internet and a telephone. … 3.10. In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute from outside the staff member's official duty station for an appropriate duration not exceeding six months. Managers may, in exceptional circumstances, consider an extension of the authorization to remotely telecommute for an additional period not exceeding three months. Remote telecommuting does not constitute a change of official duty station within the meaning of staff rule 4.8 (a).

33. In *AAL* (2023-UNAT-1342, para. 28), it was stressed by the United Nations Appeals Tribunal ("UNAT") that *there is no right to flexible working arrangements, although they should be viewed favourably "where exigencies of service allow".*

34. The denial of FWA or delay in its approval without a reasonable justification, consequently, could entail a fact of mere mismanagement and not a violation of a staff member's right, remaining very difficult to see an abuse of discretion where no right is envisaged.

35. Having so said, in general terms, the stated unjustified denial or delay could be regarded as simply an expression of a bad management; or of something more, that is a factor in creating a hostile working environment, or in fact, a retaliation. In the first situation, the staff member is not entitled to any remedy, and in the interest of having good managers remain within the Administration sphere. In the second situation, there could be a violation of employees' rights.

36. In the Judgment *AAL* above mentioned, para. 34, 35 and 38, UNAT gave importance to the fact that:

> in light of the applicable legal framework, the denial of the telecommuting request was appropriately accompanied by the basis for its non-approval in writing,

and that

> the reasons given by AAL's manager were reasonable, as they related to the operational needs of the duty station and to the type of work performed by AAL, ... [who] was a Child Protection Officer whose work proved to have limited benefits when telecommuting.

37. UNAT also stressed that the refusal of FWA can entail a discriminatory practice against the staff member, when *treated differently from other staff members in her section.*

38. In other terms, UNAT highlighted some profiles that managers must take into account in their decision, and some limit of the discretion by the Administration.

39. Applying these principles to the case at hand, the Tribunal notes that, on the one hand, although the Applicant cited no standard of conduct, rule, or regulation he claims the FRO violated, it is not normal that a manager does not answer at all to a legitimate request (Applicant's first instance) nor that he answers after 6 weeks (second instance), or unduly denies FWA, instead inviting the staff member to take an unnecessary sick leave (third instance), or disregards a request only because submitted too early (forth instance).

40. However, the Applicant, who simply recalls his complaint against his FRO (which is subject to a different application before this Tribunal (UNDT/NBI/2024/035)) without any detail, neither demonstrates or even alleges -in the present application- a pattern of unlawful behaviour by his manager that could create a hostile working environment, nor recalls any specific fact to the Applicant to enable the Tribunal to envisage a retaliation against the applicant.

41. In other terms, even putting the conduct complained of by the Applicant in the framework of the working relationship between the parties which was otherwise compromised, the Tribunal is of the view that the Applicant did not substantiate at all his complaint and, therefore, the Tribunal can envisage in the case only a mismanagement that does not entail a prohibited conduct.

42. In this case, an informal resolution process would have been more appropriate in the circumstances, more than a disciplinary action based on a misconduct.

43. It has been added that, in general a staff member has no statutory right to an investigation, given that the Organization has discretion as to how to conduct a review and assessment of a complaint of prohibited conduct (*Benfield-Laporte* (2015-UNAT-505)).

44. Indeed, only in a case of "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".

45. A fact-finding investigation may only be undertaken if there are sufficient grounds to believe that a staff member has engaged in unsatisfactory conduct.

46. In *Benfield-Laporte* (2015-UNAT-505, para. 37), UNAT stressed that

> As a general principle, the instigation 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.

47. *In Oummih,* (2015-UNAT-518/Corr.1, para. 31), UNAT added that:

> The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations.

48. In *Okwi*r (2022-UNAT-1232, para. 55), UNAT noted that:

> Only misconduct on the part of a staff member can lead to the imposition of disciplinary measures; consequently, if it becomes clear during the preliminary assessment that there is no misconduct, it is not necessary to initiate a fact-finding investigation. Although the responsible official may consider all the factors mentioned in Section 5.5 of ST/AI/2017/1, the crucial issue will always be whether the alleged actions amount to misconduct. The Appellant does not show, nor can we see, why any of the other factors mentioned in Section 5.5 of ST/AI/2017/1 could have led to a decision to initiate a fact-finding investigation. Even if the Appellant's report was made in good faith and was sufficiently detailed (Section 5.5(b)), an investigation would not seem necessary if there was no misconduct. If there is no misconduct, there is no likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case (Section 5.5(c)). If there is no misconduct, it is clear that an informal resolution process would be more appropriate in the circumstances (Section 5.5(d))

49. Finally, it is useful to add that in the said situation, where there is not a right to an investigation, also the way the complaint was investigated is not relevant at all, and any possible flaws in the process cannot substantiate otherwise the Applicant's claim, which is unfounded for all the reasons above mentioned.

50. In sum, the application is not founded.

Conclusion

51. In light of the above, the application is dismissed in its entirety.

(Signed)
Judge Francesco Buffa
Dated this 10th day of October 2024

Entered in the Register on this 10th day of October2024

(Signed)
Wanda L. Carter,Registrar, Nairobi