



Before: Judge Francis Belle

Registry: Nairobi

Registrar: Wanda L. Carter

NIGAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Patolla Niroop

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant is a former staff member, at the D-1 level, on a fixed-term appointment and was the United Nations Development Programme (“UNDP”) Resident Coordinator and Resident Representative in Riyadh at the time of the application.
2. On 23 July 2020, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to not disclose the report of an investigation into his conduct, in which he was exonerated, but which he contends was conducted based on malicious complaints by two staff members. The Applicant contends that the investigative process resulted in him being harassed and subjected to undue stress and pressure. Further, the Applicant contends that his own complaints into the conduct of the two staff members should have been subjected to the same investigative rigours that were meted out to him.
3. On 29 July 2021, the Tribunal issued Judgment No. UNDT/2021/092 ,which dismissed the application as irreceivable. The Applicant appealed the Judgment to the United Nations Appeals Tribunal (“UNAT”), and on 24 August 2022, in Judgment No. 2022-UNAT-1269, UNAT allowed the appeal in part. UNDT’s finding of irreceivability in Judgment No. UNDT/2021/092 was set aside, and the case was remanded to the UNDT for a decision on its merits.
4. By motion dated 10 May 2023, the Applicant requested the Judge President of the UNDT to order that the undersigned Judge be recused on several grounds.
5. On 25 May 2023, the Judge President issued Order No. 92 (NBI/2023) in which the motion for recusal was refused.
6. On 23 June 2023, the Tribunal issued Order No. 112 (NBI/2023) in which these proceedings were suspended while the Applicant appealed Order No. 92 (NBI/2023) to UNAT.
7. On 18 July 2024, UNAT published Judgment No. 2024-UNAT-1446 holding that the appeal against UNDT Order No. 92 (NBI/2023) was not receivable.

8. On 5 September 2024, the Tribunal issued Order No. 122 (NBI/2024) in which the parties were informed that the case would be determined based on the documents on the case record and were directed to file closing submissions by 25 September 2024, which they did.

Facts

9. By memorandum dated 16 April 2019, the Applicant was informed by an investigator from the International Monetary Fund's Office of Internal Investigations ("OII/IMF") that pursuant to a cooperation agreement between UNDP and OII/IMF, and under provisions of the UNDP Legal Framework for Addressing Non-Compliance with United Nations Standards of Conduct, OII had been requested to preliminarily assess, and to investigate, if appropriate, allegations that between 2015 and 2017, the Applicant had engaged in discrimination and abused his authority against two UNDP staff members.

10. On 23 July 2019, the Applicant wrote to the UNDP Chief of Staff and subsequently on 24 August 2019, to the UNDP Acting Assistant Administrator, Bureau of Management Services ("BMS"), requesting the draft report of the investigation. The Applicant did not receive a response.

11. On 5 August 2019, the Applicant was notified that OII/IMF had concluded its investigation, and that the investigation had found that the allegations against him were not substantiated.

12. On 19 November 2019, the Applicant wrote to the UNDP Director of the Office of Audit and Investigations ("OAI") to file a complaint in which he alleged that the two staff members who had raised the allegations against him had willfully made false, fabricated and malicious allegations against him. The Applicant also alleged in his complaint that the UNDP Administrator had acted without adequate evidence and due diligence in deciding to undertake the investigation against him.

13. On 12 December 2019, the UNDP Assistant Administrator/Director, BMS informed the Applicant that the case against him had been formally closed and that

he had been exonerated from the allegations of misconduct made by the two complainants.

14. On 30 December 2019, the Applicant filed a management evaluation request of the UNDP decisions:

- a. Not to provide him with the Report of the Investigation into the complaints made against him.
- b. Not providing him with the reason why the accusations were raised, and accepted by UNDP for investigation, more than three years after the events alleged, and nearly a year after he had retired from the United Nations; and
- c. Not providing him with the inculpatory documentary evidence against him that is noted in the OII/IMF letter of 16 April 2019.

15. On 11 February 2020, Assistant Administrator/Director, BMS provided a reply to the management evaluation request and informed the Applicant that there was no basis to set aside any of the contested decisions.

16. On 17 February 2020, the UNDP Director/OAI responded to the Applicant in reference to the allegations of wrongdoing made in his 19 November 2019, communication informing him that OAI had determined that no investigation was warranted, and that they had closed the case.

17. On 18 March 2020, the Applicant filed a request for management evaluation of the Director/OAI's decision not to investigate his complaint of harassment against the staff members who had filed the initial unsubstantiated complaint against him.

18. The Applicant was informed of the outcome of his 18 March management evaluation request by letter dated 29 April 2020. It was concluded that there was no basis to set aside OAI's decision not to investigate his complaint of harassment.

Judgment No. 2022-UNAT-1269

19. On 24 August 2022, UNAT rendered its Judgment No. 2022-UNAT-1269, holding, *inter alia*, that

The case must be, and is, remanded to the UNDT for decision on its merits *based on and limited to those matters referred to in Mr. Nigam's second management evaluation request, that is by the contents of his letter of 18 March 2020 and which was responded to by letter dated 29 April 2020.* (Emphasis added).

Parties' submissions

20. The Applicant's principal contentions are:

- a. UNDP failed to demonstrate that the two staff members acted in good faith and did not investigate his complaint in that regard. The two staff members acted with malice towards him.
- b. UNDP failed to investigate the evidence that he gave to OII/IMF which substantiated his complaint of harassment against the two staff members.
- c. UNDP was negligent in its duty of objectivity, impartiality and fairness in dismissing his complaint and has discriminated against him. The two staff members also discriminated against him and abused their authority as project managers.
- d. Since the original investigation was conducted by OII/IMF because UNDP did not consider itself independent to do it; the management evaluation should not have been conducted by UNDP. The same principle of independence should have applied to the management evaluation as well. The management evaluation did not meet the principles of objectivity, impartiality and fairness.

21. The Respondent's principal contentions are:

- a. The Respondent argues that: the decision to close the Applicant's allegations without investigation was proper; the decision to investigate the allegations made against the Applicant by the two staff members is not

reviewable; in any event, the decision to initiate a formal investigation was proper; and the Applicant is not entitled to damages.

b. The decision to close the Applicant's allegations of a malicious complaint was proper and in accordance with the UNDP Legal Framework.

c. The Applicant has not pointed to any flaw in UNDP's review of those allegations.

d. UNDP administration is entitled to a presumption of regularity, and the Applicant has not put forward any evidence to call that regularity into question.

e. The Applicant has the burden of proving bias and has failed to meet that burden here. The Applicant has not submitted any evidence that the decision to close the review of his complaint after an initial assessment was based on an improper motive. On the contrary, the Applicant's complaint was thoroughly reviewed in accordance with UNDP's policies and procedures, and, after that comprehensive review, a determination was made based on objective facts and assessment of the situation, that further investigation was not warranted.

f. There is no merit to the Applicant's claim that the management evaluation was improperly handled by UNDP. The Applicant has not claimed that the UNDP Assistant Administrator/Director, BMS who took the management evaluation decisions, had any conflict in considering his requests for management evaluation, nor is there any basis in the record to support such a claim.

Consideration

22. The Applicant challenges the decision by the UNDP Assistant Administrator/Director, BMS not to investigate his allegations of harassment against two UNDP staff members. He claims that UNDP was negligent in its duty of objectivity, impartiality and fairness in dismissing his complaint.

23. The Applicant asserted that in refusing to investigate his complaint, UNDP had acted in a discriminatory manner. It agreed to investigate the complaint of the existing staff members against him without evidence from an assessment, but not that of a retired employee to establish the facts. According to the Applicant, had UNDP accepted an investigation of his complaint, the submissions in paras. 15 (a), (b) and (c) of his closing submission would be immaterial to the Applicant's case.

24. The submission the Applicant refers to is that which mentions the names of the witnesses he wanted to be summoned to give evidence to establish his case. By proceeding in this manner, the Applicant apparently hoped to discover the contents of the preliminary assessment leading to the investigation of allegations against him. He then descends into the actual contents of the investigation to establish as stated in paragraph 15(c) of his closing submission that:

If the allegation of UNDP is that the Applicant should not have brought this concern to the notice of his supervisors and Senior Management of UNDP and by doing so be "supported KSA's views" then it is a manifestly wrong administrative reasoning as the Applicant was acting within the remit of his duties and responsibilities. In this case too, this is a matter to bring to the attention of **all** UN staff members so that they know what are the limits and expectation of their duties and responsibilities. In their complaint, the complainants noted that "In this regard, you supported the KSA's views that 92Y was a Jewish organization and Digital Good could not be associated with Jewish issues." UNDP in accepting this as a basis of an investigation raises much larger issues which the Applicant had hitherto not imagined or wished to raise. But with the Closing Submission of UNDP, the Applicant is raising these issues.

25. The Applicant argues that the action of the staff members in raising their complaints so much later and not raising it while the Applicant was in office when he could have sought the witnesses' submissions and provided all the documentation prior to an investigation, raises strong concerns of the motivation of these complainants.

26. The Applicant further submits that the complaint was meant to absolve the complainants of their mismanagement of the project and deflect that charge to

others directly or indirectly involved in the project. The fact that the complaint was brought against multiple staff is further evidence of this motivation.

27. The Applicant insists that the complaint against him was discriminatory and culturally biased. As UNDP has defended their action, UNDP is therefore also guilty of discrimination and cultural bias against the Applicant.

28. The Applicant further submits that besides being entitled to redress as noted in his submission to the UNDT in 2021, he should also be entitled to the cost of legal services.

29. The Respondent's submissions shed some light on the actions which started the process of investigation which affected the Applicant.

30. The Respondent in paragraph 9 of its closing submission summarized, stating that by memorandum dated 16 April 2019, the Applicant was informed by an investigator from OII/IMF that pursuant to a cooperation agreement between UNDP and OII/IMF and under provisions of the UNDP Legal Framework for addressing non-compliance with United Nations standards of conduct, OII had been requested to preliminarily assess and investigate, if appropriate, allegations that between 2015 and 2017, the Applicant had engaged in discrimination and abused his authority against two UNDP staff members.

31. The Respondent's submissions allege that on 5 August 2019, the Applicant was notified that OII/IMF had concluded its investigation and found that the allegations against him were not substantiated.

32. On 19 November 2019, the Applicant wrote to the UNDP Director of the Office of Audit and Investigations ("OAI") to file a complaint in which he alleged that the complainants who had raised the allegations against him, had willfully made false, fabricated and malicious allegations against him. The Applicant also alleged in that complaint that the UNDP Administrator acted without adequate evidence and due diligence in deciding to undertake the investigation against him.

33. On 12 December 2019, the UNDP Assistant Administrator/Director, BMS informed the Applicant that the case against him had been formally closed and that he had been exonerated from the allegations of misconduct made by the two complainant staff members.

34. The Respondent argues, in summary: (a) that the decision to close the Applicant's allegations against the two complainants without investigation was proper; (b) that the decision to investigate the Applicant is not reviewable; (c) in any event the decision to initiate the formal investigation against the Applicant, related to his actions, was proper; and (d) the Applicant is not entitled to damages.

The decision to close the investigation of the Applicant's allegations

35. The Respondent's submission that the decision to close the investigation into the Applicant's allegation was proper, was based largely on the Applicant's own admission that he had requested a change in venue for a meeting that was being planned because it was a "Jewish oriented venue." This reason given for changing the venue offended the complainants and was considered by them to be motivated by antisemitism.

36. The Applicant admitted asking for the venue to be changed on the basis that it was a Jewish venue, but maintained that he was only passing on a request from a donor.

37. However, the fact that the Applicant indeed made the statement, and that the complainants were offended by it, contradicts an assertion that the complainants made "false fabricated and malicious allegations" against him.

38. In any event, it is the Applicant's burden before this Tribunal to prove the allegation of bias and malice, and he has failed to do so.

39. The request to have the Tribunal hear the witnesses examined to establish the allegations the Applicant made was denied, since the witnesses named could not establish that the allegations against him were biased, or that the investigation was not conducted in an objective manner. Indeed, some of the witnesses the Applicant

wanted to summon were themselves the subject of an investigation based on the same complaints.

The decision to investigate the Applicant is not reviewable

40. The Respondent accurately cites the relevant UNAT decision in *Reilly 2022-UNAT 1309* at para. 93 where it was held that, “[T]he threshold for instituting an application for judicial review is for the applicant to show *inter alia* that the object of his/her challenge is an administrative decision capable of being reviewed that is, a specific decision which has a direct and adverse impact on the applicant’s contractual rights.”

41. As argued by the Respondent, since the Applicant was exonerated of the allegation of misconduct and therefore suffered no impact on the terms of his appointment or contract of employment, neither the preliminary assessment nor the decision to undertake a formal investigation, following which the Applicant was exonerated, had an adverse impact on the Applicant’s former appointment and therefore, neither constitutes a receivable administrative decision.

42. While the Tribunal accepts that it must hear the Applicant on the merits, it is not possible for that hearing to end in an outcome which will change any of the decisions made by OII/IMF or UNDP, nor result in any sanction of these Organizations nor their employees. This is so because it is not possible to subject the decisions which the Applicant challenges to judicial review.

The decision to institute a formal investigation was proper

43. The decision to institute a formal investigation was based on the information gathered on the allegations made by the UNDP employees. Even though no adverse conclusion was arrived at, it is wrong to assume that it was inevitable that only one conclusion could be reached after an investigation.

44. The fact that the allegations were not substantiated cannot be a sound basis for arguing that an investigation should not have been instituted. An investigation involves gathering facts which may or may not substantiate the allegations.

The Tribunal's finding

45. The Applicant applied to the Tribunal to call witnesses to help substantiate his submission that the assessment and subsequent refusal to investigate his complaint of the allegations made by him against the complainants were not properly conducted.

46. The Respondent has commented on the danger of calling witnesses to establish that there was no basis for investigating the allegation of harassment. Firstly, if the persons accused of the harassment are the same two UNDP staff members against whom the Applicant has alleged complaints based on suspicion of bias and malice, it would be improper to question these staff members as witnesses without first sharing their statements with the complainants. This is so because the Applicant's objective in calling these witnesses is to establish that they knew that the Applicant had not done anything wrong, i.e., that the Applicant had, in fact, been investigated only because of the bias and malicious allegations made by these same staff members. The Tribunal sees this as being procedurally improper and unfair to the staff members.

47. The shifting of the blame for the investigation to the bias and malice of the complainants and using such an allegation to initiate an investigation of the complainants would have brought about a "chilling effect" on the process of investigations within the United Nations system and would cripple the investigative body's ability to pursue investigations in the future. The Staff Regulations and Rules provide for disciplinary or other appropriate action to be taken against staff members that provide information that is intentionally false or misleading.¹ There was no such finding during the investigation into the complaint against the Applicant.

¹ See, for example, section 2.3 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

Fairness and impartiality

48. Fairness and impartiality are not established solely on the basis that the allegations are true. The Tribunal also must consider the impact of the allegations on the United Nations Secretariat or any of its funds or agencies. The first issue to consider would be whether any regulation or rule was breached by the impugned behaviour, or whether there was an appearance of impropriety even where no rule has been breached. It is important for the United Nations and its associated agencies to uphold and maintain an image of propriety and high standards that are acceptable to all staff and stakeholders. In other words, the standards must be representative of the views of a broad cross section of the United Nations community, across political boundaries, interest groups and cultural differences. It is important that the issues which affect them be addressed.²

49. The specific possible bias or even malice of an employee does not imply that the substance of their complaint is not worthy of investigation. However, where the appropriate official deems that a complaint was filed out of malice, it would be incumbent upon them to initiate disciplinary or other appropriate action against the Complainant.

The Applicant was treated fairly

50. The essence of any judicial review process is fairness. From the outset the Applicant was informed of allegations made against him. He was given an opportunity to refute the allegations.

51. The allegations against the Applicant were not established by the evidence, and he was exonerated. It must be assumed that the evidence against him was neither clear nor convincing. Based on such an assessment the investigation was closed. In this case, the appropriate official did not deem it necessary to look further to establish whether the complaint against him was motivated by bias or malice.

² See generally, Standards of Conduct for the International Civil Service (2013).

52. The investigators would have been called upon to use their judgment. There is no rule that requires the investigators to go further to try to establish impropriety on the part of the complainants.

53. Further, there is no evidence that the administrative assessment was biased or that the UNDP was incapable of performing a fair administrative assessment as is alleged by the Applicant. The administrative assessment would have been based on a view of the rules and regulations governing this kind of case. But for the purposes of the investigation, the administrators found it prudent to go outside of the UNDP to the IMF for supportive collaboration in conducting the investigation.

The Applicant is not entitled to damages

54. As cited by the Respondent, the UNAT decision in *Asoriotis* 2013-UNAT-309 at para. 36 established that “the need for compensation must be demonstrated by evidence and speculation will not suffice”. The Applicant has not established that he suffered any stress or anxiety because of a breach of his rights [as a result of the investigation against him or as a result of the administration’s failure to investigate his allegations against the complainants.]

Conclusion

55. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(Signed)

Judge Francis Belle

Dated this 7th day of November 2024

Entered in the Register on this 7th day of November 2024

(Signed)

Wanda L. Carter, Registrar, Nairobi