



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: Liliana López Bello

TURCANU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alister Cumming, UNICEF

Rosangela Adamo, UNICEF

Introduction

1. The Applicant, a Child Protection Specialist at the Republic of Moldova Country Office (“MCO”) of the United Nations Children’s Fund (“UNICEF”), contests the decision of the Office of Internal Audit and Investigations (“OIAI”) to close his complaint of harassment and abuse of authority against his supervisor following a preliminary review.

2. For the reasons set out below, the Tribunal decides to reject the application.

Facts and procedural history

3. On 11 October 2019, the Applicant joined MCO, UNICEF with a fixed-term appointment.

4. On 23 February 2023, the Applicant had a performance review discussion with the UNICEF MCO Deputy Representative (his “supervisor”) in the context of the 2022 Performance Evaluation Review (“PER”). During the meeting, the Applicant was informed of underperforming issues in the areas of “Leadership,” “Communication,” “Drive for Results,” and “Partnership”.

5. On 27 February 2023, a Performance Review Meeting (“PRM”) was held. During the PRM, the supervisor discussed with the Applicant his performance shortcomings and proposed an overall rating of “performance needs improvement”. He also informed the MCO Senior Management Team that he would review the Applicant’s comments before making a final decision and reflect carefully on the type of improvement plan he would propose if the rating was confirmed.

6. On the same day, the Applicant provided his comments on his performance review, and he had a second performance discussion with his supervisor. The Applicant was informed of the proposed performance rating, namely “performance needs improvement” and the need to implement a performance improvement plan (“PIP”). *Inter alia*, the Applicant expressed that such a rating was humiliating.

7. On 6 March 2023, the Applicant submitted a complaint of harassment and abuse of authority against his supervisor to OIAI.

8. By email dated 13 March 2023, the Applicant shared with the supervisor his concerns that 2022 PER was internationally aimed at intimidating and humiliating him by misusing hierarchical superiority.

9. On 17 March 2023, the Applicant's supervisor replied, regretting that the performance management discussions impacted the Applicant, but clarified that this was never his intention and confirmed the Applicant's performance rating as "performance needs improvements." He explained that the Applicant would be given a PIP, through which he would be able to demonstrate progress against mutually agreed performance indicators linked to the areas identified as needing improvement.

10. On 21 March 2023, the supervisor explained to the Applicant the procedure to finalize the 2022 PER report. He further advised the Applicant that it "[was] in [the Applicant's] best interest, and the best interest of the [O]rganization ...to agree on the way forward and the content of the PIP, so that [they could] bring implementation and move forward".

11. On 2 April 2023, the Applicant's 2022 PER was finalized with an overall rating of "performance needs improvement".

12. On 13 April 2023, the Applicant submitted a rebuttal statement for the 2022 PER.

13. By email dated 17 April 2023, OIAI requested the Applicant to provide additional information regarding his allegations, which he did on 26 April 2023.

14. On 25 May 2023, the rebuttal reviewer issued a rebuttal report recommending upholding the supervisor's rating of "performance needs improvement" for the Applicant's 2022 performance cycle and the decision to implement a PIP.

15. On 6 June 2023, the Director, Division of Human Resources ("DHR") endorsed the reviewers' recommendation. As a result, the overall rating of "performance needs improvement" for the 2022 PER was final.

16. On 26 June 2023, after reviewing the Applicant's complaint of prohibited conduct against his supervisor, OIAI closed the case. OIAI concluded that the alleged incidents would not amount to misconduct and informed the Applicant of the decision. This is the "contested decision".
17. On 12 July 2023, the Applicant submitted a request for management evaluation of the contested decision.
18. By letter dated 9 August 2023, the Deputy Executive Director, Management, upheld the contested decision.
19. On 11 September 2023, the Applicant was placed on a three-month PIP.
20. On 7 November 2023, the Applicant filed the instant application.
21. By email dated 13 December 2023, the Head of Child Protection Section noted that the "PIP [had] been concluded on December 11th successfully, as [the Applicant] [had] achieved sufficient progress against all the agreed indicators".
22. On 15 December 2023, the Respondent filed his reply.
23. By Order No. 13 (GVA/2024) of 6 February 2024, the Tribunal instructed the Applicant to file a rejoinder, which he did on 7 March 2024, and the parties to explore the possibility of having the dispute between them resolved amicably.
24. On 14 March 2024, the parties informed the Tribunal that they had been unable to resolve this matter amicably.
25. On 28 August 2024, the Applicant filed a series of email exchanges between him and the UNICEF Staff Association ("COSA"), in which he complained, *inter alia*, about being retaliated for the complaint of prohibited conduct against his supervisor in the form of post abolishment.
26. Order No. 129 (GVA/2024) of 9 October 2024, the Tribunal directed the parties to fill their closing submissions, which they did on 25 October 2024.

Consideration

27. The primary legal issue before the Tribunal is whether the OIAI's decision to close the Applicant's complaint of harassment and abuse of authority against his supervisor following a preliminary review was lawful.

Scope and standard of judicial review

28. Art. 2.1(a) of the Tribunal's Statute confers jurisdiction on the Tribunal to examine the lawfulness of administrative decisions. The administrative decision presently under scrutiny is that of OIAI to close the Applicant's complaint of prohibited conduct against his supervisor under POLICY/DHR/2020/001 v. 7 May 2020 UNICEF Policy on the Disciplinary Process and Measures ("Disciplinary Process Policy") following a preliminary review.

29. In her 26 June 2023 communication of the decision to the Applicant, the Deputy Director, Investigations, OIAI, conveyed the following to the Applicant:

OIAI is of the view that the alleged incidents would not, in the view of OIAI, amount to misconduct. As a result, it is unlikely that an investigation would reveal sufficient evidence to sustain, as a matter of law, a finding of misconduct. In accordance with paragraph 20 of the UNICEF Policy on Disciplinary Process and Measures (POLICY/DHR/2020/001 v. 7 May 2020), OIAI will not initiate an investigation into the matter.

30. In determining the lawfulness of an administration decision concerning the investigation of a complaint, the Tribunal may "enter into an examination of the propriety of the procedural steps that preceded and informed the decision eventually made, inasmuch as they may have impacted the final outcome" (*Kostomarova* UNDT/2016/009, para. 44).

31. The Tribunal recalls that, in cases of harassment and abuse of authority, it is not vested with the authority to conduct a fresh investigation into the initial complaint (*Messinger* 2011-UNAT-123, para. 27). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own decision for that of the Administration (*Samwidi* 2010-UNAT-084, para. 40).

32. The Disciplinary Process Policy provides the following in its relevant parts:

19. OIAI shall acknowledge receipt of a report and undertake an initial assessment to determine whether an investigation is warranted. OIAI retains the ultimate authority to decide which cases it will consider.

20. If the report does not contain sufficient information to warrant an investigation, the reported conduct would not, as a matter of law, amount to misconduct, or it is unlikely that an investigation would reveal sufficient evidence to sustain, as a matter of law, a finding of misconduct, OIAI shall close the case. OIAI may refer the reported conduct to the responsible manager(s) or DHR for appropriate administrative or managerial action.

33. It follows that OIAI has an obligation to consider whether the matters the Applicant complained of fall within its mandate.

34. As ruled by UNAT, “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” (*Oummih* 2015-UNAT-518/Corr.1, para. 31). Nevertheless, the “Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation” (*Nwuke* 2010-UNAT-099, para. 40).

35. Having reviewed the parties’ submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the preliminary review was conducted properly;
- b. Whether the Administration committed any errors in making the contested decision; and
- c. Whether the Applicant is entitled to any remedies.

36. The Tribunal will address these issues below *seriatim*.

Whether the preliminary review was conducted properly

37. The Applicant did not dispute the investigation process. What is disputed is whether OIAI's decision not to initiate an investigation into the Applicant's alleged harassment and abuse of authority was lawful, reasonable and fair.

38. The Applicant primarily contends that while work-related matters normally do not constitute prohibited conduct, art. 11 of POLICY/DHR/2020/002 UNICEF Policy on the Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority ("Prohibited Conduct Policy") does not exclude performance-related matters.

39. In this context, the Applicant asks the Tribunal to review his complaint under the exceptional scope of art. 11 above. He argues that he does not contest the performance ranking *per se*, but the way his performance evaluation was handled, the context and surrounding circumstances, and the personal issues with respect to the supervisor involved.

40. In support of his allegations, the Applicant claimed his supervisor:

- i. Lack of guidance, feedback, and coaching during the performance cycle;
- ii. Misjudgment of the Applicant's achievement;
- iii. Inflexibility in revising the performance rating based on the Applicant's comments;
- iv. Intent to humiliate the Applicant as a result of his criticism of MCO's management relating to staff turnover and retention;
- v. Intent to humiliate the Applicant by recommending upgrading the rating of two of Applicant's supervisees; and
- vi. The 17 and 21 March 2023 emails, which the Applicant considers a "form of coercion and blackmailing."

41. The Respondent argues that the contested decision is legal, reasonable and procedurally fair. In support of his argument, he submits that the Applicant's allegations fall squarely in the realm of disagreements on work performance and do not disclose possible prohibited conduct. The supervisor's alleged lack of guidance during the performance cycle and misjudgment of the Applicant's achievement do not fall under any examples of prohibited conduct mentioned explicitly in the Prohibited Conduct Policy.

42. The Respondent further submits that no sign of deliberate discrimination or scope of improper damage or harm, which is required to envisage his supervisor's abuse of authority in the performance evaluation, emerged from the record before OIAI. The Applicant failed to show any link both between the upgrading request and his performance rating and between his criticism of the MCO's management and his performance rating, and subsequently, failed to demonstrate his supervisor's intent to humiliate him. His supervisor's 17 and 21 March 2023 emails, referring to the performance rating as a "great opportunity" to show progress and saying that it is in the best interest of the Organization to agree on a way forward, would not amount to intimidating language.

43. The issue before the Tribunal is determining whether the Applicant's contentions fall in the scope of regular disagreements on work performance or possible prohibited conduct.

44. Article 20 of the Disciplinary Process Policy reads:

20. If the report does not contain sufficient information to warrant an investigation, the reported conduct would not, as a matter of law, amount to misconduct, or it is unlikely that an investigation would reveal sufficient evidence to sustain, as a matter of law, a finding of misconduct, OIAI shall close the case. OIAI may refer the reported conduct to the responsible manager(s) or DHR for appropriate administrative or managerial action.

45. Under this provision, a fact-finding investigation may only be undertaken, *inter alia*, if the report of possible prohibited conduct contains sufficient information to warrant an investigation, or if there is sufficient evidence to sustain,

as a matter of law, a finding of misconduct. However, if there are no such grounds or reasons, OIAI is allowed to close the case.

46. The Prohibited Conduct Policy defines harassment and abuse of authority and provides relevant guidelines to make a distinction between disagreements on performance and prohibited conduct:

6. **Harassment:** any unwelcome conduct that might reasonably be expected or be perceived to cause offence, or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment. Harassment may take the form of words, gestures, or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another person, including mobbing or bullying. Harassment may be directed at one or more persons based on a shared characteristic, trait or status.

...

8. **Abuse of authority:** the improper use of a position of influence, power or authority against another person, which is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment, which includes, but is not limited to, intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

...

11. Disagreements between a supervisor and a supervisee about his/her performance, which are to be addressed in regular performance-management discussions, or about other work-related matters normally do not constitute prohibited conduct.

...

33. OIAI shall undertake its initial assessment and investigation of the report in accordance with the provisions set out in the UNICEF Policy on the Disciplinary Process and Measures.

47. While art. 11 of the Prohibited Conduct Policy explicitly states that disagreements on performance “normally” do not constitute prohibited conduct, as

the Applicant submits, there is no doubt that by improperly influencing a staff member's performance evaluation, a supervisor's conduct could amount to "abuse of authority" (*Sarwar* UNDT/2018/005, paras. 99 and 106-107).

48. The Tribunal further recalls that with respect to "assessing abuse of authority in performance evaluation, this Tribunal considers that an incorrect or deficient evaluation (even if the outcome is objectively conditioned by some contrasts between the parties) is not a deliberately harmful evaluation" (*Yavuz* UNDT/2021/129, para. 48). An abusive performance evaluation still requires the scope of improper harm and damage, or at least, the awareness of the unfairness of the performance evaluation in its completion of it (*Yavuz*, para. 47).

49. In this respect, "the complainant has the burden of alleging the whole set of factual circumstances that may reasonably lead to the conclusion that prohibited conduct has been committed. It is essentially on this basis that the responsible official will decide whether there are sufficient grounds to warrant a formal fact-finding investigation" (*Parayil* UNDT/2017/055, para. 48).

50. After a careful examination of all the elements on file, the Tribunal notes that the principal reason for the conflict and discomfort that arose between the Applicant and his supervisor related to his performance evaluation. The Applicant's complaint against his supervisor primarily relates to his disagreement with the low-performance rating in the 2022 PER and the following decision to place him under a PIP for the subsequent cycle; a decision the Applicant alleges was predetermined and intended to humiliate him. In fact, the Applicant neither alleged nor showed any trace of harassment or abuse of authority out of the above-mentioned domain.

51. By contrasting with the definition in the Prohibited Conduct Policy, the Tribunal agrees with the Respondent that the supervisor's alleged lack of supervision, guidance and coaching during the performance cycle and his alleged misjudgment of the Applicant's achievement do not fall under any examples of harassment or abuse of authority.

52. As to the Applicant's allegation that his supervisor intended to humiliate him by recommending upgrading the rating of two of his supervisees, the record shows that his supervisor provided detailed reasons for it and, subsequently, the Applicant responded "[d]elighted to do that". Therefore, the Tribunal finds that the Applicant produced no evidence or reasons to conclude that such recommendation was intentionally aimed at humiliating him.

53. With respect to the Applicant's allegation that his supervisor and the Representative of MCO intended to humiliate him as a result of his criticism of MCO's management during the 1 December 2021 Joint Consultative Committee (JCC), the relevant meeting minutes produced by the Applicant included nothing made to his raising critical topics. However, the record shows a warning from the Representative of MCO to the Applicant stating "[d]on't be a trouble maker...all the time!!"

54. The Tribunal is mindful that the Applicant only reported his supervisor to OIAI and not the Representative of MCO. As it follows, any claim against the Representative of MCO falls out of the scope of the current judicial review. Moreover, the Applicant failed to demonstrate any link between his performance rating and criticism of the MCO's management, and how this criticism could have led his supervisor to intentionally humiliate him.

55. The supervisor's email dated 17 March 2023 sent to the Applicant reads:

In view of [my overall assessment confirmed by the PER Review Committee], a proposed improvement plan with clear and measurable deliverables, for the period of three months will give you a great opportunity to demonstrate progress against mutually agreed performance indicators linked to the areas identified as needing improvement.

56. Subsequently, the supervisor's email dated 21 March 2023 states:

I understand that you might wish to rebut the PER, which is of course your right, and I am ready to participate in the review process. Nevertheless, I still believe that it is in your best interest, and the best interest of the organization for us to agree on the way forward and the content of the PIP, so we can [implement] and move forward.

57. A plain reading of both emails sent to the Applicant does not serve to conclude any form of alleged coercion or blackmail.

58. In fact, the Tribunal notes that on 11 December 2023, the PIP was concluded successfully as the Applicant achieved sufficient progress against all the agreed indicators.

59. The Tribunal also notes that in his rejoinder, the Applicant presented numerous incidents to support his allegation that his supervisor's "intention to humiliate and to create a hostile and offensive work environment [was] deliberate because these were not only caused by the performance evaluation event itself, but [were] further confirmed and exacerbated by a series of follow up retaliation actions". However, the Applicant did not produce any evidence to substantiate said retaliatory actions besides the alleged proposal of post-abolishment, which the Tribunal dealt with as a preliminary topic above.

60. The Tribunal would like to clarify that any harm or damage resulting from the wrong use of managerial power or the awareness of the unfairness of performance evaluation may amount to abuse of authority. However, the Applicant's alleged serious damages or reaching the brink of divorce, even if true, have no direct causal link with abuse of authority and cannot reasonably substantiate the wrong use of managerial power established.

61. The Tribunal notes that a concurring evaluation made by a Rebuttal Panel also revealed the Applicant's underperformance.

62. It is in general true that the burden of proof or test to be applied to the question of whether a complaint should be investigated must be lower than the burden of proof or test to be applied to prove a case of unlawful separation (*Yavuz*, para. 52). The Tribunal finds, however, that the Applicant's case does not reach that level either. In view of the foregoing, the Tribunal concludes that the preliminary review was properly conducted.

Whether the Administration committed any errors in making the contested decision

63. The Applicant submits that both OIAI and the Ethics Office have failed to prevent and protect him from retaliation, in breach of DHR/POLICY/2018-001 UNICEF Policy on Whistle-Blower Protection Against Retaliation, and the Rebuttal Review Report has played an authoritative role in not initiating an investigation. He further claims that the recent proposal to abolish his post was retaliatory as he filed a complaint for harassment and abuse of authority against his supervisor.

64. The Tribunal recalls that the instigation of disciplinary charges against a staff member is the privilege of the Organization, and it is not legally possible to compel the Administration to take disciplinary action (*Abboud* 2010-UNAT-100, para. 34; *Benfield Laporte* 2015-UNAT-505, para. 37; *Oummih*, para. 31). Hence, decisions to investigate or not to investigate allegations of misconduct are matters that are within the margin of discretion of the Organization.

65. The Tribunal has the task to only review the validity of the contested decision on grounds of legality, reasonableness and procedural fairness. Merely disagreeing with an evaluation method does not lead to conclude that it was unreasonable and unfair (*Wang* 2014-UNAT-454, para. 42).

66. The evidence on record shows that the Applicant only requested and obtained informal guidance from OIAI and the Ethics Office rather than submitting a formal complaint of retaliation against his supervisor under DHR/POLICY/2018-001. Furthermore, the alleged proposal to abolish the post the Applicant encumbered post-dated the contested decision.

67. Indeed, the Tribunal agrees with the Respondent's argument that any retaliatory allegations fell outside the scope of the present case as alleged retaliation was not part of the contested decision and the OIAI record. The Tribunal's role in this case is, therefore, limited to reviewing whether the decision to close the Applicant's complaint of harassment and abuse of authority against his supervisor was properly conducted.

68. The fact that the Applicant believes that OIAI considered the Rebuttal Review Report in reaching the contested decision is merely speculative and does not impact the reasonableness or correctness of the contested decision.

69. Indeed, the Tribunal finds that in undertaking the preliminary assessment, OIAI duly reviewed the Applicant's complaint and evidence and did not err in concluding that the complaint lacked sufficient evidence and meaningful indicia of misconduct.

70. The Tribunal agrees with and upholds the OIAI's final conclusion that the Administration's decision not to initiate a fact-finding investigation against the Applicant's supervisor was lawful. Indeed, the incidents described in the Applicant's complaint did not provide sufficient grounds to consider that his supervisor had engaged in prohibited conduct, but the incidents fell in the realm of regular workplace disagreements.

71. Therefore, the Tribunal concludes that the contested decision was both lawful and reasonable.

Whether the Applicant is entitled to any remedies

72. The Applicant asks the Tribunal to order:

- a. The opening of a formal investigation against his supervisor, pursuant to art. 22 of the Disciplinary Process Policy;
- b. OIAI to inform the Ethics Office about retaliation risks and recommend appropriate preventive and protection actions;

c. The Ethics Office to recommend that the Executive Director take appropriate measures to safeguard his interests and to prevent any retaliatory action; and

d. USD1.0 on moral damages.

73. Since the contested decision is deemed lawful, the Applicant is not entitled to any remedy.

74. Notwithstanding, the Tribunal recalls that it cannot order the Ethics Office to undertake any action with respect to the allegations of retaliation raised by the Applicant in this case, as its role is limited to reviewing the legality, reasonableness and correctness of the contested decision. Any potential or alleged retaliation concerns should be directly addressed to the Ethics Office through the appropriate channels.

Conclusion

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

(Signed)

Judge Sun Xiangzhuang

Dated this 16th day of December 2024

Entered in the Register on this 16th day of December 2024

(Signed)

Liliana López Bello, Registrar, Geneva