



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/054

Judgment No.: UNDT/2010/073

Date: 29 April 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ELBADAWI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Self-represented

Counsel for respondent:

Jorge Balletero, Policy and Administrative Law Section, Division of Human Resources, UNICEF.

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund (UNICEF), is appealing an administrative decision taken by the Deputy Executive Director, dated 11 December 2008, to summarily dismiss him for serious misconduct. The charges related to harassment, aggressive behaviour and gender discrimination against a colleague at the work place.

The Facts

2. The Applicant joined the Organization on 1 August 2001 in the UNICEF Kadugali office as a Health Specialist at the National Officer level 3.
3. On 24 August 2008, the Applicant and the then-Officer-in-Charge (OiC), Ms. (...), had an incident of an interpersonal nature in the UNICEF Kadugali office. Two colleagues in the office witnessed their argument.
4. On 27 August 2008, the UNICEF Sudan Country Office conducted an investigation and issued its findings in a report dated 4 September 2008.
5. As a result of the investigation findings, the Division of Human Resources charged the Applicant, on 20 October 2008, with:

“harassment and threatening of another staff member and conduct unbecoming of international civil servants by aggressively addressing [the then-Officer-in-Charge] on 25 August 2008, waving [his] hand in front of her in an aggressive manner, shouting at and intimidating her, and making disrespectful and demeaning remarks about her nationality and gender”.

These charges were made on the basis of Chapter 15, section 2, paragraph 15.2.2 of the UNICEF Human Resources Manual on Policy and Procedure, Article 101 of the United Nations Charter, UN Staff Regulation 1.2 (a), and UN Staff Rule 110.1. A copy of the investigation report was provided to the Applicant.

6. The Division of Human Resources also advised the Applicant that the matter was further aggravated due to his prior history of shortcomings, which had been addressed in a written warning.
7. In his response dated 17 November 2008, the Applicant strongly denied all the charges and attached a large volume of documentation in support of his argumentation.
8. On 4 December 2008, the Deputy Executive Director decided to uphold the charges and to summarily dismiss the Applicant in accordance with UN Staff Regulation 10.2.
9. On 4 May 2009, the Applicant requested the Deputy Executive Director of UNICEF to review the decision to summarily dismiss him.
10. By email dated 7 May 2009, the Applicant requested an *ad-hoc* Joint Disciplinary Committee (JDC) review of the decision to summarily dismiss him for serious misconduct. UNICEF Division of Human Resources granted him an exceptional waiver to the time-limit based on the Applicant's plea that he lacked knowledge of applicable legal recourse mechanisms and time-limits.
11. On 29 May 2009, an *ad-hoc* JDC panel was constituted to review the Applicant's case but no report was issued. As of 1st July 2009, the case was transferred to the UNDT in New York pursuant to ST/SGB/2009/11 on

“Transitional measures related to the introduction of the new system of administration of justice”. By order of change of venue, the case was transferred to the Nairobi Registry on 6 August 2009.

12. A hearing was held on 8 February 2010. Parties did not call any witness nor provided any additional documentation.

Applicant’s Submissions

13. The Applicant avers that there is no evidence to substantiate the Respondent’s claims of misconduct for the incident of 24 August 2008. He also denies any reference to prior history of shortcomings.
14. The Applicant further argues that the incident of 24 August 2008 was a misunderstanding. He never had any problem with the then-Officer-in-Charge, nor had he discriminated or bullied her at any time. He also denies that she was harassing him but argues that the OiC had mistreated two cleaners working in the office.
15. The Applicant adds that the matter was not properly reported. First, this case is not based on witness evidence. It was based on a rather “strange assumption” that he is a trouble maker in UNICEF although no investigation was undertaken on the incident. Furthermore, he argues there was only one eye witness, Mr. “S”, and that his statement is contradictory to the one of the OiC. Finally, the two cleaners who could have confirmed his allegations against the OiC have not been interviewed although he provided their contact details. The Applicant is also of the view that the statement made by the OiC about his character and behaviour are unsupported by evidence.

Respondent’s Submissions

16. The Respondent submits that, on the basis of the evidence as presented by the investigation, the Applicant was summarily dismissed for “harassment and threatening of another staff member and conduct unbecoming of international civil servants by aggressively addressing another staff member on 25 August 2008, by acting in an aggressive manner and verbally abused her by shouting at and intimidating her, and making disrespectful and demeaning remarks about her nationality and gender” in violation of Chapter 15, section 2, paragraph 15.2.2 of the UNICEF Human Resources Manual on Policy and Procedure, Article 101 of the United Nations Charter, UN Staff Regulation 1.2 (a) and UN Staff Rule 110.1.
17. All the material facts were taken into consideration prior to the decision to dismiss the Applicant. Several witnesses submitted their statements which were not contradictory. As for the two cleaners, they did not confirm the Applicant’s allegations that the OiC abused them.
18. The Respondent adds that the decision was properly taken in the exercise of the Executive Director’s discretionary authority in disciplinary matters and taken in accordance with procedural due process.
19. The Applicant has been reprimanded in the past for misconduct. The Applicant did not heed this warning and once behaved inappropriately. The fact is that the Applicant seems entirely unaware of his shortcomings and refuses to acknowledge that this sort of behaviour at the work place is unacceptable.

Considerations

20. The Tribunal notes that the Applicant has strongly denied all the charges and challenges his summary dismissal on the ground that there is no evidence of

misconduct and that the then-OiC and the eye witnesses provided false statements to the investigation panel.

21. In his response to the Charges letter dated 20 October 2008, the Applicant stresses that he “never [did] anything that would constitute an assault upon, harassment of, or threat to [the OiC]”. As regards any reference to prior history of misconduct, the Applicant argues that it is “a recollection of unverified claims based on hearsay evidence and that “such prior history should be ignored to avoid double jeopardy”. The Tribunal further takes note that the Applicant refers to the incident in question as a “misunderstanding” between the OiC and himself.
22. As for the Respondent, the Tribunal notes his argument that the Applicant was found to have engaged in serious misconduct for “harassment and threatening of another staff and conduct unbecoming of international civil servants by aggressively addressing [the OiC] on 24 August 2008 (...)” in violation of Chapter 15, section 2, paragraph 15.2.2 of the UNICEF Human Resources Manual on Policy and Procedure, Article 101 of the United Nations Charter, UN Staff Regulation 1.2 (a), and UN Staff Rule 110.1.
23. The Respondent argues that the OiC’s narration of the 24 August 2008 incident was confirmed by a direct eye witness, Mr. “X”.
24. The Respondent explains that Mr. “X” initially heard the Applicant screaming in the OiC’s office about an e-mail she had sent. He then heard the door being slammed loudly, with the Applicant continuing to scream and shout. He therefore went to the OiC’s office to check whether there was a problem. He saw the Applicant in the OiC’s office in a highly agitated mood and aggressive body-language. He heard the Applicant make demeaning comments about the OiC. The witness thereafter went to fetch support from another colleague, Mr. “S”, who is a well-respected local staff member in the

hope that he would calm the Applicant. Mr. “S” confirmed the statement of Mr. “X”. In addition, this colleague found the Applicant and the OiC shouting in the office, the Applicant blaming the OiC to try “stabbing [him] in the back”. He confirmed that the Applicant resisted his attempts to remove [him] from the office by physically pushing the Applicant back. The Respondent argues that the description made by that witness is an indicator of the Applicant’s aggressiveness he displayed in the OiC’s office. The Respondent further argues that the eyewitness had no motive to provide a false testimony. According to the Respondent, the Applicant admitted himself that Mr. “S” “asked [him]” to leave the office but that he initially refused. In the view of the Respondent, there is no doubt as to the accuracy and credibility of the witness statements.

25. The Tribunal takes note that, in the Respondent’s view, these charges were aggravated by prior history of shortcomings on the part of the Applicant. The Applicant denies any reference to prior history of unbecoming conduct as none of them were fully investigated and remained unproven allegations. The Tribunal found evidence that the Applicant received a reprimand (“Warning Letter”) on 18 June 2006 requesting the Applicant to apologize to a security guard following the Applicant’s aggressive conduct towards him. The Respondent explained that no investigation had been undertaken as the Applicant had apologized to the security guard, therefore, the office decided to issue a warning letter rather than proceed with further investigations or initiate proceedings that could have resulted in more serious measures against the Applicant.

26. At the crux of this matter is the question whether there is evidence that the Applicant did not conduct himself in a way that is expected of an international civil servant, in particular with regard to every staff member’s basic obligation to respect diversity as set forth in Article 101 (3) of the United Nations Charter and Staff Regulation 1.2 (a) and (b).

27. In its Article 101 (3), the Charter provides that “[t]he paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity (...)”.

28. UN Staff Regulation 1.2 (a) reads as follows:

“(...) Staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals (...).”

29. UN Staff Regulation 1.2 (b) further provides that:

“Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.”

30. The provisions of UN Staff Rule Article 110.1 generally define misconduct as:

“Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the UN Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct.”

31. UNICEF Human Resources Manual on Policy and Procedure, Chapter 15, section 2, paragraph 15.2.2. reads as follows:

“Activities that would constitute misconduct include, but are not limited to, the following:

d) Assault upon, harassment of, or threats to other staff members.”

32. The Tribunal notes that the Secretary-General’s Bulletin, ST/SGB/2008/5 dated 11 February 2008, on “Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority” was applicable at the time of the incident. It defines discrimination, harassment, including sexual harassment, and abuse of authority as prohibited conducts. The term of discrimination is described as follows:

“Discrimination is any unfair treatment or arbitrary distinction based on a person’s race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.”

33. The provisions on “harassment” read as follows:

“Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implied a series of incidents (...).”

34. Finally, the Bulletin puts in clear terms the notion of “abuse of authority” as:

“(...) the improper use of a position of influence, power or authority against another person. (...). Abuse of authority may include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment (...) are particularly serious when accompanied by abuse of authority.”

35. The Tribunal observes from the Investigation Report dated 4 September 2008 that the Panel interviewed six people, namely the Applicant, Ms. (...), the witnesses, Mr. (...) and Mr. “S”, and the two cleaners. Having examined the witness statements, the Tribunal does not find that the witnesses recollection of the 24 August 2008 incident were contradictory in any way.

36. As regards the allegations made by the Applicant that the OiC had mistreated two cleaners working in the office, the Tribunal notes the cleaners’ statements that “they did not feel mistreated by the OiC. The evidence takes care of the Applicant’s allegation that the OiC had mistreated the two cleaners.

37. The documentary evidence belies the Applicant’s allegations that no investigation had been conducted and that the witnesses, including the two cleaners, had not been interviewed. In fact the Applicant had been communicated a copy of the final report and was afforded an opportunity to respond to the Charges based on the investigation report.

38. In matter of discipline, the Tribunal considers that the standard of proof in disciplinary proceedings is not as high as in a criminal trial¹. Furthermore, the Tribunal adopted the following reasoning in the case of *Diakite*:

¹ See Judgment No. UNDT/2010/41, *Liyanarachchige*, dated 9 March 2010 wherein the Tribunal referred to the case of *Fatmir Limaj et al v. Prosecutor*, Case No. IT-03-66-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Judgment, 30 November 2005.

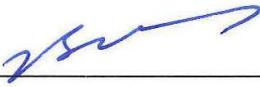
“The Tribunal has first to determine whether the evidence in support of the charge is credible and capable of being acted upon (...). Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is capable of leading to the irresistible and reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit one and only conclusion that proof has been made out? (...).”²

39. In the present matter, the Tribunal finds that the evidence in support of the charges was credible and that the Applicant has failed to prove that the questioned decision was arbitrary or motivated by prejudice or other extraneous factors, or was flawed by procedural irregularities or error of law.
40. In the light of the foregoing, the Tribunal is satisfied that the Respondent did not impinge on the Applicant’s rights to due process in respect of disciplinary matters and there were sufficient elements to determine that the Applicant had engaged in misconduct.
41. In respect of the proportionality of the disciplinary measure, the Tribunal recalls that respect for diversity and integrity are core values of the UN, which every staff member must follow, irrespective of their grades. The Tribunal is therefore of the view the measure was proportionate to the charges.

² UNDT Judgment No. 2010/024, dated 8 February 2010.

Judgement

42. For the foregoing reasons, the application is dismissed in its entirety.



Judge Vinod Boolell

Dated this 29th day of April 2010

Entered in the Register on this 29th day of April 2010

