



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/023/
JAB/2008/039
Judgment No.: UNDT/2010/205
Date: 29 November 2010
Original: English

Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

ADORNA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Jorge Ballester, UNICEF

Introduction

1. Following an investigation in which he was cleared of charges of sexual harassment and sexual assault, the Applicant, a former senior official with the India Office of the United Nations Children's Fund ("UNICEF"), received a letter of reprimand in January 2007 for "inappropriate behavior". Approximately ten months later, in November 2007, the Applicant requested disclosure of the investigation report, issuance of a public statement declaring his innocence, and compensation for his legal defence against the proceedings brought against him by the complainant in domestic courts. When these requests were refused on 19 December 2007, the Applicant sought administrative review of the decision to refuse his requests, requesting also the withdrawal of the written reprimand. He subsequently filed an appeal with the Joint Appeals Board ("JAB"). On 1 July 2009 this case was transferred to the United Nations Dispute Tribunal.

2. The Applicant claims, *inter alia*, compensation in the amount of two years' net base salary for denial of due process and compensation for the legal expenses caused by the Organisation's handling of the case, including USD2,800 for legal costs incurred in India and USD21,500 in New York. The Applicant further requests USD30,000 to cover the expenses associated with his "public exoneration" and an order to UNICEF to issue a statement concerning his exoneration.

3. The Tribunal reiterates from the outset that this case is not about the propriety or otherwise of the letter of reprimand or the Applicant's exoneration from the substantive charges filed against him by the complainant. On 28 August 2009 Shaw J issued *Adorna* UNDT/2009/012, finding that the Applicant's appeal was time-barred with regard to the issuance of the letter of reprimand, but that it was receivable with regard to the decisions expressed in UNICEF's letter of 19 December 2007, namely:

- a. the refusal to allow the Applicant access to the investigation report;

- b. the refusal to pay the Applicant's legal expenses; and
- c. the refusal to issue internal and public statements acknowledging his exoneration.

4. The issue of receivability having been determined by Shaw J, the present Judgment deals only with the merits of the application as it pertains to the three decisions cited above.

5. Six case management Orders were issued by the Dispute Tribunal in this case: Order No. 61 (NY/2009) (7 August 2009), Order No. 113 (NY/2009) (16 September 2009), Order No. 134 (NY/2009) (28 October 2009), Order No. 25 (NY/2010) (17 February 2010), Order No. 142 (NY/2010) (7 June 2010), and Order No. 157 (NY/2010) (24 June 2010). Case management hearings were held on 6 August 2009 and 5 February 2010. The Tribunal also held a hearing on the merits on 26 May 2010. The evidence received by the Tribunal, as well as the statement of appeal, the Respondent's reply and subsequent submissions constitute the pleadings and the record in this case.

Facts and procedural history

6. In October 2006 UNICEF received a complaint of sexual harassment and sexual assault against the Applicant from a staff member in UNICEF's India Office. UNICEF carried out an investigation. The investigation report, prepared in December 2006, cleared the Applicant of the allegations made by the complainant, also finding that some of the allegations were based on intentional misrepresentations. The Investigation Committee found, however, that the Applicant "sometimes ma[de] public jokes or comments that ma[de] staff feel uncomfortable because of their sexual connotation".

7. On 16 January 2007, based on the findings of the Investigation Committee, UNICEF issued the Applicant a letter of written reprimand, known as a non-

disciplinary administrative measure (see former staff rule 110.3(b)). The letter stated (emphasis in original):

As you are aware, UNICEF conducted an investigation into allegations of sexual harassment, abuse of authority and harassment in the workplace raised by a staff member against you.

The final investigation report found that you demonstrate a tendency to make public jokes or comments with sexual connotations that make some staff feel uncomfortable in the workplace. ...

Several staff found certain comments made by you inappropriate and felt uncomfortable. ...

... [T]he allegation of making comments with a sexual connotation is the only allegation that was supported by clear and convincing evidence out of 19 allegations that were raised against you. In light of these circumstances, formal charges will not be filed against you as a result of this complaint.

Any further misconduct on your part, any comments or jokes with a sexual connotation, any inappropriate questions that can reasonably be perceived as sexual advances, any type of proposition with a sexual connotation to other staff or persons working in the office, as well as any aggressive or threatening or hostile behaviour or actions of intimidation by you, including any act of retaliation against staff who cooperated with the Investigation Committee, will result in further disciplinary proceedings and the imposition of disciplinary measures against you. ...

...

On the basis of the above, you are hereby issued this **Written Reprimand**. The Reprimand will be placed in your Official Status File. ...

8. In or about March 2007, dissatisfied with the outcome of the investigation into her original allegations against the Applicant, the complainant filed additional complaints with various national agencies in India and made a number of public appearances regarding her allegations. On 30 March 2007 she filed a criminal complaint with the Indian police. The criminal case against the Applicant and other UNICEF officials was dismissed by the local court on 16 November 2007 on the basis that “all the accused persons [were] immune to [India’s] domestic legal processes”.

9. In March 2007 UNICEF issued several news releases in response to the media reports concerning the investigation and also communicated with the Ministry of External Affairs of India with regard to the findings of its investigation of the complainant's allegations. More specifically, in March 2007 UNICEF issued the following public statement:

As the leading child rights organization, UNICEF takes allegations of harassment, including sexual harassment and abuse of authority in its workplace very seriously. In fact, UNICEF has a policy of zero-tolerance in place and is committed to holding its staff members accountable, should any wrongdoing occur. UNICEF responded swiftly, in accordance with established procedures, to the allegations made by a former staff member in its New Delhi Office by sending a team of experienced investigators to India. The investigation included a detailed analysis of all available evidence as well as interviews of witnesses. The evidence did not support the allegations raised by the former staff member.

10. On 29 March 2007 UNICEF received an enquiry from one of India's news channels about the case and sent a reply on 30 March 2007, stating:

The investigation included a detailed analysis of all evidence as well as exhaustive interviews of witnesses. The evidence did not support any of the allegations raised by the former staff member [i.e., the complainant] and all parties were informed accordingly.

...

The investigation revealed that misconduct had not occurred and there was no evidence to support the complaint. Therefore, the case was closed.

11. Between June and August 2007 UNICEF and the Applicant held a number of discussions concerning the possibility of his transfer out of India. In October 2007 the Applicant began his new assignment with the United Nations Development Group in New York.

12. On 24 October 2007 several Indian newspapers published reports that an "informal inquiry" by the Indian Ministry for Women and Child Development "found the India representative of UNICEF [i.e., the Applicant] prima facie guilty of sexual

harassment of a female colleague”. This prompted the Applicant to send communications on 25 October, 12 November, and 12 December 2007 to the new Deputy Executive Director of UNICEF, protesting UNICEF’s lack of response to the news reports and requesting, *inter alia*, withdrawal of the letter of reprimand; access to the investigation report; financial backing by UNICEF for his legal defense against the complainant’s claims; internal and public pronouncements by UNICEF exonerating him of the complainant’s allegations; and financial compensation for his emotional suffering.

13. The Applicant’s first written request for a copy of the investigation report was made in his letter dated 25 October 2007, in which he protested the lack of response by UNICEF and informed the Deputy Executive Director of UNICEF that he may be requesting access to the investigation report because:

I am contracting a lawyer in India to plan a defamation suit Once set in motion, the lawyer would need UNICEF to provide information on the case, and it *might* include the full investigation report and its conclusions and the redact[ed] reports provided to the MEA [Ministry of External Affairs]. With tremendous sacrifice, I have towed the UNICEF line for a whole year, and I expect at the very least UNICEF’s cooperation to this request. UNICEF should also consider supporting my defamation suit in financial terms. The Organization’s reputation and credibility would hugely benefit from winning [this] case.

14. On 12 November 2007 the Applicant sent a follow-up email to the Deputy Executive Director of UNICEF, requesting, *inter alia*, to be provided, as soon as possible, with “a copy of the final report of the investigation and a copy of the redact[ed] report given to the Ministry of External Affairs by UNICEF”. This request for a copy of the investigation report was not made for the purposes of filing an appeal against the decision to issue a letter of reprimand; instead, it was spurred by what the Applicant described in his letter dated 25 October 2007 as a “relentless and ruthless defamation by [the complainant] starting about the time the results of the investigation on her complaints came out in January 2007”. In his request for a copy

of the report, the Applicant explained that he “could end up charged with a criminal case in India” and stated:

Let me reiterate that while the reputation of the Organization and the integrity of its investigation process are likewise threatened, aside from the damage to my own reputation, I face a more serious threat: I am continually subject to the risk of future arrest and physical harm. ... Preventing me from protecting myself and yet acting inadequately in the defense of a wrongly accused staff member, the Organization aggravates and perpetuates the impact on me of its inability to decisively conclude this case in a just manner immediately after the investigation results came out, and during some very opportune moments after that.

Given the already enormous and widespread damage to my reputation and that of my family, the grim future scenario, and the continued inadequate response of UNICEF, I ask the [O]rganization to undertake the following actions that I need for now to advance my defense:

1. Issue an internal statement in UNICEF addressed to all UNICEF staff that squarely defends the results of its investigation and protects its wrongly accused staff members ...
2. Share the same internal statement with my current Organization ...
3. Provide me soonest possible a copy of the final report of the investigation and a copy of the redact[ed] report given to the Ministry of External Affairs by UNICEF NYHQ.

...

As I said in my earlier letter to you, I still hope that the Organization would craft a permanently effective response to [the complainant]. Kindly realize, too, that UNICEF holds the more important part of my defense: the investigation report and part of the paper trail of [the complainant's] lies. As such while UNICEF remains reluctant to act effectively, if my access to those documents remains blocked, it will become imperative for me to seek other means to obtain them.

15. In response the Deputy Executive Director of UNICEF issued a memorandum dated 19 December 2007, asserting, *inter alia*, that the investigative findings were shared with the Applicant prior to the issuance of the letter of reprimand; that it is a policy of UNICEF not to share the actual investigation reports unless disciplinary action has been initiated; that UNICEF cannot be held liable for the complainant's

actions; and that UNICEF had already issued a number of public releases concerning the outcome of the investigation. The Deputy Executive Director declined to cover the Applicant's legal expenses or to issue further internal and public statements. The Applicant was reminded that the investigation did not clear him of all the allegations and that he had been formally reprimanded for inappropriate behaviour including making public jokes and comments with sexual connotation that made some staff members feel uncomfortable in the workplace. Specifically, with respect to the Applicant's request for a copy of the investigation report, the letter stated:

[I]t should be noted that it has been the policy of the Organization to not share the report unless disciplinary action is taken against any of the staff members involved. Since no disciplinary action was taken against you or [the complainant] the report was not shared with either one of you. The only reason why a redacted version of the report was shared with the Government of India was to show the Government that UNICEF had conducted a fair and impartial investigation as required by its policy and procedure and to show that it had neither unduly defended nor protected you during the investigation.

16. On 7 February 2008 the Applicant sought administrative review of the decisions communicated to him on 19 December 2007 and requested that the letter of reprimand be withdrawn. The outcome of the review was that the Applicant's requests would not be met as they were time-barred and without merit. On 2 May 2008, the Applicant submitted a statement of appeal to the JAB, reiterating his claims.

17. The Respondent submitted his reply on 14 July 2008, stating, *inter alia*, that the Applicant's request to withdraw the letter of reprimand was time-barred, since pursuant to former staff rule 111.2(a) he had two months after 16 January 2007—i.e., until 16 March 2007—to request review of the decision. The Respondent further stated that the Applicant was publicly cleared of the complainant's allegations and, since the media releases were issued in March 2007, any claims with respect to them were time-barred from May 2007.

18. On 26 September 2008 the Applicant submitted his observations on the Respondent's reply. The Applicant reiterated his previous requests, stating that his claim was not just with respect to the letter of reprimand, and, therefore, the date of 16 January 2007 was not determinative.

19. The case was subsequently transferred to the Dispute Tribunal. On 28 August 2009 the Tribunal issued *Adorna*, determining the issue of receivability of the Applicant's claims.

20. On 5 February 2010, almost six months after *Adorna* had been rendered, the Respondent filed an application for the interpretation of the meaning and scope of the Judgment pursuant to art. 30 of the Rules of Procedure. The Respondent contended that although the issue of the constitutive elements of an appealable administrative decision was raised in argument, the Judgment did not elaborate on the reasons why the Tribunal understood that the three receivable administrative decisions identified as receivable emanated from the letter of 19 December 2007 and thus an interpretation of the Judgment was warranted.

21. Although art. 30 does not specify the time within which an application for interpretation of a judgment may be made, it has to be made within a reasonable time. At the hearing of 5 February 2010 I informed the parties that because of the delay of six months, the Tribunal was not minded to admit the application, particularly as this would constitute a re-litigation of the decided issue of receivability. I also pointed out that reasons for the decision were set out, albeit briefly, in *Adorna*, and that the Respondent's application for interpretation appeared to be in the nature of an appeal. Counsel for the Respondent immediately thereafter—quite correctly, in my view—withdraw the application for interpretation.

Parties' submissions

22. As stated before, this application is receivable with respect to three decisions only, expressed in the letter of the Deputy Executive Director of UNICEF dated 19

December 2007 and confirmed in *Adorna*—i.e., the decision not to allow the Applicant access to the investigation report, the decision not to cover the Applicant's legal fees, and the decision not to issue any further statements acknowledging the Applicant's exoneration. The parties' submissions with respect to these claims are summarised below.

23. The Applicant submits that he should have been given a copy of the investigation report that was relied on by UNICEF in issuing the written reprimand. The Applicant claims that without access to the report he was deprived of the opportunity to adequately defend himself against the complainant's accusations and against the findings on which the letter of reprimand was based. According to the Applicant, UNICEF was responsible for the legal costs incurred by him and UNICEF's public statements were neither timely nor adequate.

24. The Respondent submits that the decision not to provide the Applicant with a copy of the investigation report was correct as no disciplinary proceedings had been initiated against him and that no procedures were violated. Further, the Respondent submits that UNICEF has not caused any harm to the Applicant and the public statements issued by UNICEF were appropriate, accurate and timely in view of the sensitive issues at hand. According to the Respondent, the decision to retain private counsel was that of the Applicant alone. No promises were given by UNICEF to cover his legal costs. Further, in accordance with art. 10.6 of the Tribunal's Statute, the Tribunal may only award costs against a party that has manifestly abused the proceedings before it. No such abuse has occurred in the present proceedings and therefore the request by the Applicant cannot be granted.

Consideration and findings

Scope of the case

25. The present case is not about the propriety or otherwise of the written reprimand issued to the Applicant or his exoneration from the sexual harassment and assault claims by the complainant; rather it concerns the failure by the Respondent to release the report to the Applicant after he requested it in November 2007 and the consequences thereof, if any.

26. The Applicant's request for administrative review, dated 7 February 2008, specifically addressed the decisions expressed in the Deputy Executive Director's letter dated 19 December 2007. Therefore, the Applicant's appeal against the refusal to disclose the investigation report is only receivable insofar as it relates to the decision of 19 December 2007.

27. Specifically, with respect to the Applicant's request for a copy of the investigation report, his first written request was made in an email to UNICEF dated 12 November 2007—i.e., approximately ten months after the letter of reprimand was issued. Had the Applicant's request for administrative review been in relation to UNICEF's failure to give him a copy of the report *prior* to the issuance of the letter of reprimand, it would have been time-barred, as is his appeal against the decision to reprimand him, because the request for administrative review was filed more than a year after the issuance of the letter of reprimand. Therefore, the Tribunal will not examine whether the report should have been made available to the Applicant prior to the issuance of the letter of reprimand as this issue is not properly before the Tribunal. The Tribunal will only examine whether the report should have been made available to the Applicant after he asked for it in November 2007.

Request for investigation report

28. In explaining the reasons why the report could not be provided to the Applicant, the Respondent stated that it was “the policy of the Organization to not share the report unless disciplinary action [was] taken against any of the staff members involved”. The Tribunal was not referred to any applicable rules in support of this contention. I do not find the Respondent’s argument and reliance on some general “policy” to be persuasive. Regardless of what kind of policy existed in UNICEF at the time, it clearly allowed for some exceptions as UNICEF provided a redacted copy of the investigation report directly to the Ministry of External Affairs of India in April 2007. Furthermore, UNICEF continued to rely on this report in its communications with the Applicant in 2007 and 2008, even quoting from the report in defense against the Applicant’s claims, whilst denying him the opportunity to access it.

29. The Applicant’s request for the report and the reasons given by him were reasonable and it is the Tribunal’s view that the Organisation should have properly exercised its discretion to grant the Applicant’s request. Considering the extraordinary circumstances of this case, including UNICEF’s disclosure of the report to a third party, yet not to the Applicant; its continuing reliance on it in its own communications with the Applicant; and especially taking into account the Applicant’s situation at the time and the compelling and exceptional reasons offered by him in support of his request, the Tribunal finds that the requirements of good faith and fair dealing required that the report should have been availed to the Applicant. Further, the Respondent has failed to persuade the Tribunal that UNICEF would have suffered any prejudice had it agreed to the Applicant’s request. The Applicant, however, was not provided with the report until the Respondent consented to its disclosure at a directions hearing on 5 February 2010.

30. In all the particular circumstances of this case, I find that the obligations of good faith and fair dealing required the investigation report to be made available to

the Applicant in a timeous manner after he requested it in November 2007. The Administration failed to properly exercise reasonable discretion in considering the Applicant's request.

31. The Tribunal finds that the Applicant has sufficiently demonstrated that the decision to withhold the report contributed to his emotional distress and anxiety. In particular, the Applicant's contemporaneous communications with UNICEF at the time demonstrate that he was distressed by UNICEF's refusal to assent to his request. With respect to compensation for emotional distress, such compensation ordered by the Dispute Tribunal has generally ranged between USD5,000 to USD30,000. See, e.g., *Crichlow* UNDT/2009/028, *Allen* UNDT/2010/009, *Gomez* UNDT/2010/042, *Hastings* UNDT/2010/071, *Lutta* UNDT/2010/097, *Ostensson* UNDT/2010/121; see also former UN Administrative Tribunal Judgment No. 997, *Van der Graaf* (2001). The amount of compensation for emotional distress, of course, depends on the particular circumstances of each case. The Applicant should be recompensed for the negative impact of the breach and the compensation should be proportionate to the established damage suffered by him, taking into account the particular circumstances of the case (*Crichlow* UNDT/2009/028). Having considered the appropriate amount of compensation in this case, I set it at USD15,000.

Request for a public statement

32. As regards the Applicant's request for an order to issue a public statement, having considered the parties submissions and the case record, I find that the announcements made by UNICEF in March 2007 that the evidence did not support the allegations raised by the complainant, were accurate and timeous. Although the Tribunal finds that the requirements of good faith and fair dealing required UNICEF to make the investigation report available to the Applicant after his written request in November 2007, the Tribunal does not accept the Applicant's argument that UNICEF was legally obligated to issue further statements about the matter. Furthermore, the Respondent did not contribute to the continuing adverse publicity and, in fact, took

steps to issue statements concerning the matter. See, e.g., former UN Administrative Tribunal Judgment No. 1095, *Plasa* (2002) (ordering, *inter alia*, compensation for the breach of due process and the attacks on the staff member's reputation occasioned by the publicity given, particularly in the press, by the Administration).

Request for costs

33. With respect to the legal costs incurred by the Applicant outside of the proceedings before the Tribunal, the Tribunal is of the view that these costs were primarily incurred as a result of the actions of the complainant who brought forward the original allegations against the Applicant and continued to pursue action against him in courts of national jurisdiction in 2007. The Tribunal finds that there is insufficient nexus between these legal costs and UNICEF's actions to warrant their award and there is nothing before the Tribunal to show that the Respondent made any explicit or implied promises to the Applicant to cover his legal costs. (See, e.g., Judgment No. 1413, *Sevan et al.* (2008), para. V, finding that there was a valid and binding agreement between the parties that the Respondent would reimburse the Applicant for legal fees incurred in relation to the official investigation into his conduct and that this entitlement could not be unilaterally taken away by the Respondent in the absence of an express reservation.)

34. With respect to the costs incurred by the Applicant in the proceedings before the Tribunal, neither party abused the proceedings and therefore no costs will be awarded under art. 10.6 of the Rules of Procedure.

Conclusion

35. The Tribunal finds that the Applicant should have been provided with a copy of the investigation report following his request in November 2007 and UNICEF's failure to exercise reasonable discretion was in breach of the duty of good faith and fair dealing and warrants compensation. The Respondent is ordered to pay the Applicant USD15,000. This sum is to be paid within 60 days after the Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

36. The Applicant's other pleas, including with respect to costs and further public statements by UNICEF in relation to his case, are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of November 2010

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

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry