



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Federica Midiri, UNFPA

Introduction

1. By application filed on 3 January 2015, the Applicant, a former Procurement Assistant (G-5) in the United Nations Population Fund (“UNFPA”), Procurement Services Branch (“PSB”), Africa team, based in Copenhagen, challenged UNFPA’s decision not to review her complaint of misconduct (“harassment and undermining [her]”) against one of her colleagues, Mrs. C., also a Procurement Assistant in PSB.

2. The Respondent submitted his reply on 6 February 2015. Upon the Tribunal’s instructions, the Respondent submitted additional documentation on the complaints filed by the Applicant with the Office of Audit and Investigations Services (“OAIS”) on 25 June 2015.

3. On 29 June 2015, the Tribunal informed the parties that the case would be decided on the papers, without further hearings or submissions. Subsequently, Judge Laker of the Dispute Tribunal in Geneva issued Judgment *Nielsen* UNDT/2015/061 (Case No. UNDT/GVA/2015/002), dismissing the application in its entirety. Judge Laker found that the Applicant’s complaint against Mrs. C. to OAIS was time-barred and, therefore, not receivable.

4. The Applicant appealed the above-mentioned judgment and, by Judgment *Nielsen* 2016-UNAT-648 dated 24 March 2016 but publicly distributed on 24 May 2016, the Appeals Tribunal found that the Dispute Tribunal erred in not reviewing the “Closure Note” reporting the investigation and conclusions reached by OAIS in the course of its preliminary investigation with regard to the Applicant’s complaints against, *inter alia*, Mrs. C. (“OAI Closure Note”). The Appeals Tribunal vacated the Dispute Tribunal Judgment and remanded the case to the Dispute Tribunal for reconsideration “so that the application may be considered with the benefit of the full OAIS record”.

5. By Order No. 132 (GVA/2016) of 15 June 2016, the Tribunal ordered the Respondent to file the OAI Closure Note by 24 June 2016, and the Applicant to file observations thereto by 8 July 2016. On 22 June 2016, the Respondent filed

the OAIS Closure Note and, on the same day, the Applicant filed her observations.

6. By Order No. 146 (GVA/2016) of 19 July 2016, the Tribunal further ordered the Respondent to file thirteen exhibits referred to in the OAIS Closure Note. On 4 August 2016, the Respondent filed the requested documents.

7. On 5 August 2016, the Applicant submitted additional observations, without leave from the Tribunal.

8. By motion filed on 11 August 2016, the Respondent sought leave to respond to the Applicant's observations of 5 August 2016 ("Respondent's Motion to file Additional Submissions").

Preliminary matters

Respondent's Motion to file Additional Submissions

9. The Tribunal finds that the Applicant did not bring any new information or issue in her observations filed on 5 August 2016 warranting allowing the Respondent to respond to them. The issues at stake in the present case have already been extensively covered by the Respondent's submissions in Case No. UNDT/GVA/2015/002, as well as in the documents submitted in the present case; hence, it is not necessary for a fair disposal of the case to allow further submissions.

10. The Respondent's Motion to file Additional Submissions is therefore rejected.

Hearing

11. Given that the present case was remanded by the Appeals Tribunal specifically for this Tribunal to consider the OAIS investigation file, which has now been submitted by the Respondent, and that the Tribunal is sufficiently informed by the submissions filed by the parties in Case No. UNDT/GVA/2015/002 and in the present one, the Tribunal does not

find it necessary to hold a hearing to adjudicate the case, and will hereby decide on the application based on the written submissions and documentary evidence submitted by the parties.

Facts

12. On 28 January 2013, the Applicant entered the service of UNFPA in the Africa team, PSB, on a one-year temporary appointment (“TA”). Effective 23 September 2013, she was placed on Special Leave with Full Pay (“SLWFP”), and was separated from UNFPA upon the expiration of her TA on 26 January 2014.

13. On 18 July 2013, the Applicant submitted a complaint through the fraud hotline of OAIS, formerly the Division of Oversight Service (“DOS”), UNFPA, alleging “some work problems”.

14. After having obtained further information from the Applicant and conducted a preliminary assessment, OAIS concluded on 18 August 2013 that the matter was of a managerial nature and did not fall within its mandate. OAIS decided to close the case and informed the Applicant accordingly.

15. By email of 18 August 2014, the Applicant addressed to an Investigations Analyst, OAIS, a 68-page complaint against PSB Africa team members, including Mrs. C. The Applicant generally described Mrs. C. as being “unfriendly” and “mean” with her, as well as constantly trying to discredit her. She also referred to an incident that occurred on 15 April 2013 where acid was allegedly added to a tea kettle and Mrs. C. would not have reacted appropriately. Further, the Applicant alleged that Mrs. C. made inappropriate comments against her Russian culture when another PSB staff member had her bicycle stolen.

16. By email of 22 August 2014, the Applicant addressed to an Investigations Analyst, OAIS, a separate complaint against Mrs. C., whom she described as being one of the “PSB Africa team members who were constantly bullying [her] and who were applying efforts in order to destroy [her] career in PSB”.

17. On 10 September 2014, two OAIS investigators had a phone conversation with the Applicant to clarify the information she provided in her complaints against, *inter alia*, Mrs. C. The Applicant confirmed that all the instances she described in her complaints against her former colleagues, including Mrs. C., occurred prior to 22 September 2013. The Applicant was advised that the OAIS investigators would recommend the Director of OAIS to close the case.

18. On 12 September 2014, OAIS formally closed the Applicant's case against Mrs. C. In its Closure Note, OAIS concluded that the complaint against Mrs. C. was irreceivable as the incidents described by the Applicant fell outside the 6-month time limit set forth in the 2013 UNFPA Policy on Harassment, Sexual Harassment and Abuse of Authority ("the Policy"), and her allegations of bullying and harassment "[did] not fall within the scope of prohibited conduct and [did] not, prima facie, meet the reasonable threshold level for misconduct".

19. By email of 16 September 2014, the Applicant was notified that OAIS would not be launching an investigation into her "complaints of harassment, bullying and abuse of authority against 12 staff members at PSB", since OAIS had "concluded its preliminary review of the matter and [had] found that a full investigation [was] not warranted", therefore considering the matter "closed".

20. By email of 22 October 2014, the Applicant submitted a request for management evaluation against OAIS's decision not to launch an investigation into Mrs. C.'s behaviour. She received a reply to her request on 31 October 2014 from the Executive Director, UNFPA, by which she was notified that OAIS decisions were "outside the scope of review by UNFPA management".

Parties' submissions

21. The Applicant's principal contentions are:

- a. The refusal of OAIS to launch the requested investigation is unfounded, as her complaint was duly documented and the improper behaviour of Mrs. C. against her is evident based on all the proof she already submitted on many occasions; and

b. Her case is not being treated seriously by UNFPA, and her managers treated her badly as well, instead of showing her support and integrating her into the PSB team.

22. The Respondent's principal contentions are:

a. The contested decision of OAIS was taken in compliance with its UNFPA 2014 Charter, according to which OAIS has to operate independently and has discretionary authority with respect to the matters it investigates;

b. The challenged administrative decision is furthermore lawful as it was taken in compliance with the requirements provided for in the Policy. Indeed, OAIS determined that the incidents described by the Applicant in her complaint related to "interpersonal relationships amongst colleagues involving criticism and disagreements"; hence, they did not fall under the scope of prohibited conduct and did not meet a *prima facie* reasonable threshold level of misconduct. Moreover, the complaint was time-barred as it was confirmed that it referred to incidents that occurred prior to 22 September 2013, which is not within the six-month deadline provided for by sec. 9.3.1 of the Policy;

c. In addition to the above, the Applicant did not discharge the burden of proving that she suffered any damage from the contested decision; and

d. Consequently, the Respondent asks for the application to be rejected.

Consideration

23. The Appeals Tribunal found in its Judgment *Nielsen* 2016-UNAT-648 that the Dispute Tribunal did not exercise sufficient judicial scrutiny in concluding that the Applicant's complaint against Mrs. C. was time-barred as it did not review the full record of OAIS's investigation, notably its Closure Note. In particular, the Appeals Tribunal held that:

39. In effect, the Dispute Tribunal's Judgment reads as a first instance assessment of the receivability of Ms. Nielsen's allegations of harassment when the proper function of the UNDT is to judicially review the decision of OAIS which is mandated under the 2013 UNFPA Policy to conduct such an assessment, particularly in circumstances where there was a written record capable of being disclosed to the UNDT. Thus, we are not satisfied that the conclusions reached by the Dispute Tribunal have a proper legal basis in the absence of the aforesaid documentary record. A perusal of the OAIS written record was the appropriate starting point from which the UNDT should have commenced its legal and factual review to determine whether OAIS' conclusion not to trigger an investigation had a proper legal basis. Accordingly, we cannot be satisfied that the UNDT Judgment accords with the requirements of Article 11(1) of the UNDT Statute. For the foregoing reason, we will remand the matter to the Dispute Tribunal so that the application may be considered with the benefit of the full OAIS record. We leave it to the discretion of the Dispute Tribunal as to how it wishes to access the relevant information.

24. Having reviewed the OAIS Closure Note and its exhibits, the Tribunal will examine whether the decision of OAIS not to pursue an investigation into the Applicant's complaint for misconduct against Mrs. C. complied with the Policy, as directed by the Appeals Tribunal. For the sake of completeness, the Tribunal will review, in turn, the two grounds raised by OAIS to conclude that the Applicant's complaint against Mrs. C. was irreceivable.

Legal framework

25. The Applicant's complaints against Mrs. C. for "bullying" and harassment is governed by the Policy. The prohibited conduct falling under it is defined in its sec. 4 and is limited to harassment, sexual harassment and abuse of authority. Harassment, which is more directly linked to the present proceedings, is defined in sec. 4.1 as follows:

4.1 Harassment

4.1.1 Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may be present in the form of words, gestures, or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle or cause personal humiliation or embarrassment to another or that causes intimidating, hostile or

offensive work environment. It includes harassment based on any grounds, such as race, religion, color, creed, ethnic origin, physical attributes, gender or sexual orientation. It can include a one time incident or a series of incidents. Harassment may be deliberate, unsolicited and coercive.

4.1.2. The mere expression of disagreement, admonishment, criticism or similar expressions regarding work performance, conduct or related issues within a supervisory relationship shall not normally be considered harassment within the meaning of this document.

26. The Policy establishes an informal and a formal process for dealing with complaints filed under it (see sec. 6 of the Policy). As to the formal process, sec. 6.2 provides that:

Personnel who believe that they were subject to Harassment, Sexual Harassment or Abuse of Authority may submit a complaint to the Director, Division for Oversight Services (“DOS”), alleging that they are or were the victim of Harassment, Sexual Harassment or Abuse of Authority. Section 9 provides further details on the Formal Process.

27. With regard to sec. 9 (“Formal Process”) of the Policy, its relevant parts for the present case read as follows:

9. Formal Process

9.1. Any Personnel and/or former Personnel may file a complaint of Harassment, Sexual Harassment or Abuse of Authority with the Director, DOS.

9.2. Should the Director, DOS, determine that the matter may appropriately be dealt with through an informal process, he or she may refer the matter to the Director, DHR, for an attempt at the informal resolution of the dispute, provided the complainant has given his/her consent to such referral.

9.3. Time limits

9.3.1 A formal complaint of Harassment, Sexual Harassment or Abuse of Authority may be addressed to the Director, DOS, by any Personnel within six (6) months from the date of the last incident of Harassment, Sexual Harassment or Abuse of Authority. These time limits may be extended by the Director, DOS, in exceptional cases (emphasis in original).

9.4 Formal requirements

9.4.1 The complaint shall:

- (a) be in writing;
- (b) state the identity of the alleged offender;
- (c) state the date(s) and location(s) of the alleged incident(s) of Harassment, Sexual Harassment, or Abuse of Authority;
- (d) render a description of the incident(s) in question as well as other relevant circumstances;
- (e) indicate names of witnesses and physical and/or documentary proof.

9.4.2 The complaint shall not be:

- (a) anonymous;
- (b) submitted on behalf of another person.

9.5 Further action

9.5.1 If: (i) the complaint was submitted within the time limits (section 9.3); (ii) the complaint fulfils the formal requirements (section 9.4); and if (iii) the incident or incidents subject to the complaint, on its/their face, fall within the scope of prohibited conduct as described in this document (section 4) and, prima facie, meet a reasonable threshold level for misconduct; then the Director, DOS, may consider the complaint to be receivable.

(...)

9.5.5 If the Director, DOS, determines that the complaint, will not be investigated, he or she shall advise the complainant accordingly in writing, and close the case.

Timeliness of the complaint against Mrs. C.

28. The Applicant filed her complaint against PSB staff members and separately against Mrs. C. on 18 and 22 August 2014, respectively. As recalled above, OAIS found that all incidents involving Mrs. C. described by the Applicant in her documents and conversations with OAIS occurred prior to 22 September 2013. This conclusion was indeed confirmed by the Applicant in her conversation with the OAIS investigators on 10 September 2014, and accords with the fact that the

Applicant was placed on SLWFP on 23 September 2013 and that she never returned to work afterwards. There is no indication that the Applicant had any contact with Mrs. C. after 22 September 2013. Absent any extension of time granted by the Director, OAIS, the Tribunal cannot but confirm OAIS's conclusion that the Applicant's complaints against Mrs. C., as expressed in her submissions of 28 and 22 August 2014, were time-barred pursuant to sec. 9.3.1 and, therefore, irreceivable under sec. 9.5.1 of the Policy.

29. The Tribunal notes that the Applicant's complaint to the DOS fraud hotline on 18 July 2013 has no impact on the receivability of her complaint against Mrs. C. Firstly, it appears that this complaint was of a general nature, namely about "some work problems", and did not specifically mention Mrs. C. Secondly, it did not meet the requirements of a formal complaint under sec. 9.4.1 of the Policy, which requires, *inter alia*, that a formal complaint be made in writing to the Director, OAIS, and state the identity of the alleged offender. Thirdly, the receivability of each complaint must be assessed individually. A complaint that has been closed does not suspend the time limit to submit further formal complaints.

Sufficiency of the allegations to initiate an investigation

30. It is well established that "[a]s a general principle, the investigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action" (*Oummih* 2015-UNAT-518, para. 31, referring to *Abbou* 2010-UNAT-100, para. 34). The Appeals Tribunal further held in *Oummih* that "[t]he 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".

31. A decision not to open an investigation, however, may be subject to judicial scrutiny (*Nwuke* 2010-UNAT-099). In reviewing such decision, the Dispute Tribunal shall examine if the Administration's act or omission in response to a request for investigation was taken in accordance with the applicable law (*Nwuke* 2010-UNAT-099, paras. 36 and 40). In this process, the Dispute Tribunal may

examine whether the applicable procedure was followed, whether OAIS committed a manifest error in the exercise of its discretion, and whether the decision not to initiate the investigation was tainted by ulterior motives (*Staedtler* UNDT/2014/123, para. 60).

32. In the instant case, it has been established that OAIS reviewed the Applicant's complaints against Mrs. C., as well as the documents attached thereto. OAIS investigators also contacted the Applicant by phone on 10 September 2014 to get further information and clarifications in respect of her complaints.

33. In its preliminary assessment, OAIS concluded as follows:

From OAIS' review of [the Applicant]'s eight individual complaints of bullying and harassment against her former PSB colleagues and the supporting information she provided, OAIS found that [the Applicant]'s primary concern was the lack of support she received from her colleagues when she reported to them an incident in April 2013 when allegedly acid had been accidentally been added to a tea kettle. Furthermore, [the Applicant] described feelings of isolation and not being part of her team. [The Applicant] also referred to a hostile working environment, which she specifically attributed to [Mrs. C.]. OAIS considers that the majority of the incidents described by [the Applicant] relate to interpersonal relationships amongst colleagues involving criticism and disagreements.

OAIS further identified an incident in which [the Applicant] described that she felt her two former colleagues, [Mrs. X. and Mrs. C.], made "undermining comments about her Russian culture". When asked to provide OAIS with an example of the "undermining comments about her Russian culture", [the Applicant] described an incident when, during a conversation regarding the disappearance of [Mrs. X.]'s bicycle, [Mrs. C.] made a comment that if [Mrs. X.]'s bicycle did not have a Russian name, it would not have disappeared. [The Applicant] believed that this comment was "weird" and could not understand what [Mrs. C.] meant by it. OAIS does not consider such comment to amount to harassment on the grounds of [the Applicant]'s ethnic origin.

34. Having reviewed the Applicant's complaints against PSB staff members and Mrs. C., the documents attached to these and the OAIS investigation records, the Tribunal is of the view that the OAIS Closure Note accurately captures the substance of the Applicant's complaints against Mrs. C. Apart from the two

incidents recalled in the OAIS Closure Note, these complaints essentially contain vague and general allegations attesting of a difficult interpersonal relationship between the Applicant and Mrs. C., which are not substantiated by any specific facts. Despite OAIS's efforts to obtain clarifications from the Applicant on her allegations, these remained unsubstantiated.

35. As to the two incidents involving Mrs. C., it appears that the Applicant reproaches Mrs. C. to:

- a. not have showed the Applicant support when she reported that she drank water from a tea kettle that allegedly contained acid; and
- b. have said to Mrs. X. that her bicycle would not have been stolen if it did not have a Russian name.

36. The Tribunal recalls that in accordance with sec. 9.4 of the Policy, it is a staff member's responsibility to substantiate a complaint to OAIS with a solid description of the factual circumstances, to allow the investigator to have a clear picture of the alleged incident(s). The staff member shall clearly identify who were the people involved, where, when and how the events took place, and in which way they affected the staff member's working environment or the staff member's rights.

37. The Tribunal finds that OAIS properly exercised its discretion in concluding that the Applicant's allegations against Mrs. C. were insufficient to fall within the scope of the definition of harassment and to *prima facie* establish misconduct. The two incidents reported by the Applicant involving Mrs. C. do not display any "improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation" to the Applicant, even if taken in the context of the Applicant's general allegations about Mrs. C.'s negative attitude towards her. Accordingly, the complaint did not meet the receivability requirements of sec. 9.5.1 of the Policy.

38. The Tribunal finds that the decision of OAIS to close the Applicant's complaint against Mrs. C as irreceivable was taken in compliance with the Policy.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 19th day of August 2016

Entered in the Register on this 19th day of August 2016

(Signed)

René M. Vargas M., Registrar, Geneva