



Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

O'BRIEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Elizabeth Gall, UNDP

Introduction

1. On 7 August 2020, the Applicant, a current staff member with the United Nations Development Programme (“UNDP”), filed an application contesting the 6 January 2020 decision from the Director, Office of Audit and Investigations (“OAI”), UNDP, not to launch an investigation into malicious reporting against him in reference to OAI’s Investigation in Case No. IS/2018/0110.

Facts and procedural history

2. By letter dated 20 April 2018, a Technical Specialist, UNDP Turkey, informed the Applicant that he was under investigation for allegedly having watched sexually explicit material on a handheld device while participating in a meeting held by the International Energy Agency (“IEA”) in March of 2018, which was seen by IEA female staff members. Such incident allegedly happened during an IEA Workshop in Paris.

3. On 23 April 2018, the Applicant received a letter from OAI, directing him to immediately handover his UNDP computer, all external hard drives, and any and all computing device(s), mobile telephone(s) and SIM card(s) in his possession for which UNDP paid the cost and/or usage, or which had been connected to the UNDP ICT Infrastructure (Ethernet and/or Wi-Fi) or used to create, process, store or disseminate UNDP information.

4. On 10 May 2018, the Applicant submitted to the UNDP Ethics Office a request for Protection Against Retaliation (“PaR”) from the Executive Coordinator (“EC”), UNDP, for his:

- a. Flagging in 2017 corruption allegations over UNDP Global Environmental Facility (“GEF”) Standards and Labels for Promoting Energy Efficiency in Russia project (“S&L Project”) with his supervisor, the Head of Energy, GEF Unit, Bureau for Policy and Programme Support (“BPPS”), UNDP; and

b. Cooperating with a subsequent investigation by UNDP's Office of Audit and Investigation ("OAI") into the S&L Project.

5. On 4 June 2018, the Director, UNDP Ethics Office, issued a letter in response to the Applicant's request for PaR. The Ethics Office determined that the information provided by the Applicant did not support a *prima facie* case of retaliation, further concluding that the assertion that the EC, UNDP, engaged in or facilitated multiple detrimental acts against the Applicant in retaliation for reporting corruption concerns to the Head of Energy, GEF Unit, BPPS was not supported by the evidence reviewed. Notably, the Ethics Office also concluded that the Applicant's claim that the EC, UNDP, was responsible for launching the OAI investigation into him in connection with the alleged incident during the IEA Workshop in Paris, was entirely speculative.

6. On 7 November 2018, OAI interviewed the Applicant.

7. On 13 November 2018, the Applicant sent an email to OAI claiming that the evidence of him supposedly watching pictures of naked women had been digitally altered. As proof, on 11 December 2018, the Applicant sent a letter to OAI from the Director, NZ Art Cards, who the Applicant claimed was a digital photo expert who asserted that the images analysed had indications of having been altered.

8. By email dated 17 December 2018, the Applicant requested a review of the 4 June 2018 determination of the UNDP Ethics Office by the Chairperson of the Ethics Panel of the United Nations ("EPUN").

9. On 4 March 2019, the Applicant was informed of the decision of the EPUN Chairperson upholding the UNDP Ethics Office's determination of 4 June 2018.

10. On 8 May 2019, OAI issued its investigation report in Case No. IS/2018/0110 following Allegations of Sexual Harassment and Other Failure to Comply with Obligations at BPPS, Istanbul Regional Hub, UNDP.

11. On 18 October 2019, the Assistant Administrator and Director, Bureau for Management Services, issued a letter to the Applicant exonerating him from the allegations.

12. On 31 October 2019, the Applicant sent a letter to the Director, OAI, claiming that the investigation in Case No. IS/2018/0110 had not been carried out in accordance with the OAI guidelines for conducting investigations and requesting an independent review.

13. On 6 January 2020, the Director, OAI, issued an Interoffice Memorandum finding that the Applicant's complaint did not warrant an independent review of OAI's investigation in Case No. IS/2018/0110.

14. On 4 March 2020, the Applicant requested management evaluation ("MER") of the decision contained in the letter of 6 January 2020 from the Director of OAI.

15. After additional messages from the Applicant to complement his MER, the Senior Legal Advisor, UNDP, wrote to the Applicant on 28 March 2020 to confirm the decisions for which he was seeking review. On 2 April 2020, the Applicant's email from 27 March 2020 containing additional argumentation was considered as the basis for his MER.

16. On 14 May 2020, the MEU found the MER not receivable *ratione temporis* and *ratione materiae*.

17. On 7 August 2020, the Applicant filed the application referred to in para. 1 above.

18. On 9 September 2020, the Respondent filed his reply requesting the Tribunal to determine receivability of the application as a preliminary matter, further asking that if the Tribunal were to find the application receivable, to identify the reviewable administrative decision and grant leave to the Respondent to make his submission on the merits.

19. On 25 September 2021, the present case was assigned to the undersigned Judge.

20. By Order No. 165 (GVA/2021) of 11 November 2021, the Tribunal informed the parties that, for reasons that would be explained in its judgement, it found the application receivable and identified the contested administrative decision as the one referred to in the Applicant's request for management evaluation made on 4 March 2020 (see annex 19 to the application), namely the decision contained in the 6 January 2020 letter from the Director, OAI, UNDP (see annex 14 to the application). Consequently, the Tribunal instructed the Respondent to file his submission on the merits.

21. On 24 November 2021, the Respondent filed his reply on the merits.

22. By Order No. 178 (GVA/2021) of 10 December 2021, the Tribunal instructed the parties that it was ready to adjudicate the matter and would move forward with its judgment.

23. On 13 December 2021, the Applicant filed a Motion to admit and adduce evidence, claiming that an important new piece of evidence had been produced since the filing of the application.

24. By Order No. 181 (GVA/2021) of 16 December 2021, the Tribunal instructed the parties that it would address the issue of admissibility and receivability of the motion in its judgment, further instructing the Respondent to make his comments and produce supplementary evidence, if any, in relation to such motion.

25. On 22 December 2021, the Respondent filed his response to the Applicant's motion of 13 December 2021, requesting its rejection based on the inadmissibility and irrelevance of the evidence submitted.

Parties' submissions

26. The Applicant's principal contentions are:

- a. The UNDP OAI investigation (i.e., IS/2018/0110) was mishandled by the OAI investigator who did not treat the Applicant with fairness and violated sections 39 and 40 of OAI's Investigation Guidelines;

- b. The investigation into the alleged incident at the 2018 IEA Conference in Paris was a result of malicious reporting against the Applicant in retaliation for his whistle-blowing role in the corruption investigations in the S&L Project, GEF, UNDP Russia;
- c. The malicious reporting, false allegations by anonymous witnesses, and fabrication of evidence, was orchestrated by the EC, UNDP, in retaliation for his cooperation with a protected activity. Such fact has not been properly investigated or addressed in the investigation report IS/2018/0110;
- d. As a result, the Applicant seeks rescission of the contested decision, i.e., the letter of 6 January 2020 from the Director of OAI denying his request for an independent review of OAI's investigation, and the subsequent launch of an investigation into the persons who were involved in deliberate malicious reporting against him, together with compensation for damages.

27. The Respondent's principal contentions are:

Submission on Receivability

- a. The application is not receivable because the Applicant did not submit a management evaluation request of the contested decision, namely OAI's decision of 23 April 2020 (see annex 4 to the Respondent's reply) in which OAI informed the Applicant that a formal investigation into the allegations of wrongdoing against the three UNDP staff members was not warranted;
- b. The Applicant's claims of alleged retaliation by the EC, UNDP, are not within the competence of the Dispute Tribunal;
- c. OAI's decision from 6 January 2020 to not launch an independent review of its investigation in Case No. IS/2018/0110, does not give rise to an administrative decision and, thus, does not fall within the Tribunal's competence; and

d. Likewise, the Applicant has no right under the terms of his appointment to request an investigation into staff members of another international organization, i.e., IEA.

Submission on the merits

e. The decision by the Director, OAI, to reject the Applicant's request for an independent review of OAI investigation in Case No. IS/2018/0110 is lawful. The applicant has no right to an independent review under the legal framework governing his terms of appointment. OAI's findings that the allegations against the Applicant were substantiated carries a non-binding recommendation of appropriate disciplinary or administrative action. The Applicant was exonerated and OAI's findings had no material or adverse effect on his terms of appointment;

f. In the absence of an administrative decision with material with adverse effects on the Applicant's terms of appointment, the Applicant's complaint concerning the conduct of OAI investigation are not reviewable by the Dispute Tribunal. Accordingly, the UNDT has no competence with respect to the Applicant's claims of violation of his due process rights during OAI's investigation;

g. The Applicant's claims of alleged retaliation are not within the scope of the application. As per the memorandum of 4 June 2018 from the UNDP Ethics Office, there is no *prima facie* case of retaliation, and the Applicant's assertion that the EC, UNDP, manipulated anonymous witnesses and the complaints in retaliation against him is not supported by the evidence;

h. The Applicant was informed on 4 March 2019 of the above determination, namely that there was no evidence of a causal link between the Applicant's protected activities and the investigation in Case No. IS/2018/0110. The Applicant exhausted his internal remedies under UNDP's Policy on Protection Against Retaliation and did not fulfil the mandatory step of requesting management evaluation of this decision. Thus, he cannot seek an alternative outcome through the Tribunal;

i. OAI's decision not to investigate the Applicant's allegations of wrongdoing against three UNDP staff members is not within the scope of the application. OAI's decision was taken after the Applicant submitted his MER in this case, i.e., on 23 April 2020 (see annex 4 to the Respondent's reply). Further, the Applicant has no right under the terms of his appointment to request the investigation of the three anonymous witnesses who, moreover, are staff members of another international organization, i.e., IEA. Likewise, OAI has no competence to investigate IEA staff members;

j. The Applicant's claim that the decision to launch the investigation registered under Case No. IS/2018/0110 constitutes harassment and abuse of authority has no bearing and is not reviewable by the Tribunal, as the Applicant did not follow the procedures under the UNDP Policy on Harassment, Sexual Harassment, Discrimination and Abuse of Authority; and

k. Overall, the Applicant failed to establish that the contested decision is unlawful.

Consideration

28. The issues for determination include:

- a. Is the decision conveyed in the letter of 6 January 2020 receivable?
- b. Was the investigation against the Applicant mishandled?
- c. Is there evidence of malicious reporting by the three parties who made complaints against the Applicant?
- d. Is there a link between the alleged whistle-blower role of the Applicant and the investigation against him for sexual misconduct?

The decision conveyed in the letter of 6 January 2020

29. The decision conveyed in the letter of 6 January 2020 is considered receivable because, first, it affected the Applicant's conditions of employment pursuant to section 2 of the Tribunal's Statute in that it was allegedly not in compliance with his contractual rights.

30. The Applicant had complained of malicious reporting and the letter from the Director of OAI had concluded that there was no evidence of malicious reporting against him, which implied that there may have been some truth in the view of the investigators that the complaints against him were credible. Such a decision could adversely affect the Applicant's employment record and reputation. Consequently, the Applicant would have a right to dispute it.

31. Second, the Applicant timely and explicitly requested management evaluation of the decision in the 6 January 2020 letter from the Director, OAI.

32. As a result, the Tribunal considers the contested administrative decision as the letter of 6 January 2020 from the Director of OAI and, accordingly, the application is receivable.

Was the investigation mishandled?

33. The Applicant argues that OAI's investigation of the complaints against him was mishandled. The Tribunal finds that in the circumstances surrounding the investigation, there were no unreasonable decisions made which were contrary to OAI's Investigation Guidelines, to due process and unfairly adverse to the interests of the Applicant. The investigator had to be careful to protect the integrity of information obtained and the witnesses' rights to speak freely about the allegations made without interference from others, and such care is not against OAI's Investigation Guidelines.

34. Furthermore, the Applicant had his opportunity to refute all the allegations made, to question the circumstances in which they were made and the motivation behind the allegations, which he did. All follow-up reviews requested by the Applicant upheld the legality and fairness of OAI's investigation, and OAI decided that no independent review was warranted.

35. Thus, the Tribunal is satisfied with the evidence on record that OAI's investigation followed all the required procedures and regulations.

Was there evidence of malicious reporting by three individuals against the Applicant?

36. There is no evidence that the reports made against the Applicant were malicious. OAI's investigator found that the reports were credible and the circumstances under which the complaints were made do not reveal any behaviour leading to conclude that the complaints were malicious. The situation being described where the parties were all in the same room and could observe what the Applicant was seen doing do not appear far-fetched or emotionally inspired.

37. In the circumstances the Tribunal rejects the notion that the reports were made maliciously.

Is there a link between the alleged whistle-blower role of the Applicant and the complaints made?

38. The response to this issue is itself linked to the Applicant's motion of 13 December 2021, which was brought to reinforce his submission that there is a link between the EC, UNDP, and the complainants behind the reports made against him. The Applicant strongly believes that the EC, UNDP, orchestrated the whole complaint of the alleged incident at the IEA 2018 Workshop, in retaliation for his part as a whistle-blower in the investigation into the Russian funded GEF project that, in his views, personally and purportedly offended the EC, UNDP.

39. However, there is no evidence on record that the parties who complained against the Applicant were ever in direct contact with the EC, UNDP, prior to making their complaint, nor that they were being instrumentalized by her.

40. The Applicant's claims in this regard are, therefore, rejected.

The Applicant's Motion of 13 December 2021

41. On 13 December 2021, the Applicant filed a Motion to admit and adduce new evidence. In it, he requests the Tribunal to analyse the attached documents (i.e., a Report of the Independent Review ("RIR") dated 16 January 2021, a correspondence from Transparency International to the UNDP Administrator, dated 26 November 2021, and from the Government Accountability Project and Whistleblowing International Network to officials of the GEF Secretariat, dated 8 December 2021) as relevant evidence of the mishandling of the Applicant's request in respect to the investigation brought against him.

42. On 22 December 2021, the Respondent filed comments in response to the Applicant's Motion. In it, the Respondent argues that the request to adduce documentary evidence should be rejected as the documents are not relevant to the issues in dispute.

43. The Tribunal notes that the RIR records the outcome of an independent review of the Organization's handling of the investigation into corruption allegations in the GEF funded project in Russia. The Tribunal also notes that the RIR mentions a concern over the protection of whistle-blowers against retaliation and that the Applicant is mentioned as a whistle-blower of concern.

44. However, despite the mentioning of the Applicant in the RIR, there is no actual proof of retaliation against him. In fact, the reviewer is clear in saying that he found no evidence to disagree with the Ethics Office statement that the two persons were treated fairly and appropriately in accordance with the applicable Bulletins of the Secretary-General and UNDP whistle-blowers' policy. It does not mention any evidence of malicious reporting against the Applicant.

45. Therefore, the Tribunal fails to see the relevance of the RIR in establishing whether the decision needs reviewing or not. In fact, there is no connection whatsoever in relation to OAI's investigation against the Applicant or his allegation of malicious reporting against him. The only thing the RIR establishes is that in fact the Applicant was a whistle-blower for the investigation of corruption in the Russian S&L Project, something that is not in dispute in this case.

46. Likewise, the correspondence from Transparency International and the Whistleblowing International Network do not provide any facts or proofs relevant to this analysis, as it only requests further investigation into the Applicant's allegations.

47. Consequently, the Tribunal cannot accept the Applicant's Motion to admit and adduce new evidence, as the documentation submitted are not relevant for the fair and expeditious disposal of this case. Pursuant to rules of procedure 18.1 and 18.5, the Applicant's Motion of 13 December 2021 is thus rejected.

Respondent's motion on Receivability

48. The Tribunal accepts the Respondent's submission that UNDP cannot initiate an investigation against employees of another International Organization. Therefore, there cannot be any way of satisfying the notion that an investigation of these individuals would reveal a conspiracy or malice in making the allegations of sexual misconduct against the Applicant. Such a claim therefore would not be receivable.

Analysis on the merits

49. Based on the aforesaid discussion of the issues arising from the facts and legal submissions of the parties, the Tribunal holds that no evidence has been produced which could lead to the conclusion that the investigation of allegations made against the Applicant was mishandled, unlawful or not based on the evidence.

50. Furthermore, there was no evidence leading to establish that the allegations of sexual misconduct were malicious or linked to a retaliation against the Applicant for his whistle-blower role in alleging corruption in the Russian GEF project.

Conclusion

51. In view of the foregoing, the Tribunal DECIDES to dismiss the application in its entirety.

(Signed)

Judge Francis Belle

Dated this 30th day of December 2021

Entered in the Register on this 30th day of December 2021

(Signed)

René M. Vargas M., Registrar, Geneva