



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

MASHHOUR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Tamara Shockley, UNICEF

Introduction

1. The Applicant is a former staff member of the United Nations Children’s Fund (“UNICEF”). She filed the current Application on 19 July 2010 to challenge the validity of the decision taken by the Deputy Executive Director of UNICEF to accept the recommendations of an ad-hoc Panel constituted to review her rebuttals of her 2008 and 2009 performance evaluations.

2. The Applicant requests that both evaluation reports be expunged from her personnel file and all employment records. In addition, she seeks “substantial” damages for the alleged violation of her due process rights and compensation in the amount of three years net base pay for harm to her reputation, stress, professional dislocation, and the abridgement of her rights by the supervisor. She also claims legal costs in the amount of \$20,000.

3. The Respondent argues that the power to determine the efficiency of a staff member’s performance is within the UNICEF Executive Director’s discretionary power, which power was delegated to the Deputy Executive Director. The Respondent contends that the decision to accept the recommendation of the ad-hoc Panel was a valid exercise of this discretionary power as no extraneous factors tainted the Deputy Executive Director’s decision and the Applicant was afforded due process during the performance evaluation rebuttal procedures. Finally, the Respondent claims that the Applicant has suffered no identifiable compensable losses and therefore is not entitled to compensatory damages.

Facts

4. On 17 February 2008, the Applicant commenced employment with UNICEF as a Child Protection Officer in the Egypt Country Office. Prior to joining UNICEF she had held various roles in the NGO sector in Egypt, mainly in the field of development, over a period spanning approximately 20 years.

5. On 24 February 2009, the Applicant received her first performance evaluation report (“PER”) covering the period from when she commenced employment with UNICEF to 31 December 2008 (“2008 PER”). The Applicant received a rating of “2” for three of the five competency areas and a rating of “1” for the other two. The key on the PER described a rating of “2” as “met most expectations, however, there is room for improvement” and a rating of “1” as “met few expectations”. In the 2008 PER the Applicant noted her objection to the ratings, stating that she did not agree with the supervisor’s ratings in all five competency areas.

6. On 22 March 2009, the Applicant submitted a formal rebuttal of her 2008 PER on all three grounds listed in section 2 of Chapter 7 of the UNICEF Human Resources Handbook (“Handbook”).

7. On 2 April 2009, Mr. Steven Allen, Director of the Human Resources Division, replied to the Applicant on behalf of the Deputy Executive Director informing her that it was not acceptable to make a formal rebuttal on all three grounds and that she was required to elect between basing her rebuttal on discrimination alone or basing it on other grounds.

8. On 7 April 2009, the Applicant replied to Mr. Allen requesting clarification of the terms “discrimination” and “abuse of authority” and what the implications were of submitting a formal rebuttal based on discrimination versus a formal complaint of harassment and abuse of authority.

9. On 12 April 2009, the Applicant wrote to Mr. Peter Frobel again requesting clarification of the term “discrimination” and her rebuttal rights. She stated:

I have asked Mr. Steven Allen several questions which **were not answered** like what’s the difference between filing a complaint for harassment and abuse of authority AND a formal rebuttal on the grounds of discrimination. I have also asked for a specific distinction between discrimination and abuse of authority especially in the context of PAS. [Emphasis in original]

She did not receive a response from either Mr. Allen or Mr. Frobel.

10. On 4 May 2009,¹ after consulting with the joint ombudsperson's office, the Applicant submitted an amended rebuttal statement of the 2008 PER formally on the grounds of discrimination only but nevertheless cited concerns about abuse of authority and harassment.

11. In the rebuttal statement to her 2008 PER, the Applicant claimed that she had come to UNICEF highly recommended by ex-supervisors and ex-employers for technical expertise, results-oriented management skills, leadership skills and maintaining positive communication relationships with partners and colleagues. She annexed performance reviews by former employers as evidence that she had been rated highly in previous positions. Among a range of other grievances, she claimed that the "very specific manner" in which the supervisor stated her comments in the 2008 PER gave a "very strong indication of a discrimination and abuse of authority case." The Applicant's rebuttal statement went on to describe a number of specific incidents of alleged discrimination and abuse of authority and a history of complaints against the supervisor.

12. By letter dated 8 June 2009, the UNICEF Deputy Executive Director, Mr. Omar Abdi, rejected the Applicant's rebuttal, finding that the Applicant had not proved discrimination. The letter included the following comments in relation to discrimination:

That you disagree with particulars of your supervisor's management style, however, does not qualify these interactions as "discrimination," which would have to be based on specific grounds of a discriminatory nature such as, for example, gender, religion, sexual orientation, nationality or ethnicity.

13. On 9 September 2009, the Applicant filed an application to appeal the Deputy Executive Director's decision to this Tribunal. The Applicant claimed that the 2008 PER and the rebuttal procedure violated her right to due process and requested that the 2008 PER be expunged from her personal file.

14. On 28 September 2009, the Applicant completed her second PER for the period 1 December 2008 to 15 September 2009 ("2009 PER"). She received a

¹ The Applicant and Respondent state different dates in their pleadings but nothing turns on this discrepancy.

rating of “2” in all competency areas. Her immediate supervisor, Ms. Nadra Zaki, testified that overall there had been an improvement in the Applicant’s performance since the previous review period but there was still room for improvement.

15. On 8 October 2009, the parties filed a joint submission with the Tribunal stating that the parties were negotiating a settlement agreement and requested, pursuant to article 19 of the Rules of Procedure, suspension of the proceedings.

16. On 27 October 2009, the Applicant submitted a formal rebuttal of the 2009 PER on the grounds of discrimination but made references to issues of harassment and abuse of authority.

17. On 3 November 2009, Counsel for the Respondent submitted a settlement agreement between the Respondent and the Applicant to the Tribunal (“Settlement Agreement”).

18. The Applicant consented to the Settlement Agreement on the condition that she maintained the right to appeal the decision of the ad-hoc panel.

19. In accordance with the settlement agreement, an ad-hoc panel was set up consisting of two members from the Middle East and Northern Africa Regional Office and one member from the Jordan Country Office (“Panel”).

20. On 19 November 2009, the Registrar of the Tribunal informed the parties that based on the Settlement Agreement the Applicant’s case (UNDT/NBI/2009/45) was closed.

21. The Panel conducted a substantive review of the documentation, including statements submitted by the Applicant, the Applicant’s supervisor, the second reporting officer, the Representative, the chief of operations and members of the Egypt Country Office child protection service, as well as additional documentation relating to the Applicant’s work relevant to the performance assessment. The Panel also conducted interviews with UNICEF staff members (including former staff members), government partners, staff of other United

Nations agencies and the Applicant over the period 16 to 18 February 2010. In total, seventeen persons were interviewed by the Panel's three days in Egypt.

22. The Panel stated that its mandate and scope "includes the review of rebuttal statements issued by [the Applicant] for 2008 and 2009, with specific focus on allegations of discrimination, as well as other factors therein that may have impacted on [the Applicant's] performance, as highlighted in respective PER rebuttal documents for both years."

23. By memorandum dated 25 January 2010, the Applicant was informed that her fixed-term employment contract would be renewed until 31 March 2010 to allow the completion of the PER rebuttal procedures but that there was no expectancy of renewal beyond that date.

24. On 10 March 2010, the Chairperson of the Panel submitted to the Deputy Executive Director the "Report of the Ad-hoc panel constituted by UNICEF to review the Performance Evaluation Rebuttal Statements of [the Applicant], Child Protection Officer, Egypt Country Office in line with Settlement Agreement UNDT/NBI/2009/45" ("Report").

25. By letter dated 30 March 2010, the Deputy Executive Director wrote to the Applicant attaching the Report.

26. Based on its review, the Panel concluded that the grounds of discrimination were not substantiated. It stated at paragraph 4.2 of the Report:

[G]iven that due to personal circumstances wherein there has actually recently been a change in supervisor for [the Applicant], it has been confirmed that in relation to output and capacity, concerns related to the staff member's work vis-à-vis UNICEF reasonable expectation of deliverables of an NOB officer remain; it therefore suggest [sic] that the issues at hand go beyond personality differences and are indeed mainly grounded in performance related issues. The panel has concluded therefore that despite the staff member's perceptions that discrimination has been at play and has impacted her performance in both reporting periods, the grounds of discrimination as articulated by the staff member and based on the panel's own understanding of the term discrimination...are not substantiated.

27. The Panel made seven recommendations, including that the rating for the competency of “drive for result” be raised from “1” to “2” in the 2008 PER but that all other ratings remain unchanged.

28. On 31 March 2010, the Applicant was separated from service.

29. On 26 April 2010, the Applicant finalised her third and final PER for the period October 2009 to March 2010. This PER was completed by a new supervisor. The ratings were higher than those of the previous supervisor.

30. On 19 July 2010, the Applicant lodged an application with the Tribunal appealing the decision taken by the Deputy Executive Director to accept the recommendations of the Panel and a hearing was held by the Tribunal on 10 May 2012.

Issues

31. The issue in this case is whether the administrative decision taken by the Deputy Executive Director to accept the findings of an ad-hoc panel constituted to review the performance evaluation reports and rebuttal statements of the Applicant was a valid exercise of his discretionary authority.

Applicant’s submissions

32. The Applicant’s submissions may be summarized as follows:

a. There is no valid policy reason offered to justify why, if an applicant chooses to rely on the ground of discrimination in a rebuttal statement, the applicant is prohibited from relying on either of the other two grounds listed in section 2, Chapter 7 of the Handbook.

b. The Panel did not undertake a thorough evaluation of the evidence in dispute and failed to take into account the requirements of due process encompassed in the organization’s procedures for challenging an evaluation based on discrimination and abuse of authority. The major focus of their inquiry settled on the ratings and comments of the supervisor

and the Applicant's allegedly weak technical capacities and performance although "disagreement with ratings" or technical performance were not chosen as the grounds for rebuttal.

c. The Panel ignored compelling evidence from prior employees, counterparts and co-workers that called into question the objectivity of the supervisor's criticisms of the Applicant's performance.

d. The Panel failed to adhere to the principles of due process for the following reasons.

i. The Panel did not analyze the programme that had been established to monitor both the Applicant and her supervisor in 2009, which programme was later abandoned after a short time.

ii. The Panel's conclusions were based largely on personal criticism that was not vetted with the Applicant.

iii. The Representative managed the interview schedule and communications even though the Representative was involved in the dispute between the Applicant and the Respondent.

iv. Only five of the Applicant's eight cited references were interviewed with the last one being interviewed by telephone for a few minutes at the end of the last day of the Panel's visit.

v. The formal rebuttal statement to the 2009 PER was not reviewed by members of the Panel before the interview process.

vi. The Applicant's interview was not completed. After conducting the first interview session on 16 February 2010, the Panel asked to continue the interview the following day but the second interview session was cancelled.

vii. The 2009 PER was not discussed in the Applicant's interview with the Panel.

viii. A reference made to one of the witnesses' statements in the interview was partial and misrepresented.

Respondent's submissions

33. The Respondent's submissions may be summarized as follows:

- a. The UNICEF Executive Director has broad discretionary authority with regard to performance management of staff members and the decision to accept the recommendations of the Panel was a valid exercise of discretionary authority. Article 101 of the Charter vests the responsibility for appointing staff in the Secretary-General and directs the Secretary-General to give paramount consideration to employing staff of "the highest standards of efficiency, competence and integrity". The Secretary-General and, via delegation, the Executive Director of UNICEF have the authority to determine whether a staff member has met the required standards of performance.
- b. The Applicant was afforded due process because the Deputy Executive Director's decision was taken in accordance with the procedures of the Handbook and the terms and conditions of the Settlement Agreement. The Panel was duly constituted in accordance with the Settlement Agreement and it conducted a thorough investigation.
- c. The Deputy Executive Director's decision to accept the recommendation of the Panel was not vitiated by improper motives or any other extraneous considerations.
- d. The assessment of performance is the prerogative of supervisors and management yet the Applicant is essentially requesting the Tribunal to conduct another review of her performance in 2008 and 2009.
- e. The Applicant is not entitled to any compensable damages because she suffered no identifiable compensable losses.

Consideration

34. In *Miyazaki* UNDT/2010/078, the Tribunal observed that the performance evaluation process “should essentially be a management process in which judicial review plays a limited role.” It has also been said that it is not the role of the Tribunal to substitute its own judgment for that of the panel constituted to review a staff member’s performance, nor to reevaluate that performance (see *Gabriel van-Dongen* UNDT/2011/197 and *Morsy* UNDT/2012/043). These observations are correct but are subject to qualification. The Tribunal is tasked with determining whether the correct process was followed in evaluating a staff member’s performance and ensuring that the discretionary power of management was not abused or exercised in a capricious or prejudicial manner. Ensuring correct procedure is a way of safeguarding staff members’ due process rights. The examination of whether correct procedures were followed extends also to the rebuttal process.

Was the Applicant denied due process?

35. For the reasons that follow, the Tribunal finds that the Applicant was denied due process when she sought to rebut her 2008 PER and 2009 PER.

36. An evaluation exercise of a staff member’s performance is an important component of the employer/employee relationship and impacts both on the career of the staff member and on the working environment. Great care should therefore be taken to guarantee the integrity of the process, the input of the staff member, and the interest of the Organization. Not all staff members are willing to accept an unfavourable rating and that is why a procedure to rebut the performance ratings exists so as to enable grievances against ratings to be challenged and determined by an independent panel.

37. The terms and conditions of appointment of UNICEF staff are set out in the United Nations staff regulations and rules.² The Organization’s performance appraisal system, which is governed by ST/AI/2002/3, was promulgated pursuant to former staff rule 101.3 and is therefore applicable to UNICEF staff members.

² CF/AI/2009-005 (Types of appointment and categories of staff).

Sec. 15 of ST/AI/2002/3 deals with the rebuttal process and sec. 15.1 relevantly provides:

Staff members who disagree with the performance rating given at the end of the performance year may...submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given.

38. ST/AI/2002/3 does not contain any limitations on the grounds upon which a rebuttal statement may be based. However, sec. 2 of Chapter 7 of the UNICEF Handbook, which deals with rebuttals, provides that a formal rebuttal is admissible “under one or more of the following circumstances”:

- a. if the staff member alleges discrimination in which case the formal rebuttal must be based solely on this allegation;
- b. if the staff member alleges that the PAS procedures have not been followed and that he/she can demonstrate that the non-observance of those procedures has directly and adversely affected the PER; or
- c. if the staff member’s performance in two or more areas is rated as “2” or below, or if the performance in one or more areas has been rated as “1” and the staff member is in disagreement.

39. The Applicant originally sought to challenge her 2008 PER on all the grounds listed in the UNICEF Handbook, as well as harassment and abuse of authority. However, as noted above, she was informed by Mr. Allen that she could not base her claim on multiple grounds if she also wished to allege discrimination. Specifically, he advised the Applicant:

You may either:

- File a formal rebuttal against your 2008 PER based on “discrimination,” without reference to any other grounds, with relevant, supporting documentation; *or*
- File a formal rebuttal against your 2008 PER on grounds other than discrimination as per paragraph 7.2.38 b) ii) and/or iii) of the Manual; *or*
- File a formal complaint of harassment and abuse of authority to the Executive Director or Director, Office of Internal Audit, not necessarily relating to your 2008 PER, but including other allegations of harassment or abuse of authority. [Emphasis added]

40. The Applicant sought clarification of Mr. Allen's letter on two separate occasions but received no response to her queries. She ultimately decided to base her rebuttal claim on the ground of discrimination alone but made reference to harassment and abuse of authority.

41. The above facts evidence two serious procedural flaws, both of which circumscribed the Applicant's right to challenge her performance appraisals. First, the UNICEF Handbook unduly restricted the grounds on which the Applicant could rebut her performance appraisal in a way not envisaged by ST/AI/2002/3, which merely requires a staff member to set forth briefly the "specific reasons why a higher rating should have been given". It does not limit the reasons that may be put forward. Administrative issuances have greater legal authority than policies such as the UNICEF Handbook. The Tribunal in *Villamorán* UNDT/2011/126 set out the legislative hierarchy as follows:

At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

42. To the extent that the UNICEF Handbook and ST/AI/2002/3 were inconsistent, ST/AI/2002/3 prevailed. A policy document of a single United Nations entity cannot be allowed to displace the rights and obligations agreed to at the level of the entire Organization and promulgated by the Secretary-General via an administrative issuance. To allow this to occur would result in inconsistent treatment of different staff members contrary to laws established by the Secretary-General in his capacity as the chief administrative officer of the Organization. Accordingly, by restricting the grounds on which a staff member could rebut a performance appraisal, UNICEF unlawfully circumscribed its staff members' rights, including those of the Applicant.

43. The second circumvention of the Applicant's rights occurred as a result of Mr. Allen's letter. When Mr. Allen informed the Applicant that she could not

challenge her performance ratings on grounds other than discrimination, he prevented her from exercising her fundamental right to place before the Rebuttal Panel all her grievances flowing from harassment, discrimination and abuse of authority. Staff rule 1.2(e) provides that “[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.” At the stage of the application for rebuttal, it was immaterial whether the Panel would have found these allegations substantiated. Mr. Allen had no right or authority to vet the application and discourage the Applicant from proceeding as she had originally intended to. By so acting, Mr. Allen placed himself in a situation of conflict. Mr. Allen should have left it to the Rebuttal Panel to determine whether the rebuttal grounded on discrimination, harassment, abuse of authority and the other grounds would be receivable or not. By misinforming the Applicant and effectively causing her to abandon the other legitimate grounds of rebuttal she had intended to rely on, he flawed the whole rebuttal process (see in this connection, ILOAT Judgment No. 2956, 2 February 2011).

Did the Rebuttal Panel conduct the review process correctly?

44. Even if the above procedural defects were not present, the rebuttal process itself was flawed because the Rebuttal Panel failed to address properly the sole ground on which the Applicant ultimately based her rebuttal, namely discrimination. The Tribunal also observes that the Rebuttal Panel’s Report appeared to be one-sided, giving more weight to the evidence of Ms. Zaki than that of the Applicant.

45. The Rebuttal Panel had before it an application grounded on discrimination yet failed to provide a clear definition of the concept and did not refer to any accepted legal definitions. It also appeared to conflate the concept of discrimination with those of harassment and abuse of authority. In its Report, a footnote to the word “discrimination” stated that the panel “reviewed the claim of discrimination as articulated by [the Applicant] which then includes allegations and linkages of discrimination and the realm of harassment and abuse of authority.” It is not clear precisely what is meant by this statement. In the

“Conclusions” section of the Report, the Panel referred to its “own understanding of the term discrimination” which “would require a demonstration of behaviour on the part of the supervisor which is different either on grounds or [sic] gender, religion, sexual orientation, ethnicity, or applying different standards in assessing performance among team members”.

46. The Secretary General’s Bulletin ST/SGB/2002/13, entitled “Status, basic rights and duties of United Nations staff members of 1 November 2002 was adopted by UNICEF in its Administrative Instruction CF/AI/2002-017, 20 November 2002. Discrimination is referred to in the document adopted by UNICEF as follows: “Freedom from discrimination is a basic human right. International civil servants are expected to respect the dignity, worth and equality of all people without any distinction whatsoever”.

47. The Panel did not refer to the definition of discrimination contained in any UNICEF document but found on the facts there was no discrimination. The Tribunal finds this very strange as the Panel would have been expected to at least seek guidance from the Administration as to UNICEF’s policy on discrimination and be guided by the rules applicable to UNICEF in matters of discrimination.

48. The Applicant gave no particulars about her claim of discrimination. From a perusal of the facts it can be inferred that she was not invoking discrimination on the ground of sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language or social origin. It was for the Panel to determine whether the case of the Applicant fell within the ambit of CF/AI/2002-017. It was not enough for the Panel to come up with its own vague definition of “discrimination” and base its Report on that.

49. As discrimination was the key ground of the Applicant’s rebuttal, it was vital that the Panel defined the concept clearly and examined the facts of the case in light of that definition. It should also have referred to the definitions of “harassment” and “abuse of authority” in CF/EXD/2008-004 (Prohibition of harassment, sexual harassment and abuse of authority) as it purported to address these allegations in its review. Absent any evidence of a proper understanding of these concepts on the part of the Panel, the Tribunal has serious doubts about

whether these allegations were properly addressed with the result that the findings of the Panel cannot be relied on.

Conclusion

50. In view of the serious procedural flaws in the rebuttal process, the Tribunal finds that the Secretary-General should not have accepted the recommendations of the Panel. His decision to do so was therefore an invalid exercise of his discretionary authority.

51. The evidence overwhelmingly shows that the Applicant was subjected to a work environment that can only be described as hostile and harassing in view of the attitude of her supervisor towards her. Instead of engaging with her in compliance with the rules of the Organization the supervisor embarked on a shouting crusade against her and even went to the length of calling her a liar. This in itself is clear proof of how the supervisor was trying to demean the Applicant not only as an individual but in front of her colleagues. In this context the Tribunal will refer to paragraph 15 of ST/SGB/2002/13, which provides that:

Managers and supervisors are in a position of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when they are subject to criticism arising from carrying out of their duties.

52. Whatever the supervisor's views were on the manner in which the Applicant was working and her performance she nonetheless had the duty to ensure that the work environment which she managed was conducive to the needs of all the staff members in her section, including the Applicant. The evidence on record shows judgment on the part of Ms. Zaki as a manager to have been both poor and objectionable.

53. The Tribunal therefore orders the Respondent to pay to the Applicant the amount of six month's net base salary and USD10,000 for moral damages.

Further, it is ordered that the Applicant's 2008 PER and 2009 PER be expunged from her personnel records.

(Signed)

Judge Vinod Boolell

Dated this 30th day of October 2013

Entered in the Register on this 30th day of October 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi