



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Federica Midiri, UNFPA

Introduction

1. By application filed on 21 December 2015 and supplemented on 12 January 2016, the Applicant, a former Procurement Assistant (G-5) in the United Nations Population Fund (“UNFPA”), Procurement Services Branch (“PBS”), Africa team, based in Copenhagen, contests the two following decisions:

- a. The decision of the Officer in Charge (“OiC”), Investigation Branch, Office of Audit and Investigation Services (“OAIS”), UNFPA, of 4 September 2015 “not to forward [her] complaint/allegation on OAIS’s inaction and misconduct toward her (harassment, discrimination and abuse of authority toward [her])”; and
- b. The implied decision of the Director, OAIS, of 2 October 2015, not to trigger an investigation and “admit the fact of misconducts (sic.)” of UNFPA Division of Human Resources (“DHR”) for failure to complete the rebuttal process of her Performance Appraisal and Development (“PAD”) for 2013.

Facts

2. The following facts are taken from the Applicant’s submissions to the Tribunal in the instant case, and from the judgments of this Tribunal in respect of other cases involving the Applicant which, as the Applicant states, are inter-related.

3. 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, and was separated from UNFPA upon the expiration of her TA on 26 January 2014.

4. As of April 2013, the relations between the Applicant and some of her colleagues and supervisors became difficult.

5. From July 2013 onwards, the Applicant submitted several complaints to OAIS for harassment, discrimination and abuse of authority against a number of PBS staff members and supervisors.

6. She later submitted complaints to OAIS against its staff members, for their mishandling of her complaints against PBS' staff members and supervisors. Finally, she submitted complaints to OAIS against its Director, the Chief of DHR and the Executive Director of UNFPA for their inaction.

7. Whereas the exact number and date of complaints lodged by the Applicant to OAIS is unclear, an Investigations Specialist, OAIS, confirmed that 12 complaints filed by the Applicant between 1 July and 12 September 2014 had been closed without further action by 16 September 2014, and three complaints filed on 20 October 2014, 10 December 2014 and 23 December 2014, respectively, were under examination as of 4 March 2015. The Director, OAIS, also confirmed by email of 9 July 2015 that an unspecified number of complaints lodged by the Applicant had been closed, as she had already been informed, and that some others remained under review.

8. On 14 January 2014, the Applicant's performance evaluation report for 2013 was completed, and she received the following ratings: "not proficient" for core competencies, "developing proficiency" for functional competencies and "partially achieved outputs" for developmental outputs. Therefore, the Applicant was not recommended for consideration in respect of any employment opportunity within PBS, UNFPA, in the future.

9. On 14 February 2014, the Applicant initiated a rebuttal of her performance evaluation, for which she received an acknowledgement of receipt on 3 March 2014. She provided additional documents related to her rebuttal case on 30 April 2014, but did not receive any further reply since then.

10. By email of 21 August 2015 to the OiC, Investigation Branch, OAI, the Applicant lodged a complaint against OAI's inaction to address her "complaints so far" before said office, and in particular against the Director, OAI. The Applicant requested said OiC to "forward the current complaint to a correct person/Office, who can do the assessment of actions of [the Director, OAI]".

11. By email of 3 September 2015, the OiC, Investigation Branch, OAI, responded to the Applicant that he was not in a position to advise her as "there is no investigative office that has automatic, inherent jurisdiction over UNFPA OAI staff", and that he was in a position of conflict of interest due to the fact that he had already reviewed some of her complaints.

12. By email of 4 September 2015, the Applicant replied to the OiC, Investigation Branch, OAI, that she was not seeking his advice but rather requesting him to forward her complaint of 21 August 2015 "to a correct receiver" or to review it himself.

13. By email of the same day, the OiC, Investigation Branch, OAI, responded that he did not have authority to investigate complaints against OAI staff members or its Director, nor to refer complaints to external investigative bodies. He further advised the Applicant that it would be "usual practice" for complaints against OAI staff members to be sent to its Director or, when said complaints involved the Director, to the Executive Director of UNFPA; however, considering that in the present case the Applicant had brought complaints against the Director of OAI and the Executive Director of UNFPA, "it remain[ed] [her] prerogative to determine whether or not to do so".

14. On 12 September 2015, the Applicant submitted a request for management evaluation of the decision of 4 September 2015 by the OiC, Investigation Branch, OAI, "not to forward [her] complaint/allegation on OAI's inaction and misconduct toward [her] (harassment, discrimination and abuse of authority toward [her])". She further stated that said request for management evaluation was "also a direct complaint on OAI to the UNFPA Executive Director because as advised by [the OiC, Investigation Branch, OAI,] if the complaint is addressed on OAI Chief it should be directed to UNFPA [Executive Director]".

15. On 30 September 2015, the Applicant sent an email to the Director, OAIS, requesting her to, by 2 October 2015:

a. “admit the fact of misconduct from UNFPA employees side (DHR Chief of Learning Branch who does the PAD) and all those who [are] supposed to work with him on [her] PAD rebuttal” or, if no misconduct is found, to “ensure that [she] will get either the final PAD or the new (2nd) PAD Rebuttal Panel’s Report”; and

b. “extend [her] rights as a staff member, so that [she] could achieve justice at least in UNDT and UNAT”.

16. On 14 October 2015, the Applicant submitted a request for management evaluation against the implied decision of the Director, OAIS, of 2 October 2015 “apparently not to trigger the investigation and not to admit the fact of misconducts of UNFPA DHR Office not [to] issue the final Rebutted PAD 2013 for [her] work performance and [her] competencies”.

17. On 21 December 2015, the Applicant filed her application before this Tribunal, wherein no contested decision(s) were identified, and without its Annex 24.

18. By Order No. 5 (GVA/2016) of 6 January 2016, the Tribunal ordered the Applicant to file, by 14 January 2016, an amended application clearly identifying the contested decision(s), and Annex 24 to her application.

19. On 12 January 2016, the Applicant submitted, on an *ex parte* basis, a 62-page document entitled “Reply to UNDT Order GVA/2016/005”, which reproduces, in its text, the content of a number of documents, together with a motion requesting that her additional submissions remain confidential. In her additional submissions, the Applicant identified the contested decisions as being those listed in para. 1 above and reproduced the text of her requests for management evaluation quoted in paras 14 and 16 above. Furthermore, the Applicant alluded to her previous requests in other cases for the recusal of the undersigned Judge.

Applicant's submission

20. The Applicant's principal contentions are:

- a. She was misled by OAIS staff members about the requirement to submit a written complaint under UNFPA Policy on Harassment, Sexual Harassment and Abuse of Authority;
- b. OAIS uses a flexible threshold in deciding whether to investigate allegations of misconduct, placing it higher for her than in other cases involving less serious allegations;
- c. The OiC, Investigations Branch, OAIS, misconstrued OAIS' role in stating that it is not its role "to admit the facts of misconduct";
- d. OAIS failed to ensure that it had all the evidence necessary to assess her complaints;
- e. She was discriminated against by OAIS staff members;
- f. UNFPA has provided no explanation or justification for the delay in completing her PAD rebuttal, which, according to the UNFPA Policy on PAD rebuttal, should be completed within a month;
- g. OAIS Director failed to extend her staff member rights;
- h. The overall situation into which UNFPA has placed her amounts to torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- i. The Applicant requests the Tribunal to:
 - i. Admit the improper/poor work performance of UNFPA OAIS staff members listed in her requests for management evaluation of 12 September and 14 October 2015;
 - ii. Admit the fact that OAIS prevents justice as it never agreed to extend her staff members rights;

- iii. Admit that the impossibility for her to obtain justice in the UN system allows her to bring the matter raised in her application before the Danish domestic courts and, possibly, the European Court of Human Rights;
- iv. Admit the fact that OIAS ignored the multiple unlawful actions of UNFPA staff members toward her and discriminated against her;
- v. Admit the fact that UNFPA “tortures/tortured” her;
- vi. Award her damages equivalent of two year salary, or, alternatively of the equivalent of 13 month salary in compensation of expenses and time spent to limit the damages caused to her;
- vii. Order UNFPA to issue the final PAD and remove the conclusion that she is not recommended for further employment within PSB, UNFPA; and
- viii. Award her compensation for moral damages.

Consideration

Recusal of the undersigned Judge

21. The Tribunal recalls that the Applicant requested the recusal of the undersigned Judge in five cases currently pending, namely UNDT/GVA/2015/028, UNDT/GVA/2015/075, UNDT/GVA/2015/076, UNDT/GVA/2015/079 and UNDT/GVA/2015/080. The motions for recusal were rejected by order No. 015 (NBI/2016) of 2 February 2016.

22. Furthermore, the undersigned Judge notes that the UNDT Geneva Registry duly notified the Applicant about his assignment to the instant case, and that the Applicant did not request his recusal; rather, she accepted in her additional submission that the undersigned Judge handle the instant case until and unless a decision is made by the President granting her motions for recusal in the above-mentioned cases.

23. Indeed, whereas the Applicant reiterated her concerns that the undersigned Judge may issue a judgment where the description of facts solely reflects the Respondent's submissions and provides her "bad results", she stated:

I do not want to make big noise again with this case (by addressing and contacting the UNDT President in regards to recusal), and I will leave it to UNDT Geneva Office to decide on how to act. Possibly, UNDT Geneva can lead this case until the decision about the recusal will be done (sic.). And if in other my cases the recusal will happen at some point, in this case the recusal should also be done.

24. In view of the above, and given that the undersigned Judge does not consider to have or appear to have a conflict of interest as defined in art. 27 of the Tribunal's Rules of Procedure, the undersigned Judge sees no impediment to his handling of the instant case.

Decision not to forward the Applicant's complaints concerning OAIS and its Director

25. Art. 2(a) of the Dispute Tribunal's Statute provides that the Tribunal is competent to hear and pass judgement on an application filed by an individual "[t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". Pursuant to the well-established jurisprudence of the Appeals Tribunal, an administrative decision "is a unilateral decision taken by the Administration in a precise individual case (individual administrative act) which produces direct legal consequences to the legal order" (see e.g. *Al Surkhi et al.* 2013-UNAT-304).

26. The Appeals Tribunal emphasised that "the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce[] direct legal consequences' affecting a staff member's terms or condition of appointment" (*Wasserstrom* 2014-UNAT-457).

27. In the instant case, the Applicant challenges the "decision" of 4 September 2015 by the OiC, Investigations Branch, OAIS, not to forward her complaints against OAIS and its Director to another, unspecified, entity.

28. The Tribunal notes that pursuant to para. 52 of OAIS's Charter:

Allegations of misconduct against OAIS personnel shall be reported to the Executive Director who shall seek advice from the Audit Advisory Committee. Such allegations cannot be reviewed or investigated by OAIS.

29. It is clear from this provision that OAIS has no authority to review the Applicant's complaints against its personnel, and that these had to be submitted to the Executive Director. Consequently, the OiC, Investigations Branch, OAIS, rightfully advised the Applicant about considering to submit her complaints to the Executive Director, if she deemed it appropriate.

30. The Tribunal finds that the response of the OiC, Investigation Branch, OAIS, to the Applicant's request for transmittal is no more than an advice. It carries no direct legal consequence on the Applicant's contractual rights, if any, and, therefore, cannot be considered as an administrative decision. Indeed, the Applicant remained at liberty to submit her complaints to any authority she deemed appropriate, and the refusal by the OiC, Investigations Branch, OAIS, to accommodate her request for transmittal did not affect her rights in any way. In this respect, the Tribunal recalls that it is incumbent upon the aggrieved staff member to seek redress before the competent authority, and that an invitation to do so, such as in the present case, cannot be validly appealed before this Tribunal.

31. Therefore, the Tribunal finds that the application, insofar as it challenges the decision not to forward the Applicant's complaints concerning OAIS and its Director, is not receivable *rationae materiae*.

Implied decision not to investigate allegations of misconduct

32. The Applicant contests the implied decision of 2 October 2015 by the Director, OAIS, not to trigger an investigation into DHR's misconduct for failure to complete her PAD 2013 rebuttal process. In particular, the Applicant asserts that the deadline for completing a rebuttal process at UNFPA is one month, and that failure to do so one year and seven months after the submission of her rebuttal statement amounts to misconduct imputable to DHR.

33. At the outset, the Tribunal notes that the Applicant interprets the absence of a response by the Director, OAIS, to her request for investigation of 30 September 2015 within the deadline set forth thereto, i.e. 2 October 2015, as a decision not to trigger the requested investigation. In this respect, the Tribunal stresses that whereas “not taking a decision is also a decision” (see, e.g. *Nwuke* 2010-UNAT-099, para. 25), a failure to act would only amount to an implied decision if the Administration fails to issue a decision within the set legal deadline, if any, or within a reasonable time taking into account the circumstances of the case.

34. In the instant case, the 2-day deadline set by the Applicant cannot in any way be considered as binding. It is also unreasonably short. Therefore, the absence of a response by Director, OAIS, within the deadline in question cannot, in and of itself, be interpreted as an implied decision.

35. Even at the time the request for management evaluation was filed, i.e. on 14 October 2015, the time elapsed from the date at which the Applicant filed her request for investigation was not long enough to conclude that the Administration took an implied decision that may be subject to the review of this Tribunal, if it otherwise fell within the scope of its jurisdiction.

36. In any event, the Tribunal recalls that it may review a decision not to undertake an investigation only if “the contested administrative decision affect[s] the staff member’s rights directly” (*Nwuke* 2010-UNAT-099). In this respect, the Appeals Tribunal has stressed that:

In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.

A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures. (*Nwuke* 2010-UNAT-099, paras 29-30)

37. In light of the foregoing, the Tribunal shall determine whether the applicable regulations and rules grant the Applicant a right to compel OAIS to conduct an investigation into DHR's alleged misconduct for a delay in the completion of her PAD rebuttal process.

38. In this respect, OAIS's Charter provides the following, in its relevant part under its "Investigations" section:

21. OAIS shall conduct preliminary assessments and, as necessary, investigations, into allegations of:

a) Wrongdoing, including "proscribed practices" (corrupt, fraudulent, coercive, collusive, obstructive or unethical practices), harassment, sexual harassment, abuse of authority, sexual exploitation and abuse, and other violations of applicable regulations, rules and administrative or policy issuances, by UNFPA staff (internal investigations).

39. Accordingly, any right to compel the Administration to conduct an investigation in the instant case would require, at minima, allegations of a violation of "applicable regulations, rules and administrative or policy issuances, by UNFPA staff".

40. Contrary to the Applicant's assertion, the UNFPA "Policies and Procedures Manual: Human Resources, Rebuttal and Related Remedies Regarding Performance Appraisal and Development (PAD)", which govern the PAD rebuttal process, do not provide any time limit for the rebuttal panel to decide on the receivability of a rebuttal statement or to issue a final decision on the merits. As the Appeals Tribunal held in *Zeid*, "[a] staff member cannot create a duty where none exists in the Staff Regulations and Rules" (2014-UNAT-401).

41. Absent any time limit in the applicable policy, the asserted delay in the completion of the Applicant's PAD rebuttal process cannot amount to "wrongdoing" by DHR staff members for which OAIS would have investigative authority.

42. Consequently, the Tribunal finds that the implied decision, if any, not to conduct an investigation into the alleged misconduct of DHR does not directly affect the Applicant's rights, and that the application, insofar as it challenges said decision, is not receivable *rationae materiae*.

43. The above is a matter of law, which may be adjudicated even without serving the application to the Respondent for reply, and even if it was not raised by the parties (see *Gehr* 2013-UNAT-313, *Christensen* 2013-UNAT-335). Indeed, the Appeals Tribunal has confirmed in *Kazazi* 2015-UNAT-557 that in addressing issues of receivability, it is appropriate for the Dispute Tribunal to proceed by way of summary judgment under art. 9 of its Rules of Procedure.

Conclusion

44. In view of the foregoing, the Tribunal REJECTS the application in its entirety.

Judge Thomas Laker

(Signed)

Dated this 3rd day of February 2016

Entered in the Register on this 3rd day of February 2016

(Signed)

René M. Vargas M., Registrar, Geneva