



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KUAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Miles Hastie, UNICEF

Introduction

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF). On 23 November 2015, he filed an application before the United Nations Dispute Tribunal (UNDT) challenging what he describes as the termination of his fixed-term appointment.

2. The Respondent filed a reply to the application on 9 December 2015 in which it was argued that the application was not receivable.

3. On 6 January 2017, the Tribunal issued Judgment No. UNDT/2017/002 in which it held that the Applicant's claims in relation to allegations of bullying, harassment, intimidation and abuse of authority by his supervisor and the UNICEF Country Representative were receivable. The Tribunal also required the Respondent to file a substantive reply to those allegations by 13 January 2017.

4. The Respondent filed the reply on 11 January 2017.

5. On 5 February 2017, the Applicant filed a motion seeking leave to respond to the 11 January 2017 reply. The motion was granted and the Applicant filed the response on 16 February 2017.

6. The Tribunal finds that there are no contentious substantive issues of fact and only questions of law to be decided in this case. Consequently, the Tribunal has decided, in accordance with art. 16.1 of the UNDT Rules of Procedure, that an evidentiary fact-finding hearing is not necessary.

Factual Background

7. The facts summarized below are taken from the parties' pleadings and supplemental submissions.

8. The Applicant joined UNICEF on 18 April 2007 as a Programme Assistant at the GS-5 level in Rumbek, Sudan (now South Sudan). On 26 September 2007, he was appointed as a Finance Assistant at the GS-6 level in Juba.

9. On 15 August 2013, the Applicant was placed on Special Leave Without Pay (SLWOP).

10. On 2 January 2015, the UNICEF South Sudan Country Office advertised three Operations Officer (NO-B) posts located in Bor, Bentiu and Malakal. The Applicant was successful in his application for the post in Bor and returned from SLWOP on 10 March 2015 to assume his duties as Operations Officer (NO-B) in Bor on a three-month appointment.

11. On 22 May 2015, the Applicant had a meeting with his supervisor, Mr. Benjamin Fisher, the Chief Field Officer in Bor. Mr. Fisher indicated that it was his view that the operations structure in place did not appear to warrant an Operations Officer (NO-B) and two Logistics Assistants.

12. On 23 and 25 May 2015, the Applicant sent emails alleging intimidation and bullying against his supervisor to Mr. Brian Nyakanda, Human Resources Specialist in Juba, copying other UNICEF staff.

13. On 8 and 9 June 2015, the Applicant held meetings with other UNICEF colleagues in Juba to discuss his concerns and complaint against Mr. Fisher.

14. The Applicant travelled back to Bor on 10 June 2015 and was informed by Ms. Omayma Ahmed, Human Resources Manager, that his appointment would be extended for three months and that he would be reassigned to Juba to support the Finance Section.

15. On 15 June 2015, Ms. Ahmed sent the Applicant three documents: a memorandum from the UNICEF Representative; a letter of appointment for a three-month period and a copy of CF/EXD/2012-007 (Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority).

16. On 12 July 2015, the Applicant wrote to UNICEF's Deputy Executive Director, Management, requesting management evaluation of several issues, namely:

- a. “the undue and unfair treatment meted upon [him] by [his] Supervisor Benjamin Samuel Fisher, CFO Bor” including intimidation and bullying;
- b. his victimization by UNICEF South Sudan Management in allegedly failing to apply UNICEF Rules and Regulations as stipulated in policy documents by siding with Mr. Fisher instead of objectively considering the complaints he had raised; and
- c. the administrative decision to abolish the need for his post just two months after he commenced working.

17. On 25 August 2015, the Deputy Executive Director, Management, informed the Applicant that his management evaluation request was not receivable as no decision to abolish the post of Operations Officer (NO-B) in Bor had been made.

The Applicant’s case

18. The Applicant’s submissions relevant to his claims in relation to allegations of bullying, harassment, intimidation and abuse of authority by his supervisor and the UNICEF Country Representative are summarized below:

- a. The Respondent’s responses to his allegations of intimidation, bullying and abuse of authority are not “genuine.”
- b. The reply of 11 January 2017 is the first response he has received since 23 May 2015 after he reported the issue to the UNICEF management in South Sudan.
- c. UNICEF has not acted in good faith in order to address the reported case of intimidation, bullying and abuse of authority.
- d. The management evaluation review ignored his allegations of intimidation, bullying and abuse of authority.

e. He did not report the harassment case to the UNICEF South Sudan management through the Office of Human Resources Management because the Human Resources (HR) Manager told him that he should drop the case or face certain consequences for raising such complaints in the first place. This happened during a series of meetings between 8 and 9 June 2016.

f. He raised his complaint to the Office of Internal Audit and Investigation (OIAI) but OIAI chose not to address his complaint and only recommended that he file a request for management review concerning the decision to abolish his post.

g. He requested management evaluation in July 2015 but the management evaluation response ignored his harassment case and only concentrated on the administrative decision to abolish his post.

h. He was unfairly treated by UNICEF South Sudan because he reported intimidation, bullying and abuse of authority.

i. He was forced to sign a separation agreement without benefits or indemnity payment.

j. He deserves compensation for the loss of his professional career and “damage enforced on [him]” by the UNICEF Representative for being forced to sign a “mutually agreed termination.”

k. The Applicant prays the Tribunal to consider applying art. 10.5(b) of its Statute for the mishandling by UNICEF South Sudan of his intimidation, bullying and abuse of authority case.

The Respondent’s case

19. The Respondent’s submissions are summarized below.

20. On 23 May 2015, the Applicant sent an email to an HR Specialist making various complaints.

21. Meetings were held with the Applicant on 8 and 9 June 2015 which included the HR Manager, Operations Manager and Chief of Operations.

22. On 11 June 2015, following efforts at informal resolution, the Applicant provided further allegations in a “Diary of events” transmitted to OIAI.

23. Informal efforts at resolution were unsuccessful.

24. By management evaluation request dated 12 July 2015, the Applicant appended the “diary of events” and amplified a number of his allegations.

25. UNICEF does not consider that the complaints amount to allegations of harassment, abuse of authority or discrimination.

26. Ultimately, UNICEF and the Applicant concluded a settlement agreement. Following communication of some later reticence about the agreement, the Applicant confirmed that he intended to be bound by it.

27. The separation agreement provides consideration in exchange for not contesting his separation or any other decision connected thereto. The agreement embodied a mutual understanding that it would finally resolve the Applicant’s complaints and ensure his amicable departure from UNICEF.

28. The Applicant provided no indication, in the agreement or subsequent to it, that he nevertheless expected UNICEF to provide redress for discrete allegations of harassment or abuse of authority. The agreement precludes: (i) contestation of the Applicant’s itemized complaints pertaining to job performance, which may relate to separation; or (ii) further compensation for separation.

29. The Applicant identifies no violations of CF/EXD/2012-007. The Applicant invoked both informal and formal processes. Neutral third parties were involved in informal resolution and a calm and respectful discussion followed on the part of UNICEF. UNICEF’s independent OIAI discussed the matter with the Applicant but concluded that it did not merit a comprehensive review and was not a well-founded allegation of prohibited conduct. It proposed an alternative recourse, which was pursued.

30. A *de novo* exploration of allegations is not required as the decision not to further investigate was reasonable.

31. The proper inquiry before the UNDT is only whether any decisions concerning prohibited conduct were procedurally defective, improperly motivated, or clearly irrational.

32. There is no allegation of procedural defect. There is no evidence of improper motivations. With respect to the rationality of the decision, there have been no actions identified that tend to abuse, demean, intimidate, belittle, humiliate or embarrass another person or which create an intimidating, hostile or offensive work environment, or reflect the improper use of a position of influence, power or authority to affect another's rights, or to cause a hostile or offensive work environment. Instead, the Applicant's complaints appear to be (unsubstantiated) ones of non-compliance with UNICEF procurement procedures and ones relating to management style.

33. The only relief that the Applicant appears to seek is a termination indemnity associated with his separation. Such relief is not available as there was no termination. The claim is not receivable since the separation by written agreement was not subject to management evaluation. A separation agreement has been signed precluding further legal challenge and no specific harm has been alleged or demonstrated.

34. Apart from the losses arising from the separation, no other harm, supported by evidence, has been alleged. Compensation is precluded under art. 10.5(b) of the UNDT Statute.

Considerations

35. Article 2 of the UNDT Statute states that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2 of the present statute.

36. The UNDT is not cloaked with jurisdiction to investigate harassment complaints under art.2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment. It is not the task of the UNDT to conduct a fresh investigation into a harassment complaint; rather its task is to determine if there was a proper investigation into the allegations.¹

37. The legal issue arising for consideration in this case is whether there was a proper investigation into the Applicant’s allegations of bullying, harassment, intimidation and abuse of authority by his supervisor and the UNICEF Country Representative.

38. The procedure for conducting investigations of allegations of harassment and abuse of authority by staff members of UNICEF is set out in Administrative Instruction CF/EXD/2012-007. The Applicant has provided no evidence that the CF/EXD/2012-007 procedures were not complied with in relation to his case.

39. The undisputed evidence before the Tribunal is that UNICEF’s independent OIAI discussed the allegations with the Applicant but concluded that it did not merit a comprehensive review and was not a well-founded allegation of prohibited conduct. It proposed alternative recourse, which the Applicant pursued.

¹ *Messinger* 2011 UNAT-123.

40. The Tribunal further notes that the Applicant and UNICEF subsequently concluded a settlement agreement in which the Applicant agreed to withdraw all his complaints related to his separation from UNICEF. The Applicant now alleges that he was forced to sign the separation agreement. He has provided no evidence of this alleged duress. The Respondent, however, in Annexes R3 and R4 to the reply, filed a series of email exchanges between the Applicant and UNICEF management in which the Applicant described his grievances, his efforts at informal resolution of those grievances in accordance with CF/EXD/2012-007, his waiver of claims and desire to be bound by the terms of the separation agreement.

Judgment

41. Having found that the Applicant's allegations of bullying, harassment, intimidation and abuse of authority by his supervisor and the UNICEF Country Representative were adequately addressed, the Tribunal hereby dismisses this application in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 8th day of March 2017

Entered in the Register on this 8th day of March 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi