



Before: Judge Teresa Bravo
Registry: Geneva
Registrar: René M. Vargas M.

NOOR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Katrina Waiters, UNFPA

Introduction

1. By application filed on 10 April 2018, the Applicant, a State Program Coordinator (NOC-II) at the United Nations Population Fund (“UNFPA”), contests the decision to authorize and conduct a fact-finding mission to the UNFPA State Office in Bihar (“Bihar Office”), India, in response to his complaint of discrimination, harassment and abuse of authority by the UNFPA Assistant Representative in India and four colleagues.

Facts

2. On 6 October 2017, the Representative of UNFPA’s India Country Office (“the Representative”) requested authorization from the Regional Director, Asia and Pacific Regional Office, UNFPA (the “Regional Director”), to conduct a human resources mission to the Bihar Office (“HR Mission”). The request was motivated by several email messages from the Applicant and other Bihar Office staff members flagging performance and interpersonal conflicts, as well as a communication from the Applicant alleging harassment, abuse of authority and discrimination based on religion by the Assistant Representative and four other colleagues.

3. Following the Regional Director’s authorization, the HR Mission was conducted from 5 to 8 November 2017. A report was issued at the end of the mission and it did not contain any finding related to the Applicant’s allegations of harassment or of abuse of authority. The report did capture a reference to discrimination based on religion during the Applicant’s interview and, also, included recommendations to move forward with respect to the Applicant’s employment status.

Parties’ submissions

4. The Applicant’s principal contentions are:
- a. The decision to convene an HR Mission to the Bihar office, following the Applicant’s complaint for misconduct, violates UNFPA Rules and Regulations;

- b. The Executive Director, UNFPA, failed to have the Applicant's complaint investigated or forwarded to the Office of Audits and Investigations ("OAI");
 - c. The HR Mission had no Terms of Reference or, at least, they were never shared with the Applicant;
 - d. The Applicant was never interviewed nor asked to explain anything by the HR Mission whose sole purpose was to obtain his resignation; and
 - e. The HR Mission was an abuse of managerial prerogative, a violation of rules and policies as well as of the disciplinary framework, and an attempt to illegally terminate his employment for having reported misconduct.
5. The Respondent's principal contentions are:
- a. The application is manifestly irreceivable and should be rejected because:
 - i. The Applicant did not submit a proper management evaluation request because he did not use the correct form nor addressed the request to the proper authority; and
 - ii. The contested decision, i.e., the decision to convene an HR Mission to the Bihar Office, is not an administrative decision but solely a managerial action, which is an exclusive prerogative of the Administration.

Consideration

6. The Tribunal considers that the case raises purely legal questions and that it is fully informed to adjudicate the matter based on the parties' written submissions. Therefore, the Tribunal is of the view that neither a case management discussion nor a hearing is needed in this case.

Receivability

7. The Respondent challenges the receivability of the application on the following two grounds:

- a. That the Applicant did not file a proper management evaluation request since he did not use the proper form and emailed it to the Executive Director, UNFPA, instead of using the email address specifically set up for such requests. Consequently, the Respondent argues, he has deprived UNFPA of the opportunity to review and cure flawed administrative decision where needed; and
- b. That the contested decision, namely conducting an HR Mission to the Bihar Office, is a managerial action and not an administrative decision subject to judicial review.

Management evaluation request

8. Concerning requests for management evaluation, the UNFPA Policies and Procedures Manual provides that they shall be submitted using a form annexed to said Manual and sent to a precise email address. The record shows that the Applicant neither used the form referred to nor the email address specified in the Manual.

9. Instead, the Applicant emailed a letter dated 30 November 2017 with attached exhibits directly to the Executive Director, UNFPA. The subject of that letter read “Request for Management Evaluation to prevent abuse of managerial prerogative ensuring procedural fairness and administrative jurisprudence in UNFPA India as per details in Annexure”.

10. The Respondent argues that he was not aware of the Applicant’s request for management evaluation, and that he only learned about it on 18 April 2018 upon being served the application. He also states that up to that date, he did not receive inquiries on the receipt or pending status of the Applicant’s management evaluation request. The Respondent thus concludes that the Applicant’s failure to follow the mandatory procedure to submit his management evaluation request should be construed as a failure to submit it.

11. First, the Tribunal notes that the Applicant's 30 November 2017 communication clearly indicated its nature: a request for management evaluation. Second, the Applicant received an "out of office" message in response to his email to the Executive Director, UNFPA. He resent his communication to the email address of the person designated in that message to handle "urgent matters" during the Executive Director's absence. Such recipient acknowledged receipt of the Applicant's email on 5 December 2017, advising that it would be brought to the Executive Director's attention upon return from official travel.

12. Thirdly, it is undisputed that since 2004, pursuant to ST/SGB/2004/10 (Authority of the United Nations Population Fund in matters relating to human resources), the Executive Director, UNFPA, has had delegated authority from the Secretary-General to consider appeals against administrative decisions under the former system of administration of justice, and that this delegated authority was "carried over", as of 2009, into the current system of administration of justice albeit through the establishment of a dedicated administrative structure to carry out management evaluation functions.

13. While the Tribunal recognises that the Applicant has not followed the established formalities to request management evaluation, i.e., use of a form and a specified email address, it cannot be overlooked that he exercised due diligence to ensure that his documented request reached the Executive Director, UNFPA and that, moreover, his request was acknowledged. The latter, in turn, brings the Tribunal to conclude that the Applicant could reasonably believe that he had complied with the initial mandatory requirement of requesting management evaluation.

14. The Respondent did not proffer a plausible explanation for the lack of action on the Applicant's request for management evaluation and, under the circumstances, he cannot shield behind what seems to have been an internal communication breakdown to support his challenge to the receivability of the application on purely formal reasons.

15. In view of the foregoing, the Tribunal finds that the Applicant met the requirement to request management evaluation and did not deprive UNFPA of the opportunity to “review and, if necessary, cure flawed administrative decisions”.

Lack of Administrative Decision

16. The Respondent also argues that the contested decision is not an administrative decision but rather a managerial action that is thus not subject to judicial review.

17. Art. 2.1 of the Tribunal’s Statute provides that the Tribunal is “competent to hear and pass judgment” on applications seeking to “appeal an administrative decision that is alleged to be in non-compliance with [an applicant’s] terms of appointment or the contract of employment”.

18. Consequently, for an application to be receivable, the action under review must be an “administrative decision” within the meaning of the above article of the Tribunal’s Statute.

19. The contested decision, as identified by the Applicant, is the Regional Director’s decision to authorize an HR Mission to the Bihar Office following, *inter alia*, the Applicant’s complaint for harassment and discrimination.

20. According to the Applicant, this decision was meant to illegally terminate him for having reported misconduct and represents an abuse of managerial prerogative and a breach of the UNFPA Rules and disciplinary procedures.

21. The Appeals Tribunal has adopted the definition of an administrative decision (see *Al Surkhi et al.* 2013-UNAT-304), as developed by the former Administrative Tribunal in *Andronov* (Judgment No. 1157 (2003)). It is well-established internal case law that administrative decisions are characterized by the fact they are taken by the Administration, they are unilateral and of individual application, and carry direct legal consequences.

22. First, the case file shows the HR Mission was an “add-on” to a broader undertaking, namely a planned international consultant group HR review mission to the UNFPA India Country Office as part of the Country Office’s realignment for India Country Programme (2018-2022).

23. Second, having examined the HR Mission Report, which was shared with the Applicant in a redacted form, as well as the Terms of Reference of said mission, the Tribunal is of the view that the purpose of the HR Mission was to evaluate ongoing problems with regard to persisting staff performance issues, as well as managerial and behavioural issues in the Bihar Office. The scope of the HR Mission went far beyond the complaint made by the Applicant for discrimination and harassment.

24. The Tribunal is satisfied that the HR Mission was a managerial exercise of discretion to assess a number of complex and different issues in the Bihar Office. Consequently, the contested decision is not an administrative decision but rather a managerial action within the discretionary authority of the Regional Director, which is not subject to judicial review.

25. The Applicant alleges that the HR Mission was devised to illegally terminate his appointment. In relation to this allegation, the Tribunal also recalls that it is the Applicant who bears the burden of proof to demonstrate that the scope of the HR Mission to Bihar was to lead him to resign.

26. However, the Applicant has not demonstrated such assertion and did not provide any evidence of said intentions. On the contrary, the evidence on file suggests that it was the Applicant who, during his second interview with the Head of the HR Mission, reported that he had decided to resign on medical grounds and offered no other explanation as to why he wanted to resign.

27. The Tribunal could not identify any direct legal consequence on the Applicant which impacted his terms of appointment as a result of the HR Mission to Bihar. In fact, at the time the application was filed, the Applicant was still a staff member and there is no evidence of any harm suffered by him as a consequence of said HR Mission.

Conclusion

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

To reject the application as irreceivable *ratione materiae*.

(Signed)

Judge Teresa Bravo

Dated this 29th day of May 2020

Entered in the Register on this 29th day of May 2020

(Signed)

René M. Vargas M., Registrar, Geneva