



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

COLEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Edward Patrick Flaherty

Counsel for Respondent:

Alister Cumming, UNICEF

Chinonyelum Esther Uwazie, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF"), contests the "final administrative decision to place [her] on Special Leave Without Pay" ("SLWOP") effective 1 May 2018.

Facts

2. The Applicant joined the Pakistan Country Office of UNICEF ("UNICEF PCO") in September 2014 as Chief of the Child Protection Section, at the P-5 level. She held a fixed-term appointment that expired on 30 September 2018.

3. The Government of Pakistan granted visas to the Applicant for the following periods: 8 September 2014 to 7 September 2015; 15 October 2015 to 13 December 2015 and 28 January 2016 to 11 October 2017. The Applicant was also issued with a Ministry of Foreign Affairs ("MOFA") accreditation card that was last renewed for the period from 4 August 2015 to 30 September 2016.

4. On 28 September 2016, before the accreditation card expired, the Administration section of UNICEF PCO sent an email to the Applicant requesting her to complete the renewal form and return it with her passport photographs.

5. The Applicant only returned the requested documentation in July 2017.

6. On 1 August 2017, the Administration, on behalf of the Applicant, submitted the renewal request of her accreditation card to the MOFA in Islamabad. Her request was denied, and she was advised by the MOFA to leave Pakistan, which she did on 26 August 2017.

7. In October 2017, while the Applicant was in the United Kingdom, her place of residence, she personally approached the Pakistan High Commissioner in London and obtained an assignment visa for another three months, namely from 13 October 2017 to 12 January 2018, for her to return to Islamabad. She returned to Pakistan on 19 October 2017.

8. On 16 January 2018, the MOFA in Islamabad informed UNICEF PCO that it would not renew the Applicant's accreditation card and expressly requested that she be advised to leave Pakistan on expiry of her visa. An exit visa was approved and she was required to depart Pakistan no later than 10 February 2018.
9. On 6 February 2018, the UNICEF PCO received a *Note Verbale* from the MOFA in Islamabad referring to a letter dated 24 January 2018 that the Applicant had addressed to it in which the Applicant tendered a personal apology for "effecting several [MOFA] protocol breaches in the recent past".
10. By letter dated 7 February 2018, the Director, Division of Human Resources ("DHR"), UNICEF, informed the Applicant of the decision to place her on Special Leave With Full Pay ("SLWFP"), effective the date of her departure from Pakistan, for an initial period of one month. Her placement on SLWFP was further extended until 30 April 2018.
11. On 9 February 2018, the Applicant departed Pakistan at the request of the Government.
12. On 14 April 2018, the Applicant was offered a temporary reassignment to the P-4 post of Child Protection Specialist, with remuneration at the P-5 level, in South Sudan, which the Applicant refused.
13. By letter dated 20 April 2018, the Director, DHR, UNICEF, informed the Applicant *inter alia* of the decision to place her on SLWOP as of 1 May 2018 until the expiry of her appointment if no other available positions at the P-5 level arose in the meantime.
14. On 24 April 2018, the Applicant requested management evaluation of the decision to place her on SLWOP.
15. On 1 May 2018, the Applicant was placed on SLWOP.
16. On 14 June 2018, the Deputy Executive Director, Management, UNICEF, upheld the decision to place the Applicant on SLWOP.

17. On 5 September 2018, the Applicant filed the present application and on 10 October 2018, the Respondent filed his reply.

18. On 3 April 2020, the Applicant filed a rejoinder to the reply.

19. On 8 December 2020, the Tribunal held a case management discussion with the participation of the Applicant, her Counsel and Counsel for the Respondent.

20. By Order No. 128 (GVA/2020) of 9 December 2020, the Tribunal ordered the Respondent *inter alia* to submit additional documents relevant to the consideration of the case. It also ordered the Applicant *inter alia* to elaborate further on her request for a hearing.

21. On 21 December 2020, the parties complied with Order No. 128 (GVA/2020) and the Applicant withdrew her request for a hearing in the present case.

22. On 12 January 2021, the parties filed their respective closing submission.

Parties' submissions

23. The Applicant's principal contentions are:

- a. The contested decision is arbitrary and unlawful;
- b. UNICEF failed to obtain the renewal of her visa;
- c. UNICEF failed to send a formal letter of apology to the Government of Pakistan;
- d. UNICEF failed to allow the Applicant to work remotely and to reassign her to another position commensurate with her grade, competence, skills and experience; and
- e. The contested decision is the result of abuse of authority, bias, prejudice and harassment against the Applicant. It is also an irregular disciplinary sanction.

24. The Respondent's principal contentions are:

- a. The only administrative decision properly before the Tribunal is the decision to place the Applicant on SLWOP;
- b. UNICEF made good faith efforts to secure the renewal of the Applicant's accreditation card and visa;
- c. The Applicant's request to work remotely was not accepted because her functions could not be performed from outside Pakistan;
- d. The contested decision was lawful and a proper exercise of discretionary authority, taken after the Applicant opted not to avail herself of the option to be temporarily reassigned to an alternative position; and
- e. The Applicant has failed to provide any evidence to substantiate her allegations that the contested decision was tainted by improper motives.

Consideration

25. After a careful review of the case file and the evidence provided by the parties, the Tribunal has identified the following legal issues to be determined in the case at hand:

- a. Whether the application is receivable in its entirety;
- b. Whether the decision to place the Applicant on SLWOP was lawful;
- c. Whether the contested decision was tainted by bias or improper motives; and
- d. Whether the Applicant is entitled to any remedies.

Whether the application is receivable in its entirety

26. The Respondent raises the issue of receivability arguing, *inter alia*, that the application is not receivable in relation to the Applicant's claims related to her expulsion from Pakistan and her allegations that the Organization did not make

good faith efforts to reassign her to another post, commensurate with her grade, competence, skills and experience.

27. The Respondent claims that the only administrative decision properly before this Tribunal is the decision to place the Applicant on SLWOP.

28. It is well-settled internal case law that the Tribunal has the power to interpret and identify the “contested administrative decision” at stake, even if the party or parties have failed to do so (*Massabni* 2012-UNAT-238):

25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties’ contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties’ submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant the requested judgment.

29. After reviewing the parties’ submissions, including the application and the management evaluation request, the Tribunal finds that the allegations mentioned in para. 26 above are none other than the legal arguments raised by the Applicant to contest the decision to place her on SLWOP. These arguments are the grounds on which the Applicant builds her case and cannot be seen nor interpreted as two separate administrative decisions subject to judicial review.

30. Therefore, the Tribunal will consider the Applicant’s claims in the context of the review of the decision to place her on SLWOP, which application the Tribunal finds receivable.

Whether the decision to place the Applicant on SLWOP was lawful

31. The Tribunal will now assess the lawfulness of the contested decision in light of the legal arguments raised by the parties.

UNICEF's alleged failure to ensure the renewal of the Applicant's visa and accreditation card

32. From the Applicant's point of view, the decision to place her on SLWOP was unlawful because UNICEF failed in its responsibility to ensure the renewal of her visa and accreditation card, which could have prevented her expulsion from Pakistan.

33. The Respondent challenges the Applicant's arguments and claims that UNICEF made good faith efforts to renew her visa and accreditation card.

34. The evidence on record shows that the renewal of a visa or accreditation card is, indeed, a shared responsibility between the Administration and the staff member. On the one hand, the Administration Section of the UNICEF PCO facilitates the process by requesting staff members to complete the relevant documentation and, on the other hand, the staff members are required to return said documentation for the Administration to complete the process before the MOFA.

35. The documentary evidence filed by the Respondent, namely an email sent to the Applicant on 28 September 2016, shows that it was the Applicant's own failure to timely submit the required documents, i.e., the renewal form and passport photographs, that prevented the Administration from completing the renewal request process and obtaining the timely renewal of her accreditation card.

36. The Tribunal refers to the sequence of facts indicated in paras.4 to 6 above and notes that while the Administration contacted the Applicant prior to the expiration of her accreditation card in September 2016, she only provided the requested documentation for the renewal in July 2017, almost a year after the expiry of her accreditation card.

37. There is no evidence that the Applicant replied to the email sent to her on 28 September 2016 requesting her to submit the required documentation or that she provided these documents to the Administration prior to the expiry of her accreditation card.

38. Indeed, had the Applicant timely sent the relevant documents as requested on the email of 28 September 2016, it is reasonable to infer that no issue would have arose vis-à-vis the MOFA.

39. Furthermore, the Tribunal notes that contrary to the Applicant's assertions, the evidence on record shows that following her return to Islamabad in October 2017, the Organization made good faith efforts to secure the renewal of her visa and accreditation card with the Pakistani authorities, unfortunately without success.

40. The evidence also shows that by email dated 13 January 2018, the then Deputy Representative, UNICEF PCO, provided the Applicant with an update of actions that the Organization had taken in relation to the renewal of her visa and accreditation card. According to that email, the Organization took at least 11 separate actions including: discussing the issue between the Officer-in-Charge, UNICEF PCO, and the Director General Protocol, MOFA, in four meetings between October 2017 and January 2018, sending two *Notes Verbales* to the MOFA in October and November 2017, making several telephone calls and sending a number of emails to Protocol as of October 2017 and discussing the matter between the Deputy Representative and the Director General Protocol, MOFA, in December 2017.

41. Therefore, the Tribunal finds that the Applicant's claim concerning the failure of the Organization to support the renewal of her visa and accreditation card is unsupported.

UNICEF's alleged failure to send a formal letter of apology to the MOFA

42. The Applicant claims that UNICEF failed to send a formal apology to the Government of Pakistan, which negatively impacted her chances to have her accreditation card renewed.

43. The Tribunal has reviewed the evidence on record and is concerned that the Applicant appears to have misrepresented the relevant facts.

44. First, the Tribunal notes that while the Applicant took the initiative, on 8 January 2018, to draft a letter of apology on behalf of UNICEF to the Government of Pakistan for her protocol breaches, UNICEF was not obliged to send said formal apology to the Government of Pakistan.

45. Second, the evidence shows that the Applicant sent later on to the MOFA, on her own volition and apparently without prior consultation with UNICEF, a letter dated 24 January 2018 personally apologizing for “affecting several [MOFA] protocol breaches in the recent past” and admitted to “personal failings” with regard to her accreditation card and visa renewal.

46. The Tribunal is of the view that the Organization bears no responsibility on this initiative of the Applicant and, therefore, cannot be held accountable for the outcome of her actions.

47. Indeed, the Applicant, as an international staff member working in UNICEF PCO, should have known that a valid visa and accreditation card were conditions *sine qua non* for her to stay in Pakistan and be able to perform her professional duties.

48. Since these conditions were not met and the Applicant had to leave Pakistan at the explicit request of the Government, the Organization had no other solution but to consider alternative administrative arrangements, such as placing the Applicant on SLWFP or SLWOP, to address her situation.

UNICEF's alleged failure to allow the Applicant to work remotely and to properly reassign her to another position.

49. The Applicant alleges that her request to work remotely until the expiration of her contract was unfairly denied. However, it results from the case file that the nature of the Applicant's functions was not compatible with working remotely and, therefore, the Organization was not in a position to grant her request as communicated to her in an email dated 2 February 2018.

50. The Applicant also claims that UNICEF failed to properly reassign her to a position commensurate with her P-5 grade, competence, skills and experience.

51. The Tribunal agrees with the Respondent in that UNICEF was under no obligation to reassign the Applicant, who admitted in her letter of 24 January 2018 to the Government of Pakistan that it was her own breach of diplomatic protocol that caused her expulsion from the host country.

52. Nevertheless, the Tribunal notes that in April 2018, the Organization offered the Applicant a temporary reassignment to a P-4 post of Child Protection Specialist in South Sudan with remuneration at the P-5 level. The Applicant unfortunately rejected such offer as it did not correspond to her personal P-5 level.

53. The Tribunal is of the view that the Organization had no obligation to find the Applicant another assignment once she refused the position in South-Sudan not only because the circumstances of her departure from Pakistan were self-created, but also because she had informed the then Deputy Representative UNICEF PCO, in a meeting held on 26 January 2018, that she was not interested in continuing working with UNICEF beyond the expiration of her fixed-term appointment.

54. As in civil law, the legal principle of *venire contra factum proprium* applies, which basically means that the Applicant cannot avail herself of a circumstance she has created.

The legality of the decision to place the Applicant on SLWOP

55. Staff rule 5.3(f) provides that “[i]n exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization”.

56. The Appeals Tribunal held in *Sanwidi* 2010-UNAT-084, at para. 40, that when judging the validity of the exercise of discretionary authority,

the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

57. The evidence on record shows that the Applicant was placed on SLWOP on 1 May 2018 as a result of her decision not to accept the temporary reassignment to a P-4 position in South Sudan with salary remuneration at the P-5 level.

58. The Tribunal considers that in view of the particular circumstances of the present case, namely that i) the Applicant placed herself in a situation in which she could no longer perform her duties in Pakistan; ii) she rejected the temporary assignment offered to her in South Soudan; and iii) she was not interested in working in UNICEF beyond the expiry of her appointment, the decision to place her on SLWOP was a proper exercise of discretion. Indeed, it is reasonable to conclude that it was not in the interest of the Organization to keep the Applicant on pay status whilst not performing work for the Organization until the expiry of her fixed-term appointment on 30 September 2018.

59. Consequently, the Tribunal finds that the decision to place the Applicant on SLWOP is a lawful exercise of administrative discretion.

Whether the contested decision was tainted by bias or improper motives

60. It is well settled jurisprudence that the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450 and *Matadi et al.* 2015-UNAT-592) and that if an applicant claims that the decision was ill-motivated, the burden of proving any such allegation rests with said applicant (see, for instance *Azzouni* 2010-UNAT-081 and *Obdeijn* 2012-UNAT-201).

61. The Applicant argues that the contested decision is the result of abuse of authority, bias, prejudice and harassment against her by “senior management” following a complaint she filed with the Office of Internal Audit and Investigations (“OIAI”) in March 2018 against her former supervisor, the then Deputy Representative, UNICEF PCO. She also claims that she was a victim of retaliation for having filed such complaint.

62. The Tribunal notes that in a separate case (UNDT/GVA/2019/071) which is still pending adjudication, the Applicant contests the decision to uphold the OIAI determination that her supervisor did not engage in harassment and abuse of authority against her.

63. Regardless of the outcome of the above-mentioned case, the Tribunal notes that in the case at hand, the Applicant has failed to prove that a causal link existed between her complaint and the contested decision. In fact, the decision to place her on SLWOP was not taken by her former supervisor but by the UNICEF Director, DHR at Headquarters in New York, who was not the subject of her complaint.

64. Similarly, the Applicant has not provided any evidence to substantiate her allegations that the contested decision was a veiled or disguised disciplinary measure. Consequently, this argument also fails.

65. In light of the above, the Tribunal finds that Applicant has failed to substantiate her allegations that the contested decision was tainted by improper motives.

Whether the Applicant is entitled to any remedies

66. Since the Tribunal finds the contested decision lawful, there are no legal grounds to grant the remedies requested by the Applicant. The Tribunal also finds that there is no evidence to substantiate her allegation that the Respondent has abused the present proceedings. Therefore, her claim in this respect is also rejected.

Conclusion

67. In view of the foregoing, the Tribunal DECIDES that the application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 23rd day of February 2021

Entered in the Register on this 23rd day of February 2021

(Signed)

René M. Vargas M., Registrar, Geneva