



Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

REHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Kevin Browning, UNICEF

Esther Uwazie, UNICEF

Introduction

1. The Applicant served on a fixed-term appointment, as a Programme Assistant in the Education Section at the United Nations Children’s Fund (“UNICEF”) Country Office in Islamabad.

2. The Applicant was separated from service on 31 December 2015, which decision she challenged. Judgments *Rehman* UNDT/2018/031 and *Rehman* UNDT/2018/039/Corr.1 were rendered in favour of the Applicant. In this application she contests the failure by the Respondent to follow the Tribunal’s directives in the latter of these two Judgments in deciding to close the investigation into complaints of harassment, discrimination and abuse of authority, lodged by the Applicant against other staff members.

Procedural history

3. On 5 February 2019, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the Respondent’s actions in implementing the Tribunal’s findings in *Rehman* UNDT/2018/039/Corr.1.

4. The Respondent filed his reply on 7 March 2018. He challenges the receivability of the application. On the substance of the application, the Respondent contends that his actions were lawful, and moves the Tribunal to dismiss the matter, with cost, as frivolous, vexatious and an abuse of process.

5. On 1 February 2021, the Tribunal issued Order No. 12 (GVA/2021) setting this matter down for a case management discussion (“CMD”).

6. The CMD took place, as scheduled, on 9 February 2021. The Applicant was present in person, self-represented. Counsel attended on behalf of the Respondent.

7. On 10 February 2021, the Tribunal issued Order No. 34 (GVA/2021) summarising the discussion, listing the issues for adjudication and issuing orders for disclosure and final submissions.

Facts

8. On 26 January 2016, the Applicant filed a complaint with the Office of Internal Audit and Investigation (“OIAI”), UNICEF, against her former supervisor, the Chief of the Education Section at UNICEF, Pakistan Country Office (“PCO”), Islamabad (“Chief of the Education Section”), citing UNICEF’s Executive Directive on Prohibition of discrimination, harassment, sexual harassment and abuse of authority (“CF/EXD/2012-007 Amend.1”). In her complaint, the Applicant listed various incidents of alleged ill treatment, discrimination, harassment, humiliation and abuse of authority that she allegedly suffered at the hands of the Chief of the Education Section. The Applicant also complained that she believed she was a victim of a web of conspiracy and that she was being framed by certain staff members, including the former UNICEF Representative PCO and the Chief of the Education Section, especially in relation to the allegations raised against her with respect to the fraudulent payment of a hotel bill.

9. On 21 March 2016, another complaint was filed by the Applicant with OIAI alleging similar acts of harassment against her by the former Chief of Human Resources of UNICEF, PCO.

10. The decision made by the Respondent in relation to the complaints was to close them without conducting investigations.

11. In *Rehman* UNDT/2018/039/Corr.1, the Tribunal remanded the Applicant’s complaints of harassment, discrimination and abuse of authority, to the Director, OIAI, UNICEF, for “a new thorough, proper, comprehensive and reasoned examination based on the rules governing complaints of harassment and abuse of authority.” The Tribunal further ordered that “[t]he [Chief of investigations] and the Investigations Specialist who previously handled the Applicant’s complaints [...] be recused from dealing with the remanded complaints”.

12. The Respondent outsourced the investigations to an independent, external firm, Moore Stephens LLP (“Moore Stephens”), based in the United Kingdom.

13. On 8 August 2018, Moore Stephens concluded that there was no evidence of abuse of authority or misconduct.

14. By email dated 15 August 2018, the Applicant received correspondence dated 13 August 2018 from the Director, Division of Human Resources (“DHR”), UNICEF, who assessed the investigation report and concluded that the investigations by Moore Stephens were thorough, proper and comprehensive, and advised the Applicant that the assessment of her complaints had been closed.

15. On 28 August 2018, the Applicant was advised that in accordance with CF/EXD/2012-007 Amend. 1, she was not entitled to either a closure memorandum or the reports of the investigations.

Parties’ submissions

16. It is the Applicant’s case that the Respondent acted unlawfully in his handling of her complaints. The Respondent, she argues, did not abide by the directions of the Tribunal in its judgment remanding the matter for a fresh examination.

17. The Applicant is also aggrieved by the Respondent’s refusal to disclose the investigation report and materials which led to the impugned decision.

18. The Respondent contends that he complied with the applicable law and the Tribunal’s directive in *Rehman* UNDT/2018/039/Corr.1.

19. According to the Respondent, UNICEF exercised due care and complied with the provisions of its Executive Directive on Disciplinary Process and Measures (“CF/EXD/2012-005”) and the Uniform Principles and Guidelines for Investigations, in ensuring that the process followed in the investigations was proper and reasonable. The Respondent holds the view that he went further than he was required to in engaging an independent firm, Moore Stephens, to conduct the investigations.

20. The Respondent contends Moore Stephens conducted a thorough, proper and comprehensive investigation; it accessed all available documentation and interviewed numerous witnesses, including the Applicant and the two accused persons, to corroborate information in its possession, and whilst not required, it engaged a professional court-approved transcriber, to transcribe the Applicant's interview. The Applicant was provided the *verbatim* transcript of her interview, and "notwithstanding the further assurance that no point was missed during the interview, the Applicant was granted time to submit comments or confirm facts, which in her opinion, may have been compromised".

21. The Respondent cites section 5.19(a) of CF/EXD/2012-007 Amend.1, according to which a complainant is entitled to a summary of the findings and conclusions, with which the Director, DHR, UNICEF, complied. A complainant is not entitled to either a closure memorandum or the report of an investigation, as both are internal confidential documents of the Organization.

Consideration

22. The issues for adjudication in this matter were set out by the Tribunal during the CMD with the parties and recorded in Order No. 34 (GVA/2021). This Judgment will consider and decide on those issues in turn.

Has the Respondent complied with Rehman UNDT/2018/039/Corr.1 by way of a thorough, proper, comprehensive and reasoned investigation for purposes of the preliminary assessment under sections 5.13 to 5.16 of CF/EXD/2012-007 Amend.1?

Thorough

23. The regulatory framework makes clear at section 5.14 of CF/EXD/2012-007 Amend.1 that the first step in the preliminary assessment is that the Applicant must be interviewed. This is required to:

- a. clarify the allegation(s);
- b. ensure that the complaint pertains to allegations of discrimination, harassment, sexual harassment or abuse of authority;

- c. ensure that all available evidence is submitted; and
- d. consider the possibility of informal resolution

24. In this case, the Applicant was interviewed but has identified shortcomings with the interview process. She contends that without forewarning she was contacted by a representative of Moore Stephens and informed that they would be interviewing her with regard to her complaints. A physical face-to-face or Skype interview was proposed by Moore Stephens. These did not materialize; what took place instead was a partially inaudible telephone call interview on 1 July 2018.

25. The Applicant considered this treatment to have been vastly unfair and markedly different from when she had been the subject of a false allegation of misconduct. In that case, investigators travelled to Islamabad to interview her. Instead, in the present case only a telephone call interview was arranged. On 19 July 2018, the Applicant was asked to fill in gaps in the transcript of her interview. These gaps were due to the faulty audio of the telephone call. On 23 July 2018, Moore Stephens told the Applicant that they would wait for her response and send her a summary of the revised transcript before sending it on to OIAI.

26. The Applicant completed the exercise of filling gaps in the transcript on 15 August 2018 and sent it to Moore Stephens with additional materials. However, by then Moore Stephens had already submitted their investigative report without waiting for the Applicant's expected response. They submitted the report on 8 August 2018. Then the Respondent's decision based on the report was made on 13 August 2018 but not conveyed to the Applicant until 15 August 2018.

27. This sequence of events is unrefuted. Further, the investigation report submitted as final in the Respondent's *ex parte* filing bears the watermark as a draft. It neither summarises nor attaches a transcript of the interview with the Applicant as the complainant.

28. The next step provided by the regulatory framework is that after the Applicant's interview, if the complaint is credible and merits comprehensive review, the alleged offenders are notified. Those persons are then invited to provide written responses, with explanations, materials and proposed witnesses. The investigative reports however appear to indicate that the assessment of the Applicant's complaints was based on interviewing the alleged offenders and other persons. That process is not provided for at the preliminary assessment stage under sections 5.13 to 5.16 of CF/EXD/2012-007 Amend.1. Additionally, as gleaned from the reports, the information given by persons interviewed was accepted as factual and credible whilst analysis of the Applicant's interview was not included.

29. The Tribunal notes that while the investigators were careful to ensure that all aspects of the allegations were identified and alphabetically labelled in the report, the investigative exercise as a whole was quite clearly one-sided.

30. Having examined the evidence on record, the Tribunal finds that the investigation conducted by Moore Stephens on behalf of the Respondent was not thorough. The investigators' failure to properly interview and consider the Applicant's response to the transcript of her interview renders the investigation and reporting process incomplete.

Proper

31. The questions to be considered here are:

- a. Whether the process of assessment/investigation was procedurally fair; and
- b. Whether there was legal basis for the impugned decision.

32. The contentions of the Applicant regarding the manner of facilitation of her interview, the unkept promises regarding the transcript of her interview and the summary to be provided as well as the failure to await and take account of her transcript revisions and additional materials submitted on 15 August 2018 all militate against a conclusion that there was procedural fairness.

33. An investigation which took such scant account of the complainant's interview cannot be said to have been properly conducted.

Comprehensive

34. There is a clear omission from the record of any evidence that the Applicant's interview and materials submitted were considered in the preliminary assessment process. The purpose of the proceedings documented in the investigation reports was in fact for a preliminary assessment of the complaints. The investigation envisaged by the Tribunal in remanding the complaints to the Respondent was one that would fulfil the requirements for a preliminary assessment under sections 5.13 to 5.16 of CF/EXD/2012-007 Amend.1. As the Applicant's interview and materials were clearly not a focal point of the process, the Tribunal's finding is that the investigation was not comprehensive.

Reasoned

35. In remanding the Applicant's complaints of 26 January and 21 March 2016 to the Respondent for a new thorough, proper, comprehensive and reasoned examination based on the rules governing complaints of harassment and abuse of authority, the Tribunal in *Rehman* UNDT/2018/039/Corr.1 underscored that:

41. ... [I]t behoves the Organization, and in this instance OIAI, UNICEF, to respond in a detailed communication as to how they have reached a decision to reject and to officially close a staff member's complaint.

42. It is unequivocally incumbent upon the Organization to provide anyone who files a complaint with a properly reasoned decision, especially when the complaint is being rejected.

36. In considering whether the reasons provided for the challenged decision in this case meet the stipulations as underscored by the Tribunal, the Tribunal is guided by the Appeals Tribunal in *Jafari* 2019-UNAT-927, para. 36:

[A]n administrative decision, which adversely impacts on a staff member's status, must be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised. In this respect, the harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.

37. The reasons provided by the Respondent in the decision letter on 13 August 2018 were as follows:

I have carefully reviewed the two reports from Moore Stephens, which conclude that: (i) your allegations against Ms. [B.M.] are not substantiated; and (ii) your allegations against Ms. [E.G.] are only substantiated with respect to your allegation that [she] unfairly challenged your travel to Peshawar, stating that it was not authorized. With respect to the one substantiated allegation against Ms. [E.G.], I have come to the conclusion that the facts do not indicate that misconduct has occurred, with reference to Sections 2 and 4 of CF/EXD/2012-005 (Disciplinary Process and Measures). I further note that Moore Stephens' investigators assessed the available documentation, and interviewed you, Ms. [B.M.] and Ms. [E.G.], and numerous other witnesses, and I have come to the conclusion, therefore, that the investigation by Moore Stephens was thorough, proper and comprehensive. With this conclusion, the assessment of your complaints is closed.

38. These reasons do not provide an adequate indication as to how the decision not to proceed to a full investigation was reached; nor is it evident from the decision that the complaints were fully or properly assessed. Crucially, the finding that all allegations against the then Human Resources Manager were unsubstantiated is barely explained, never mind "reasoned", in the decision letter.

39. Marginally more detail is provided in the investigation report on Case No. 2018-086 dated 8 August 2018. That report was disclosed *ex parte* to the Tribunal as directed in Order No. 34 (GVA/2021). It states in relevant part as follows:

D. Assessment

27. No person interviewed had witnessed any discriminatory behaviour in the form of bullying and harassment from Ms [B.M.] to [the Applicant].

[...]

E. Conclusion

56. To conclude, we are unable to prove or disprove the allegations of bullying and discrimination toward [the Applicant] by Ms [B.M.]. The evidence provided has not been able to substantiate the allegations which have been made.

40. The reasons provided in the decision letter also fail to give any indication as to why in assessing the complaints against the Applicant's line manager all, except one, were found to be unsubstantiated allegations. The Tribunal finds it curious that the one allegation that was found to have been proven did not trigger an investigation in accordance with section 5.16 of CF/EXD/2012-007 Amend.1. Nothing in the record before the Tribunal explains why that "proven allegation" of misconduct was also dismissed without further action by the Respondent.

41. Minimal additional detail as to reasons is set out in the 8 August 2018 investigation report on Case No. 2018-085 as follows:

56. To conclude, we are unable to prove or disprove the abuse of authority or harassment and discrimination toward [the Applicant] by Ms [E.G.]. Taking all evidence into consideration it is important to note that although Incident E has been proven, it may fall underneath section 1.2 of the Executive Directive Prohibition of discrimination, harassment, sexual harassment and abuse of authority, 'Disagreement between a staff member and supervisor on work performance or on other work-related issues is normally not considered harassment or abuse of authority and is not dealt with under the provisions of this directive but in the context of performance management'.

57. Ms [E.G.]’s requests of [the Applicant] were proportionate and reasonable for a management role and protocol was followed in all instances. Although disagreements were present, there is no evidence of abuse of authority or harassment.

42. Having considered the reports and the decision letter, the Tribunal finds that the explanations provided to the Applicant are scant and inadequate, and do not amount to the reasoned decision that the Tribunal in *Rehman* UNDT/2018/039/Corr.1 directed the Respondent to provide.

Is the Applicant entitled to the disclosure she seeks of the investigation reports that were issued subsequent to that judgment?

43. The Tribunal takes the position that the Applicant in this case would have been entitled to the reports which resulted from the investigation into *her* complaints.

44. Under the circumstances, however, the Tribunal will not order disclosure of the Stephen Moore report and its accompanying material because the matter is being remanded for remedial action by the Respondent.

45. As to the Applicant’s claim for moral damages, no evidence of harm has been submitted.

Conclusion

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

- a. Judgment for the Applicant;
- b. The complaints are once more remanded to the Respondent for a proper investigation in compliance with the regulatory framework;
- c. The Respondent is to provide the Applicant with a copy of her interview transcript and the summary of it (if any) prepared by Moore Stephens that was utilized in their prior investigation; and

- d. The Applicant's request for compensation for moral harm is rejected.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 12th day of March 2021

Entered in the Register on this 12th day of March 2021

(Signed)

René M. Vargas M., Registrar, Geneva