



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

GHARAGOZLOO PAKKALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Monika Ona Bileris

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. The Applicant, a staff member of the United Nations Children's Fund ("UNICEF") serving as a Senior Advisor (D-2 level), contests the imposition of the following administrative measures on her:

- a. Issuance of a written reprimand and its placement in her Official Status File ("OSF") for a period of five years;
- b. Her removal from all supervisory functions for a period of two years; and
- c. Requiring her to undertake appropriate training to enhance self-awareness and improve her people management skills.

Facts and procedural history

2. On 10 January 2019, the Office of Internal Audit and Investigations ("OIAI"), UNICEF, informed the Applicant that she was the subject of an investigation into allegations of harassment and abuse of authority.

3. On 23 July 2019, OIAI issued its investigation report ("OIAI report").

4. By letter of 22 October 2019 ("charge letter"), the Director, Division of Human Resources ("DHR"), UNICEF:

- a. Charged the Applicant of harassment and abuse of authority based on the OIAI report; and
- b. Gave the Applicant 14 days to submit any further evidence in response to the charge letter.

5. On 20 November 2019, the Applicant responded to the charges of misconduct.

6. On 8 January 2020, the Applicant received a letter of reprimand from the Director, DHR, UNICEF, dropping the charges of misconduct and finding that the investigation, nevertheless, identified that the Applicant had exhibited over a significant period a concerning pattern of behaviour. Consequently, the Director imposed on the Applicant the administrative measures outlined in para. 1 above. Additionally, the Director, DHR, UNICEF, gave the Applicant the opportunity to submit comments on the OIAI report and/or on the reprimand to also place them, if any, in the Applicant's OSF together with the written reprimand.

7. On 20 January 2020, the Applicant submitted comments on the letter of reprimand.

8. On 20 March 2020, the Applicant filed the application referred to in para. 1 above.

9. The application was served on the Respondent, who filed his reply on 20 April 2020.

10. On 26 January 2021, the case was assigned to the undersigned Judge.

11. By Order No. 55 (GVA/2021) of 18 February 2021, the Tribunal *inter alia* informed the parties that the matter would be determined on the papers before it, and ordered them to file closing submissions, which they did on 12 April 2021.

Consideration

Scope of review

12. It is settled jurisprudence, and confirmed by the parties in their submissions, that in reviewing decisions imposing a sanction, be it disciplinary or administrative, the Tribunal's scope of review is limited to determining whether: an applicant's due process rights were respected, the facts underlying disciplinary or administrative measures were established, the established facts amount to the conduct foreseen in the rules provided for the applied measure, and the measure was proportionate to the offence (see *Elobaid* UNDT-2017-054 at para. 36 and *Applicant* 2012-UNAT-209).

Merits

Due process

13. The Applicant claims that the measure imposed on her is not based on clear and specified facts. She further alleges some flaws in the disciplinary investigation concerning, in particular, the witnesses heard (and suggesting that OIAI *inter alia* changed witnesses' statements or misquoted them or refused to interview witnesses that the Applicant proposed) and in the process followed.

14. The Tribunal notes that the facts reproached to the Applicant are clear in the charge letter, to which the contested decision refers. The Applicant's claim that the Organization did not provide concrete examples of her behaviour thus fails.

15. The Tribunal also finds that the Applicant's claims on the regularity of the investigation process are not relevant for the case at hand, given that those aspects are not related to the measure imposed to the Applicant but to the decision, which is favourable to the Applicant, not to start a disciplinary proceeding, and that the Applicant did not produce any supporting evidence or specify her claims and their relevance for the measures imposed.

16. From its examination of the record, the Tribunal is satisfied that the Applicant was afforded the opportunity to provide comments related to the administrative measures applied at every step of the process and observes that the Applicant was represented by Counsel as of the issuance of the charge letter. An adversarial examination of the allegations was undertaken, and the Applicant has not challenged this.

17. The Tribunal therefore finds that the Applicant's due process rights were respected.

Factual basis for the imposition of administrative measures

18. It is uncontested that the decision-maker did not find grounds to institute disciplinary proceedings. The Applicant, who does not dispute UNICEF's right to apply administrative measures, contests, however, the decision-maker's finding that there was factual basis warranting administrative measures/managerial action.

In particular, the Applicant complains because the Administration allegedly applied the measures in question to punish facts it failed to demonstrate their relevance as misconduct.

19. More specifically, the Applicant claims that there was no factual basis for the allegations in her case and sustains that there was no evidence that she failed to comply with her obligations under the United Nations Charter and the Staff Regulations and Rules of the United Nations, thus asserting that not even administrative measures were warranted in her case.

20. The standard of proof in disciplinary matters resulting on the imposition of administrative measure(s), such as the case in hand, is that of “preponderance of evidence” (see *Elobaid* 2018-UNAT-822, para. 35). The parties have also acknowledged this in their submissions.

21. The Tribunal observes that the contested decision is grounded in a finding that the Applicant’s behaviour did not meet the standards expected of an international civil servant at her seniority level as, for instance, set forth in the opening sentence of sec. 2.3 of UNICEF Executive Directive CF/EXD/2012-007 (Prohibition of discrimination, harassment, sexual harassment and abuse of authority), which *inter alia* calls for managers to act “as role models by upholding the highest standards of conduct and by promoting a harmonious working environment”. As per the record, the Applicant’s management style was perceived as autocratic, dismissive of others’ views and felt to be demeaning.

22. Although the Tribunal acknowledges that the allegations remain in the realm of opinions and impressions and, indeed, could not give rise to disciplinary proceedings, it also finds that the supporting documentation provided the decision-maker with reasonable grounds to consider them as established facts under the applicable standard of proof.

23. Consequently, the Tribunal finds that the facts in support of the administrative measures imposed were established as per the applicable standard of proof.

Nature of the measures applied and their proportionality

24. The Applicant also challenges the imposed administrative measures arguing, on the one hand, that they constitute disguised disciplinary measures and, on the other hand, that they are disproportionate to the conduct alleged.

25. The applicable legal framework, namely staff rule 10.2 and UNICEF Executive Directives CF/EXD/2012-005 (Disciplinary process and measures) and CF/EXD/2012-007, clearly differentiate between disciplinary and administrative measures. Staff rule 10.2 reads as follows:

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- (ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

- (i) Written or oral reprimand;

- (ii) Recovery of monies owed to the Organization;
 - (iii) Administrative leave with full or partial pay or without pay pursuant to staff rule 10.4.
- (c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

26. Sec. 4, titled “Disciplinary process”, of Executive Directive CF/EXD/2012-005 reads in its relevant part as follows:

4.3 In accordance with UN Staff Rule 10.2, the Deputy Executive Director, Management may impose on the staff member one or more of the following disciplinary measures, which shall be proportionate to the nature and gravity of the staff member’s misconduct:

- (a) written censure;
- (b) loss of one or more steps in grade;
- (c) deferment, for a specified period, of eligibility for salary increment;
- (d) suspension without pay for a specified period;
- (e) fine;
- (f) deferment, for a specified period, of eligibility for consideration for promotion;
- (g) demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (h) separation from service, with notice or compensation in lieu of notice, notwithstanding UN Staff Rule 9.7, and with or without termination indemnity pursuant to Annex III (c) to the UN Staff Regulations;
- (i) Dismissal.

4.4 In accordance with UN Staff Rule 10.2(b), a written reprimand by a supervisor, recovery of monies owed to the organization, and administrative leave pending investigation and the disciplinary process, are not considered to be disciplinary measures.

27. Sec. 5 of Executive Directive CF/EXD/2012-007 reads in its relevant part:

Procedures following the investigation

5.20 On the basis of the report, the Director, Division of Human Resources will take either of the following actions:

- (a) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the Director, Division of Human Resources will decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measure that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions of responsibilities including re-assignment, counselling or other appropriate corrective measures.

28. In *Elobaid*, the Appeals Tribunal distinguished between disciplinary and administrative measures and relevantly held that:

25. The consequences of a disciplinary measure are not equivalent to those of an administrative measure. Although the reprimand could have an adverse impact on the concerned staff member's career, since it is placed in his or her Official Status File, it is not comparable, by its nature, to the effects of any disciplinary measure.

29. From the above legal and jurisprudential framework, as well as from the parties' pleadings on the issue, it stems the following.

30. First, that the measures at stake are different in nature, conditions, scope and consequences. In particular, disciplinary measures are intended to punish the infringement by the staff member of his/her duty inherent the working relationship and presuppose a fact of misconduct, specifically provided in the rules as such and punished. On the contrary, administrative measures can be taken in cases where a staff member's conduct does not rise to the level of misconduct, but a managerial action is nevertheless required; their function is preventive, corrective and cautionary in nature.

31. Administrative measures have different legal consequences to disciplinary measures, as staff members who are separated or dismissed from service following a disciplinary process on grounds of misconduct are not eligible for reappointment by UNICEF, and a staff member who has received a disciplinary measure must disclose the measure when applying for a new position. On the contrary, the issuance of an administrative measure does not by itself bar appointment or promotion within UNICEF, and staff members who have received a written reprimand are not obliged to disclose the measure when applying for a new position.

32. A record of the imposition of a disciplinary measure is maintained permanently in a staff member's Official Status File. On the contrary, an administrative measure is issued for a specific period of time and is removed from the Official Status File at the conclusion of that time.

33. Second, the Organization has a right to apply disciplinary or administrative measures, following its discretionary evaluation of the relevance of the reproached facts, on a staff member who has failed to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or the relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant.

34. Third, a non-disciplinary ("managerial") action can be taken in cases where a staff member's conduct does not rise to the level of misconduct but there was nonetheless "a factual basis for the allegations".

35. Fourth, under the applicable legislative framework, the administration is bestowed with the discretionary authority to impose a disciplinary or an administrative measure and the Dispute Tribunal is to determine if the decision is legal, rational, procedurally correct, and proportionate (considering whether relevant matters have been ignored and irrelevant matters considered, and also examining whether the decision is absurd or perverse). It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it, nor is it the role of the Tribunal to substitute its own decision for that of the Administration.

36. This said in general and coming to the specific measures applied in the case, Staff rule 10.2(b)(i) clearly and unequivocally qualifies a written reprimand as an administrative measure. This is also reflected in sec. 4.4 of CF/EXD/2012-005 and sec. 5.20(a) of CF/EXD/2012-007 quoted above.

37. The law is clear on this point and the Applicant's argument in respect of the nature of the written reprimand has no legal ground.

38. The Applicant further observes that a difference between the written censure (which is a disciplinary measure) and the written reprimand (which is an administrative measure) could be difficult in practice, and that the overlapping of the measures results in the infringement of her rights.

39. The Tribunal finds the claim without merit bearing in mind what was said above about the difference between disciplinary and administrative measures in view of their nature and effects. Furthermore, the Tribunal observes that the content of the reprimand letter is not of a punitive nature but of an informative nature as it brings to the Applicant's attention shortcomings in her behaviour as a senior manager expected to serve as a role model for the staff members supervised.

40. With respect to the two other administrative measures, namely the Applicant's two-year removal of supervisory functions and the requirement to undertake training, as well as the retention period (five years) of the written reprimand in the Applicant's OSF, the Tribunal finds, first, that they are not punitive but preventive, corrective and cautionary in nature.

41. Indeed, the removal of supervisory functions, pending appropriate training, is a rational response of the Organization to temporarily shield staff from the impact of the Applicant's conduct shortcomings. It is not a demotion. The requirement for training is clearly remedial and the five-year retention of the reprimand letter in the Applicant's OSF strengthens the cautionary nature of the reprimand.

42. As to the Applicant's claim that UNICEF has not taken action to provide her with the training referred to in the reprimand letter, the Tribunal underlines that the Applicant shares responsibility with its employing entity to have such training materialize and, while exhorting both Parties to follow-up on the matter, finds the issue not relevant for the adjudication of the case at hand.

43. The Tribunal reiterates that the administrative measures imposed on the Applicant are limited in time. This sets them apart from disciplinary measures, which have lasting effects.

44. Moreover, contrary to what is the case with disciplinary measures, the administrative measures taken do not bar the Applicant from seeking other positions within or outside UNICEF as, for instance, it is not mandatory to disclose the imposition of a written reprimand when applying for vacancies as admitted by the Respondent; of course, the existence of a written reprimand itself may come to light during reference checks, but it is simply one factor that would be considered in assessing a candidate's suitability for a position.

45. In support of her claim of disproportionality, the Applicant, firstly refers to this Tribunal's judgment in *Elobaid*, and more specifically to para. 57 where it is stated that "only reprimand has a punitive character". Suffice it to say that the Appeals Tribunal vacated that judgment in its entirety.

46. Secondly, the Applicant relies on the 2019 UNICEF Annual Report on Disciplinary Measures and Other Actions taken in response to Misconduct. Such reliance is ill-chosen as all the cases that the Applicant pointed out concerned a finding of misconduct, which is not her case, and resulted *inter alia* in the imposition of a disciplinary measure.

47. Thirdly, the Applicant submits that mitigating factors such as her length of service, her professional record, and her cooperation during the investigation were not considered. On the latter, the Tribunal underlines that staff members have a duty to cooperate during investigations. As to the rest, the Applicant merely states her disagreement with the mitigation degree of said factors. The Tribunal recalls that the reprimand letter explicitly referred to the Applicant's excellent technical skills

while emphasizing that they are only part of the skillset that senior managers must have.

48. The Tribunal finds that the administrative measures imposed on the Applicant were rational and proportionate to the established facts, as well as to address the concerns that UNICEF had about her conduct, and did not constitute disguised disciplinary measures as they are of a different nature than disciplinary measures, targeted specific behaviours, have a limited application in time, and do not necessarily play a role in future selection exercises.

49. The Applicant claims that the administrative measures imposed on her were tainted by personal prejudice, malice, ill-will, bias, and discrimination by UNICEF officials. The Tribunal reiterates its finding that the facts in support of the imposed administrative measures were established as per the required standard and, recalling that it is settled jurisprudence that an applicant has the burden of proving bad faith on the part of the Organization, finds that the Applicant has failed to prove the alleged flaws of the decision-making process.

50. In sum, the Tribunal finds that the decision to impose administrative measures on the Applicant was procedurally and legally sound, as well as factually supported.

Conclusion

51. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signed)

Judge Francesco Buffa

Dated this 29th day of June 2021

Entered in the Register on this 29th day of June 2021

(Signed)

René M. Vargas M., Registrar, Geneva