



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/GVA/2016/007
UNDT/GVA/2016/017
UNDT/GVA/2016/094
Order No.: 186 (GVA/2017)
Date: 3 October 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

REHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON APPLICANT'S MOTION FOR
PRODUCTION OF DOCUMENTS
AND
ON RESPONDENT'S MOTION TO
AMEND REASON FOR THE
CONTESTED DECISION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Miles Hastie, UNICEF

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Introduction

1. The Applicant has three cases pending before the Tribunal. In each of the cases, the Applicant is challenging the following administrative decisions:

- (a) the non-renewal of her fixed-term appointment as Programme Assistant GS-6, Education Section, United Nations International Children's Emergency Fund ("UNICEF"), Islamabad, Pakistan, registered under Case No. UNDT/GVA/2016/007;
- (b) the decision not to select her for the post of Programme Assistant, GS-5, FT Polio Section, Peshawar, Pakistan, registered under Case No. UNDT/GVA/2016/017;
- (c) the decision of the Office of Internal Audit and Investigation ("OIAI") to close the investigations into the Applicant's complaint of harassment, discrimination and abuse of authority lodged by the Applicant against other staff members, registered under Case No. UNDT/GVA/2016/094.

2. The Tribunal issued Order No. 173 (GVA/2017) on 11 September 2017, calling the parties to a Case Management Discussion (CMD) to be held on 18 September 2017. In the same order, the Tribunal noted that the Respondent had not filed any evidence to prove the alleged financial constraints that UNICEF Pakistan office was facing in 2015 which led to the decision not to renew the Applicant's contract.

3. On 18 September 2017, at the CMD, among other matters discussed were the identification of witnesses and the production of the above referenced documents. Once again, Respondent's Counsel was informed and reminded that the Tribunal was waiting to receive the ordered documents. Additionally, the Applicant was waiting to receive the documents in preparation of her witness list for the hearing scheduled for 4 to 6 October 2017. Respondent's Counsel confirmed to the

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Tribunal at the CMD that he would be filing the ordered documents by Friday, 22 September 2017.

4. On Friday, 22 September 2017 at 10:31 p.m. (Geneva time), a notification was sent by the Tribunal's electronic case management system to the Registry informing it of the Respondent's Counsel's filing. This notification was only seen by the Registry staff on Monday, 25 September 2017. The Respondent's Counsel filed several documents and with it a motion for additional time to file the requested documents.

5. In his motion, the Respondent's Counsel indicated that "[l]ogistical and staffing issues [had] posed challenges in exhaustively gathering and cogently presenting the information ordered." Thus, he requested leave to have Order No. 173 (GVA/2017) varied to allow him time to file all the documents by Wednesday, 27 September 2017. By Order No. 184 (GVA/2017), the Tribunal rejected the Respondent's motion, nevertheless, in the interest of justice ordered the Respondent to file the documents by Tuesday, 26 September 2017.

6. On 26 September 2017, the Respondent filed certain documents and a list of witnesses to be called. The Applicant, on 28 September 2017, provided the Registry with her list of witnesses that she wanted the Tribunal to summon on her behalf. The Tribunal's Registry staff requested the Respondent's Counsel to inform it if the witnesses requested by the Applicant were in the employment of the Organisation and of their availability to testify before the Tribunal during the hearing.

7. On 29 September 2017, the Respondent confirmed the availability of the witnesses and on the same day filed a document titled "submission to withdraw issue." On the same date the Applicant filed a motion titled "request to confine/direct the Respondent to provide remaining documents advised by UNDT in CMD and Order No. 173 (GVA/2017), 184 (GVA/2017) before schedule the hearing on merit of cases [*sic*]."

8. On 2 October 2017, the Respondent filed a response to the Applicant's above-referenced motion and as *ex parte*, a closure memo into allegations of entitlement fraud against the Applicant at the UNICEF Pakistan Country Office.

Consideration

9. Pursuant to arts. 19 of the Tribunal's Rules of Procedure, the Tribunal is cognisant of the fact that it can make an order that it deems appropriate and fair and in the interests of justice. The Tribunal will consider both the Applicant's motion and the Respondent's submission in turn.

Respondent's submission

(a) Submission to withdraw issue

10. The Respondent in his submission indicates as follows:

1. UNICEF respectfully seeks to withdraw an issue from contention in the above-captioned court file, to simplify the issues in dispute.
2. UNICEF will no longer argue that there was insufficient funding in the Pakistan Country Office, Education Section, or under the Medium Term Strategic Plan (MTSP) thematic grant to fund Ms. Rehman's post in 2016.
3. UNICEF's defence of the contested decision will be restricted to arguing that the continued funding of Ms. Rehman's post was not considered necessary or appropriate, given that her functions could be (and were, in fact) re-distributed to other staff.

11. The Tribunal would like to inform the Respondent that it is within its purview to determine the issues for consideration and therefore it is not the role of any party to decide to "withdraw" an issue, especially, if there is no unequivocal concession and or admission of liability.

12. The Tribunal finds this submission troubling to say the least and accordingly finds the Respondent's submission more of a motion to amend reasons for non-renewal given to the Applicant consequently amending his defence.

13. The Tribunal takes note that in the submissions made on 26 September 2017, the Respondent's Counsel clearly retracts the reason for non-renewal which was given to the Applicant on 30 September 2015 and it established an admission of a party against interest. Therein, the Applicant was told by Ms. Angela Kearney, the then UNICEF Representative in Pakistan, that her contract was not being renewed due to "funding constraints." The Respondent, in his reply of 5 May 2016 in arguing in defence of lack of funding *inter alia*, stated that the decision not to renew the Applicant's contract was affected by "exchange rate fluctuations." However, in his recent submission, the Respondent seeks to "withdraw" the issue of funding and "replace" it with the following:

4. UNICEF's non-renewal decision was not taken as a consequence of a discrete and complete loss of a grant/funding source for the Applicant's position. Instead, it was taken on the basis of:

(a) the replication of some of the Applicant's functions by the Pakistan Country Office's Business Transaction Centre (BTC) in Islamabad, and the replication of some of those functions by the General Shared Services Centre in Budapest;

(b) the possibility of carriage of the remainder of the Applicant's functions by a GS-7 staff member (whose other functions remained needed), creating a post structure with no more than one Education Section Programme Assistant in each duty station;

(c) a historical and projected pattern of funding constraints in the Education Section, both in general and from the grant used to fund Ms. Rehman's post, which constraints necessitated selectivity in post funding; and

(d) a re-examination of the priorities of the Education Section.

14. The Tribunal takes note of the Organisation's contriving, not mistaken, actions and reserves its full opinion and reasoning in the judgment on liability and relief.

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(b) Response to Applicant's motion and *ex-parte* submission

15. The Tribunal takes note of the Respondent's response to the Applicant's motion.

16. Regarding the *ex parte* submission, namely the "closure memo," the Respondent argues that the provision of closure memos relates to investigators closing a case and not "*providing* a closure memo to the alleged offender."

17. The Tribunal does not agree with this interpretation for the sole reason that the UNICEF Policy which the Respondent seeks to rely on, namely CF/EXD/2012-007 sec 5.19 (a), clearly states that that:

Where the Director, Office of Internal Audit and Investigations deems that there is insufficient evidence ... he/she shall close the case with a closure memo and inform the alleged offender and complainant that the case is closed and share with them a summary of the findings and conclusions of investigation as appropriate.

18. While sec 3.5 (c) of CF/EXD/2012/005 on the disciplinary process and measures provides as follows:

Investigation

3.5 The Director, Office of Internal Audit and Investigations shall assess the information gathered during the preliminary review and decide whether the matter should be:

...

(c) closed with a closure memo, if he/she has come to the conclusion that the alleged facts would not constitute misconduct and that no further investigative steps are warranted. He/she shall prepare a record of the reasons for doing so and notify the subject(s).

19. Nothing in the above quoted provisions support the Respondent's argument. In fact, they are contrary to his submission. Additionally, CF/EXD/2012-005 makes it mandatory for the Director, OIAI, to notify the subject of an investigation.

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20. The Director, OIAI, or the Deputy Director, OIAI, (as is the author of the closure memo on file,) should have informed the Applicant of the closure of the case and provided a summary and a conclusion but he did not do so. He seemed to have left this role to the UNICEF Representative in the Pakistan Country Office who decided to use an email instead of a formal letter informing the Applicant that she had been cleared of any allegations of fraud.

21. The Applicant asked several times for the closure memo but instead she only received emails informing her that the case was closed and that she had been cleared but with no formal document given to her to that effect. If indeed UNICEF, OIAI did not want the Applicant to receive a copy of the closure memo dated 12 October 2015 that it had sent to the UNICEF Pakistan Representative, why did they not write a formal official communication to the Applicant informing her of the closure of the case against her? The handling of the fraud allegations against the Applicant raises a lot of troubling questions but the Tribunal will not address them in this Order.

22. The Tribunal finds that since UNICEF, OIAI did not officially communicate to the Applicant of the closure of the case of the allegations of fraud against her as is required by UNICEF's own Regulations and Rules, the closure memo filed *ex parte* by the Respondent will be shared with the Applicant.

Applicant's motion

23. In her motion the Applicant raises different issues: She is requesting the production of additional documents by the Respondent or requesting the postponement of the hearing until such documents are produced; the Applicant is also seeking advice from the Tribunal regarding some issues and whether she should make a request for management evaluation among other issues and the Applicant is also challenging some of the persons called by the Respondent as witnesses alleging conflict of interest if those persons testify.

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24. The Tribunal believes that the Applicant has all the necessary documents and information to adequately present her case and to be able to cross-examine witnesses at the hearing. The Tribunal does not believe that any further order for the production of documents should be made at this stage.

25. The Applicant requested postponement of the hearing due to the lack of documents but the Tribunal does not find the Applicant's reasons sufficient to warrant a postponement of the hearing especially in light of the fact that the Tribunal will not order the production of any additional documents.

26. The Applicant is also challenging the Respondent's witnesses claiming that:

The witnesses nominated for Case No. UNDT/GVA/2016/007 and UNDT/GVA/2016/094 are nominated Offenders, Respondents and Parties of these cases. In this situation they may record their personal statements but may not be considered as witness in these cases due to conflict of interest.

27. The Tribunal finds that the Applicant's allegation is untenable. The Respondent is free to plan and defend his case as he deems appropriate as long as this is in compliance with the Rules of Procedure of the Tribunal. Furthermore, the Tribunal would like to inform the Applicant that all cases at the Dispute Tribunal are against the Secretary-General as the Chief Administrative Officer and not against individual staff members. Therefore, any complaints that she may have had against the witnesses administratively do not preclude them from testifying for the Respondent before the Tribunal.

28. In her motion, the Applicant requests that the Tribunal advise her on how to deal with some of the Respondent's actions and its change of reasons for the contested decision not to renew her contract. This Tribunal is not in a position to advice the Applicant on how to handle her cases and potential future claims. The Applicant is, however, informed that if she is in need of legal advice, she can contact the Office of Staff Legal Assistance (OSLA).¹

¹ Contact information available at www.un.org/en/oaj/legalassist/contact.shtml

29. The Tribunal notes that the Applicant is self-represented and that she has no legal background. Nonetheless, she has tried her level best to present her case before it, but is growing a bit weary of the repetitive submissions being made.

Witnesses

30. The Tribunal in accordance to art. 17.5 of its Rules of Procedure and after reviewing the witness lists, especially in light of the filing of the closure memo by the Respondent, is of the view that the testimony of two of the witnesses – the Operations Chief and Finance Manager - that the Applicant requested the Tribunal to summon are no longer relevant.

31. The two witnesses were key with regard to the allegations of fraud against the Applicant. However, with the sharing of the closure memo, the facts surrounding the allegations are clear and the outcome of the preliminary review found no wrong doing on the part of the Applicant and consequently the matter was closed. Therefore, the Tribunal finds no need to hear any testimony with regard to the subject of the allegations of fraud.

IT IS ORDERED THAT:

32. The Respondent's motion to "withdraw issue" is rejected;

33. The Applicant's motion for production of additional documents, postponement of the hearing and refusal to have Respondent's witnesses testify is rejected;

34. The Registry is Ordered to make the closure memo available to the Applicant on an under seal basis. The Applicant is warned not to disclose, use, show, convey, disseminate, copy, reproduce or share this document and or in any way communicate the under seal document—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by the Tribunal;

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35. The two witnesses the Applicant sought to have the Tribunal summon in relation to case No. UNDT/GVA/2016/094, that is the Operations Chief and Finance Manager, will not be required to testify; and

36. Both parties shall refrain from filing any additional submissions, motions and or documents to the Tribunal without first obtaining and being granted leave from the Tribunal or being expressly ordered to do so. Any additional filing without leave of the Tribunal will be rejected and expunged from the Tribunal's record.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 3rd day of October 2017

Entered in the Register on this 3rd day of October 2017

(Signed)

René M. Vargas M., Registrar, Geneva