UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-675

Uwais

(Appellant)

v.

Commissioner-General

[redacted]

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Appellant: Amer Abu-Khalaf, LOSA

Counsel for Respondent: Rachel Evers

JUDGE DEBORAH THOMAS -FELIX , PRESIDING .

1. The United Nations Appeals Tribunal has before it an appeal by

… By email to the [Deputy Director of UNRWA Operations in the West Bank ("Deputy Director of Operations")] dated 28 September 2013, the Applicant inquired about the results of the investigation into her complaint.

… By email dated 30 September 2013,the [Deputy Director of Operations] informed the Applicant that her complaint had been submitted to the Field Investigations Committee ("Investigat ion Committee") for action and was being processed accordingly. He pointed out that she would be informed of the outcome in due course.

… On 27 October 2013, the Applicant submitted a complaint of physical harassment against the [FPS Officer].

… By email dated 14 November 2013, the Applicant submitted another complaint of harassment against the [FPS Officer].

… In the Applicant's performance evaluation report ("PER") dated 2 December 2013, the overall rating of her performance was "[d]oes not fully meet expectations". The [FPS Officer] recommended terminating the Applicant's duties in the interest of the Agency, and the [Deputy Chief, FHP] noted that the Applicant did not meet the performance objectives.

… By a report dated 16 February 2014, the Investigation Committee concluded that there was no evidence to substantiate the Applicant's complaints of harassment [of 27 October 2013 and 14 November 2013] against the [FPS Officer].

… By letter dated 21 February 2014, the [Director of Operations] informed the Applicant of the outcome of the investigations into the allegations of misconduct that she had raised against the [FPS Officer]. The letter provides, in relevant part, as follows:

> […] I have authorized investigation committees to look into your allegations on two separate occasions – the first committee was tasked with investigating the misconduct allega tions you raised on 16 July 2013 and the second investigation dealt with your misconduct allegations from both 27 October 2013 and 14 November 2013. Neither investigation committee substantiated the misconduct allegations you brought against [the FPS [Officer]]. Accordingly, the Agency considers this matter closed.

… On 17 March 2014, the Applicant requested review of the decision to close the case in relation to her complaints of harassment and abuse of power.

… By letter dated 23 April 2014, the [Director of Operations] informed the Applicant of the decision to terminate her services in the interest of the Agency. The letter provides, in relevant part, that:

12. On 21 January 2016, Ms. Uwais filed the pending appeal. By Order No. 254 (2016), the President of the Appeals Tribunal granted an extension of time to the Commissioner-General to file his answer, to 7 April 2016. On 7 April 2016, the Commissioner-General filed his answer to the appeal.

Submissions

Ms. Uwais' Appeal

13. Ms. Uwais contends that the UNRWA Dispute Tribunal erred on a question of law and procedure by failing to find that the decisions to close the cases arising from her complaints of harassment and abuse of power were tainted by procedural irregularities. The preliminary assessment of her 16 July 2013 complaint was flawed as the Deputy Chief, FHP had a conflict of interest. He was Ms. Uwais' second supervisor and the FPS Officer's supervisor. He was "fully supportive" of the FPS Officer. For the same reasons, the investigation of her 27 October 2013 and 14 November 2013 complaints was flawed as the Deputy Chief, FHP was a member of the Investigation Committee.

14. The Investigation Committee's failure to interview the witnesses nominated by Ms. Uwais further demonstrates the Committee's lack of neutrality. Also, the witnesses interviewed by the Committee were all, in effect, supervised by the Deputy Chief, FHP "hence they gave their testimonies under pressure".

15. The UNRWA Dispute Tribunal erred on a question of procedure, as it failed to obtain written statements from the witnesses identified by Ms. Uwais in her complaints, or order their appearance at the hearing on the merits.

16. Further, the UNRWA Dispute Tribunal erred in finding that the complaints of harassment and retaliation were not substantiated. The Tribunal did not take into account the views of the Ethics Office regarding the investigation or Ms. Uwais' testimony at the hearing on the merits.

17. Ms. Uwais submits that the UNRWA Dispute Tribunal erred on a question of law and procedure in finding the decision to terminate her fixed-term appointment lawful. The procedural irregularities ought to have led to a finding that the decision was unlawful and an award of compensation for the damage that she suffered as a result of the irregularities.

Further, the UNRWA Dispute Tribunal erred in concluding that her performance was the basis for the termination decision.

18. Ms. Uwais requests the Appeals Tribunal to rescind the decision to close the cases arising from her complaints of harassment and abuse of power, and the decision to terminate her fixed-term appointment. She also requests reinstatement to her position and compensation.

The Commissioner-General's Answer

19. The UNRWA Dispute Tribunal correctly found that there were no procedural irregularities in the investigation of Ms. Uwais' complaints. The UNRWA Dispute Tribunal considered Ms. Uwais' claims regarding lack of neutrality and failure to interview witnesses, and in doing so, it applied the applicable administrative instrument and reviewed the investigation report. In her appeal, Ms. Uwais has not identified any specific errors made by the UNRWA Dispute Tribunal in its consideration of her claims. In an appeal to the Appeals Tribunal, it is not sufficient for an appellant to reargue the case he or she made before the UNRWA Dispute Tribunal.

20. The UNRWA Dispute Tribunal did not make an error of procedure by not ordering the appearance of the witnesses nominated by Ms. Uwais in her complaints. The UNRWA Dispute Tribunal has broad discretion in relation to case management, and this is not a case of denial of due process affecting the right to produce evidence. Ms. Uwais did not call the witnesses to give evidence on her behalf during the hearing on the merits, or request an order from the Tribunal compelling the witnesses to give evidence.

21. Ms. Uwais seeks to adduce new evidence in her appeal that was not before the UNRWA Dispute Tribunal. The correspondence from the Ethics Office was not part of the record before the UNRWA Dispute Tribunal and cannot be introduced for the first time on appeal.

22. The UNRWA Dispute Tribunal's finding that the decision to terminate Ms. Uwais' fixed-term appointment is sound. Ms. Uwais did not adduce evidence of any damage suffered as a result of the mischaracterization of the termination decision as a disciplinary measure. Also, Ms. Uwais has not identified a specific error made by the UNRWA Dispute Tribunal in concluding that she did not suffer any harm as a result of the

use of the incorrect process to evaluate her performance during the probationary period. The UNRWA Dispute Tribunal properly concluded that the reason given for the termination decision, namely unsatisfactory performance, was justified based on the evidence on the record.

23. The Commissioner-General requests that the Appeals Tribunal dismiss the appeal.

Considerations

24. The UNRWA Dispute Tribunal consolidated Ms. Uwais' two cases and disposed of them in one judgment. We consider Ms. Uwais' appeal on the merits in her two cases in turn.

Case 1: The decision to close the cases arising from Ms. Uwais' complaints of harassment and abuse of power

25. Ms. Uwais argues that the UNRWA Dispute Tribunal erred in finding that the decision to close the cases arising from her three complaints of harassment and abuse of power against her supervisor were lawful. For the following reasons, we affirm the UNRWA Dispute Tribunal's findings.

26. We accept the UNRWA Dispute Tribunal's finding that the investigation of her complaints was not tainted by procedural irregularities. The UNRWA Dispute Tribunal considered Ms. Uwais' argument that the investigation was irregular as one of the individuals nominated to investigate her complaints, the Deputy Chief, FPH, had a conflict of interest. We see no reason to hold that the UNRWA Dispute Tribunal's analysis of this issue was flawed. Likewise, we find that the UNRWA Dispute Tribunal did not err by concluding that the Investigation Committee's decision not to interview all of the 16 witnesses identified by Ms. Uwais in her complaints violated her rights. The UNRWA Dispute Tribunal correctly found that the Investigation Committee interviewed only those witnesses whose testimony was most relevant during the investigation.

27.

whether to call a certain person to give evidence, remains within the discretion of the Tribunal of first instance, and we will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.[2] We do not accept Ms. Uwais' argument that this threshold has been met. Also, we have consistently affirmed that a Tribunal of first instance does not have competence to conduct a de novo investigation of complaints of harassment or other forms of prohibited conduct. [3]

28. Finally, Ms. Uwais has not persuaded us that the UNRWA Dispute Tribunal erred in deciding that the decision to close the cases arising from her complaints was lawful. The UNRWA Dispute Tribunal carefully considered the arguments made by Ms. Uwais but ultimately concluded that the decision to close the cases was justified based on the evidence gathered during the investigation.

Case 2: The decision to terminate Ms. Uwais' fixed-term appointment in the interest of the Agency

29. The letter dated 23 April 2014 wherein Ms. Uwais was informed by the Agency that her services were terminated indicated that the decision was "a disciplinary measure". Those words, to a substantial degree, bring into question whether the decision to terminate her appointment was in fact for reasons of performance, and whether it was indeed a lawful decision. The Commissioner-General by way of explanation states that the letter of 23 April 2014 erroneously characterized the decision to terminate as a disciplinary measure.

30. We wish to point out that a decision to terminate any staff member's appointment "in the interest of the Agency" under Area Staff Regulation 9.1 is a very serious decision, since it is the ultimate manifestation of the Administration's prerogative to do so where appropriate, and is permanent in nature. Such a decision has far-reaching consequences for the staff member and requires careful consideration and deliberation before implementation. It is therefore expected that a letter or notice which informs a staff member of the termination of his or her service will be transparent and written in such a way as to properly and adequately communicate, characterize and explain the reason for the decision. Therefore, we do not accept the assertion that the description of the decision as a disciplinary measure was simply a mischaracterization.

[2] Wu v. Secretary-General of the United Nations, Judgment No. 2015-UNAT-597, paras. 34 and 35.
[3]

31. We find that the characterization of the decision as a disciplinary measure as stated in the letter of termination has tainted the process to such a significant degree that it renders the termination decision unlawful.

Judgment

32. The appeal is allowed in part. The Judgment of the UNRWA Dispute Tribunal with respect to Ms. Uwais' application challenging the termination decision (Case No. UNRWA/DT/WBFO/2014/043) is vacated.

33. We award compensation of six months' net base salary as pecuniary damages.

34. Payment of the compensation is to be effected within 60 days of the date of issuance of this Judgment. Interest shall accrue on the compensation award from the date of issuance of this Judgment at the current US Prime Rate until payment is made. If payment is not made within the 60-day period, an additional five per cent shall be added to the US Prime Rate.