



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/023/
JAB/2008/039
Judgment No.: UNDT/2010/205
Date: 29 November 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar:

Introduction

1. Following an investigation in which he was cleared of charges of sexual harassment and sexual assault, the Applicant, a former senior official with the India Office of the United Nations Children's Fund ("UNICEF"), received a letter of reprimand in January 2007 for "inappropriate behavior". Approximately ten months later, in November 2007, the Applicant requested disclosure of the investigation report, issuance of a public statement declaring his innocence, and compensation for his legal defence against the proceedings brought against him by the complainant in domestic courts. When these requests were refused on 19 December 2007, the Applicant sought administrative review of the decision to refuse his requests, requesting also the withdrawal of the written reprimand. He subsequently filed an appeal with the Joint Appeals Board ("JAB"). On 1 July 2009 this case was transferred to the United Nations Dispute Tribunal.

2. The Applicant claims, *inter alia*, compensation in the amount of two years' net base salary for denial of due process and compensation for the legal expenses caused by the Organisation's handling of the case, including USD2,800 for legal costs incurred in India and USD21,500 in New York. The Applicant further requests USD30,000 to cover the expenses associated with his "public exoneration" and an order to UNICEF to issue a statement concerning his exoneration.

3. The Tribunal reiterates from the outset that this case is not about the propriety or otherwise of the letter of reprimand or the Applicant's exoneration from the substantive charges filed against him by the complainant. On 28 August 2009 Shaw J issued *Adorna* UNDT/2009/012, finding that the Applicant's appeal was time-barred with regard to the issuance of the letter of reprimand, but that it was receivable with regard to the decisions expressed in UNICEF's letter of 19 December 2007, namely:

- a. the refusal to allow the Applicant access to the investigation report;

disciplinary administrative measure (see former staff rule 110.3(b)). The letter stated (emphasis in original):

As you are aware, UNICEF conducted an investigation into allegations of sexual harassment, abuse of authority and harassment in the workplace raised by a staff member against you.

The final investigation report found that you demonstrate a tendency to make public jokes or comments with sexual connotations that make some staff feel uncomfortable in the workplace. ...

Several staff found certain comments made by you inappropriate and felt uncomfortable. ...

... [T]he allegation of making comments with a sexual connotation is the only allegation that was supported by clear and convincing evidence out of 19 allegations that were raised against you. In light of these circumstances, formal charges will not be filed against you as a result of this complaint.

Any further misconduct on your part, any comments or jokes with a sexual connotation, any inappropriate questions that can reasonably be perceived as sexual advances, any type of proposition with a sexual connotation to other staff or persons working in the office, as well as any aggressive or threatening or hostile behaviour or actions of intimidation by you, including any act of retaliation against staff who cooperated with the Investigation Committee, will result in further disciplinary proceedings and the imposition of disciplinary measures against you. ...

...

On the basis of the above, you are hereby issued this **Written Reprimand**. The Reprimand will be placed in your Official Status File. ...

8. In or about March 2007, dissatisfied with the outcome of the investigation into her original allegations against the Applicant, the complainant filed additional complaints with various national agencies in India and made a number of public appearances regarding her allegations. On 30 March 2007 she filed a criminal complaint with the Indian police. The criminal case against the Applicant and other UNICEF officials was dismissed by the local court on 16 November 2007 on the basis that “all the accused persons [were] immune to [India’s] domestic legal processes”.

9. In March 2007 UNICEF issued several news releases in response to the media reports concerning the investigation and also communicated with the Ministry of External Affairs of India with regard to the findings of its investigation of the complainant's allegations. More specifically, in March 2007 UNICEF issued the following public statement:

As the leading child rights organization, UNICEF takes allegations of harassment, including sexual harassment and abuse of authority in its workplace very seriously. In fact, UNICEF has a policy of zero-tolerance in place and is committed to holding its staff members accountable, should any wrongdoing occur. UNICEF responded swiftly, in accordance with established procedures, to the allegations made by a former staff member in its New Delhi Office by sending a team of experienced investigators to India. The investigation included a detailed analysis of all available evidence as well as interviews of witnesses. The evidence did not support the allegations raised by the former staff member.

10. On 29 March 2007 UNICEF received an enquiry from one of India's news channels about the case and sent a reply on 30 March 2007, stating:

The investigation included a detailed analysis of all evidence as well as exhaustive interviews of witnesses. The evidence did not support any of the allegations raised by the former staff member [i.e., the complainant] and all parties were informed accordingly.

...

The investigation revealed that misconduct had not occurred and there was no evidence to support the complaint. Therefore, the case was closed.

11. Between June and August 2007 UNICEF and the Applicant held a number of discussions concerning the possibility of his transfer out of India. In October 2007 the Applicant began his new assignment with the United Nations Development Group in New York.

12. On 24 October 2007 several Indian newspapers published reports that an "informal inquiry" by the Indian Ministry for Women and Child Development "found the India representative of UNICEF [i.e., the Applicant] prima facie guilty of sexual

actions; and that UNICEF had already issued a number of public releases concerning the outcome of the investigation. The Deputy Executive Director declined to cover the Applicant's legal expenses or to issue further internal and public statements. The Applicant was reminded that the investigation did not clear him of all the allegations and that he had been formally reprimanded for inappropriate behaviour including making public jokes and comments with sexual connotation that made some staff members feel uncomfortable in the workplace. Specifically, with respect to the Applicant's request for a copy of the investigation report, the letter stated:

[I]t should be noted that it has been the policy of the Organization to not share the report unless disciplinary action is taken against any of the staff members involved. Since no disciplinary action was taken against you or [the complainant] the report was not shared with either one of you. The only reason why a redacted version of the report was shared with the Government of India was to show the Government that UNICEF had conducted a fair and impartial investigation as required by its policy and procedure and to show that it had neither unduly defended nor protected you during the investigation.

16. On 7 February 2008 the Applicant sought administrative review of the decisions communicated to him on 19 December 2007 and requested that the letter of reprimand be withdrawn. The outcome of the review was that the Applicant's requests would not be met as they were time-barred and without merit. On 2 May 2008, the Applicant submitted a statement of appeal to the JAB, reiterating his claims.

17. The Respondent submitted his reply on 14 July 2008, stating, *inter alia*, that the Applicant's request to withdraw the letter of reprimand was time-barred, since pursuant to former staff rule 111.2(a) he had two months after 16 January 2007—i.e., until 16 March 2007—to request review of the decision. The Respondent further stated that the Applicant was publicly cleared of the complainant's allegations and, since the media releases were issued in March 2007, any claims with respect to them were time-barred from May 2007.

18. On 26 September 2008 the Applicant submitted his observations on the

December 2007 and confirmed in *Adorna*—i.e., the decision not to allow the Applicant access to the investigation report, the decision not to cover the Applicant's legal fees, and the decision not to issue any further statements acknowledging the Applicant's exoneration. The parties' submissions with respect to these claims are summarised below.

23. The Applicant submits that he should have been given a copy of the investigation report that was relied on by UNICEF in issuing the written reprimand. The Applicant claims that without access to the report he was deprived of the opportunity to adequately defend himself against the complainant's accusations and against the findings on which the letter of reprimand was based. According to the Applicant, UNICEF was responsible for the legal costs incurred by him and UNICEF's public statements were neither timely nor adequate.

24. The Respondent submits that the decision not to provide the Applicant with a copy of the investigation report was correct as no disciplinary proceedings had been initiated against him and that no procedures were violated. Further, the Respondent submits that UNICEF has not caused any harm to the Applicant and the public statements issued by UNICEF were appropriate, accurate and timely in view of the sensitive issues at hand. According to the Respondent, the decision to retain private counsel was that of the Applicant alone. No promises were given by UNICEF to cover his legal costs. Further, in accordance with art. 10.6 of the Tribunal's Statute, the Tribunal may only award costs against a party that has manifestly abused the proceedings before it. No such abuse has occurred in the present proceedings and therefore the request by the Applicant cannot be granted.

Case No.

Case No.

Case No.

steps to issue statements concerning the matter. See, e.g., former UN Administrative Tribunal Judgment No. 1095, *Plasa* (2002) (ordering, *inter alia*, compensation for the breach of due process and the attacks on the staff member's reputation occasioned by the publicity given, particularly in the press, by the Administration).

Request for costs

33. With respect to the legal costs incurred by the Applicant outside of the proceedings before the Tribunal, the Tribunal is of the view that these costs were primarily incurred as a result of the actions of the complainant who brought forward the original allegations against the Applicant and continued to pursue action against him in courts of national jurisdiction in 2007. The Tribunal finds that there is insufficient nexus between these legal costs and UNICEF's actions to warrant their award and there is nothing before the Tribunal to show that the Respondent made any explicit or implied promises to the Applicant to cover his legal costs. (See, e.g., Judgment No. 1413, *Sevan et al.* (2008), para. V, finding that there was a valid and binding agreement between the parties that the Respondent would reimburse the Applicant for legal fees incurred in relation to the official investigation into his conduct and that this entitlement could not be unilaterally taken away by the Respondent in the absence of an express reservation.)

34. With respect to the costs incurred by the Applicant in the proceedings before the Tribunal, neither party abused the proceedings and therefore no costs will be awarded under art. 10.6 of the Rules of Procedure.

Conclusion

35. The Tribunal finds that the Applicant should have been provided with a copy of the investigation report following his request in November 2007 and UNICEF's failure to exercise reasonable discretion was in breach of the duty of good faith and fair dealing and warrants compensation. The Respondent is ordered to pay the Applicant USD15,000. This sum is to be paid within 60 days after the Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

36. The Applicant's other pleas, including with respect to costs and further public statements by UNICEF in relation to his case, are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of November 2010

Entered in the Register on this 29th day of November 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry