

Case No.: UNDT/GVA/2018/006  
Judgment No.: UNDT/2018/040  
Date: 20 March 2018

## **Introduction**

1. On 19 January 2018, the Applicant, a staff member of the United Nations Children's Fund ("UNICEF"), filed an application, further to her receipt of the response to her request for management evaluation, contesting UNICEF's claim that

- a. Placing her on special leave without pay in October 2017 was an administrative error;
- b. UNICEF's Ethics Office decision on her case was delayed due to the Applicant's fault and that such delay did not prejudice the outcome of the review by the Ethics Office; and

*The Applicant's administrative status*

7. After an incident on 17 May 2017, the Applicant was placed on certified sick leave (“CSL”) with full pay. Effective 9 August 2017, and following exhaustion of the Applicant’s entitlement to CSL with full pay, she was placed on CSL with half pay, combined with half annual leave to keep her on full pay status.

with half pay from the time of exhaustion of her paid leave, namely from October until December 2017.

*The Applicant's request for whistleblower protection*

13. By email dated 8 April 2017 to, *inter alia*, the Human Resources Manager, PFP, UNICEF, Geneva, and the Human Resources Learning and Development Specialist, PFP, Geneva, the Applicant complained about a “situation” she had with her first reporting officer. The Learning and Development Specialist responded to that email on 10 April 2017, suggesting a meeting between the Applicant, her direct supervisor and herself, which took place shortly thereafter.

14. By letter dated 9 September 2017, the Applicant requested whistleblower protection from the UNICEF Ethics Office, identifying the email of 8 April 2017 as the protected activity under the whistleblower policy and noting that her health situation was due at least partly to some actions of her supervisors after said email.

15. Several communications ensued between the Applicant and the Ethics Advisor, UNICEF, by which the latter requested additional information to substantiate the Applicant's request for retaliation. The Ethics Advisor informed the Applicant that in the absence of any further information from her, she would complete the preliminary review by early December.

16. The Principal Adviser, UNICEF Ethics Office, dismissed the Applicant's request by email of 6 December 2017, expressing her regret for the delay which she noted was partly due to the Applicant's failure to respond to the Ethics Office. The Principal Adviser informed the Applicant of her finding that she had not presented a credible *prima facie* case of retaliation.

17. On 13 December 2017, the Applicant filed a request for review of the UNICEF Ethics Office decision dismissing her request with the Chairperson of the Ethics Panel of the United Nations. The latter, by letter dated 16 February 2018, informed the Applicant that, after review, he concurred with the UNICEF Ethics Office conclusion that she had not established a case of retaliation. He noted, however, that he agreed with the Applicant's concern that the matter had been

unjustifiably delayed and that this delay did not nullify the preliminary determination on her request.

*Management evaluation*

18. On 5 December 2017, the Applicant requested management evaluation of:
  - a. The decision of 17 October 2017 to place her on special leave without pay, starting on 8 November 2017; and
  - b. The administrative situation by which one month and a half after the deadline set by the Ethics Office to reply to her whistleblower protection request of 9 September 2017, she had not received a response on whether UNICEF would recognize her status as a whistleblower.
  
19. By letter dated 12 January 2018, UNICEF informed the Applicant of the outcome of the management evaluation, stressing, *inter alia*, that
  - a. With respect to her placement on half-pay, UNICEF had complied with the Tribunal's Order; and
  - b. Her complaint of non-receipt of a response from the Ethics Office was not only moot but also that management evaluation was not the right mechanism to challenge it.

**Parties' submissions**

20. The Applicant's main contentions may be summarised as follows:
  - a. On 9 September 2017, she filed a complaint for retaliation against whistleblowers with the UNICEF's Ethics Office with respect to two UNICEF staff members;
  - b. The decision of 17 October 2017 to place her on SLWOP was not an administrative error but based on improper motives and of a retaliatory nature; although, upon the Tribunal's order, UNICEF returned her salary to her, the motive should be examined by the Tribunal also to prevent potential unlawful acts against her in the future; UNICEF is conducting an informal

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submissions, is her placement on SLWOP; following Order No. 250 (GVA/2017), the decision was rescinded with full retroactive effect and, hence, the matter is moot;

b. UNICEF's Ethics Office's assessment of the Applicant's request for protection against retaliation was not unduly delayed and the fact that it took longer than the statutory 45-day period was mainly due to the Applicant's failure to respond to the email from the Principal Advisor; such delay did not impact the outcome of the review;

c. If OIAI were to rule that her complaint to it was time-barred, which it has not, the Applicant could request management evaluation of such a ruling;

d. After the Applicant submitted her request for management evaluation, at the time of the filing of the application, the Ethics Office had completed its review; hence, the matter is moot;

e. Alternatively, recourse with respect to the assessment by the UNICEF's Ethics Office, lies with the Chairperson of the UN Ethics Panel; the Tribunal is not competent to review such assessment, as was held by majority by the Appeals Tribunal in *Wasserstrom*;

f. The Applicant's assertion that UNICEF was incorrect to find that her complaint of 8 April 2017 to the Ethics Office raised workplace issues is a

- a. Placing her on SLWOP in October 2017 was an “administrative error”;
- b. UNICEF’s Ethics Office decision of her case was delayed solely due to her fault and such delay did not prejudice the outcomes of the Ethics Office review;
- c. Her complaint of 8 April 2017 raised workplace issues rather than rights’ violations and breaches of UNICEF rules and regulations.



26. With respect to the decision of 17 October 2017, the Respondent argues that it is moot because the Tribunal did already decide on this matter and UNICEF complied with its decision. The Tribunal notes that, indeed, following Order No. 250 (GVA/2017), the decision to place the Applicant on SLWOP was rescinded and agrees with the Respondent that this matter is moot.

27. Concerning the alleged delay in the UNICEF Ethics Office's review of the Applicant's request for protection of 9 September 2017, the Tribunal notes that, on 6 December 2017, the UNICEF Ethics Office completed its review and informed the Applicant of its view that no prima facie case of retaliation had been established. As argued by the Respondent and agreed by the Applicant, the proper forum to request a review of that assessment is not management evaluation, but a request to the Chairperson of the Ethics Panel of the United Nations (cf. UNICEF's *Whistle Blower protection policy*, Executive Directive CF/EXD/2007-005 Rev. 2).

28. The Tribunal notes that on 13 December 2017, the Applicant availed herself of that possibility and requested the Chairperson of the Ethics Panel of the United Nations to review the UNICEF Ethics Office's initial assessment of 6 December 2017, regarding her request for protection against retaliation. The Chairperson of the Ethics Panel of the United Nations informed the Applicant on 16 February 2018 that he agreed with the assessment by the UNICEF Ethics Office.

29. The Tribunal recalls that the review by the Ethics Office cannot be subject to judicial review. Indeed, the Appeals Tribunal ruled in *Wasserstrom* (2014-UNAT-457) that:

41. (...) We agree with the Secretary-General that the Ethics office is limited to making recommendations to the Administration. Thus, the Appeals Tribunal, with Judge Faherty dissenting, finds that these recommendations are not administrative decisions subject to judicial review and as such do not have any "direct legal consequences". Hence, the Secretary-General's appeal on receivability is upheld.

30. Further, in *Nguyen-Kropp & Postica* 2016-UNAT-673, the Appeals Tribunal found that a finding by the Ethics Office after a preliminary review that there was

no credible case of retaliation does not constitute a decision carrying direct legal consequences and, hence, it is not subject to judicial review.

31. The findings of the Appeals Tribunal are binding for the Dispute Tribunal and are applicable in similar cases (*Igbinedion* 2014-UNAT-411, *Zeid* 2014-UNAT-401 and *Hepworth* 2015-UNAT-503).

32. In light of the jurisprudence of the Appeals Tribunal in *Wasserstrom* and *Nguyen-Kropp & Postica*

the Applicant's health and reputation, the Tribunal finds it appropriate to redact her name from the present judgment.

### **Conclusion**

36. In light of the foregoing, the Tribunal DECIDES that: