



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1272

Case No. 1355

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Dayendra Sena
Wijewardane; Mr. Joon Seng Goh;

Whereas, on 20 May 2004, a former staff member of the United Nations
Children's Fund (hereinafter referred to as UNICEF) filed an Application containing
pleas which read, in part, as follows:

“II. PLEAS

7. With respect to competence and procedure, the Applicant respectfully
requests the Tribunal:

...

(c) to decide to hold oral proceedings on the present application ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) to rescind the decision of the Secretary-General to make no
recommendation in respect of the Applicant's appeal;

...

(d) to award the Applicant appropriate compensation in the amount of
three year's net base pay in view of the special circumstances of the case;

(e) to award the Applicant as cost, the sum of \$7,500.00 in legal fees
and \$500.00 in expenses and disbursements.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2004 and twice thereafter until 31 December;

Whereas the Respondent filed his Answer on 17 December 2004;

Whereas the Applicant filed Written Observations on 1 February 2005;

Whereas, on 28 October 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

...

The [Applicant] joined UNICEF on 1 November 1984, on a two-year fixed-term appointment ... as a Programme Officer for Women Development and Education at the NO-C level in the Egypt Country Office (ECO). On 1 November 1986, her appointment was extended for two years. ... On 1 January 1988, she was promoted to the NO-D level. ... She was subsequently granted several extensions of her fixed-term ... appointment until 31 December 2001, when she separated from UNICEF on agreed termination following abolition of her post.

Summary of the facts

PER rebuttal

... On 20 February 2000, [the Applicant's supervisor and] First Reporting Officer, completed [the Applicant's Performance Evaluation Report (PER) for 1999, giving her ratings in the various categories that were lower than in previous PERs]

... In [the] General Comments, it was noted

‘[the Applicant] is a competent professional. However, her performance this year - while generally acceptable - remains below her capacity and my expectation. She clearly possesses the skills and qualities required to perform at a level commensurate with her responsibilities, competence and talent.’

[Under] Performance Feedback, [the Applicant's supervisor] noted that he had brought the [Applicant's] deficiencies to her attention in ‘two periodic

performance discussions and during a number of other consultations held during the course of the year'. ...

... On 23 February 2000, [the UNICEF] Representative, [ECO], (... [the] Representative...) completed and signed [the Applicant's] PER, as Second Reporting Officer. [The] Representative ... commented on the [Applicant's] work and stated that:

'I am very familiar with the staff member's performance this past year. I have recognized in the past her intellectual capacity and her qualifications. I agree with her supervisor's general comments I must also add my extreme disappointment at learning this year that [the Applicant's] management of work relationships and understanding of the vested responsibilities in supervision... fell so short of my expectations'. ...

... On 23 February 2000, the [Applicant] received a copy of her PER. On 1 March 2000, the [Applicant] completed and signed ... the PER, indicating that she would avail herself of the rebuttal procedure ...

... By letter dated 6 March 2000 to [the] Deputy Executive Director, UNICEF, the [Applicant] submitted her formal rebuttal to her PER alleging that her rebuttal was submitted as a result of the 'intentional discrimination, harassment, retaliation, intimidation and resulting damage to [her] professional reputation directed against [her] by [her] supervisors'. Additionally, she stated that her 'supervisors actions [were] the result of an extraneous influence, namely a reaction to [her] position as [ECO] Ombudsperson and in particular to [her] handling of a staff member case during 1999. ...

... By memorandum dated 25 April 2000, to [the] Representative ... [the Applicant's supervisor and first reporting officer] communicated his comments on the [Applicant's] rebuttal ...

...

... By memorandum dated 11 May 2000 ... [the] Representative ... provided her comments on the [Applicant's] rebuttal stating [inter alia that] ... the [Applicant's] role 'as Ombudsperson does not, nor should it have any bearing on her PER for 1999, nor at any other time'.

... By memorandum dated 17 July 2000, ... [the] Representative ... forwarded [to the Applicant] her comments and [those] of [the first reporting officer] in response to the [Applicant's] rebuttal ... The [Applicant] was also informed [that] she could submit her comments to the Deputy Director for consideration prior to the Director's decision. ...

... By memorandum dated 11 September 2000 ... the [Applicant] commented on [the] materials forwarded to her on 17 July 2000 ... The [Applicant] alleged that [the] Representative ... did attempt to interfere with her role as Ombudsperson ...

... By letter dated 16 October 2000, [the] Deputy Executive Director, after consideration of the [Applicant's] rebuttal, decided to 'maintain the [Applicant's] 1999 PER' Additionally, she found no factual basis for the

[Applicant's] allegations of discrimination, or that she was subject to a hostile work environment that inhibited her work.

Pattern of harassment and discrimination: Ombudsperson's role

... In May 1999, the [Applicant] and another staff member were selected as the new Ombudspersons for [ECO] ...

...

... [On 9 August 1999, the Applicant, in her capacity as Ombudsperson, submitted to the Regional Director, Middle East and North Africa Regional Office (MENARO) her Report on a particularly sensitive case.]

... [On] 28 September 1999 ... [the Regional Director, MENARO] acknowledged the Report ... [commending her] 'effort to review thoroughly all information pertinent to the case'. ...

...

National Council for Women, Arab Republic of Egypt

... By letter dated 4 April 2000, to [the] Representative ... [the] Secretary-General, National Council for Women, Arab Republic of Egypt, requested the services of the [Applicant] on a part-time basis for the development of a programme of cooperation between UNICEF and the National Council of Women.

... By letter dated 16 April 2000 ... [the] Representative ... replied ... [stating] that 'the United Nations cannot accede to a request for the services of a United Nations staff member because a staff member cannot receive instructions both from [a] government and from UNICEF'. ...

Procedure

... By email dated 16 April 2000 ...the [Applicant] requested administrative review of a decision concerning her PER ... [stating] that 'the rebuttal letter submitted to [the Deputy Executive Director] on 6 March 2000 should be considered as an official request for a review of an administrative decision'. ...

[On 6 June 2000, the Applicant lodged an appeal with the JAB in New York.]

..."

The JAB adopted its report on 8 October 2003. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

39. ... The Panel concluded that all steps of the rebuttal procedure were followed in an appropriate manner. While the decision of the Deputy

Executive Director was not made until 16 October 2000, such a delay did not affect the Appellant's right to file an appeal with the [JAB].

40. The Panel did not find persuasive the Appellant's claim that the periodic performance feedback discussions and the first and second reporting officers' comments on the Appellant's performance was evidence of harassment and discrimination. ... Periodic discussions of performance are necessary so that a staff member can meet his/her performance goals. As such the Panel found no basis whatsoever for the Appellant's request to nullify her PER. ...

41. The Panel next examined the other contentions of the Appellant. The Appellant argues that her role as Ombudsperson affected her relationship with management, and thus her PER. The record and supporting documentation indicated that [the] Representative ... was supportive of the Appellant's role as Ombudsperson ...

42. The Panel also noted that it did not appear that the Appellant was singled out for retaliation because of her role as Ombudsperson. ...

43. The Panel also reviewed the contention of the Appellant that [the] Representative's ... refusal to assent to the request from the National Council of Women, Arab Republic of Egypt for the Appellant's services on a part-time basis was another example of discrimination. The Panel did not find that the decision of [the] Representative ... was evidence of discrimination. ...

Conclusions and Recommendations

44. In light of the foregoing, the Panel concluded that the UNICEF PER Recourse Procedure as outlined in [UNICEF administrative instruction CF/AI/1994-02, entitled 'UNICEF Revised Appraisal System, dated 1 March 1994] was fully complied with and was not in any way tainted by prejudice or other extraneous factors. The Panel also concluded that the Appellant who carried the burden of proof of harassment and discriminatory treatment, had not provided convincing evidence in support of her case, thus, the Panel concluded that the Appellant's rights were not violated.

45. The Panel, therefore, *unanimously decided* to make no recommendation in support of this appeal."

On 14 October 2003, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's reasoning and findings and accordingly had decided to accept the JAB's unanimous conclusion and to take no further action on her appeal.

On 20 May 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the Applicant's rights as a staff member, specifically with respect to the harassment and retaliation she suffered as a result of exercising her duties as UNICEF Country Ombudsperson.

2. The JAB failed to make a full and adequate inquiry into the circumstances surrounding and leading up to the decisions to retaliate against the Applicant for her having attempted to carry out her duties as Ombudsperson.

3. The Applicant's PER for 1999 was biased; UNICEF's rebuttal procedures amount to little more than review by a higher-level official – there is no independent review by an impartial panel and therefore rebuttals have little practical effect.

4. The JAB erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights.

Whereas the Respondent's principal contentions are:

1. UNICEF's policies and procedures on performance evaluations did not violate the Applicant's rights.

2. The Applicant has failed to meet her burden of establishing that she was the victim of harassment and discrimination.

3. The Applicant's claim for damages is without merit.

4. The Applicant is not entitled to compensation for her costs.

The Tribunal, having deliberated from 28 October to 23 November 2005, now pronounces the following Judgement:

I. The Applicant was a staff member with the UNICEF Egypt Country Office for some fifteen years, initially serving as a Programme Officer for Women Development and Education at the NO-C level and subsequently as Project Officer for Women Development, attaining the NO-D level. On 31 December 2001, she separated from UNICEF under a termination agreement following the abolition of her post, a termination which the Applicant undertook not to contest and which is not at issue before the Tribunal.

II. This case concerns a claim by the Applicant that she was prejudiced and suffered harassment and discrimination, for which she should be compensated. The Applicant's case rests primarily on her contention that her PER covering the period 1 January to 31 December 1999 was not executed in good faith but was carried out as a retaliatory act, which is the reason for the substantially lower evaluation ratings of her performance as compared with the ratings of her performance in previous years. She argues that for a period of approximately one and a half years, at the close of her career, beginning in the second half of 1999 and continuing through the end of her services in December 2001, she suffered harassment and discrimination. Her claim is, essentially, that having made an "outstanding" contribution to the work of ECO and the work of UNICEF for over fifteen years, a fact which was generally recognized, she was, nonetheless, harassed and discriminated due to no shortcoming of hers but because of the bias and the abuse of power on the part of her two supervisors. Her claim, furthermore, is that she did not receive adequate consideration within UNICEF regarding the rebuttal of her 1999 PER and she now appeals to the Tribunal to compensate her for the damage to her professional reputation and dignity; for the emotional stress she has suffered; and, to give her redress for the wrongs she had to endure.

III. The Applicant advances a number of grounds to show bias and discrimination, the most important of which is that the independent exercise of her admittedly important functions as an Ombudsperson in a controversial case, which arose in 1999, put her "in the wrong camp" in an office that clearly suffered from a breakdown in management-staff relations. Consequently, according to the Applicant, she was considered by management as a "trouble maker" and her 1999 PER, which was completed in February 2000, was one of the ways in which the Administration retaliated against her.

IV. It is not in dispute that the Applicant had received highly laudatory PERs from various supervisors, including the very supervisors who completed her PER for 1999. The UNICEF Country Representative, who agreed with the Applicant's immediate supervisor's comments in the controversial PER had, in fact, gone on record as praising the Applicant's performance in superlative terms a few months earlier. She

had supported the Applicant enthusiastically when the latter applied to become a Regional Adviser as an International staff member – a post which the Applicant was offered but finally decided, for personal reasons, not to accept.

The fact that a staff member who, for years, had received excellent performance reports should, in a particular year, receive a bad or indifferent PER, is clearly not, in and of itself, an exceptionally significant issue, let alone one that will necessarily sustain a claim of discrimination. However, the Tribunal considers that such a development calls for some explanation and would therefore focus more closely on the facts, figures, and evidence on which the evaluation is based. This is only natural, as it would be seen as a deviation from the trend or pattern of performance. Such an onus must operate at a significantly higher level in the current case, as apart from the deviation from the 15-year long pattern, there is the added factor of the problematic relationships which existed within ECO. There is no question that the staff-management relations in that Office had suffered and had reached a disturbingly troublesome level, leading to the involvement of the Regional Office which, in an attempt to resolve the situation, sent out a Joint Mission from Amman to Cairo. In its Report of April 2000, the Joint Mission, inter alia, endorsed the following description of the state of affairs pertaining in ECO in February 2000, and even earlier, in November 1999: “A majority of staff perceives that the office suffers from an atmosphere of mistrust, unfairness, favouritism, loss of credibility with partners and no vision. Staff made the same complaints ... during [the] November 1999 mission”. This is a serious contemporaneous indictment which is also relevant to the issues concerning the present case, as is clear from the very next passage of the Joint Mission’s report:

“That [Staff Association] Representatives and Ombudspersons are vocal is true. That is why they were elected. Were they always reasonable? Probably sometimes not, due to their frustrations. The systematic ‘pulling on the rope’ from both sides (management and staff) was turning staff concerns into self-fulfilling prophecies. With dialogue breaking down, there was no way to move on with UNICEF business, build consensus, have a vision or raise funds.”

It would seem that as a result of this Mission, PERs for the year 2000 were set aside and the Regional Office made a valiant effort to have a new start.

It is within this setting that the allegations of discrimination and abuse of power have to be assessed in the present case. The Applicant was one of the Ombudspersons and she had been seized, since June 1999, with a case which was, apparently, highly charged and polarized. Her report concerning that case was submitted in August 1999 and was acknowledged in gracious and proper terms by the Regional Director. The report did, essentially, uphold the grievance of the staff member concerned and made a practical and concrete suggestion for a way to move forward.

V. It goes without saying that an Ombudsperson is not entitled to any greater consideration in the evaluation of his or her performance than any other staff member. However, when that Ombudsperson is also a staff member whose performance has coincidentally taken a significantly downward turn compared with previous years, and when claims of harassment are brought alleging that such harassment was the result of the performance of the duties of Ombudsperson, there is certainly a need to ensure that the performance ratings are fully justified. The appropriate way to do so is by reference to concrete facts. Indeed, the second reporting officer, who was the Country Representative, described the Applicant's 1999 PER as "extremely disappointing". The Tribunal considers that, especially in light of the detailed formal rebuttal and follow up by the Applicant, it was necessary for the Respondent to discharge an onus to support and substantiate the contested PER. The Respondent did not discharge this burden.

The Respondent makes no attempt to analyze or to present the Tribunal with the detailed considerations that led to and justify the ratings and comments in the controversial PER. The Tribunal reaffirms its consistent position, that the assessment of performance is the prerogative of supervisors and of management. (See, for example, Judgements No. 613, *Besosa* (1993) and No. 1178, *Shao* (2004).) However, when the manner in which this undoubtedly discretionary power is exercised comes under serious attack, claiming abuse thereof as being motivated by extraneous factors, in such cases it is imperative that a clear explanation and justification of the assessment be forthcoming for scrutiny. Such a process will not lead to any substitution of the Respondent's judgment regarding performance evaluation; but such

a process does become a necessary step to refute a charge of discrimination, prejudice or bias.

In the circumstances of the present case and having considered the documentation which the Applicant has placed before the Tribunal, it is wholly inadequate for the Respondent to simply claim that it is for the Applicant to prove discrimination and to say no more. It is likewise inadequate for the Respondent to rely on the compliance with procedures as set out in the UNICEF performance appraisal system as an end in itself. The issue is whether the discretionary power of management to assess performance has been abused or not and that requires demonstration of relevant documentation and assessment of the evidence, not a formal response to it, claiming in a very general manner, that there were no procedural irregularities, either in the PER process or in the process of the rebuttal thereof.

VI. The Tribunal notes that the UNICEF system for performance appraisal has been structured in a way which, essentially, enables a rebuttal of a PER by way of submitting the points of view of the staff member and of management to be recorded and placed on file. The UNICEF rebuttal system appears to be more restrictive than that which pertains in most other parts of the United Nations system, where the rebuttal procedure is taken a step further to include an objective review by a peer panel established for this purpose. This probably led to the relatively formal response by the Deputy Executive Director, the reliance on which is, in the Tribunal's view, no answer to the Applicant's complaint of prejudice in the preparation of her 1999 PER.

VII. The Tribunal does not see merit in the other grounds advanced by the Applicant in support of her claim of bias. However, based on the above and on the documentation available to it, the Tribunal concludes that the Applicant's PER for 1999 was not based on objective considerations but had been improperly motivated by extraneous factors, for which the Applicant is entitled to compensation.

VIII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid compensation equivalent to six months' net base salary at the rate in effect on the date of this Judgement, with interest payable at eight per cent per annum as from

90 days from the date of distribution of this Judgement until payment is effected; and

2. Rejects all other pleas.

(Signatures)

Kevin Haugh
Vice-President, presiding

Dayendra Sena **Wijewardane**
Member

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary