



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Mashhour

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/133, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 October 2013. The Secretary-General appealed on 6 January 2014 and Ms. Sahar Mashhour answered on 3 March 2014.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... On 17 February 2008, the Applicant commenced employment with [the United Nations Children's Fund (UNICEF)] as a Child Protection Officer in the Egypt Country Office. Prior to joining UNICEF she had held various roles in the

... On 12 April 2009, the Applicant wrote to Mr. Peter Frobela again requesting clarification of the term “discrimination” and her rebuttal rights. She stated:

I have asked Mr. Steven Allen several questions which **were not answered** like what’s the difference between filing a complaint for harassment and abuse of authority AND a formal rebuttal on the grounds of discrimination. I have also asked for a specific distinction between discrimination and abuse of authority especially in the context of PAS. [Emphasis in original]

overall there had been an improvement in the Applicant's performance since the previous review period but there was still room for improvement.

... On 8 October 2009, the parties filed a joint submission with the Tribunal stating that the parties were negotiating a settlement agreement and requested, pursuant to article 19 of the Rules of Procedure, suspension of the proceedings.

... On 27 October 2009, the Applicant submitted a formal rebuttal of the 2009 PER on the grounds of discrimination but made references to issues of harassment and abuse of authority.

... On 3 November 2009, Counsel for the Respondent submitted a settlement agreement between the Respondent and the Applicant to the Tribunal ("Settlement Agreement").

... The Applicant consented to the Settlement Agreement on the condition that she maintained the right to appeal the decision of the ad-hoc panel.

... In accordance with the settlement agreement, an ad-hoc panel was set up consisting of two members from the Middle East and Northern Africa Regional Office and one member from the Jordan Country Office ("Panel").

... On 19 November 2009, the Registrar of the Tribunal informed the parties that

... On 10 March 2010, the Chairperson of the Panel submitted to the Deputy Executive Director the “Report of the Ad-hoc panel constituted by UNICEF to review the Performance Evaluation Rebuttal Statements of [the Applicant], Child Protection Officer, Egypt Country Office in line with Settlement Agreement UNDT/NBI/2009/45” (“Report”).

... By letter dated 30 March 2010, the Deputy Executive Director wrote to the Applicant attaching the Report.

... Based on its review, the Panel concluded that the grounds of discrimination were not substantiated. It stated at paragraph 4.2 of the Report:

[G]iven that due to personal circumstances wherein there has actually recently been a change in supervisor for [the Applicant], it has been confirmed that in relation to output and capacity, concerns related to the staff member’s work vis-à-vis UNICEF reasonable expectation of deliverables of an NOB officer remain; it therefore suggest [sic] that the issues at hand go beyond personality differences and are indeed mainly grounded in performance related issues. The panel has concluded therefore that despite the staff member’s perceptions that discrimination has been at play and has impacted her performance in both reporting periods, the grounds of discrimination as articulated by the staff member and based on the panel’s own understanding of the term discrimination ... are not substantiated.

... The Panel made seven recommendations, including that the rating for the competency of “drive for result” be raised from “1” to “2” in the 2008 PER but that all other ratings remain unchanged. [The Ad-hoc Panel’s recommendations were accepted by UNICEF’s Deputy Executive Director on 30 March 2010.]

... On 31 March 2010, the Applicant was separated from service.

exercising her fundamental right to place before the Rebuttal Panel all her grievances flowing from harassment, discrimination and abuse of authority” and “flawed the whole rebuttal process”.⁴ In addition, the Dispute Tribunal found the rebuttal process “flawed” as the Ad-hoc Panel failed to address the issue of discrimination, the sole ground of Ms. Mashhour’s rebuttal. The Ad-hoc Panel did not refer to any definition of discrimination or that of harassment or abuse of authority in any UNICEF document or seek guidance as to UNICEF’s policy in that regard. It came up with its own vague definition of discrimination and then based its report on that. The Dispute Tribunal found that in view of the serious flaws in the rebuttal process, the UNICEF Deputy Executive Director’s acceptance of the recommendations of the Ad-hoc Panel represented “an invalid exercise of his discretionary authority”. Having determined that Ms. Mashhour had been subjected to a “hostile and harassing” work environment and “poor and objectionable” management on the part of her first reporting officer, the Dispute Tribunal ordered the Secretary-General to pay Ms. Mashhour six months’ net base salary for material damages and USD 10,000 for moral damages, and moreover, to expunge the 2008 and 2009 PERs from Ms. Mashhour’s personnel records.

Submissions

The Secretary-General’s Appeal

4. The UNDT erred in finding that the Ad-hoc Panel failed to properly address Ms. Mashhour’s claims of discrimination. The Dispute Tribunal’s reliance on ST/AI/2002/3 is misplaced, as it does not provide any definition of discrimination. The definition of discrimination adopted by the Ad-hoc Panel was not vague or legally incorrect but consistent with internationally accepted definitions of discrimination. Nor did it adversely affect the Ad-hoc Panel’s assessment of Ms. Mashhour’s allegations of discrimination. It demonstrated that the Ad-hoc Panel had properly addressed Ms. Mashhour’s allegations of discrimination.

5. The Dispute Tribunal erred in concluding that Ms. Mashhour was subject to harassment. The Secretary-General notes that Ms. Mashhour did not pursue her complaints of harassment or abuse of authority in accordance with the relevant procedures, and that no investigation was subsequently initiated by the Administration. Under the circumstances, the Dispute Tribunal did not have the competence to conduct a *de novo* investigation of

⁴ *Id.*, para. 43.

Ms. Mashhour's harassment complaint, and exceeded its competence and erred in law in concluding that Ms. Mashhour was subjected to a "hostile and harassing" work environment.

6. The Dispute Tribunal erred in fact and in law in awarding compensation in the absence of procedural irregularities in the present case and on the basis of its erroneous finding of a "hostile and harassing" work environment.

7. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Mashhour's Answer

8. There is no refutation of the UNDT's finding that UNICEF's restrictions on the

Considerations

12. Pursuant to Article 2 of the Statute, “[t]he Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.”

13. The Secretary-General appeals on the grounds that the UNDT i) erred on questions of law and fact; and ii) exceeded its competence.

14. The underlying claim of Ms. Mashhour was that her performance evaluation reports were improperly motivated by the hostile and discriminatory atmosphere created by her supervisor and endorsed by the Egypt Country Office Management.

15. The Ad-hoc Panel set up to examine the claims of Ms. Mashhour found that the claims of discrimination were not substantiated. It recommended that for Ms. Mashhour’s 2008 PER, the rating of 1 should be raised to 2, but all other ratings in both the 2008 and the 2009 PERs should remain the same.

16. The issue before the UNDT was whether the administrative decision taken by the Deputy Executive Director to accept the findings of the Ad-hoc Panel constituted to review the performance evaluation reports and rebuttal statements of Ms. Mashhour was a valid exercise of his discretionary authority.

Appeal as to error on questions of law and fact

Did the UNDT err in concluding that ST/AI/2002/3 applied to Ms. Mashhour and that her rights to a rebuttal as set out in ST/AI/2002/3 were unduly restricted by UNICEF?

17. The Secretary-General submits that the UNDT erred in concluding that ST/AI/2002/3 applied to UNICEF and that the UNICEF Handbook unduly restricted the rights of Ms. Mashhour to a rebuttal process as set forth in ST/AI/2002/3.

18. The Secretary-General submits further that while the United Nations Staff Regulations and Rules apply to UNICEF staff members, administrative issuances issued by the United Nations do not apply to UNICEF staff members unless their applicability is expressly accepted.

19. The Secretary-General refers to the Secretary-General's Bulletin on the "Procedures for the promulgation of administrative issuances" (ST/SGB/2009/4), which expressly provides, in Section 2.3, that: "[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability".

20. ST/AI/2002/3 on the "Performance Appraisal System" does not contain any text indicating the express acceptance of the applicability of that administrative issuance by the separately administered funds, organs or programmes.

21. We note further that UNICEF had not promulgated any administrative issuance incorporating ST/AI/2002/3 until it promulgated in 2011 its own separate UNICEF administrative instruction on performance appraisal, CF/AI/2011-001. Until then, UNICEF's performance appraisal system was established pursuant to Chapter 7 of the UNICEF Handbook, which was abolished and replaced by CF/AI/2011-001.

22. The UNDT, relying on *Villamoran*⁵ setting out the legislative hierarchy within the United Nations, held that administrative issuances have greater legal authority over manuals such as the UNICEF Handbook. Consequently, to the extent that the UNICEF Handbook and ST/AI/2002/3 were inconsistent, ST/AI/2002/3 prevailed.

23. As the Secretary-General rightly points out, the principle articulated in *Villamoran* is applicable only where there is a conflict between guidelines and manuals and a properly promulgated administrative issuance. However, this was not the case here.

24. Within UNICEF, Chapter 7 of the Handbook entitled "UNICEF Manuals: Policies and Procedures" governs how UNICEF has to conduct a staff member's performance appraisal. In addition to establishing the obligations that UNICEF has towards its staff members, the

⁵ *Villamoran v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/126. On appeal, the Appeals Tribunal affirmed that judgment in Judgment No. 2011-UNAT-160.

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32. The appeal succeeds on this ground.

Did the UNDT err in law and fact in finding that the Ad-hoc Panel failed to properly address Ms. Mashhour's claim of discrimination?

33. The UNDT was of the view that:

As discrimination was the key ground of the Applicant's rebuttal, it was vital that the Panel defined the concept clearly and examined the facts of the case in light of that definition. It should also have referred to the definitions of "harassment" and "abuse of authority" in CF/EXD/2008-004 (Prohibition of harassment, sexual harassment and abuse of authority) as it purported to address these allegations in its review. Absent any evidence of a proper understanding of these concepts on the part of the Panel, the Tribunal has serious doubts about whether these allegations were properly addressed with the result that the findings of the Panel cannot be relied on.⁸

34. We find the above sentiments expressed by the UNDT unreasonable as there is no definition of discrimination in either the UNICEF Manuals or in ST/AI/2002/3 for the Ad-hoc Panel to adopt or apply.

35. On the definition of discrimination, the Secretary-General referred to Article 26 of the International Covenant on Civil and Political Rights, which provides for "protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

36. The Appeals Tribunal recalls the Discrimination (Employment and Occupation) Convention, which entered into force in 1960. That Convention defines "discrimination" as including:

... [A]ny distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

... [S]uch other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

⁸ Impugned Judgment, para. 49.

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Excess of jurisdiction or competence

Did the UNDT exceed its competence in concluding that Ms. Mashhour was subjected to a hostile and harassing workplace environment?

43. The Secretary-General submits that Ms. Mashhour did not pursue her complaints of harassment or abuse of authority in accordance with the relevant procedures and that no investigation was subsequently initiated by the Administration. Under the circumstances, the Dispute Tribunal did not have the competence to conduct a *de novo* investigation into Ms. Mashhour's harassment complaint, and therefore exceeded its competence and erred in law in concluding that Ms. Mashhour was subjected to a "hostile 013 Tc.2(d)the s.98 79ic.28
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48. Nonetheless, we do not see the complaint of harassment as a separate claim. It should be noted that Ms. Mashhour's rebuttal statements were replete with "incidents" of discrimination, harassment and abuse of authority.

49. After investigating allegations of discrimination, harassment and abuse of authority in the incidences cited by Ms. Mashhour in her 2008 and 2009 rebuttals, the Ad-hoc Panel found:

... [T]hese incidences reflect disagreements between the supervisor and supervisee on management style, disaffection by the supervisor of the performance of the supervisee and differences in the personalities and communication style of both the supervisor and supervisee.

...

... When staff in the section were asked about incidences of discrimination, harassment and abuse of authority that they have witnessed between the supervisor and supervisee, they confirmed that they have observed disagreements in opinions and views which were expressed strongly by both the supervisor and supervisee, but not in a discriminatory, humiliating or abusive manner.

...

... Additionally when exploring the work processes within the Child Protection Section, it was found that the management style of the supervisor and the work processes followed within the section were consistent with all of the supervisees without any discrimination against the supervisee submitting the rebuttal[.]¹²

50.

Judgment

53. The appeal against UNDT Judgment No. UNDT/2013/133 succeeds. The impugned Judgment is therefore vacated.

54. The order by the UNDT that Ms. Mashhour's 2008 PER and 2009 PER be expunged from her personnel file is set aside.

