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Tips and Information Newsletter for International Civil Servants

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*UN Policy Requiring Claimants to Produce Evidence of Harassment
As a Condition of Receiving Appendix D Benefits Under Challenge at UNDT*

In Brief

Since 2012, the United Nations has applied an unlawful and pernicious policy requiring staff members who develop service-incurred illnesses based in whole or part on allegations of harassment to submit an organizational finding that they were harassed, which may be contained in an “OIOS or BOA report, an independent investigation report, a UNDT or UNAT opinion or UN Ethics Office report”. An appeal is currently pending before the UNDT challenging the lawfulness of the policy.

Facts

The former staff member¹ was subject to a humiliating internal and public campaign impugning his management of a program. The victim was subject to two OIOS investigations which found the allegations of mismanagement, including fraud, were unsubstantiated. As invariably happens in these cases, owing to the public attacks (partly) the victim fell ill and was granted a disability pension. The victim also timely filed a claim for compensation for a service-incurred illness under Appendix D. The UN denied the claim as irreceivable on the grounds that its policy requires claimants to first submit written evidence that they were subject to harassment where the illness may have been caused in whole or part by incidents that may be characterized as harassment. The terms of the policy are contained in a document issued in 2017 entitled “Managers’ Guide to Appendix D and the Advisory Board on Compensation Claims (ABCC)”:

“Documentation for cases of harassment/abuse of authority: As it is not within the purview of the ABCC to verify an allegation of harassment or abuse of authority and as the Organization has established legislation, procedures and recourse for such allegations, claims based on such allegations are receivable by the ABCC only when the Organization has made a definitive finding of whether there has been harassment or an abuse of authority in a specific case. This finding may be in the form of a conclusion in an OIOS or BOA report, an independent investigation report, a UNDT or UNAT opinion or UN Ethics Office report. In the absence of such a definitive finding, claims based on allegations of harassment or abuse of authority are not receivable.”

The UN proceeded on the basis that the policy was perfectly legal and legitimate. The request for management evaluation went unanswered, and the appeal is currently pending with the UNDT.

¹ The views expressed in this note are those only of the author, counsel in this case.

Comment

There are a number of reasons why the policy should be declared illegal. First, the policy conflicts with the terms of Appendix D (the higher legislation) and thus violates the hierarchy of norms, and indeed substantively amends Appendix D. This principle is well-settled in the law, and was clearly explained in 2012-UNDT-178:

“32.Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (Tolstopiatov UNDT/2010/147, Ibrahim UNDT/2011/115, Morsy UNDT/2012/043).”

Second, in Judgment No. 3173 the ILOAT addressed this issue and identified that the policy makes an untenable assumption “that work-related stress said by an employee to be the result of abuse and harassment, can only arise if, as an objective fact, there has been abuse and harassment . . . [the] claim raised the question of whether her supervisor’s conduct caused a stress-related illness not whether his conduct, viewed objectively, could be characterised as abuse and harassment.”

Finally, there are a number of practical difficulties in applying such policy. The victim of harassment is not obliged to file a complaint of harassment; should the victim’s decision not to pursue harassment claims then abrogate his/her rights under Appendix D? In some cases, the UN, OIOS or an investigative panel refuses to investigate. The OIOS operates under a different legal framework, and applies a burden of proof in misconduct investigations (clear and convincing evidence – see 2018-UNAT-862, at para. 48) that is different from that applied in assessing compensation claims (preponderance of the evidence – see 2018-UNAT-822, at para. 35). If the OIOS or investigative panel finds that the victim suffered harassment, and the decision-making authority rejects the findings, the victim has the right to appeal such decision, but it may be upheld on appeal unless the findings are unreasonable and irrational – a very difficult burden. 2018-UNAT-873. The UNDT and UNAT have no authority to conduct an investigation on their own; they may only order the UN to investigate if there has been a procedural error; it has “no power to conduct a *de novo* appeal on the correctness of the panel’s findings of prohibited conduct”.

If the UNDT finds the policy unlawful, the UN will likely take an appeal to the UNAT.

This case shows that victims continue to be stigmatized and subjected to humiliating treatment when trying to assert their rights under Appendix D. Any staff member who has faced this issue and been denied a claim under Appendix D for failure to provide written proof of harassment or other prohibited conduct causing the illness should contact their staff representatives for guidance.