



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RAMOS PINTO SOARES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Child Protection Officer at the United Nations Mission in South Sudan (“UNMISS”) holding a fixed term appointment (“FTA”) at the P-3 level and based in Juba, impugns the Administration’s decision to not “open an investigation into her complaint of workplace harassment and abuse of authority against her Second Reporting Officer (“SRO”) and Chief, Child Protection Unit, UNMISS.”

Factual and procedural background

2. On 16 August 2021, she filed an application with the United Nations Dispute Tribunal sitting in Nairobi to impugn the Respondent’s decision to not “open an investigation into her complaint of workplace harassment and abuse of authority against her Second Reporting Officer and Chief, Child Protection Unit, UNMISS.”

3. The Respondent filed his reply on 15 September 2021. The Respondent’s principal contention is that the application is time-barred and lacks merit.

4. On 3 August 2022, the Tribunal issued Order No. 103 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022. The Respondent filed his closing submissions as directed. The Applicant informed the Registry that she had nothing to add to what is already in her application.

Facts

5. The Applicant joined the Mission in South Sudan on 9 July 2018. She was the Team Leader of the Child Protection Office of the Juba Field Office. Her SRO was AO.

6. On 11 February 2020, the Applicant submitted a complaint to the Office of Internal Oversight Services (“OIOS”) alleging workplace harassment and abuse of authority pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), against her SRO.

7. On 2 June 2020, OIOS referred the Applicant's complaint to the responsible official for attention and appropriate action.
8. On 18 December 2020, the responsible official informed the Applicant of the impugned decision.
9. On 9 February 2021, with the agreement of the Applicant and the SRO, UNMISS reached out to the United Nations Ombudsman and Mediation Services ("UNOMS") regarding an informal resolution process. UNOMS agreed to engage with the Applicant and her SRO.
10. On 15 February 2021, the Applicant requested management evaluation. She also requested that the Management Evaluation Unit ("MEU") hold her request in abeyance pending informal dispute resolution efforts.
11. The MEU agreed to hold the request in abeyance until 19 May 2021.
12. The informal dispute resolution process was unsuccessful.
13. On 20 May 2021, the Applicant requested that the MEU proceed with her management evaluation request.
14. On 9 July 2021, the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") informed the Applicant of her decision to accept the MEU recommendation and uphold the impugned decision.
15. On 16 August 2021, the Applicant, who meanwhile decided not to ask for extension of her fixed-term appointment, lodged with the United Nations Dispute Tribunal sitting in Nairobi the application mentioned in para. 1.
16. The Respondent filed his reply on 15 September 2021. The Respondent's principal contention is that the application is time-barred and lacks merit.

Parties' submissions

17. The Applicant argues that the impugned decision failed to consider the Guidelines for United Nations Secretariat Managers on how to deal with possible

discrimination, harassment, including sexual harassment and abuse of authority. In particular, that,

allegations of disrespectful behaviour, rude e-mails or derogatory comments may in some cases, reflect poor communication skills and insensitivity rather than amount to prohibited conduct/misconduct. However, such conduct in the context of work performance or work-related issues may, in some cases, amount to harassment. Certain incidents, when viewed as isolated events could be regarded as purely work-related issues. However, a series of such incidents, taken together, may warrant investigation.

Among the examples of conduct listed in the Guidelines are (i) not keeping the affected individual informed while other members of the team are kept informed, (ii) bypassing the affected individual and giving instructions directly to supervisees.

18. The Applicant submits that her complaint details incidents showing that she repeatedly endured, among others, the very conduct listed as examples of probable harassment.

19. The Applicant argues that it is unreasonable for the responsible official to determine that her complaint could be handled through informal resolution when the SRO had refused to engage in this process previously.

20. It is also unreasonable to maintain that the facts alleged in her complaint will not be investigated because doing so could polarize the environment in the Child Protection Unit since colleagues would have to be called to assert the different positions at issue. This approach would ultimately amount to no reports of abuse of authority and harassment in the workplace being investigated, as any questioning of colleagues is able to potentially lead to discomfort and polarization of tensions. The impugned decision is contrary to the spirit and purpose of ST/SGB/2019/8.

21. The contested decision did not assess the SRO's blatantly discriminatory practice towards her when compared to other colleagues in the same position. It also ignored the various documents submitted in support of the allegations made in the complaint.

22. The Respondent submits that the application is time-barred. The Applicant requested management evaluation on 15 February 2021. In accordance with staff rule 11.2(d), the management evaluation was due within 45 calendar days of the receipt of the management evaluation request, i.e., 1 April 2021. Accordingly, the deadline for filing the application was 30 June 2021. The Applicant filed the application over six weeks later, on 16 August 2021.

23. The Applicant's challenge is also materially not receivable. Not only is the referral to the Ombudsman Office not an administrative decision pursuant to art. 2(1)(a) of the Dispute Tribunal's Statute of the Dispute Tribunal; it is also a process she consented to.

24. Jurisdictional challenges aside, the Respondent takes the position that the impugned decision was lawful.

25. The responsible official properly determined that although the Applicant's report of unsatisfactory conduct was made in good faith and was sufficiently detailed, it could not amount to misconduct. There was therefore no cause for the establishment of a formal fact-finding investigation panel.

Consideration

Receivability

26. The record shows that the Applicant requested management evaluation on 15 February 2021. In accordance with staff rule 11.2(d), the management evaluation decision was due within 45 calendar days of the receipt of the management evaluation request, i.e., 1 April 2021.

27. On 20 May 2021, the Respondent was informed by the Office of the Ombudsman that the informal resolution process had not been successful.

28. The Appeals Tribunal held in *Neault* 2013-UNAT-345, that the deadline for filing an application with the Dispute Tribunal will reset only when the management evaluation is received after the deadline of 45 calendar days but before the expiration of 90 days for seeking judicial review.

29. The Applicant's 90-day filing deadline with the Dispute Tribunal expired on 30 June 2021.

30. The Tribunal is well aware that in general MEU does not have the authority to hold requests for management evaluation in abeyance or to waive its deadlines for completing a management evaluation (*see Dieng 2019-UNAT-941*, para. 38) and that only the Secretary-General may extend the deadline for completing management evaluation.

31. The Tribunal notes however that, by email dated 13 April 2021, the Chief of the Management Evaluation Unit wrote to the Applicant and stated:

Once submitted, the Rules also allow for an extension of the 45 day time to complete the evaluation process under similar circumstances, i.e., where the matter is under informal discussions with the assistance of the Ombudsman. We could, then, hold off on commencing the management evaluation process until such time as the informal process has finalized, at which point if the process is unsuccessful and you wished to pursue the formal process we would start the 45 day from the date of completion of the informal process.

32. The Tribunal therefore finds that the Respondent's submissions on receivability of the application is contrary to good faith.

33. In any case, the receivability of the application must be assessed even *ex officio*.

34. Art. 7(3) of the UNDT Rules of Procedure provides that:

Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

35. The Tribunal is of the view that the informal discussions between the parties in this case was aimed at reaching a settlement agreement. It is akin to the more formal mediation process before the Ombudsman, which is envisaged in the Rules of Procedure and can result in the deadline being suspended.

36. Considering the period of suspension of the process, the deadline for filing an application with the Dispute Tribunal was reset when the Respondent was informed

by the Office of the Ombudsman that the informal resolution process had not been successful; and then again when the Applicant received the outcome of her management evaluation request on 9 July 2021.

37. Therefore, the application is not time barred. It is receivable.

Merits

38. The substantive question before the Tribunal is whether the responsible official acted lawfully and properly in his treatment of the Applicant's complaint.

39. In undertaking a preliminary assessment of a report of unsatisfactory conduct, the Responsible Official may consider the following factors: (a) whether the Applicant's allegations of unsatisfactory conduct could amount to misconduct; (b) whether the provision of the information of unsatisfactory conduct is made in good faith and is sufficiently detailed that it may form the basis for an investigation; (c) whether there is a likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case; and (d) whether an informal resolution process would be more appropriate in the circumstances.¹

40. As explained in *Benfield-Laporte* UNDT/2013/162, "it is the responsible official's duty to assess whether there is a 'reasonable chance' that the alleged facts described in the complaint - if indeed they occurred - would amount to prohibited conduct." The complainant-staff member bears the burden of satisfying the responsible official that there are sufficient grounds to warrant a formal fact-finding investigation (*Parayil* UNDT/2017/055).

41. The Organization has a degree of discretion regarding how to conduct a review and assessment of a complaint of prohibited conduct. (*Oummih* 2015-UNAT-518/Corr.1; *Benfield-Laporte* 2015-UNAT-505). Only in a case of "serious and reasonable accusation, does a staff member have a right to an investigation against another staff member which may be subject to judicial review." A fact-finding investigation may only be undertaken "if there are 'sufficient grounds' or,

¹ Section 5.5 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

respectively, ‘reason[s] to believe that a staff member has engaged in unsatisfactory conduct.’” Similarly, there must be “meaningful indicia” in the complaint of prohibited conduct. (*Nadeau* 2017-UNAT-733/Corr.1)

42. In reviewing such administrative decision, the Dispute Tribunal shall examine if the Administration’s act or omission in response to a request for investigation was taken in accordance with the applicable law (*Nwuke* 2010-UNAT-099, paras. 36 and 40).

43. In this exercise, the Tribunal must recall that, in cases of harassment and abuse of authority, it is not vested with the authority to conduct a fresh investigation into the initial complaint (see *Messinger* 2011-UNAT-123, para. 27). As for any discretionary decision of the Organization, it is not the Tribunal’s role to substitute its own decision for that of the Administration (see, e.g., *Sanwidi* 2010-UNAT-084, para. 40). However, the Tribunal may “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” (see *Sanwidi*, para. 40).

44. In this process, the Dispute Tribunal may examine whether the applicable procedure was followed, whether the decision maker committed a manifest error in the exercise of his or her discretion and whether the decision not to initiate the investigation was tainted by ulterior motives (*Staedtler* UNDT/2014/123, para. 60).

45. With reference to the case at hand, the Applicant complains in sum that she was bypassed as team leader, falsely accused in writing using alleged demeaning and insulting language by her supervisor, ordered not to make report exceeding six lines, falsely accused of overstepping her mandate, and publicly shamed and embarrassed before members of her team.

46. The Tribunal finds that the 18 December 2020 decision by the Special Representative of the Secretary-General, United Nations Mission in South Sudan (“responsible official”) to not open an investigation into the Applicant’s complaint of workplace harassment and abuse of authority against her SRO was lawful and constituted a reasonable exercise of the Organization’s discretion in accordance with ST/AI/2017/1.

47. The record shows indeed that the Applicant's SRO acted within his powers, without any abuse of authority (following the definition in ST/SGB/2008/5) or mistreatment of the Applicant, and that the allegations in the Applicant's complaint "squarely [fell] in the realm of workplace disagreements about the normal exercise of managerial authority" (See *Okwir* UNDT/2021/026. See also *Fosse* UNDT/2021/049).

48. Section 1.1 of ST/SGB/2019/8 states that "[d]isagreement on work performance or on other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of the present bulletin but in the context of performance management".

49. In this regard staff rule 1.2(a) provides that staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors. Staff regulation 1.2(c) provides that the Secretary-General has broad discretion to assign staff to different functions as he deems appropriate. A mere disagreement between staff members in a supervisory relationship does not, in and of itself, give rise to cause for an investigation

50. The responsible official's conclusion that it was unlikely that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case (section 5.5 (c) of ST/AI/2017/1) was therefore not unlawful and instead it was taken within the limits provided for a reasonable exercise of the Organization's discretion in accordance with ST/AI/2017/1.

Conclusion

51. In light of the foregoing, the application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 10th day of October 2022

Entered in the Register on this 10th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi