



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

COOPER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Bart Willemsen, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Introduction

1. On 24 January 2011, the Applicant, Head of Office, the Office for the Coordination of Humanitarian Affairs (“OCHA”), Kenya, received from Ms. Valerie Amos, the Under-Secretary-General OCHA (“USG/OCHA”), a written reprimand following an investigation into allegations against her for harassment and abuse of authority.

2. On 20 April 2011, the Applicant filed an Application in which she contends that the decision to impose the written reprimand was in violation of her right to due process. The Respondent filed a Reply on 23 May 2011.

Facts

3. The Applicant joined the Organization on 22 April 2003 as a Humanitarian Affairs Officer on an intermediate-term appointment at the L-3 level with OCHA’s Regional Office in Nairobi, Kenya. Effective 18 July 2007, the Applicant’s level was reclassified to L-4 and, on 1 November 2008, she was promoted to the L-5 Level as Head of Office and reassigned to the OCHA Country Office in Kenya.

4. By letters dated 14 and 17 May 2010, OCHA Management received complaints from two staff members in its Nairobi office against the Applicant alleging harassment and abuse of authority in violation of ST/SGB/2008/5, (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

5. On 2 August 2010, the then Assistant Secretary-General, OCHA (“ASG/OCHA”), Ms. Catherine Bragg, informed the Applicant of the complaints received against her and of the appointment of a Panel to conduct a fact-finding investigation into these complaints.

6. The Panel visited Nairobi from 26 to 28 August 2010 and interviewed 11 staff members including the Applicant and the complainants. The Panel investigated 26 incidents of harassment and abuse of authority described by the

complainants and submitted its final report to the ASG/OCHA on 21 October 2010.

7. The Panel concluded that there was a preponderance of evidence that the Applicant's behavior, actions or managerial style constituted harassment, that certain described aspects of her behavior constituted abuse of authority and that she did not take all the appropriate measures to promote a harmonious work environment free of intimidation, hostility and any form of prohibited conduct. The Panel noted that the Applicant had experienced additional heavy workload and severe stress as a result of the increased responsibilities as the size of the OCHA office grew dramatically in 2008. The Panel also noted that one of the complainants may have appeared disrespectful towards the Applicant by occasionally questioning her authority.

8. By letter dated 20 January 2011, the USG/OCHA, Ms. Amos took managerial action by imposing a written reprimand to be placed in the Applicant's official status file pursuant to para. 5.18 (b) of ST/SGB/2008/5.

9. On 20 April 2011, the Applicant filed the present Application. The Respondent filed a Reply on 23 May 2011.

10. The Tribunal heard the Application on 24 October 2011 and on 30 January 2012 during which evidence was received from the following:

- a. The Applicant;
- b. Ms. Valerie Amos, USG/OCHA; and
- c. Mr. Aeneas Chuma, Humanitarian and Resident Coordinator, United Nations Development Program, Kenya, (Applicant's First Reporting Officer).

11. Ms. Amos' evidence is summarized below:

- a. She commenced her duties as USG/OCHA on 6 September 2010 after succeeding Mr. John Holmes.

- b. She considered the investigation Panel's findings. The report indicated that there was a factual basis for some of the allegations of harassment and abuse of authority.
- c. The Panel's findings indicated poor managerial behavior falling below the standard expected but there were mitigating factors present. For example, the Applicant was adversely affected by the rapid growth of the OCHA Nairobi office from 2 to 26 staff members within a year and she was promoted relatively quickly from a P-4 to a P-5.
- d. She also relied on the Panel's observation that the Applicant's behavior and managerial style improved upon participating in the Management Development Programme.
- e. She reached the conclusion that the investigation Panel's findings revealed performance shortcomings rather than misconduct, therefore, managerial action was the most appropriate course of action.
- f. Her decision to reassign the Applicant was both in the interests of OCHA and the Applicant, as it was not fair to the Applicant to keep her in a job which she could not do.
- g. The decision to require the Applicant to undergo training gave the Applicant the opportunity to address her performance shortcomings and to advance her career within OCHA.
- h. She took the contested decision in her role as the 'responsible official' as identified in para. 5.11 of ST/SGB/2008/5 and pursuant to para. 5.18(b) of ST/SGB/2008/5.
- i. She had a meeting with the Applicant in Nairobi where she explained to the Applicant the reasons for her decision to take managerial action.

12. Mr. Chuma's evidence is summarized below:
- a. The Applicant reported to him weekly on humanitarian affairs.
 - b. He neither supervised the Applicant in her capacity as head of office nor did he oversee the Applicant's daily supervision of her staff. The Applicant reported to New York in that respect.
 - c. He was not aware of the specific allegations against the Applicant.
 - d. He was not interviewed by the investigation Panel.

Applicant's case

13. In her evidence before the Tribunal and in her pleadings, the Applicant's case is as follows:

14. Paragraph 5.14 of ST/SGB/2008/5 provides that it is for the responsible official to review a complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. It was therefore for Mr. Holmes to review the complaints to decide on the institution of a formal fact-finding investigation as the responsible official at all times when he was performing the functions of Under-Secretary-General of OCHA. However, it was Ms. Catherine Bragg, the Assistant Secretary-General of OCHA, who reviewed the complaints and who decided to institute a formal fact-finding investigation.

15. The Secretary-General failed to produce evidence that would suggest that there is more than one responsible official in OCHA, much less that the Assistant Secretary-General for OCHA was authorized to act as the 'responsible official' for the application and purpose of ST/SGB/2008/5. This must result in the conclusion that the institution of the fact-finding investigation was unlawful and all decisions taken on the basis of this fact-finding investigation are therefore null and void, including the written reprimand and the Applicant's reassignment.

16. The procedure followed that led to the imposition of the reprimand and her subsequent reassignment failed to afford her a minimum level of due process.

17. Staff rule 10.2(b) (i) provides that an oral or written reprimand is considered to be a non-disciplinary measure. The Applicant submits, with reference to the terms indicating that the list of measures included in staff rule 10.2(b) is not exhaustive, that a forced reassignment must also be considered a non-disciplinary measure, in particular if imposed pursuant to an investigation into potential misconduct and premised on the findings of that same investigation.

18. Ms. Amos imposed both the written reprimand and reassignment following a procedure that ignores all of the due process protections incorporated in staff rule 10.3(a). It is correct that Ms. Amos, as the responsible official, was authorized under Section 5.18(b) of ST/SGB/2008/5 to impose the reprimand and reassignment. However, this is immaterial if the procedure upon which her decision was founded stands in conflict with other regulations and rules of a superior nature or otherwise general principles of law. It is the Applicant's submission that the procedure as set out in Section 5 of ST/SGB/2008/5 is indeed irreconcilable with the terms of staff rule 10.3(a), a provision of a superior nature, as well as general principles of law.

19. The Secretary-General cannot hide behind the terms of staff rule 10.3(a) and argue that in this case, or in other cases that concern the procedure set out in section 5.18 of ST/SGB/2008/5, there was no institution of a disciplinary process. There is no substantive distinction between a reprimand imposed pursuant to staff rule 10.3(a) or imposed pursuant to para. 5.18 of ST/SGB/2008/5. The Secretary-General in these proceedings has failed to demonstrate such substantive distinction. It cannot be contended that an identical measure, an administrative reprimand with identical ramifications for the staff member, can be imposed through two different avenues with one of those avenues, that is, para. 5.18(b) of ST/SGB/2008/5, lacking all the due process protections that would be available once the other avenue would be used, that is: staff rule 10.3 and ST/AI/371, (Revised Disciplinary Measures and Procedures).¹

¹ As last amended by ST/AI/371/Amend.1, effective 11 May 2010.

20. In the instant case, the Applicant did not receive the complaints in writing, the transcripts of the interviews with the other witnesses were never disclosed to her, she was never shown the final report upon which the decisions to reprimand and reassign her was based and at no point prior thereto was she informed she could consult with Counsel. A written reprimand will have serious ramifications for her professional career and her personal life. A forced reassignment in conjunction with a removal of critical management functions, tantamount therefore to a demotion, has similar ramifications and for Ms. Amos to suggest otherwise, as she did in her oral evidence, is without merit. To impose such invasive measures after a procedure that ignores all of the basic due process protections does not withstand the test of lawfulness.

21. Under para. 5.18(c), Ms. Amos was obliged to refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action, which would have triggered the due process protections of staff rule 10.3 and ST/AI/371/Rev.1.

22. The Applicant submits that even if the procedure followed is sanctioned and even if Ms. Amos was correct not to refer the matter to the Assistant Secretary-General for Human Resources Management, it was unreasonable for Ms. Amos to take such an invasive decision based on her evaluation of the Applicant's performance in the report without ever discussing the matter with either the Applicant or her direct supervisor, Mr. Aeneas Chuma. The report has, in essence, replaced what would otherwise be an elaborate process of performance management including detailed discussions between the Applicant and her supervisors.

23. The Panel did not consider it relevant to interview Mr. Chuma, whose evaluation of the Applicant's performance was therefore never taken into consideration by Ms. Amos.

24. The Applicant submits that well before the institution of the fact-finding Panel upon receipt of the two complaints, senior management of OCHA in New York received numerous reports of the problems in its office in Nairobi, which reports, in particular those by the Applicant and Mr. Chuma, were accompanied

by requests for senior management's assistance and/or intervention, which reports were all ignored.

25. The Applicant submits that she wrote many times to senior management of OCHA in New York to report that the situation in the office was deteriorating, referring to the conduct of, *inter alia*, the two complainants and requesting senior management's assistance. Senior management ignored all these clear signals and requests for assistance but chose to institute a fact-finding Panel once, in its view, the situation became too difficult to control and subsequently blamed the Applicant who was the one who first reported about the situation and requested senior management's assistance.

26. At the relevant time, Mr. Holmes failed to act at all in accordance with his role as the responsible official, did not want to deal with the issue and therefore chose instead to send in a fact-finding panel to conduct an investigation, which would at least provide it with a basis to take some action that could resolve the situation. This demonstration of poor management through the absence of guidance, much less the requested assistance vitiates the reprimand which warrants its rescission and entitles the Applicant to be placed in the position she would have been in had it not been for the unlawful act.

27. Based on the foregoing, the Applicant requests that:

- a. the written reprimand and the placing of the same in her official status file be rescinded and that any and all decisions that are based on the written reprimand be reversed; and
- b. reserves her position on the magnitude of the moral damages following the Tribunal's ruling on the matter of liabilities.

Respondent's case

28. The Respondent's case is as follows:

29. This case does not involve the imposition of a disciplinary measure following the completion of a disciplinary process. It concerns a manager taking

action by imposing an administrative measure in the form of a written reprimand. The Applicant was required to request a management evaluation of the contested decision but she did not. Having failed to take the first mandatory step of requesting a management evaluation, the Applicant does not have access to the Dispute Tribunal's jurisdiction.

30. The USG/OCHA validly exercised her authority to take managerial action by imposing a written reprimand upon the Applicant pursuant to para. 5.18(b) of ST/SGB/2008/5 instead of referring the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action.

31. The decision to issue a written reprimand was not taken following the completion a disciplinary process initiated against the Applicant under staff rule 10.3(a) in conjunction with ST/AI/371/Amendment 1.

32. Disciplinary measures and managerial actions, such as a reprimand are different under the law. The Applicant never faced the risk of the imposition of the full range of disciplinary measures, including dismissal. As such, she was not entitled to the due process rights applicable to a staff member who is the subject of a disciplinary process. Staff rule 10.3 and ST/AI/371/Amend.1 are inapplicable to this case.

33. Staff rule 10.3 is a distinct legal provision affording due process protection to staff members in the disciplinary process. In such a process, a staff member faces the risk of the imposition of the full range of disciplinary measures, including dismissal. Under para. 5.18(b) of ST/SGB/2008/5, a staff member does not face the same peril. Other than closing or referring the case to the Assistant Secretary-General for Human Resources Management, the Head of Office can only take managerial action. Given the difference in the severity between the sanctions available to the decision-maker following the disciplinary process and managerial action under para. 5.18(b) of ST/SGB/2008/5, the same due process rights do not attach.

34. Whereas the Applicant was not entitled to due process protection under staff rule 10.3, during her interview on 24 August 2010, she was informed of the

nature of the complaints against her in accordance with para. 5.15 of ST/SGB/2008/5. The Applicant's responses to each of the 26 allegations are incorporated in the investigation report and formed the basis of the Panel's findings. The procedure followed in this case complied with ST/SGB/2008/5. Furthermore, if the Applicant had grounds to believe that the procedure under ST/SGB/2008/5 was not followed, para. 5.20 provides the right to appeal against the decision to take managerial action through the imposition of a written reprimand pursuant to Chapter XI of the Staff Rules. The Applicant did not avail herself of this right to appeal. She failed to request management evaluation of the impugned decision.

35. The Applicant has failed to establish that the USG/OCHA exercised her authority under ST/SGB/2008/5 improperly. The Applicant has not produced any evidence which demonstrates that the contested decision was unlawful, irrational, procedurally incorrect or disproportionate. The available evidence shows that the decision was reasonable, all relevant matters were considered and no irrelevant matters were relied upon.

36. In view of the above, the Respondent requests the Tribunal to reject the Application.

Considerations

37. The legal issues arising from the facts in this case are as follows:

- a. Whether the procedure for reviewing complaints of harassment and abuse of authority prescribed in ST/SGB/2008/5 was followed in respect to the Applicant.
- b. Whether the Applicant's claims contesting the written reprimand are receivable.
- c. Whether the Applicant's claims contesting her reassignment are receivable.

Was the procedure for reviewing complaints of harassment and abuse of authority prescribed in ST/SGB/2008/5 followed in respect to the Applicant?

38. Under this heading, the Applicant submitted that it was not the responsible official who reviewed the complaints against her to assess whether they appeared to have been made in good faith and whether there were sufficient grounds to warrant a formal fact-finding investigation. She further argued that the Secretary-General failed to produce evidence that would suggest that there is more than one responsible official in OCHA and that this must result in the conclusion that the institution of the fact-finding investigation was unlawful and all decisions taken on the basis of this fact-finding investigation were therefore null and void, including the written reprimand and the Applicant's reassignment.

39. Paragraph 5.14 of ST/SGB/2008/5 provides that it is for the responsible official to review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. Paragraph 5.11 of ST/SGB/2008/5 defines "responsible officials" as the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or, for mission staff, to the Under-Secretary-General for Field Support.

40. The complaints against the Applicant could not have been referred to the Applicant in her capacity as the head of office. In her capacity as the Assistant Secretary-General of OCHA, Ms. Bragg falls within the definition of responsible official as provided under para. 5.11 of ST/SGB/2008/5 and in this regard, the procedure for reviewing complaints of harassment and abuse of authority prescribed in ST/SGB/2008/5 was followed in respect to the Applicant.

Are the Applicant's claims contesting the written reprimand receivable?

41. The Respondent submitted that this case does not involve the imposition of a disciplinary measure following the completion of a disciplinary process. It concerns a manager taking action by imposing an administrative measure in the

form of a written reprimand. The Applicant was required to request a management evaluation of the contested decision but she did not. Having failed to take the first mandatory step of requesting a management evaluation, the Applicant does not have access to the Dispute Tribunal's jurisdiction.

42. Paragraphs 5.18(b), (c) and 5.20 of ST/SGB/2008/5 stipulates as follows:

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

43. Staff rule 10.2(b)(i) provides that a written reprimand is not considered a disciplinary measure under the Staff Rules.

44. Chapter XI of the Staff Rules is titled "Appeals". Under Chapter XI, staff rule 11.2(b) requires that a staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff

rule 10.2 *following the completion of a disciplinary process* is not required to request a management evaluation.

45. The Tribunal finds as follows:

- a. A written reprimand is not a disciplinary measure as stipulated by paras 5.18(b) and (c) of ST/SGB/2008/5 but is considered a managerial action.
- b. To challenge the managerial action of a written reprimand, the Applicant was required to appeal pursuant to chapter XI of the Staff Rules.
- c. The exemption from requesting management evaluation under staff rule 11.2 (b) does not apply to managerial action taken under paras. 5.18(b) and (c) of ST/SGB/2008/5 since this action was not taken following the completion of a disciplinary process.

46. The Applicant had argued that the written reprimand was a veiled disciplinary measure and as such there was no need to request a management evaluation. The Tribunal does not agree with this submission as it is for the Tribunal to make a determination as to whether the sanction was a veiled disciplinary measure or not. Suffice it to say, as stipulated in art. 8(1)(c) of the Statute of the Tribunal's Statute, an application shall only be receivable if an applicant has previously submitted the contested administrative decision for management evaluation where required. In view of this, the Tribunal finds and holds that the Applicant's claims contesting the managerial action of a written reprimand are not receivable as they were never submitted for a management evaluation as required.

47. It is however mention-worthy that as stipulated at para. 5.18(b) of ST/SGB/2008/5, the responsible official shall decide on the type not "types" of managerial action to be taken given the facts of each case. The simple interpretation of this provision which enumerates the various managerial actions available is that only one type which is deemed suitable for the purpose shall be applied. ST/SGB/2008/5 does not provide for the implementation of several

different types of managerial action in any particular circumstance. In the present case, the USG/OCHA decided on at least three types of managerial action, that is, the issuance of a written reprimand, mandatory training and a change of functions and responsibilities. This was certainly more of an overkill.

Are the Applicant's claims contesting her reassignment receivable?

48. The Applicant's claims contesting her reassignment are not receivable as the Applicant failed to submit them for management evaluation.

Judgment

49. In view of its findings above, the Tribunal finds and holds that this Application is not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 29th day of January 2013

Entered in the Register on this 29th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi