



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, an Investigator at the P-4 level, step XIII, with the Office of Internal Oversight Services (“OIOS”), contests the dismissal by the Under-Secretary-General for Management (“USG/DM”) of two complaints that the Applicant had submitted against the Officer-in-Charge of the Management Evaluation Unit (“OiC/MEU”) pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority) and ST/AI/371 (Revised Disciplinary Measures and Procedures), respectively.

2. The Respondent contends that the application is without merit as the facts presented in the complaints would not amount to harassment or abuse of authority as defined in ST/SGB/2008/5 or unsatisfactory conduct for which a disciplinary measure may be imposed under ST/AI/371.

Factual and procedural background

3. In his application, the Applicant presents the facts of the case as set out below, and the Respondent has not contested these facts which are also corroborated by the annexes appended to the application (emphasis in the original):

1. On 28 August 2015, the Applicant filed two complaints against [the OiC/MEU]:

(a) The first complaint ... concerned the comments made by [the OiC/MEU] in his response to the Applicant’s request for a management evaluation; the response is dated 4 March 2015....

(b) The second complaint ... concerned the failure of [the OiC/MEU] to discharge his responsibilities under the applicable legal framework, as evidenced by the contents of the response to the Applicant’s request for a management evaluation; the response is dated 4 March 2015....

2. Complaint 1 was submitted pursuant to the Secretary-General’s bulletin ST/SGT/2008/5 — Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (see ST/SGT/2008/5) — and was sent to [the USG/DM].

3. In his response [dated 4 March 2015], [the OiC/MEU] wrote...:

Section 5.14 of ST/SGB/2008/5 requires the responsible official to review the complaint 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.” The MEU noted that, on 9 January 2014 the USG, OIOS informed you, in a meeting and in a subsequent email, that she had reviewed your submissions and that nothing in your complaint would attract a finding of misconduct under ST/SGB/2008/5, even if substantiated. The MEU considered that this e-mail clearly and unequivocally conveyed to you, a seasoned investigator, that the USG, OIOS had reviewed your complaint pursuant to section 5.14 and had concluded that there was no basis for a fact-finding investigation. The MEU further noted that the USG, OIOS informed you of how she would proceed to address the issues you had raised. None of the actions she described either indicated or even implied that she would establish a fact-finding panel. The MEU considered that this communication conveyed a final decision following her section 5.14 review. Her subsequent email to you on 18 February 2015, over a year later, did no more than reiterate her communication of 9 January 2014. The MEU therefore considered that you were notified of the decision of the USG, OIOS on your complaint on 9 January 2014. (Underline added by the Applicant).

4. Complaint 1 was transmitted by e-mail to [the USG/DM] on 28 August 2015 ... he took cognizance of this on the same day....

5. Complaint 2 was submitted pursuant to administrative instruction ST/AI/371 — Revised disciplinary measures and procedures — and was also sent to [the USG/DM]. In his complaint, the Applicant stated that [the OiC/MEU] had neglected to exercise his jurisdiction pursuant to the requirements of the applicable legal framework and, *a fortiori*, was in contempt of the General Assembly since he had violated its resolution 62/228 (6 February 2008).... The Applicant added that [the OiC/MEU] had violated the provisions of the Secretary-General’s bulletin ST/SGB/2010/9 (see ST/SGB/2010/9, para. 10.2).

6. Complaint 2 was transmitted by e-mail to [the USG/DM] on 28 August 2015 ... he took cognizance of this on the same day....

7. Not having received a response from [the USG/DM], the Applicant submitted two requests for evaluations of the administrative decisions on 24 November 2015:

(a) The first request concerned the complaint submitted pursuant to ST/SGB/2008/5.... The Management Evaluation Unit took cognizance of the e-mail on the same day....

(b) The second request concerned the complaint submitted pursuant to administrative instruction ST/AI/371.... The Management Evaluation Unit took cognizance of the e-mail on the same day....

8. On 24 November 2015, [the] Director of the Office of the Under-Secretary-General for Management, informed the Applicant of the following...:

In response to the two letters you sent [the USG/DM] on 28 August 2015 with respect to the non-receivability letter dated 4 March 2015 that you received from [OiC/MEU] of the MEU.

I understand you received a letter from the MEU informing you that based on its review of the chronology of facts, your request for management evaluation was time-barred.

Having reviewed the matter in question, I can report that [the USG/DM] does not consider that any action is warranted under the ST/SGB/2008/5 or the ST/AI/371 based on the content of such letter.

I am aware that you have already received a decision from the [Dispute Tribunal] confirming the MEU decision of non-receivability. As you may be aware, decisions or findings of the MEU are not new administrative decisions which can be contested before the Tribunals. (Underline added by the Applicant).

9. On 3 December 2015, the Management Evaluation Unit informed the Applicant that his two evaluation requests had lapsed ... because the Applicant had received a response from [the USG/DM], which had been communicated to him by Mr. Saunders....

10. On 1 January 2016, the Applicant submitted two new requests for evaluations of the administrative decisions following [the USG/DM]'s refusal to take action to address the complaints against [the OiC/MEU]....

(a) The first request concerned complaint 1, submitted in accordance with ST/SGB/2008/5...; the Management Evaluation Unit took cognizance of the e-mail on 4 January 2016....

(b) The second request concerned complaint 2, submitted in accordance with administrative instruction ST/AI/371...; the Management Evaluation Unit took cognizance of the e-mail on 4 January 2016....

11. On 26 January 2016, the Management Evaluation Unit informed the Applicant that "*your requests for management evaluation [are] not receivable*"....

4. On 21 March 2016, the Applicant filed the application in French.

5. On 22 March 2016, the Registry acknowledged receipt of the application and instructed the Respondent to submit his reply by 21 April 2016. The parties were further informed that the application had been sent for translation into English and that they would be notified when the English version of the application would be available.

6. On 28 March 2016, the Registry informed the parties that an English translation of the application was now available through the eFiling portal.

7. On 21 April 2016, the Respondent filed his reply.

8. On 14 July 2016, the present case was assigned to the undersigned Judge, of which the parties were informed by the New York Registry's email of the same date.

9. By Order No. 185 (NY/2016) dated 28 July 2016, the Tribunal instructed the Applicant to file his comments, if any, to the submissions included in the Respondent's reply by 12 August 2016, explaining that:

... From the parties' submissions, it follows that the parties seem to agree on factual background of the case and that the dispute rather concerns whether, under the given circumstances, it was appropriate or not for the Under-Secretary-General for Management to dismiss the Applicant's two complaints. After having closely perused the case record, the Tribunal is of the view that all relevant facts appear to have been properly documented. However, before adjudicating on the matters before it, the Tribunal will allow the Applicant, as the moving party, to respond to the submissions included in the Respondent's reply.

10. On 12 August 2016, the Applicant filed his comments to the Respondent's reply as per Order No. 185 (NY/2016). As the comments were in French, the Registry submitted these comments for translation into English and on 17 August 2016, notified the parties that the translation was available in the eFiling system.

11. On 19 August 2016, the Applicant submitted a motion in French, requesting the Tribunal's permission to file an objection concerning the translation of the case documents. On 22 August 2016, the motion was sent for translation into English. On

25 August 2016, the English translation of the motion was made available to the parties on the eFiling portal. In the motion, the Applicant objected to the translation of case documents by stating that:

... First, the English translation of the application of 21 March 2016 and of the Applicant's comments on the Secretary-General's reply to his application is of poor quality; for example, phrases from the French text have been omitted in the English translation, the terminology used in the English translation is imprecise, and the respect expressed towards the Tribunal in the original version of the comments is absent from the English translation.

... Second, the Applicant consulted his case file on the eFiling portal on 18 August 2016, and the Secretary-General's reply to the request of 21 March 2016 had not yet been translated into French.

... Lastly, the Tribunal has already granted the Applicant the right to have his case heard in French and to receive a judgment in that language: case No. UNDT/GVA/2015/152.

... In view of the fact that the Applicant stated in paragraph 35 of the application that "the use of a language other than French in the proceedings in this case would place him at a disadvantage", he reiterates his request to have his case heard in French by the Tribunal and to receive a French translation of the Secretary-General's pleadings, in accordance with General Assembly resolution 2(I) [General Assembly resolution 2(I) of 1 February 1946].

Consideration

Language of the proceedings

12. In his application and 19 August 2016 motion, the Applicant requests that the present case be conducted in French. The Tribunal notes that no such right is contemplated in the legal framework governing the Dispute Tribunal, including its Statute and the Rules of Procedure, and that English is the only official working language at the United Nations Headquarters in New York where the Applicant works. Also taking into account that the undersigned Judge is Anglophone, the Applicant's request is, therefore, denied.

13. Regarding the Applicant's 19 August 2016 objection against the English translation of the case documents in French, the Tribunal notes that all the translations provided are official translations undertaken by the French Translation Unit of the Department for General Assembly and Conference Management. The Tribunal is, therefore, bound to rely on its accuracy and authenticity and the motion is dismissed.

Hearing

14. In his comments to the Respondent's reply, the Applicant requests the Tribunal:

... to allow him to present his arguments in French at a hearing, in view of the important issues raised in the present case, including the independence and impartiality of the Management Evaluation Unit, when the contested decision was made by the senior official responsible for the MEU, namely [USG/DM].

15. According to the Dispute Tribunal's Rules of Procedure (emphasis added): "[t]he judge hearing a case *may* hold oral hearings" and "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure" (see arts. 16.1 and 16.2). As the present case does not concern "an appeal against an administrative decision imposing a disciplinary measure," it is entirely up to the assigned judge to determine whether or not a hearing should be held.

16. The Tribunal notes that the reason behind the Applicant's request for an oral hearing is not that he wishes to present any new evidence or legal contentions which he has otherwise been prevented from submitting during the proceedings but rather that he wishes to present his arguments in person in French to the Tribunal. The Tribunal remarks that in his application and his 12 August 2016 comments, the Applicant has already argued his case in French and that all of his arguments have been presented in a logical, easily understandable and comprehensive manner.

Consequently, the Tribunal finds that there is no need for further clarification of the issues arising from the appeal at an oral hearing.

17. In accordance with arts. 10.1 and 19 of the Dispute Tribunal's Rules of Procedure, for the fair and expeditious disposal of the case and to do justice to the parties, the Tribunal, therefore, does not find that a hearing is necessary in the present case and denies the Applicant's request.

The scope of the judicial review

18. In his application, the Applicant, in essence, contends that the writing of the OiC/MEU in the letter dated 4 March 2015 amounted to an infringement of both ST/SGB/2008/5 and ST/AI/371 and that the USG/DM should, therefore, not have dismissed the Applicant's two complaints against the OiC/MEU.

19. The Appeals Tribunal, in *Nwuke* 2010-UNAT-099, defined the limitations of the judicial review when examining a staff member's right to have action taken against another staff member for possible misconduct as follows (emphasis added):

27. Article 2(1) of the UNDT Statute stipulates that the UNDT "shall be competent to hear and pass judgment on an application filed by an individual against ... (a) ... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ...". It also establishes that "[t]he terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance."

28. *So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?*

29. In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.

30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

31. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority. Paragraph 2.1 of ST/SGB/2008/5 provides that “every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse”.

32. Paragraph 2.2 adds that “[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed”. Paragraph 5.3 establishes that “[m]anagers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.”

...

35. Chapter XI of the Staff Rules provides for the possibility to submit an application before the UNDT, and under Article 10 of the UNDT Statute, the UNDT may order the rescission of a contested administrative decision or a specific performance, and compensation (indispensable as an alternative to the rescission or performance ordered when the contested administrative decision concerns appointment, promotion, or termination).

36. *In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.*

37. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission, and in the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

Applicable law

20. Article 2.1(a) of the Dispute Tribunal Statute defines the nature of the administrative decisions that may be appealed to the Tribunal:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance....

21. As regards the requirement for an applicant to request management evaluation of (some) administrative decisions before submitting an application to the Dispute Tribunal, staff rule 11.2 provides, as relevant to the present case, that (emphasis added):

(a) *A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.*

...

(d) The Secretary-General’s response, reflecting the outcome of the management evaluation, *shall be communicated in writing to the staff member....*

22. Concerning cases, like the present one, related to the United Nations Secretariat, pursuant to sec. 3.6 of ST/SGB/2010/9 (Organization of the Department

of Management), the USD/DM “is responsible for the conduct of the management evaluation process [and] has the authority to make decisions on the outcome of a management evaluation of a contested administrative decision.” According to sec. 10.1 of ST/SGB/2010/9, the MEU is headed by a Chief, who is “accountable to the Director of the Office of the Under-Secretary-General for Management” and, under sec. 10.2, the functions of the MEU are defined in the following manner:

10.2 The core functions of [the MEU] are as follows:

(a) Conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations;

(b) Making recommendations to the Under-Secretary-General for Management on the outcome of the management evaluations and proposing appropriate remedies in case of improper decision made by the Administration;

(c) Communicating the decision of the Under-Secretary-General for Management on the outcome of the management evaluation to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York;

(d) Proposing means of informally resolving disputes between staff members and the Administration; making recommendations to the Under-Secretary-General for Management on extending the deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman;

(e) Conducting a timely review of an application to suspend the implementation of a contested administrative decision until the management evaluation has been completed in cases involving separation from service; making a recommendation to the Under-Secretary-General on the outcome of such review; and communicating the decision of the Under-Secretary-General on the outcome of the review to the staff member;

(f) Monitoring the use of decision-making authority and making recommendations to the Under-Secretary-General for Management to address any discerned trends;

(g) Assisting the Under-Secretary-General for Management to strengthen managerial accountability by ensuring managers' compliance with their responsibilities in the internal justice system.

23. ST/SGB/2008/5 defines different types of prohibited conduct which would warrant the USG/DM to take action as follows:

1.1 Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

1.3 Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

24. ST/AI/371, as amended by ST/AI/371/Amend.1 of 11 May 2010, art. II.2, sets out a non-exhaustive list of situations in which a disciplinary investigation against a staff member would be warranted and provides as follows:

II. Investigation and fact-finding

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. Staff rule 10.1 provides that ‘Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of the disciplinary process and the imposition of disciplinary measures for misconduct.’ Conduct for which disciplinary measures may be imposed includes, but is not limited to:

(a) Acts or omissions in conflict with the general obligations of staff members set forth in article 1 of the Staff Regulations and the Staff Rules and instructions implementing it;

(b) Unlawful acts (e.g., theft, fraud, possession or sale of illegal substances, smuggling) on or off United Nations premises, and whether or not the staff member was officially on duty at the time;

(c) Misrepresentation, forgery or false certification in connection with any United Nations claim or benefit, including failure to disclose a fact material to that claim or benefit;

(d) Assault upon, harassment of, or threats to other staff members;

(e) Misuse of United Nations property, equipment or files, including electronic files;

(f) Misuse of office; abuse of authority; breach of confidentiality; abuse of United Nations privileges and immunities;

(g) Acts or behaviour that would discredit the United Nations.

Findings

25. The Applicant contends that as a staff member, he has a legal obligation to report any breach of the Organization’s regulations and rules and, by doing so, he

fulfilled this duty and that the MEU, presumably, failed to determine the legality of the USG/DM's decision under ST/SGB/2010/9, para. 10.2(a).

26. The Tribunal notes that it is apparent from the facts that the MEU only became involved in appraising the matters set out in its 4 March 2015 letter as a result of the request for management evaluation which the Applicant himself had filed pursuant to staff rule 11.2. Therefore, by its assessments made in this letter, the MEU merely undertook its duties and responsibilities as described in sec. 10.2 of ST/SGB/2010/9 and staff rule 11.2(d). Subsequently, the Director of the Office of the USG/DM informed the Applicant about the USG/DM's decision to dismiss his complaints against the OiC/MEU and, as such, no further administrative steps were necessary under secs. 3.6 and 10 of ST/SGB/2010/9 because the MEU is ultimately accountable to this Director.

27. The Applicant further submits that the OiC/MEU's remarks in the MEU's 4 March 2015 letter were "objectionable, abusive, alarming or demeaning." When reading the paragraph of the letter (see para. 3 in the quotation in para. 3 above) that the Applicant specifically complains about, including the sentence highlighted by the Applicant, it is written in an uncontroversial, clear, simple and plain everyday conversational English which sets out the MEU's reasons and findings based on the management evaluation request filed by the Applicant himself. The Tribunal, therefore, finds nothing contentious or improper in the letter that can in any possible manner be construed as either (a) amounting to discrimination, harassment, sexual harassment or abuse of authority as defined in ST/SGB/2008/5 or (b) suggesting that the MEU/OiC has been involved in "unsatisfactory conduct for which a disciplinary measure may be imposed" pursuant to ST/AI/371, as amended by ST/AI/371/Amend.1.

28. The Applicant also alleges that the USG/DM failed to take into account the grounds and the evidence presented by the Applicant in contravention with the principle "he who decides must hear" for which he refers to *Morgan v. United States*, 298 U.S. 468 (1930). However, it follows from the facts presented by the Applicant

that the Director of the Office of the USG/DM informed the Applicant that the USG/DM had “reviewed the matter in question” and “did not consider that any action is warranted under the ST/SGB/2008/5 or the ST/AI/371 based on the content of [the MEU’s 4 March 2015 letter].” The Tribunal, therefore, finds no grounds for considering that the USG/DM was not fully and appropriately apprised of the issues before him when dismissing the Applicant’s complaints against the OiC/MEU.

29. Accordingly, the Tribunal concludes that there is no basis for finding that the OiC/MEU’s writing in the MEU’s 4 March 2015 letter amounted to a breach of either ST/SGB/2008/5 or ST/AI/371 and the USG/DM, therefore, did not infringe on the Applicant’s rights when dismissing his complaints against the OiC/MEU.

Conclusion

30. The application is dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of August 2016

Entered in the Register on this 26th day of August 2016

(Signed)

Hafida Lahiouel, Registrar, New York