



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, HRLU/UNOG

Bettina Gerber, HRLU/UNOG

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By application filed on 16 March 2018, the Applicant, a Human Rights Officer (P-3) in the Office of the High Commissioner for Human Rights (“OHCHR”), contests the implied decision not to process her complaint of abuse of authority against the High Commissioner for Human Rights (“High Commissioner”).

Facts

2. In 2015 and 2016, the Applicant filed applications for protection against retaliation to the Ethics Office under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

3. On 20 July 2016, the Applicant filed a complaint of harassment under ST/SGB/2008/5 (Protection against discrimination, harassment, including sexual harassment, and abuse of authority) against her then first and second reporting officers.

4. The Ethics Office determined in its confidential memorandum of 7 October 2016, that some of the activities that the Applicant had engaged in did constitute protected activities under ST/SGB/2005/21, but that most did not. However, the Ethics office found that there was no *prima facie* case that the protected activities were a contributing factor in causing the alleged retaliation.¹

5. Following a telephone call between the Applicant and an officer of the Ethics Office on 13 October 2016, her complaint with the Ethics Office was re-opened.

6. On 5 January 2017, the High Commissioner responded to the Applicant’s complaint of harassment indicating that the facts alleged regarding adverse actions in performance management had been corroborated, but related to the management

¹ The Ethics Office memorandum was not filed in this case, however it is well known to both parties, having been filed in another matter between them. The Tribunal has determined to include the memorandum in the file in this case, as the summary advanced by the Applicant was not complete.

of performance. Managerial action was taken to remind the Applicant's former supervisors of the need to respect the rules of performance management.

7. The Applicant was contacted on 19 and 20 January 2017 by a journalist indicating that he had received United Nations Ethics Office's documents. On 23 January 2017, the journalist communicated to her documents concerning the application for protection against retaliation she had submitted to the Ethics Office in a redacted form and requested comments.

8. The Applicant reported this communication to the Head of Communications, OHCHR, the Ethics Office and the Office of Internal Oversight Services ("OIOS") whom she requested to open an investigation into the source of the leak.

9. On 1 February 2017, the "Inner City Press and blog" published the confidential memorandum from the Ethics Office dated 7 October 2016 referencing allegations raised by the Applicant to the Ethics Office and OIOS concerning the provisions of names of Chinese Human Rights defenders by OHCHR to the Chinese government. The article also mentioned that the Applicant had suffered from retaliation at OHCHR. A similar article was also published on 1 February 2017 on the Government Accountability Project's website.

10. On 2 February 2017, OHCHR published a press release, which was also forwarded to all OHCHR staff, concerning the practice of providing names of human rights defenders to the Chinese delegation. In the final paragraph, the press release stated:

GAP and the Inner City Press also refer to a staff member at the UN Human Rights Officer in relation to this case, who they assert is a whistle-blower and who they allege suffered reprisals at the hands of the Office. In fact, the staff member has never faced reprisals. The staff member has had her contracts renewed and remains employed by the organization on full pay. She has made allegations against various managers. These have been taken seriously, leading to two separate independent investigations that have been carried out to determine whether or not there is any substance to her allegations. In both instances, the claims made by the staff member were found to be unsubstantiated.

11. On 20 February 2017, the Applicant wrote to the High Commissioner taking issue with the content of the press release. She expressed the view that it misrepresented OHCHR's policies regarding the sharing of information regarding NGO participants in OHCHR meetings with the Chinese government. The Applicant took issue with the public discussion of confidential complaints that she had made, with the claim that she had not been retaliated against whilst the request for protection from retaliation was still pending with the Ethics Office and with the assertion that her claims had been found unsubstantiated when some of the facts alleged in her complaint of harassment had been corroborated but found by the High Commissioner not to represent harassment. The Applicant requested a retraction and correction of the press release.

12. On or around 20 February 2017, the Applicant filed a complaint of abuse of authority with OIOS regarding the press release.

13. On 25 February 2017, the Applicant followed up on her complaint with OIOS. OIOS responded on 27 February 2017 that it had been received and that a decision would be made regarding whether or not OIOS or another office was more suitable to address the matter raised by the Applicant.

14. On 4 March 2017, the Applicant requested management evaluation of the decision to close her harassment complaint and to issue the press release.

15. On 13 March 2017, the Applicant filed a complaint of abuse of authority against the High Commissioner regarding the press release under ST/SGB/2008/5 to the acting Assistant Secretary-General ("acting ASG"), Office of Human Resources Management ("OHRM"), United Nations Headquarters.

16. On 14 March 2017, the High Commissioner informed the Applicant that he would not retract or correct the press release. He also recalled that all the Applicant's allegations in her letter of 20 February 2017 had been reviewed and/or investigated by internal mechanisms of the Organization, including OIOS, the Ethics Office and an independent fact-finding panel established pursuant to ST/SGB/2008/5.

17. On the same day, the Applicant enquired as to the mechanism for supplementing her complaint of abuse of authority.

18. On 24 March 2017, the Administrative Law Section (“ALS”), OHRM, indicated to the Applicant that her complaint was under review and that there was no formal process for supplementing it.

19. On 7 April 2017, the acting ASG, OHRM, requested the High Commissioner to provide his comments on the Applicant’s complaint. He responded on 20 April 2017.

20. On 1 June 2017, the Applicant wrote to the acting ASG, OHRM, raising concern about the fact that she had received no response as to whether an investigation would be opened into her complaint.

21. On the same day, a legal officer with ALS indicated to the Applicant that the matter was under review and that she would be informed of the outcome in due course.

22. On 29 June 2017, the Applicant responded to the legal officer, ALS, asking what he meant by “under review” and enquiring as to whether an investigation would be conducted. She followed-up again on 12 July 2017 as to when she might receive a response.

23. On 14 July 2017, the legal officer, ALS, responded that the matter was “under active review”.

24. On the same day, the Applicant enquired as to the meaning of “active review” and whether an investigation had been opened.

25. The legal officer, ALS, responded on the same day that no decision had been made as to how to proceed.

26. The Applicant subsequently followed up with ALS on 24 July and 9 August 2017. On 10 August 2017, she wrote to the Executive Office of the Secretary-General informing him of the failure to take a decision as to whether the complaint would be investigated.

27. On 17 July 2017, the Applicant filed an application before the Dispute Tribunal, registered under Case No. UNDT/GVA/2017/052, contesting the decisions to conclude her complaint of harassment with only managerial action and for “defamation” and “violation of her privacy rights” resulting from the publication of the press release. In his reply of 17 September 2017, the Respondent challenged the receivability *ratione materiae* of the application insofar as it contested the press release. This application is pending.

28. On 11 August 2017, the Executive Office of the Secretary-General wrote to the Applicant that her case “remains under active review” and that she will be informed as soon as a decision is made on the matter.

29. On 12 August 2017, the Applicant enquired with the Executive Office of the Secretary-General as to when she could expect a response. She then raised the matter with the Under-Secretary-General for Management by emails of 31 August 2017, 19 September 2017 and 2 November 2017. She received no response.

30. On 7 December 2017, the Applicant requested management evaluation of the implicit decision not to take action on her complaint of abuse of authority against the High Commissioner. She did not receive any answer.

31. By letter of 11 January 2018, the ASG, OHRM, informed the Applicant that the Secretary-General had decided not to make a final decision on her complaint until the proceedings before the Tribunal in her Case No. UNDT/GVA/2017/052 are completed.

Procedural history

32. As recalled above, the Applicant filed an application before the Tribunal challenging the implied decision not to take any action on her complaint of abuse of authority on 16 March 2018 (see para. 1 above).

33. The Respondent filed his reply on 19 April 2018, with one document submitted *ex parte*.

34. On 15 April 2019, both parties confirmed their agreement that the case may be decided on the basis of the documents.

35. By his submissions dated 15 April 2019, the Applicant also sought leave to adduce medical evidence and to comment upon a letter dated 11 January 2018 filed by the Respondent as Annex 11 to his reply. The Tribunal finds that it is in the interest of justice to grant the Applicant's request and that it would cause no prejudice to the Respondent. It will therefore accept the additional evidence and submissions produced by the Applicant.

Parties' submissions

36. The Applicant's principal contentions are:

- a. The failure to process her complaint is a reviewable administrative decision;
- b. The failure to process her complaint more than a year after its filing is unlawful in light of ST/SGB/2008/5 and the Appeal's Tribunal jurisprudence;
- c. There is no authority to delay an investigation under ST/SGB/2008/5 pending the completion of proceedings before the Dispute Tribunal and this is against the practice of the Organization. Furthermore, a judicial review and a request for investigation deal with separate issues;
- d. The communication of 11 January 2018 indicating that the investigation would be delayed until after the resolution of her complaint was sent almost a year after the Applicant lodged her complaint, and half a year after she filed her application before the Tribunal in Case No. UNDT/GVA/2017/052. No justification is provided as to why no decision was made before. This communication appears to be calculated to respond to the Applicant's arguments in her request for management evaluation and does not provide any justification for the failure to process the Applicant's complaint; and

- e. The Applicant requests:
 - i. A decision as to whether her complaint will be investigated be made and communicated to her within a reasonable delay; and
 - ii. Compensation for moral damages (stress and anxiety).

37. The Respondent's principal contentions are:

- a. The application is not receivable as no implied decision not to investigate the Applicant's complaint has been taken. The application is thus premature;
- b. Should the Tribunal consider that the application is receivable, the taking of additional time to complete the review of the Applicant's complaint is a proper exercise of the Administration's discretion. The Applicant has made several overlapping complaints and applications against several individuals, to different entities. The time taken to review the complaint is therefore reasonable in view of the complexity of the entire matter;
- c. Furthermore, the Secretary-General considered that it was appropriate to pause the review of the Applicant's complaint pending the outcome of the proceedings before the Dispute Tribunal since the publication of the press release is the main component of the Applicant's complaint against the High Commissioner; and
- d. The Respondent requests that the Tribunal rejects the application in its entirety.

Consideration

38. The Tribunal notes that at the time of submitting her request for management evaluation, the Applicant had not yet received the letter of 11 January 2018 from the ASG, OHRM. The Applicant had been repeatedly told that her complaint was under "active review", and thus challenged the implicit decision not to take action on her complaint due to the absence of any action taken almost nine months after

its submission to the ASG, OHRM. This is the matter that is the subject of the application and thus under review.

39. In turn, the letter of 11 January 2018 where the ASG, OHRM, communicated her decision to defer the consideration of the Applicant's complaint pending adjudication of her application in Case No. UNDT/GVA/2017/052 was produced in the present case by the Respondent to explain or justify the delay in considering the Applicant's complaint. This is not the decision under review and the Tribunal will consider the letter of 11 January 2018 only insofar as it is relied upon by the Respondent to justify the lengthy time taken in the consideration of the Applicant's complaint.

40. In examining the receivability of the application, the Tribunal must determine if the failure to take any action on the Applicant's complaint almost nine months after its filing, taking into account the time elapsed at the time of the management evaluation request, amounts to an implicit decision not to take action on her complaint. This issue requires the Tribunal to determine if there has been an inordinate delay in the consideration of the Applicant's complaint. It is intertwined with the merits of the application, which claims that the Administration violated the Applicant's terms and conditions of employment in not taking action on her complaint as required by ST/SGB/2008/5. The Tribunal will thus examine both the receivability and the merits of the application at the same time.

Receivability and merits of the application

41. Sec. 5.3 of ST/SGB/2008/5 sets a clear duty for management to act without delay when seized of possible prohibited conduct, including abuse of authority:

Managers 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.

42. Sec. 5.14 of ST/SGB/2008/5 provides that (emphasis added):

Upon receipt of a formal complaint or report, the responsible official will *promptly* 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. If that is the case, the responsible office shall *promptly* appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

43. Sec. 5.17 further provides that when a panel is appointed to conduct an investigation, its report “shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint”. It necessarily follows from this provision that a decision as to whether to trigger an investigation must be taken promptly and should not exceed three months from the date of the submission of the complaint.

44. It is noted that a failure to conclude an investigation within the three-month time limit set out in sec. 5.17 of ST/SGB/2008/5 has not been systematically considered to be in violation of staff members’ terms and conditions of employment. The Appeals Tribunal has considered that the complexity of some complaints, the fact that additional elements were put forward by the complainant and the exercise of the parties’ rights through litigation were considered to be valid justifications when examining delays in the conclusion of investigations (see, *e.g.*, *Oummih* 2015-UNAT-518). That being said, the Appeals Tribunal held in *Benfield-Laporte* 2015-UNAT-505 that “a period of six months to communicate the decision not to open a formal fact-finding investigation is far from prompt” and did not conform with the requirements of ST/SGB/2008/5.

45. It is also trite law that failure to take a decision can represent a reviewable administrative decision (see, *e.g.*, *Tabari* 2010-UNAT-030). The Appeals Tribunal specifically applied this principle in a case where the Administration failed to act on a complaint under ST/SGB/2008/5 on the basis that the rules provide staff members making such complaints with certain specific and enforceable rights (*Nwuke* 2010-UNAT-099, paras. 25 and 36).

46. It is not disputed that, at the time of the Applicant’s request for management evaluation, almost nine months had already elapsed since the filing of her complaint. Another month elapsed before the ASG, OHRM, informed the Applicant

that she would defer her consideration of the complaint until resolution of Case No. UNDT/GVA/2017/52. At the time of the application, the Applicant's complaint had been pending for a year. No action had been taken to decide whether or not to initiate a fact-finding investigation, as required by sec. 5.14 of ST/SGB/2008/5. The only step that appears to have been taken was to ask the High Commissioner to provide his comments on the complaint.

47. The Tribunal finds that the ASG, OHRM's failure to take action on the Applicant's complaint almost nine months after its filing, taking into account only the period that preceded the request for management evaluation, is a clear violation of the provisions of ST/SGB/2008/5.

48. The Administration's failure to act on the Applicant's complaint amounts to an implicit administrative decision and is reviewable by the Tribunal. The application is therefore receivable.

49. The failure to process the Applicant's complaint is also unlawful insofar as it does not comply with the provision of ST/SGB/2008/5. In this connection, for the reasons explained below, the Tribunal finds unpersuasive the Respondent's argument that it was appropriate for the Secretary-General and a lawful exercise of his discretion to suspend consideration of the Applicant's complaint until resolution of her application before this Tribunal in Case No. UNDT/GVA/2017/052.

50. There is no provision allowing the Secretary-General to unilaterally decide to suspend or defer the treatment of a complaint under ST/SGB/2008/5, nor any discretionary power involved. In deciding to defer the consideration of the Applicant's complaint, the Secretary-General was not exercising any specific right under the rules that could justify a delay in the conclusion of the investigation under the Appeals Tribunal's jurisprudence (see para. 44 above). He was making a unilateral decision to deviate from the applicable rules, which is not permitted.

51. Furthermore, there is no cogent reason to defer consideration of the Applicant's complaint until a decision is made on her application in Case No. UNDT/GVA/2017/052, which challenges, *inter alia*, the issuance of the press release of 2 February 2017 on the basis of alleged violations of the Applicant's

rights to privacy and to be protected against defamation. An investigation into a complaint of abuse authority has a different purpose than the Tribunal's review of the decision to issue a press release, if this is deemed to constitute a reviewable administrative decision.

52. The formal procedure set out in ST/SGB/2008/5, which deals with prohibited conduct, would entail a fact-finding investigation into the allegations of abuse of authority made by the Applicant if the ASG/OHRM considers that the complaint appears to have been made in good faith and there are sufficient grounds to warrant a formal fact-finding investigation (sec. 5.14). If the allegations are found to be substantiated, managerial action(s) or disciplinary proceedings against the offender may ensue (sec. 5.18).

53. In turn, the Tribunal is tasked in Case No. UNDT/GVA/2017/052 to conduct an administrative review of the issuance of the press release to determine if it negatively affected the Applicant's terms and conditions of employment. The nature and scope of an administrative review has been defined by the Appeals Tribunal in *Sanwidi* 2010-UNAT-084 as follows:

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

54. It is not unusual for investigations to be conducted whilst proceedings before the Tribunal on connected issues are also ongoing. The two mechanisms often operate in parallel and, if anything, it is the judicial proceedings before the Tribunal that are at times suspended pending the outcome of investigations under

ST/SGB/2008/5 (see, e.g., *Belkhabbaz* UNDT/2018/071, para. 41). This is because this Tribunal generally does not engage into fact-finding, nor does it conduct a merits-based review, as recalled above. Fact-finding investigations are sometimes relevant to the Tribunal's determination on connected issues, but not the other way around.

55. In the present case, any determination made by the Tribunal in relation to the application in Case No. UNDT/GVA/2017/052 as to the lawfulness of the press release, if the application is found receivable, would not be determinative of the issue as to whether the High Commissioner abused his authority in publishing the press release, as the Applicant alleges in her complaint.

56. Finally, the letter of 11 January 2018 appears to be an *ex post facto* justification for the delay in processing the Applicant's complaint, following the filing of her request for management evaluation. This letter came almost ten months after the Applicant submitted her complaint and six months after she filed her application before the Tribunal in Case No. UNDT/GVA/2017/052. It is also noted that the Respondent has vehemently challenged the receivability *ratione materiae* of the application in Case No. UNDT/GVA/2017/052 insofar as it concerns the press release, arguing that this does not constitute an administrative decision. It is contradictory for the Secretary-General to argue, on the one hand, that the Tribunal has no jurisdiction to examine the Applicant's application in Case No. UNDT/GVA/2017/052 and, on the other hand, to defer the consideration of her complaint on the basis of awaiting the outcome of an allegedly irreceivable application.

57. In view of the foregoing, the Tribunal finds that the Administration's failure to act on the Applicant's complaint is unlawful.

Remedies

58. Given that the unlawfulness in the present case involves inaction, the appropriate remedy is an order for specific performance under sec. 10.5(a) of the Tribunal's Statute, so as to compel the Administration to make a determination as to whether to initiate a fact-finding investigation into the Applicant's complaint, in

accordance with sec. 5.14 of ST/SGB/2008/5. Taking into account the time already elapsed and the fact that the ASG, OHRM, had already received comments from the High Commissioner, the Tribunal considers it appropriate to give the ASG, OHRM, a thirty-calendar day deadline to do so.

59. As to the Applicant's request for moral damages resulting from the delay in the treatment of her complaint, the Tribunal finds that the medical report submitted by the Applicant does not allow to establish a sufficient connection between her medical condition and the delay in the process of her complaint. Absent any evidence, the request for moral damages cannot be granted.

Conclusion

60. In view of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The ASG, OHRM, shall review the Applicant's complaint of abuse of authority of 13 March 2017 to assess whether it appears to have been made in good faith and determine whether there are sufficient grounds to warrant a formal fact-finding investigation under sec. 5.14 of ST/SGB/2008/5 within thirty calendar days as of the issuance of this judgment; and
- c. All other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 24th day of May 2019

Entered in the Register on this 24th day of May 2019

(Signed)

René M. Vargas M., Registrar, Geneva