



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

DE RIJK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Security Officer with the former International Criminal Tribunal for the Former Yugoslavia (“ICTY”) filed an application contesting the decision not to initiate an investigation into his allegations of harassment and abuse of authority. In response, the Respondent submits that the application is without merit.

2. For the reasons stated below, the Tribunal rejects the application.

Facts and procedural history

3. On 26 October 2016, the Applicant submitted to the Registrar of the ICTY a complaint of harassment and abuse of authority in application of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and, abuse of authority) concerning the Chief, Security and Safety Section (“SSS Chief”) of the ICTY.

4. On 16 December 2016, the ICTY Registrar informed the Applicant that he did not find sufficient grounds to warrant a formal investigation into his allegations.

5. The Applicant filed his application in the Geneva Registry and the case was initially assigned to Judge Rowan Downing. On 23 November 2018, the case was transferred to the New York Registry and assigned to Judge Alessandra Greceanu. Following the end of Judge Greceanu’s term with the Dispute Tribunal, the case was reassigned to the undersigned Judge on 21 November 2019.

Consideration

The parties' submissions and scope of the case

6. The Applicant's case can be summarized as follows:
 - a. Initiating a fact-finding investigation was not discretionary. Therefore, the Tribunal must conduct a *de novo* review of the allegations and substitute its own assessment for that of the Administration, including in respect of whether "sufficient grounds" existed to warrant a formal investigation;
 - b. The decision not to initiate an investigation was procedurally incorrect because assessment of whether there were sufficient grounds to warrant an investigation was made by the Deputy Registrar;
 - c. The Administration exceeded the scope of the initial review of the complaint;
 - d. The Administration did not apply the correct legal standard in the consideration of whether there were sufficient grounds to warrant an investigation;
 - e. The Registrar did not specify the actions he undertook after he "identified several areas which would benefit from further articulation of the applicable policies in the Security and Safety Section".
7. The Respondent in essence, responds as follows:
 - a. The correct procedure was applied. The Registrar did not delegate his authority as responsible official. He merely requested the Deputy Registrar to make a preliminary assessment after which, the Registrar reviewed the complaint himself;

b. The Registrar applied the correct legal standard in concluding that the complaint did not raise sufficient grounds to warrant an investigation. He did not make finding of fact in relation to the alleged incidents;

c. The Registrar considered all relevant factors in reaching his decision. He reviewed each alleged incident as well as the impact of all alleged incidents together;

d. There was no obligation on the Registrar to share details of the actions taken following the complaint.

Legal framework

8. Section 5.11 of ST/SGB/2008/5 provides that formal complaints under this policy are submitted to the responsible official, who, among others, can be the concerned head of department, office or mission.

9. Section 5.14 of ST/SGB/2008/5 further states that upon receipt of a formal complaint or report, the responsible official shall promptly review the complaint to determine whether it was made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation.

10. In *Nadeau* 2017-UNAT-733, paras. 33 and 34, the Appeals Tribunal recalled its long-standing jurisprudence stating that the Administration has a degree of discretion in reviewing a complaint and deciding whether to undertake an investigation on all or some of the allegations. The Appeals Tribunal recalled that a staff member only has a right to an investigation against another staff member in cases of serious and reasonable accusations. The Appeals Tribunal added that, in application of sec. 5.14 of ST/SGB/2008/5 and ST/AI/371 (Revised disciplinary measures and procedures), applicable at the time, there are situations where the only possible lawful decision is to deny the staff member's request for an investigation.

11. The Appeals Tribunal found that an investigation may only be undertaken when there are sufficient grounds or “reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”. Lacking such grounds, the Appeals Tribunal concluded that the Administration is not allowed to initiate an investigation because such an investigation can have a negative impact on the staff member concerned.

12. The Appeals Tribunal has also recalled that in examining the validity of the Administration’s exercise of discretion, the Dispute Tribunal’s scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct, so that it does not lend to unfairness, unlawfulness or arbitrariness (see for instance *Abusondous* 2018-UNAT-812, para. 12). In this regard, “The [Dispute] Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General” (see *Sanwidi* 2010-UNAT-084, para. 40).

Scope of review

13. The Applicant alleges that once the two requirements set out in sec. 5.14 of ST/SGB/2018/5 are met, that is, when (a) the complaint has been made in good faith and (b) it raises sufficient grounds to warrant an investigation, the Administration no longer has a margin of discretion and must immediately initiate an investigation. The Tribunal agrees herewith, noting that the requirements are cumulative. However, it is plain from the wording of ST/SGB/2008/5 and the jurisprudence of the Appeals Tribunal in *Nadeau*, stated above, that the Administration has a range of discretion in assessing whether these two elements are met.

14. The Applicant further argues that the Deputy Registrar did not properly examine the good faith requirement. The Tribunal notes that in the Registrar's memorandum of 16 December 2016, he does not question that the element of good faith is met. His decision not to initiate an investigation was clearly founded on his finding that the second element of sufficient grounds to warrant a formal fact-finding investigation was not fulfilled.

15. Therefore, the only issue before the Tribunal is whether or not the Registrar made a correct use of his discretion in reaching the contested decision.

The Registrar's review of the 26 October 2016 complaint

16. At the Registrar's direction, the Deputy Registrar conducted the preliminary review of the complaint. To do so, she sought responses from the SSS Chief on certain aspects of the complaint, as allowed by the Appeals Tribunal (*Benfield-Laporte* 2015-UNAT-505, para. 38), and made the following findings with respect to each incident raised by the Applicant:

Loss of responsibilities in September 2008

17. The Applicant alleged that he was berated by the SSS Chief and stripped of his duties as focal point for security finance, procurement and budget. The SSS Chief informed the Deputy Registrar that she had received complaints about the Applicant's inappropriate behavior at a meeting with representatives of various international organizations and that the Applicant was advised by her accordingly. The Applicant's replacement as focal point was due to operational reasons as the SSS Chief and the Deputy SSS Chief both found that this function was best combined with a newly created position of "storeman". The Applicant did not seem to have applied to this position.

Performance improvement plan February 2011

18. The Applicant had complained that after he had left his weapon belt in an unauthorized area, on 14 February 2011, his supervisor placed him on a performance improvement plan (“PIP”) for an initial duration of six months and cautioned him against challenging this decision. The Applicant claimed that the PIP disproportionately impacted his career advancement. The Deputy Registrar reviewed the documentation provided by the Applicant and concluded that the PIP was based on four performance-related issues, including the weapon belt incident. The Deputy Registrar concluded that the PIP was an appropriate way to address the issues identified and appreciated no abuse of authority in the handling of this matter.

Extension of the February 2011 PIP

19. In the complaint, the Applicant alleged that the PIP was extended after he expressed dissent with the SSS management at a meeting. After the PIP was successfully completed, the Applicant claimed that the SSS Chief used this as a reason to deny him career advancement opportunities such as training and deployment to field missions.

20. The Deputy Registrar reviewed the documentation submitted by the Applicant in support of his complaint and observed that only one of the allegations of denied opportunities for career advancement required further inquiry. She then requested the SSS Chief’s observations on this allegation. The SSS Chief explained that while not a written policy, it was a practice in SSS not to deploy officers who had recently been on a PIP. She added that going on missions is not a core function or an entitlement and that the Applicant was eventually allowed to go on mission in early 2012.

21. The Deputy Registrar concluded that while there was no indication of abuse of authority, it would be advisable to reflect this practice in a written policy to ensure transparency.

Non-selection for training

22. The Applicant complained that he was denied enrollment in a training in September 2013 despite being qualified. After consulting with the SSS Chief, the Deputy Registrar found that the Chief's decision was based on the recommendations by the section's Lieutenants who had advised against nominating the Applicant for the training because he had been involved in several incidents during previous trainings, to the embarrassment of the Organization.

23. The Applicant had raised this matter with the ICTY Chief Administrative Officer ("CAO"). The CAO advised the Chief SSS that because the Applicant's PIP had been completed several years prior and he had since had good performance appraisals, he should be permitted to attend the training. The SSS Chief heeded the CAO's advice and the Applicant attended the following training in Vienna in August 2014.

24. The Deputy Registrar found that the SSS Chief initial refusal to allow the Applicant to enroll for the training resulted from advice from the Applicant's most direct supervisors and found no indication of arbitrariness or abuse of authority. Moreover, the disagreement had eventually been resolved in the Applicant's favor.

September 2014 Note to File and second PIP

25. The Applicant complained that following a deployment to the Sarajevo office, the SSS Officer who took over the functions complained about Applicant's performance while on deployment. The Deputy SSS Chief investigated the allegations and dismissed all but four of them, placing a note to the Applicant's file regarding the remaining allegations. The Applicant suspected that this complaint was encouraged and orchestrated by the SSS Chief. The Applicant further alleged that this incident caused him emotional distress which lead him to post an emotional comment on a colleague's online social media platform. This posting was reported to SSS's management and the Applicant was placed on a second PIP.

26. Following her review of these allegations, the Deputy Registrar came to the conclusion that the Applicant's allegation concerning the SSS Chief's involvement in the events following the Sarajevo deployment was not supported by any evidence. Indeed, the SSS Chief was not even involved in this matter, which was directly handled by the Deputy SSS Chief. Concerning the online posting, the SSS Chief informed the Deputy Registrar that the contents of the posting were accusatory and unprofessional. The Deputy Registrar concluded that the actions taken by SSS management were justified.

Inappropriate interference

27. The Applicant complained that the SSS Chief attempted to negatively influence his career when, while he was in deployed with the Finance Section of the ICTY in 2016, she requested that the Applicant's access to the financial information of senior officers of the ICTY be restricted.

28. The SSS Chief informed the Deputy Registrar that, in consultation with the CAO, it had been decided to restrict the number of staff accessing the personal information of senior ICTY officers. This decision was taken after several ICTY principals and senior staff had received anonymous letters sent to their personal addresses containing what the SSS Chief termed as "unfounded accusations" against SSS management. This demonstrated an unauthorized access to the senior staff's personal information. The Deputy Registrar concluded that the decision to restrict the Applicant's access to senior staff personal information was not arbitrary. Moreover, it did not negatively impact the Applicant's reputation, in particular, as the Chief of the Finance Section found the Applicant was "very helpful to the section".

Overall assessment

29. After reviewing each case raised in the complaint individually, the Deputy Registrar considered the incidents together. She did not find any indication of abuse

of authority or harassment. She also found that some of the alleged disputes had already been resolved and saw no need to “revisit them”. She further recommended that the practice of not sending security officers on mission after a PIP be articulated in a written policy.

Was the Registrar’s assessment lawful?

30. The Applicant argues that the Registrar applied an incorrect evidentiary standard. He contends that the role of the responsible official under ST/SGB/2008/5 is not to determine whether the alleged facts amount to abuse of authority or harassment but rather to assess whether there are sufficient grounds warranting an investigation. This assessment is not comprehensive in his view and the responsible official may not make definitive findings in respect of the allegations raised in the complaint.

31. As the Appeals Tribunal clarified in *Nadeau*, discussed above, in his or her preliminary assessment of a complaint under ST/SGB/2008/5, the responsible official will determine if there are reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed. The Tribunal will review the assessment conducted by the Registrar, based on the Deputy Registrar’s preliminary review, to conclude whether the Registrar made a proper use of his discretion.

32. In her preliminary assessment, the Deputy Registrar correctly reviewed not only the allegations contained in the complaint but also the evidence provided by the Applicant. She further sought observations from the SSS Chief in areas that she considered required further elucidation. In doing so, the Deputy Registrar established that the SSS Chief’s decisions in each one of the incidents were justified by facts, proportionate and within her managerial discretion. The Tribunal finds that the Registrar, in endorsing the recommendations of the Deputy Registrar, reasonably

found no grounds to believe that the SSS Chief had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed.

33. As none of the individual allegations were found to indicate unsatisfactory conduct, the Registrar reasonably concluded that, considered together, they did not reveal a possible pattern of harassment.

34. The Applicant further contends that the Registrar violated the procedure established in ST/SGB/2008/5 because he unlawfully delegated his authority as responsible official to the Deputy Registrar. The Respondent states that the Deputy Registrar provided the Registrar with a preliminary assessment of the complaint and that it was the Registrar's decision not to proceed with an investigation given the lack of sufficient grounds to warrant such an investigation.

35. In the 16 December 2016 memorandum, the Registrar indeed states that he requested the Deputy Registrar to perform a preliminary assessment of the complaint. In his 20 December 2017 submission, the Respondent stated that this request was made verbally. In her memorandum to the Registrar of 6 December 2017, the Deputy Registrar states: "You asked me to provide you with a preliminary assessment of the complaint submitted by [the Applicant] on 26 October 2016 [...]". She goes on to review the incidents raised in the complaint and concludes that there are no sufficient grounds to conclude that the SSS Chief's conduct could amount to prohibited conduct in the sense of the bulletin.

36. In his 16 December 2016 memorandum, the Registrar states that he "thoroughly reviewed" the Deputy Registrar's memorandum of 6 December 2016 and examined "each of the incidents" raised in the complaint along with the evidence provided to conclude that there was no "meaningful indication of possible abuse of authority" or "pattern of harassment". He goes on to conclude that there were no sufficient grounds to warrant a formal fact-finding investigation.

37. The Tribunal sees no evidence that the Registrar delegated his authority as responsible official under ST/SGB/2008/5. He merely sought the assistance of the Deputy Registrar in conducting a preliminary reviewing the complaint. The evidence shows that the Registrar was the official taking the final decision that one of the elements required to initiate an investigation was missing and, therefore, he took the final decision not to initiate a fact-finding investigation. In sum, the Tribunal appreciates no procedural error in this respect.

38. The Applicant further claims that in finding that some of the incidents had already been resolved, the Registrar failed to consider whether such incidents could amount to unsatisfactory conduct. The Tribunal has found that the Registrar correctly determined that the decisions taken by the SSS Chief were not arbitrary but were rather based on facts and within her managerial discretion. The Registrar also correctly found that the incidents all concerned either performance issues or other managerial decisions. The Registrar assessed that there were no indications that the SSS Chief exceeded her managerial discretion in handling these events. The Tribunal finds no error in this assessment.

39. Finally, the Applicant argues that the Registrar failed to properly articulate the remedial managerial actions he had undertaken in several areas which he deemed could benefit from “further articulation of the applicable policies in [SSS]”. The Tribunal agrees with the Applicant that it would have been advisable for the Applicant to be informed of what policies would be updated following the review of his complaint. However, the failure to do so has no bearing on the lawfulness of the decision not to initiate an investigation, which was properly founded, as discussed above.

Conclusion

40. In light of the above, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 20th day of February 2020

Entered in the Register on this 20th day of February 2020

(Signed)

Nerea Suero Fontecha, Registrar