



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/058

Judgment No.: UNDT/2020/092

Date: 19 June 2020

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

HAMMOND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, ALD/OHR, UN Secretariat
Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. On 17 November 2018, the Applicant, an Administrative Officer at the P-4 level, with the African Union-United Nations Mission in Darfur (“UNAMID”), filed an application challenging the processing of his complaint of prohibited conduct under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against his First Reporting Officer (“FRO”). The case was filed with the Nairobi Registry.

2. On 24 December 2018, the Respondent filed his reply submitting that the application is without merit as the Applicant’s complaint was processed in accordance with the provisions of ST/SGB/2008/5.

3. On 19 July 2019, the case was transferred to the New York Registry and, on 1 April 2020, the case was assigned to the undersigned Judge.

4. Pursuant to Order No. 68 (NY/2020) dated 15 April 2020, the Respondent filed his closing submission on 24 April 2020 and the Applicant filed his closing statement on 30 April 2020.

5. For the reasons below, the Tribunal finds that since the Applicant was afforded full due process and the investigation was properly conducted, the application is therefore rejected.

Facts

6. On 17 October 2017, the Applicant filed a complaint against his FRO alleging abuse of authority and retaliation. The Applicant alleged that his FRO: (a) imposed irregular working conditions on him; (b) did not recommend extension of the Applicant’s appointment; and (c) recommended reclassification of the post which the

Applicant encumbered from the P-4 level to FS- 6 level because the Applicant rebutted his 2016-2017 electronic performance appraisal (“ePAS”).

7. On 22 October 2017, the UNAMID Conduct and Discipline Team (“CDT”) acknowledged receipt of the Applicant’s complaint. On 5 December 2017, the CDT sent its assessment of the Applicant’s complaint to the Head of Mission, the UNAMID Joint Special Representative. The CDT recommended that a fact-finding panel be established to investigate the Applicant’s allegations of harassment and abuse of authority.

8. On 5 December 2017, the Head of Mission established a panel to conduct a fact-finding investigation between 10 December 2017 and 22 January 2018 (the “Panel”), and informed the Applicant and FRO of the same.

9. On 4 March 2018, the Panel submitted its report on the fact-finding investigation to the Head of Mission.

10. On 20 August 2018, the CDT informed the Applicant that the Panel had concluded that the allegations of harassment and abuse of authority had not been substantiated. The CDT informed the Applicant that: (a) although the FRO’s comments in an email to him were inappropriate, they did not constitute harassment; (b) the delay in finalizing the Applicant’s 2016-2017 ePAS and the extension of his appointment, as well as the reclassification of the post he encumbered from P-4 to FS-6 level, did not constitute abuse of authority; and (c) the Head of Mission would take managerial action against the FRO.

11. On 23 September 2018, the Head of Mission also wrote to the Applicant informing him of the outcome of the Panel’s investigation, and that he would take managerial action in the form of requiring counselling and training for the FRO.

Consideration

The issue of the present case

12. The primary legal issue before the Tribunal is whether the processing of the Applicant's complaint of prohibited conduct under ST/SGB/2008/5 against his FRO was lawful.

Legal framework

13. Staff rule 1.2(f) prohibits any form of discrimination, abuse of authority or harassment at the workplace or in connection with work.

14. ST/SGB/2008/5 provides the procedure for addressing complaints of prohibited conduct.

15. In accordance with sec. 5.20 of ST/SGB/2008/5, where the complainant believes that the procedure followed in addressing the complaint was improper, he or she may appeal pursuant to Chapter XI of the Staff Rules.

16. Before commencing its review, the Tribunal must recall that it is not vested with the authority to conduct a fresh investigation of the initial harassment allegations (see, for instance, *Messinger* 2011-UNAT-123; *Luvai* 2014-UNAT-417). The Dispute Tribunal's scope of review is limited to determining whether the exercise of the Administration's discretion is legal, rational, reasonable and procedurally correct, so that it does not lead to unfairness, unlawfulness or arbitrariness (*Nadeau* 2017-UNAT-733). 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. It is not the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General (*Sanwidi* 2010-UNAT-084).

Was the investigation properly conducted?

17. The Applicant claims that he was denied his right to due process and the investigation was not properly conducted. The Respondent states, on the other hand, that the Administration properly followed the formal requirements set out in ST/SGB/2008/5 in respect to the Applicant's complaint and that the the Applicant has not established any procedural irregularities in the handling of his complaint.

18. After reviewing the record, the Tribunal is satisfied that the investigation complied with the requirements set out in ST/SGB/2008/5 and that the Applicant was afforded proper due process. Notably, following the receipt of the Applicant's 17 October 2017 complaint, the CDT responded promptly and comprehensively. On 31 October 2017, the CDT Chief met with the Applicant and advised him to provide specific details of his allegations. The Applicant, on 14 November 2017, provided details of his allegations of harassment, abuse of authority and retaliation. On 22 November 2017, the CDT requested the Applicant to provide further clarification regarding his allegations, which he provided on 24 November 2017. On 5 December 2017, the CDT sent its assessment of the Applicant's complaint to the Head of Mission. The CDT recommended that a fact-finding panel be established to investigate the Applicant's allegations of harassment and abuse of authority. On the same day, the Head of Mission established the Panel with a mandate to conduct a fact-finding investigation between 10 December 2017 and 22 January 2018, and informed the Applicant and the FRO of the same. On 17 December 2017, the Panel interviewed the Applicant. The Panel also interviewed 12 other individuals between 13 and 19 December 2017. On 4 March 2018, the Panel submitted its report on the fact-finding investigation to the Head of Mission.

19. The Tribunal further notes that the Head of Mission then proceeded to take action following the investigation, having determined that whilst the Applicant's allegations of harassment and abuse of authority were unsubstantiated, the FRO had failed to communicate with the Applicant about the downsizing and that personal remarks in the FRO's emails to the Applicant were inappropriate. Accordingly,

pursuant to sec. 5.18(b) of ST/SGB/2008/5, the Head of Mission decided to take managerial action requiring the FRO to undergo counselling and training. In this regard, the Tribunal notes that the FRO attended Prevention of Workplace Harassment, Sexual Harassment and Abuse of Authority in the Workplace training on 25 September 2018, and Performance Management and Staff Development for Managers and Supervisors training on 26 September 2018. The CDT Chief also counselled the FRO regarding his communication with supervisees.

20. Based on the above, the Tribunal finds that the Applicant was afforded appropriate due process in regard of his complaint.

Were there any other procedural flaws?

21. The Tribunal will next examine the Applicant's claims of other procedural flaws. The Applicant contends that: (a) the interview process was flawed; (b) the Panel did not address the Applicant's allegation of retaliation; (c) potential conflict of interest of the decision-maker in the complaint, namely the Head of Mission; (d) failure to provide the Applicant with a copy of the full investigation report; and (e) undue delay in the investigation process.

The interview process

22. The Applicant contends that the Panel improperly interviewed the FRO on 13 December 2017 prior to interviewing the Applicant.

23. The Tribunal notes that the Panel maintains the discretion to determine how to conduct the investigation of a complaint (*Masyllkanova* UNDT/2015/088). The only specific limitation on this discretion is contained in sec. 5.16 of ST/SGB/2008/5, which provides that "[t]he fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have

relevant information about the conduct alleged”. ST/SGB/2008/5 does not prescribe any specific order for conducting interviews.

24. The Panel complied with the sec. 5.16 requirement and properly exercised its discretion on how to conduct the investigation. In this case, the Panel interviewed the FRO on 13 December 2017, four days before interviewing the Applicant because the FRO was departing on leave on 14 December 2017. The Tribunal considers the decision to have been reasonable in order to address the Applicant’s complaint expeditiously.

25. The Applicant further contends that he should have been given the opportunity to interview certain witnesses in order to “confront his accusers”. The Tribunal notes that the provisions of ST/SGB/2008/5 do not grant such a right to staff members who bring complaints of prohibited conduct and therefore finds no merit to this claim of an irregularity.

Did the Panel properly address the Applicant’s claims?

26. The Applicant alleges that the Panel only partially considered his complaint as it did not address his allegation of retaliation. The Applicant’s complaint included an allegation that his FRO recommended a downward classification of the post he encumbered in retaliation for the Applicant rebutting his 2016-2017 ePAS.

27. Upon review of the record, the Tribunal finds that the Panel did consider this aspect of the Applicant’s complaint. In this regard, the Tribunal notes that the Panel’s terms of reference included finding facts regarding the allegation of retaliation. The Tribunal further notes that the Panel concluded that the FRO’s recommendation for the reclassification of the post was in the interests of the Organization and did not constitute an abuse of authority under ST/SGB/2008/5. Accordingly, the Tribunal finds that the Panel fully considered all relevant and material aspects of the Applicant’s complaint.

Was there a conflict of interest?

28. The Applicant argues that the investigation was tainted by an undeclared conflict of interest by the decision-maker of the complaint, the Head of Mission. The Applicant states that the decision-maker was also his Second Reporting Officer (“SRO”) in his 2016-ePAS. The Applicant argues that as the Applicant’s ePAS was central to his complaint, the SRO was required to defend his own actions in an earlier rebuttal of the ePAS and this would have caused a conflict of interest.

29. The Tribunal considers it important that the decision-maker of a complaint should not be, or even perceived to be, biased or impartial. The United Nations Charter, art. 101.3 also provides that “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity”. Staff regulation 4.2 provides that, “paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity”. Specifically, on conflict of interest, staff regulation 1.2(m) states that:

(m) A conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

30. Section 3.3 of ST/SGB/2008/5 provides that the heads of department or office are responsible for implementation of the Bulletin. In the present case, the Head of Mission, being the head of office, complied with the provisions of the ST/SGB/2008/5. Upon the initial assessment and recommendation of the CDT, the Head of Mission promptly convened an independent Panel consisting of qualified individuals, in accordance with sec. 5.14, to conduct the investigation into the Applicant’s claims and

subsequently took administrative action against the FRO based on the findings of the investigation Panel. The Tribunal notes that in smaller entities in the Organization, a head of office may also be required to act as an SRO of staff members and make appropriate managerial decisions in both capacities. The Tribunal finds that such a circumstance does not raise an inherent conflict of interest which would prevent the SRO from reasonably exercising his or her duties and responsibilities as head of office in relation to the the implementation of ST/SGB/2008/5. Each case must be examined on its own merits, and in the present case there is no evidence to suggest that the Head of Mission's impartiality could be reasonably perceived to be or was compromised. The Tribunal further notes that the Applicant's underlying complaints were in regard to his FRO and not his SRO and can therefore sees no merit to the claim that the SRO may have acted partially in this matter.

Failure to provide the Applicant with a copy of the full investigation report

31. The Applicant states that he was not provided with a full copy of the investigation report, nor given the opportunity to comment on it before its release.

32. The Tribunal notes that the Head of Mission informed the Applicant in writing of the outcome of the investigation and of the action taken on 25 September 2018. In this regard, sec. 5.18 ST/SGB/2008/5 sets forth the Administration's obligations with respect to providing the complainant with information stating that the "responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken". The Appeals Tribunal has held that a complainant is not entitled to receive the full investigation report unless cogent arguments have been presented to demonstrate "exceptional circumstances" (see, for instance, *Ivanov* 2015-UNAT-519 and *Masyllkanova* 2016-UNAT-662). The Applicant has not presented any exceptional circumstances warranting disclosure of the Panel's Report and there is therefore no basis for his complaint. Furthermore, the provisions of ST/SGB/2008/5 do not grant

the Applicant a right to comment on the Panel's report and, as such, there is no procedural irregularity in this regard.

Alleged delay in the investigation process

33. The Applicant alleges undue delays in the investigation process, noting that the Panel took four months to submit its report rather than the suggested three months under sec. 5.17 of the ST/SGB/2008/5 which states that a fact-finding Panel should submit its report “**normally** no later than three months from the date of submission of the formal complaint” (*emphasis added*).

34. The Respondent contends that there were no unreasonable delays in the present case. The Tribunal notes that the CDT promptly acknowledged the Applicant's 17 October 2017 complaint and requested further details of the allegations. Upon receipt of these additional details, the CDT assessed the complaint and within three weeks, recommended to the Head of Mission on 5 December 2017 that a fact-finding Panel be convened to investigate the complaint. On 5 December 2017, the Head of Mission convened the Panel. The Panel submitted its report to the Head of Mission on 4 March 2018, within four months of the CDT receiving the Applicant's case log detailing his allegations. The Respondent adds that section workloads and operational constraints such as staff members' leave and rest and recuperation schedules did not permit the Head of Mission's decision to be finalized before 20 August 2018.

35. The Tribunal acknowledges that a three months deadline is a benchmark for best practices and should be adhered to when possible. However, ST/SGB/2008/5 does not require a mandatory three month deadline and each case must be considered within its own unique set of facts and circumstances. In the present case, given that the Panel interviewed 13 individuals in the course of its investigation, the Tribunal finds that this four month period to complete the investigation is a reasonable amount of time and therefore finds no undue delay in the process.

Conclusion

36. In light of the foregoing, the application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 19th day of June 2020

Entered in the Register on this 19th day of June 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York