



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

JACKSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER UNDER ARTICLE 10.4 OF
THE UNDT STATUTE REMANDING
CASE FOR INSTITUTION OF
REQUIRED PROCEDURE**

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Alan Gutman, ALS/OHRM

INTRODUCTION

1. The Applicant is a staff member of the United Nations African Union Mission in Darfur (UNAMID). She filed an application on 19 July 2017 contesting what she described as “[t]he implied decision not to formally respond with a decision as to whether an investigation will take place following allegations of sexual misconduct pursuant to ST/SGB/2008/5”.

2. On 18 August 2017, the Respondent filed his reply contesting the claim as being not receivable and submitting that, in any event, it was moot.

3. Following Case Management Discussions (CMDs) on 29 May and 2 July 2018, a hearing took place from 9th to 11th October 2018.

4. Upon a review of the documents and the evidence the Tribunal decided that this was an appropriate case in which to invoke Article 10.4 of the Statute of the United Nations Dispute Tribunal (UNDT) to seek the concurrence of the Secretary-General to remand the case for institution or correction of the correct procedure.

5. The concurrence of the Secretary-General having been obtained this Order is a formal remand under Article 10.4.

CONSIDERATIONS

6. The Secretary-General’s bulletin on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5) provides in paragraph 1.3 that:

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.

7. ST/SGB/2008/5 also provides in paragraph 2.2 that the “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.”

8. The Applicant alleged that on 24 February 2016, a National Security Guard with UNAMID, sexually harassed/assaulted her at UNAMID Headquarters in El Fasher, Darfur. The Applicant submits that the Administration owed her a duty of care to protect her against any form of prohibited conduct. They failed to do so in that the Administration breached her terms of appointment by not dealing with her complaint in a timely manner and not keeping her informed about developments relating to her complaint. Under para. 5.17 of ST/SGB/2008/5, the investigation report should have been submitted to the responsible official no later than three months from the date of submission of her complaint. This deadline was not adhered to and she had no knowledge of what steps, if any, were being taken to investigate her complaint.

9. After a delay of 16 months, during which she received no feedback as to what steps were being taken to investigate her complaint, she filed her application with the Tribunal submitting that given the inordinate delay she inferred that there was an implied decision not to investigate her complaint. She first reported the matter on 24 February 2016, the day of the alleged incident, and made an initial statement which was preserved in accordance with procedure. On 2 March 2016, she filed her formal complaint under ST/SGB/2008/5.

10. By memorandum dated 27 July 2017, eight days after the Applicant filed her claim with the Tribunal, Mr. Jeremiah Mamabolo, the Joint Special Representative (JSR) for UNAMID, informed the Applicant that Mr. Matthew Sanidas, Officer-in-Charge (OiC), Office of Human Resources Management (OHRM), decided to close the case. The memorandum includes the following extract:

SIU investigated this matter and, upon the completion of its investigation, I referred the case to the Under-Secretary-General for Field Support for appropriate action. The matter was subsequently referred to the Office of Human Resources Management (OHRM) for possible disciplinary action. However, after reviewing the investigation report and supporting documents, OHRM concluded that the allegations were not substantiated by the available evidence and decided to close the case with no further action.

11. The Applicant received the above-mentioned memorandum on 30 July 2017. This was after a delay of 16 months and 25 days during which there was no communication with her since 8 May 2016. She expressed concern at the fact that no explanation was provided as to why it took so long and what steps had been taken to carry out a full and proper investigation which would have included feedback to enable her to be reassured that her complaint was being taken seriously. In particular, she was not afforded the opportunity to comment on or to rebut any countervailing evidence that may have been obtained in the course of any investigation.

12. The Administration resists the claim first on a technical legal defence of receivability and second on the merits asserting that there was a proper investigation and that the case was closed because the allegations were not substantiated by the available evidence.

13. The Applicant submits that the manner in which the Administration handled her complaint amounted to a denial of the protection to which she was entitled to under the letter and spirit of the Organization's policy of protection to victims of sexual harassment and/or assault. She relies upon the provisions of ST/SGB/2008/5 as well as ST/AI/371/Amend. 1 (Revised disciplinary measures and procedures).

14. It emerged during the hearing that a witness informed the investigators that he was present at the time of the alleged incident. He stated that he witnessed no inappropriate behaviour and that there was a friendly and familiar exchange between the Applicant and the alleged perpetrator. Of particular relevance is the fact that the Applicant asserted that there were no witnesses present at the time. The investigation began on 8 May 2016 and at no time since the commencement

of the investigation was the Applicant interviewed either to obtain further particulars to supplement the initial statements that she had made and more particularly to obtain her reaction and comments on the evidence obtained from the staff member who stated that he was present and gave evidence that was in significant and material contradiction to the account given by the Applicant.

15. The Tribunal finds that there were fundamental flaws in the investigation including, in particular, the failure to obtain the Applicant's comments on the evidence obtained from the person who claimed to have been an eye witness. This was a significant failure given the fact that the Applicant had always maintained, and continues to do so, that there were no witnesses to the alleged incident.

16. In all the circumstances, the Tribunal finds that there was a failure to act in full accordance with both the letter and spirit of the Organization's policy and the published commitments of successive Secretary-Generals to a policy of zero tolerance of sexual harassment and/or assault. Given this finding, the Tribunal considered that prior to a determination of the merits of the case consideration should be given to a referral to the Secretary-General under Article 10.4 of the Statute of the UNDT.

INSTITUTION OF REQUIRED PROCEDURE UNDER ART. 10.4 OF THE UNDT STATUTE

17. Article 10.4 of the UNDT Statute provides:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

18. This is a case of alleged sexual assault in which the Tribunal has heard evidence and submissions but has not yet reached a determination on the merits of the case save for a finding of procedural error.

19. After evaluating the evidence, the Tribunal concluded that there were sufficient grounds for it to seek the concurrence of the Secretary-General to remand the case under Article 10.4 of the UNDT Statute for institution or correction of the required procedure

20. The Statute and Rules of Procedure do not set out a prescribed procedure to be followed to give effect to the underlying purpose of Article 10.4. However, Article 36.1 of the Rules of Procedure provides that:

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

21. The Tribunal considers that a referral under Article 10.4 of the Tribunal's Statute falls outside the adversarial process, and is directed to the Secretary-General in his/her independent capacity as the Chief Administrative Officer of the United Nations and not as the Respondent in the case. Accordingly, the undersigned Judge considered it appropriate to approach the Secretary-General directly and not through Counsel who represents the Secretary-General as the Respondent in this case.

22. The Tribunal considered that such an approach would: (i) avoid any risk of a perception of actual or potential bias; (ii) protect the integrity of the Tribunal; and (iii) serve to preserve confidence in the Organization's policies and procedures and the Secretary-General's personal commitment to ensuring zero tolerance for sexual harassment, responding rapidly to allegations, supporting victims through their trauma and ensuring commitment and accountability for all concerned in the process.

23. Accordingly, on 29 November 2018, the Tribunal referred the matter to the Secretary-General under Article 10.4 of the UNDT Statute and sought his

concurrence to remand the case for institution or correction of the required procedure.

24. On the same day, by Order No. 184 (NBI/2018), the Tribunal notified the parties that:

1. It is appropriate to stay proceedings while the matter is under consideration by the Secretary-General.

2. On receipt of the response of the Secretary-General, the Tribunal will issue either an Order remanding the case, in accordance with article 10.4 of the Statute, or issue a Judgment on the merits.

25. On 21 January 2019, the Tribunal obtained the concurrence of the Secretary-General that the case be remanded for institution or correction of the required procedure under Article 10.4 of the Statute.

26. The Tribunal regrets the delay in issuing this Order because the Judge who has conduct of this case is not currently on duty. However, to avoid any further delay, notwithstanding that he is on Special Leave Without Pay (SLWOP), the Judge considered it important to issue this formal order to facilitate an expeditious conclusion.

27. Article 10.4 of the UNDT Statute, allows the Tribunal to order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by procedural delay, which is not to exceed the equivalent of three months' net base salary.

28. Any such order is truly compensatory and not punitive. It recognizes, as a matter of general principle, that failure on the part of the Organization to give full effect to its own procedures may result in loss to a staff member. However, not all such errors will inevitably result in loss and each case has to be considered on its own facts and circumstances. However, it may well be surprising if, in a complaint of sexual harassment or assault that is not properly investigated and where there is a finding of inordinate delay, that a Tribunal may find that there has been no loss. However unlikely may such a prospect be, the Tribunal has a duty to individualise the application of Article 10.4 of the Statute to each case.

Accordingly, the Tribunal must first consider whether there has been such loss in this case and, if there has been, to quantify it as best it can.

29. Evidence in support of an award of compensation for loss is to be found first in the Application to the Tribunal which read as a whole indicates that the distress experienced by the Applicant went beyond her being upset by the alleged assault but also by the failure to carry out a proper investigation, to interview her once the investigation commenced and/or to provide her with necessary feedback as well as the delay in reaching a fair conclusion. It should be noted that at the time she filed her application she had no knowledge as to whether any investigation had taken place and she had not been informed that a person claiming to be a witness gave evidence which directly contradicted her account of events. The fact that she was given no opportunity to comment on, or rebut, this evidence was a procedural error which was to her detriment in that it resulted in a fundamentally flawed decision, taken prematurely, to close the case without completing an essential step in the investigation thereby depriving the Applicant of the fair and proper investigation that she was entitled to under the terms of her contract with the Organization.

30. The Tribunal recalls the Applicant's response at the second CMD, on 2 July 2018, when she was given the opportunity to comment. She responded in what may be described as an emotional outburst which reflected the extent to which she was upset. It included the comment that nobody had taken the trouble to hear what she had to say which appeared to the Tribunal to be a clear reference to the fact that the investigation was concluded without any communication with her for 16 months. Order No. 107 (NBI/2018) which followed that CMD records at paragraph 3:

After a full discussion of the issues, the Applicant was given the opportunity to address the Tribunal. It was clear to the Tribunal that the Applicant, who was still working in UNAMID, was upset at the manner in which she had been treated after she had filed a formal complaint of alleged sexual harassment with particular reference to the delay in concluding the investigation and what she regarded as the failure to listen to her and to keep her informed of progress.

31. At the hearing the Applicant repeated her concerns at the lack of any follow up or support following her complaint. She said, “Nobody reached out to me.” “Nobody spoke to me or told me what was happening about my case”. In cross examination, she added that a witness who saw the state she was in shortly after the incident was not interviewed. Later in cross examination she said that, “I wanted my case to be heard. I needed to be heard. I had been carrying my burden all alone and suffering all alone after I had been sexually assaulted. [...] This incident was going to remain as a stigma on me. [...] And I also think I should be treated fairly and given due process to an investigation where I could have been heard. I think that there should also be a fair judgment. I had the right to be heard by whatever investigation was instituted. I should have been heard. I should be allowed to speak. [...] I deserve to have been heard. The Organization owes it to me to hear me. When the investigation was set up, I was not called, I was never told. This is very crucial. This is very important. I need my healing and how do I get my healing if nobody hears me out? Tell me how to get my healing and how to put closure to this? I want to know how I get closure to this when I have never been given the audience and I have never been heard out. My witnesses were not called to give their voluntary statements when the investigation started. Nobody informed me that an investigation had started.”

32. Referring to the decision to close the case without further investigation the Applicant pointed out that it “only refers to the SIU Report. Still waiting for the ST/SGB/2008/5 complaint to be dealt with.”

33. The Tribunal has quoted as best it can the above comments made by the Applicant during her sworn testimony and which explain her state of mind and distress that goes beyond the alleged assault and relates directly to the failures to give full effect to the Organization’s policy and procedures on such prohibited conduct.

34. The particular question to address is whether the procedural error itself caused the loss as distinct from any harm she may have suffered as a result of the alleged sexual assault. Article 10.4 recognises that procedural error may give rise

to loss which is compensable as a distinctly separate award to that which may arise under Article 10.5(b) following a determination on the merits of the claim.

35. The Tribunal has regard to Article 10.5(b) of the UNDT Statute, as amended by General Assembly resolution 69/203 and the rulings by the Appeals Tribunal that: “Generally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages”¹ However, the Tribunal observes that the Resolution which amended Article 10.5 did not amend Article 10.4. If the General Assembly intended that the amendment should apply to both Articles 10.4 and 10.5 of the Statute they would have included it in the Resolution. Nevertheless, the Tribunal considers that due deference should be given to the principle that there must be evidence of loss within the meaning of Article 10.4.

36. The Tribunal considers that the aforementioned comments by the Applicant are entirely consistent with a rational response of a staff member faced with the circumstances of this particular case. The Tribunal concludes that the applicable legal principles governing the assessment of an award of compensation under Article 10.4 are satisfied. The Applicant is to be compensated for loss as a result of procedural errors in the investigation of her *bona fide* complaint of sexual harassment/assault.

37. The Tribunal ORDERS that:

- a. Pursuant to art. 10.4 of the UNDT Statute, the case is remanded, with the concurrence of the Secretary-General, for institution of the required procedure, within two months of the date of this order.
- b. All further proceedings be stayed until 21 April 2019.
- c. On receipt of the response of the Secretary-General to this Order the Tribunal will consider the appropriate manner of disposing of this case

¹ *Auda* 2017-UNAT-787; *Kebede* 2018-UNAT-874.

either by issuing a judgment on the merits or by further order as may be appropriate.

d. The Applicant be paid, pursuant to Article 10.4 of the Statute, the equivalent of two months net base salary, within 30 days of this Order. If this sum is not paid within the 30 days period, interest will accrue at the rate of an additional five percent to be added to the US Prime Rate until the date of payment.

e. This order be served on the Office of the Secretary-General and the parties.

Signed

Judge Goolam Meeran

Dated this 21st day of February 2019

Entered in the Register on this 21st day of February 2019

Signed

Abena Kwakye-Berko, Registrar, Nairobi