

UNDT/2021/129, Yavuz

UNAT Held or UNDT Pronouncements

Scope of judicial review The Applicant only challenged the dismissal of his complaint against his FRO and SRO by way of management evaluation. Recalling the general requirement of staff rule 11.2(a), the Tribunal will limit its scope of judicial review to the decision not to investigate the Applicant's complaint against his FRO and SRO. The Tribunal does not have jurisdiction to consider appeals against the MEU's responses to the Applicant's request for management evaluation. Therefore, it will not adjudicate the Applicant's arguments against the MEU's responses to his request for management evaluation. Whether the decision not to investigate is lawful Under sec. 5.14 of ST/SGB/2008/5, a fact-finding investigation may only be undertaken if there are "sufficient grounds", i.e., the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the Bulletin (see Ostensson UNDT/2011/050, para. 30). Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 can have a negative impact on the staff member concerned (see Nadeau, para. 34). After a careful examination of all the elements on file, the Tribunal finds that the principal reason for the conflict and discomfort that arose between the Applicant and his supervisors related to his work performance. Indeed, the Applicant's complaint against his FRO and SRO primarily relates to his disagreement about the normal exercise of managerial authority in respect of his work performance and on the measures taken to improve his performance. Indeed, the Applicant neither alleged nor showed any trace of harassment or abuse of authority out of the above-mentioned domain. While some actions from the Applicant's supervisors may have not been exemplary, as the Respondent admits, the record did not justify initiating an investigation into an issue that was principally a performance management matter. First of all, disagreements on work performance or other work-related issues in themselves normally do not constitute harassment under sec. 1.2 of ST/SGB/2008/5 and are not dealt with under the provisions of this Bulletin but in the context of performance management. Moreover, the incidents described by the Applicant do not fall under any of the examples of "abuse of authority" specifically mentioned in sec. 1.4 of ST/SGB/2008/5. Under this provision, abuse of authority is the improper use of a position of influence, power or authority against another person, for instance, to improperly influence a staff member's career. No doubt that improperly influencing a staff member's performance evaluation by his supervisor(s) could amount to "abuse of authority" (see, e.g., Sarwar UNDT/2018/005, paras. 99 and 106 107; Gakumba UNDT/2012/192, para. 109; Belkhabbaz UNDT/2018/016/Corr.1, paras. 181, 182), but this does not include the simple wrong evaluation of a staff member committed in good faith and without any improper will to damage him/her and without deliberate discrimination (see ILOAT Judgment 3185, para. 5.b). The Applicant's supervisors followed the performance evaluation process and no sign of discrimination or abuse of authority emerges from the record, although the outcome of the performance evaluation was objectively unfair (see UNAdT Judgment No. 1430, Waite (2009), para. VI). Although the threshold to initiate an investigation under ST/SGB/2008/5 is low, the Applicant's case does not reach that level. The Applicant does not show any trace of discrimination, harassment, or abuse of authority in the present case, but the mere normal exercise of managerial powers by his FRO and SRO, which remains irrelevant if the outcome of the managers' evaluation is found objectively wrong for other purposes as it was the case. The various incidents alleged in the present case and complained of by the Applicant, even if true, singularly and globally considered do not disclose any possible prohibited conduct under ST/SGB/2008/5 by his FRO or SRO, but reflect the different positions of the contrasting persons in the hierarchy, and do not overcome the limits of ordinary contrasts in a work relationship, although sometimes expressed in a harsh and impolite way by a supervisor. Finally, the Tribunal has the task to only review the validity of the contested decision on grounds of legality, reasonableness, and procedural fairness (see Sanwidi). In the present case, the scrutiny of the contested decision leads to the conclusion that the

evaluation by the Administration was proper. Consequently, the Tribunal finds that the decision not to initiate an investigation is not unlawful.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision not to investigate his complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

Legal Principle(s)

Under staff rule 11.2(a), a staff member wishing to formally contest an administrative decision must submit a request for a management evaluation as a first step. The Administration's response to a request for management evaluation is not a reviewable decision" (see Nwuke 2016 UNAT 697, para. 20). The Tribunal is not vested with the competence to conduct a fresh investigation into the complaint (see Luvai 2014-UNAT-417, para. 58; Messinger 2011-UNAT-123, para. 25). The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations (see, e.g., Oummih 2015-UNAT-518, para. 31; Nadeau 2017-UNAT-733, para. 33). It is not the Tribunal's role to substitute its judgment for that of the responsible official in the exercise of his or her discretion under ST/SGB/2008/5 (see, e.g., Masykanova UNDT/2015/088, para. 67; Sanwidi 2010-UNAT-084). However, the Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation a staff member had a right to an investigation (see Nwuke 2010-UNAT-099, para. 40). A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by its Regulations and Rules (see Nwuke 2010-UNAT-099, para. 5). There are situations where the only possible and lawful decision of the Administration is to deny a staff member's quest to undertake a fact-finding investigation against another staff member (see Nadeau, para. 33). This follows directly from sec. 5.14 of ST/SGB/2008/5. There is no requirement that prohibited conduct be proven since the very purpose of a fact-finding investigation is to establish whether or not the alleged prohibited conduct took place (see Ostensson, para. 30).

Outcome

Dismissed on merits

Outcome Extra Text

Full judgment

[Full judgment](#)

Applicants/Appellants

Yavuz

Entity

UNECE

Case Number(s)

UNDT/GVA/2020/6

Tribunal

UNDT

Registry

Geneva

Date of Judgement

7 Nov 2021

Duty Judge

Judge Buffa

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Investigation

Applicable Law

Secretary-General's bulletins

- SGB/2008/5

Staff Rules

- Rule 11.2(a)

Related Judgments and Orders

2010-UNAT-099

2016-UNAT-697

2014-UNAT-417

2011-UNAT-123

2015-UNAT-518

2017-UNAT-733

UNDT/2015/088

2010-UNAT-084

UNDT/2011/050

UNDT/2021/062

UNDT/2018/005

UNDT/2012/192

2015-UNAT-534

UNDT/2013/162