



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/008
Judgment No.: UNDT/2021/124
Date: 27 October 2021
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Camila Nkwenti Fuomene, UNEP
Isabel Martínez, UNEP

Introduction

1. On 22 March 2021, the Applicant, a staff member of the Secretariat for the Convention on Biological Diversity (“SCBD”) of the United Nations Environment Programme (“UNEP”), appealed the Administration’s determination that no retaliation had been established following her request for protection against retaliation.
2. On 21 April 2021, the Respondent replied that the application is without merit.
3. For the reasons provided below, the Tribunal finds that the contested decision is unlawful and grants the application in part.

Relevant facts

4. On 7 June 2019, in application of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), the Applicant submitted a request for protection against retaliation to the Ethics Office. The Applicant alleged that the then Executive Secretary of the SCBD (“Executive Secretary”) had retaliated against her after she had cooperated with a fact-finding panel investigation into some other allegations of misconduct by the Executive Secretary (“the retaliation complaint”).
5. On 18 June 2019, the Applicant filed a separate complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) referring to many of the same incidents identified as retaliation in her 7 June 2019 complaint (“the harassment complaint”).
6. On 27 August 2019, the Ethics Office notified the Applicant that it had found a *prima facie* case of retaliation with respect to some of the Applicant’s allegations, which it had referred to the Office of Internal Oversight Services (“OIOS”) for investigation.

7. On 18 September 2019, OIOS informed the Ethics Office that a fact-finding panel had been convened to investigate the Applicant's harassment complaint. OIOS stated that given the overlap between the inquiries into the harassment complaint and the retaliation complaint, OIOS had decided to temporarily suspend the investigation into the retaliation complaint pending the outcome of the fact-finding panel investigation.

8. On 3 October 2019, the Ethics Office responded to OIOS that it was not of the view that a suspension of the retaliation investigation was warranted.

9. On 30 November 2019, the Executive Secretary separated from the Organization.

10. On 6 January 2020, OIOS advised the Ethics Office that since the Executive Secretary had separated from the Organization in November 2019, the Applicant did no longer face any retaliation concerns. OIOS also noted that no disciplinary action would be possible against the Executive Secretary following her separation. Therefore, OIOS would not take any further action with respect to the Applicant's retaliation complaint.

11. On 20 January 2020, the Ethics Office requested OIOS to complete its investigation into the retaliation complaint to enable the Ethics Office to make a final determination of whether or not retaliation had been established in accordance with art. 8 of ST/SGB/2017/2/Rev.1.

12. On 20 October 2020, OIOS forwarded its investigation file to the Ethics Office.

13. On 19 November 2020, the Ethics Office informed the Applicant that, having reviewed the investigation file, it concluded that retaliation could not be established.

14. On 18 December 2020, the Chef de Cabinet informed the Applicant that she accepted the Ethics Office's determination.

Considerations

Scope of the application

15. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

Allegations concerning matters, which were not found to raise a *prima facie* case of retaliation.

16. Section 9 of ST/SGB/2017/2/Rev.1 provides that challenges against preliminary determinations by the Ethics Office under secs. 7.5 and 7.6 of this Bulletin may be challenged before the alternate Chair of the Ethics Panel of the United Nations.

17. Pursuant to sec. 10 of ST/SGB/2017/2/Rev.1, the Dispute Tribunal’s review of a retaliation case is limited to final decisions taken by the Administration on the basis of the Ethics Office’s recommendations under sec. 8 of this framework.

18. In its preliminary review under sec. 7 of ST/SGB/2017/2/Rev.1, the Ethics Office found that the Applicant engaged in a protected activity when she cooperated with a fact-finding panel investigating allegations of prohibited conduct against the Executive Secretary on 14 January 2019.

19. The Ethics Office further determined that the Applicant’s allegations concerning the Executive Secretary wanting her “out” of the SCBD as well as regarding the changes to her reporting lines did not raise a *prima facie* case of retaliation. These allegations therefore did not form part of the OIOS investigation.

20. Therefore, all allegations concerning matters that the Ethics Office did not find to have raised a *prima facie* case of retaliation fall outside the scope of this case and will therefore not be addressed.

Allegations predating the protected activity

21. Section 1.4 of ST/SGB/2017/2/Rev.2 defines retaliation as “any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened or taken for the purpose of punishing, intimidating or injuring an individual because that individual engaged in an activity protected by the present policy ...”.

22. By way of consequence, the alleged retaliatory act can only have taken place after the complainant’s engagement in a protected activity.

23. The Ethics Office determined that the Applicant’s cooperation with a fact-finding panel as of 14 January 2019 constituted a protected activity. Therefore, any retaliatory act in the sense of ST/SGB/2017/2/Rev.1 may only have occurred after that date.

24. Accordingly, the Tribunal will not review any allegations with respect to events prior to 14 January 2019.

Allegations concerning the Applicant’s protection during the investigation

25. The Applicant alleges that the Administration failed to take preventative action against the continuing retaliation following the Ethics Office’s *prima facie* finding.

26. The Tribunal notes that any interim measures recommended by the Ethics Office and their implementation by the Administration under sec. 8.3 of ST/SGB/2017/2/Rev.1 are also not within the scope of the present case. Any action or inaction of the Administration following an Ethics Office recommendation in this respect should have been challenged individually at the appropriate time.

Submission to the Chair of the Ethics Panel of the United Nations

27. As stated above, the Alternate Chair of the Ethics Panel is only competent to review preliminary determinations by the Ethics Office.

28. Therefore, the Applicant did not follow the correct procedure when she sought review of the 18 December 2020 decision through the Alternate Chair of the Ethics Panel of the United Nations, as the Ethics Office explained to her in an email dated 21 December 2020.

Allegations pertaining to the Applicant's 18 June 2019 complaint of harassment

29. Throughout the application and the submissions to the Alternate Chair of the Ethics Panel and the Management Evaluation Unit, the Applicant regularly refers to matters that pertain to her 18 June 2019 complaint pursuant to ST/SGB/2008/5.

30. The Administration's handling of the Applicant's 18 June 2019 complaint was considered by this Tribunal in Judgment No. UNDT/2021/049 issued on 3 May 2021. Allegations pertaining to this complaint are therefore outside of the scope of the present case and will not be addressed in this judgment.

Review of the contested administrative decision

31. It results from the preceding considerations that the only matter under review in this case is the 18 December 2020 decision accepting the Ethics Office 19 November 2020 determination that no retaliation was established with respect to the Applicant's retaliation complaint.

32. The Applicant's challenge of this decision can be summarized in two main points of contention: (a) the Applicant's procedural rights were violated, and (b) the conclusions of the Ethics Office were not founded on reliable evidence.

33. With respect to the procedural irregularities, the Applicant contends that OIOS did not interview her in the course of its investigation, which violated her due process rights under the Staff Regulations and Rules.

34. She further argues that the delays in completing the review of her complaint of retaliation caused her additional stress and damage to her career.

35. The Applicant further contends that since any action against the Executive Secretary is now moot due to the latter's separation from the Organization, the Applicant is denied "the moral satisfaction of a finding in her case, let alone the publication of a decision or judgment in her favour, which is often seen as an important element of redressing the effects of harassment".

36. The Respondent replies that OIOS's decision not to interview the Applicant did not violate her due process rights as there is no specific due process right for a complainant to be interviewed in an OIOS investigation into retaliation.

37. Moreover, the Respondent states that the OIOS investigation relied on the information collected by the Ethics Office during its preliminary review of the complaint, which included conversations with the Applicant.

38. As regards the delay in the investigative process, the Respondent admits that it is "unfortunate" in light of the guidance provided in sec. 8.1 of ST/SGB/2017/2/Rev.1 for OIOS to seek to complete its investigation in 120 days. However, the Respondent recalls that this timeframe is not mandatory and explains that the delays were due to OIOS's decision to suspend its own investigation pending the outcome of the investigation into the Applicant's complaint of prohibited conduct.

39. The Tribunal notes from the evidence that the Ethics Office referred certain aspects of the Applicant's complaint of retaliation to OIOS for investigation on 27 August 2019. Shortly after, on 18 September 2019, OIOS notified the Ethics Office that it had decided to suspend its retaliation investigation pending the outcome of the fact-finding investigation into the Applicant's harassment complaint.

40. On 3 October 2019, the Ethics Office responded to OIOS that it was not of the view that a suspension of the retaliation investigation was warranted. After this response, there is no evidence that OIOS took any investigative action in this matter until it contacted the Ethics Office again on 6 January 2020 to inform that it would not take any further action with respect to the Applicant's retaliation complaint.

41. On 20 January 2020, the Ethics Office again advised OIOS that no suspension of a retaliation investigation was warranted under ST/SGB/2017/2/Rev.1 and it was not until 20 October 2020 that OIOS finally completed the retaliation investigation.

42. The Tribunal notes that it does not appear from the evidence that OIOS took any action whatsoever with respect to the retaliation investigation from 27 August 2019 to 20 January 2020 when the Ethics Office rejected the suspension of the investigation for the second time. Then, it took OIOS another nine months to complete the investigation.

43. The Tribunal acknowledges that the 120-day deadline is, as the Respondent points out, not mandatory. However, the Tribunal is of the view that a departure from this deadline has to be justified.

44. In this case, there is no justification for such an egregious departure from the recommended deadline. The Tribunal can understand that in September 2019, OIOS's attempt to suspend its retaliation investigation may have resulted from a misapprehension of the framework.

45. However, there is no excuse for OIOS having made no progress in its investigation after the Ethics Office rejected its suspension.

46. Moreover, the Tribunal finds that after the Ethics Office's initial rejection of a suspension of the retaliation investigation in October 2019, OIOS's second attempt to terminate the investigation in January 2020 is evidence of bad faith or, at the very least, negligence on its part.

47. Finally, after the Ethics Office rejected the termination of the retaliation investigation in January 2020, there is also no evidence of any justification for the subsequent nine-month delay in completing the investigation.

48. Given these circumstances, even if the 120-day deadline to complete a retaliation investigation is not mandatory, the Tribunal cannot but conclude that the delays and unjustified attempts to suspend or terminate the investigation in this case constitute an egregious violation of ST/SGB/2017/2/Rev.1.

49. With respect to OIOS's decision not to contact the Applicant during its investigation, the Tribunal notes that this is not a mandatory step in a retaliation investigation. The Tribunal also notes that OIOS relied on the Ethics Office's *prima facie* evaluation, which relied, among other circumstances, on conversations with the Applicant.

50. However, the Tribunal recalls that the preliminary review of a complaint of retaliation carried out by the Ethics Office is quite distinct from the investigation carried out by OIOS.

51. Whereas the Ethics Office's review is limited to the information provided by the complainant, OIOS must conduct a full investigation of all the relevant aspects of the case. Moreover, the Tribunal recalls that the purpose of the OIOS investigation of retaliation is to allow the Ethics Office to determine whether the Administration has proved by clear and convincing evidence that it did not engage in retaliation.

52. In light of this very exigent test, the Tribunal finds that it would at least be good practice to interview the complainant to ensure that all relevant aspects of the case were considered.

53. In sum, as stated above, the Tribunal concludes that the review of the Applicant's complaint of retaliation was vitiated by procedural irregularities.

54. In *Thiombiano* 2020-UNAT-978 (para. 34), the Appeals Tribunal recalled its long-standing principle that only substantial procedural irregularities can render an administrative decision unlawful. In light of this jurisprudence, the Tribunal will examine whether, in this case, the established procedural irregularities impacted the outcome of the decision.

55. At the outset, the Tribunal notes that the Executive Secretary separated from the Organization on 30 November 2019. By not initiating its investigation until January 2020 at the earliest, OIOS rendered itself unable to interview the individual having allegedly perpetrated the retaliatory acts under investigation.

56. In the Tribunal's view, this error is, in itself, fatal. Finding otherwise would render the framework on protection against retaliation meaningless as all the Administration would need to do when faced with retaliation allegations would be to delay any action until the allegedly responsible officials separate from the Organization.

57. Moreover, the inability to interview the allegedly implicated official, coupled with the failure to interview the complainant can only lead to the conclusion that the Administration was unable to prove by clear and convincing evidence that no retaliation existed.

58. The contested administrative decision is therefore unlawful.

Remedies

59. The Tribunal finds that a remand of the unlawful decision for a fresh investigation would be meaningless at this time as it would be impossible for the Administration to cure the defects that marred the original process.

60. Moreover, the Tribunal recalls that these fatal defects were caused by the Administration's own negligent handling of the matter. As a consequence, the

Applicant was deprived of her right, as a staff member, to have her complaint, which was found to raise a *prima facie* case of retaliation, resolved in due course.

61. Accordingly, the Tribunal deems it fair to award the Applicant compensation in the amount of USD5,000 for the fatal procedural irregularities in this case.

62. The Applicant further seeks compensation for the harm caused by the contested decision. She claims that she suffered damage to her professional reputation and that she was denied a promotion to the D-1 level that she was promised.

63. These claims are meritless. As a staff member, when applying for a job in the Organization, all the Applicant is entitled to is to be afforded full and fair consideration. The same right assists any other staff member applying to the same position.

64. The Tribunal notes further that the Applicant brings no evidence of damage to her professional reputation. In any event, the findings in this Judgment, which is public, would be sufficient to redress any misperceptions in this respect.

65. The Applicant further alleges that the improper handling of her complaint caused additional stress and seeks compensation in the amount of two year's net base salary for "failing or refusing to respond repeatedly to her requests for protection from harassment, or acknowledge her requests, let alone to take action to prevent on-going acts of harassment or to address hostile working environment in which the Applicant works".

66. The Applicant provides two medical reports to support her claim of harm. The first report is dated 2 June 2020 and lists a series of conditions afflicting the Applicant. The report further states:

[The Applicant] also repeatedly complained of extreme work-related emotional distress, anxiety; stress and mental psychoemotional drain and exhaustion directly affecting her mental/ physical/functional state and worsening, aggravating her underlying [...] condition symptoms and limitations of which she was suffering and treated for most of the time.

She was explained and advised by [a treating physician] on multiple occasions that there is a direct and casual psychosomatic relationship between mentally (psychologically and emotionally) stressed out mind set and aggravating, worsening or developing of full range of different debilitating physical conditions and dysfunctions (including but not limited to which she was treated medically at our facility).

She was also advised to avoid any stressfully impacting her work related/working place situations and to address her psychoemotional work place related, mental health stress matters further through psychological counseling/ psychiatry consult for which she agreed to be referred for.

67. The second medical report is dated 4 July 2020 and states:

I have been seeing [the Applicant] for [medical treatment] over the past months. My practice specializes in the treatment of anxiety and stress disorders using [a prescribed medical treatment]. Our current work has focused on her symptoms of anxiety and depression stemming from a workplace harassment situation incurred by an authority figure over the last two years in Montreal.

68. The Tribunal notes that the first report refers to allegations of workplace harassment related by the Applicant to the certifying physicians, but shows no medical finding of a link between the Applicant's report and her medical conditions.

69. The second report, however, links the Applicant's past experience in her workplace to the conditions treated by the medical professional.

70. In light of this evidence, the Tribunal is satisfied that the Applicant has shown corroboration of her statement that the improper handling caused her distress and anxiety as required by art. 10.5(b) of the Tribunal's Statute.

71. The Tribunal notes, however, that in her pleadings, the Applicant links her symptoms not only to the mishandling of her retaliation complaint but also to other matters which, as previously stated, fall outside of the scope of this case, such as the allegedly inadequate protective measures afforded during the pendency of the investigation or the handling of her complaint of harassment.

72. Accordingly, the Tribunal is not satisfied that the compensation requested by the Applicant is commensurate to the established illegality.

73. In the Tribunal's view, an award of USD5,000, coupled with the redressing effect of this judgment, constitutes a just compensation for the harm caused by the unlawful decision.

Conclusion

74. In light of the foregoing, the Tribunal DECIDES that:

- a. The Application is granted in part;
- b. The Applicant is awarded compensation in the amount of USD5,000 for the violation of her right to have her complaint of retaliation properly handled;
- c. The Applicant is awarded compensation in the amount of USD5,000 for the harm caused by the unlawful administrative decision.

75. The compensation amount shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 27th day of October 2021

Entered in the Register on this 27th day of October 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York