



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/005

Judgment No.: UNDT/2012/057

Date: 19 April 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

OSMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed with the Tribunal on 28 January 2011, the Applicant contests the decision rejecting his request for an investigation into his allegations of harassment, discriminatory treatment and abuse of authority against the Chief Aviation Officer and the former Chief of Mission Support, United Nations Assistance Mission for Iraq (“UNAMI”).

2. He requests the Tribunal to find that his rights were violated by failing to afford his complaint full and fair consideration and to order that an impartial inquiry be conducted.

Facts

3. The Applicant joined the United Nations in October 1991. He served in various peacekeeping missions and, on 19 February 2007, started serving at UNAMI, as a Fuel Supply Assistant at the FS-3 level under a fixed-term appointment. His contract, which was initially for six months, was renewed on several occasions.

4. On 19 March 2008, a performance improvement plan was made for the Applicant.

5. By memorandum dated 20 October 2008, the Chief of Mission Support, UNAMI, informed the Applicant that his function was being abolished in the budget for 2009 and that he would be reassigned, together with his post, to the Movement Control Unit, in Baghdad, Iraq.

6. On 28 August 2008, another performance improvement plan was prepared for the Applicant.

7. On 9 December 2008, the Applicant’s supervisor sent him an email raising shortcomings in his performance. In addition, the Applicant’s team leader recorded in an email dated 27 January 2009 that his performance for the previous three months had been inadequate. In a memorandum dated 29 January 2009, the Administration noted that the Applicant had acknowledged his shortfalls and

showed interest in being part of the team. On 17 March 2009, a performance improvement plan was again put into place for the Applicant.

8. In accordance with the rotation plan for April 2009 of the Baghdad International Airport, where the Applicant was discharging his duties, he was due to leave Iraq for rest and recreation (“R&R”) in the second half of the month, with a return date on 30 April 2009. On 14 April 2009, the Applicant made a request through the matrix system for R&R from 23 to 30 April 2009 and annual leave from 1 to 4 May 2009.

9. This request was approved by the Applicant’s direct supervisor, but refused, on 15 April 2009, by his second reporting officer, i.e., the Chief Aviation Officer, on the ground that the Applicant was required to make progress on his special performance monitoring and associated training programme.

10. The Applicant wrote to the Chief Aviation Officer stressing that he had requested annual leave in order to attend to his mother, who was in a serious medical condition. In reply, the Chief Aviation Officer reiterated, on 16 April 2009, that he would not approve the leave request as submitted, while stating that the Applicant would receive full cooperation if he wished to use some of the uncertified sick leave balance available for compassionate purposes, as provided for in former staff rule 106.2(c). He advised the Applicant to consult with the Human Resources Section for this matter.

11. The Applicant did not do so; he took his leave as planned, with the concurrence of his first reporting officer. He decided to relocate his mother to Karthoum on 23 April 2009, after she had spent two months in Amman awaiting to undergo surgery. The Applicant returned to work on 5 May 2009.

12. On 25 May 2009, the Applicant was called to Kuwait by his supervisor to discuss his performance. On the same date, his e-PAS for the period 2007-2008 was finalized, rating his performance as “partially meets performance expectations”, and on the following days some discussions took place between the Applicant and his hierarchy on performance matters. He returned to Baghdad on 31 May.

13. On 3 June 2009, the Chief Aviation Officer informed the Applicant that he would be transferred to Kuwait. On 7 June, he travelled to Amman for his last R&R.

14. The Applicant was informed, by memorandum from the Chief of Mission Support, dated 9 June 2009, that his contract, which was to expire on 18 July 2009, would not be extended due to unsatisfactory performance. It was pointed out that efforts had been exerted to absorb the Applicant after his initial post had been declared redundant, but he had not cooperated to perform satisfactorily.

15. The Applicant's mother died on 14 June 2009. As he learnt it upon his arrival to Kuwait on 15 June, he intended to obtain uncertified sick leave for family-related emergencies in order to travel for the burial; however, he could not travel as his passport had expired and he had to wait until 21 June for it to be renewed. He was on annual leave until that date and eventually left for Sudan on 22 June 2009. He was placed on sick leave until 28 June.

16. By memorandum dated 17 June 2009, the Applicant advised UNAMI that he wished to rebut his e-PAS for 2007-2008.

17. On 13 July 2009, the Applicant's appointment was extended until 18 August 2009 on humanitarian grounds.

18. On 23 July 2009, as the Applicant was making attempts to be transferred to a position as Movement Control Assistant in Nairobi with the United Nations Operations in Somalia ("UNOSOM"), he had a meeting with his hierarchy, at which he was informed that his supervisor had been in contact with the Head of the Movement Control Unit of UNOSOM. Also, during this meeting, a discussion was engaged on the Applicant's terms of reference, his supervisors being of the opinion that they should be reduced. The foregoing was qualified by the Applicant as an attempt to block his efforts to move to a different mission.

19. By email of 23 July 2009 to the Chief of Mission Support, he reiterated his intention to rebut his 2007-2008 e-PAS.

20. On 2 August 2009, the Applicant requested management evaluation of the decision not to renew his appointment beyond 18 August 2009.

21. On 3 August 2009, the Applicant submitted to the Dispute Tribunal a request for suspension of action, during the pendency of management evaluation, regarding the decision not to renew his contract, which was granted by order dated 13 August 2009 (UNDT/2009/008).

22. The Applicant's contract was extended several times for short periods through 30 June 2010.

23. On 17 August 2009, the Applicant initiated the rebuttal of his e-PAS for 2008-2009, which had been issued two weeks earlier, rating his performance as "partially meets performance expectations".

24. On 14 September 2009, the rebuttal panel rendered its final report regarding the Applicant's e-PAS for 2007-2008, concluding, *inter alia*, that the Applicant "could not exactly understand or totally agree with work expectations from the [first reporting officer] due perhaps partly to his new arrival in UNAMI ...". His rating was upgraded to "fully satisfactory performance".

25. On 17 September 2009, the same panel issued the final report on the Applicant's rebuttal of his 2008-2009 e-PAS, which stressed that the Applicant had benefited from performance improvement plans in a timely manner for the reporting period, as well as from support and guidance by both his first and second reporting officers; it concluded that the Applicant should have been reasonably aware of what was expected from him in terms of performance. The rating "partially meets performance expectations" was maintained.

26. By letter dated 5 October 2009, the Applicant was notified of the result of the management evaluation concerning the non-renewal decision, i.e., that his request had become moot in view of the successive renewals of his appointment.

27. By memorandum dated 6 October 2009 from the Officer-in-Charge of Mission Support, the Applicant was reassigned back to his initial functions as Fuel Supply Assistant effective 11 October 2009, and for that purpose a post was loaned from another section. He was advised that his supervisor had been instructed to draw up a work plan for him.

28. On 9 June 2010, the Applicant sent to the Under-Secretary-General for Field Support, at United Nations Headquarters, a formal complaint of harassment

and abuse of authority against the Chief Aviation Officer and the former Chief of Mission Support, UNAMI, under the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and requested that a formal investigation be conducted.

29. After he obtained a fully satisfactory evaluation for the period from January to March 2010, dated 27 April 2010, on 30 June 2010 the Applicant's appointment was renewed for one year.

30. By memorandum dated 1 July 2010, the Special Representative of the Secretary-General for Iraq replied to the Applicant's complaint for harassment and discrimination stating that his allegations were not substantiated.

31. On 5 July 2010, the Applicant referred his complaint under ST/SGB/2008/5 to the Assistant Secretary-General for Human Resources Management and renewed his request for an independent investigation.

32. On 16 July 2010, the Officer-in-Charge, Office of Human Resources Management at United Nations Headquarters advised the Applicant that further inquiries were being made regarding the points he had raised. On 3 August 2010, the Assistant Secretary-General for Human Resources Management replied that, after such further inquiries, there was no reason to suggest that the decision by the Special Representative of the Secretary-General for Iraq was unreasonable or made without due inquiry into, and consideration of, all relevant facts.

33. On 30 August 2010, the Applicant lodged a request for management evaluation of the rejection of his two requests for formal investigation into his allegations of harassment. As communicated to the Applicant by letter of 2 November 2010, the Management Evaluation Unit found "no basis to conclude that the ... decision [of the Special Representative of the Secretary-General] was unreasonable or taken without consideration of all relevant facts".

34. On 28 January 2011, the Applicant filed the present application with the Geneva Registry of the Dispute Tribunal. The Respondent submitted his reply on 4 March 2011.

35. By Order No. 51 (GVA/2012) issued on 8 March 2012, the parties were convened to an oral hearing on 14 March 2012, to which the Applicant and his Counsel participated by phone and Counsel for the Respondent via videoconference.

Parties' submissions

36. The Applicant's principal contentions are:

a. Staff regulation 1.2 prohibits any form of discrimination or harassment. The Applicant suffered a "continuous and increasingly hostile series of actions forming a pattern of behavior primarily motivated by ending the Applicant's service, not because of poor performance but because he challenged his supervisor's authority";

b. Violations such as those reported by the Applicant require a heightened degree of scrutiny, not examining each element in isolation but the cumulative result of several actions. The Applicant was never requested to supply his proof or investigate the specific allegations. Requiring him to do so amounts to misstating the purpose of filing a complaint and unfairly placing on the Applicant the burden of proving his case without the benefit of an investigation;

c. The issue at stake is not whether the different contested actions fall within the scope of his supervisor's purview, but whether those decisions were arrived at fairly. The fact that the Applicant was reassigned whereas his post was not abolished calls into question the motivations behind his reassignment. The suspension of action of the non-renewal decision was in large part motivated by the incompleteness of his performance evaluations; following rebuttal, one of them was modified, and after a management evaluation process, it was decided to renew the Applicant's appointment. The refusal to investigate impartially the circumstances of those decisions and to appreciate their negative impact on the Applicant represents a rejection of the principle of accountability and renders meaningless the procedures for preventing harassment;

d. The Applicant had an exemplary record of service before encountering difficulties with his most recent supervisors. The Applicant's complaint was made in good faith. He made his concerns clear and the Respondent had an obligation to consider them carefully. Instead, his claims were rejected summarily, with no effort to contact him and ascertain whether he had further information or documentation to substantiate them;

e. The Applicant's successful rebuttal, combined with the Tribunal's and the Management Evaluation Unit's intervention to suspend and overturn the adverse decisions, point to a potential misuse of authority, which calls, at least, for an impartial inquiry.

37. The Respondent's principal contentions are:

a. His superiors did not harass the Applicant; they made decisions on work performance and work-related issues. The Special Representative of the Secretary-General for Iraq acted in conformity with the applicable law in determining that there were no sufficient grounds put forward in the Applicant's complaint to warrant a formal fact-finding investigation under ST/SGB/2008/5. The application at hand is flawed in that it focuses on events starting in April 2009—when a request for leave was not granted—skipping over the issues of performance;

b. Regarding the Applicant's performance, its shortcomings are well documented and the staff member received feedback in this regard in informal meetings and through correspondence with his supervisors. His hierarchy gave him an opportunity to improve his performance and provided him with frequent guidance. These efforts were recognized in the report of the rebuttal panel for the 2008-2009 performance cycle. The Applicant was rated as having partially met performance expectations for the cycles 2007-2008 and 2008-2009. After rebuttal of the 2007-2008 report, his rating was upgraded to fully successful performance, but for the 2008-2009 report, the rebuttal panel confirmed the initial assessment;

c. As regards the request for annual leave following R&R, it was not approved by the Applicant's second reporting officer due to the exigencies of service. His absence would have caused a disruption to the operation requirements at Baghdad International Airport and the need to assign another individual to replace the Applicant. Former staff rule 105.1(b)(iii) stipulated that "[a]ll arrangements as to leave shall be subject to the exigencies of service, which may require that leave be taken by a staff member during a period designated by the Secretary-General ...";

d. When the second reporting officer was made aware that the Applicant intended to attend to his mother's medical needs he advised the staff member to coordinate with the Human Resources Section to utilize his uncertified sick leave entitlements for compassionate purposes, in accordance with former staff rule 106.2(c), and assured him full cooperation by UNAMI in this respect. The Applicant elected not to do so, taking instead leave with his immediate supervisor's concurrence;

e. As to the non-renewal decision, it was taken in light of the Applicant's continuing performance failings. However, for various reasons his contract was subsequently renewed several times. Then, following a special performance report dated 27 April 2010 for the period January-March 2010, the Applicant was considered to have demonstrated a fully successful performance. In recognition, the Applicant's appointment was extended until 30 June 2011;

f. Concerning the complaint for harassment submitted on 9 June 2010 by the Applicant, the Special Representative of the Secretary-General for Iraq reviewed the Applicant's complaint and gave him explanations in his 1 July 2009 letter as to why a fact-finding investigation did not appear as warranted;

g. Each specific allegation leveled by the Applicant arose in relation to work performance and other work-related matters. Nothing suggests that these actions are a manifestation of harassment or discrimination;

h. The Tribunal is not to undertake a merit-based review, but instead to determine whether the decision was legal, rational and procedurally correct. It is not its role to substitute its own decision for that of the Administration. In this case, the Applicant does not aver that the Respondent lacked authority to carry out the contested actions, but that they were ill-motivated. It is incumbent on the party making such allegations to produce the evidential backing to support them. The Applicant has failed to do so.

Consideration

38. The Applicant contests the decision to reject his request for an investigation into his allegations of harassment, discriminatory treatment and abuse of authority against the Chief Aviation Officer—the Applicant’s second reporting officer—and the former Chief of Mission Support, taken by the Special Representative of the Secretary-General for Iraq and subsequently confirmed by the Assistant Secretary-General for Human Resources Management. As such, the application is receivable as regards to its subject-matter, in line with the Appeals Tribunal’s finding in *Nwuke* 2010-UNAT-099 that:

The [Dispute Tribunal] has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law.

39. As explained in *Nwuke*, the decision to investigate or not upon complaints of harassment or discrimination is appealable inasmuch as staff members are entitled to “certain administrative procedures” in these situations as part of their terms of appointment.

40. In this connection, as per article 2.1(a) of the Tribunal’s Statute, the “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the material time, and, indeed, Secretary-General’s bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) caters for

enforceable rights for staff members on the matter. Specifically, section 5.14 of the bulletin provides:

Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation ...

41. Also, section 5.3 stipulates that managers and supervisors have a “duty to take prompt and concrete action in response to reports and allegations of prohibited conduct”.

42. This bulletin was in force at the time of the facts characterized as harassment or discrimination by the Applicant and, in fact, he expressly invoked it as the basis for his complaint.

43. However, the Respondent argues that the actions alleged by the Applicant are not manifestations of harassment or discrimination as they were related to work performance or other work-related issues. It is important to stress, in this regard, that section 1.2 of ST/SGB/2008/5 defines harassment as:

[A]ny improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

44. The last sentence in this provision does not exclude disagreements on performance and other work-related issues *per se* from the ambit of harassment. Rather, the use of the word “normally” indicates that they may in some cases amount to harassment. In any event, the key consideration in ascertaining if a given set of facts constitutes harassment remains whether those facts amount to an “improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation” and whether it tends to “annoy, alarm,

abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment”. Hence, the actions complained about by the Applicant cannot be deemed to fall beyond the scope of ST/SGB/2008/5 for the sole reason that they arose in the context of work performance or other work-related issues.

45. Having concluded that the bulletin was applicable to the facts at issue, and with regard to the Applicant’s request that an investigation be conducted, the Tribunal must now determine whether the decision not to undertake such an investigation in his case was in violation of the Applicant’s rights.

46. The above-cited section 5.14 provides for two general criteria for the purpose of launching a fact-finding investigation, to wit, that the formal complaint or report be made in good faith and that there are sufficient grounds to warrant such an investigation. The Tribunal not having any reason to doubt the Applicant’s good faith, the essential question lies with the “sufficient grounds” condition.

47. Regarding the standard to be applied in appraising whether sufficient grounds exist, the Tribunal stated in *Ostensson* UNDT/2011/050 that “the requirement that there should be ‘sufficient grounds to warrant a formal fact-finding investigation’ may not be too narrowly interpreted”. If only those cases where the prohibited conduct is already demonstrated were to be followed up and investigated, the very purpose of the entire ST/SGB/2008/5 would be defeated. As a matter of fact, proving a harassment/discrimination case without the benefit of a formal inquiry would be an excessive burden placed on the concerned staff member’s shoulders.

48. This said, in his formal complaint dated 9 June 2010, the Applicant reported a number of incidents which, in his view, amounted to harassment. He referred to his transfers to different locations within the UNAMI region of operations, and in particular his reassignment from Baghdad to Kuwait at the beginning of June 2009; the refusal to approve his annual leave following his R&R in April 2009; the decision not to renew his appointment in June 2009; and

the negative assessment given to prospective supervisors when the Applicant was seeking to move to another peacekeeping mission.

49. Concerning his transfers, the Applicant was first reassigned from Kuwait to the Movement Control Unit in Baghdad on 20 October 2008. It is worth noting that, as stated in the memorandum notifying the Applicant of this measure, the purpose of it was to keep him on board after his post had been abolished in the budget for the next year. Therefore, his first transfer appears rather as a measure taken in the interest of the Applicant than as an act of harassment. Then, on 3 June 2009, the Chief of Mission Support decided to transfer him to Kuwait, and, the Applicant claims, he thereby had his R&R cycle disrupted. This decision, nevertheless, followed a number of incidents and statements which made evident the mutual dissatisfaction between the Applicant and his hierarchy while he was serving in Baghdad. Besides, the R&R entitlement of a staff member is not a consideration that a supervisor must take into account in deciding whether to assign a staff member to a different duty station. The Tribunal thus fails to see any negative intent in this second reassignment. Lastly, by his third transfer, the Applicant returned to the Fuel Supply Assistant position that he held prior to his first reassignment. The memorandum dated 6 October 2009 informing the Applicant of this transfer stated that he was given “another opportunity to prove [him]self in a function which [he was] familiar with and for which [he had been] recruited”. It transpires that this constituted an attempt to assign the Applicant to a position which best fitted his skills, even if this arrangement required that a post be loaned from a different section.

50. Regarding the refusal to approve the Applicant’s five-day annual leave request, it must be recalled that, according to former staff rule 105.1(b)(iii), “[a]ll arrangements as to leave shall be subject to the exigencies of service, which may require that leave to be taken by a staff member during a period designated by the Secretary-General ...”. The Applicant’s second reporting officer was therefore acting within his sphere of competence and, furthermore, he provided plausible reasons for his denial, i.e., the repercussions on the rotation calendar of the Applicant’s unit and the need to follow the measures put in place to address his performance shortcomings. More importantly, as soon as the Applicant explained

that he sought leave in order to attend to his mother's medical needs, he received advice as to how to obtain leave—uncertified sick leave instead of annual leave—on those specific dates, and he was assured full cooperation for that matter. The advice given was timely and correct, as former staff rule 106.2(c) does provide for the use of the uncertified sick leave entitlement “to attend to family-related emergencies”. It was the Applicant's choice not to take advantage of the opportunity offered by his second reporting officer. Lastly, one may not forget that, despite the non-approval by his second reporting officer, the Applicant did take annual leave on the very days requested, with the concurrence of his direct supervisor. As it turned, this incident does not yield any sign of bad faith or harmful intention on the part of the Applicant's second reporting officer.

51. As to the non-renewal of the Applicant's appointment, according to the memorandum dated 9 June 2009, it was decided on account of his poor performance. Although the decision was suspended by decision of the Tribunal due to procedural flaws in the performance assessment, it is clear that, at that point in time, the expressed concerns with the quality of the Applicant's work were real. Indeed, the rebuttal process of his 2007-2008 e-PAS led to the upgrading of his rating, not because his actual performance was considered satisfactory, but on the basis that it might not have been completely clear to the Applicant what was expected from him; in any case, his 2008-2009 e-PAS, i.e., that for the appraisal period preceding the non-renewal decision, rated his performance only as partially meeting expectations, and such rating remained unchanged after scrutiny by the rebuttal panel. It is also manifest that his supervisors shared those concerns with him and made serious efforts to address the identified shortcomings. In these circumstances, the Tribunal finds no indication that the non-renewal decision was an act of harassment against the Applicant; all the more since the Applicant was finally kept employed and once the said shortcomings were overcome, his appointment was again renewed for a full year.

52. Finally, assuming that the Applicant's supervisors gave a negative assessment of his performance to their counterparts in UNOSOM, where he attempted to move, and this input deterred his prospective employers from hiring

him, a staff member cannot be blamed for providing candid views when asked by his colleagues. In fact, they have a duty to do so.

53. In sum, after examination, none of the alleged instances of harassment, discrimination, or abuse of authority put forward by the Applicant offers sufficient grounds to conduct an investigation into his complaint. The Applicant insists, nonetheless, that this kind of allegations needs to be assessed as a whole, as opposed to examining each incident in isolation.

54. It is possible that the cumulative effect of a series of actions may reveal a pattern of harassment, whereas each action, taken alone, may appear as perfectly lawful and harmless. This is consistent with the idea contained in the definition of harassment under ST/SGB/2008/5 that it “normally implies a series of incidents”.

55. However, in the instant case, even considering together and in context the entire set of events reported by the Applicant, no meaningful indicia of harassment could be found. Some of the supervisors’ actions, such as the (later overturned) non-renewal of appointment, were not favourable to the Applicant; yet, they are not to be regarded as arbitrary or unreasonable. Others, on the contrary, showed a true intention to accommodate the Applicant’s interest and preferences, like his third and last reassignment or the advice that he take uncertified sick leave to stay in Amman at the beginning of May 2009. In any case, the behaviours at stake do not point to any kind of prohibited conduct in the sense of ST/SGB/2008/5.

56. Against this background, the Tribunal is unable to find that the Special Representative erred in concluding that there were not sufficient grounds in the Applicant’s complaint of harassment, discrimination and/or abuse of authority to warrant a fact-finding investigation into his allegations. It may be added that the contested decision does not appear tainted by any procedural flaw. It was made by a competent responsible official within the meaning of ST/SGB/2008/5, it was rendered less than a month after the Applicant submitted his complaint and was duly notified to him, in consonance with his due process rights.

57. Accordingly, the decision not to undertake further inquiries cannot be deemed in breach of the Applicant's terms of appointment.

58. The Tribunal is mindful that the period going from the end of 2008 to the beginning of 2010 was grueling for the Applicant considering, in particular, the personal loss that he endured. However, in the Tribunal's view this trying situation was not the result of a conduct amounting to harassment, discrimination or abuse of authority by his supervisors at the time.

Conclusion

59. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 19th day of April 2012

Entered in the Register on this 19th day of April 2012

(Signed)

René M. Vargas M., Registrar, Geneva