UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/039
Judgment No.: UNDT/2012/095
Date: 27 June 2012
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Ingeborg Daamen-Mayerl, UNOV/UNODC

Introduction

1. By an application filed on 20 July 2011 which was registered under Case No. UNDT/GVA/2011/039, the Applicant, a former staff member of the United Nations Office on Drugs and Crime ("UNODC"), challenges the decision of the Director of the Division for Management at UNODC not to take action in response to his reports of prohibited conduct.

2. He asks the Tribunal to award him compensation for the violation of his due process rights, including the right to have his reports addressed promptly and the right to be treated fairly. He also seeks compensation for the humiliation he suffered and for the violation of the integrity of the management evaluation process. He further asks the Tribunal to order that all adverse material in relation to his performance be expunged from his personnel file and that the cases of those officials whom he believes to be responsible for breach of his contract be referred to the Secretary-General for possible action to enforce accountability.

Facts

3. The Applicant joined UNODC in Vienna in 2002. With effect from 1 November 2007, he was appointed to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch ("TPB"), within the Division of Treaty Affairs ("DTA"). His functional title was changed to that of Chief of the Counter-Terrorism Legal Services Section I in April 2008 and his appointment was extended several times.

4. In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant's first and second reporting officers, informed him that his post would be abolished and that he would be reassigned, at the same level, to the position of Senior Legal Adviser which was to be created within the Office of the Chief of TPB.

5. In a document dated 31 January 2010 ("document of 31 January") sent to the UNODC Executive Director, the Applicant explained that, in his view, the

decision to abolish his post and reassign him to the position of Senior Legal Adviser was tainted by irregularities and motivated by extraneous considerations. He further explained that the decision in question had been preceded by prohibited conduct on the part of his first and second reporting officers, consisting of (i) "baseless accusations" made by the Officer-in-Charge of DTA that the Applicant had jeopardized the UNODC relations with a determined government; (ii) the fact that the Chief of TPB had assigned technical assistance missions to junior staff members rather than to him; (iii) the fact that the Chief of TPB had effectively removed him from his functions of Chief of the Counter-Terrorism Legal Services Section I without prior notification or reply to his questions and, (iv) the comments he had received in the context of his mid-point performance review for the appraisal period from 1 April 2009 to 31 March 2010 ("2009-2010 performance appraisal").

6. On 27 April 2010, the Applicant filed with the Tribunal an application in which he challenged the decision to abolish his post and to reassign him to the position of Senior Legal Adviser, and he complained of harassment on the part of his reporting officers. The application was registered under Case No. UNDT/GVA/2010/082.

7. Under cover of a letter dated 1 December 2010 ("document of 1 December"), the Applicant transmitted to the UNODC Executive Director copy of a request for management evaluation which he had submitted to the Management Evaluation Unit at the United Nations Secretariat Headquarters to challenge a series of decisions taken in relation to his 2009-2010 performance appraisal, as well as annexes to that request. The annexes included a written appraisal of the Applicant's 2009-2010 performance which had been conveyed to him on 19 November 2010, a 32-page document containing his comments on that written appraisal, the document of 31 January, and copy of an exchange of correspondence between him, his reporting officers and the then Officer-in-Charge of the UNODC Division for Management. In the letter, the Applicant asked the Executive Director to consider the letter and its annexes as a report of misconduct concerning his reporting officers.

8. Under cover of a subsequent letter of 8 December 2010 ("document of 8 December") to the Executive Director, the Applicant referred to the document of 1 December and appended two documents which, he said, constituted the basis for a report of misconduct regarding his reporting officers: a 36-page document containing further comments on the written appraisal of his performance of 19 November 2010 as well as the document of 31 January.

9. The written appraisal of 19 November 2010 was eventually amended and a revised written appraisal, which both the Applicant's reporting officers signed off on 2 March 2011, was provided to him. Save for two paragraphs in the appraisal made by his first reporting officer and one paragraph in the appraisal made by his second reporting officer, the new appraisal was substantially identical to that of 19 November 2010.

10. On 8 March 2011, the Applicant wrote to the Executive Director. Referring to the documents of 30 January, 1 and 8 December, he again reported what he considered as prohibited conduct on the part of his reporting officers and drew the Executive Director's attention to the fact that none of his previous reports had been investigated.

11. On 14 March 2011, the Director of the Division for Management responded on behalf of the Executive Director that, if the Applicant wished to pursue his allegations, he ought to resubmit his reports in accordance with section 5.13 of the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He observed that the format in which the Applicant's allegations were presented had led the Administration to believe that the matters in question were under the Tribunal's review.

12. On 17 March 2011, the Applicant wrote to the Director of the Division for Management and complained about the Administration's failure to respond to his reports of misconduct. He further asked that action be taken.

13. The Director of the Division for Management responded to the Applicant in an email of 28 April 2011, explaining that the requirements prescribed in

section 5.13 of ST/SGB/2008/5 were mandatory and that the Applicant's communications prior to that of 8 March 2011 did not satisfy these requirements since they attached copies of documents submitted to other bodies or loosely titled "to whom it may concern" and they "covered the broader review of contested administrative decisions, which addressed a multitude of other issues". Only the communication of 8 March 2011 provided a "decipherable description" of his grievances but the issues raised therein were, in the opinion of the Director of the Division for Management, disagreements on work performance, thus excluded from the scope of ST/SGB/2008/5.

14. On 4 May 2011, the Applicant submitted a request for management evaluation, in which he challenged *inter alia* the decision not to investigate nor take action in response to the documents of 31 January, 1 and 8 December.

15. By letter dated 17 June 2011, the Applicant was notified that, in the view of the Secretary-General, insofar as the matters which formed the subject of the documents of 31 January, 1 and 8 December were before the Tribunal, it was inappropriate for the Administration to take action. The Applicant was further advised to pursue his allegations of prohibited conduct in accordance with section 5.13 of ST/SGB/2008/5.

16. On 20 July 2011, the Applicant filed with the Tribunal the application which forms the subject of this Judgment.

17. On 12 August 2011, the Tribunal issued Judgment UNDT/2011/142 in Case No. UNDT/GVA/2010/082. It noted that the Applicant's post had not been abolished, and found that his reassignment was justified by the restructuring of TPB. It further rejected his allegations of harassment on procedural grounds.

18. On 31 December 2011, the Applicant was separated from service.

19. A hearing was held on 18 April 2012, which the Applicant and Counsel for the Respondent attended by videoconference.

Parties' submissions

20. The Applicant's principal contentions are:

a. The Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) requires managers and supervisors to take prompt and concrete action in response to reports and allegations of prohibited conduct. It also provides that failure to do so may be considered a breach of duty and this has been upheld by the Dispute Tribunal in *Borhom* UNDT/2011/067;

b. The separation of powers within the Organization requires that the Administration take action on reports of prohibited conduct irrespective of the fact that the same conduct is described in the context of proceedings before the Tribunal;

c. The Respondent is estopped from claiming that he could not "decipher" the Applicant's complaints as he did address these complaints in the context of other proceedings before the Tribunal;

d. The Respondent's contention that the Applicant's reports of prohibited conduct did not comply with section 5.13 of ST/SGB/2008/5 is unsubstantiated. That section does not reflect mandatory requirements. Further, the Applicant made it clear that the matters he reported went beyond work performance issues;

e. The actions taken by the Administration for the past years are such that a reasonable person must believe that they amount to constructive dismissal;

f. The management evaluation process was tainted by partiality given that Counsel for the Respondent took part in the assessment of the management evaluation request.

21. The Respondent's principal contentions are:

a. The email of 28 April 2011 provides a duly considered response including the reasons why the Administration, though willing to act on the Applicant's reports, required him to adhere to the provisions of ST/SGB/2008/5;

b. The specific requirements prescribed in section 5.13 are to be adhered to in order to facilitate a clear record of what the staff member believes to be the complaint, and for the Administration to assess whether such report appears to have been made in good faith and whether there are sufficient grounds to warrant a fact-finding investigation;

c. The Applicant's communications contained mere references to or included copies of submissions made before internal justice bodies and they addressed a multitude of other issues. They did not provide a clear, succinct, comprehensive or comprehensible statement of his allegations. The Applicant should have, at least, given a reasonable explanation as to why his reports did not comply with section 5.13 of ST/SGB/2008/5 and the Respondent should not be left to guess or assume what is being claimed;

d. In spite of the fact that the Applicant was invited to resubmit his allegations in line with section 5.13, he did not make any submission after 8 March 2011;

e. The way in which the Applicant presented his communications led the Administration to believe that his allegations were already under the Tribunal's review and that the judicial process needed to be respected;

f. The Director of the Division for Management did provide the Applicant with an assessment of the matters raised by the Applicant in his letter of 8 March 2011 and he considered these to be disagreements on work performance and other work-related issues;

g. The Applicant failed to request management evaluation of the alleged violation of the right to the integrity of the management evaluation process. This contention should therefore be considered irreceivable. Further, in view of the seriousness of his contention, the Applicant should be ordered to provide convincing evidence and, in the event he does not, subjected to sanctions and directed to issue a written apology.

Consideration

22. At the outset, it should be recalled that the Tribunal has jurisdiction to examine the Administration's actions and omissions following a request for investigation submitted pursuant to the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (see, in particular, *Nwuke* 2010-UNAT-099).

Whether the Administration had a duty to take prompt and concrete action in response to the Applicant's allegations

23. ST/SGB/2008/5 relevantly provides:

> **Section 5**
>
> **Corrective measures**
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> …
>
> 5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings …
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> …
>
> *Formal procedures*
>
> 5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned …

> 5.13 The complaint or report should describe the alleged incident(s) of prohibited conduct in detail and any additional evidence and information relevant to the matter should be submitted. The complaint or report should include:
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> (a) The name of the alleged offender;
>
> (b) Date(s) and location(s) of incident(s);
>
> (c) Description of incident(s);
>
> (d) Names of witnesses, if any;
>
> (e) Names of persons who are aware of incident(s), if any;
>
> (f) Any other relevant information, including documentary evidence if available;
>
> (g) Date of submission and signature of the aggrieved individual or third party making the report.

24. In essence, the Respondent argues that the documents submitted by the Applicant could not be considered as formal reports of prohibited conduct within the meaning of section 5 of ST/SGB/2008/5 as they did not comply with the requirements of section 5.13.

25. However, irrespective of whether or not the allegations contained in those documents met the requirements set out in section 5.13, the Administration had a duty to take prompt and concrete action to address these allegations, if only to inform the Applicant that they had not been submitted in accordance with that section and ask him to resubmit them accordingly. This follows from a plain reading of section 5.3, according to which the obligation to take action is not limited to formal complaints or reports but also extends to "allegations" of prohibited conduct.

26. The Tribunal finds that the Administration failed to take "prompt and concrete action" pursuant to section 5.3 quoted above in response to the Applicant's allegations of prohibited conduct. It has found in *Ostensson* UNDT/2011/050 that a delay of three months and a half to respond to a staff member's harassment complaint warranted compensation, and it observes that, in this case, the Administration responded for the first time to the Applicant's allegations on 14 March 2011, that is, more than 13 months after he submitted the document of 31 January.

27. Even accepting that the reason why the Administration did not react earlier to the document of 31 January is because the format in which the Applicant's allegations had been presented led the Administration to believe that the matters were under the Tribunal's review, the Tribunal considers that the Administration's delay in responding to him is still unreasonable. It is true that, when filing Case No. UNDT/GVA/2010/082 on 27 April 2010, the Applicant reiterated parts of the content of the document of 31 January in the application form and that he appended this document to the form. Nonetheless, almost three months had already elapsed between the time when the Applicant first referred his allegations to the UNODC Executive Director and the time when the application registered under Case No. UNDT/GVA/2010/082 was transmitted to the Respondent for his reply.

Were there sufficient grounds to warrant a formal fact-finding investigation?

28. Section 5.14 of ST/SGB/2008/5 states:

> 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.

29. The Applicant challenges the Administration's failure to take action on his reports of misconduct. The Tribunal must therefore determine whether the Applicant's allegations, in the form in which they were then submitted to the Executive Director, provided "sufficient grounds" to warrant a formal fact-finding investigation. In so doing, it bears in mind that section 1.2 of ST/SGB/2008/5 defines harassment and abuse of authority respectively as follows:

> 1.2 Harassment is any 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.
>
> …
>
> 1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion.

30. In addition, the Tribunal held in *Osman* UNDT/2012/057 (see also *Ostensson* UNDT/2011/050) with respect to section 1.2:

> 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".

The document of 31 January

31. The document of 31 January identified the Applicant's first and second reporting officers as the alleged offenders and it described the main purported incident of prohibited conduct as the decision to abolish his post and to reassign him to the position of Senior Legal Adviser.

32. However, he did not provide explanations as to why, in his view, the decision to reassign him to a post at the same level, entailing no managerial functions, constituted harassment or abuse of authority and he simply stated that the functions of that post, as described by his first reporting officer, "[we]re not the usual functions of a legal adviser".

33. In the document, the Applicant also stated:

> [T]he … decision to remove me from my current position has been prec[e]ded by a number of prohibited conducts including bullying (mobbing) and harassment. They also included acts aimed at discrediting me, tarnishing my reputation and humiliating me. In my view, those prohibited conducts pursued the aim of preparing the ground for arbitrarily reducing my functions and eventually removing me from my cur[r]ent position.

34. The Applicant then described several incidents which, in his opinion, had "prepared the ground" for the decision to abolish his post and reassign him, namely: (i) "baseless accusations" made by the Officer-in-Charge of DTA that the Applicant had jeopardized the UNODC relations with a determined government; (ii) the fact that the Chief of TPB had assigned technical assistance missions to junior staff members rather than to the Applicant; (iii) the fact that the Chief of TPB had effectively removed him from his functions of Chief of the Counter-Terrorism Legal Services Section I without prior notification or reply to his questions and, (iv) the comments he had received in his 2009-2010 mid-point performance review.

35. Even assuming that the "earlier" incidents referred to by the Applicant in the document of 31 January were considered by him as further instances of prohibited conduct, the Tribunal notes that no indications were given as to the dates or factual circumstances of these incidents. Nor did the Applicant reflect the content of the comments he had received in his 2009-2010 mid-point performance review.

36. Taking into account all of the circumstances, the Tribunal considers that the document of 31 January, which was not even signed by the Applicant (see section 5.13(f) of ST/SGB/2008/5), did not provide sufficient detail for the responsible officer, in this case the Executive Director, to assess whether there were sufficient grounds to warrant a formal fact-finding investigation.

The documents of 1 and 8 December

37. In the document of 1 December, the Applicant stated:

> I … transmit to you the copy of a letter … by which I have requested a management evaluation of the administrative decision taken by [the Officer-in-Charge of DTA] and [the Chief of TPB] concerning my performance appraisal for the period 01 April 2009 to 31 March 2010 … I would be grateful, if you could consider this letter and its annexes as a report of misconduct concerning [the Officer-in-Charge of DTA] and [the Chief of TPB].

38. Though the Applicant identified in the document the alleged offenders as his first and second reporting officers, he did not describe the alleged incidents of prohibited conduct other than by means of a mention to his 2009-2010 performance appraisal and reference to the annexes appended to the document.

39. The annexes which contained the performance appraisal made by his first and second reporting officers and the exchange of correspondence are to be treated as "documentary evidence" as foreseen by section 5.13(f). The 32-page document containing the Applicant's comments on his written performance appraisal of 19 November 2010 complements the letter in that it presents the specific incidents of prohibited conduct alleged by the Applicant.

40. Likewise, in the document of 8 December, the Applicant identified the alleged offenders as his two reporting officers, but he did not refer to any particular incident of prohibited conduct and, instead, simply referred to the two annexes to the document, namely a 36-page document containing further comments on his written performance appraisal of 19 November 2010 as well as the document of 31 January.

41. The subject title of the document of 8 December is "Request for Management Evaluation; revised and expanded document" and the 36-page document includes, and sometimes develops, the content of the 32-page document. The Tribunal also notes that the Applicant indicated in the application he filed on 20 July 2011 that "[t]he report of 8 December 2010 … replaced the report of 1 December 2010". It considers, therefore, that the allegations contained

in the document of 8 December superseded those contained in the document of 1 December.

42. In the 36-page document, the Applicant challenged the comments made by his reporting officers in his 2009-2010 performance appraisal of 19 November 2010.

43. The Tribunal considers that comments made in the context of a staff member's performance appraisal could in some circumstances fall under ST/SGB/2008/5. For example, harsh criticism unsupported by examples or the use of offensive language could constitute improper conduct that might reasonably be expected or be perceived to cause offence or humiliation.

44. In the 36-page document, the Applicant first takes issue with the way his 2009-2010 performance appraisal was handled and he challenges several procedural aspects of the appraisal process, including the legal basis for the appraisal and the decision to proceed with a written appraisal. He also expresses his disagreement with several comments made by his first reporting officer, concerning particularly his involvement in the restructuring process or his requests for travel. These instances, in the view of the Tribunal, constitute disagreements concerning respectively work performance and work-related issues which did not provide sufficient grounds to warrant a formal fact-finding investigation.

45. Secondly, the Applicant submits that there was some inconsistency between the overall performance rating he received on the one hand, and the rating of various competencies as well as comments made in the appraisal on the other hand. However, the Tribunal observes that his reporting officers provided specific examples to illustrate the shortcomings they had identified in the appraisal and the Tribunal cannot agree with the Applicant's contention that their comments "express[ed] a profound lack of respect". Whether or not the comments made in the appraisal were accurate is a different issue, which could be addressed in the context of the rebuttal process. In addition, the reporting officers recognized that the Applicant was "a talented lawyer, with a significant corpus of knowledge relevant to the substantive work of the Branch", that he had "managed to maintain

a high rate of technical assistance delivery", and that "[h]is contributions … ha[d] drawn appreciation from member States as well as from partnering organizations", thus tempering their assessment. In view of this, the Tribunal finds that the comments made in the appraisal did not provide sufficient grounds to warrant a formal fact-finding investigation.

46. Lastly, the Tribunal rejects the Applicant's allegations that the Administration's actions amount to constructive dismissal and that the management evaluation process was tainted by partiality as these have no bearing on the issues raised in the application.

47. The Respondent asks the Tribunal to order the Applicant to provide evidence of his allegation that the management evaluation process was tainted by partiality, failing which it should subject him to sanctions and direct him to issue a written apology. In the case at hand, the Tribunal finds no grounds to make such a determination and therefore rejects the Respondent's request.

Compensation

48. In *Appellant* 2011-UNAT-143, the Appeals Tribunal upheld the Dispute Tribunal's finding that the prejudice caused by the Administration's failure to respond to the appellant's complaint warranted compensation (see also *Shkurtaj* 2011-UNAT-148, whereby the Appeals Tribunal confirmed the award of compensation for the Administration's failure to timely consider, act on, or communicate the Ethics Office's findings and recommendations to the appellant).

49. The Applicant seeks compensation for the violation of his right to have his reports of prohibited conduct promptly addressed. The Tribunal has found that, concerning the document of 31 January, the Administration had failed to discharge its duty under section 5.3 of ST/SGB/2008/5 (see paragraph 26 above).

50. Because of the Administration's failure to take prompt and concrete action to address his allegations of harassment, the Applicant suffered frustration and uncertainty, warranting compensation in the amount of USD3,000.

Conclusion

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

a. The Respondent shall compensate the Applicant in the amount of USD3,000 for moral injury. This amount shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;

b. All other claims are dismissed.

(*Signed*)

Judge Thomas Laker

Dated this 27th day of June 2012

Entered in the Register on this 27th day of June 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva