



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/063

Judgment No.: UNDT/2012/203

Date: 21 December 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

FEATHERSTONE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Jérôme Blanchard, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), “assert[s] that the procedures in referring [a fact-finding Panel Report] to the Assistant Secretary-General for Human Resources Management were incorrect and challenge[s] the decisions taken by the Registrar of ICTY.”

2. The Applicant requests the Tribunal:

a. To determine that the Registrar of ICTY (“the Registrar”) failed to apply the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) when referring the matter concerning her to the Assistant Secretary-General, Office of Human Resources Management (“OHRM”), without conducting a separate formal investigation with due notice to her and without considering alternative methods of solution provided for in ST/SGB/2008/5;

b. To determine that the Registrar acted improperly and failed to exercise his discretion as he referred the matter concerning her to the Assistant Secretary-General, OHRM, without observing her right to due process provided for in ST/SGB/2008/5;

c. To order the production of documents on which the decision to refer the matter concerning her to the Assistant Secretary-General, OHRM was based;

d. To award her compensation for emotional anxiety and moral distress.

Facts

3. In June 2011, the Registrar appointed a fact-finding panel (“the Panel”), under ST/SGB/2008/5, to investigate a third-party complaint on alleged prohibited conduct by a staff member under the Applicant’s supervision.

4. The Panel submitted its investigation report to the Registrar, as the responsible officer, on 13 September 2011; it found, *inter alia*, that the Applicant may have failed to fulfill her obligations as a manager pursuant to section 3.2 of ST/SGB/2008/5 by not taking all appropriate measures to promote a harmonious work environment.

5. On 21 October 2011, the Registrar informed the Applicant about the Panel's findings concerning her, and his determination that her conduct amounted to possible misconduct. He further advised her that he had referred the matter to the Assistant Secretary-General, OHRM for disciplinary action.

6. Subsequently and at several occasions, the Applicant asked the Registrar for further information and documents concerning the allegations against her, in particular, a copy of the initial complaint of the third party in June 2011, the investigation report, the memorandum referring the matter to the Assistant Secretary-General, OHRM, and the response from the United Nations Headquarters.

7. By memorandum dated 1 March 2012, the Registrar informed the Applicant that the Assistant Secretary-General, OHRM, decided not to pursue disciplinary proceedings against her on the basis of the investigation report. The Registrar confirmed to the Applicant that the matter was closed and that no related information was contained in her ICTY Human Resources file.

8. On 30 April 2012, the Applicant requested management evaluation of the decisions taken by the Registrar reflected in his 1 March 2012 memorandum to her, namely confirming to her that the matter was closed and that no related information related to it was contained in her ICTY Human Resources file, and "implicitly ... denying ... [her] repeated oral and written requests for access to specific documents ...".

9. On 2 May 2012, her request for management evaluation was rejected as not receivable, as the challenged "matter ... [did] not constitute a reviewable administrative decision".

10. On 30 July 2012, the Applicant filed the present application.
11. On 11 October 2012, the Tribunal held an oral hearing that the Applicant attended in person, and Counsel for the Respondent by videoconference.

Parties' submissions

12. The Applicant's principal contentions are:
 - a. The challenged decisions are subject to judicial review by the Dispute Tribunal under its Statute. The procedural errors of the Registrar and the ensuing referral to the Assistant Secretary-General, OHRM, affect the Applicant's rights by entailing possible disciplinary measures. These rights include the right to due process during the conduct of the proceedings. The procedural flaws were of such severity as to invalidate any further actions. It is irrelevant that the final decision was in the Applicant's favour. Furthermore, section 5.20 of ST/SGB/2008/5 clearly intends to protect the staff member at all stages of the proceedings. The Appeals Tribunal confirmed in *Nwuke* 2010-UNAT-099 that an alleged offender is entitled to certain administrative procedures under ST/SGB/2008/5 and that the Dispute Tribunal can determine the legality of the conduct of an investigation;
 - b. The procedures in referring the matter concerning the Applicant to the Assistant Secretary-General, OHRM, were incorrect and amount to a breach of the Applicant's right to due process under ST/SGB/2008/5 and staff rule 10.3:
 - i. The Registrar failed to apply the provisions of ST/SGB/2008/5. By referring the matter to the Assistant Secretary-General, OHRM, without conducting a separate formal investigation pursuant to sections 5.14 and 5.15 of ST/SGB/2008/5 with due notice to the Applicant, and without considering the alternative actions mandated in said Bulletin, he impinged on the Applicant's right to due process;

ii. The Registrar acted improperly and failed to fairly exercise his discretion pursuant to section 5.18 of ST/SGB/2008/5. This discretion is limited to the allegations which form the subject of the fact-finding investigation. The Registrar referred the matter concerning the Applicant to the Assistant Secretary-General, OHRM, on the basis of an investigation report into the conduct of another staff member. As the Applicant was not the immediate subject of the investigation, the Registrar abused his discretion. He breached the Applicant's right to due process under ST/SGB/2008/5, in particular, by failing to provide the Applicant with information and documents regarding the basis of the allegations against her and the reasons on which the referral to the Assistant Secretary-General, OHRM, is based. To substantiate her argument the Applicant refers to previous judgments of the present Tribunal and the case law of the former UN Administrative Tribunal;

iii. As confirmed in previous judgments of the Dispute Tribunal as well as the former Administrative Tribunal, it is a fundamental right of any individual, enshrined in the Universal Declaration of Human Rights, to know the basis of allegations brought against him or her. By continuously refusing the Applicant's requests for further information concerning her alleged breach of duty, the Registrar breached her right to due process;

c. The above-mentioned breaches are not cured by the final decision of the Assistant Secretary-General, OHRM not to pursue disciplinary proceedings against the Applicant. "[T]o be 'cleared of any charge of misconduct' ... is not the same as never to have been charged at all";

d. The improper practices of the Registrar, and their potential impact upon the Applicant's professional reputation, caused her emotional anxiety and moral distress. She suffered from insomnia and weight loss. The Applicant could not announce her decision of early retirement as early as she intended to.

13. The Respondent's principal contentions are:

a. The application is not receivable pursuant to article 2.1(a) of the Statute of the Dispute Tribunal. The referral of the case to the Assistant Secretary-General, OHRM does not constitute an administrative decision as it does not produce direct legal consequences in the legal order. It is a preliminary step before the actual disciplinary process. The Dispute Tribunal held in *Asswad*, Order No. 062 (GVA/2010) that the formal notification of allegations of misconduct, which initiates the disciplinary process, does not by itself carry direct legal consequences. *A fortiori*, neither does the preliminary referral. Furthermore, even if the referral were to be considered improper, the final decision to close the Applicant's case had the effect of curing any alleged irregularities that may have occurred during the preceding part of the process. The referral might only be reviewed by the Dispute Tribunal if the Administration had taken an action which affected the staff member's rights. The closing of the Applicant's case did not affect her rights. Thus, there is no administrative decision subject to the Dispute Tribunal's review under article 2.1(a) of its Statute;

b. The Applicant's due process rights under Chapter X of the Staff Rules were not violated, because a disciplinary process was not initiated. Pursuant to staff rule 10.3, only a formal notification of the allegations initiates the disciplinary process. Therefore, under ST/AI/371/Amend.1 (Revised disciplinary measures and procedures), the Applicant was not entitled to a copy of the Report and her claim that her due process rights had been violated is without merits;

c. No investigation into the conduct of the Applicant was initiated. She was only interviewed as a witness during an investigation into her supervisee's conduct. Had the Applicant been interviewed as an alleged offender, due process rights would have been guaranteed through the procedure set out in section 5.20 of ST/SGB/2008/5;

d. The referral was not based on improper motives, but on the conclusions of the investigation report and on sections 3.2, 3.3 and 5.18 of ST/SGB/2008/5;

e. As the Applicant was not the subject of an investigation, she is not entitled to receive the documents she requested. Even if the Applicant had been the subject of an investigation, she would not have been entitled to receive these documents at the stage of referral. ST/AI/371/Amend.1 stipulates that a staff member is only entitled to receive a copy of the documentary evidence if he/she is requested to respond to formal allegations of misconduct;

f. The Applicant is not entitled to compensation. As the decision not to pursue a case against her did not affect the Applicant's terms of appointment or contract of appointment, no violation of her rights occurred. The final decision not to pursue any disciplinary proceedings cured any alleged irregularities. The Applicant's claim that it would have been impossible to clear her name had she resigned before the matter was resolved is speculative. The Applicant did not suffer any injury and, for this reason, is not entitled to any compensation.

Consideration

Referral of the matter concerning the Applicant to the Assistant Secretary-General, OHRM

14. The Applicant requests the Tribunal to determine that the Registrar failed to apply the provisions of ST/SGB/2008/5, and failed to exercise his discretion under said Bulletin by referring her case to the Assistant Secretary-General, OHRM.

15. ST/SGB/2008/5 provides in its relevant parts:

Section 5

Corrective measures

5.14 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. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. ...

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

...

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question.

...

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to Chapter XI of the Staff Rules.

16. Staff rule 11.2 provides that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of Ombudsman, under conditions specified by the Secretary-General.

17. Section 5.20 of ST/SGB/2008/5 specifically provides for a right to appeal an alleged procedural irregularity during the preliminary investigation. Any alleged procedural flaw concerning the preliminary investigation has to be challenged pursuant to Chapter XI of the Staff Rules. Thus, a staff member who wants to challenge the proceedings of a preliminary investigation pursuant to section 5.20 of ST/SGB/2008/5 has to observe the provisions set out in staff rule 11.2. Further, it follows from the provisions quoted above that the preliminary investigation under ST/SGB/2008/5 has been established as an independent part of any disciplinary process. Therefore, measures taken on the basis of ST/SGB/2008/5 must not be considered as preliminary decisions that cannot be contested. On the contrary, section 5.20 of ST/SGB/2008/5 urges the concerned person to take appropriate action pursuant to Chapter XI of the Staff Rules.

18. By referring the matter concerning the Applicant to the Assistant Secretary-General, OHRM, pursuant to section 5.18(c) of ST/SGB/2008/5, the Registrar completed the preliminary investigation phase. On 21 October 2011, the Registrar informed the Applicant about this determination.

19. The Applicant had to observe the time-limits under staff rule 11.2(a) and (c) with regard to the 21 October 2011 decision to refer her case to the Assistant Secretary-General, OHRM. As per staff rule 11.2(c), the Applicant had until 20 December 2011 to submit a request for management evaluation. However, she did not do so until 30 April 2012, that is approximately over 4 months later.

20. Article 8.3 of the Tribunal's Statute stipulates that "[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation". In this respect, the Appeals Tribunal has consistently held that:

[T]he UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review. Time limits prescribed for administrative review (and management evaluation under the new system), which could be waived under the previous system, cannot be waived under Article 8(3) of the Statute of the Dispute Tribunal (UNDT Statute), due to a specific prohibition in this respect contained in Article 8(3). (*Ajdini et al.* 2011-UNAT-108; see also *Costa* 2010-UNAT-036, *Trajanovska* 2010-UNAT-074, *Barned* 2011-UNAT-169, *Muratore* 2012-UNAT-191)

21. It results from the foregoing that the Applicant's claim against the Registrar's decision to refer her case to the Assistant Secretary-General, OHRM is time-barred, and the Tribunal cannot but reject it.

Access to documents

22. Article 2.1(a) of the Dispute Tribunal's Statute provides:

The Dispute Tribunal shall be competent to hear and pass judgements on an application filed by an individual ... against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

23. Regarding the concept of an administrative decision, the former UN Administrative Tribunal defined it as "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order." (UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003); see also *Tabari* 2010-UNAT-030).

24. In the instant case, the Applicant had repeatedly asked for the disclosure of the investigation report as well as other documents. In his memorandum of 1 March 2012, the Registrar informed the Applicant about the decision of the Assistant Secretary-General, OHRM, not to pursue disciplinary proceedings against her. The Registrar further confirmed that the matter was closed and that no information related to it was in the Applicant's ICTY Human Resources file. He

did not, however, address the Applicant's requests for further information and access to documentary evidence. The absence of a formal response to the Applicant's requests has to be regarded as an implicit final refusal of them. Denying disclosing any documentary evidence concerning the Applicant's case may have direct legal consequences on the Applicant's rights as a staff member. Thus, it constitutes an administrative decision pursuant to article 2.1(a) of the Tribunal's Statute open to judicial review.

25. The Applicant argues that she has a right to receive documentary evidence concerning the allegations brought against her. Apart from ST/SGB/2008/5, she claims this right has its legal foundation in Chapter X of the Staff Rules as well as in the Universal Declaration of Human Rights.

26. Administrative Instruction ST/AI/371.Amend.1, setting out procedures for the implementation of Chapter X of the Staff Rules, provides in its relevant parts:

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted.

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters shall:

(a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;

...

27. Sections 5 and 6 of the above administrative instruction clearly restrict the right of a staff member to receive documentary evidence concerning allegations brought against him or her to cases in which the Assistant Secretary-General, OHRM, decides to pursue the case. Otherwise, the right to be granted such access does not arise. In the Applicant's case, the Assistant Secretary-General, OHRM decided not to pursue the matter and to close it. Thus, the Applicant has no right

to obtain the requested documents. Moreover, such a right is also not enshrined in the Universal Declaration of Human Rights.

28. Finally, the Tribunal emphasizes that the Applicant's case is closed and that her name is cleared of any charge. At the oral hearing, the Applicant did not allege that information related to this matter was kept in her ICTY Human Resources file. The Tribunal does not find it necessary for the Applicant to have access to documentary evidence of an investigation that has left no traces in her official personnel records.

29. Accordingly, the Applicant's request for access to documents concerning her case has no legal basis and has to be rejected.

Compensation

30. The Applicant seeks compensation under article 10.5(b) of the Tribunal's Statute for moral damages. In light of the Tribunal's above findings, it cannot but reject the Applicant's claim for compensation.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 21st day of December 2012

Entered in the Register on this 21st day of December 2012

(Signed)

René M. Vargas M., Registrar, Geneva