



**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

SMITH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**

Lennox S. Hinds

Claire Gilchrist

**Counsel for Respondent:**

Cristiano Papile, ALS/OHRM, UN Secretariat

Susan Maddox, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 7 January 2013, the Applicant, a Supervisor in the Publishing Section, Department for General Assembly and Conference Management (“DGACM”), filed an application contesting the Organization’s failure to give full and proper consideration to the applicable procedures with respect to investigating allegations of discrimination, harassment and abuse of authority against staff members of the Publishing Section.

2. By reply dated 6 February 2013, the Respondent addressed the merits of the issues raised, whilst submitting that the application is not receivable due to the fact that both the request for management evaluation and the application before the Tribunal were filed outside the applicable time limits. In addition, it was submitted that the Applicant lacked standing to contest the investigation panel’s findings because he filed the claim in his capacity as a staff representative.

## **Issues**

3. The issues of receivability in this case are as follows:

a. Was the request for management evaluation filed within the requisite time limit with the Management Evaluation Unit (“MEU”)? If it was, the Tribunal will consider, in sequence, the other issues hereunder. If it was not, the Tribunal will have no jurisdiction to do so.

b. Was the application filed with the Tribunal within the requisite time limit?

c. Does the Applicant have standing to contest the findings of the investigation panel responsible for reviewing the allegations of harassment and abuse of authority?

4. Further issues for consideration include the following:
  - a. Did the investigation panel follow proper procedures when reviewing the allegation filed by the Applicant?
  - b. Did the Assistant Secretary-General (“ASG”), Office of Human Resources Management (“OHRM”), act lawfully when she dismissed the complaint of the Applicant that he was the victim of harassment and abuse of authority?
  - c. Is the Applicant entitled to receive a copy of the investigation report?

### **Facts**

5. On 3 and 11 November 2011, the Applicant sent a letter on behalf of the staff of the Publishing Section, DGACM, to Mr. Shaaban, USG, DGACM, requesting an investigation into what he described as mismanagement and abuse of authority by Mr. Nandoe, Chief of the Publishing Section. The Applicant’s letter contained a 35-page annex detailing 48 acts of alleged gross negligence, abuse of authority and professional misconduct which the staff of the Publishing Section were complaining about.
6. On 21 November 2011, Mr. Shaaban established a three-person fact-finding panel. The terms of reference of the panel were given orally to its members on 21 November 2011 and confirmed in writing on 31 January 2012.
7. On 8 December 2011, the Office of Internal Oversight Services informed the Applicant that, after careful consideration, they considered that the matter would be more appropriately addressed by the relevant department in accordance with the terms outlined in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

8. That day, the fact-finding panel had a meeting with the Applicant, following which a record of the questions and answers discussed with the panel was provided to him. The Applicant later signed it to confirm its accuracy. The record of questions and answers included the following extracts:

[Panel member 1] said that whether we agree or not with a manager's decisions, those decisions were not something that the panel could investigate, but it could investigate individual incidents of harassment or improper behaviour. He stressed that the panel was interested in the factuality of the events. He explained that, in order to have action on a formal complaint, the alleged incidents needed to be confirmed through the provision of information on when the events took place and who was involved. ... He then suggested going through the annexes to the memo dated 11 November 2011 addressed to [the USG, DGACM], which contained the allegations, stressing to [the Applicant] that the panel would need to receive the names of the people involved and any witnesses.

...

[Panel member 2] also clarified that the panel would only investigate those incidents that fell under the scope of the Secretary-General's Bulletin on the prohibition of discrimination, harassment, including sexual-harassment, and abuse of authority (ST/SGB/2008/5).

The panel members and the interviewee went through the annexes, focusing on paragraphs 6, 8–9, 11, 13, 14, 15–17, 20–21, 23–26, 28–29, 32–33 and 38.

...

Asked why the people involved hadn't signed the memo themselves, Mr. Smith explained that they would have signed had it been a petition, but that in [sic] occasions like this one, it was more usual for the staff representative to sign on behalf of a group. There would be a vote and then one person would represent the others.

...

Mr. Smith said he would get back to the panel with regard to paragraphs 32 and 38. Also on 38, he was asked whether other derogatory names had been used; Mr. Smith said he would ask and get back to the panel.

**Mr. Smith said he was not personally involved in any of the incidents.** [emphasis added]

[Panel member 3] clarified that the document sent by Mr. Smith to Mr. Shaaban had been prepared by different people. The information had been compiled by Mr. Smith, then forwarded. Mr. Smith didn't verify each incident. ...

[Panel member 1] stressed that [the Applicant] was the representative, not the complainant, and that the complainants would have to provide the Panel with the facts relevant to their complaints. ...

...

[Panel member 3] asked Mr. Smith whether he understood the mandate of this panel and advised that the investigation would be conducted in accordance with the SGB. There were some things that the panel could focus on, but other things fell outside its mandate or jurisdiction. [The Applicant] said he understood.

9. On 9 January 2012, the Applicant provided the fact-finding panel with an amended version to the annex appended to the complaint addressed to Mr. Shaaban, identifying the individual staff members affected by each of the specific incidents. The Applicant's name appeared against seven out of 38 of the alleged violations being complained of, namely those identified by paras. 6, 7, 29, 31, 34, 35 and 38.

10. On 18 June 2012, the panel completed its fact-finding report.

11. On 9 July 2012, Mr. Shaaban released the summary of findings of the report of the investigation panel to Ms. Catherine Pollard, Assistant Secretary-General for Human Resources Management, with a copy to the Applicant, Mr. Nandoe and Ms. Beswick. The summary stated that:

3. ... [T]he Panel did not investigate allegations provided in the complaint relating to the diversion of funds expended for outsourced services to non United Nations entities, as referred in the submitted complaint.

4. ... [E]vidence indicated that Mr. Nandoe's behavior may not always have comported with the Organization's best practices relative to the core values and managerial competencies.

5. ... [A]fter careful examination of the complaint, the Panel ruled that twenty-eight counts of alleged harassment and abuse of authority out of a total of thirty eight were judgmental claims in

nature for which the factual basis could not be established, and decided to limit its investigation to the other ten counts.

12. Accordingly, the Panel decided to limit its investigation to allegations described in paragraphs 8, 9, 11, 13, 16, 17, 23, 24, 25 and 28 of the annex to the complaint sent to the USG, DGACM. In summary, the panel stated in paragraph 4 of the report that:

The evidence presented to the Panel did not support the allegations of harassment, abuse of authority or other prohibited conduct as defined in ST/SGB/2008/5.

13. On 16 July 2012, the Applicant requested a copy of the panel's report. On 18 July 2012, the Applicant was informed that ST/SGB/2008/5 did not contain any provisions for the complainant to be provided with a copy of the report.

14. On 7 September 2012, the Applicant requested management evaluation in the following terms:

Failure by Ms. Catherine Pollard, Assistant Secretary-General for Human Resources Management [ASG, OHRM], and the Investigative Panel ("the Panel") on harassment and abuse of authority by Mr. Narendra Nandoe, Chief [Publishing Section, DGACM], to follow proper procedures in respect of the allegations of prohibited conduct against Mr. Nandoe resulting in the premature dismissal of the complaint against him.

15. On 3 January 2013, the MEU informed the Applicant that his request for management evaluation was not receivable on the ground that he had no standing to challenge the decision and conclusions of the investigation related to prohibited conduct under the bulletin since he had not been identified as a person who had been subjected to mistreatment.

16. On 7 January 2013, the Applicant filed the present application. The Respondent filed his reply on 6 February 2013.

17. On 13 February 2013, by Order No. 42 (NY/2013), the Tribunal requested the Applicant to provide a concise statement identifying the facts in support of his contention that he had personally been subjected to treatment that was in non-compliance with the terms of his appointment. The Applicant was also ordered to identify which of the alleged incidents that affected him personally had been submitted to the MEU. Finally, the Applicant was asked to respond to the Secretary-General's contention that his application was not receivable. The Applicant responded to the Tribunal's Order on 22 February 2013.

### **Consideration**

18. Before considering the substantive merits of the claim the Tribunal is required to determine whether the claim is receivable.

#### *Time limits*

19. The Respondent submits that the Applicant's request for management evaluation of the findings of the fact-finding panel was submitted out of time and that the present appeal is therefore not receivable.

20. Staff rule 11.2(c) states that a "request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

21. The Applicant stated in his application that he was contesting the decision that was notified to him on 9 July 2012. A further review of the evidence provided to the Tribunal indicates that on that date the Applicant was carbon copied on the report of the fact-finding panel that was sent by Mr. Shaaban to Ms. Pollard. The introductory paragraph of the report starts off by stating that it is addressing a complaint that "was filled on 11 November 2011 on behalf of the staff of

the Publishing Section by Mr. Alex O'Keith Smith, Staff Representative of Unit 5, Publishing Section”.

22. A review of the factual circumstances indicates that Ms. Gilchrist, legal representative for the Applicant, initially attempted to file the request for management evaluation at 4:54 p.m. on Friday, 7 September 2012. This was the last day for submitting a request for management evaluation under staff rule 11.2(c). However, due to a technical problem, the email bounced back at 5:21:16 p.m. that same day, Friday 7 September 2012. In the circumstances, the Applicant still had 6 hours and 48 minutes up to midnight on 7 September to submit a request for management evaluation within the period of 60 days as required.

23. At 12:45 p.m. on Monday, 10 September 2012, Ms. Gilchrist sent the MEU the following email:

On Friday afternoon, we filed a request for management evaluation on behalf of Alex Smith. We then received the below message, indicating the email was over capacity for the administrator. We will therefore be resending the filing shortly, in batches.

Thank you and best regards,

Claire Gilchrist  
Stevens, Hinds & White, P.C.

-----Original Message-----

From: Mail Delivery Subsystem

Sent: 09/07/2012 17:21:16

Subject: Returned mail: see transcript for details

----- The following addresses had permanent fatal errors -----

<meu@un.org>

(reason: 552 Message size exceeds fixed maximum message size set by administrator)

----- Transcript of session follows -----

... while talking to hqsmtphub.un.org.:

>>> MAIL From:<claire.gilchrist@gmail.com> SIZE=26283830

<<< 552 Message size exceeds fixed maximum message size set by administrator

554 5.0.0 Service unavailable



Reporting-MTA: dns; node002-ptc.un.org  
Received-From-MTA: DNS; NYSV0251.ptc.un.org  
Arrival-Date: Fri, 7 Sep 2012 17:21:14 -0400  
Final-Recipient: RFC822; meu@un.org  
Action: failed  
Status: 5.3.4  
Diagnostic-Code: SMTP; 552 Message size exceeds fixed maximum  
message size set by administrator  
Last-Attempt-Date: Fri, 7 Sep 2012 17:21:16 -0400

24. The Tribunal notes the absence of any explanation as to why such a refiling “in batches” could not have taken place on 7 September 2012 and why the fact of non-service of the request went unnoticed until mid-day on Monday, 10 September 2012. The question therefore arises as to the reason resulting in the request for management evaluation not being presented within time. In particular, was it (a) as a result of a failure of the system for filing requests for management evaluation or (b) a failure on the part of the Applicant’s legal representative to exercise due diligence in ensuring a timely filing.

25. The Tribunal had regard to the following principles in considering the issue of the timeous filing of requests for management evaluation:

a. The MEU website has provided sufficient guidance and an appropriate system for the filing of requests for review;

b. The onus is on the applicant and his or her legal representatives to submit the request within the time limit;

c. Where an applicant engages a legal representative, there is a professional duty on the representative to act in the client’s best interest by ensuring that the requisite time limit is complied with;

d. Where a filing is left to the eleventh hour of the final day, due diligence requires that appropriate steps are taken to allow for sufficient time to make an electronic filing and to monitor its progress so as to establish that it has been effected and, if it has not, to adopt alternative means of doing so.

26. In *Romman* 2013-UNAT-308, the United Nations Appeals Tribunal stated that it “has repeatedly held that it “has been strictly enforcing, and will continue to strictly enforce, the various time limits” (see also *Mezoui* 2010-UNAT-043; *Ibrahim* 2010-UNAT-069; *Islam* Order No. 7 (UNAT/2010); *Meron* Order No. 42 (UNAT/2011); and *Harding* Order No. 44 (UNAT/2011)).

27. The Applicant was required to file a request for management evaluation within 60 days from the date on which he received notification of the various decisions that he challenges.

28. The Applicant filed a single complaint regarding “the various decisions that he challenges” and the Organization completed a single investigation report regarding these “various decisions”. As expressed in *Nguyen-Kropp* UNDT/2013/028 and *Postica* UNDT/2013/029, it was not until the investigation had been completed and a report of its findings provided to him, in this case on 9 July 2012, that the Applicant could consider that a decision affecting his rights had been taken, with any request for management evaluation therefore being due by Friday, 7 September 2012.

29. It is unarguable that Counsel for the Applicant left the filing of the request for management evaluation to the eleventh hour and, having done so, failed to monitor its effective delivery by electronic means. As a consequence thereof she did not leave herself in a position to institute the necessary remedial measures for which there was sufficient time to do so before time expired at midnight on the final day. Counsel for the Applicant adopted the measure of filing the voluminous documents in batches on Monday, 10 September 2012. It is clear that had she monitored whether the filing had been properly effected, she would have discovered the problem shortly after submitting the request for management evaluation (see para. 22–23). Accordingly, she would still have had more than six hours to ensure an effective filing.

30. The fact that the Applicant was able to submit the request on the following Monday shows that it could have been similarly effected on Friday, 7 September 2012, as there was sufficient time to do so. Accordingly, the Tribunal finds that despite the technical problems that were encountered, it was still feasible to make a timely request for management evaluation.

31. The Tribunal finds that the activating cause of the request for management evaluation being filed out of time was failure on the part of the Applicant's legal representative and not due to any failure by the MEU.

32. The Tribunal finds that the claim is not receivable. In the circumstances, it is not necessary to consider the remaining issues identified at paras. 3 and 4 above.

#### *Costs*

33. Had due diligence been applied on the part of Mr. Smith's legal representative, his claim would have been in compliance with the mandatory requirement regarding the filing of his request for management evaluation under the rules. As a consequence of this failure, the parties themselves, and the Tribunal, have incurred unnecessary costs and expenditure of time and effort. The issue to consider is whether the Tribunal has power to impose any sanction against the party in default and, in the particular circumstances of this case, against the Applicant's legal representative.

34. Article 10.6 of the Dispute Tribunal's Statute states that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

35. The costs incurred by the parties and the Tribunal were avoidable but they were not due to any act which, despite being unreasonable or even negligent, could properly be described as a "manifest abuse of proceedings" before the Tribunal within the meaning of art. 10.6 of the Tribunal's Statute.

36. The Tribunal's Statute and Rules of Procedure do not make provision for the imposition of a sanction against either party for conduct that does not amount to manifest abuse albeit it may be frivolous, vexatious, negligent, unreasonable or otherwise misconceived. Until such time as the General Assembly considers it appropriate to amend the Statute and the Rules of Procedure of the Tribunals to deal with such conduct, the loss of a right to a judicial determination of the merits of one's case is the only salutary lesson to parties to observe the requirements under the Staff Rules, the Statute and the Rules of Procedure of the Tribunals, and, regrettably, unnecessary costs will continue to be incurred.

37. The Application is not receivable. No order for costs will be made.

### **Conclusion**

38. The application is dismissed.

*(Signed)*

Judge Goolam Meeran

Dated this 17<sup>th</sup> day of December 2013

Entered in the Register on this 17<sup>th</sup> day of December 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York