



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

IVANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Joseph Grinblat

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision of the Under-Secretary-General (“USG”), Department of Economic and Social Affairs (“DESA”), dated 28 February 2011, not to take further action in response to his complaint of harassment and abuse of authority, including his refusal to provide him a copy of the investigation report. The decision was made following the finding made by the Investigation Panel appointed by the USG/DESA that the alleged harasser “may not necessarily be in breach” of the Secretary-General’s bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The Applicant requests the Tribunal to find that his due process rights were breached, that a copy of the report from the Investigation Panel be produced to him, and that following the production of the investigation report he be allowed to submit an updated appeal. Further, the Applicant seeks damages equal to at least one year’s salary.

3. The Respondent contends that the application should be dismissed on the grounds that the investigation into the Applicant’s complaint was done in accordance with the applicable rules. The Respondent asserts that the case was closed in accordance with ST/SGB/2008/5 following the submission by the Investigation Panel of its report which indicated that no prohibited conduct took place.

Relevant background

4. On 12 April 2010, the Applicant submitted via email a letter entitled “Work Place Harassment” and requested “that appropriate action should be taken to prevent any further recurrence of this harassment, and to compensate [him] for [his] sufferings”. In the letter, the Applicant alleged that he had been the victim of work place harassment and abuse of authority since 2004.

5. On 3 August 2010, the Chief, Personnel Section, Executive Office, DESA, informed two staff members that they had been appointed “to conduct a fact-finding investigation of a case of allegation of harassment, in accordance with ST/SGB/2008/5”. On 13 August 2010, the Investigation Panel completed an investigation work plan for the purpose of investigating the Applicant’s allegations and, on 9 September 2010, the Investigation Panel interviewed the Applicant.

6. On 7 December 2010, the Applicant received a memorandum from the Executive Officer, DESA, containing a summary of the Investigation Panel’s findings into his complaint, which stated that the Investigation Panel had concluded that “the conduct of [his chief] may not necessarily be in breach of ST/SGB/2008/5”.

7. On 9 December 2010, the Applicant acknowledged receipt of the 7 December 2010 memorandum, stating that he was “not satisfied with the summary of the findings of the Investigation Panel. [He] would appreciate it very much if [the Executive Officer] could provide [him] with the full report of the fact-finding investigation. Learning the facts established by the Investigation Panel and contained in this report will allow [him] to prepare detailed comments”.

8. On 17 December 2010, the Executive Officer, DESA, responded to the Applicant, informing him “that pursuant to ST/SGB/2008/5, the investigation is confidential and the final report is with the Head of Department for a final decision in accordance with section 5.18 of ST/SGB/2008/5”.

9. On 28 February 2011, the USG/DESA responded to the Applicant’s 14 February 2011 request that he be provided with an update regarding the status of his complaint, informing him that “[i]n view of the conclusion by the Investigation Panel, no further action will be taken by [DESA] with regard to your complaint”.

Procedural history

10. On 28 March 2011, the Applicant requested management evaluation of “the decision of the USG of DESA, given to [him] on 3 March 2011, that rejects [his]

complaint of 12 April 2010 of being the victim of harassment and abuse of authority from the Director of the Population Division”.

11. On 27 April 2011, the Management Evaluation Unit (“MEU”) found that it “was satisfied that the contested decision was not unlawful; that there was no evidence that the decision not to take further action with respect to [the Applicant’s] complaint of harassment and abuse of authority was improperly motivated; and that the contested decision constituted a proper exercise of administrative discretion”.

12. On 23 May 2011, the Applicant filed the present application. On 24 June 2011, the Respondent filed his reply to the application.

13. On 29 June 2011, the Applicant filed a motion for leave to submit comments on the reply and attached the said comments. That same day, the Respondent informed the Tribunal that he intended to oppose the Applicant’s motion for leave by 1 July 2011.

14. On 1 July 2011, the Respondent submitted a response to the Applicant’s motion in which he objected to the comments of the Applicant “in the interests of judicial economy and justice” and setting forth his reasons for objecting. The following day, the Applicant submitted comments on the Respondent’s response of 1 July 2011.

15. On 5 July 2011, the Tribunal (Judge Ebrahim-Carstens), by Order No. 168 (NY/2011), informed the parties that it “does not intend to take a decision as to whether to admit the information as submitted by the Applicant after the Respondent’s reply of 24 June 2011 until such a time that the matter can be discussed at a case management hearing” and ordered that no further filing be submitted unless directed by the Tribunal.

16. On 5 May 2013, the undersigned Judge was assigned to the present case.

17. On 23 October 2013, by Order No. 268 (NY/2013), the Tribunal requested that the parties file closing submissions.

18. On 15 November 2013, the Applicant filed his closing submissions in response to Order No. 268, stating that he was “respectfully request[ing] the Tribunal to order that a copy of the full report of the Investigation Panel be given to him, to find that [he] was the victim of work-place harassment, and to order that he should receive an amount equal to at least one year salary to compensate him for the violation of his rights for due process, and for the years of suffering which he endured”.

19. That same day, the Respondent filed his closing submissions in reply to Order No. 268 submitting that the Applicant’s “allegations were properly addressed in accordance with the formal procedures set out in ST/SGB/2008/5 (*Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority* (the Bulletin), and the Applicant’s rights were fully respected”. The Respondent stated that, therefore, the application had no merit and should be dismissed.

Consideration

Receivability

20. The Applicant received the contested decision on 28 February 2011 and requested management evaluation on 28 March 2011. On 29 April 2011, he was informed that the Secretary-General had decided to endorse the MEU’s recommendations regarding the lawfulness of the decision to take no further action in response to the Applicant’s complaint of harassment and abuse of authority, including the refusal to provide him with a copy of the investigation report. The present application was filed on 23 May 2011 and meets all the receivability requirements of art. 2 of the Dispute Tribunal’s Statute.

Investigation panel’s report

21. The Tribunal will first consider the Applicant’s submission regarding his right to obtain a copy of the Investigation Panel’s investigation report.

22. ST/SGB/2008/5 states that the procedure to be followed after receiving a formal complaint or report on harassment and abuse of authority is as follows:

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.

...

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

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

(a) If the report indicates that no prohibited conduct took place, *the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;* [emphasis added]

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. *The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;* [emphasis added]

(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. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

23. In accordance with the mandatory provisions of sec. 5.17 of ST/SGB/2008/5, the Investigation Panel must prepare a detailed report, giving a full account of the facts they have ascertained during their investigation together with the documentary evidence in support of their findings. Upon completing their report, the Investigation Panel must then transmit a copy of its report to the responsible official so that he or she can take one of the three courses of action described in sec. 5.18 of ST/SGB/2008/5. As stated in sec. 5.18(a), if the report concludes that no prohibited conduct was carried out by the alleged offender, the responsible official will close the case and inform the alleged offender and the aggrieved individual of the Investigation Panel's findings and conclusions in the form of a summary.

24. On 28 February 2011, the Applicant was further informed by the same official that, in view of the conclusions of the Investigation Panel regarding the conduct of the alleged offender, no further action would be taken.

25. It results from the above that the Applicant is not entitled to receive a detailed copy of the investigation report but, rather, only a summary of its findings and conclusions which, per the evidence submitted by the parties, the Applicant received from the USG/DESA on 7 December 2010.

26. In conclusion, the legal provisions of ST/SGB/2008/5 were respected by the Investigation Panel and by the responsible official with regard to which course of action to take in response to the Applicant's request for a copy of the full report of the Investigation Panel.

27. The Tribunal notes that, in *Adorna* UNDT/2010/205 and *Haydar* UNDT/2012/201, the Dispute Tribunal expressed that, the applicable rule notwithstanding, the decision as to whether to provide an aggrieved individual with a copy of an Investigation Panel's report should be taken on a case by case basis, including whether the aggrieved individual presented exceptional circumstances for her or his request. Nevertheless, in the present case, the Applicant did not identify any exceptional circumstances that would justify diverging from the requirement that the Applicant only be provided with a summary of the Investigation Panel's findings.

Case closure

28. The Tribunal will further analyze the Applicant's submission regarding the decision taken by the responsible official to not take further action, and close the case, on his complaint of work place harassment.

29. The summary of the findings and conclusion of the Investigation Panel states:

The panel could establish that materials mentioned by [the Applicant] in his complaint have either been used in other documents produced by the Division without attributing authorship, or are still under revision by [redacted in original] for quality assurance purposes. The panel could also establish that medical reasons provided a robust explanation as to why some of [the Applicant]'s mission proposals were not approved. The panel could not establish that the assignment of administrative functions performed by [the Applicant] were attributable to [redacted in original] direct instructions, or that they were unusual or unreasonable tasks for a professional to perform. Moreover, the panel considers that [redacted in original] delayed but did not deny approval to publish technical work. Finally, the panel could not establish that the selection process for positions mentioned by [the Applicant] had been unduly influenced by [redacted in original].

30. In the present case the Tribunal concludes that there is no evidence that the Investigation Panel did not gather sufficient evidence before issuing its report. The Respondent clarified that the medical reasons to reject some of the Applicant's mission related proposals, as expressed and accepted by the Investigation Panel in the summary of its findings, applied only to some missions and not to the entire

period of 2006 to 2009, mentioned by the Applicant.

31. In accordance with the Staff Rules and Regulations ST/SGB 2011/1, the entire discretion as to whether or not to initiate or take action against a staff member rests solely with the Secretary-General. As stated in *Ryan* UNDT/2010/174, it is not for the Tribunal to order the Secretary-General to take the initiative of instituting disciplinary proceedings against a staff member.

32. The Tribunal observes that the decisions considered by the Applicant as being part of a pattern of abusive behavior by his supervisor could have been brought up directly to, and discussed with, his supervisor. Further, in accordance with sec. 5.1 of ST/SGB/2008/5, “individuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred”. More importantly, as expressed in sec. 4 (“Preventive measures”) of ST/SGB/2008/5, the informal mechanisms offered by the Organization provide a real and effective opportunity for staff members to resolve such conflicts, including by seeking the assistance of a third party (e.g., Ombudsman office, staff counsellor, human resources officer, staff representative, etc.).

33. Consequently, the Applicant’s appeal against the decision by the USG, DESA not to take action in response to his complaint for harassment and abuse of authority, including his refusal to provide him a copy of the investigation report, is to be rejected.

Conclusion

In light of the foregoing the Tribunal DECIDES:

34. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 25th day of February 2014

Entered in the Register on this 25th day of February 2014

(Signed)

Hafida Lahiouel, Registrar, New York