UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/018
Judgment No.: UNDT/2015/047
Date: 9 June 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

BELKHABBAZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 2 May 2014, the Applicant, a former Legal Officer with the Office of Staff Legal Assistance ("OSLA"), Office of Administration of Justice ("OAJ") contested several decisions in relation to an investigation of misconduct, which she described as follows:

> 1) Decision to refer allegations of misconduct against [her] to the [Assistant Secretary-General for Human Resources Management] following the conclusion of an illegal investigation by an incompetent investigative body;
>
> 2) Failure to make a decision on whether to pursue the case as a disciplinary matter;
>
> 3) Implied decision to hold the matter in indefinite abeyance with wilful disregard for [her] right to bring the matter to a close;
>
> 4) Failure to provide [her] with a complete investigation report, including all attachments and annexes;
>
> 5) Decision to place a note into [her] official status file amounting to a de facto "do not hire";
>
> 6) Overall decision and motivation to take these decisions against the Applicant in retaliation for having filed a complaint against [the] Chief OSLA and for challenging the OAJ Executive Director's [("ED/OAJ")] decisions in the formal system of administration of justice.

Facts

2. On 27 April 2012, the Applicant filed a complaint based on ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the Chief, OSLA—her First Reporting Officer ("FRO")—as well as against one of her former colleagues at OSLA.

3. By written declaration of 7 June 2012, further complemented on 13 June 2012, the above mentioned former colleague reported to the ED/OAJ, through the Chief, OSLA, that the Applicant had verbally insulted and threatened her on 31 May 2012 during an encounter at UN premises. The Chief, OSLA,

noted that he considered that the Applicant's remarks did also constitute a threat to him.

4. By e-mail dated 11 July 2012, the ED/OAJ, informed the Applicant of the allegations of verbal threat made by her colleague, as well as those made by the Chief, OSLA, and requested her to provide comments on the matter, which she did on 23 July 2012.

5. The ED/OAJ considered the matter within the framework of ST/AI/371 (Revised disciplinary measures and procedures) and concluded that the information before her warranted the conduct of an investigation. She recorded the reasons for her decision in a note for the file dated 18 September 2012.

6. By letter of 21 September 2012, the ED/OAJ notified the Applicant that there was "reason to believe that [she] had engaged in conduct for which a disciplinary measure may be imposed within the meaning of para. 2 of ST/AI/371 as amended", and that, accordingly, she would "appoint a panel to conduct an investigation to determine whether an encounter took place on 31 May 2012 between Ms. […] and [the Applicant] in which [the latter] made a threat against Ms. […] and/or [the Chief, OSLA]". The same fact-finding panel that had been constituted to review the Applicant's complaint of 27 April 2012 against her FRO and her former colleague, was also tasked with investigating the complaint made against the Applicant by her FRO and said former colleague. The panel members interviewed the Applicant on the complaints made against her during their visit to Geneva in December 2012.

7. On 19 November 2012, the Applicant requested management evaluation of, among other things, the above-noted decision of 21 September 2012. However, by e-mail dated 5 February 2013, the Applicant withdrew this request for management evaluation. By letter dated 6 February 2013, the Chief, Management Evaluation Unit ("MEU"), Office of the Under-Secretary-General for Management, informed the Applicant that, on the basis of her e-mail dated 5 February 2013, MEU would proceed to close her respective file.

8. Following an investigation that included interviews with eleven witnesses, the fact-finding panel issued its report on the complaint made against the Applicant on 10 March 2013, and shared it with the ED/OAJ on 1 April 2013. The report concluded, among other things, that it was "more likely than not" that "an encounter had occurred between Ms. […] and the Applicant on May 31, 2012 in essentially the way that Ms. […] described it", and that "it was reasonable for Ms. […] and [the Chief, OSLA] to interpret this as being a threat against each of their careers (but not a physical threat)".

9. On 17 April 2013, the panel submitted to the ED/OAJ an addendum to its report, dated 9 April 2013, and by letter dated 26 April 2013, sent by email of 29 April 2013, the Applicant was informed that following a review of the findings of the panel, the ED/OAJ had concluded that there was sufficient evidence indicating that the Applicant had engaged in wrongdoing that could amount to misconduct, thus deciding to refer the matter to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), in accordance with ST/AI/371/Amend.1, which she did on the same day. In her letter of 26 April 2013, the ED/OAJ shared with the Applicant a summary of the findings and conclusions of the investigation report.

10. In the meantime, i.e. since 26 March 2013, the Applicant was placed on sick leave, on which she remained until her separation from service on 4 April 2014 following the non-renewal of her fixed-term appointment.

11. On 27 June 2013, the Applicant filed a request for management evaluation ("the first request") contesting the 26 April 2013 decision of the ED/OAJ to refer the matter of the complaint made against her to the ASG/OHRM.

12. By e-mail dated 6 August 2013, the Applicant requested the ASG/OHRM to provide her with a copy of the investigation report, together with its addendum, which she was provided with on 17 August 2013.

13. By e-mail dated 21 August 2013, the Applicant confirmed receipt of the investigation report and of its addendum, but requested OHRM to also send her the annexes to the investigation report. By the same e-mail, she also requested to be advised of the next step in the process.

14. By e-mail of 5 September 2013, sent in reply to her 21 August 2013 request, the Applicant was informed that:

> ST/AI/371, as amended ("Revised disciplinary measures and procedures"), sets out the procedures applicable to matters involving possible misconduct. Among other things, section 6 of ST/AI/371 provides that staff members shall be provided with a copy of the documentary evidence of the alleged misconduct only if the matter is to be pursued as a disciplinary case.
>
> In your case, a decision to pursue this matter as a disciplinary case has not been made. Instead, in view of the fact that you were on certified sick leave at the time that the investigation report was referred to OHRM, and in accordance with the practice then in effect, the matter was held in abeyance. Accordingly, the provisions of ST/AI/371 have not given rise to any entitlement, on your part, to receive the investigation report and supporting documentation.
>
> It is noted that you have been provided with a copy of the investigation report. This was done on an exceptional basis and at the discretion of the Organization, and in consideration of relevant factors, including your expressed interest in receiving a copy of the investigation report and the fact that a decision had not been made regarding whether to pursue the matter as a disciplinary case. However, in view of the strictly confidential nature of the annexes to the investigation report, it is considered that it would be appropriate to provide them to you only in the event that a decision were made to pursue this matter as a disciplinary case under ST/AI/371.

15. By e-mail dated 18 December 2013, the Applicant again requested to be provided with "all the annexes to the investigation report". Additionally, she reiterated her request to be informed of the action that would be taken on the referral of the matter of the complaint made against her and when she could expect to receive a decision on it.

16. The Applicant was informed by e-mail of 20 December 2013 that she should refer to the content of the e-mail sent to her on 5 September 2013. The Applicant replied, on the same day, noting that she was no longer on certified sick leave and that she "need[ed] closure to this matter as soon as possible". She added that she was "waiv[ing] any right not to receive this decision while on sick leave", requesting "to be informed of a decision on whether this matter w[ould] be pursued as a disciplinary case as soon as possible". She again reiterated her request to be provided with a copy of the investigation report annexes. Finally, she wrote that in the event she would not be issued with a final decision by 15 January 2014, she would understand the silence as an implied decision not to provide her with a decision on this matter.

17. By e-mail of 15 January 2014 to the Applicant, the Chief, Administrative Law Section, OHRM, noted the following:

> We have been informed that you are presently on certified sick leave and that your appointment with the Organization has been extended solely to enable you to utilize your sick leave entitlement under sections 4.9 and 4.10 of ST/AI/2013/1 [Administration of fixed-term appointments].
>
> Given that your appointment has been extended solely to enable you to utilize your sick leave entitlement, a decision regarding whether to pursue this matter as a disciplinary case will not be made at this time. Instead, it is anticipated that, following your separation from the Organization, a note will be placed in your official status file, indicating [that] the Administrative Law Section, OHRM, should be contacted in the event that you should become re-employed by the United Nations Common System (UNCS). Should you become re-employed by the UNCS in the future, a decision regarding whether to pursue the matter as a disciplinary case may be made.
>
> You will be provided the opportunity to comment on the note to file prior to it being placed in your official status file.

18. On 23 January 2014, the Applicant filed a request for management evaluation ("the second request") contesting the implied decision not to render a decision on whether to pursue the matter as a disciplinary case, and the decision to place a note on her official status file following her separation from service, stating that the decision had been communicated to her on 15 January 2014. In

particular, under the section "[a]dministrative decision to be evaluated" in the management evaluation request form, the Applicant wrote:

> - Failure to render a decision whether or not the matter will be pursued as a disciplinary case;
> - Decision to hold the matter in abeyance in violation of the Organization's rules and procedures and in gross violation of the Applicant's due process rights;
> - Failure to take the necessary procedural steps following an information investigation as required under ST/AI/371 and ST/AI/371/Amend.1;
> - Failure to provide Applicant a copy of the annexes to the investigation report despite her requests;
> - Subjecting Applicant to an illegal preliminary investigation conducted by an illegal incompetent body in violation of Applicant's due process rights;
> - Decision to conduct a preliminary investigation against Applicant in retaliation for Applicant filing a complaint against her FRO pursuant to ST/SGB/2008/5 and for exercising her right to appeal in the formal and informal justice system;
> - Decision to place a note in Applicant's official status [file] amounting to a de facto "do not hire";
> - Delaying to an uncertain future time the decision whether or not to pursue the matter as a disciplinary case.

19. By letter of 24 January 2014, which the Applicant contends having received on 3 February 2014, the MEU notified her that her first request for management evaluation of 27 June 2013 was not receivable, as the decision contested was only a preparatory decision, the legality of which could only be disputed in light of a final decision, which was absent in her case.

20. The Applicant filed the present application on 2 May 2014, and the Respondent submitted his reply on 3 June 2014.

21. On 9 June 2014, the Respondent provided the Tribunal with the reply of the Chief, MEU, to the Applicant's second request for management evaluation of 24 January 2014, which had been issued on 5 June 2014, stating that the Applicant's claims were not receivable.

22. A case management discussion was convoked for 27 May 2015; however, it was cancelled due to the Applicant's unavailability. The latter also filed a "request for counsel assistance" in the proceedings before the Tribunal.

23. By Order No. 116 (GVA/2015) of 9 June 2015, the Tribunal decided that the case would be considered on the papers.

Parties' submissions

24. The Applicant's principal contentions are:

a. The investigation launched against her was in fact merely used as a means of retaliation for her having filed a complaint of harassment and abuse of authority against her FRO. Further, the investigation violated her due process rights as it was carried out by an incompetent body and in an illegal manner. Indeed, the same fact-finding panel was also tasked with investigating, at the same time, her complaint against her FRO under ST/SGB/2008/5, which was procedurally incorrect; the fact-finding panel was moreover unlawfully constituted. The refusal to provide her with the complete investigation file, including annexes, is another procedural irregularity;

b. The decision of the ED/OAJ, concluding that she had engaged in wrongdoing and referring the matter to the ASG/OHRM, was also motivated by bias and retaliation against her for refusing to withdraw her complaint against her FRO, and for using the formal system of administration of justice; indeed, no reasonable person could conclude that the facts alleged, even if proven to be true, could possibly amount to misconduct;

c. The failure to make a decision on her case, in line with ST/AI/371, was in breach of the letter and spirit of said administrative instruction, and constitutes an abuse of authority. Indeed, the decision to put the matter in abeyance for the alleged reason that she was on certified sick leave was not made in good faith; rather, it was a deliberate action to further frustrate her,

to keep her in a state of uncertainty, and to damage her reputation among her peers;

d. The decision to place a note in her file amounts to a *de facto* "do not hire" note, and is not one of the options of measures listed under sec. 9 of ST/AI/371; hence, it is unlawful;

e. In view of the above, she mainly seeks rescission of the contested decisions. She also asks for an award of "One Million Dollars as compensation for the illegal and immoral actions of the [ED/OAJ] and OHRM in facilitating the enumerated illegal actions and decisions", as well as "One Hundred Thousand Dollars for the moral damages and harm to reputation caused to [her] as a result of these unlawful decisions";

f. In addition, she requests access to her e-mail account in order to provide missing supporting documentation or, in the alternative, for the Tribunal to order that the Respondent provide all documentation in his possession leading to the contested decisions;

g. Finally, she asks that all related negative information be removed from her official status file, and that the actions of the ED/OAJ, and those of OHRM officials be referred for accountability purposes to the Secretary-General.

25. The Respondent's principal contentions are:

a. The application is not receivable:

i. The decision to initiate an investigation into the Applicant's conduct is not an administrative decision capable of appeal, as it is not a final decision but only a preparatory step in a procedure that may or may not lead to a decision to impose an administrative or disciplinary measure on her. In the alternative, even if the decision to investigate the Applicant is considered to be an administrative decision, its challenge is not receivable as the Applicant missed the applicable time limits to formally contest it;

ii. The decision to refer the matter to the ASG/OHRM after investigation does not constitute a challengeable administrative decision either, since it is also a mere preparatory step in the procedure. In the alternative, if the decision to refer the investigation report to the ASG/OHRM were to be considered by the Tribunal as an administrative decision, it is submitted that the Applicant missed the applicable time limits to formally contest it;

iii. The decisions to defer consideration of whether to pursue the matter as a disciplinary case, and not to provide the Applicant with annexes to the investigation report are not administrative decisions, as none of them produces any direct consequences in the legal order or on the Applicant's terms or conditions of appointment. In the alternative, even if these decisions were to be considered appealable administrative decisions, the Applicant missed the 60-day time limit to request management evaluation;

iv. As for the "anticipated decision" to place a note on the Applicant's official status file, the application before the Tribunal is premature since, to date, no such note has been placed in the Applicant's file, nor has she been requested to comment on the placement of such a note. The placement of a note on her file is being deferred pending the outcome of this case;

v. Finally, with respect to the "overall decision and motivation to take these decisions against the Applicant in retaliation for having filed a complaint […] and for challenging […] decisions in the formal system of administration of justice", as stated by the Applicant, such assertion does not identify any administrative decision that is capable of challenge before the Tribunal;

b. In case the Tribunal were to reject one or more of the above arguments on receivability, it is submitted that, based on a number of arguments, the Applicant's claims are without legal merit;

c. In view of the above, the application should be dismissed in its entirety, and costs pursuant to art. 10(6) of the Tribunal's Statute should be awarded against the Applicant as her application amounts to a manifest abuse of proceedings.

Consideration

26. In her application, the Applicant listed in detail six decisions she wished to contest before the Tribunal (see para.1 above). Considering judicial economy, the Tribunal will first examine the receivability of each of the six contested decisions successively. Indeed, the Tribunal recalls the scope of its jurisdiction as per art. 2.1(a) of its Statute, which provides:

> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, 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.

27. It results from that provision that for an application to be receivable, the contested decisions have to be "administrative decisions" under the provisions of the Tribunal's Statute. It is well-established jurisprudence that the Appeals Tribunal adopted the following definition of an administrative decision (see *Al Surkhi et al.* 2013-UNAT-304), as developed by the former Administrative Tribunal of the United Nations in *Andronov* (Judgment No. 1157 (2003)):

> [A] unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. […] Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

Referral of the allegations of misconduct against the Applicant to the ASG/OHRM following the conclusion of the investigation

28. The first decision the Applicant wishes to contest relates to the assessment of the ED/OAJ, that there was sufficient evidence in the fact-finding report indicating that she had engaged in wrongdoing that could amount to misconduct, thus referring the matter to the ASG/OHRM (see para. 9 above). Notwithstanding the question of whether this decision was only of a preparatory nature, therefore not amounting to a final decision, the Tribunal notes that it was communicated to the Applicant by email of 29 April 2013. By filing her request for management evaluation on 27 June 2013, the Applicant complied with the 60-day deadline provided for by staff rule 11.2(c).

29. As per staff rule 11.2(d), "[t]he Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member … within 45 calendar days of receipt of the request … if the staff member is stationed outside of New York", which was the Applicant's case; thus, the 45-day deadline to reply to her request for management evaluation ended on 12 August 2013.

30. Since no response to the Applicant's request for management evaluation was provided within this timeframe, the Applicant's application before the Tribunal should have been filed within 90 calendar days of the expiry of the 45-day response period for the management evaluation, pursuant to art. 8.1(d)(i)(b) of the Tribunal's Statute. This deadline expired by mid-November 2013. By filing her application on 2 May 2014, the application is obviously time-barred with respect to the decision under consideration.

31. Finally, the Tribunal takes note that a reply to the request for management evaluation was rendered in January 2014 (see para. 19 above). However, this event did not reset a new 90-day deadline to file an application, for the reply from the MEU occurred well beyond the deadline of November 2013 as calculated above (see *Eng* 2015-UNAT-520).

32. It follows from the above, that the application is not receivable in respect of the ED/OAJ's referral of the Applicant's case to the ASG/OHRM.

Failure to make a decision on whether to pursue the case as a disciplinary matter and implied decision to hold the matter in indefinite abeyance

33. The Tribunal notes that the decisions listed under Nos. 2 and 3 in the application (see para. 1 above) are in fact similar acts; hence, it will consider them together. Indeed, they consist in, and can be defined as, the implied refusal to take a decision on the Applicant's case, further to its referral to the ASG/OHRM pursuant to ST/AI/371 (as amended).

34. In this respect, the Tribunal notes that the Applicant was already informed of the course of action decided by the Administration by email of 5 September 2013, the content of which was clear (see para. 14 above)—in that it stated that:

> In your case, a decision to pursue this matter as a disciplinary case has not been made. Instead, in view of the fact that you were on certified sick leave at the time that the investigation report was referred to OHRM, and in accordance with the practice then in effect, the matter was held in abeyance.

35. In view of this, by requesting management evaluation of that decision only on 23 January 2014 (see para. 18 above), the Applicant obviously missed the 60-day deadline provided for by staff rule 11.2(c).

36. With respect to the email that was sent to the Applicant on 15 January 2014, the Tribunal observes that it was a mere confirmation of the decision of 5 September 2013. Pursuant to settled jurisprudence, the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to the statutory time limits, which start to run from the date of the original decision (see *Sethia* 2010-UNAT-079; *Odito-Benito* 2012-UNAT-196; *Cremades* 2012-UNAT-271, *Chahrour* 2014-UNAT-406).

37. It follows from the above, that the application is not receivable with respect to this matter either.

Failure to provide the Applicant with a complete investigation report, including all attachments and annexes

38. With respect of the above-mentioned decision, listed under No. 4 in her application (see also para. 1 above), the Tribunal notes that the second part of the 5 September 2013 email received by the Applicant was straightforward: it clearly stated that annexes to the investigation report would be provided to the Applicant "only in the event that a decision were made to pursue this matter as a disciplinary case under ST/AI/371", which was tantamount to a refusal to provide her with those documents at the material time. Pursuant to staff rule 11.2(c), the Applicant should have requested management evaluation of that decision within 60 calendars days; she did not, as she filed her request for management evaluation in that respect only on 23 January 2014. Therefore, this part of her application is also irreceivable *ratione materiae* (see *Egglesfield* 2014-UNAT-402).

Placement of a note into the Applicant's official status file

39. The Tribunal observes that the "decision" the Applicant wishes to contest here is in fact only an expression of intention to put a note into her file. Such an intention is not constitutive of any administrative decision as per the above-quoted definition, as it has no direct legal effect on the Applicant's rights. The tentativeness of this "decision" is confirmed by the express promise to provide the Applicant with "the opportunity to comment on the note to file prior to it being placed in [her] official status file", which, to the knowledge of the Tribunal, has not happened until now.

40. Against this background, the application is also not receivable in this respect.

Overall decision and motivation to take the decisions against the Applicant in retaliation for having filed a complaint against the Chief, OSLA, and for challenging the decisions of the ED/OAJ in the formal system of administration of justice

41. Finally, with respect to the issue listed under No. 6 in the application (see also para. 1 above), the Tribunal considers that its description amounts rather to grounds or reasons for the decisions she is challenging; hence, it does not constitute, on its own, an administrative decision subject to an appeal as per the applicable definition. There is, therefore, no need for the Tribunal to examine this claim as it is not receivable.

Summary of findings

42. It follows from the above that the application is irreceivable in all respects, and the Tribunal may not examine its merits (see *Servas* 2013-UNAT-349).

43. Furthermore, in view of the Tribunal's conclusion, there is no need to rule on the Applicant's request to be granted access to her former mail account at OSLA, and the Applicant's request for counsel assistance (see also *Belkhabbaz* UNDT/2015/046).

44. Finally, with respect to the Respondent's request for award of costs, the Tribunal is of the view that the conditions of art.10.6 of the Tribunal's Statute are not met in this case, as it cannot be considered that the Applicant "manifestly abused the proceedings".

Conclusion

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

The application is rejected in its entirety.

(*Signed*)
Judge Thomas Laker
Dated this 9th day of June 2015

Entered in the Register on this 9th day of June 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva