



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

FAUST

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**SUMMARY JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 3 March 2016, the Applicant, a former staff member of the United Nations Framework Convention on Climate Change (“UNFCCC”), contests the 4 December 2015 decision of the Executive Secretary, UNFCCC, to take no further action, after investigation, on her complaint for prohibited conduct under ST/SGB/2008/5 (Prohibition of discrimination, harassment including sexual harassment, and abuse of authority) and, as a result, to close the case.

## **Facts**

2. On 18 January 2015, the Applicant requested management evaluation, concurrently to the Management Evaluation Unit (“MEU”) and to the Executive Secretary, UNFCCC, of *inter alia* “the conduct of [her] supervisors in [the Sustainable Development Mechanisms programme]”.

3. The Applicant’s complaint was pursued in accordance with UNFCCC Secretariat Bulletin B/2011/1 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority and Disciplinary measures and procedures), which implements the provisions of ST/SGB/2008/5 at the UNFCCC Secretariat.

4. By letter dated 5 March 2015, the Executive Secretary, UNFCCC, informed the Applicant about the establishment of an investigation panel to conduct a formal fact-finding investigation of her complaint.

5. By email dated 9 September 2015 to the Executive Secretary, UNFCCC, the Applicant, noting that the investigation panel had postponed a second round of interviews and would not meet the 30 September 2015 deadline to submit its report, expressed her disappointment with the time taken to complete the investigation into her complaint. Additionally, the Applicant draw the Executive Secretary’s attention to the fact that “the 60-day deadline for filing [her] submission on the matter of harassment and abuse of authority to the MEU began on 13 August 2015”.

6. By email of 14 September 2015 to the Applicant, the Executive Secretary, UNFCCC, replied that after consultation with the investigation panel members, based in Geneva, she was resetting “the deadline for submission by the investigators of the Panel report from 30.09.2015 to 30.10.2015”, and that she would inform the Applicant of “the outcome of the Panel’s report as soon as it is available”.

7. On 11 October 2015, the Applicant addressed a request for management evaluation to the MEU “on the basis of an ‘implied’ decision that no prohibited conduct took place”, and asked the MEU to advise her whether:

a. “[T]o wait for the outcome of the investigation” and then “proceed to MEU, should the outcome/decision taken by the [Executive Secretary] not be an acceptable decision”; or

b. “[T]o proceed with the management evaluation, based on the ‘implied’ decision ... that no prohibited conduct took place”.

8. By letter dated 26 October 2015, the MEU replied to the Applicant that “because [her] complaint of harassment and abuse of authority [was] still under consideration within the appropriate processes of the Organization, no final decision ... has been made”, and that “[c]onsequently ... [her] request for management evaluation [was] premature”. Also, the MEU noted that its reply was “without prejudice to [the Applicant’s] right to request management evaluation should [she] wish to challenge a final decision in the matter”.

9. By letter dated 4 December 2015, which the Applicant alleges to have received on 5 December 2015, the Executive Secretary, UNFCCC, communicated her decision on the Applicant’s complaint, namely that the record indicated that the conduct complained of did not violate the provisions of ST/SGB/2008/5, and that she therefore would close the case.

10. On 3 March 2016, the Applicant filed the instant application, which was registered under Case No. UNDT/GVA/2016/006.

## Consideration

11. The Tribunal notes that in her application, the Applicant clearly indicates that the decision she wishes to challenge is the one closing the case in respect of her complaint under ST/SGB/2008/5, and communicated to her by letter dated 4 December 2015. Furthermore, the Applicant admits not having requested management evaluation of said decision (see section VI and, in particular, para. 12 of section VII of the application).

12. The issue of whether requesting management evaluation was mandatory in the instant case is a matter of law, which may be adjudicated even without serving the application to the Respondent for reply, and even if it was not raised by the parties (see *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335; see also *Bofill* UNDT/2013/141; *Lee* UNDT/2013/147).

13. As such, the Tribunal deems it appropriate to decide on the application by summary judgment, in accordance with art. 9 of its Rules of Procedure, which reads:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

14. The Tribunal recalls that the requirement of management evaluation is set out in staff rule 11.2:

(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.* (emphasis added)

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2

following the completion of a disciplinary process *is not required to request a management evaluation*. (emphasis added)

(c) 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. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

15. Likewise, art. 8.1(c) of the Tribunal’s Statute provides that an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”.

16. In support of her direct submission to the Tribunal, the Applicant puts forward the following:

a. “The opportunity ‘... to give management a chance to correct itself ...’ took place by way of the investigation and the decision taken by the UNFCCC Executive Secretary”;

b. “[A] management evaluation is not required if the contested decision ... was taken by the Administration based on the advice of a technical body. In such cases, an application can be made directly to the UNDT. In this case, an investigation panel was established by the Administration, consisting of two investigators from UNOG, who have been trained in investigating allegations of prohibited conduct. The decision by the Administration (UNFCCC ES) was taken based on their report”;

c. UNFCCC Secretariat Bulletin B/2011/1, Formal process, Step 10, provides that “[w]here 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, to the UN Dispute Tribunal and eventually the UN Appeals Tribunal (ST/SGB/2008/5, Section 5.20)”;

d. In *Nwuke* (2010-UNAT-099), the Appeals Tribunal found that “[i]n light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, ... when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.”; and

e. In accordance with para. 5.18(a) of ST/SGB/2008/5, “the [Executive Secretary, UNFCCC] provided [the Applicant] only [with] a summary of the findings and conclusions of the investigation. However, this summary is based on an interpretation of the panel’s report and further, it does not address all incidents reported. The panel informed [the Applicant] that at this stage the Administration has no legal obligation to disclose the full report to the complainant, and that for the disclosure or a review of the investigation panel report the case would have to be submitted to the UNDT”.

17. The Applicant’s claim that a request for management evaluation was not necessary because its main goal was, in her view, met by other means (see para. 16.a above) cannot stand. The requirement of filing a request for management evaluation prior to submitting an application before the Tribunal has been invariably upheld by the Appeals Tribunal (see e.g., *Rosana* 2012-UNAT-273; *Dzuverovic* 2013-UNAT-338), and more recently reiterated in *Kouadio* 2015-UNAT-558, where the Appeals Tribunal recalled that it is “settled law that requesting management evaluation is a *mandatory* first step in the appeals process” (emphasis added).

18. The Applicant's second argument in support of her direct submission (see para. 16.b above), relies on her equating an investigation panel to a "technical body", thus triggering the exception to requesting a management evaluation set forth in staff rule 11.2(b). First, the Tribunal notes that, as of the date of this summary judgment, the Secretary-General has not made a determination pursuant to staff rule 11.2(b) designating investigation panels as technical bodies.

19. Second, specialized training alone, if any, undertaken by investigation panel members does not suffice to qualify investigation panels as technical bodies. In this connection, the Tribunal observes the Appeals Tribunal's position expressed in *Gehr* (2014-UNAT-479), whereby it was not persuaded that "absent any designation process by the Secretary-General", particular requirements, e.g., "adequate knowledge and experience required to review the appraisal and its rating", led to the conclusion "that the Secretary-General intended that a rebuttal panel should be considered as a technical body".

20. Furthermore, the Tribunal recalls its finding in *Tsoneva* (UNDT/2014/027) that a decision to close a case, after investigation, concerning a complaint for harassment and abuse of power "does not fall under any of the two categories of decisions for which a management evaluation is not required under staff rule 11.2(b)".

21. Concerning the third and fourth arguments advanced by the Applicant in support of her direct submission to the Tribunal (see paras. 16.c and 16.d above), the Tribunal acknowledges that the provisions and jurisprudence the Applicant refers to do indeed provide for a right to appeal against administrative decisions taken on the basis of ST/SGB/2008/5 and, also, against any alleged procedural flaw related to a fact finding investigation. However, nothing in the provisions and jurisprudence in question supports an exception to requesting management evaluation. In *Gallo* (UNDT/2015/036), this Tribunal found that "the decision to accept the report of a fact finding panel to investigate a complaint of prohibited conduct under ST/SGB/2008/5 ... is an administrative decision ... subjected to the requirement of MEU's review according to the mandatory rules from art. 5.20 of ST/SGB/2008/5 and ... does not fall under the exemption of staff rule 11.2(b)".

22. In respect of the Applicant's last argument concerning her direct submission (see para. 16.e above), even if one were to accept that a full copy of an investigation report is to be shared with an Applicant/complainant in the context of proceedings before this Tribunal, this is not tantamount to a waiver of the mandatory requirement of requesting management evaluation prior to exercising one's right to appeal.

23. Pursuant to art. 8.3 of its Statute, and as reaffirmed by its jurisprudence and that of the Appeals Tribunals, this Tribunal has no jurisdiction to either waive the deadlines for the filing of requests for management evaluation with the MEU or make any exception to it (*Costa* 2010-UNAT-036; *Sethia* 2010-UNAT-079, *Samardzic* 2010-UNAT-072; *Trajanovska* 2010-UNAT-074, *Ajdini et al.* 2011-UNAT-108; *Barned* 2011-UNAT-169; *Muratore* 2012-UNAT-191; *Christensen* 2013-UNAT-335).

24. This Tribunal is, therefore, incompetent to review decisions which have not been subjected to management evaluation (*Christensen* 2013-UNAT-335). It follows that in the absence of a management evaluation request, this Tribunal cannot but consider the present application as irreceivable *ratione materiae*.

### **Conclusion**

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

The application is rejected.

*(Signed)*

Judge Rowan Downing

Dated this 10<sup>th</sup> day of March 2016

Entered in the Register on this 10<sup>th</sup> day of March 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva