



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AWE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is a Resident Auditor in the Office of Internal Oversight Services (OIOS). He serves at the P-4 level, and is based in Bamako, Mali.

The Applications and Procedural History

2. At the material time, the Applicant was the OIOS Chief Resident Auditor at the United Nations Assistance Mission for Iraq (UNAMI).

3. On 1 December 2015, the Applicant filed an Application (UNDT/NBI/2015/177) contending that the Respondent's decision, following the outcome of the investigation of his allegations pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority), was flawed in that it failed to grant him an effective remedy for the harm caused to him, and that the administration failed to provide him with a prompt and efficient internal means of redress.

4. On 7 December 2015, the Applicant filed another Application, (UNDT/NBI/2015/179) also relating to his complaint of harassment and abuse of authority, alleging that the actions of the UNAMI Chief of Mission Support (CMS) at the time was in breach of ST/SGB/2008/5 which were prejudicial to his rights as a staff member to be provided with a prompt and effective means of redress.

5. The similarity between the two cases was that they shared the same factual background; both Applications alleged that the Applicant's rights as a staff member were breached and that he was denied the protection afforded under ST/SGB/2008/5. The same Fact Finding Panel (FFP/the Panel) interviewed the witnesses and produced a common Report. However, the significant difference was that Mr. Kubis, the responsible officer, made different decisions in relation to Mr. Rutgers, Chief of Staff (COS) and Ms. Yasin, the former CMS.

6. By Order No. 425 (NBI/2016), a case management discussion (CMD) took place on 15 September 2016 to discuss the claims and issues raised in these separate claims and to deal with the Respondent's motion for combined proceedings, which was being resisted by the Applicant who also filed a motion for disclosure of the reports of the FFP.

7. On 19 September 2016, the Tribunal issued Order No. 435 (NBI/2016) requiring both parties to disclose relevant documents. The Respondent's motion for consolidation of the Applicant's two cases was also granted.

8. The parties complied with the Order, as directed, and the relevant documents were filed on 27 September 2016.

9. On 26 October 2016, the Tribunal issued Order No. 464 (NBI/2016) requiring further particulars from the Respondent with particular reference to the complaint against the CMS.

10. The Tribunal reviewed the Respondent's response to Order No. 464 (NBI/2016) and found that although there were common questions of background facts relating to both cases, the decisions taken in each were not identical. Moreover, the applicable legal principles and issues appear potentially to be sufficiently different such that the order for combined proceedings needed to be reconsidered particularly given the fact that the complaint relating to the CMS is still under consideration.

11. On 10 November 2016, the Tribunal issued Order No. 479 (NBI/2016) informing the parties that Cases UNDT/NBI/2015/179 and UNDT/NBI/2015/177 were severed and the order for combined proceedings was discharged. Accordingly separate judgments are being issued in each case.

Background Facts

12. On 20 January 2014, Ms. Yasin refused to authorise the Applicant's Movement of Personnel for travel to Baghdad on an official mission pursuant to his duties as Chief Resident Auditor. The Applicant's mission to Baghdad had already been approved by UNAMI's Chief of Staff (COS), Mr. Rutgers, and cleared by the Security Section.

13. Subsequently, at the Senior Management Team (SMT) meeting on 22 January 2014, the COS made statements about the Applicant which the Applicant regards as containing "malicious innuendo" which was prejudicial to him. At the same meeting, the COS indicated, in the presence of the CMS, that she intended to convince the Special Representative of the Secretary-General (SRSG/SRSG Mladenov) to have the Applicant withdrawn from the Mission because he had been seriously compromised.

14. Minutes of this meeting were circulated to about 25 staff members, who comprised - among others - members of the management team, section chiefs and administrative assistants.

15. The Minutes stated:

Issue of the Auditor's two week pre-planning mission to Baghdad was discussed and rationale for it questioned. It seems that making up for financial loss incurred due to the move to Kuwait features prominently in the decision to visit Baghdad. However, the mission is strongly backed by the Chief of the Auditing Unit. CMS has suggested rotating out the auditor because he has been seriously compromised.

16. On 28 January 2014, the Applicant told Mr. Rutgers that he had seen the Minutes of the SMT meeting and the allegations that were made about him.

17. On 20 February 2014, Mr. Rutgers wrote to the Applicant apologising for his actions.

18. On 3 March 2014, the Applicant complained of abuse of authority and harassment on the part of Mr. Rutgers and Ms. Yasin, under section 5.11 of ST/SGB/2008/5. The complaint was addressed to the former Under-Secretary-General, Department of Field Support (USG/DFS) with a copy to the Assistant Secretary-General, Office of Human Resource Management (ASG/OHRM). He did not complain to the SRSG because he was present at the SMM at which the derogatory statements were made.

19. On 17 April 2014, the complaint was referred by ASG/OHRM to SRSG Mladenov for his consideration and further action.

20. On 15 June 2014, SRSG Mladenov decided to convene a FFP pursuant to section. 5.14 of ST/SGB/200/5.

21. On 22 June 2014, the Applicant was informed that there was to be a delay in the investigation of his complaint because of the deterioration of the political and security situation in Iraq.

22. On 6 August 2014, the FFP was established and provided with its terms of reference.

23. Between 14 September 2014 and 18 February 2015, the Panel interviewed 14 witnesses. This list included the Applicant and staff members who were present at the meeting as well as Mr. Rutgers and Ms. Yasin.

24. The Applicant was interviewed on 15 and 17 September 2016. Ms. Yasin was interviewed on the same day.

25. Mr. Rutgers was interviewed on 18 September 2014, and SRSG Mladenov was interviewed on 29 January 2015.

26. During one of the Applicant's interviews with the Panel, he was made to understand that its report would be submitted to the SRSG by the end of October.

Prior to that, the Applicant was to have received a *verbatim* copy of his statement for his review and subsequent signature.

27. On 11 November 2014, the Applicant wrote to the Panel to enquire into the status of the investigation and noted that he was yet to receive a copy of his statement. The Panel responded that their report was still pending, but sent him a copy of his statement; which the Applicant reviewed and returned.

28. The Applicant was reassigned to serve in the United Nations Multidimensional Integrated Stabilisation Mission in Central African Republic (MINUSCA). He started in MINUSCA on 20 November 2014.

29. On 17 December 2014, the Applicant wrote to SRSG Mladenov complaining about the delay in reviewing his complaint. The Applicant stressed that he had an interest in “getting (his) name cleared sooner rather than later because retention of the offending statements constituted a source of continued injury to (his) dignity, character, personal and professional reputation”. This complaint was copied to the ASG/OHRM and the then USG/DFS.

30. The Applicant did not receive a response from any of the recipients.

31. On 13 January 2015, the Applicant requested management evaluation of the Respondent’s violation of his due process rights and for prompt consideration of his complaint pursuant to ST/SGB/2008/5.

32. On 20 January 2015, the Management Evaluation Unit (MEU) informed the Applicant that they found the Applicant’s request for review to be not receivable.

33. On 27 January 2015, the Applicant wrote to SRSG Mladenov again enquiring into the status of his complaint.

34. The SRSG responded by informing the Applicant that the FFP had indicated that it would submit its Report by 15 February 2015, and that he would review it as a matter of urgency and take appropriate action.

35. On 20 February 2015, the FFP provided SRSG Mladenov with its initial Investigation Report.

36. The Respondent submits that between 20 February 2015 and 20 March 2015, the Mission's Conduct and Discipline Unit conferred with DFS and the Ethics Office regarding the potential conflict of interest in that SRSG Mladenov, who was to decide on further action following the Panel's findings, was also a witness in the FFP's investigations.

37. On 4 March 2015, the Secretary of the FFP informed the Applicant that its Report had been submitted to the SRSG. On 22 March 2015, SRSG Kubis was appointed to succeed SRSG Mladenov as Head of Mission.

38. SRSG Kubis received the Panel's Report on 24 March 2015.

39. The relevant paragraphs of the FFP's summary of their findings appear at paragraph 67 under "Considerations".

40. On 21 May 2015, SRSG Kubis informed the Applicant and the USG/DFS of the outcome of the investigation. The memorandum detailing the Panel's findings was dated 23 April 2015.

41. The Applicant was informed that as a result of the Panel's findings, a letter of reprimand had been placed in Mr. Rutger's Official Personnel File. With regard to Ms. Yasin, the matter was referred to the USG/DFS because she was no longer assigned to UNAMI.

42. On 9 June 2015, the USG/DFS acknowledged receipt of SRSG Kubis' referral. The USG/DFS determined that the complexity of the case required the involvement of an expert trained in dealing with complaints of this nature.

43. On 15 June 2015, the matter was forwarded to the USG of the Department of Peacekeeping Operations (USG/DPKO).

44. On 15 July 2015, the Applicant sought management evaluation of the SRSG's decision with regard to Ms. Yasin. The Applicant was specifically challenging the SRSG's decision to refer the matter to DFS.

45. On 16 July 2015, MEU acknowledged receipt of the Applicant's submission and informed him that a decision would be rendered no later than 29 August 2015.

46. On 5 October 2015, MEU decided that his request for management evaluation was not receivable.

47. On 1 December 2015, the Applicant filed an Application challenging the Respondent's decision in respect of Mr. Rutgers (UNDT/NBI/2015/177).

48. On 7 December 2015, the Applicant filed a second application before the UNDT challenging the Respondent's actions in respect of the Panel's findings against Ms. Yasin and the failure to afford him an effective remedy.

49. The Respondent stated that the designated expert could not begin her work on the Applicant's complaint until 6 January 2016.

50. In February 2016, the USG/DPKO referred the findings against Ms. Yasin to the ASG/OHRM. While the matter was under review by the ASG/OHRM, the Office received a second referral from the USG/DPKO concerning Ms. Yasin.

51. As at the time of this Judgment, the matter remains under "review" by OHRM.

Considerations

52. This case concerns the manner in which allegations of prohibited conduct were dealt with. The applicable instrument is ST/SGB/2008/5 (the Bulletin/SGB) promulgated on 11 February 2008.

53. The preamble to the Bulletin indicates that its purpose is to ensure that “all staff members of the Secretariat are treated with dignity and respect and are aware of their role, and responsibilities, in maintaining a work place free of any form of discrimination, harassment, including sexual harassment, and abuse of authority...”. The Bulletin protects staff members against the various forms of prohibited conduct.

54. The allegations in this case concern harassment and abuse of authority as defined in section 1.2 and 1.4 respectively.

55. Sections 1.2 and 1.4 of the Bulletin provide:

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

56. Section 3 of the Bulletin deals with the duties of staff members and managers. Staff members have an obligation not to engage in, or condone, prohibited conduct. It provides that:

Managers and supervisors have a duty to take all appropriate measures to promote a harmonious work environment free of

intimidation, hostility, offence and any form of prohibited conduct.

57. Managers and supervisors also have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the Bulletin “may be considered a breach of duty which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate”.

58. Section 5.11 deals with the requirements for filing a complaint and Section 5.14 makes provision for the steps to be taken upon receipt of a formal complaint including the appointment of a fact finding panel.

59. There is no issue between the parties in relation to the establishment of the FFP. The Panel completed its work and produced a detailed report as they were required to by section 5.17 of the Bulletin. However, the section provides that the report *shall* “be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint”.

60. On 3 March 2014, the Applicant submitted his complaint in accordance with the Bulletin. The Panel was not commissioned until five months later on 6 August 2014. The FFP Report was submitted to SRSG Mladenov in its draft form on 20 February 2015 and, its final form, to SRSG Kubis on 24 March 2015.

61. It took a further two months for the Applicant to be informed by SRSG Kubis that he had received the Report and what action he had taken in response to the Panel’s findings.

62. The Applicant contends that the handling of his complaint was subject to significant and unnecessary delay at almost every stage. The time it took to constitute the Panel and to conclude the investigation, coupled with how long it took the SRSG to act on the Panel’s findings was inordinate in the circumstances. It served to further compound the damage to his personal and professional

reputation and standing. The Applicant consistently maintains that despite the Panel's clear findings nothing was done to restore his reputation. Given the gravity of the Panel's findings, he considers the written reprimand in Mr. Rutger's file inadequate as an effective remedy for the harm he suffered.

63. On the question of delay, the Respondent's position is that:

[T]he SRSG decided to convene a fact-finding panel about two months after receiving and reviewing the Applicant's complaint. While the Bulletin does not define "prompt", the handling of the Applicant's complaint was reasonable given the need to determine whether a panel was warranted.

64. In terms of the remedy afforded to the Applicant, it is the Respondent's case that he acted appropriately in accordance with section 5.18(b) in deciding that there were not sufficient grounds to justify the institution of disciplinary proceedings against Mr. Rutgers.

65. The Respondent submits that:

The Applicant has adduced no evidence that he suffered any harm from the alleged delay in processing his complaint. While the Applicant has requested that the senior management meeting minutes be expunged, he has not cited any staff rule or regulation requiring the Organization to do so or any evidence that he suffered ongoing harm or any harm at all from the failure to expunge the minutes. During the pendency of his complaint, both the Applicant and the COS left the mission. The COS demonstrated that he had no intent to cause the Applicant harm, issuing him a written apology. The Applicant's claim that the outcome was tainted by a conflict of interest is also unsupported. Although the investigation was initiated by the former UNAMI SRSG, who was also a witness, the new SRSG made the final decision on the outcome.

66. The submission of the Respondent that the Applicant suffered no harm and that he had adduced no evidence to support such a claim defies common sense. The Tribunal finds that the contents of the minutes of the SMT of 22 January 2014, the Applicant's communication to SRSG Mladenov (see para 29 above) describing the harm he suffered, the factual support in the findings of the FFP and, the failure on the part of the Administration to date to remove the offending

minutes and/or to write to all recipients of the minutes withdrawing the damaging allegations against the Applicant taken together support a finding of harm which will endure as long as no steps are taken to restore the damage to the Applicant's reputation and professional standing.

67. Sections 5.18(b) and (c) of the Bulletin specifically provides that:

(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, counseling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(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.

The Fact Finding Panel's Report

68. In a detailed and thorough examination of the allegations and the responses of various interviewees the Panel expressed their conclusions as follows:

[B]y preventing [the Applicant's] official travel to Baghdad on 21 January from taking place on unsubstantiated grounds and without exercising proper diligence, Mr Rutgers and Ms Yasin violated staff rule 1.2 (q) and abused the power and authority vested in them to process MOPs for official travel;

[B]y using false pretence, making unsubstantiated and derogatory remarks against Mr Awe in the presence of others and by

circulating the minutes of the meeting in which such remarks has been affixed, Mr Rutgers and Ms Yasin violated the provisions of art. 101 (3) of the Charter of the United Nations, and the core values set out in former staff regulation 1.2 (a) and former staff rules 101.2(d), 201.2(d) and 301.3(d), which provide that every staff member has the right to be treated with dignity and respect;

[B]y making unsubstantiated and derogatory remarks against [the Applicant] in the presence of others and by circulating the minutes of the meeting in which such remarks had been affixed, Mr Rutgers and Ms Yasin failed to uphold the core value of professionalism and live up to the standards of efficiency and competence expected of them, in addition to creating a more challenging and possibly hostile working environment for [the Applicant];

[B]y attempting to have [the Applicant] removed from UNAMI on unsubstantiated grounds, Ms Yasin failed to uphold the core value of integrity and the standard of efficiency.

69. On receipt of the Report of the FFP, the responsible official is required to take action in accordance with the provisions of section 5.18(c) of ST/SGB/2008/5 which provides that:

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 (emphasis added).

70. In considering the duty on the responsible official, it is necessary to identify the factors to be taken into account under section 5.18(c). Does the report indicate that the allegations were well founded? If so, does the conduct in question amount to possible misconduct? Both elements have clearly and unequivocally been established by the thorough investigation of the FFP.

71. In the circumstances, the mandatory language of section 5.18(c) of ST/SGB/2008/5 requires a referral to the ASG/OHRM for disciplinary action in accordance with the applicable disciplinary procedures. Failure to make such a referral on the part of SRSG Mladenov, and then SRSG Kubis, is an error of procedure which denied the Applicant his contractual right to be afforded the benefit and protection against prohibited conduct in accordance with

ST/SGB/2008/5. The Applicant is entitled to an award of compensation for this procedural error.

72. The underlying policy recognises the crucial function of the ASG/OHRM who is vested with the authority, and has the experience and expertise, to give effect to the Organization's disciplinary procedures in an objective, detached and consistent manner.

73. It is settled law that taking disciplinary action is a prerogative of the Secretary-General and not that of the affected staff member.¹ This function has been delegated to the ASG/OHRM and it is not for the responsible officials to ignore the clear duty placed on them by section 5.18(c) to refer a case to the ASG where the allegations have been proven to be well founded and the conduct in question amounts to possible misconduct. It is for the Organization to take the next steps in the process, under the guidance and responsibility of the ASG/OHRM, and not for individual managers to purport to exercise a discretion which they do not have under section 5.18(c).

74. The Administration failed to draw a distinction between action, if any, to be taken against an alleged offender following a report and findings of a Fact Finding Panel and the harm, if any, suffered by the alleged victim. The former involves a proper construction of section 5.18 of ST/SGB/2008/5, regarding the duty of the responsible official, which is a matter for the administration, and the latter which relates to action to mitigate or ameliorate the harm suffered by the alleged victim.

CONCLUSION

75. The Tribunal finds that although it has to be acknowledged that there was a deterioration in the political and security situation in Iraq, that is not an adequate explanation for the considerable delay in taking appropriate steps to mitigate the harm to the Applicant. For example, receipt of the report of the FFP would have put the matter beyond doubt that the Applicant's complaint of abuse of power and

¹ See, for example, *Abboud* 2010-UNAT-100; *Benfield-Laporte* 2015-UNAT-505; *Oummih* 2015-UNAT-518; *Rangel* 2015-UNAT-535.

abuse of authority was well founded. It would also have been abundantly clear that the Applicant had suffered harm and the obvious step of withdrawing, amending or expunging the offending minutes and notifying all recipients, has still not taken place. There is no logical or acceptable explanation for this continuing delay which has nothing to do with the situation in Iraq.

Compensation

76. The Appeals Tribunal has consistently ruled that

The Dispute Tribunal has an unquestioned discretion and authority to quantify and order compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.²

A Tribunal may award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.³

77. The stress and moral injury occasioned here stems from the “unsubstantiated derogatory remarks” made against the Applicant by the Chief of Staff, who quite plainly should have known better. The records clearly show that those comments by Mr. Rutgers on 22 January 2014 were made in the presence of the senior-most managers in the Mission, including Ms Yasin, the CMS, and then recorded and circulated as minutes to several people. The Fact Finding Panel took issue with both the comments and the circulation of minutes containing the offending remarks, and found it to be conduct unbecoming of a staff member. Specifically, the Panel found it to have been a violation of the Applicant’s right to be treated with dignity and respect.

78. The Tribunal finds that despite the Panel’s findings, the Respondent has not seen fit to have those comments retracted or expunged from the minutes. The Respondent’s initial submission to the Tribunal was that:

² *Antaki* 2010-UNAT-095; *Zhouk* 2012-UNAT-224.

³ *Antaki* 2010-UNAT-095.

While the Applicant has requested that the senior management meeting minutes be expunged, he has not cited any staff rule or regulation requiring the Organization to do so or any evidence that he suffered ongoing harm or any harm at all from the failure to expunge the minutes.

79. Much later, and only in response to a specific question from the Tribunal, the Respondent submitted:

As a sign of good faith and to address the Applicant's ongoing concerns about the meeting minutes, the mission is ready and willing to amend and recirculate the Senior Management Meeting notes of 21 January 2014 to the original recipients if the Applicant wishes.

80. Good faith would have been properly demonstrated if the minutes were expunged following Mr. Rutger's apology to the Applicant. To continue to fail to do so to date, two years later, after many of the recipients have left the Mission shows little regard for the reputation of the Applicant and little understanding of the gravity of the Applicant's complaint and the Panel's findings. Such conduct is wholly inconsistent with the values of the Organisation and the policy and principles underpinning the protection afforded to staff members under ST/SGB/2008/5.

81. The Applicant has complained of humiliation and disrespectful treatment by the Mission's senior management team, which has resulted in him suffering and continuing to suffer injury to his dignity, character and personal and professional reputation.

82. That injury was compounded by delays in the investigation and reporting processes and the continuing damage to the Applicant's personal and professional standing and reputation as an auditor.

83. The Tribunal finds that the Applicant's claim is well founded and that he suffered damage to his reputation and professional standing exacerbated by the continuing and unacceptable delay in affording him the relief to which he is entitled. The Applicant is entitled to compensation for the harm suffered, such

harm being assessed well above the midpoint in the range of awards made by the Tribunal.

JUDGMENT

84. The Applicant's claim is well founded and succeeds.

85. The Respondent is **ORDERED** to:

- a) Remove forthwith from the records any and all of the offending references in the minutes of the SMT meeting on 22 January 2014 **and** to send written confirmation to all recipients of the minutes to inform them of the findings of the Fact Finding Panel that there was no basis to support the damaging comments made against the Applicant.
- b) Pay to the Applicant the sum of USD3,000 for procedural error.
- c) Pay to the Applicant the sum of USD15,000 for harm suffered.
- d) The compensation awarded to the Applicant shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of this judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Goolam Meeran

Dated this 18th day of November 2016

Entered in the Register on this 18th day of November 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi