UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/173
Judgment No.: UNDT/2016/214
Date: 6 December 2016
Original: English

Before: Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

GORLICK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, former Chief, Office of Staff Legal Assistance ("OSLA"), Office of Administration of Justice ("OAJ"), contests the decision of the Executive Director, OAJ ("ED/OAJ"), dated 7 May 2015, to appoint a new fact-finding panel under the Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) in connection with a complaint against the Applicant.

Facts

2. On 27 April 2012, a staff member of OSLA ("complainant") lodged a complaint alleging prohibited conduct under ST/SGB/2008/5 by both the Applicant, as Chief, OSLA, and another OSLA colleague.

3. On 21 September 2012, the ED/OAJ decided that no fact-finding investigation would be carried out on the complaint against the complainant's colleague, but that an investigation would be conducted in respect of some of the allegations levelled against the then Chief, OSLA.

4. On 8 October 2012, a panel was established to investigate such allegations, and was composed of two individuals from outside the Organization. The complainant raised concerns about its composition at the time.

5. On 1 April 2013, the panel submitted its report to the ED/OAJ, who, on 26 April 2013, determined, on the basis of it, that no further action should be taken in respect of the complaint against the Applicant.

6. On 11 September 2013, the complainant filed an application, registered as Case No. UNDT/GVA/2013/050, contesting the decision to take no further action on her complaint against the Chief, OSLA.

7. On 15 January 2014, this Tribunal rendered Judgment *Oummih* UNDT/2014/004 in Case No. UNDT/GVA/2013/050, ruling in favour of the applicant before it, that is, the complainant.

8. The Secretary-General appealed the above-referenced judgment on 17 March 2014. The complainant filed a cross-appeal on 16 May 2014.

9. On 26 February 2015, the Appeals Tribunal issued its Judgment *Oummih* 2015-UNAT-518, dismissing the cross-appeal and providing the following at paragraph 43:

> The Secretary-General's appeal is granted in part. The UNDT's rescission of the Executive Director's decision dated 21 September 2012 is reversed and the award of moral damages is vacated. The case is remanded to the Executive Director who shall establish a new fact-finding panel in accordance with the Secretary-General's Bulletin ST/SGB/2008/5.

10. On 18 April 2015, the Applicant resigned from his post as Chief, OSLA, OAJ, on which he had been on secondment, and returned to UNHCR, his releasing entity.

11. By letter of 7 May 2015, the ED/OAJ informed the Applicant that:

> Pursuant to Judgment No. 2015-UNAT-518 of the Appeals Tribunal, I am establishing a new fact-finding panel in connection with the complaint dated 27 April 2012.

12. The letter also identified two individuals from the roster of the Office of Human Resources Management appointed to be members of the newly constituted panel. Furthermore, it indicated 15 May 2015 as the expected date for the panel to begin its work and listed the matters referred for investigation.

13. On 22 June 2015, the Applicant requested management evaluation of the decision contained in the 7 May 2015 letter, which was upheld by letter to the Applicant dated 22 July 2015.

14. The present application was filed on 15 October 2015. The Respondent filed his reply on 19 November 2015.

15. A case management discussion was held on 16 December 2015, where the Tribunal heard the parties' views, *inter alia*, on the possible application of article 20 of the Tribunal's Rules of Procedure. Following this discussion, by Order No. 264 (GVA/2015) of 22 December 2015, the Tribunal determined that the receivability of the application was a threshold matter to be considered in the first place, on the basis of the materials and submissions already before it.

Parties' submissions

16. The Applicant's principal contentions are:

a. The decision to authorise the investigation in question amounts to a reviewable administrative decision under article 1.2(a) of the Tribunal's Statute, pursuant to the definition adopted within the Organization's internal justice system. It was unilaterally taken by the Administration, it is of individual application and created direct legal consequences for the Applicant's terms of employment;

b. Staff rule 1.2(3) requires staff members to "cooperate with duly authorized audits and investigations", which includes attending an investigation interview as a subject. Yet, the very use of the term "duly authorized" suggests that a staff member has no obligation to cooperate with an investigation that is not duly authorised, and, *a fortiori*, which is not in compliance with the applicable rules. Since staff members cannot unilaterally determine whether an investigation is duly authorised, they need to seek a determination from the entities empowered to do so, such as the Tribunal;

c. *Nguyen-Kropp & Postica* 2015-UNAT-509 held that: "[g]enerally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature". The phrase "generally speaking" suggests that this principle allows exceptions. This judgment also states that "tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal

processes"; this passage supports that the Tribunals have jurisdiction to intervene when the Administration does not adhere to its internal processes;

d. *Powell* 2012-UNAT-295 ruled that only limited due process rights apply during the preliminary investigation. The right to a "duly authorized, impartial and independent investigation and decision-maker" is part of these limited due process rights;

e. The ED/OAJ lacks authority to appoint a fact-finding panel because the Applicant no longer serves in the Secretariat. He returned to UNHCR—from where he had been seconded—after the UNAT Judgment was issued but before the new fact-finding panel was appointed. This fact stripped the ED/OAJ of her jurisdiction in relation to the Applicant. Hence, at the time of the contested decision, the ED/OAJ had no authority to appoint the fact-finding panel, and OHRM would have no authority to take any further action following the panel's investigation, particularly of a disciplinary nature;

f. Under article 11 of the Appeals Tribunal's Statute, the Organization could, and should, have sought revision of the judgment on the grounds of the discovery of a decisive fact unknown at the time of the judgment namely, in this case, the Applicant's separation, or else its revision, as a means of clarification;

g. If the investigation is not carried out in accordance with ST/SGB/2008/5, its outcome and validity may be challenged, in which case the Applicant will have to undergo the same process for a third time;

h. The fact-finding panel's composition is improper. It is composed of two individuals who are on the roster of OHRM but who are no longer UN staff members, as they retired, and are reportedly holding a consultancy or "when actually employed" contract;

i. The panel's composition is governed by paragraph 5.14 of ST/SGB/2008/5, the English and French version of which differ: while the

English text simply requires the panel to be composed of at least two *individuals*, the French one specifies that both individuals be "fonctionnaires" (i.e., staff members). ST/SGB/2008/5 being a bilingual piece of legislation, the rule must be to retain the "shared meaning" of both versions; and

j. Submitting the Applicant to a new investigation violates the principle of *ne bis in idem* and contravenes that of desirability of finality of disputes. In addition, the handling of this matter has been characterised by inordinate delay and mismanagement. The harm that pursuing this matter causes the Applicant exposes the Organization to liability.

17. The Respondent's principal contentions are:

a. The execution of an Appeals Tribunal's judgment does not constitute an administrative decision. The Appeals Tribunal's judgments are final and binding upon the parties. The establishment of the fact-finding panel did not result from the exercise of the ED/OAJ's delegated discretionary authority;

b. The submission that the Secretary-General should have sought revision or interpretation Judgment *Oummih* 2015-UNAT-518 is without merit;

c. Convening a fact-finding panel is just one in a series of preparatory steps, as opposed to a reviewable administrative decision. The conduct of an investigation may be challenged only once the outcome of the complaint under ST/SGB/2008/5 is known and a final decision made thereupon. The contention that the principle held in *Nguyen-Kropp & Postica* was subject to exceptions has no merit. The application is irreceivable *ratione materiae*;

d. The Applicant's claim that a complaint against him cannot be investigated since he is no longer a staff member of the Secretariat is misconceived. The complaint related to his alleged conduct whilst he served at the Secretariat and he does not become immune form investigation as a result of his secondment coming to an end. Furthermore, the Appeals

Tribunal ruled that the complainant had a right to have her complaint investigated by a duly constituted fact-finding panel under ST/SGB/2008/5, and the Secretary-General is obliged to execute its Judgment;

e. The fact-finding panel is properly constituted, pursuant to section 5.14 of ST/SGB/2008/5. Such a panel may contain former staff members. First, there is no substantial difference in meaning between the English and French versions of this provision, as the term "fonctionnaire" may include both current and former staff members. Second, in case of discrepancy, the latter must be solved in favour of the English version, as this was the language in which the bulletin was drafted. Any discrepancy would have been introduced as an error in the translation into French. Third, even applying the "shared meaning" rule, the clearest level of commonality is reached by the English text, i.e., "individuals" includes both current and former staff members;

f. Neither the principle of double jeopardy nor that of finality of disputes prevents an investigation of the complaint against the Applicant. The Appeals Tribunal was aware that the initial investigation resulted in the closure of the case when it rendered its Judgment, and did not consider it a bar to the setting up of a new fact-finding panel to investigate afresh; and

g. Any delay in the resolution of the complaint is due to litigation with the complainant.

Consideration

18. Article 2.1(a) of the Tribunal's Statute clearly provides that the Tribunal is competent to hear and pass judgment on applications appealing an *administrative decision* alleged to be in non-compliance with the terms of appointment or the contract of employment of the concerned applicant.

19. The Respondent submits that the Tribunal lacks jurisdiction to adjudicate this case because the appointment of a new fact-finding panel, to investigate anew

the complaint against the Applicant, did not constitute an *administrative decision* within the meaning of the Statute on two accounts.

20. Firstly, he holds that the execution of a judgment of the Appeals Tribunal, which is final and binding as per article 10.5 and 6 of its Statute, is not an administrative decision, because it does not involve any exercise of discretionary authority by the decision-maker.

21. In this respect, it should be recalled that the Appeals Tribunal has repeatedly endorsed (e.g., *Andati-Amwayi* 2010-UNAT-058, *Tabari* 2010-UNAT-030, *Schook* 2010-UNAT-013, *Tintukasiri* 2015-UNAT-526) the definition of "administrative decision" adopted by the former United Nations Administrative Tribunal (Judgment No. 1157, *Andronov* (2002)), to wit:

> 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.

22. Importantly, it is plain that this widely-accepted definition does not even mention any given degree of discretion among the elements characterising an administrative decision. As a matter of law, administrative decisions may be discretionary or not discretionary, but this does not affect their qualification as administrative decisions. For this purpose, as long as a decision produces legal effects, is of individual application and emanates from the Administration, it is irrelevant whether the decision-maker disposes of a large latitude or whether its action is tightly dictated by the legislation or, as in this case, by a judicial ruling.

23. By contrast, it is an essential feature of any administrative decision that it must emanate from the Administration. That was indeed the case regarding the establishment of a new fact-finding panel. More specifically, it emanated from the head of OAJ, who is part and parcel of the Organization's Secretariat. In this sense, it is noticeable that the Appeals Tribunal, in its Judgment *Oummih* 2015-UNAT-518 did not set up the panel itself, but ordered the ED/OAJ to do so, which prompted her decision dated 7 May 2015.

24. This was no doubt a decision where the ED/OAJ had very little margin of discretion, inasmuch as she could not choose whether or not to appoint a fact-finding panel, nor the scope of the facts to be investigated. Yet, she still enjoyed some latitude in respect of how and when to constitute the panel. As a matter of fact, the ED/OAJ decided indeed on the panel's composition, which is one of the aspects challenged by the Applicant. However, since this concerns the correctness of the ED/OAJ's action in the exercise of her duties under ST/SGB/2008/5, it is a question that belongs to the merits of this matter.

25. The second ground the Respondent advances to claim the Tribunal's lack of jurisdiction *ratione materiae* is that the contested decision was not a final administrative decision, but merely a preparatory one.

26. In this connection, it is well-established that preparatory decisions are not appealable, as they do not deploy, *per se*, direct legal consequences. Rather, they represent one of the various steps of a composite decision-making process (*Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173, *Gehr* 2013-UNAT-313). As such, they may not be contested in themselves but only in the context of the challenge of a final decision.

27. The impugned decision in this case, as identified in the application, is that by the ED/OAJ, dated 7 May 2015, "to appoint a fact-finding panel in accordance with the Secretary-General's bulletin on "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority".

28. The Appeals Tribunal ruled in *Birya* 2015-UNAT-562 that:

> Deciding to set up a fact-finding panel is not of itself a decision relating to the contractual rights of a staff member … Such a step is preliminary in nature and irregularities in connection with that decision … may only be challenged in the context of an appeal after the conclusion of the entire process.

29. In the same vein, the Appeals Tribunal had already held in *Nwuke* 2010-UNAT-099, regarding investigations into prohibited conduct complaints, that any alleged irregularity in such an investigation may be tackled once a final decision has been reached further to the conclusions of the investigation at issue.

30. Even if the Tribunal, using its "inherent power to individualize and define the administrative decision impugned … and identify what is in fact being contested" (*Massabni* 2012-UNAT-238), was to interpret the contested decision in a larger manner and understand that the Applicant rather meant to take issue with the fact of launching a new investigation on the allegations against him, the latter would still be simply a preparatory step. Indeed, in *Nguyen-Kropp & Postica* 2015-UNAT-509 (para. 31), the Appeals Tribunal found that authorising or launching an investigation was a preparatory act, as follows:

> Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

31. Notwithstanding this quite clear formulation of the principle, the Applicant contends that the use of the expression "generally speaking" suggests the existence of exceptions to it. He further notes that *Nguyen-Kropp & Postica* pursues stating (para. 32):

> This accords with another general principle that tribunals should not interfere with the matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

32. He argues that this statement may be read as implying, *a contrario*, that the competent judicial bodies might be entitled to interfere with internal processes of the Administration which are not lawful.

33. The Tribunal wishes to stress, nevertheless, that the *Nguyen-Kropp & Postica* also holds some paragraphs later (para. 34), in most categorical and unambiguous terms, that:

> Initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute.

34. The Tribunal notes that it is expected to "recognize, respect and abide by the Appeals Tribunal's jurisprudence" (*Igbinedion* 2014-UNAT-410). With this in mind, it sees no grounds to distinguish the present case from *Nguyen-Kropp & Postica*.

35. Accordingly, it is the Tribunal's conclusion that the application at hand is irreceivable since it falls outside its material jurisdiction. In consequence, the Tribunal shall refrain from making any determination on the merits of the application before it, including the propriety of the fact-finding panel's composition. This question remains open and may well become the subject-matter of a subsequent case once the investigation has been concluded and a decision taken on the basis thereof.

36. Lastly, since the Tribunal will not enter into the substance of the case, it would be neither necessary nor appropriate to grant in these proceedings the Applicant's request for disclosure of various documents relating to the appointment of the panel and the conduct of the investigation.

Conclusion

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

The application is rejected as irreceivable.

(*Signed*)
Judge Rowan Downing
Dated this 6th day of December 2016

Entered in the Register on this 6th day of December 2016
(*Signed*)
René M. Vargas M., Registrar, Geneva