



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

ABDELLAOUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. On 30 August 2018, the Applicant filed an application contesting the decision which she described as “explaining the disposal of her harassment complaint filed pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority), notified to her on 27 November 2017.”

2. The Respondent submitted his response on 1 October 2018, with several annexes filed on an *ex parte* basis, namely the full investigation report, the memoranda issued to the two subjects of the investigation asking them for comments, the letters sent to the two subjects of the investigation upon receipt of their comments, as well as comments from one investigator. The annexes that were filed without a confidentiality setting were the Applicant’s complaint as well as several memoranda and a letter from the Director-General, UNOG, addressed to the Applicant (cf. para. 7 below).

Facts

3. On 22 January 2017, the Applicant filed, with the Office of Internal Oversight Services (“OIOS”), a harassment complaint under ST/SGB/2008/5 against eighteen staff members mainly from the Arabic Translation Section (“ATS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”), as well as against the Chief, Languages Service (“Chief, LS”), covering the period from 2009 through to 2016. She filed additional information on 16 and 22 February 2017.

4. On 30 March 2017 the Director-General, UNOG, notified the Applicant that an investigation would commence in relation to the allegations against two staff members of ATS. She was also notified that the allegations against the Chief, LS, and the other staff members mentioned in her complaint would not be investigated but that some staff members may, if relevant, be heard as witnesses. The Director-General expressed his view that the allegations against the Chief, LS, related to issues of management and non-selection, which fall outside the scope of the Bulletin, and that her claims concerning her non-selection to JO No. 62272 would

be handled within the framework of her request for management evaluation against that decision.

5. On 27 November 2017, the Director-General informed the Applicant that the investigation had been completed and that while it had been decided not to initiate disciplinary proceedings, managerial action pursuant to sec. 5.18(b) of the bulletin was warranted with respect to one of the two staff members who were subjects of the investigation.

6. The Applicant requested management evaluation of the decision on 24 January 2018.

7. On 16 April 2018, the Director-General informed the Applicant that following receipt of the comments of one of the two subjects of the investigation, he had decided to close the case against that staff member. He further informed the Applicant that he decided to take managerial action against the other staff member. He encouraged the Applicant to pursue mediation with these two staff members and expressed his hope that all staff members within ATS would engage in constructive communication and in creating a positive working environment.

8. On 6 June 2018, the Applicant was informed by the Under-Secretary-General for Management that the Secretary-General had upheld the decision concerning the investigation into her complaint.

Procedure before the Tribunal

9. By Order No. 160 (GVA/2018) of 4 October 2018, the Tribunal ordered the parties to file a reasoned objection, if any, to a judgment being rendered without a hearing. While the Respondent did not object thereto, the Applicant submitted that it was important to have a hearing for her to give evidence. However, she did not identify witnesses nor did she indicate the issue/s they would give evidence on and how it related to the merits of her application. The Respondent was asked to file comments on the Applicant's submission, which he did on 24 October 2018, confirming his agreement that a decision may be rendered on the papers.

10. With respect to the Applicant's request for disclosure of the documents filed by the Respondent on an *ex parte* basis, the Tribunal noted that the latter contained confidential information affecting other staff members. Having carefully considered the issues in this case, the relevance of the documents sought to be disclosed together with the probative value of such disclosure, the Tribunal decided that the Applicant was embarking on a fishing expedition and it did not appear necessary to share with the Applicant any of the *ex parte* documents filed by the Respondent, and these documents would be disregarded by the Tribunal (cf. Order No. 160 (GVA/2018)).

Parties' submissions

11. The Applicant's principal contentions are:

- a. The application is receivable and she sought timely management evaluation upon the completion of the entire procedure; she was not obliged to challenge the failure to include the Chief, LS, or the remaining (fifteen) colleagues as subjects of the investigation at an earlier stage;
- b. Some witnesses suggested by her were never interviewed by the Investigation Panel and the interview conclusions were biased and some email evidence provided by her was "brushed aside" by the Panel;
- c. She was subjected to harassment intermittently since 2009 and the mobbing reached an unprecedented peak in 2015-2017, with the tacit approval of the Chief, LS;
- d. The Chief, LS, and HRMS "tampered" with the Rules and Regulations in the classification exercise for the post of Chief, ATS, amounting to fraud and corruption. The classification of that post was effected with the purpose of excluding the Applicant from the selection process despite her roster status and because of it;
- e. The lengthy delays in carrying out the investigation into her complaint made her miss an opportunity to have her application for the post of Chief, ATS, fully and fairly considered;

f. The decision is flawed since the investigation did not include an inquiry into her allegations of abuse of authority by the Chief, LS. The decision did not provide a summary of the findings and conclusions in breach of ST/SGB/2008/5. Although she was subject to harassment within the meaning of ST/SGB/2008/5, the Director-General's decision failed to expressly state whether or not she was subjected to harassment;

g. The Applicant requests that UNOG be ordered to produce the entire investigation report, to secure her a safe working environment, that she be awarded moral and material damages for the failure to conduct a proper investigation, and that the matter be referred to the appropriate office for investigation into the Chief, LS, engagement in prohibited conduct, which adversely affected her career.

12. The Respondent's principal contentions are:

a. The application in respect of the decision not to investigate the allegations made against the Chief, LS, and fifteen other staff members is not receivable, since the Applicant failed to file a timely request for management evaluation;

b. Some claims of the Applicant were not subject to management evaluation and are unrelated to her complaint of 22 January 2017. Further, her claims relating to her non-selection are challenged in Cases Nos. UNDT/GVA/2017/47 and UNDT/GVA/2017/15;

c. The Applicant's complaint was handled in accordance with ST/SGB/2008/5. It was reviewed promptly to determine whether there were sufficient grounds to warrant a formal fact-finding investigation. It was decided not to investigate the claims raised against all of her eighteen colleagues but only two of the alleged offenders mentioned in the complaint;

d. Upon receipt of the investigation report, the responsible official concluded that there were insufficient grounds to refer the matter to the Assistant Secretary-General for Human Resources Management for possible disciplinary action. The alleged offenders and the Applicant, as the aggrieved

individual were informed of the outcome by way of a summary of the findings and conclusions of the investigation, in accordance with sec. 5 of ST/SGB/2008/5;

e. The application should be dismissed.

Consideration

13. Given the Applicant's description of the contested decision as the "decision explaining the disposal of her harassment complaint filed pursuant to ST/SGB/2008/5", the Tribunal considered that it was necessary to identify the essence of the complaint in line with UNAT's guidance in *Massabni* 2012-UNAT-238. The Tribunal finds that the Applicant is contesting the decision not to investigate her complaint under ST/SGB/2008/5 against the Chief, LS, and fifteen of her colleagues and, following the investigation against two individuals, the decision to take managerial action against only one of the staff members she had complained about.

Receivability

14. Since the Applicant failed to request timely management evaluation of the decision not to investigate her complaint against the Chief, LS, and fifteen other staff members, notified to her on 30 March 2017, these claims in her application are not receivable, *ratione materiae*, pursuant to staff rule 11.2(c) (cf. *Eggesfield* 2014-UNAT-402). The Applicant's argument that she was required to await the outcome of the whole process and completion of the investigation is without merit, because she was clearly notified on 30 March 2017 that the complaint with respect to the Chief, LS, and the fifteen other staff members, except two, would not be investigated. The sixty days' deadline for management evaluation for that decision started to run from 30 March 2017. The Tribunal will refrain from examining the merits of the claims against the Chief, LS, insofar as they relate to managerial issues and to the non-selection of the Applicant to the post of Chief, ATS, since these matters fall to be considered, if relevant, in Cases Nos. UNDT/GVA/2017/15 and UNDT/GVA/2017/47 which were heard on 13 to 14 November 2018.

Scope of judicial review

15. Pursuant to art. 2.1(a) of its Statute, the Tribunal is competent to examine the lawfulness of administrative decisions. In cases of harassment and abuse of authority, the scope of judicial review is restricted to an examination of how the Administration responded to the complaint and if it was taken in accordance with the applicable law (cf. *Nwuke* 2010-UNAT-099; *Luvai* 2014-UNAT-417).

16. As the Appeals Tribunal held in *Sanwidi* 2010-UNAT-084,

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

17. The Tribunal will therefore examine whether the Administration fulfilled its obligations with respect to the review of the complaint and the investigation process, as set out under the bulletin.

18. Section 5.20 of ST/SGB/2008/5 provides (emphasis added):

Where 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.

19. The Applicant's complaint, dated 22 January 2017, refers to a lengthy period covering the years 2009 through to 2016 and implicates eighteen staff members mainly from the Languages Service, UNOG. In the circumstances it is the duty of the Tribunal to exercise care in balancing the various competing interests taking into account the right of the Applicant to a just determination of her grievances and

the reasonable and legitimate expectations of colleagues against whom various allegations have been made and who are equally entitled to protection from any unfair and unjustified attacks on their integrity.

20. The primary focus of the complaints appears to be against two colleagues (husband and wife) within ATS, as well as the Chief, LS.

21. It is apparent from the historically wide ranging complaints that the poor interpersonal relationships and atmosphere of suspicion and intrigue, as revealed in the Applicant's complaints, must have a deleterious effect on morale within ATS in the Languages Service. The atmosphere of mistrust and tension undoubtedly affected the Applicant as well as colleagues. The Tribunal is satisfied that the Administration took the complaint seriously, and properly followed the procedure outlined in ST/SGB/2008/5.

22. The Tribunal will address the Applicant's concerns and the procedural issues raised by her, to the extent necessary without upsetting an already fragile ecology. The Applicant's concern that some witnesses proposed by her were never interviewed by the Investigation Panel, has led her to infer that the conclusions of the interviews were biased and that some emails she presented as evidence "were merely brushed aside". She also argues, without substantiating her allegations that there was bias on behalf of the Human Resources Management Service in the dealing with her complaint.

23. The Tribunal recalls that pursuant to sec. 5.16, "the fact finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged". The Tribunal notes that the Applicant identified 18 witnesses to be interviewed and that the investigation Panel interviewed only those witnesses whom it found relevant, namely those who had been referred to by both the Applicant and the alleged harassers during their interviews. The Tribunal observes that an Investigation Panel has a wide discretion in determining which witnesses it finds relevant, and failure to interview one or some witnesses will result in a procedural violation only in limited circumstances (cf. *Belkhabbaz* UNDT-2018-016). In this case, the Applicant failed to indicate both in her request for management evaluation

and in her application to the Tribunal the names of specific witnesses and how failure to interview them had an impact on the outcome of the investigation. Further, while the Applicant states that the interview conclusions were “biased”, she did not provide further particulars to support that contention. Further she did not substantiate her claim that the Panel “brushed” aside emails presented as evidence, nor did she identify the impact that it had on the outcome of the investigation.

24. The Tribunal reviewed the case file, including the Applicant’s complaint and the Panel’s conclusions at Annex 1 of the memorandum of 27 November 2017 that was shared with the Applicant. In the absence of further particulars provided by the Applicant as to the bias and failure to take into account relevant evidence, the Tribunal is satisfied that in the exercise of its discretion, the Investigation Panel identified relevant witnesses by adopting appropriate and relevant criteria and properly considered the evidence before it. The Tribunal is further satisfied that the Director-General diligently reviewed the Panel’s report when he decided to close the matter with respect to one subject and to take managerial action concerning another subject. In the circumstances the Tribunal finds that the procedure of ST/SGB/2008/5 was complied with and that the decision communicated to the Applicant on 27 November 2017 is lawful.

25. Finally, the Tribunal expresses its concern that it appears that what the Applicant is trying to achieve through this application is a finding that she had been subjected to harassment which, according to her, culminated in her non-selection for the post of Chief, ATS. The Applicant’s non-selection is the subject of Cases No. UNDT/GVA/2017/15 and UNDT/GVA/2017/47, which are the subject of a separate judgment on their merits following a hearing on 13 and 14 November 2018. Accordingly, any allegations of ulterior motive or harassment in relation to her non-selection and the argument that the classification process for that post was irregular, will be examined in those cases to the extent that the Tribunal considers it necessary to do so.

26. The application in respect of the decision not to investigate the complaint against the Chief, LS, and other colleagues (except the two staff members subject of the complaint) is not receivable.

27. Having considered the issues relating to the investigation and outcome of the complaint against the two colleagues the Tribunal decided that no useful purpose will be served by disclosing the report of the investigation panel and any associated documents given that the absence of particulars provided by the Applicant suggested that she was on a fishing expedition wishing to trawl through the documents on the off chance that there was material that may be of marginal relevance to her belief that several of her colleagues were complicit in a concerted campaign to harm her interests in the workplace. In the circumstances of this case the Tribunal considered that the highly probable prejudicial effect of disclosure will outweigh the limited probative value, if any, to the issues in this case. Further the Tribunal considered that a hearing on the merits was not necessary and that the case be decided on the papers.

28. There is no merit in the Applicant's contentions and all concerned may wish to reflect on the guidance offered by the Director-General of UNOG on the importance of engaging in constructive communication and of fostering a positive working environment.

Judgment

The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 21st day of November 2018

Case No. UNDT/GVA/2018/095

Judgment No. UNDT/2018/114

Entered in the Register on this 21st day of November 2018

(Signed)

René M. Vargas M., Registrar, Geneva