



Before: Judge Goolam Meeran
Registry: Nairobi
Registrar: Abena Kwakye-Berko

JACKSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Alan Gutman, ALS/OHRM

INTRODUCTION

1. The Applicant filed an application on 19 July 2017 contesting what she described, under “Details of the contested decision”, as “The implied decision not to formally respond with a decision as to whether an investigation will take place following allegations of sexual misconduct pursuant to ST/SGB/2008/5”.

2. The Applicant alleged that on 24 February 2016 she was sexually harassed/assaulted by a National Security Guard with UNAMID. The Applicant submits that the Administration owed her a duty of care to protect her against any form of prohibited conduct. They failed to do so in that the Administration breached her terms of appointment by not dealing with her complaint in a timely manner and not keeping her informed about developments relating to her complaint. Under para. 5.17 of ST/SGB/2008/5, the investigation report should have been submitted to the responsible official no later than three months from the date of submission of her complaint. This deadline was not adhered to and she had no knowledge of what steps, if any, were being taken to investigate her complaint.

3. After a delay of 16 months, during which she received no feedback as to what steps were being taken to investigate her complaint, she filed her application with the Tribunal submitting that given the inordinate delay she inferred that there was an implied decision not to investigate her complaint.

4. On 18 August 2017, the Respondent filed his reply resisting the claim first on a technical legal defence of receivability and second on the merits asserting that there was a proper investigation and that the case was closed because the allegations were not substantiated by the available evidence.

5. On 29 May 2018, a case management discussion (CMD) took place. Both Counsel participated. The Applicant could not be connected to the audio conference for technical reasons. However, it was directed by consent, that the CMD would proceed. A second CMD took place on 2 July 2018 to deal with outstanding issues relating to receivability of the claim and disclosure of documents. The Tribunal considered it important, given the issues in the case, to

once again invite the Applicant to attend. The Applicant, her Counsel and Counsel for the Respondent participated by telephone.

6. A hearing was conducted in the UNDT Courtroom in New York from 9th to the 11th October 2018. Counsel for the parties were present in the Courtroom. The Applicant participated by video link and telephone. Apart from the Applicant, the following witnesses gave evidence: Ms. Bintou Keita, former Deputy Joint Special Representative (DJSR) Protection and Officer-in-Charge, UNAMID; Mr. Saifullah Malik, Chief, Conduct and Discipline Team (CDT), UNAMID and Mr. Seth Odame, Security Officer, Special Investigation Unit, UNAMID.

7. Upon consideration of the documents and the evidence the Tribunal decided that this was an appropriate case in which to invoke Article 10.4 of the Statute of the United Nations Dispute Tribunal (UNDT) to seek the concurrence of the Secretary-General to remand the case for institution or correction of the required procedure.

8. Given the action taken as a result of the referral to the Secretary-General under article 10.4 of the UNDT Statute, the Tribunal, having taken into account the views of the parties, has decided that it was not necessary, in this Judgment, to deal with the respective contentions of the parties on the receivability of the claim.

FINDINGS OF FACT

The Tribunal finds the following facts proven on the basis of the documents, including responses to the Tribunal's Orders and the oral evidence:

9. On 24 February 2016, the Applicant reported an incident which took place at about 16:20hrs that day. She alleged that when she confronted the alleged perpetrator, at about 18:30hrs that day he apologized and asked her not to file a complaint against him. She reported the incident to the UNAMID Special Investigations Unit (SIU) on the same day and provided a voluntary statement.

10. On 25 February 2016, the Applicant sought advice from the Staff Counsellor.

11. On 28 February 2016, the Applicant provided the SIU with a second statement concerning the incident.

12. By email dated 2 March 2016 to Ms. Keita, DJSR, the Applicant filed a formal complaint under ST/SGB/2008/5. On the same day, the DJSR replied to the Applicant indicating that SIU had been conducting a preliminary investigation and that the preliminary investigation report would be sent to CDT for assessment.

13. On 3 March 2016, CDT received the preliminary report from SIU. Following a review of the report, CDT concluded that the report described a sexual assault and referred the case to the Office of Internal Oversight Services (OIOS) for investigation as a Category I allegation.

14. On 4 May 2016, the Applicant wrote to the DJSR requesting an update on the status of her complaint pursuant to ST/SGB/2008/5.

15. On 8 May 2016, the DJSR responded, advising the Applicant that UNAMID had determined that her complaint fell outside the scope of ST/SGB/2008/5 because “the conduct [she] [had] reported constitut[ed] ‘sexual assault’ and not ‘sexual harassment’ or any other prohibited conduct”. She indicated in her email that the Applicant’s complaint had been referred to OIOS on 3 March 2016. The DJSR advised the Applicant to seek information directly from CDT concerning the status of her case.

16. Following the email of 8 May 2016, the Applicant visited the CDT office to inquire about her case. There is no evidence in the case file about the information provided to the Applicant, if any.

17. After having received the case, OIOS categorized it as “for information” since OIOS considered that most of the investigative work had already been done by UNAMID and that the case would be best handled by the Mission. OIOS did not conduct an investigation and on 9 May 2016, they returned the complaint to CDT for completion of the investigation. On the same day, CDT referred the case back to the SIU for investigation and completion of the final investigation report.

18. On 18 May 2016, SIU obtained statements from three witnesses, two of whom had been identified by the Applicant. SIU also obtained a further statement from the alleged perpetrator. On 23 May 2016, SIU provided CDT with its final investigation report.

19. On 31 October 2016, after considerable and inexplicable delay, CDT requested SIU to obtain additional evidence from witness B, who said that he was an eyewitness to the alleged incident.

20. On 3 November 2016, SIU provided CDT with the information requested. The Applicant had no knowledge of these developments nor was she given the opportunity to comment on or rebut this person's account.

21. On 20 March 2017, after a further delay of over four months CDT recommended that the Joint Special Representative (JSR) refer the matter to the Office for Human Resources Management (OHRM) through the Under-Secretary General for Field Support (USG/DFS). On the same day, the JSR sent a memo to the USG/DFS recommending that the matter be referred to OHRM.

22. On 13 April 2017, the USG/DFS referred the matter to the Assistant Secretary-General (ASG), OHRM. In accordance with paragraph 3 of ST/AI/371 such a referral would suggest that UNAMID considered that there was a case for possible disciplinary action against the alleged perpetrator.

23. By memorandum dated 6 July 2017, Mr. Matthew Sanidas, Officer-in-Charge (OiC), OHRM, informed the USG/DFS of his decision not to pursue this matter as a disciplinary case because of insufficient evidence on the record.

24. By memorandum dated 27 July 2017, eight days after the Applicant filed her claim with the Tribunal, Mr. Jeremiah Mamabolo, the Joint Special Representative (JSR) for UNAMID, informed the Applicant that Mr. Sanidas had decided to close the case. The memorandum includes the following extract:

SIU investigated this matter and, upon the completion of its investigation, I referred the case to the Under-Secretary-General for Field Support for appropriate action. The matter was subsequently referred to the Office of Human Resources

Management (OHRM) for possible disciplinary action. However, after reviewing the investigation report and supporting documents, OHRM concluded that the allegations were not substantiated by the available evidence and decided to close the case with no further action.

25. The Applicant received the above-mentioned memorandum on 30 July 2017. This was after a delay of 16 months and 25 days during which there was no communication with her since 8 May 2016. She expressed concern at the fact that no explanation was provided as to why it took so long and what steps had been taken to carry out a full and proper investigation which would have included feedback to enable her to be reassured that her complaint was being taken seriously. In particular, she was not afforded the opportunity to comment on or to rebut any countervailing evidence that may have been obtained in the course of any investigation. The Applicant did not challenge the decision to close her case by requesting management evaluation nor did she file another claim with the Tribunal.

26. The Applicant submits that the manner in which the Administration handled her complaint amounted to a denial of the protection to which she was entitled to under the letter and spirit of the Organization's policy of protection to victims of sexual harassment and/or assault. She relies upon the provisions of ST/SGB/2008/5 as well as ST/AI/371/Amend. 1 (Revised disciplinary measures and procedures).

INSTITUTION OF REQUIRED PROCEDURE UNDER ART. 10.4 OF THE UNDT STATUTE

27. This is a case of alleged sexual assault in which the Tribunal heard evidence and submissions but had not yet reached a determination on the merits of the case save for a finding of procedural error.

28. After evaluating the evidence, the Tribunal concluded that there were sufficient grounds for it to seek the concurrence of the Secretary-General to remand the case under Article 10.4 of the UNDT Statute for institution or correction of the required procedure.

29. Article 10.4 of the UNDT Statute provides:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

30. The UNDT Statute and Rules of Procedure do not set out a prescribed procedure to be followed to give effect to the underlying purpose of Article 10.4. However, Article 36.1 of the Rules of Procedure provides that:

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

31. The Tribunal considered that a referral under Article 10.4 of the Tribunal's Statute falls outside the adversarial process, and is directed to the Secretary-General in his/her independent capacity as the Chief Administrative Officer of the United Nations and not as the Respondent in the case. Accordingly, the undersigned Judge considered it appropriate to approach the Secretary-General directly and not through Counsel who represents the Secretary-General as the Respondent in this case.

32. The Tribunal considered that such an approach would: (i) avoid any risk of a perception of actual or potential bias; (ii) protect the integrity of the Tribunal; and (iii) serve to preserve confidence in the Organization's policies and procedures and the Secretary-General's personal commitment to ensuring zero tolerance of sexual harassment, responding rapidly to allegations, supporting victims through their trauma and ensuring commitment and accountability for all concerned in the process.

33. Accordingly, on 29 November 2018, the Tribunal referred the matter to the Secretary-General under Article 10.4 of the UNDT Statute and sought his

concurrence to remand the case for institution or correction of the required procedure.

34. On the same day, by Order No. 184 (NBI/2018), the Tribunal notified the parties that:

1. It is appropriate to stay proceedings while the matter is under consideration by the Secretary-General.
2. On receipt of the response of the Secretary-General, the Tribunal will issue either an Order remanding the case, in accordance with article 10.4 of the Statute, or issue a Judgment on the merits.

35. On 21 January 2019, the Tribunal obtained the concurrence of the Secretary-General that the case be remanded for institution or correction of the required procedure under Article 10.4 of the UNDT Statute. Accordingly, the case was formally remanded by Order No. 023 (NBI/2019) including an Order that the Applicant be paid two months' net base salary under Article 10.4 of the UNDT Statute which makes provision for the Tribunal to order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by procedural delay, which is not to exceed the equivalent of three months' net base salary.

CONSIDERATIONS

36. The issues for determination are:

- a. Were there procedural delays which in the particular circumstances of this case were unjustified?
- b. Was there a failure to observe proper investigation procedures prescribed in the Staff Regulations and rules or administrative issuances and/or were there fundamental flaws in the investigation process?
- c. Was the manner in which the administration handled this complaint inconsistent with the provisions of ST/SGB/2008/5 and ST/AI/371...the letter and spirit of the Organization's policy for protecting staff members from sexual abuse and harassment and the pronouncements

of successive Secretaries General to a commitment and policy of zero tolerance towards such prohibited conduct.

Were there procedural delays which in the particular circumstances of this case were unjustified?

37. The Secretary-General's bulletin on Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5) provides in paragraph 1.3 that:

Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

38. In relation to the formal procedure to be followed by the Organization upon receipt of a formal complaint, ST/SGB/2008/5 provides as follows:

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15 At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

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.

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. *This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report* (emphasis added).

39. ST/SGB/2008/5 provides in paragraph 5.18 that on the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(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, counselling 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.

40. At no point, from the referral by OIOS back to UNAMID on 9 May 2016 to 20 March 2017, did UNAMID or any person acting on behalf of UNAMID contact the Applicant to keep her informed of progress but most importantly she

was not contacted by the investigators to seek clarification or further information particularly given the nature of evidence which a witness claimed to have which directly contradicted the Applicants account of events.

41. During the case management discussion held on 29 May 2018, the Tribunal noted the lack of information concerning the steps that were taken by the Administration on receipt of the Applicant's complaint of 2 March 2016 to carry out a proper investigation. By Order No. 094 (NBI/2018) dated 30 May 2018, the Respondent was ordered to provide detailed information on the sequence of events relating to the investigation beginning with the Applicant's report at 20:30hrs on 24 February 2016 and ending with the letter dated 27 July 2017 notifying her that it was decided to close the case with no further action. The Respondent was also asked to provide evidence of any steps or action taken to keep the Applicant informed about the progress of the investigation or to explain the reasons for the delay in carrying out and concluding the investigation.

42. On 22 June 2018, the Respondent filed a submission concerning the sequence of events between 24 February 2016 and 27 July 2017. He provided information about the steps that the Organization took internally to deal with the Applicant's complaint but he did not file the information that he was ordered by the Tribunal to produce with respect to the actions taken to keep her informed about the progress of the investigation. Apart from the emails sent to the Applicant on 8 May 2016 and 30 July 2017, the Respondent indicated that "following the email of 8 May 2016, the Applicant visited the CDT offices on several occasions to inquire about her case. During the Applicant's visits, CDT informed her of the status of her case". In this respect, the Applicant stated that "she attended the offices [CDT] only on one occasion that day [8 May 2016] to speak to Ms. Rose Dennis of the CDT office". The Tribunal notes that no evidence was provided by the Respondent concerning the information, if any, given to the Applicant during such visits to the CDT. At the hearing, the witnesses were specifically asked by the Tribunal to provide these particulars. They were unable to do so. In the circumstances, particularly the failure on the part of the Respondent to provide information regarding the steps taken to inform the Applicant about progress in the investigation the Tribunal finds that Counsel for

the Respondent was misled by those instructing him into stating that the Applicant had been so informed.

43. The Tribunal finds that delay was unconscionable and failure to keep the Applicant informed of any progress in the investigation was unacceptable. The delay of 16 months, is bereft of any justification. Such failures, if not curbed, will have the effect of undermining the very policy underpinning ST/SGB/2008/5 which is intended to protect staff from prohibited conduct, in this case sexual misconduct and/or assault.

Was there a failure to observe proper investigation procedures prescribed in the Staff Regulations and rules or administrative issuances and/or were there fundamental flaws in the investigation process?

44. Insofar as it is material to this case there appears to be no significant difference between the applicable procedures in ST/AI/371 and ST/SGB/2008/5.

45. It emerged during the hearing that a witness informed the investigators that he was present at the time of the alleged incident. He stated that he witnessed no inappropriate behaviour and that there was a friendly and familiar exchange between the Applicant and the alleged perpetrator. Of particular relevance is the fact that the Applicant asserted that there were no witnesses present at the time. The investigation began on 8 May 2016 and at no time since the commencement of the investigation was the Applicant interviewed either to obtain further particulars to supplement the initial statements that she had made. Of greater concern is the failure to provide the Applicant with an opportunity to rebut the evidence and/or to obtain her reaction and comments on the evidence obtained from the staff member who stated that he was present and gave evidence that was in significant and material contradiction to the account given by the Applicant.

46. Witnesses called by the Respondent were unable to explain why such an obvious and elementary step in the investigation was not taken.

47. The Tribunal finds that there were fundamental flaws in the investigation including, in particular, the failure to obtain the Applicant's comments on the evidence obtained from the person who claimed to have been an eye witness. This

was a significant failure given the fact that the Applicant had always maintained, and continues to do so, that there were no witnesses to the alleged incident.

48. The Tribunal finds that for reasons explained above, that there was a failure on the part both of those responsible for the investigation and the OiC ASG/OHRM, who reviewed the investigation report, to recognize that there was a breach of due process when the Applicant was not provided with the opportunity of rebutting the evidence given by a person who stated that he was a witness to the events in question.

Was the manner in which the administration handled this complaint inconsistent with the provisions of ST/SGB/2008/5 and ST/AI/371...the letter and spirit of the Organization's policy for protecting staff members from sexual abuse and harassment and the pronouncements of successive Secretaries General to a commitment and policy of zero tolerance towards such prohibited conduct.

49. In all the circumstances, the Tribunal finds that there was a failure to act in full accordance with both the letter and spirit of the Organization's policy and the published commitments of successive Secretary-Generals to a policy of zero tolerance of sexual harassment and/or assault.

50. Given this finding, the Tribunal considers that irrespective of whether there is a legal obligation under any administrative issuance, including ST/SGB/2008/5, to provide feedback to a complainant, it is good administration to do so particularly in cases of this kind. Failure to do so, without good cause, calls into question the commitment of those involved in the process and, unless remedied, will undermine the very policy on prohibited conduct that the Organization is determined to enforce.

CONCLUSION

51. In order to uphold the laudable principles and objective of ST/SGB/2008/5, and the zero-tolerance policy of the Organization and the commitment of the Secretary-General to tackle prohibited conduct, the Tribunal

considered it appropriate to refer the case to the S-G under Article 10.4 of the Statute by Order 023 (NBI/2019).

52. The Secretary-General has taken appropriate action, following his concurrence that the case may be remanded under Article 10.4 of the Statute for institution or correction of the required procedure and the payment to the Applicant of the equivalent of two months' net base salary as per Order No. 023(NBI/2019).

53. There is no longer any matter for further judicial consideration.

JUDGMENT

54. The Tribunal orders that the case of *Jackson v. Secretary-General of the United Nations*, Case No. UNDT/NBI/2017/063, be closed.

(Signed)

Judge Goolam Meeran

Dated this 28th day of June 2019

Entered in the Register on this 28th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi