UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/063
Judgment No.: UNDT/2019/168
Date: 22 November 2019
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Peter A. Gallo, Esq.

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former team leader and investigator at the P-4 level with the Office of Internal Oversight Services ("OIOS"), contests the Secretary-General's failure to act in accordance with art. 3.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) with respect to a complaint that he submitted on 18 February 2015. The application was filed on 23 November 2015.

2. The present case was initially assigned to Judge Ebrahim-Carstens. Upon the Respondent's claim that the application was not receivable, and after undertaking various case management steps, by Judgment No. UNDT/2018/052 on receivability dated 25 April 2018, Judge Ebrahim-Carstens held that the application was receivable.

3. In response to Judge Ebrahim-Carstens's subsequent orders, the Respondent informed on 6 August 2018 that, "The [p]arties have not successfully engaged in informal dispute resolution discussions".

4. On 30 June 2019, Judge Ebrahim-Carstens's tenure with the Dispute Tribunal ended. The following day (on 1 July 2019), the case was reassigned to the undersigned Judge.

5. On 8 October 2019, the Applicant filed a motion for stay of proceedings to discuss an informal settlement of the present case. Considering the previous submissions of the Respondent and the general lack of cooperation between the parties, the Tribunal sees no perspective in granting the Applicant's request for stay of proceedings as the parties appear incapable of agreeing on an informal resolution of the present case.

6. After the Tribunal had issued various case management orders, the parties filed their closing statements as follows: 20 October 2019 (the Applicant), 11 November 2019 (the Respondent), and 18 November 2019 (the Applicant).

Facts

7. The following factual chronology is based on the written documentation on record and the parties' submissions.

8. On 18 February 2015, the Applicant filed a complaint to the Secretary-General—with specific and explicit reference to sec. 3.2 of ST/SGB/2008/5—against the then Under-Secretary-General of OIOS's ("the then USG/OIOS") for failing to take "appropriate action" against "OIOS staff members" for allegedly harassing and retaliating against their "colleagues" and committing "wrongdoings that could amount to misconduct and were identified as misconduct".

9. By email of 8 May 2015, the Director of the Office of the Under-Secretary-General for Management ("the Director") informed the Applicant that the Office of the Under-Secretary-General for Management had been requested "by the EOSG to review the matter in question" and that, "[w]e will revert to you in due course".

10. On 19 August 2015, the Applicant filed a request for management evaluation describing the "administrative decision to be evaluated" as the "[f]ailure by the Secretary-General to take action upon receipt of a complaint filed pursuant to ST/SGB/2008/5", noting that his "complaint was filed on 18 February 2015 and no decision has been made yet, as of 19 August 2015".

11. By email of 21 August 2015, the Director wrote to the Applicant that, "This is to confirm that the matters you have raised are being considered in the context of

paragraph 3.2 of ST/SGB/2008/5. Rest assured that your complaint is being taken seriously and that appropriate action will be taken in due course".

12. On 28 August 2015, the Officer-in-Charge of the Management Evaluation Unit ("the MEU") rejected the Applicant's management evaluation request for not being receivable, noting that "[i]n your underlying complaint to the Secretary-General, you had alleged that [the then USG/OIOS] had violated specifically Section 3.2 of ST/SGB/2008/5", explaining, *inter alia* that "[t]he MEU considered that a failure by a manager or supervisor to fulfil his/her obligations under paragraph 3.2 of ST/SGB/2008/5 would not, in itself, constitute prohibited conduct as defined in paragraph 1.5". The MEU further indicated that "paragraph 3.2 of ST/SGB/2008/5 provides that a breach of a duty may lead to a number of consequences, including reflection in the staff member's performance appraisal or administrative or disciplinary action", noting that the Director by his 21 August 2015 email "confirmed to you that the matters you raised are being considered in the context of paragraph 3.2 of ST/SGB/2008/5, and he assured you that your complaint was being taken seriously and that appropriate action would be taken in due course". The MEU therefore found that "there was thus no administrative decision, implied or explicit, not to take action on your complaint. Rather, your complaint is being considered in the appropriate context".

13. Responding to an email from the Applicant of 6 October 2015, by an email of the same date, the Director reiterated that the Applicant's complaint was being taken "seriously" but he also noted that "in a large bureaucracy such as ours, resolving matters such [as yours] is by no means an easy and straight forward matter".

14. On 8 and 16 October 2015, the Applicant met with the Director to discuss his case, but they apparently did not agree on any solutions (no meeting notes have been submitted from either meeting).

15. By email of 16 October 2015, the Assistant Secretary-General and Acting Head of the Office of Internal Oversight Services ("the ASG/OIOS"), in response to an email from the Applicant of 5 October 2015, requested him to provide his "specific suggestions on the additional actions that need to be taken to further improve your work environment". The ASG/OIOS further requested the Applicant to "discuss these suggestions with [his] supervisors so that they can let me know of their recommendations", nothing that he did so "because your note does not highlight any concrete measures that I can act on at this time".

16. By email dated 2 November 2015, the Applicant responded to the ASG/OIOS's email of 16 October 2015 and explained that his workplace issues were primarily caused by, or with the approval of, Mr. MD (name redacted). As solutions, the Applicant proposed: (a) "a divisional retreat for all [Investigations Division's] staff"; (b) "an external audit of all staffing actions with the OIOS during the mandate of [the formed Under-Secretary-General of OIOS]; and (c) "the resumption of the monthly publication of the [Investigations Division] staffing table". According to the Applicant's own submissions, Mr. MD and he have not worked in the same place since 10 April 2014 (see Judgment No. UNDT/2018/052, para. 5).

The parties' submissions

17. The Applicant, in essence, submits that as the Dispute Tribunal in Judgment No. UNDT/2018/052 found that the Applicant had submitted a legitimate complaint under sec. 3.2 of ST/SGB2008/5, the Applicant was not only entitled to a response from the Respondent, but was explicitly promised one on three occasions although he never received it.

18. The Respondent submits that no right to an investigation exists where none is warranted, arguing that in *Nadeau* 2017-UNAT-733/Corr.1, and also referring to

Auda 2017-UNAT-787, the Appeals Tribunal identified the principles for reviewing a complaint under sec. 5.14 of ST/SGB/2008/5, noting, *inter alia*, that, "The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations".

19. The Respondent further contends that the substance of the complaint did not, as required by sec. 5.13 of ST/SGB/2008, describe any incidents of alleged prohibited conduct. The reasons that the Applicant mentions, those by which the former USG/OIOS did not meet her obligations under sec. 3.2 of ST/SGB/2008/5, did not provide a meaningful *indicium* of prohibited conduct. They did not indicate incidents of harassment, sexual harassment, discrimination, or abuse of authority. On the contrary, the reasons provided by the Applicant misconstrued the rights and duties of a manager. First, the former USG/OIOS had no duty to hold the staff members identified in "a vacated judgment" accountable (it is not clear to the Tribunal to what exact judgment the Respondent refers). Second, the Applicant, despite his disagreement with the former USG/OIOS, provided no indication that the former USG/OIOS abused her authority in reviewing complaints of prohibited conduct. Third, the Applicant had no right to be provided with the full text of a report prepared at the Organization's expense for its own management.

20. The Respondents submits that the Organization's response to the Applicant's complaint was consistent with the requirements of ST/SGB/2008/5, which does not specify any procedures for responding to complaints when the responsible official determines that there are insufficient grounds to initiate a formal fact-finding investigation. The Organization retained the discretion to respond to such complaints managerially, as was done in this matter and engaged in good faith efforts to address the Applicant's feelings of dissatisfaction. The Director met with the Applicant on 8

and 16 October 2015 to discuss and to seek to resolve the Applicant's concerns. In addition, the then ASG/OIOS engaged with the Applicant and asked him to identify specific suggestions to further improve his work environment. The ASG/OIOS also requested the Applicant to discuss these suggestions with his supervisors and let the ASG/OIOS know of their recommendations. The Applicant's only suggestions were: a divisional retreat for staff of the OIOS Investigations Division, an external audit of all staffing actions within OIOS during the mandate of the former USG/OIOS and the monthly publication of the Investigations Division staffing table. The Applicant made no suggestions relating to his own duties or responsibilities, reporting lines or working arrangements, or similar matters that could reasonably be expected to impact his work environment, and the Organization continued its efforts to address the Applicant's dissatisfaction well after the filing of the application.

Consideration

The substantive issues of present case

21. In Judgment No. UNDT/2018/052, when holding the application was receivable, Judge Ebrahim-Carstens defined the contested administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute as "the Administration's failure/omission to consider the Applicant's complaint dated 18 February 2015 under ST/SGB/2008/5 and to inform him of the result". She also clarified that the present case is not *res judicata* as the Dispute Tribunal's previous Judgment No. UNDT/2015/097 concerned a complaint dated 27 December 2013, which the then USG/OIOS dismissed on 18 February 2015 and the complaint in the present case is dated 18 February 2015 and therefore cannot have been adjudicated as part of *Nadeau* UNDT/2015/097. In addition, the former complaint was about the

Secretary-General not taking action with reference to sec. 5.14, of ST/SGB/2008/5, and the present case concerns sec. 3.2 of the same Bulletin.

22. The issues of the present Judgment are therefore:

a. If the Administration's alleged failure/omission to consider the Applicant's complaint dated 18 February 2015 under sec. 3.2 of ST/SGB/2008/5 and to inform him of the result constitutes a breach of any right of the Applicant under his employment contract as per art. 2.1(a) of the Dispute Tribunal's Statute?

b. If so, what remedies, if any, is the Applicant entitled to?

Did the Administration's alleged failure/omission to consider the Applicant's complaint breach his rights?

The applicable legal framework

23. Article 2.1(a) of the Statute of the Dispute Tribunal provides that, "The Dispute Tribunal shall be competent to hear and pass judgement on an application … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance". This therefore also includes ST/SGB/2008/5.

24. ST/SGB/2008/5 provides in sec. 3.2 that, "Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct". This includes that, "They must act as role models by upholding the highest standards of

conduct … have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner". If they fail to do so and "fulfil their obligations under the present bulletin" then this "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".

25. The Tribunal notes that whereas sec. 3.2 of ST/SGB/2008/5 imposes a "duty" on the Administration "to take all appropriate measures" with a view to "promot[ing] a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct", very limited statutory guidance is otherwise provided in the provision on what such measures could be in practice. The only example, at least as relevant to the present case, appears to be that "complaints of prohibited conduct are promptly addressed in a fair and impartial manner".

26. A search of the Appeals Tribunal's jurisprudence reveals that the Appeals Tribunal has not had the opportunity to pronounce itself on the interpretation of sec. 3.2 in terms of what the actual obligations of managers and supervisor are to achieve the goals stated in this provision. Regarding managerial decisions in general, the Tribunal notes that the Appeals Tribunal has held that the Administration enjoys certain margin of discretion (see, for instance, *Sanwidi* 2010-UNAT-084, paras. 38-42), which, in a situation as in the present case, would also appear to apply to its obligations under sec. 3.2 of ST/SGB/2008/5.

27. The Tribunal notes that the regular principle of interpretation before the Dispute Tribunal is the plain meaning rule (see, for instance, *Scott* 2012-UNAT-225). When using the word "duty" and stating that "complaints of prohibited conduct are promptly addressed in a fair and impartial manner", this would imply that when a staff member requests the Administration "to take appropriate measures" with reference to sec. 3.2, the Administration would also need to respond thereto, and

depending on the circumstances, would also need to take some sort of relevant action if not rejecting the complaint. To trigger such a duty to respond, it is therefore not a prerequisite that the Administration actually finds that the relevant conduct was of a "prohibited" nature insofar as the relevant complaint simply concerned such allegation. On a more general note, the Tribunal notes that such duty to respond also constitutes a basic tenet of administrative law whereby an administration must address all genuine requests from the public—even if found groundless—within reasonable time or else incur liability.

28. If the Administration then promises the staff member to do something to address a situation, it must also then fulfill its promise to do so and take some action, even if it simply means to dismiss a request. This follows from the principle of legitimate expectations (see, for instance, *Sina* 2010-UNAT-094, affirming on liability definition of *Sina* UNDT/2010/060). The Tribunal further refers to para. 36 of Judgment No. UNDT/2018/052 in which the Dispute Tribunal stated that:

> … It appears evident that if a staff member files a complaint about her or his work environment under sec. 3.2, the Administration must, as stated by the Director, take this complaint seriously because such complaint could potentially have very significant impact not only on the staff member but also on involved managers and/or supervisors and, as stated in sec. 3.2, "Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner". Embedded in the text of the sec. 3.2 is therefore a duty for the Administration, at minimum, to consider such complaint and then inform the complainant about the outcome of these deliberations—otherwise, in cases such as the present, the provision would be left without any practical effect or meaning (the purposive approach). This also appears, commendably, to be the understanding of the Director in his communication with the Applicant, undertaking that his complaint would be considered and that a response would be forthcoming.

Did the Administration fulfill its duty under sec. 3.2 of ST/SGB/2008/5?

29. The Tribunal notes that contrary to the contentions of the Respondent, this case concerns sec. 3.2 and not secs. 5.13 and 5.14 of ST/SGB/2008/5. As stated above, under sec. 3.2 of ST/SGB/2008/5, the Administration is required to address a complaint of prohibited conduct "promptly" and in a "fair and impartial" manner. Even when the Administration finds that the relevant conduct is not actually "prohibited", the complainant must be informed accordingly.

30. From the case record, it follows that in addition to the communications between the Applicant and the Director regarding the Applicant's workplace concerns referred to in para. 35 of Judgment No. UNDT/2018/052, the Applicant also had an email exchange with the ASG/OIOS from 28 September to 2 November 2015. From these emails, it follows that the Applicant's main issue was his relationship with Mr. MD, but it also follows that Mr. MD no longer worked in the same place, and according to the Applicant's own factual submissions, he had not done so since 9 April 2014. Upon the ASG/OIOS's request for specific measures that could then be enacted to improve the Applicant's situation, the Applicant proposed in his 11 November 2019 email to the ASG/OIOS that, as also submitted by the Respondent, three measures could be enacted, namely: a divisional retreat, an external audit, and the publication of the staffing table.

31. The Tribunal notes that it would therefore seem that the Applicant's situation with Mr. MD had actually been resolved in that they no longer worked together. The Applicant's eventual temporary reassignment would appear to have been a very reasonable further solution to bring him out of an office environment in which he obviously continued to feel uncomfortable and which he even labelled as toxic on various occasions. Finally, the Tribunal finds that it would fall within the Administration's discretion whether to enact any of the three measures proposed by

the Applicant; as also submitted by the Respondent, all of these measures concern the general environment in the Applicant's workplace rather than his specific issues.

32. Nevertheless, with reference to sec. 3.2 of ST/SGB/2008/5, the Tribunal finds that whereas the responses to the Applicant's 18 February 2015 complaint were therefore "fair and impartial", these responses were not necessarily "prompt", which according to the online dictionary of Merriam-Webster means "being ready and quick to act as occasion demands" and "performed readily or immediately".

33. In this regard, the Tribunal notes that the Applicant submitted his complaint under sec. 3.2 of ST/SGB/2008/5 on 18 February 2015. The Director emailed the Applicant on 8 May, 21 August and 6 October 2015 promising him a response to his complaint and, by the Respondent's own admission, the Director only met with the Applicant on 8 and 16 October 2015. Subsequently, the Director emailed the Applicant on 27 November 2015. Furthermore, on 16 October 2015, the ASG/OIOS responded by email to the Applicant's emails of 28 September and 5 October 2015 requesting his "specific suggestions" to further improving his work environment, which the Applicant then provided on 2 November 2015. Finally, the Respondent has throughout the case submitted that discussions on his workplace concerns were "continuous"—the problem is just that the Respondent has provided no evidence on when and how such alleged discussions took place and the submissions therefore stand unsubstantiated.

34. In light of the above, the Tribunal finds that the first meaningful and substantive response to the Applicant's 18 February 2015 complaint was his meeting on 8 October 2015 with the Director, almost eight months after he submitted his complaint. This is, by no means, addressing a complaint of prohibited conduct promptly. Although the Administration might have found it difficult to properly respond to the Applicant, particularly as his apparent main problem, namely his

troublesome relationship with Mr. MD, was no longer an issue, it still had a duty to respond to the Applicant in a timely manner. If the Administration simply intended to reject the Applicant's requests, this should have been made clear to the Applicant at its earliest convenience. Accordingly, the Tribunal finds that the Administration failed to address the Applicant's complaint under sec. 3.2 with the mandatory promptness.

Remedies

35. The Tribunal observes that art. 10.5(b) of the Dispute Tribunal's Statute states that, "As part of its judgment, the Dispute Tribunal may … order … [c]ompensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant".

36. As remedy, the Applicant requests immediate compensation of two years of net-base salary and an additional USD50,000 for unnecessary and avoidable stress and suffering. In response, the Respondent essentially submits that the Applicant has not provided credible evidence to show that he has suffered harm from the contested evidence.

37. As evidence of the alleged harm that the Applicant suffered from the delayed response(s) to his complaint under sec. 3.2 of ST/SGB/2008/5, he submits a written evaluation in the form of an email that was provided by "his treating psychiatrist" from 4 May 2017 through 8 January 2019. In this email is, *inter alia*, stated that the Applicant was "highly stressed by his feeling the [United Nations] Organization failed to address the hostile work environment in his office" and that he "strongly [felt] that he was being forced to work under individuals whom he believe[s] were demonstrably unethical or incompetent".

38. It follows from the consistent jurisprudence of the Appeals Tribunal that the Dispute Tribunal is the primary fact-finder and that it falls "within [its] competence to consider all the evidence presented by both parties and to determine the weight to attach to such evidence" (see *Gehr* 2012-UNAT-234, para. 47 and similarly, for instance: *Abbassi* 2011-UNAT-110, *Larkin* 2011-UNAT-134, *Larkin* 2012-UNAT-263, *Ljungdell* 2012-UNAT-265, *Fiala* 2015-UNAT-516, *Riano* 2015-UNAT-529). Regarding the evidentiary value of a written assessment of a medical professional, the Appeals Tribunal has taken a flexible approach and while in some cases considering such documentation adequate evidence, it has in other cases dismissed it as insufficient (see, for instance, *Kozlov and Romadanov* 2012-UNAT-228 *vis-à-vis Maslei* 2016-UNAT-637).

39. The Tribunal notes that in the present case, the written assessment is provided by a psychiatrist, who only started to treat the Applicant around two years later after the Administration's delayed response to his complaint. The assessment is therefore made retrospectively and is not a contemporaneous evaluation of the Applicant's emotional and psychological state of mind (i.e. based on hearsay). Furthermore, while the assessment is that the Applicant suffered some psychological harm from his workplace environment, this is not specifically linked to the improper delay. Consequently, the Applicant has failed to substantiate the necessary causality between the irregularity and his alleged harm, and based on the assessment, it is not possible for the Tribunal to determine whether the Applicant suffered any compensable injury from the Administration's breach of his rights under sec. 3.2 of ST/SGB/20008/5.

40. Accordingly, the Applicant's request for compensation is rejected.

Conclusion

41. In light of the foregoing, the application is granted in part:

a. The Administration's response to the Applicant complaint under sec. 3.2 of ST/SGB/2008/5 was adequate but untimely;

b. The Applicant's request for compensation is rejected.

(Signed)

Judge Joelle Adda

Dated this 22nd day of November 2019

Entered in the Register on this 22nd day of November 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York