



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MICALETTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Victor Rodriguez

Counsel for the Respondent:

Jonathan Croft, AAS/ALD/OHR

Susan Maddox, AAS/ALD/OHR

Introduction

1. On 7 May 2017, the Applicant, a former staff member working with the United Nations-African Union Hybrid Operation in Darfur (“UNAMID”) filed an application before the Dispute Tribunal contesting the following decisions:

a. The decision to place an adverse note in his Official Status File (“OSF”).

b. The decision to deny him his right to defend himself, to due process and to work, by withholding the disciplinary process that the Secretary-General had initiated.

c. The decisions not to properly consider his submissions that refute the allegations made against him, not to grant his requests for evidence and not to observe his due process rights, which he requested in his letter to the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) dated 25 January 2017.

d. The decision not to disclose and assess the records of the two audio interviews of the witness that the Office of Internal Oversight Services (“OIOS”) claimed had corroborated one of the two OIOS’s final findings mentioned in paragraph 146 of an OIOS investigation report of 18 November 2016.

2. The Respondent filed a reply on 19 May 2017.

Facts

3. The Applicant joined UNAMID on 8 January 2007 at the P-5 level. In August 2010, the Applicant was placed on Special Post Allowance at the D-1 level as Officer-

in-Charge of the Humanitarian and Protection Strategy Unit, a position he held until August 2014.¹

4. On 25 March 2014, OIOS received, from the Office of Legal Affairs (“OLA”) at UNAMID, a report of possible misconduct implicating the Applicant. It was reported that in February and March 2014, four Humanitarian Officers of UNAMID filed a complaint against the Applicant, for alleged abuse of authority, harassment, violent and retaliatory behavior.²

5. On 2 June 2015, the Applicant was separated from the service of the Organization with compensation in lieu of notice for a prior matter in which he was found to have engaged in misconduct.³

6. In May 2016, the Applicant received a synopsis of the allegations against him sent from OIOS Juba-South Sudan Office. On 31 October 2016, the Applicant provided written comments to OIOS and denied all allegations of wrongdoing made against him.⁴

7. On 18 November 2016, the Director of the Investigations Division of OIOS referred a preliminary report to the Department of Field Support (“DFS”). OIOS recommended that DFS should consider placing a copy of the Preliminary Investigation Report in the Applicant’s OSF for future consideration and action in the event the Applicant applies to the United Nations positions.⁵

8. On 9 December 2016, the Assistant Secretary-General, Department of Field Support (“ASG/DFS”) concurred with the OIOS finding that the Applicant had engaged in conduct that violated the United Nations Regulations and Rules, including, *inter alia*, ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual

¹ Application, annex 3.

² Application, annex A-1.

³ Application, section VII, para 19; reply, section A.

⁴ Application, section VII, para 21; Application, annex A-2.

⁵ Application, section VII, para 22, Application, annex A-2.

harassment, and abuse of authority). Accordingly, the ASG/DFS approved the placement of a Note in the Official Status File (OSF) of the Applicant.⁶

9. On 9 January 2017, the Applicant was notified of the placement of the Note in his OSF pursuant to ST/AI/292 (Filing of adverse material in personnel records).⁷ On 25 January 2017, the Applicant, in a letter sent to the ASG/OHRM challenged the placement of the Note in his OSF and stated that the investigation conducted by OIOS had major legal, procedural and factual flaws.⁸

10. On 14 February 2017, the Applicant requested for management evaluation of the contested decision.⁹ The Applicant received the response on 5 April 2017.¹⁰

Submissions

Receivability

Respondent's submissions

11. The application against the decision to place the Note in the Applicant's OSF is not receivable as it has no direct effect on his legal rights.

12. The Note does not make explicit reference to any alleged misconduct or disciplinary sanction. It does not bar the Applicant from being re-employed by the Organization. The Note does not constitute a final action in the matter of the complaints against the Applicant, it follows that no final decision has been taken in that matter.

13. The present case is akin to that of *Nguyen-Kropp & Postica*¹¹, in which the United Nations Appeals Tribunal ("UNAT") found that a challenge to a decision to initiate an investigation was not receivable, as it is one of a series of steps aimed at

⁶ Application, annex 2.

⁷ Application, section VII, para 22.

⁸ Application, section VII, para 23.

⁹ Application, section VII, para 24.

¹⁰ Ibid.

¹¹ *Nguyen-Kropp & Postica* 2015-UNAT-509.

leading to an administrative decision, and as such does not directly affect the legal rights of a staff member.

14. The Applicant was separated from service previously for a prior matter in which he was found to have engaged in misconduct. The Note merely indicates that a matter was unresolved at a time when the Applicant was no longer a staff member.

15. Providing the Note to the Applicant served to provide notice to the Applicant of the placement of the Note, and also afforded an opportunity for the Applicant to provide comments which could be included with the Note. This accorded with the requirements of ST/AI/292 regarding the placement of information that may be considered adverse on a staff member's OSF.

16. The Note conveys no decision and explicitly provides for the possibility of further review of the matter should the Applicant rejoin the Organization. The Note is not in any way a ban on his employment and it in no way conveys any finding as to whether he engaged in misconduct. The Note states that OHRM should be contacted if the Applicant rejoins the Organization. The Note does not state that OHRM should be contacted if the Applicant applies to join the Organization or is being considered for a position. Accordingly, the Applicant's contentions that the placement of the Note constitutes the placement of adverse material carrying direct legal consequences is incorrect and misplaced at this juncture as he is being specifically informed that no decision has been taken on the matter.

Applicant's submissions

17. The Note placed in the Applicant's OSF constitutes a unilateral decision taken by the Administration in a precise individual case - individual administrative act-, which produces direct legal consequences to the legal order, affecting a former staff member's terms and conditions of appointment.

18. The Secretary-General took the decision pursuant to ST/AI/292 and this constitutes adverse material related to the conduct attributed to the Applicant.

19. The Secretary-General's decision to place an adverse Note in his OSF as a preliminary decision within the already initiated disciplinary process contravened then applicable ST/AI/371/Amend.1 (Revised disciplinary measures and procedures).

20. The placement of the Note has become an additional worrisome deterrent to the Applicant's search for a job in his professional field. Despite the assertion by the Respondent that the OIOS investigation report has not been physically placed in his OSF, it is obvious that the Administrative Law Section OHRM will refer to it in case of an inquiry from a prospective employer. In order to avoid pernicious and irreversible consequences to his reputation and compromise future job opportunities within the United Nations Common System, the Applicant has been forced not to apply for a number of posts that have become available. The Applicant has suffered similar concerns in the case of applications out of the United Nations Common System.

Merits

Applicant's submissions

21. The Applicant submits that the decision to place a Note in his OSF is arbitrary, constitutes a violation of his fundamental rights and a denial of justice, and, importantly, inappropriately attempts to avoid accountability on the part of the Respondent.

22. By way of remedy, the Applicant requests the Tribunal to order that: (a) the Note placed in his OSF and all other possible negative materials relating to him be removed from his records; (b) the Respondent ensure an immediate, credible and independent determination of his case so that facts are established; (c) the Applicant be granted access to all evidence and documentation already requested in his letter to ASG/OHRM dated 25 January 2017; and (d) the payment of adequate monetary compensation for the violation of fundamental and due process rights, abuse of process and moral and other damages that he suffered.

Respondent's submissions

23. The Respondent contends that placing the Note in the Applicant's OSF is in keeping with the Organization's practice. It is common practice to place such notes in the Official Status Files of former staff members, including retirees, and staff members who have either been terminated or resigned. The Respondent maintains that the Applicant has introduced no evidence to the contrary and has, further, introduced no evidence that such a practice is prohibited.

24. With regard to the Applicant's demand to have his case determined and facts established, the Respondent submits that the staff has no right to require the Secretary-General to institute any disciplinary proceedings.

25. On the basis of the foregoing, the Respondent requests the Tribunal to dismiss the Application in its entirety.

Considerations

26. The Tribunal through Order No. 226 (NBI/2019) issued on 26 December 2019 on case management advised the parties to file final submissions. This was because upon a close assessment of the record, the Tribunal was of the view that the matter can be disposed of summarily.

27. There are essentially two issues for determination relating to: (i) placing of the note on the Applicant's personal file and its consequences; and (ii) the alleged failure of the Respondent to afford the Applicant his due process rights in the manner that he handled allegations of misconduct regarding four complainants filed against the Applicant.

(i) *Placing of the note on the Applicant's personal file and its consequences*

Whether the Tribunal is competent to hear and pass judgment on this issue?

28. Article 2(1)(a) of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or 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 non-compliance”.

29. The Respondent derived his authority to place the Note in the Applicant’s OSF from ST/AI/292 which provides the regulatory framework including the procedure to be followed when he decides to take that action. This was the relevant administrative issuance in force at the time of the alleged non-compliance.

30. There is no dispute as to the contents of the Note and the procedure that was followed prior to and after placing it. In summary, through a letter of 9 January 2017 containing three attachments, (a) a memorandum dated 9 January 2017 (b) investigation report dated 18 November 2016 concerning four complaints submitted by four Humanitarian Affairs Officers against the Applicant alleging abuse of authority, harassment, violence and retaliation, and (c) the Note.

31. The Applicant armed with these three documents was given two weeks within which to make comments pertaining to the Note so that those comments alongside the Note but excluding the investigation report and referral memorandum could be placed in his OSF in accordance with ST/AI/292.

32. The Applicant provided his comments stating among other things that the investigation which prompted the referral to OHRM was conducted with major legal and procedural flaws.

33. Paragraph 2 of ST/AI/292 provides that:

adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle,

such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.

34. As indicated earlier in this judgment the Applicant does not dispute that the Respondent complied with ST/AI/292 to the letter. He concedes that the Respondent acted within the law.

35. The Applicant however feels that although the Respondent acted within the regulatory framework prevailing at the time, the Tribunal should still find that the placing of the Note was arbitrary and that it has direct legal consequences on his contract or terms of employment in that among other grievances, he is barred from ever getting re-employed within the United Nations system.

36. This however is not provided as a consideration under the relevant administrative issuance. The Applicant's conclusions are also contrary to the objective for which the Note was placed, which was to record that the Applicant separated from service and at the time of separation, a matter had not been resolved and that the Administrative Law Section should be contacted in the event that the Applicant should become re-employed with the United Nations Common System in the future.

37. The Respondent's right to place a Note in a OSF and the obligation to allow the staff member including former staff member to make written comments on the Note if he or she wishes derives from the principle that:

The Secretary -General clearly has authority to administer the Organization's records, including those of former staff members, and to ensure they reflect the staff member's performance and conduct during his or her period of employment. This authority does not lapse upon the staff member's separation from service...to conclude otherwise would mean that the conduct by a staff member in his or her last days of service could not be recorded in the Organization's files if the staff member separated prior to such conduct being recorded...a staff member could essentially obviate the Administration's broad discretion and authority

in administrative matters by simply resigning or otherwise separating from the Organization.¹²

38. This UNAT precedent is clear and illustrative of the intention of ST/AI/292. It is intended to allow the Secretary-General to manage records, properly manage investigations and discipline and record a reflection of a staff member's performance and conduct during employment. A staff member including a former staff member has an opportunity to set the record straight through placing of his or her own comments in the OSF.

39. The Applicant's right under ST/AI/292 was exercised by placing his comments in his OSF. It is therefore not correct to allege that "[he]has already **exposed in detail** (his emphasis) every element about the applicability of ST/AI/292" to mean that "The Note de facto bans the Applicant from re-employment with the Organization and from working with International Organizations of the UN Common System".

40. On that basis, the application on the first issue is not receivable as it does not disclose any administrative decision that has any direct legal consequences on the Applicant's contract or a term of his employment.

(ii) *The alleged failure of the Respondent to afford the Applicant his due process rights in the manner that he handled the allegations of misconduct regarding four complaints filed against the Applicant.*

41. The Applicant does not dispute that the disciplinary procedure into the allegation of misconduct submitted by four complainants against him is and remains inconclusive. No final decision has been made regarding that allegation of misconduct. It is therefore premature for the Applicant to declare that the procedure was legally flawed because his due process rights were violated.

42. The Tribunal has competence to hear and pass judgment on matters that have reached finality thereby having direct legal consequences on a staff member. It is not

¹² Gallo 2016-UNAT-706 at para 18.

open for the Tribunal to reach findings of fact and make legal pronouncements on decisions that are not final and conclusive.

43. In cases of an incomplete disciplinary process, the Tribunal is persuaded by the reasoning in *Applicant* UNDT/2010/096/Corr.2 at paragraph 16-holding that “it follows that the Applicant is not entitled to require the Secretary-General to institute disciplinary proceedings against him, whether to give an opportunity to clear his name or for any other reason”.

44. The Applicant’s request to this Tribunal that “the Respondent ensure an immediate, credible and independent determination of his case so that facts are established and to be granted access to all evidence and documentation already requested in his letter to ASG/OHRM dated 25 January 2017” relate to the issue of the disciplinary process which was discontinued upon the Applicant’s separation from service.

45. The Applicant has not cited any term of a contract or employment or jurisprudence that entitles him or this Tribunal for that matter to compel the Secretary-General to institute or conclude disciplinary proceedings against a former staff member.

46. The application is not receivable as there is no administrative decision which is the subject of an appeal to this Tribunal. It is dismissed.

JUDGMENT

47. The Application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 10th day of January 2020

Entered in the Register on this 10th day of January 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi