



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

ARVIZU TREVINO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. On 26 May 2020, the Applicant, the former Chief Executive Officer of the United Nations Joint Staff Pension Fund (“CEO/UNJSPF”) filed an application challenging the 16 January 2020 decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) “not to investigate [his] harassment complaint filed on 24 July 2019 in violation of the harassment policy, due process and other UN rules, regulations, and administrative issuances.”

2. On 26 June 2020, the Respondent filed his reply submitting that the application is not receivable *ratione personae* as the Applicant is no longer a staff member. In the alternative, the Respondent contends that the application has no merit as the contested decision was lawful.

Background

3. On 1 January 2006, the Applicant commenced his service with the United Nations.

4. On 7 January 2019, the Applicant separated from service.

5. On 24 July 2019, the Applicant filed a harassment complaint in accordance with sec. 5.13 of the Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). In his complaint, the Applicant alleged that a number of staff members had engaged in a defamation campaign against the Applicant and committed other acts intended to intimidate and damage his reputation.

6. On 16 January 2020, the Applicant was informed that the USG/DMSPC decided, after a review of the complaint and related materials, “that the statements and comments were made by those staff members in their capacity as staff representatives.

Accordingly, any assessment of their statements and comments must take into account the latitude afforded staff members acting as staff representatives, as well as the principle of freedom of association which demands that the Administration refrain from interfering with the activities of staff representatives. Under these circumstances, pursuit of the matter within the context of a disciplinary process would not be warranted”.

Consideration

Scope of the case

7. The legal issues before the Tribunal are:
 - a. Whether the Applicant has standing as a former staff member to bring the claim before the Tribunal?
 - b. If so, whether the decision not to investigate the Applicant’s complaint of prohibited conduct under ST/SGB/2008/5 was lawful?

Does the Applicant have standing to bring the claim before the Tribunal?

8. The Respondent submits that the application is not receivable because the Applicant is no longer a staff member. The Respondent argues that the Applicant’s status as a former status member does not grant him standing to challenge the outcome of a complaint of prohibited conduct submitted after his separation from service on 7 January 2019. The Respondent states that the decision to close the Applicant’s complaint is not connected to the Applicant’s former terms of appointment and therefore cannot be challenged.

9. The Tribunal finds that the Respondent’s claim of non-receivability based on the Applicant’s lack of standing is unconvincing. Article 3.1(b) of the Statute of the Dispute Tribunal states that an application under the Statute may be filed by “any

former staff member of the United Nations”. The Applicant is a former staff member and the contested decision concerns matters related to his former employment with the United Nations, namely, that the Applicant’s 24 July 2019 complaint raises claims of alleged harassment experienced by the Applicant while he was in his former workplace. Accordingly, the application is receivable *ratione personae*.

Whether the decision not to investigate the Applicant’s complaint of prohibited conduct under ST/SGB/2008/5 was lawful?

10. The Applicant claims that the USG/DMSPC’s decision dated 16 January 2020 not to formally investigate the Applicant’s 24 July 2019 complaint of harassment was unlawful.

Legal framework

11. Staff rule 1.2(f) prohibits any form of discrimination, abuse of authority or harassment at the workplace or in connection with work.

12. ST/SGB/2008/5 (which was in force at the material time) provides the procedure for addressing complaints of prohibited conduct.

13. Section 5.14 of ST/SGB/2008/5 provides “[u]pon 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”.

14. The Dispute Tribunal has held that “it is the responsible official’s duty to assess whether there is a ‘reasonable chance’ that the alleged facts described in the complaint—if indeed they occurred—would amount to prohibited conduct” (*Benfield-Laporte* UNDT/2013/162 (affirmed by 2015-UNAT-505)).

15. Only in a case of “serious and reasonable accusation, does a staff member have a right to an investigation against another staff member which may be subject to judicial review” (*Nadeau* 2017-UNAT-733/Corr.1).

16. The Organization has a degree of discretion how to conduct a review and assessment of a complaint of prohibited conduct (see for instance, *Oummih* 2015-UNAT-518/Corr.1; *Benfield-Laporte* 2015-UNAT-505). The judicial review of an administrative decision involves a determination of the validity of the contested decision on grounds of legality, reasonableness and procedural fairness (see for instance, *Belkhabbaz* 2018-UNAT-873, *Sanwidi* 2010-UNAT-084).

Merits

17. With the above in mind, the Tribunal will now determine whether the decision not to investigate the Applicant’s complaint of prohibited conduct was in violation of the Applicant’s rights.

18. The Applicant contends that the USG/DMSPC’s initial review and assessment of his complaint was flawed, tainted with bias and motivated by extraneous motives. In support of his claim, the Applicant submits that the USG/DMSPC erroneously concluded that the individuals were apparently staff representatives and that an investigation could not be opened. The Applicant claims that the USG/DMSPC failed to properly consider the evidence on record. Finally, the Applicant submits that even if the individuals identified in his complaint were purporting to act in their capacity as staff representatives, their behavior went far beyond any legitimate bounds and are not shielded by principles of freedom of association.

19. The Respondent on the other hand submits that the contested decision was lawful. The Respondent states that the Secretary-General, with the assistance of the USG/DMSPC, reviewed the Applicant’s allegations as detailed in the complaint, and arrived at a lawful and reasonable decision. The Respondent states that the statements

and conduct identified by the Applicant were part of staff representatives' efforts to reach out to their constituents on the administration of pension and disability benefits, and to ensure that the dialogue with management on pension and disability benefits was informed by staff comment. The Respondent states that the Secretary-General considered the latitude of expression afforded to staff representatives, as well as the principle of freedom of association, which demands that the Administration refrain from interfering with the activities of staff representatives. The Respondent argues that the Administration, therefore, properly determined that the facts described in the complaint, if proven, did not warrant an investigation.

20. Having reviewed the papers before it, the Tribunal is satisfied that the contested decision was lawful. In his 24 July 2019 complaint, the Applicant alleged that the staff members identified in his complaint subjected him to harassment, "which is on-going, resulted in significant reputational and career harm as well as in severe deterioration in [his] health and eventual disability". In accordance with sec. 5.14 of ST/SGB/2008/5, upon receipt of the Applicant's complaint, the USG/DMSPC, as the responsible official, reviewed the complaint to assess whether there were sufficient grounds to warrant a formal fact-finding investigation. Within five months of the receipt of the complaint from the Office of Internal Oversight Services, the USG/DMSPC completed her review.

21. Following her review, the USG/DMSPC found that the seven named staff members whose conduct the Applicant complained about were established staff representatives either as active office holders or actively involved with the staff union. The Tribunal notes that statements and conduct of the staff representatives identified by the Applicant appear to be in relation to the Applicant's conduct in his role as CEO/UNJSPF, and therefore concern workplace issues, such as how UNJSPF manages and administers the pension and disability benefits.

22. The Tribunal finds that it was reasonable for the USG/DMSPC to determine that the status and management of the UNJSPF is a legitimate subject of concern to staff at large and therefore comments made by staff representatives about the management of UNJSPF concern work-related issues. In this regard, the Tribunal notes that staff rule 8.1(f) entitles staff representative bodies to effective participation in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies.

23. Based on the record, it also was reasonable for the USG/DMSPC to determine that the Applicant's complaint did not identify any statement or conduct that would constitute a gross abuse by staff representatives of their right to express themselves on workplace issues. It is clear that the Applicant is unhappy about how the staff representatives articulated their concerns about the management of UNJSPF. However, the Tribunal notes that sec. 1.2 of ST/SGB/2008/5 clarifies that "[d]isagreement on work performance or on other work-related issues is normally not considered harassment ...".

24. The Applicant alleges that the USG/DMSPC's participation in the assessment of his complaint was tainted with bias "since there are reasonable grounds and evidence that her refusal to establish a fact-finding panel seems partial and motivated by extraneous and possibly improper motives".

25. Under the jurisprudence of the Appeals Tribunal, if the applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081; *Obdeijn* 2012-UNAT-201). However, the Applicant has presented no evidence to that effect. In the absence of sufficient evidence, there is no basis for concluding that the contested decision was improperly motivated.

26. Based on the above, the Applicant has not shown that there were sufficient grounds to warrant a formal fact-finding investigation in this matter, or that the

USG/DMSPC acted unreasonably in making her decision. The contested decision was therefore lawful.

Conclusion

27. In light of the above, the application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 18^h day of December 2020

Entered in the Register on this 18th day of December 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York