



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

OKWIR

v.

SECRETARY-GENERAL

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG
Miriana Belhadj, LPAS, UNOG

Introduction

1. The Applicant, an Auditor at the P-3 level, Internal Audit Division, Office of Internal Oversight Services (“IAD/OIOS”) in Geneva, contests the Administration’s decision not to initiate a fact-finding investigation into his complaint against the Chief, Headquarters Audit Section (“HAS”), IAD/OIOS and the Director, IAD/OIOS.
2. For the reasons stated below, the application is rejected.

Facts

3. On 1 August 2019, following assignments in other duty stations, the Applicant joined IAD/OIOS in Geneva, Switzerland.
4. On 2 September 2019, the Applicant wrote an email to the Director of IAD/OIOS to submit a complaint for “harassment, work bullying, failure to provide a conducive working environment and, abuse of office” against the Chief, HAS, IAD/OIOS, who was then acting as Officer-in-Charge (“OiC”) of the United Nations High Commissioner for Refugees (“UNHCR”) Audit Service.
5. The Applicant’s complaint alleged that the Chief, HAS, IAD/OIOS:
 - a. Asked him personal questions upon his arrival in Geneva (e.g., if he found housing, when his family would be joining him), and later used the information to keep track of days when he would be out of the office and to chastise him for his absence from duty;
 - b. Frequented his office as well as a restroom located across from his office to monitor his presence in the office;
 - c. Made the Service Chief’s secretary monitor his movement and to report to Chief, HAS, IAD/OIOS, in case of his absence;

- d. Called other staff members at early and late hours to monitor their attendance;
 - e. Inappropriately referred to him as “junior staff”;
 - f. Criticized and tried to humiliate his immediate supervisor regarding his team’s methods of work, review process and work product and with whom the Chief, HAS, IAD/OIOS, disagreed on several issues in that regard; and
 - g. Told the Applicant that if he escalated the “issue”, he would turn the issue into a performance matter.
6. The Applicant asked the Director of IAD/OIOS to withdraw the delegation of authority as OiC from the Chief, HAS, IAD/OIOS, and to initiate an investigation into his actions.
7. On 3 September 2019, the Director of IAD/OIOS spoke to the Applicant by telephone to discuss the matters raised in his complaint.
8. On 3 October 2019, the Director of IAD/OIOS sent an email to the Applicant in response to his complaint of 2 September 2019. The Director’s response included the following:
- a. One cannot reasonably expect others to adjust their visits to a restroom and thus the Applicant should adapt to his environment;
 - b. It is the secretary’s official responsibility to monitor the attendance of all staff and the secretary had been performing this function for the last several years even before the Applicant’s arrival in Geneva;

c. While he claims that he is afraid of the Chief, HAS, IAD/OIOS, his own behaviour and words are not typical behaviours of someone who is afraid of his supervisor as he freely expressed his disagreements to the Chief, HAS, IAD/OIOS, and he was inappropriate and rude in his response to the Chief, HAS, IAD/OIOS;

d. The Chief, HAS, IAD/OIOS, is the OiC of the UNHCR Audit Service and in this capacity, he has the authority to talk to any staff member, and the Applicant has a duty to cooperate with colleagues and supervisors on work matters;

e. He does not need to champion other staff members' causes as they can directly speak to her in strict confidence; and

f. She found it unfortunate that the Applicant attributed sinister motives to the Chief, HAS, IAD/OIOS' well-intentioned questions as the questions he asked would be the sorts of questions that senior staff typically would ask arriving staff members to make them comfortable and help them settle down.

9. The Director of IAD/OIOS concluded that “there [were] no grounds to grant the ‘remedies’ [the Applicant] [had] sought” and advised him to “take a step back and assess [his] own behavior”. The Director of IAD/OIOS further conveyed to the Applicant that he had the option of contacting the Office of the Ombudsman and Mediation Services or the Staff Counsellor if he needed their assistance.

10. On the same day (3 October 2019), the Applicant submitted a formal report of prohibited conduct to the Assistant Secretary-General for Internal Oversight Services (“ASG/OIOS”), who was then acting as Officer-in-Charge of OIOS (“OiC/OIOS”). In his complaint, the Applicant raised allegations of “harassment, abuse of authority, threat of work performance, retaliation, misrepresentation and breach of confidentiality”. Specifically, the Applicant claimed that the Chief, HAS, IAD/OIOS,

retaliated against him by criticizing his work and making a threat with his statement that he would turn the issue into a performance matter.

11. On 5 October 2019, the Applicant wrote another email to the ASG/OIOS. In this email, he stated that he believed that the Director of IAD/OIOS spoke to the Chief, HAS, IAD/OIOS, about the matter and that the Director's assessment and conclusion were biased. He expressed his disagreement with the Director's assessment and stated that the Director's email of 3 October 2019 caused him distress.

12. On 14 October 2019, the Applicant submitted a request for protection against retaliation to the Ethics Office, claiming that the Chief, HAS, IAD/OIOS, and the Director of IAD/OIOS retaliated against him.

13. On 22 October 2019, the Ethics Office responded to the Applicant and advised him that although he had engaged in a protected activity when he reported allegations of prohibited conduct to the ASG/OIOS on 3 October 2019, no *prima facie* case of retaliation against him had been established since the alleged retaliatory acts all preceded his protected activity.

14. On 23 October 2019, the Applicant provided the ASG/OIOS with additional information regarding his complaint. In particular, he informed the ASG/OIOS that he had filed a request for protection against retaliation and received a response from the Ethics Office. In addition, he informed the ASG/OIOS that he had a meeting with the Director of IAD/OIOS on 22 October 2019 and that the Director told him to "move on" and asked his first reporting officer to "build capacity for [him]", which he considered to be retaliatory comments. He also wrote that he believed that the designation of the Chief, HAS, IAD/OIOS, as OiC was unlawful.

15. On 25 October 2019, the ASG/OIOS informed the Applicant that after careful review of his complaint, he had decided not to initiate a fact-finding investigation as he "did not find sufficient grounds for initiating a fact-finding investigation in accordance with either ST/SGB/2019/8 or ST/AI/2017/1" ("contested decision").

16. On 31 October 2019, the Applicant submitted a request for a management evaluation of the contested decision.

17. On 13 December 2019, by management evaluation, the contested decision was upheld. For the management evaluation, the OiC/OIOS provided comments in response to the Applicant's submission. The OiC/OIOS indicated that he considered the Director of IAD/OIOS's responses to the Applicant appropriate, which were part of his assessment that there were insufficient grounds to initiate a fact-finding investigation. The OiC/OIOS further indicated that none of the incidents cited by the Applicant demonstrated prohibited conduct by the Chief, HAS, IAD/OIOS, which included:

(i) the questions asked by [the Chief, HAS, IAD/OIOS] to [him] on [his] arrival to Geneva about [his] settling in to Geneva, which [he] alleged was for purposes of monitoring [his] absences; (ii) [the Chief, HAS, IAD/OIOS]'s frequent visits to [his] office or to the washroom near [his] office to allegedly monitor [his] presence; (iii) discussions and disagreements related to work matters; (iv) [the Chief, HAS, IAD/OIOS] advising [him] on the procedures of recording time and attendance in Geneva; and, (v) [the Chief, HAS, IAD/OIOS] ordering the time-keeper in the office to monitor [his] time and attendance.

18. On 13 January 2020, the Applicant filed the present application.

19. On 3 February 2021, by Order No. 22 (GVA/2021), the Tribunal informed the parties that the Tribunal would decide the case based on the papers before it.

Consideration

20. The issue in this case is whether the OiC/OIOS's decision not to investigate the Applicant's complaint of prohibited conduct was lawful.

21. From the outset, the Tribunal notes that the Applicant seems to also challenge the Administration's response to his request for management evaluation. However, the Administration's response to a request for management evaluation is not a reviewable

administrative decision (see *Kalashnik* 2016-UNAT-661) and therefore the Tribunal will only review the contested decision itself.

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

23. ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) provides the procedure for addressing complaints of possible prohibited conduct, and sec. 5 sets out the procedure for receiving and handling formal reports of possible prohibited conduct.

24. Section 5.4 provides that “[p]ossible prohibited conduct shall be reported” to the responsible official. The “responsible official” for OIOS staff members is the Under-Secretary-General for Internal Oversight Services (“USG/OIOS”).

25. Section 5.5 provides that “[t]he preliminary assessment of a report of possible prohibited conduct, investigations of possible prohibited conduct and action taken subsequent to an investigation shall accord with the procedures set out in sections 5 to 12 of ST/AI/2017/1”.

26. Section 5 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) governs the process for the “preliminary assessment of the information about unsatisfactory conduct”, and secs. 5.5-5.7 provide as follows:

5.5 In undertaking the preliminary assessment, the following factors may be considered:

(a) Whether the unsatisfactory conduct is a matter that could amount to misconduct;

(b) Whether the provision of the information of unsatisfactory conduct is made in good faith and is sufficiently detailed that it may form the basis for an investigation;

(c) Whether there is a likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case;

(d) Whether an informal resolution process would be more appropriate in the circumstances;

(e) Any other factor(s) reasonable in the circumstances.

5.6 Upon conclusion of the preliminary assessment, the responsible official shall decide to either:

(a) Initiate an investigation of all or part of the matters raised in the information about unsatisfactory conduct; or

(b) Not initiate an investigation.

5.7 In cases where the responsible official decides not to initiate an investigation, the responsible Official should decide either to close the matter without further action or to:

(a) Take managerial action, without prior consultation with the staff member; and/or

(b) Issue a written or oral reprimand, provided the staff member has had the prior opportunity to comment in writing on the facts and circumstances, in accordance with staff rule 10.2 (c).

27. 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 *Benfield-Laporte* 2015-UNAT-505)).

28. 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”, and “a fact-finding investigation may only be undertaken if there are ‘sufficient grounds’ or, respectively, ‘reason[s] to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed” (*Nadeau* 2017-UNAT-733/Corr.1).

29. The Organization has a degree of discretion on 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).

30. 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.

31. First, the Applicant argues that the decision is unlawful because it was made by the ASG/OIOS on the date the new USG/OIOS assumed her office.

32. Section 4.3 of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) provides rules governing the delegation and subdelegation of authorities when a head of office is replaced, whereby:

Pending the appointment of an officer-in-charge, an officer ad interim or a replacement head of entity, all subdelegations will remain in effect. When the head of entity is succeeded by another, the duly appointed successor will ordinarily be afforded the same level of delegations as the predecessor and shall be notified of and accept the delegations through the online portal. All subdelegations issued by the predecessor shall remain valid, with the accountability transferring to the successor unless otherwise withdrawn or modified by the successor.

33. The ASG/OIOS was appointed as OiC by the previous USG/OIOS pending the appointment of a new head of entity. As sec. 4.3 provides, "[a]ll subdelegations issued by the predecessor shall remain valid ... unless otherwise withdrawn or modified by the successor". Therefore, the mere fact that the new USG/OIOS began her term does not make subdelegations by the predecessor invalid and there is no allegation or evidence that subdelegations to the ASG/OIOS as OiC/OIOS were withdrawn or

modified by the new USG/OIOS. Rather, in the contested decision, the ASG/OIOS used his title as OiC/OIOS. Therefore, the Tribunal finds that the contested decision was made by the authorized responsible official.

34. Next, the Applicant argues that the contested decision is procedurally deficient because the OiC/OIOS did not undertake the preliminary assessment pursuant to sec. 5.5 of ST/SGB/2019/8 and sec. 5.5 of ST/AI/2017/1. The Applicant argues that there is no evidence that the OiC/OIOS considered all the factors enumerated in sec. 5.5 of ST/AI/2017/1.

35. In the contested decision, the OiC/OIOS indicated that he decided not to initiate a fact-finding investigation as he did not find sufficient grounds for it. In the comments provided during the management evaluation process, OIOS further explained that the OiC/OIOS considered the Director of IAD/OIOS's responses to the Applicant appropriate and that none of the incidents cited by the Applicant demonstrated prohibited conduct by the Chief, HAS, IAD/OIOS.

36. The Tribunal notes that while the OiC/OIOS's decision does not refer to the specific subsections in sec. 5.5 of ST/AI/2017/1, it is clear that he considered that the reported conducts were not "a matter that could amount to misconduct" (subsec. (a)) even if true. Contrary to the Applicant's argument, sec. 5.5 does not require the responsible official to consider all the factors set forth in that section but states that these factors may be considered in undertaking the preliminary assessment.

37. Accordingly, the Tribunal finds that the OiC/OIOS decided not to initiate an investigation and close the matter without further action following a preliminary assessment in accordance with secs. 5.5-5.7 of ST/AI/2017/1 and, therefore, the contested decision complied with the procedural requirements.

38. The last remaining question is whether the contested decision is reasonable. As already stated above, the Organization has a degree of discretion on how to review and assess a complaint of prohibited conduct, and the Tribunal only reviews the validity of

the contested decision on grounds of legality, reasonableness and procedural fairness. Further, as stated in *Sanwidi*, it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General or to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him.

39. In this regard, the Respondent submits that the contested decision was reasonable given that the factual basis underpinning the Applicant's allegations of misconduct, even if true, would not reasonably lead to a conclusion that prohibited conduct may have occurred. Instead, the allegations squarely fall in the realm of workplace disagreements about the normal exercise of managerial authority by the Chief, HAS, IAD/OIOS, mainly regarding time and attendance and work performance.

40. The Applicant disagrees and argues that the allegations he made could rise to conduct that creates an intimidating, hostile or offensive work environment and not just disagreement on work-related issues. He therefore maintains that the contested decision was arbitrary and unfair.

41. Under ST/SGB/2019/8, discrimination, harassment, and abuse of authority are collectively referred to as "prohibited conduct". It provides that "[d]isagreement on work performance or on other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of the present bulletin but in the context of performance management" (sec. 1.1).

42. Harassment is defined as "any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment" (sec. 1.3). Abuse of authority is defined as "the improper use of a position of influence, power or authority against another person" which may also include conduct that "creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion" (sec. 1.8).

43. Having reviewed the details of the allegations raised by the Applicant and the reasoning of the contested decision, the Tribunal finds that the OiC/OIOS reasonably concluded that the allegations did not amount to prohibited conduct even if true. It is clear that there were tensions between the Applicant and the Chief, HAS, IAD/OIOS, with regard to the monitoring of attendance and work performance, but they were reasonably considered as work performance or other work-related issues.

44. Furthermore, while the Applicant was unsatisfied with the Director of IAD/OIOS's actions in handling his complaint, the Tribunal finds that the OiC/OIOS reasonably concluded that the Director's actions toward the Applicant did not amount to prohibited conduct.

45. Based on the above, the contested decision was therefore lawful.

Conclusion

46. In light of the foregoing, the application is rejected.

Judge Alexander W. Hunter Jr.

(Signed)

Dated this 22nd day of March 2021

Entered in the Register on this 22nd day of March 2021

(Signed)

René M. Vargas M., Registrar, Geneva