



**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** Geneva

**Registrar:** René M. Vargas M.

VITESKIC

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Marcus Joyce, UN Women  
Christine Graham, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. On 15 January 2020, the Applicant, a staff member with the United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”) in Belgium, filed an application to contest the decision of the Investigations Division of the Office of Internal Oversight Services (“OIOS”) not to launch an investigation into his complaint against a staff member of the United Nations Interim Administration Mission in Kosovo (“UNMIK”).
2. For the reasons stated below, the application is rejected.

## **Facts**

3. From August 2013 to November 2016, the Applicant served as a Chief Security Officer in UNMIK, under a United Nations Development Programme (“UNDP”) contract.
4. Before the Applicant’s departure from UNMIK, on 28 October 2016, the Applicant issued a reassignment letter to a local staff member, Ms. A, who was a member of his section.
5. On 20 November 2016, Ms. A filed a complaint against the Applicant, with UNMIK, concerning the reassignment decision. Among other things, Ms. A complained that the reason for the reassignment decision was not clear and that she had been subjected to continuous sexual advances from the Applicant. Ms. A provided several examples in her complaint: (a) the Applicant asked her to go out with him for lunch or dinner, which she declined; (b) the Applicant gave her a surprise birthday gift; and (c) the Applicant offered her a ride several times, which she declined.
6. On 12 December 2016, Ms. A’s complaint was forwarded to OIOS, who in turn referred the matter to the UNDP Office of Audit and Investigations (“OAI”) since the Applicant was serving under a UNDP contract.

7. On 11 May 2017, OAI notified the Applicant that he was under investigation regarding a workplace harassment and abuse of authority complaint filed by Ms. A.

8. On 19 July 2017, OAI informed the Applicant that after an assessment of the allegations made by Ms. A, it determined that a formal investigation was not warranted and had closed the case.

9. On 10 August 2017, after determining that Ms. A's allegations against the Applicant may not have been made in good faith, OAI referred this matter to OIOS for appropriate action.

10. On 29 August 2017, in response to the Applicant's inquiry, OAI informed him that the decision not to launch a formal investigation was taken because "a deep assessment [had] not established any wrongdoing from [his] part". OAI also stated that Ms. A's complaint "seemed not accurate with the facts" and that OAI did not find Ms. A's allegations "credible" and that it had referred the matter to OIOS.

11. On 7 November 2017, the Applicant submitted a complaint to UNMIK stating that Ms. A made false and malicious allegations against him.

12. On 23 November 2017, UNMIK Conduct and Discipline Officer asked the Applicant several questions regarding his complaint.

13. On 29 November 2017, the Applicant answered UNMIK Conduct and Discipline Officer's questions.

14. On 19 December 2017, OIOS decided to put the case concerning Ms. A in abeyance pending the conclusion of a related investigation.

15. Following the finalization of a related investigation, OIOS prepared an assessment report dated 24 January 2019, in which OIOS determined that there were "insufficient elements to justify the initiation of a mala fide investigation against [Ms. A]".

16. On 28 June 2019, in response to the Applicant's inquiry, UNMIK advised him that his complaint was forwarded to OIOS and that on 2 May 2019, OIOS informed UNMIK that as of 20 February 2019 it decided to close the investigation with no further action.

17. On 23 July 2019, in response to the Applicant's inquiry, OIOS advised the Applicant that OIOS determined that there were insufficient grounds to pursue an investigation against Ms. A.

18. On 8 August 2019, the Applicant filed a request for management evaluation of the decision to not launch an investigation into his complaint against Ms. A.

19. By memorandum dated 18 October 2019, the Management Evaluation Unit ("MEU") informed the Applicant that MEU considered that he did not have standing before the MEU and thus rejected his request as not receivable.

20. On 15 January 2020, the Applicant filed the present application.

21. On 19 February 2020, the Respondent's reply was filed by UN Women. In the reply, UN Women argued that it is not the appropriate organization to defend the contested decision in this case.

22. On 14 April 2020, the Respondent filed a motion informing the Tribunal that UN Women and the Appeals and Accountability Section ("AAS"), Administrative Law Division ("ALD") of the Secretariat would act jointly as Counsel for the Respondent in this case and that the Respondent could supplement the reply if the Tribunal considered it necessary.

23. On 1 February 2021, the case was assigned to the undersigned Judge.

24. On 15 February 2021, pursuant to Order No. 11 (GVA/2021), the Respondent filed a complete reply. In the reply, the Respondent submitted an OIOS assessment report dated 24 January 2019 and the OIOS Director's memorandum dated 20 April 2020 addressed to AAS concerning this matter.

25. On 12 March 2021, pursuant to Order No. 58 (GVA/2021), the Applicant filed a response to the Respondent's reply of 15 February 2021.

### **Consideration**

#### *Preliminary issue*

26. Before addressing the merits of the case, the Tribunal will first address the procedural issue raised by the Applicant in his submission of 12 March 2021.

27. In this case, the application was initially served on AAS as Counsel for the Respondent. However, after AAS advised the Registry of the Dispute Tribunal that UN Women is Counsel for the Respondent, the application was re-served on UN Women.

28. Noting that the reply filed on 19 February 2020 failed to appropriately respond to the application on its merits, in which UN Women argued that it was not the appropriate organization to defend the contested decision, and that UN Women and AAS subsequently advised the Tribunal that they would act jointly as Counsel for the Respondent, the Tribunal directed UN Women and AAS to file a complete reply, which the Respondent complied with.

29. The Applicant argues that the reply filed on 15 February 2021 should be dismissed as it was filed 12 months after the deadline. The Applicant claims that the delay contributed to his continued suffering and the depletion of the memory of witnesses and the preservation of evidence which would be critical should the Tribunal decide to set aside the contested decision.

30. The Tribunal finds that this argument is without merit. While it is regrettable that the Respondent initially failed to file an appropriate reply due to the failure to resolve internal disagreements as to which office was to serve as Counsel for the Respondent, the Respondent advised the Tribunal in April 2020 that he was available to supplement the initial reply. Upon assignment of the case to the undersigned Judge on 1 February 2021, the Respondent was directed to file a complete reply.

31. Therefore, the Tribunal rejects the Applicant's claim in this regard and will consider the Respondent's additional submission filed pursuant to the Tribunal's Order in adjudicating the case at hand.

*Merits*

32. The issue in this case is whether OIOS's decision not to investigate the Applicant's complaint was lawful.

33. 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.

34. The governing legal framework in this case is ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). The Applicant also refers to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) in his application. However, the Tribunal finds that ST/SGB/2008/5 is not applicable in this case as he did not allege that he was subjected to discrimination, harassment, or abuse of authority by Ms. A. Rather, the Applicant's claim is that Ms. A filed a false and malicious complaint against him, which is not a subject matter governed by ST/SGB/2008/5.

35. Section 5.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides that "OIOS retains the ultimate authority to decide which cases it will consider and shall determine whether the information of unsatisfactory conduct received merits any action, and if so, is better handled by the responsible official or by OIOS. OIOS may at any time decide that a case is better handled by it".

36. Section 12.3 of ST/AI/2017/1 provides that “[t]he operational mandate of OIOS includes handling reports of unsatisfactory conduct received by it in accordance with its internal procedure. Nothing in the present instruction shall be construed to limit the operational independence of OIOS with regard to its mandated activities. Furthermore, nothing herein shall limit the discretionary authority of OIOS to undertake investigations into any and all matters concerning the Organization, before or after the separation of a staff member”.

37. 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).

38. 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).

39. As the Appeals Tribunal stated, “[t]he 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” (*Nadeau* 2017-UNAT-733/Corr.1, para. 33, citing *Benfield-Laporte* 2015-UNAT-505). Only “in a case of a serious and reasonable accusation, does a staff member have a right to an investigation against another staff member” and “[t]here are situations where the only possible and lawful decision of the Administration is to deny a staff member’s request to undertake a fact-finding investigation against another staff member” (*Nadeau*, para. 33).

40. 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).

41. In this case, the Applicant argues that the contested decision is unlawful on the following grounds:

a. UNMIK violated his due process rights by requesting additional information from him, which amounted to an unauthorized investigation, when the matter was referred to OIOS;

b. OIOS failed to disclose to the Applicant whether OIOS was provided with the OAI case file and failed to provide him with a summary of findings and conclusions of the investigation in accordance with sec. 5.18 of ST/SGB/2008/5;

c. OIOS determined to close the case solely based on a referral letter from OAI, disregarding the Applicant's submission which was over 40 pages long and contained documentary evidence and a list of witnesses, and without interviewing any witnesses;

d. According to the OIOS Investigations Manual, a closure report needs to be signed by the Director and yet the OIOS assessment report in this case was not signed by the Director;

e. OIOS violated the fundamental principle of equal treatment of all staff members when it decided to treat unsubstantiated sexual harassment complaints differently and leniently; and

f. There was undue delay in considering the Applicant's complaint as it took over 19 months to complete the assessment after receiving a referral from OAI.

42. In response, the Respondent submits that OIOS has broad discretion to determine which cases to investigate and it reasonably exercised its discretion in making the decision to close the case.



43. The Respondent also submits that there was no undue delay because there is no time limit for a preliminary assessment. The Respondent also submits that the case was put in abeyance pending a conclusion of a related investigation that was finalized on 28 December 2018.

44. The Tribunal will address the Applicant's arguments in turn.

45. First, the Applicant claims that UNMIK violated his due process rights by asking questions concerning his complaint in violation of ST/AI/2017/1, which amounted to an unauthorized investigation.

46. Under sec. 4 of ST/AI/2017/1, information about unsatisfactory conduct may be brought to the attention of the responsible official or OIOS. If the responsible official received a complaint, sec. 4.6 provides that the responsible official "shall forward the information of unsatisfactory conduct received to OIOS". OIOS then decides which cases it will consider, and the responsible official shall conduct a preliminary assessment if OIOS determines that the matter is better handled by the responsible official (see secs. 5.1-5.3).

47. While the responsible official may make further inquiries including from the person reporting the unsatisfactory conduct when conducting a preliminary assessment (sec. 5.4), the responsible official can only conduct a preliminary assessment if OIOS determines that the matter is better handled by the responsible official.

48. In this case, after the Applicant reported the unsatisfactory conduct to UNMIK, UNMIK referred the report to OIOS according to the above legal framework. Since the matter was under review by OIOS, UNMIK's conducting of further inquiries violated the provisions of ST/AI/2017/1.

49. However, while it is unfortunate that UNMIK did not follow the provisions of ST/AI/2017/1, this procedural mistake of UNMIK was irrelevant to the contested decision. The contested decision was made by OIOS and there is no allegation or evidence that UNMIK's procedural mistake had any impact on the contested decision

made by OIOS. As the Appeals Tribunal held, “only substantial procedural irregularities can render an administrative decision unlawful” (*Thiombiano* 2020-UNAT-978, para. 34) and yet a procedural mistake by UNMIK was immaterial and inconsequential to the contested decision.

50. Accordingly, the Tribunal rejects the Applicant’s argument in this regard.

51. Second, the Applicant argues that OIOS failed to disclose to him whether OIOS was provided with the OAI case file and failed to provide him with a summary of findings and conclusions of the investigation in accordance with sec. 5.18 of ST/SGB/2008/5.

52. However, the Applicant has no such right under the applicable legal framework. Section 4.7 of ST/AI/2017/1 provides that “[u]nless expressly provided for in the present instruction or other administrative issuances, staff members and third parties are not entitled to information about an investigation or action taken”. Further, as already stated above, ST/SGB/2008/5 is not applicable in this case.

53. Accordingly, this argument is also rejected.

54. Third, the Applicant questions the methodology of OIOS’s preliminary assessment arguing that OIOS determined to close the case solely based on a referral letter from OAI, disregarding the Applicant’s submission which was over 40 pages long and contained documentary evidence and a list of witnesses, and without interviewing any witnesses.

55. However, the Applicant’s argument that OIOS simply relied on a referral letter from OAI in conducting a preliminary assessment is factually incorrect. In the OIOS assessment report, it is noted that “[i]n response to the OAI referral, OIOS requested and reviewed the evidence gathered by [OAI]” and OIOS presented its analysis of the evidence gathered by OAI in the assessment report.

56. In fact, the assessment report shows that OIOS analysed and considered email correspondences, several witness statements provided by OAI, OAI closure note, and the Applicant's detailed response provided to OAI which responded to Ms. A's allegations and suggested several witnesses who could corroborate his version of events.

57. OIOS obviously did not conduct additional interviews with witnesses suggested by the Applicant, but given that the OAI case file already included several witness statements, the Tribunal finds that OIOS reasonably decided to rely on the extensive case file provided by OAI in reaching its conclusion.

58. Therefore, this argument is also rejected.

59. Fourth, the Applicant points out that the OIOS assessment report was not signed by the Director and this violated the OIOS Investigations Manual concerning a closure report.

60. In this regard, the Tribunal notes that in the OIOS Director's memorandum dated 20 April 2020, which was prepared for the litigation of this case, the Director noted that the assessment report was prepared using OIOS's normal report template, when "it could/should have been prepared as either a Memo or an [Note to File ("NTF")]". The Director further noted that, however, such consideration is irrelevant to the content of the document.

61. The Tribunal finds that whether the OIOS assessment report in question complied with all the formalities required by the OIOS Investigations Manual is irrelevant. Even if the OIOS assessment report was not in strict compliance with the OIOS Investigations Manual, it has no impact on the fact that the OIOS Director considered the assessment report in making the contested decision in this case.

62. As the Tribunal noted already, only substantial procedural irregularities can render the administrative decision unlawful, and the Tribunal finds that this alleged procedural mistake does not qualify as such and thus this argument is rejected.

63. Fifth, the Applicant argues that OIOS violated the fundamental principle of equal treatment of all staff members when it decided to treat unsubstantiated sexual harassment complaints differently and leniently. This argument is made in reference to the OIOS Director's memorandum, in which he wrote:

If potential victims of sexual harassment were to believe that they could be investigated by OIOS, if their complaints were determined to be unsubstantiated, it would have a chilling effect on the willingness of victims of sexual harassment to come forward. That in turn would up-end everything the United Nations is attempting to do in relation to its response to sexual harassment. Hence my instruction and the subsequent and very thorough assessment of the Applicant's complaint against [the victim] and the subsequent OAI response.

... A further consideration insofar as *male fide* complaints are concerned is the difficulty in proving them to the requisite standard. The investigation has to show that the complaint was false and furthermore that the complainant made the complaint knowing it to be false. That can be an extremely difficult evidentiary proposition.

64. The Tribunal disagrees with the Applicant's characterisation of the OIOS's policy consideration. OIOS did not say that it decided to consider *mala fide* sexual harassment complaints more leniently. Rather, given that launching an investigation against a sexual harassment complainant would have a chilling effect on the willingness of victims to come forward, the OIOS Director instructed investigators that complaints against an alleged victim of sexual harassment should be very thoroughly assessed. The Appeals Tribunal held in *Nadeau* 2017-UNAT-733/Corr.1 that "if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member" since "the mere undertaking of an investigation [] can have a negative impact on the staff member concerned". Therefore, the Tribunal does not find the OIOS Director's additional consideration of a potential "chilling effect" unreasonable.

65. In any event, having reviewed the OIOS assessment report, the Tribunal finds that OIOS reasonably determined not to conduct the investigation based on its preliminary assessment of existing evidence.

66. In the assessment report, OIOS determined that there were insufficient grounds to launch an investigation against Ms. A since after a thorough analysis of the OAI case file, OIOS disagreed with OAI's assessment that Ms. A may have filed a complaint against the Applicant in bad faith. In particular, among other things, OIOS disagreed with OAI's conclusion that Ms. A "intentionally lied" or "deliberately omitted" certain facts regarding the reassignment decision and noted that OAI interviewed witnesses suggested by the Applicant and yet failed to conduct a follow up interview with Ms. A to further clarify her allegations against the Applicant. OIOS then determined that the evidence did not provide *prima facie* grounds for a *mala fide* claim and recommended that the case be closed.

67. The Tribunal does not find any fault with OIOS's analysis and finds that it exercised its discretion reasonably by deciding to close the case.

68. Finally, the Applicant argues that there was undue delay in considering the Applicant's complaint as it took over 19 months to complete the assessment after receiving a referral from OAI.

69. In response, the Respondent argues that there was no undue delay because there is no time limit for a preliminary assessment under ST/AI/2017/1. The Respondent also submits that the case was put in abeyance pending a conclusion of a related investigation, which was finalized on 28 December 2018.

70. In advancing this argument, the Applicant relies on the Appeals Tribunal's judgments concerning the Administration's handling of a complaint under ST/SGB/2008/5. In the cases cited by the Applicant (*Abubakar* 2012-UNAT-272, *Benfield-Laporte* 2015-UNAT-505, *Masytkanova* 2016-UNAT-662), the Appeals Tribunal found that the delay in handling a complaint was in breach of ST/SGB/2008/5 which specifically requires that complaints shall be promptly addressed.

71. However, unlike ST/SGB/2008/5, which does not apply in this case, ST/AI/2017/1 does not have a comparable clause. As the Respondent points out, there is no set time limit for a preliminary assessment. In addition, OIOS explained that the Applicant's complaint was put in abeyance pending a conclusion of a related investigation that was finalized on 28 December 2018.

72. Therefore, the Tribunal finds that the delay in notifying the Applicant of the contested decision did not violate any terms or conditions of the Applicant's employment and rejects this argument.

73. Based on the above, the Tribunal finds that the contested decision was lawful.

### **Conclusion**

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

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 19<sup>th</sup> day of April 2021

Entered in the Register on this 19<sup>th</sup> day of April 2021

*(Signed)*

René M. Vargas M., Registrar, Geneva