



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/030

Judgment No.: UNDT/2021/049

Date: 3 May 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Camila Nkwenti, UNEP

Thomas Deleuil, UNEP

Introduction

1. The Applicant, a staff member of the Secretariat of the Convention on Biological Diversity (“CBD”) in Montreal, Canada, contests the Administration’s decision “refusing to take action to address [her] complaint under ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)] or to address the effects of harassment and retaliation”.

2. For the reasons stated below, the application is rejected.

Facts

3. On 23 April 2018, the Applicant joined CBD as the Head of Administrative, Finance, and Conference Services Division. The Applicant directly reported to the Executive Secretary of CBD.

4. On 14 January 2019, the Applicant was interviewed by the fact-finding panel established as part of an investigation of allegations of harassment and abuse of authority made by another CBD staff member against the Executive Secretary of CBD. The Applicant was interviewed again on 31 January 2019 and 26 February 2019.

5. On 20 February 2019, by email, the Executive Secretary informed the Applicant that she would report to a new first reporting officer and that the Executive Secretary would act as her second reporting officer. The Applicant considered the change of reporting lines as the Executive Secretary’s retaliatory acts against her for participating in the interviews by the fact-finding panel.

6. In March 2019, the Applicant requested a conversation with the Director of the Corporate Services Division of the United Nations Environment Programme’s (“UNEP”). According to the Applicant, she informed the Director of the Corporate

Services Division of the issues she was having with the Executive Secretary and requested the Office of Internal Oversight Services (“OIOS”) to audit the office.

7. On 17 April 2019, the Applicant requested a management evaluation of the decision by which she was directed to report to a new first reporting officer. She claimed that the decision was inconsistent with the legal framework governing performance management and that the decision was arbitrary and discriminatory as she was the only head of division at CBD who would not report to the Executive Secretary directly. The Management Evaluation Unit subsequently rejected the request for management evaluation as not receivable, stating that the contested decision did not constitute a reviewable administrative decision but rather an “operational decision”.

8. In May 2019, the Executive Secretary of CBD asked the Applicant to complete her performance evaluation for the 2018-2019 cycle. The Applicant objected to the request on the basis that her workplan had not been approved in a timely manner and that it would therefore be “futile” to complete it after the end of the past performance cycle with no agreement on the goals, success criteria or performance expectations. The Executive Secretary of CBD reiterated her request and stated that she would proceed with the offline evaluation if the Applicant did not enter her workplan in the United Nations E-performance platform Inspira.

9. On 4 June 2019, the Applicant attended a senior management meeting. According to the Applicant, she was “publicly demeaned” by the Executive Secretary at the meeting.

10. According to the Ethics Office’s memorandum of 27 August 2019, on 17 June 2019, the Applicant submitted a request for protection from retaliation to the Ethics Office.

11. On 18 June 2019, the Applicant submitted a complaint of “prohibited conduct, including harassment, abuse of authority, and discrimination” against the Executive

Secretary of CBD to the the Assistant Secretary-General of Office of Human Resources (“ASG/OHR”), with a copy to OIOS.

12. On 27 August 2019, the Ethics Office informed the Applicant that “there is a *prima facie* case that [her] cooperation with the Panel may have been a contributing factor in causing the alleged harassment and abuse of authority by the Executive Secretary” and that her case was referred to OIOS for investigation.

13. By email dated 17 October 2019, the Investigations Division of OIOS (“ID/OIOS”), following its initial assessment, referred the matter to ASG/OHR for her attention and appropriate action, indicating that ID/OIOS considered that the matter could be best handled by the ASG/OHR’s office. ID/OIOS informed the ASG/OHR that ID/OIOS was in the process of investigating a retaliation allegation by the Applicant following a *prima facie* assessment by the Ethics Office.

14. On the same day (17 October 2019), the Executive Secretary of CBD resigned from CBD effective 30 November 2019.

15. On 14 January 2020, the Acting Executive Secretary of CBD issued a revised organizational structure in which the Applicant’s reporting line was changed back to the Executive Secretary as the first reporting officer.

16. By memorandum dated 21 January 2020, the ASG/OHR informed the Applicant that subsequent to her complaint of 18 June 2019, the Executive Secretary resigned from CBD and that “there is no longer any reason for [her] to fear further harassment, abuse of authority or retaliation”. The ASG/OHR wrote that in these circumstances, she recommended to the Acting Executive Secretary of CBD to seek to informally resolve her complaint.

17. By memorandum dated 27 January 2020, the ASG/OHR recommended to the Acting Executive Secretary of CBD to informally resolve the Applicant’s complaint of 18 June 2019.

18. In an email dated 3 February 2020, the Acting Executive Secretary explained to the Applicant that since the former Executive Secretary had resigned, no rationale existed for conducting a full investigation and that informal resolution means that “we have to work jointly on ensuring that your working conditions are what they should be in a normal United Nations office”. The Acting Executive Secretary noted that the Applicant’s former reporting lines and functions had already been restored, and since the former Executive Secretary was no longer in the office, “the matter can now be considered closed”.

19. On 4 February 2020, the Applicant responded to the Acting Executive Secretary that her legal representative would reach out to her.

20. On 13 March 2020, the Applicant submitted a request for management evaluation of “[t]he decision to close [her] complaint on prohibited conduct ... and [her] request for protection from retaliation ... without an investigation, without any accountability for engaging in prohibited conduct and without taking any action to mitigate the effects of harassment and retaliation”.

21. On 8 June 2020, the Applicant was notified that following the management evaluation, the contested decision was upheld.

22. On 27 June 2020, the Acting Executive Secretary informed the Applicant that a performance evaluation for 2018-2019 had been completed by her previous supervisor with a “successfully met performance” grade.

Consideration

23. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

24. The Applicant characterizes the contested decision as “refusing to take action to address [her] complaint under ST/SGB/2008/5 or to address the effects of harassment and retaliation”. Specifically, the Applicant refers to the memorandum of 21 January 2020 from the ASG/OHR to the Applicant concerning the ASG/OHR’s handling of her complaint. In this memorandum, the ASG/OHR stated that “there is no longer any reason for [her] to fear further harassment, abuse of authority or retaliation” considering the Executive Secretary’s resignation. Therefore, the ASG/OHR recommended to the Acting Executive Secretary to “seek to informally resolve her complaint”.

25. At the outset, the Tribunal notes that the Applicant raises allegations of retaliation. The record indicates that the Applicant filed two separate complaints, one of prohibited conduct on 18 June 2019 under ST/SGB/2008/5 and one of retaliation on 17 June 2019 under ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) which, as of the date of the application, was under investigation by OIOS.

26. In the present case, the Applicant is appealing the ASG/OHR’s decision of 27 January 2020 not to pursue her 18 June 2019 complaint of prohibited conduct. The Applicant does not appeal any administrative decision resulting from the 17 June 2019 complaint. Therefore, allegations of retaliation raised in the application are not under review in this case.

27. Therefore, the Tribunal considers that the contested decision can be defined as the decision not to investigate the Applicant’s complaint of prohibited conduct and to close the matter following a preliminary assessment in accordance with ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

28. ST/SGB/2019/8 provides the procedure for addressing complaints of prohibited conduct, and sec. 5 sets out the procedure for receipt and handling of formal reports of prohibited conduct. Of relevance to the present case:

a. Section 5.4 provides that “[p]ossible prohibited conduct shall be reported” to the responsible official, with a copy to OIOS, or to OIOS.

b. 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”.

c. Section 5.5(e) provides that if OIOS refers a report of possible prohibited conduct to a responsible official for action pursuant to sec. 5.3 of ST/AI/2017/1, “[t]he responsible official shall normally make the determination pursuant to section 5.6 of ST/AI/2017/1 within three months of receipt of the report from OIOS”.

29. 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 the following steps regarding this process:

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).

30. The jurisprudence of the Appeals Tribunal has further clarified that 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 and *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 and *Sanwidi* 2010-UNAT-084).

31. The Applicant claims that she was denied the “satisfaction of having her complaint be investigated or any conclusion be made regarding her complaint”.

32. The Applicant further claims that although the memorandum of 21 January 2020 encouraged CBD to engage in informal efforts to address her concerns, she has received no communication on any informal efforts from the Respondent. She claims that she made a written offer to discuss an informal resolution, and yet the Respondent did not respond and did not recognize the moral damages she suffered from the extended period of harassment and abuse of authority. The Applicant claims that she suffered significant harm from the stress, which warranted compensation for the

substantive violations of her contractual rights as well as from moral damages she suffered from the extended period of harassment and abuse of authority.

33. In response, the Respondent submits that the appropriate action was taken to address the Applicant's complaint in a timely manner. Specifically, the Respondent points out that under sec. 5.5 of ST/AI/2017/1, in undertaking the preliminary assessment of a complaint, the responsible official may consider "whether an informal resolution process would be more appropriate in the circumstances". In this case, the ASG/OHR recommended informal resolution given the resignation of the sole subject of the complaint filed by the Applicant.

34. The Respondent also submits that under sec. 5.5(e) of ST/SGB/2019/8, the responsible official shall make the determination within three months of receipt of the referral from OIOS. Since OIOS referred the Applicant's complaint to a responsible official on 17 October 2019 and the responsible official informed of her decision on 21 January 2020, the complaint was handled within the requisite time limits.

35. The Respondent further submits that an investigation and a disciplinary process are not obligatory under ST/SGB/2019/8 and that the responsible official has the discretion to take into consideration whether an informal resolution would be more appropriate than an investigation under the circumstances.

36. The Respondent also argues that no right arises to seek monetary or other compensation under the applicable legal framework.

37. The Tribunal notes that the Applicant filed a complaint of possible prohibited conduct to the ASG/OHR, with a copy to OIOS, on 18 June 2019. ID/OIOS referred the Applicant's complaint to the ASG/OHR on 19 October 2019. Accordingly, the ASG/OHR was tasked with making the decision to initiate or not to initiate an investigation following a preliminary assessment under sec. 5.6 of ST/AI/2017/1.

38. Under sec. 5.5 of ST/AI/2017/1, the responsible official may undertake a preliminary assessment considering various factors. In this case, the ASG/OHR

decided not to initiate an investigation because due to the resignation of the alleged harasser, there was no longer any reason for the Applicant to fear further harassment, abuse of authority or retaliation.

39. The Tribunal finds that this decision fell within the Administration's margin of appreciation and was a reasonable exercise of discretion. Under the applicable legal framework, the Applicant is not entitled to force the Administration to investigate her complaint. To the contrary, the responsible official is provided with a discretion to initiate or not to initiate an investigation under the applicable legal framework.

40. As the Appeals Tribunal held in *Sanwidi*, when reviewing the Administration's exercise of discretion, "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", but its role is to determine whether the contested decision was legal, reasonable, and procedurally fair.

41. The Tribunal finds that the ASG/OHR reasonably decided not to investigate the Applicant's complaint in light of the alleged harasser's resignation. The decision was also procedurally compliant as the ASG/OHR notified the Applicant of the decision in about three months as required by the applicable legal framework.

42. In the memorandum of 21 January 2020, the ASG/OHR recommended to the Acting Executive Secretary, CBD to seek to informally resolve the complaint. It appears that this recommendation caused confusion. On the one hand, as stated in her email of 3 February 2020 to the Applicant, the Acting Executive Secretary understood that an informal resolution means that "we have to work jointly on ensuring that [the Applicant's] working conditions are what they should be in a normal United Nations office". Since the Applicant's former reporting lines and functions were restored and the former Executive Secretary was no longer in the office, the Acting Executive Secretary considered that the matter was resolved and could be closed. On the other hand, the Applicant considered that she should be compensated for harm she suffered due to the harassment as part of an informal resolution.

43. The Tribunal agrees with the Respondent that the Applicant is not entitled to monetary or other compensation under the applicable legal framework as there was no finding of misconduct. The contested decision in this case was the closure of the Applicant's complaint following a preliminary assessment, and while a term "informal resolution" might have caused some confusion, the Respondent had no obligation to respond to the Applicant's "informal resolution" offer or otherwise compensate her for harm she reportedly suffered.

44. Furthermore, the Tribunal cannot award any compensation for harm either. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and the Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them, and the claimant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act (*Kebede* 2018-UNAT-874, paras. 20-21). Since there is no finding of an illegality relating to the contested decision, no compensation can be awarded.

45. The Applicant cites several judgments by the Tribunals, including *Civic* UNDT/2019/188, to support her claim that she is entitled to compensation for harm she suffered due to harassment. However, the Applicant's case is distinguishable from the cited judgments, including *Civic* 2020-UNAT-1069, which affirmed *Civic* UNDT/2019/188. In the judgments relied upon by the Applicant, there was a finding of an unlawful act (e.g. harassment) that caused harm to the applicant, which is absent in the present case.

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

Conclusion

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

(Signed)

Judge Joelle Adda

Dated this 3rd day of May 2021

Entered in the Register on this 3rd day of May 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York