



**Before:** Judge Francis Belle  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

NIGAM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Angela Arroyo, UNDP

## **Introduction**

1. The Applicant is a staff member of the United Nations Development Programme (“UNDP”). He serves at the D-1 level on a fixed-term appointment, and was the Resident Coordinator and Resident Representative in Riyadh, Saudi Arabia, at the time of the application.

2. On 23 July 2020, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to not disclose the report of the investigation into his conduct, in which he was exonerated, but which he contends was conducted on the basis of malicious complaints by two staff members. The investigative process resulted in him being harassed and subjected to undue stress and pressure. Further, the Applicant contends, his own complaints into the conduct of the two staff members should have been subjected to the same investigative rigours that were meted out to him.

3. The Respondent filed his reply on 2 September 2020. The Respondent takes the position that the application is partly not receivable because it is time-barred. The Respondent also contends that the decision to not disclose the investigative materials was proper and lawful, and that the decision to close the Applicant’s allegations of a malicious complaint was also proper.

4. On 4 September 2020, the Applicant sought leave to respond to the Respondent’s reply. The Tribunal issued Order No. 093 (NBI/2021) granting this motion, and setting this matter down for a case management discussion (“CMD”). The Tribunal also advised the Applicant to seek the assistance of counsel.

5. The Applicant filed his submissions on 13 May 2021.

6. The CMD took place, as scheduled, on 14 May 2021.

7. On 24 May 2021, the Tribunal issued Order No. 104 (NBI/2021) recording the contents of the CMD. The Respondent was directed to file any further submissions he may have on receivability.

8. The Respondent and the Applicant filed submissions on 19 and 21 May 2021, respectively.

## **Facts and Submissions**

### *Applicant*

9. The Applicant has characterised the basis of his allegation as negligence on the part of UNDP in launching an investigation against him. He submits that the investigation was based on a malicious report by two UNDP staff members and challenges the Respondent's decision to deny his request for access to the investigation report as discriminatory.

10. The Applicant also alleged that no evidence was provided to him to support the allegations against him by the staff members despite his requests including for management evaluation, based on which he concludes that there was no evidence against him and the investigation was unwarranted.

11. He referred the Tribunal to the UNDP Investigation Guidelines 2012 which provides that the purpose of an investigation by the Investigative Office is to "examine and determine the veracity of allegations... and allegations of misconduct on the part of the organization's staff members."

12. The Applicant also referred the Tribunal to the legal framework for addressing non-compliance with the section 2 of the United Nations Standards of Conduct, March 2008: "Allegation of wrongdoing is the reasonable belief based on factual information that misconduct has occurred."

13. The first discussion on the work of the Office of Audit and Investigations ("OAI") was that the OAI referred to the investigation as an investigation and assessment in the same breath, making it difficult to determine whether there was an investigation or an assessment of misconduct.

14. The Applicant also pointed to the standards of objectivity, impartiality and fairness provided for in the investigation and the further requirement to conduct the investigation competently and with the highest level of integrity.

15. The Applicant then came to the crux of his case which is that there is little protection offered for the subject of the investigation. He did not accept that being absolved of the charges obviates the duty of the UNDP to provide the evidence upon which the charges were based. The Applicant submits that by failing to supply the evidence, OAI failed to proceed with objectivity, competence and fairness.

16. It seems that the conduct which was investigated related to something said; which the Applicant says had to do with him making a point to express the wishes of a donor. The concerns of the donor he was expressing were not new; the then UNDP Deputy Director was well aware of the donor's concerns regarding the venue selected by the two staff members. Even the UNDP Administrator was well aware that the request to change the venue came from the donor. Impliedly, the Applicant is arguing that due diligence would have avoided the investigation.

17. The Applicant was also of the view that the UNDP has not shown that the two staff members acted in good faith.

*Respondent*

18. A staff member has a right to confront evidence against him in an investigation report. However, this applies only when there has been a finding of misconduct and some disciplinary action is being considered.

19. The subject of an investigation has no right to see an investigation report where the investigation is closed as unsubstantiated. Indeed, this is so even where detrimental action is taken which is not disciplinary action. In this case, the Applicant was told that he was exonerated entirely. This meant that UNDP acted consistent with its policy.

20. Allowing the Applicant to speak to the complainants about their complaint would have violated UNDP's Investigation Guidelines on confidentiality:

Confidentiality is required for the investigative process to be effective in cases of alleged misconduct. Confidentiality is in the interest of the Organization, the investigation participants and the subject of the investigation. The requirement of confidentiality extends equally to all UNDP personnel including investigators,

management staff members and non-staff personnel and to third parties involved in the investigation.

21. The Guidelines further state that:

Information will only be disclosed as required by the legitimate needs of the investigation.

22. The Applicant has not pointed to any flaw in UNDP's review of his allegations. The Applicant failed to demonstrate that the complaints against him were not made in good faith. Secondly, UNDP is entitled to a presumption of regularity. No evidence has been led to suggest that the investigative process was tainted or irregular in any way.

23. The Respondent further argues that the complaints against the Applicant were credible and sufficient to justify an investigation.

24. As a matter of process, there is no bias proven to substantiate the claim that the UNDP was negligent in its duty of objectivity impartiality and fairness in dismissing his complaint. The burden of proving inappropriate motivation lies with the staff member contesting the decision. The Applicant has not met this burden.

25. The fact that the complainants' allegations were not substantiated does not mean there should have been no investigation. An investigation is intended to gather facts to determine whether allegations are supported by such facts. The fact that allegations are not supported does not constitute evidence of bad faith.

26. The Respondent is also of the view that the management evaluation was properly handled by the UNDP. This is so despite the fact that the UNDP did not consider itself independent to conduct the investigation and referred to the Independent Evaluation Office of the International Monetary Fund ("IIO-IMF"). An investigation is not the same as a management evaluation and there is no allegation that Ms. Angelique Crumbly, Assistant Administrator and Director who handled the management evaluation, had a conflict of interest.

27. The Respondent argues that the Applicant is not entitled to damages since moral damages are not substantiated because no harm has been linked to or

reasonably attributed to any breach of the Applicant's substantive or procedural rights.

28. The need for compensation must be demonstrated by evidence and speculation will not suffice. There has been no breach of the Applicant's rights and the Applicant has not produced evidence that he suffered damage due to stress. The Applicant is therefore not due any damages.

## **Considerations**

### **Receivability**

#### *Receivability Ratione Temporis*

29. The Respondent argued that the Application was not receivable *ratione temporis* because the Applicant had requested materials from the investigation. The actions of the Organization were the subject of a management review submitted since 30 December 2019. The Applicant was informed that the material would not be provided since 10 February 2020. The Applicant filed his application on 23 July 2020, which was not within 90 days of being informed of the decision.

30. To the extent that the application requests that such materials, namely the evidence upon which the complaint was made be provided, the application is not receivable because art.8.1 of the Tribunal's Statute makes it clear that the application must be filed within 90 days of receipt of the management evaluation where the management evaluation is provided within 45 days of the request. That aspect of the application is therefore not receivable.

#### *Receivability Ratione Materiae*

31. It is also submitted that the allegation that the Organization was "negligent" was being raised for the first time and was never raised in the management evaluation request pursuant to art. 8.1 of the UNDT Statute. The Tribunal agrees with this submission. The Applicant had raised for management evaluation the complaint that the investigation was not fair and balanced because the report had

not been disclosed to him. There was therefore no management evaluation of the allegation of negligence. That allegation is therefore not receivable.

32. The application is accordingly dismissed.

*(Signed)*

Judge Francis Belle

Dated this 29<sup>th</sup> day of July 2021

Entered in the Register on this 29<sup>th</sup> day of July 2021

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko., Registrar, Nairobi