UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2019/008
Judgment No.: UNDT/2021/106
Date: 15 September 2021
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

ISAKSSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant serves on a continuing appointment at the United Nations Interim Administration Mission in Kosovo ("UNMIK"), as a Security Officer.

2. By an amended application filed on 18 March 2019, he seeks to challenge the conduct and findings of an investigation, under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), and the managerial measures imposed on him as a result of those findings.

3. The Respondent filed his reply on 17 April 2019. It is the Respondent's case that the impugned decision is legal, reasonable and procedurally fair. Although the decision reflected acceptance that there was factual basis for the allegations of harassment and abuse of authority made against the Applicant, it did not include a finding of disciplinary misconduct against him. Neither disciplinary proceedings nor sanctions were part of the decision and the managerial measures imposed were rational and proportionate.

Procedural history

4. On 11 February 2021, the Tribunal issued Order No. 34 (GVA/2021) to record the salient aspects of a Case Management Discussion ("CMD") held the day before with the parties.

5. The Order recorded that during the CMD, the dispute between the parties was summarised by the Tribunal as follows:

a. Whether the outcome of the investigation into the Applicant's conduct resulted in a finding of harassment;

b. Whether (if so) that finding was justified;

c. Whatever the outcome of the fact-finding exercise, whether the investigation and the resultant actions by the Respondent were procedurally proper; and

d. Whether the Applicant is entitled to rescission of the finding of harassment and the managerial measure imposed as a result.

6. At the CMD, Counsel for the Applicant submitted that the fact-finding report which was filed *ex parte* by the Respondent should be disclosed to the Applicant. The Respondent then reiterated the point made in the reply that the contested decision did not entail a finding of harassment against the Applicant.

7. According to Counsel for the Respondent, this was not a disciplinary matter and the measures imposed on the Applicant were managerial measures because the facts did not justify disciplinary proceedings. This, the Respondent submitted, was the reason the investigation report was not disclosed to the Applicant. The Respondent's Counsel underscored concerns pertaining to the protection of witnesses in an investigative process which, it was argued, prevents the Respondent from disclosing investigation reports, when the facts at issue do not give rise to a disciplinary process.

8. The Applicant maintained that the decision-maker in this case expressly, by written communication on 17 August 2018, characterised the Applicant's conduct as harassment and abuse of authority. This is tantamount to misconduct within the Organization's regulatory framework. In those circumstances, the Applicant sought to be permitted access to the fact-finding panel's investigation report to properly instruct his Counsel in pursuing the remedies sought herein. The authorities cited by Counsel in support of this submission were *Adorna* UNDT-2010-205 and *Bertucci* 2011-UNAT-121.

9. Having heard these submissions, the Tribunal included in the CMD Order the grant of the Applicant's request for disclosure. The Respondent was directed to disclose the report at issue by 2 March 2021 but was permitted to do so under seal. The Order prohibited dissemination by the Applicant of any part of the report.

10. At the CMD, the Tribunal encouraged the parties to engage in settlement discussions with a view to having this matter resolved *inter partes,* for which purpose the parties jointly moved for suspension of proceedings. The Tribunal granted the motion in Order No. 61 (GVA/2021) and suspended proceedings, including disclosure of the investigation report, until 1 April 2021.

11. On 1 April 2021, the parties jointly moved the Tribunal for a 30-day extension of that deadline to enable them to complete the ongoing settlement discussions. The further extension was granted in Order No. 75 (GVA/2021) but only to 23 April 2021 so as to allow for resolution, if possible, prior to the 31 May 2021 end date of the undersigned Judge's deployment.

12. On 23 April 2021, the parties jointly informed the Tribunal that settlement discussions did not result in an agreement and that litigation should therefore proceed. Thereafter, on 3 May 2021, in compliance with Order No. 81(GVA/2021), the Respondent disclosed an unredacted version of the investigation report on an under-seal basis. The Applicant filed closing submissions on 28 May 2021.

Facts and Parties' submissions

13. On 22 October 2018, the Applicant received the decision challenged in this application. It was an email from the Chief, Office of Legal Affairs, UNMIK, informing him of the outcome of a fact-finding investigation undertaken pursuant to ST/SGB/2008/5 on "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority" following a complaint made by [SS]. It informed him, firstly, of findings of the investigation into his conduct and, secondly, of the decisions taken as a result of the findings.

14. The meaning of this correspondence, as to whether it amounted to a disciplinary finding of misconduct, is one of the issues identified in these proceedings. The letter read as follows (emphasis added):

> I am writing to advise you about the outcome of the fact-finding investigation undertaken pursuant to ST/SGB/2008/5 on 'Prohibition of discrimination, harassment, including sexual

> harassment, and abuse of authority' following a complaint made by [SS].
>
> **The fact-finding panel found** that in relation to the incident on 13 March 2017: **you harassed [SS]** by threatening him with handcuffing and/or restraint, ordered him in a commanding way not to touch his computer and limited his ability to work by leaving [Mr. T] standing over him as a sentry; you did not notify [SS] of the need to gather the information or give him reasonable time to provide it contrary to due process rights laid out in organizational guidelines; your behavior towards [SS] did not comport with principles of dignity and mutual respect expected among staff and that in undertaking the investigation you failed to observe the guidance set out in ST/SGB/2004/15. **The panel further found** that you misinterpreted the powers conferred upon Security Officers and improperly used your position of influence, power or authority against [SS] - i.e. **that you abused your authority**.

15. The email further indicated that the Special Representative of the Secretary-General ("SRSG") had decided to:

a. Accept the findings of the fact-finding investigation panel;

b. Take managerial actions in accordance with sec. 5.18 of ST/SGB/2008/5 requiring that the Applicant take an online training course on "Working Together Harmoniously" and undergo counselling on appropriate standards of conduct in conducting investigations; and

c. Direct the Head of the Security Section to prepare a draft UNMIK Standard Operating Procedure on investigations which shall clarify roles, responsibilities and procedures.

16. The genesis of the investigation into the Applicant's conduct that led to the challenged decision set out above was a direction given to him to carry out one of his functions as a Security Officer. He was asked to investigate a threat made by the then Head of the Security Section to unfairly transfer other staff members. The Applicant was instructed to conduct that investigation on 13 January 2017, and he complied by approaching [SS] seeking access to his hard drive. The Applicant believed that the hard drive contained drafts of the transfer letters relevant to his

investigation. [SS] did not cooperate and instead called his boss, who was the Security Section Head being investigated, to inform him about the request.

17. According to the Applicant, he then restrained [SS] with a view to securing access to the information sought as part of his investigation. However, there was evidence before the fact-finding panel that the Applicant made repeated statements to [SS] that he was under a duty to cooperate and directed him to step away from his computer. The Applicant, who was carrying an UNMIK-issued gun and handcuffs, said that he would handcuff or restrain [SS].

18. The exchanges between the Applicant and [SS] became increasingly louder and were overheard by other staff members in the Security Section. The Officer in charge of the Section intervened asking that the Applicant produce documentation authorising the investigation he was conducting. The Applicant left [SS] under guard to ensure that he did not touch his computer while he went to get the documentation. After the documentation was retrieved, [SS] was instructed by the Officer-in-Charge to give the Applicant the documents he sought from his computer. Thereafter there was a further exchange in which the Applicant accused [SS] of modifying the documents requested, called him a liar and threatened to confiscate his computer.

19. [SS] felt that he was harassed, verbally abused and threatened by the Applicant when the above-mentioned events unfolded. He filed an ST/SGB/2008/5 complaint against him, the outcome of which is the subject matter of this application.

20. The Applicant's challenge to the emailed decision was formulated without sight of the investigative report. However, one of the grounds for contesting the decision was the view that the fact-finding panel conducting the investigation erred by "applying the procedures and standards set out in ST/SGB/2008/5 instead of the legal regime governing the use of force under ST/AI/309/Rev. 2 [(Authority of United Nations Security Officers)]".

21. Further, the Applicant contended that the persons on the fact-finding panel lacked experience in investigating cases involving use of force. They therefore failed to consider the appropriate conditions and modalities for resorting to use of force in coming to their conclusions. These conclusions wrongly characterized the temporary measure of restraint utilised by the Applicant as harassment as opposed to a proper use of force. The Applicant further contends that coercive measures were necessary to restrain [SS] who does not dispute that he refused to cooperate.

22. A critical plank of the Applicant's challenge to the impugned decision is that it included the panel's finding of harassment which was accepted without proof of *mens rea*. The Applicant seeks rescission of this finding. The Applicant also seeks rescission of the administrative measures imposed although it is not in dispute that he has completed both the training and the counselling. There remain only the questions as to whether there were findings of misconduct, namely harassment and abuse of authority and, if so, whether such findings should be rescinded.

23. The Respondent's submission in reply is that the panel conducted a thorough investigation. This included correctly applying the Organization's policies and procedures on the use of force and investigations. Further, the Respondent asserts that the emailed decision was proper and in compliance with sec. 5.18(b) of ST/SGB/2008/5. The Respondent's position is that the findings of fact made by the panel, which were accepted by the decision-maker, were found to be insufficient to justify disciplinary proceedings. Instead only reasonable managerial measures were imposed.

Consideration

Regulatory Framework

24. The provisions in ST/SGB/2008/5 referred to by the Respondent as governing the fact-finding process and resulting decision challenged in this case are as follows (emphasis added):

> 5.14 Upon 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. If that is the case, **the responsible office shall promptly appoint a panel of at least two individuals** from the department, office or mission concerned **who have been trained in investigating allegations of prohibited conduct** or, if necessary, from the Office of Human Resources Management roster.

…

5.17 The officials appointed to conduct the fact-finding investigation shall **prepare a detailed report, giving a full account of the facts that they have ascertained** in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

…

(b) **If the report indicates that there was a factual basis for the allegations** but that, **while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action**, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. **Managerial action may include mandatory training**, reprimand, a change of functions or responsibilities, **counselling or other appropriate corrective measures**. **The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken**;

(c) **If the report indicates** that the allegations were well-founded and that **the conduct in question amounts to possible misconduct**, the responsible official shall **refer the matter** to the Assistant Secretary-General for Human Resources Management **for disciplinary action** … The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

25. The Applicant contends that since he was not engaged in misconduct but was carrying out his investigative duties when the allegation of harassment was made, the questions raised about his actions should have been addressed by application of ST/AI/309/Rev.2 governing the use of force. It provides as follows (emphasis added):

> 1. United Nations security officers function as agents of the Secretary-General to preserve order and to protect persons and property within the Headquarters area. All persons on the premises are expected to comply with the directions that may be issued by the security officers in the performance of their functions. Security officers, and all staff members, are expected to **exercise their functions with courtesy and in conformity with established rules and regulations**, including applicable local law.
>
> 2. Security officers are **authorized to search** persons, vehicles, handbags, briefcases or packages and to seize property if they have reason to believe that any person is carrying an unauthorized weapon, explosives or other dangerous substances or narcotics, or is removing property from the premises without proper authorization. …
>
> 3. Refusal to comply with directions issued by the security officers within their authority may result in removal from or denial of access to the premises and shall be reported by the Chief, Security and Safety Service, to the Assistant Secretary-General, Office of Conference and Support Services, for appropriate action.
>
> 4. Compliance with and application of the present administrative instruction **in no way prejudices** the duties, obligations and privileges of staff members, under the Staff Regulations and Rules, or their **right to file complaints** with the Assistant Secretary-General, Office of Conference and Support Services, through the Chief, Security and Safety Service, **if directions by security officers are thought to be unfair or unjust**.

26. A footnote to paragraph 1 of the above-quoted administrative instruction ("AI") provides that "security officers are authorized, within the limits permitted by local law, to effect arrest, including the use of force, where the person to be arrested is committing or attempting to commit an offence or has in fact, committed a felony. (See "Legal Guidelines", Handbook for Personnel of the Security and Safety Service, p. 60, part IX, sect. 9.03.)"

27. According to the Respondent there was no failure by the fact-finding panel to consider the provisions of ST/AI/309/Rev2. In fact, the panel considered the Applicant's contention that based on para. 3 of the said AI he was entitled to restrain [SS]. The panel's report explains their finding that the said AI cannot exculpate the Applicant's actions since it applies to preserving order at UNHQ. The panel considered more applicable the provisions of the UNDSS Manual of Instruction on Use of Force Equipment and Firearms and the Use of Force Policy in the UNSMS Security Policy Manual.

28. In any event, the panel found that the Applicant failed to comply with the organizational guidelines in sec. 8.4 of ST/SGB/2004/15 for obtaining information from a staff member's computer. The panel expressed the view that the situation demanded that the Applicant allow [SS] his due process rights to provide the information after consultation with his supervisor.

Findings on Issues

29. The issues identified in this case require factual determinations as well as determination as to whether, based on the facts, reasonable decisions were made on a proper interpretation of the relevant rules. In reviewing the reasonableness of the decisions, the Tribunal is guided by the presumption of regularity that has been recognised in UNAT's jurisprudence as applicable to the Respondent's decision-making.

30. The Respondent has a minimal burden of proof to justify a contested administrative action or decision. Once that minimal burden is discharged, the burden remains with an applicant to prove that the actions of the Respondent were unlawful or unjust. This must be done by clear and convincing evidence (*Rolland* 2011-UNAT-122).

31. The Tribunal examines whether the Applicant's challenge to the contested decision is based on sufficient evidence to rebut the presumption of regularity. In so doing, the Tribunal does not conduct a merit-based review that would replace the decision-making process of the Respondent. Rather it is the reasonableness of the decision-making process, including whether appropriate provisions were

applied, and relevant information taken into account that the Tribunal reviews. This is the approach applied in the following consideration of the issues.

Did the outcome of the investigation into the Applicant's conduct result in a finding of harassment and abuse of authority?

32. This issue is one of fact. It is clear from a reading of the emailed decision that the terms "harassment" and "abuse of authority" are used. The context is also important. The Respondent states these words in the part of the email that is intended to set out the facts found by the panel. The words, on the face of it, appear to state a finding of misconduct against the Applicant. Despite this appearance, the case for the Respondent is that the expression of these words is only intended to reflect that the panel found that factually the allegations based on which [SS] complained about harassment and abuse were proven.

33. This submission by the Respondent is borne out on an examination of the actual investigative report where the findings were not stated in terms that mirrored those of serious misconduct. Instead, the panel's actual finding was that the Applicant

> a. Made [SS] feel harassed, offended and threatened and negatively affected his work environment (para. 109 of the panel report);
>
> b. In undertaking the investigations, … failed to observe the laid out organizational guidelines for obtaining information from staff as per ST/SGB/2004/15 of 29 November 2004 on the Use of Information and Communication Technology Resources and Data (para. 113 of the panel report); and
>
> c. Improperly used his position of influence, power or authority [and] …. misinterpreted the powers conferred upon Security Officers in this particular situation (para. 114 of the panel report).

34. In these circumstances, the wording utilised in the decision letter wrongly indicated findings of misconduct. As a matter of fact, what was found by the panel was that the allegations made by [SS] were factually true and amounted to breaches

of the provisions that should have guided the Applicant in conducting his investigative duties.

35. The fact that the wording used in the decision email does not accurately reflect the basis for the action taken by the Respondent is evident in that it is expressed as acceptance of findings that the Applicant harassed [SS] and abused his authority. These words mirror those describing acts of prohibited conduct defined at secs. 1.2 and 1.4 of ST/SGB/2008/5.

36. It is clear from submissions by Counsel for the Respondent that there was no intention to indicate acceptance of a well-founded allegation of misconduct against the Applicant. However, the wording of the decision email reflects that prohibited conduct was the accepted finding.

37. Sec. 5.18(c) of ST/SGB/2008/5 prescribes the safeguards of disciplinary procedures that must be instituted where allegations of possible misconduct are well-founded. Those procedures allow for a staff member so charged to exercise due process rights in defending against the charges. This includes being informed of the basis for the findings disclosed and being permitted to respond.[1] As the Respondent did not intend to act pursuant to sec. 5.18(c) of ST/SGB/2008/5, there was no disclosure of the basis of the findings to the Applicant before the managerial measures were imposed.

38. Months after the managerial measures were imposed, the fact-finding report was disclosed to the Applicant under seal as directed by the Tribunal. Counsel for the Applicant sought in his submissions in response to introduce arguments as to the deficiencies in the fact-finding panel's investigations. Such submissions are exactly of the type that the Applicant would have been entitled to make during disciplinary proceedings if in fact there had been a finding of possible misconduct.

39. Having considered the actual report of the panel's findings and the submission of the Respondent, it is my finding that there was in fact no finding that the Applicant committed acts of harassment or abuse of authority amounting to

[1] *Akello*, 2013-UNAT-336; *Cabrerra*, 2012-UNAT-215; *Masylkanova,* UNDT/2015/088.

possible misconduct. However, the decision email inappropriately gives the impression that there was such a finding.

If there was a finding of harassment, was it justified?

40. The reference in the decision letter to acceptance of facts found by the panel could only refer to what was actually in the panel's report. The report did not include any findings of misconduct, whether by way of harassment or abuse of authority. In those circumstances, it can be accepted that although the words "harassment" and "abuse of authority" were stated in the decision letter as part of the findings accepted against the Applicant, there were no such findings in the sense of disciplinary misconduct.

41. Instead, the intended meaning of the email was simply to convey that the allegations made by [SS] were factually proven as to his being made to feel harassed. However, there was no finding of misconduct.

42. The drafting of the decision email did not clearly convey the intended message that there was no finding of misconduct and that, as a result, only managerial measures will be imposed.

Whatever the outcome of the fact-finding exercise, were the investigation and the resultant actions by the Respondent procedurally proper?

43. To the extent that the fact-finding panel's investigation resulted in a finding of actions on the part of the Applicant that called for corrective measures in the form of training and counselling, the Respondent's actions were procedurally proper.

44. There is no rule that exempts the Applicant, in his investigative role as a Security Officer, from being the subject of complaints. Para. 4 of ST/AI/309/Rev.2 that he relies on in these proceedings provides that such complaints are not ruled out.

45. The persons who sat on the investigative panel were not required under sec. 5.14 of ST/SGB/2008/5 to be experienced in the use of force. They met the requirements to be members of the panel. They also showed, by the contents of the report, that the implications of all relevant use of force policies and procedures were fully considered.

46. In response submissions, counsel for the Applicant contends that the investigative steps taken, and findings reached by the panel were deficient. He further contends that the panel wrongly considered certain provisions such as sec. 8.4 of ST/SGB/2004/15, which governs obtaining information from a staff member's computer.

47. However, as has been determined in this Judgment, there was no finding of possible misconduct. The Tribunal's determination is that there was sufficient evidential basis from witness testimony and consideration of exculpatory factors, reflected in the panel's report, to justify the finding of the Respondent that factually certain allegations were established and there was need for managerial corrective measures.

48. Though the Respondent in his discretion may have come to other conclusions and decided on other measures, there is no indication from the report that the decision reached was unreasonable, absurd or disproportionate. It was a "reasonable exercise of the Administration's broad discretion" in addressing the allegations made against the Applicant. The decision that the facts found merited managerial measures was arrived at in the proper exercise of a discretion which, as underscored in *Koutang* 2013-UNAT-374 at para 30, will not lightly be interfered with by the Tribunal.

49. As to the Respondent's decision on the type of managerial measures imposed, the Tribunal explained in *Gharagozloo Pakkala* UNDT/2021/076 at para. 30 that

> [A]dministrative measures can be taken in cases where a staff member's conduct does not rise to the level of misconduct, but a managerial action is nevertheless required; their function is preventive, corrective and cautionary in nature.

50. The cautionary corrective measure of providing training and counselling for the Applicant was appropriately taken in accordance with ST/SGB/2008/5 in circumstances where, although there was no misconduct, the Applicant's manner of performing his duties caused a staff member to feel harassed. It is reasonable and proactive that the Respondent decided to take managerial action to try to ensure that when the investigative role is carried out by a Security Officer it need not involve making staff members feel harassed.

Is the Applicant entitled to rescission of the finding of harassment and/or the managerial measure imposed as a result?

51. The managerial measures imposed were the outcome of a procedurally fair process based on the findings of the panel. However, as there was in fact no finding of misconduct, the decision email ought to be rescinded so that it is removed from the Applicant's record. Any negative findings as to misconduct committed by the Applicant are to be expunged from his record.

52. It may be appropriate for the Respondent to replace the decision letter on the Applicant's record with one that correctly reflects that no finding of misconduct was made against him by either the investigative panel or the SRSG who made the decision.

Conclusion

53. The Applicant succeeds in part.

54. In view of the foregoing, the Tribunal DECIDES:

The Respondent's decision to find as a fact that the Applicant engaged in acts of misconduct, namely harassment and abuse of authority is rescinded. Any record of such findings is to be expunged from the Applicant's record.

(*Signed*)
Judge Eleanor Donaldson-Honeywell
Dated this 15th day of September 2021

Entered in the Register on this 15th day of September 2021
(*Signed*)
René M. Vargas M., Registrar, Geneva