



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

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MITCHELL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Stephen Margetts, ALD/OHR/DMSPC

## **Introduction**

1. The Applicant is the Deputy Head of Office and Director of Political Affairs working with the United Nations Office to the African Union (“UNOAU”), based in Addis Ababa, Ethiopia.<sup>1</sup>

2. By way of an application filed on 14 January 2021, the Applicant contests the 6 August 2020 decision of the Office of Internal Oversight Services (“OIOS”) on closing the investigation of his complaint against Ms. HT (anonymized due to confidentiality), the Special Representative of the Secretary-General (“SRSG”) at UNOAU.<sup>2</sup>

3. The Respondent filed a reply on 22 February 2021.

## **Facts and procedural history**

4. On 29 February 2020, the Applicant sent an email to the SRSG raising concerns, *inter alia*, of not being invited in any meetings conducted by the SRSG with senior African Union (“AU”) officials and certain verbal comments by the SRSG. The Applicant indicated that he was subjected to race-based discrimination by the SRSG.<sup>3</sup> The Applicant and the SRSG are of different races, national origin and colour.

5. On 2 March 2020, the SRSG responded to the Applicant’s email rejecting his allegations. The SRSG detailed reasons for not inviting the Applicant to the meetings. The SRSG also informed the Applicant that she would send his email and her reply to the Head of the United Nations Ombudsman and Mediation Services and seek her advice on how best to proceed towards a resolution of the matter.<sup>4</sup>

6. On 3 March 2020, the Applicant responded to the SRSG and contested the content of her email as either being incorrect or distorted. The Applicant however,

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<sup>1</sup> Application, section I.

<sup>2</sup> Application, section V and annex 8.

<sup>3</sup> Application, annex 1, p. 11, application, section V.

<sup>4</sup> Application, annex 1.

welcomed the referral of the matter to the Ombudsman.<sup>5</sup>

7. On 30 March 2020, the Applicant submitted a formal complaint of discrimination to the Secretary-General. Specifically, he requested an investigation into the discriminatory behavior of the SRSG pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).<sup>6</sup>

8. On 9 April 2020, Ms. Phyllis Wang, on behalf of the Executive Office of the Secretary-General, acknowledged receipt of the Applicant's complaint and informed him that his complaint had been forwarded to OIOS.<sup>7</sup>

9. On 6 May 2020, OIOS informed the Applicant, among others, that since the SRSG had requested an informal resolution of the matter, OIOS had placed his complaint in "suspense" expecting the matter to be resolved informally.<sup>8</sup>

10. On 14 May 2020, the Applicant requested management evaluation challenging the OIOS's decision of placing his complaint in suspense.<sup>9</sup> On 29 May 2020, the Management Evaluation Unit ("MEU") rejected the Applicant's request on the ground that the OIOS had not yet taken a final decision on whether or not to investigate his complaint, and thus his request was premature.<sup>10</sup>

11. On 6 August 2020, the Applicant wrote to OIOS seeking an update on his complaint and inquired whether his complaint would be held in suspense indefinitely or for a determined period of time.<sup>11</sup> On the same day, OIOS reiterated the reasons contained in their email of 6 May 2020 and informed the Applicant that his complaint was now closed in the OIOS case management system ("the contested decision").<sup>12</sup>

12. On 15 September 2020, the Applicant requested management evaluation of

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<sup>5</sup> Application, annex 2, p. 4.

<sup>6</sup> Application, annex 3.

<sup>7</sup> Application, annex 4.

<sup>8</sup> Application, annex 5.

<sup>9</sup> Application, annex 6.

<sup>10</sup> Application, annex 7.

<sup>11</sup> Application, annex 8.

<sup>12</sup> Ibid.

OIOS's decision to not investigate his complaint.<sup>13</sup> The MEU has yet to respond.<sup>14</sup>

## **Submissions**

### *Applicant's submissions*

13. The Applicant submits that OIOS's decision to not investigate the allegations set forth in his complaint was procedurally irregular, arbitrary and capricious. The decision amounts to an abuse of discretion and violates sections 4.10 of the ST/SGB/2019/8 and section 6.1 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

14. The Applicant also contends that his due process rights were denied by OIOS not undertaking the investigation. Further, as a result of OIOS's failure to investigate the allegations of discrimination, the Administration breached its duty of care to protect him against prohibited conduct.

15. Relying on *Staedtler*<sup>15</sup> and *Ostensson*<sup>16</sup>, the Applicant submits that whereas OIOS has discretion whether or not to investigate a complaint, such a discretion must be exercised properly. In his view, OIOS abused its discretion.

16. The Applicant thus requests the Tribunal, by way of remedies, to:

- a. Find that OIOS committed procedural errors in placing his case in suspense and closing it on the basis stated in its communications to him dated 6 May 2020 and 6 August 2020;
- b. Remand the matter for institution or correction of the required procedure under art. 10.4 of the Dispute Tribunal's Statute; and
- c. Award appropriate compensation for the procedural errors committed.

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<sup>13</sup> Application, annex 9.

<sup>14</sup> Application, section V, para. 8.

<sup>15</sup> *Staedtler* UNDT/2014/123, para. 41.

<sup>16</sup> *Ostensson* UNDT/2010/120, para. 60.

*Respondent's submissions*

17. Relying on *Nadeau*<sup>17</sup>, the Respondent submits that the Administration has considerable discretion in deciding whether or not to investigate a complaint. He opines that the staff member has no absolute right to demand an investigation of his or her complaint. An investigation may only be undertaken when the matters referred to in section 5.5 of ST/AI/2017/1 have been taken into account and, taking all matters into consideration, there are sufficient grounds for reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed. Lacking such grounds, the Appeals Tribunal has concluded that the Administration is not allowed to initiate an investigation because such an investigation can have a negative impact on the staff member concerned.<sup>18</sup>

18. The Respondent further contends that in reviewing the complaint, OIOS had before it the allegations made by the Applicant against SRSG and the detailed response by the SRSG in her email of 2 March 2020. On 6 May 2020, OIOS informed the Applicant of its consideration of the matter and its recommendation that the Applicant should pursue informal resolution. This approach is specifically contemplated by section 5.5(d) of ST/AI/2017/11, where OIOS is mandated to consider an informal resolution process if it is more appropriate in the circumstances. Importantly, OIOS concluded noting that “absent further evidence of serious misconduct” it would not investigate the matter on the basis of the facts the Applicant had presented.

19. On 6 August 2020, the OIOS informed the Applicant that inter-personal issues of the nature of those detailed in his complaint are rarely solved by an investigation and, ultimately, the outcome of any investigation, “is unlikely to provide any satisfaction to any party” to the complaint. Further, despite the invitation to do so, the Applicant did not present any additional evidence to OIOS. The key evidence remains

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<sup>17</sup> *Nadeau* 2017-UNAT-733.

<sup>18</sup> Reply, section II, para. 12.

the differing accounts of the Applicant and the SRSG detailed in the contemporaneous email exchange between 29 February 2020 and 2 March 2020.

20. The Respondent therefore, maintains that OIOS acted in accordance with the procedures set down in ST/SGB/2019/8 and ST/AI/2017/1, taking into account all relevant considerations in reaching its decision under section 5.1 of ST/AI/2017/1 to take no action on the complaint.

21. The Respondent thus contends that there is no foundation for the substantive claim by the Applicant, nor any foundation for any award of compensation. Accordingly, the Respondent requests the Tribunal to reject the application in its entirety.

### **Applicable law**

22. Section 1.2 of ST/SGB/2019/8 defines prohibited conduct to include discrimination, as follows:

Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, gender, sexual orientation, gender identity, gender expression, religion, nationality, ethnic origin, disability, age, language, social origin or other similar shared characteristic or trait. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

23. Section 5.5 of ST/SGB/2019/8 provides that the preliminary assessment of a report of possible prohibited conduct will be conducted in accordance with the procedures set out in sections 5 to 12 of ST/AI/2017/1. Section 5.1 of ST/AI/2017/1 provides that OIOS is responsible for determining whether any action will be taken on a complaint of prohibited conduct, as follows:

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.

24. Factors that are relevant in the assessment of a complaint are detailed in section 5.5 of ST/AI/2017/1 as follows:

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.

25. It is settled law that the Administration has considerable discretion in deciding whether to investigate a complaint (*Nadeau* 2017-UNAT-733). The case law is also settled that OIOS decision making is reviewable and open to scrutiny where the decision impacts on the legal rights of a staff member or former staff member (*Nwuke* 2010-UNAT-099). Nowhere does it state that a staff member has an absolute right to demand an investigation of their complaint but it does indicate that any decision should be legal, rational, reasonable, and procedurally correct. An investigation may only be undertaken when the matters referred to in section 5.5 of ST/AI/2017/1 have been taken into account and, taking all matters into consideration, there are sufficient grounds for “reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”. Lacking such grounds, the Appeals Tribunal has concluded that the Administration is not allowed to initiate an investigation because such an investigation can have a negative impact on the staff member concerned (*Nadeau* 2017-UNAT-733; *De Reijk* UNDT-2020-026).

## Considerations

26. In reviewing the complaint, this Tribunal had before it the allegations made by the Applicant against the SRSG and the detailed response provided by the SRSG in her email of 2 March 2020.

27. As referred to above, the Applicant by way of email of 29 February 2020, challenged the SRSG for not inviting him to the meeting held on 28 February 2020 and detailed a series of other grievances concerning, among other things, failing to invite him to other senior-level meetings over the preceding year, transparency in communications between them and, generally, the nature of the relationship between the SRSG and the Applicant.

28. Specifically, the Applicant stated:

On 27 February 2020, the SRSG told me that I could not attend a meeting to be held next day at the African Union Commission (“AUC”) because in her own words “you are not an African”. This was direct face-to-face discrimination, as per the terms of ST/SGB/2019/8, under which I submitted my complaint. Furthermore, she subsequently invited several less senior UNOAU colleagues of African origin to accompany her to this meeting.

In attempting to justify her position, the SRSG said “sometimes I have to act like an African politician rather than a UN technocrat”, and “we should not impose UN values on the AU”. Given that the discussion focused on the SRSG barring me from attending a meeting at the AUC based on my race/nationality, the value at stake is ‘respect for diversity’ a core UN value. She furthermore, identified a member of the AUC leadership, stating the individual would not want me in attendance and that my presence would constrain the discussions, directly inferring that my race/nationality was an obstacle to professional engagement with the AUC leadership; effectively and subjectively accusing members of the AUC leadership of harboring discriminatory attitudes.

I wrote to the SRSG on 29 February expressing my deep concern for her discriminatory conduct (para. 4.1 ST/SGB.2019/8), which has also included: systematic exclusion from all of the meetings she has organized with the AUC leadership since her arrival to post in January 2019; direct obstruction by the SRSG to my access to Notes-to-File of meetings conducted by the SRSG with the AUC leadership; exclusion from a previous meeting with Southern African Development



Community (SADC) representatives on 5 April 2019, on the basis that she was “trying to build trust” while other less senior UNOAU colleagues of African origin were invited to attend; prior comments in staff meetings to the effect that African colleagues are more invested in the work of UNOAU and understand it better.

The SRSG responded to my e-mail on 2 March 2020, and in a 24-paragraph communication, she did not once refute that she had spoken discriminatory words towards me on 27 February 2020, but rather attempted to justify her discriminatory actions and divert attention from the issue-at-hand, by raising issues with me that she had never previously communicated, such as my performance. Regardless of my concerning e-mail to her, in her long response, she did not address or acknowledge my complaint of discrimination with regard to her remarks spoken on 27 February 2020.

29. On 2 March 2020, the SRSG responded to the Applicant’s email rejecting his allegations. Among other things, she stated that:

I would request that until this matter is resolved through the appropriate dispute resolution processes particular to the UN I would request that all communication relating to the work of UNOAU that needs to be exchanged between us is communicated in writing. Please be advised that if you request a meeting with me to discuss any issue I will ensure that there is a note taker present who will within a few hours of our meeting provide us both with a summary of our discussion. If you have any corrections to make I would request that you do so within a day of receiving the document and if you do not comment I will assume that it is because you believe it is an accurate reflection of the meeting.

30. In reference to the Notes-to-File of meeting allegations, the SRSG replied as follows:

Dear [Applicant],

I am informed that you have requested for notes of the meetings I held with the Commissioners last week without reference to me. If you want them, why don’t you just ask me to let you know what we discussed? I’d be happy to share the details of our discussions, and would prefer that you do that rather than asking for notes of my meetings without reference to me. In summary with C we discussed [...]. That was about it.

I think that it is not appropriate for you to ask for my meeting notes from our junior colleagues without reference to me, they are my meetings and sometimes I request them not to make notes or to share information that

I have been requested by my counterpart to hold as confidential information. It's necessary to be able to keep our counterparts confidences in order to build a relationship of trust. Anytime you want to have a discussion on a meeting I have held and discussions that have taken place please just come and ask me, I have no problem sharing the details with you myself.

Best Regards,

SRSG

31. The SRSG also informed the Applicant that she would send his email and her reply to the Head of the United Nations Ombudsman and Mediation Services and seek her advice on how best to proceed towards a resolution of the matter.<sup>19</sup>

32. Importantly, the SRSG referred the matter to the Ombudsman's office characterizing the issue as a "misunderstanding" and requesting assistance in resolving the matter. On 3 March 2020, the Applicant wrote to the SRSG welcoming the referral of the matter to the Ombudsman.

33. Having considered the matter, the Tribunal has concluded that the key issues are the following:

(i) The allegation of racism amounts to one contested sentence in a meeting between two individuals, which one party to the meeting rejects and the other recounts, using varying forms of direct and reported speech.

(ii) The Applicant's and the SRSG's account of events are set out in detail in a contemporaneous email exchange, where the Applicant alleges he was excluded from the meeting based on his race/nationality and the SRSG denies this allegation and explains the reasons he was not invited to the meeting. It is highly unlikely that an investigation would reveal any additional information.

(iii) The remainder of the complaint can be characterized as a mix of allegations of poor communications, failing to be invited to meetings, a

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<sup>19</sup> Application, annex 1.

misunderstanding of roles, underpinned by a mutual and obvious breakdown in trust.

(iv) In these circumstances, there is little likelihood that an investigation would reveal any sufficient information to pursue the matter as a disciplinary case.

(v) An investigation would not resolve the dispute between the Applicant and the SRSG, since there clearly was and remains inter-personal differences between them. Instead, it would likely deepen the divide between them. An investigation will naturally produce countervailing arguments which may go to the performance and fitness of the Applicant for his role, issues that the SRSG touched on in her response.

(vi) In these circumstances, the issue is a management issue between two individuals where an informal process would be more appropriate.

34. Accordingly, on 6 May 2020, OIOS informed the Applicant of its consideration of the matter and its recommendation that the Applicant should pursue informal resolution. This approach is specifically contemplated by section 5.5(d) of ST/AI/2017/1, wherein OIOS was mandated to consider “[w]hether an informal resolution process would be more appropriate in the circumstances”. Importantly, OIOS concluded noting that “absent further evidence of serious misconduct” it would “not investigate the matter on the basis of the facts that [the Applicant had] presented” (see Annex 5 to the application).

### **Conclusion**

35. OIOS acted in accordance with the procedures set down in ST/SGB/2019/8 and ST/AI/2017/1, taking into account all relevant considerations in reaching its decision under section 5.1 of ST/AI/2017/1 to take no action on the Complaint. Accordingly, there is no foundation for the substantive claim made by the Applicant, nor any foundation for any award of compensation. The Applicant is not entitled to

the remedies sought. As such, the Tribunal rejects the application in its entirety.

**JUDGMENT**

36. The application is hereby dismissed.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 11<sup>th</sup> day of November 2021

Entered in the Register on this 11<sup>th</sup> day of November 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi