



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DRISSI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Camila Nkwenti, UNEP

Isabel Martinez, UNEP

Thomas Deleuil, UNEP

Introduction

1. The Applicant is a Programme Management Officer, at the P-4 level, working with the United Nations Environment Programme (“UNEP”), based in Nairobi, Kenya.¹

2. By an application filed on 28 January 2021, the Applicant contests what she termed as “the outcome of the preliminary assessment stating that the facts obtained regarding the complaint did not amount to misconduct or prohibited conduct, and the subsequent management evaluation decision”.²

3. The Respondent filed a reply on 3 March 2021.

Facts and procedural history

4. On 25 July 2019, the Applicant met with an officer of the Office of Internal Oversight Services (“OIOS”) and thereafter filed an in-person complaint against Mr. C (anonymized for privacy).³ At the time of the complaint, Mr. C was the Applicant’s Second Reporting Officer.⁴

5. The Applicant specifically alleged that Mr. C harassed her and engaged in recruitment irregularities. The examples given include: reducing the budget for her team in comparison to the budget of other teams; humiliating her during meetings, such as where each person would have a turn to talk about their work, but when her turn came, Mr. C skipped her and asked someone else to talk; Mr. C creating a post which largely overlapped with her functions that would make her redundant.⁵

6. On 8 August 2019, by way of an email, the OIOS informed the Applicant that her complaint falls within the application of ST/SGB/2008/5 (Prohibition of

¹ Application, section I.

² Application, section V.

³ Application, section VII, para. 7.

⁴ Ibid, para. 1; reply, annex B.

⁵ Reply, annex A.

discrimination, harassment, including sexual harassment, abuse of authority) and the OIOS would like to refer her complaint to the Executive Director of UNEP (“ED/UNEP”) for thorough review and assessment of the matter.⁶

7. On 14 August 2019, the Applicant consented to the OIOS submitting her complaint to the ED/UNEP.⁷

8. On 21 August 2019, OIOS referred the complaint to ED/UNEP, requesting her to take the necessary action concerning the Applicant’s report of alleged prohibited conduct and recruitment irregularities.⁸

9. Upon receipt of the complaint from OIOS, the ED/UNEP in turn requested the then Acting Chief of Staff of UNEP (“ACS”) to conduct a preliminary assessment of the complaint.⁹

10. On 5 December 2019, the ACS requested the Applicant to provide further information about her complaint, including the emails and names of individuals who witnessed the situations.¹⁰ The Applicant submitted the requested information on 17 January 2020.¹¹ On 23 January 2020, the Applicant provided some additional information in relation to her complaint.¹²

11. On 5 June 2020, the ACS informed the Applicant that the preliminary assessment was completed and that the facts obtained regarding her complaint did not amount to misconduct or prohibited conduct.¹³

12. On 20 August 2020, the Applicant requested management evaluation of the Administration’s decision to not investigate her complaint.¹⁴ The Management

⁶ Application, section VII, para. 8.

⁷ Ibid, para. 9.

⁸ Reply, annex B.

⁹ Reply, section II, para. 4.

¹⁰ Reply, annex C, p. 7.

¹¹ Ibid, p.1.

¹² Reply, annex D.

¹³ Reply, annex F.

¹⁴ Application, annex 8.

Evaluation Unit responded on 30 October 2020 informing her that the Administration had complied with its obligations in respect of its handling of her complaint and the Secretary-General had decided to uphold the contested decision.¹⁵

Submissions

Applicant's submissions

13. The Applicant submits that her complaint was not fairly or competently investigated.¹⁶ She avers that in support of her statement, she provided emails and a list of eyewitnesses. However, the Administration did not interview or consult any of the witnesses, nor was she interviewed during the assessment of the complaint.

14. The Applicant further opines that for any investigation, the details of events provided by witnesses are a critical element of the evidence gathered. Witness statements can assist in forming reasonable grounds to substantiate a charge and can assist the assessment team in reaching a decision that the charge against the accused person has been proved. Assessment cannot only be based on emails. There could not have been a proper assessment without the inclusion of the witness statements.

15. The Applicant therefore, contends that the Administration's discretion to investigate was not exercised properly, facts were biased and arbitrary and the non-inclusion of the eyewitnesses in the assessment affected the final decision.

16. As remedies, the Applicant requests the Tribunal to:

- a. Order that an investigation be initiated; and
- b. Award her moral damages.

¹⁵ Application, annex 9.

¹⁶ Applicant's response to Order No. 187 (NBI/2021).

Respondent's submissions

17. The Respondent submits that the allegations in the complaint submitted by the Applicant did not provide a *prima facie* case of harassment as the claims were unsubstantiated. The Respondent argues that regarding the allegation of humiliation by Mr. C during the meeting by skipping her when he received updates from other members of the team, the Applicant failed to specify the date when the incident happened, and she could not indicate whether she brought it to the attention of Mr. C.

18. In respect of the allegation relating to the budget allocation, the Applicant was unable to produce any emails that substantiated her claim. She only stated that several programme officers complained about the way Mr. C would allocate the budget according to his agenda, making it challenging for them to manage their projects and deliver results. She, however, did not provide emails of staff members who complained about the fact that the budget being allocated was small.

19. In reference to the allegation that Mr. C performed recruitment irregularities with the intention of making her role redundant, the Respondent submits that the Applicant did not submit any information supporting her claim. Such information is also not available in the documentation supporting the selection exercise in the impugned position.

20. Regarding the Applicant's argument that the Administration should have interviewed witnesses, the Respondent submits that the Administration is not obliged to contact witnesses during preliminary assessments especially when the Applicant does not substantiate the allegations in the complaint. The ED/UNEP has the discretion to conduct the preliminary assessment as he or she deems necessary, taking into consideration section 5.5 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

21. Finally, the Respondent requests the Tribunal to reject the application.

Applicable Law

22. ST/SGB/2008/5 was promulgated by the Secretary-General to ensure that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment and abuse of authority (“prohibited conduct”).

23. Section 1.2 of ST/SGB/2008/5 defines harassment as:

Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

24. Section 2.2 of this SGB places a duty on the Organization to take all appropriate measures to ensure a harmonious work environment and to protect staff from exposure to any form of prohibited conduct. Section 2.3 enjoins staff to act with tolerance, sensitivity and respect for differences.

25. Section 5.14 provides:

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.

26. Section 5.5 of the ST/AI/2017/1 provides that 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; and
- e. Any other factor(s) reasonable in the circumstances.

27. Section 5.6 states that 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.

28. This Tribunal held in *Omwanda* UNDT/2015/104 that:

49. The Tribunal takes into account that it is for the head of department to exercise a judgment as to whether to call for a fact-finding investigation. So long as the head of department exercises his or her discretion in a lawful manner, taking into account relevant factors and disregarding irrelevant considerations, and provided that in all the circumstances the decision was not irrational or perverse, given the overarching policy considerations under ST/SGB/2008/5, the Tribunal will not interfere.

Consideration

Was the Applicant's complaint reviewed in accordance with ST/SGB/2008/5 and ST/AI/2017/1?

29. Following the referral of the complaint to UNEP, the Executive Director tasked the ACS of UNEP, pursuant to section 5.4 of ST/AI/2017/1, to conduct a preliminary assessment.

30. The ACS contacted the Applicant to obtain additional information and documentation to substantiate her claims. Mr. C was also contacted and he provided his response to the issues raised in the complaint filed by the Applicant. The ACS also contacted the United Nations Office at Nairobi-Human Resources Management Service (“UNON/HRMS”) to obtain the supporting documents for the selection process of the position of Programme Management Officer, P4, Job Opening no. 109882.

31. The Administration reviewed the information and additional documents and made the decision to close the preliminary assessment given that the facts in the complaint were not substantiated.

32. The Tribunal is, therefore, satisfied that the Applicant’s complaint was reviewed in accordance with the applicable legal framework.

Did the Applicant provide a prima facie case of harassment?

33. The Applicant did not provide a *prima facie* case of harassment as the claims were unsubstantiated and she did not provide adequate proof to support them. The facts did not amount to misconduct or prohibited conduct. For this reason, the matter was closed.

34. The ACS requested the Applicant to provide additional information to support her complaint pursuant to section 5.4 of ST/AI/2017/1. This included: (i) any emails which may have indicated that Mr. C tried to force her to resign or to move into another role, and the dates and circumstances when this happened; (ii) information on the specific meetings in which she was humiliated by Mr. C, and the names of the individuals who witnessed this; (iii) more information concerning the allegation that a small amount of funds were allocated for her team including the names of

projects/initiatives, the period for which the funds were allocated and the amounts, if possible; and, (iv) more information concerning her communications with the Ombudsman and any follow up.

35. The Tribunal notes that the purpose of this request was to assist the ACS in eliciting the details which would allow him to determine whether an investigation into the conduct the Applicant alleged in her complaint would reveal sufficient evidence to further pursue the matter as a disciplinary case. However, the Applicant's response to the ACS did not provide sufficient information to indicate that a further investigation would reveal misconduct. For example, the Applicant described the difficulty she experienced in completing the tasks assigned to her by Mr. C in respect of her Performance Improvement Plan. This is a managerial prerogative and not one dealing with discipline or discrimination.

36. The Applicant also indicated that Mr. C attempted to discredit her by mentioning to her colleagues via email that she was underperforming, but she was unable to produce any emails to this effect.

37. The Applicant stated that Mr. C tried to humiliate her during a branch meeting by skipping her when he received updates from other members of the team. However, she could not specify the date when the alleged incident happened and could not indicate whether she brought this to the attention of Mr. C.

38. In respect of budget allocation, the Applicant was unable to produce any emails that substantiated her allegations, but she noted that several Programme Officers complained about the way Mr. C would allocate the budget according to his agenda, making it challenging for them to manage their projects and deliver results. She was also unable to provide emails of staff members who complained about the fact that the budget being allocated was small.

39. With regard to the Applicant's argument that the Administration should have contacted witnesses to obtain information from them regarding the allegations in her complaint, the Tribunal recalls that the Administration is not obliged to contact

witnesses during preliminary assessments especially when the Applicant does not substantiate the allegations in the complaint. The Executive Director has the discretion to conduct the preliminary assessment as he/she deems necessary, taking into consideration section 5.5 of ST/AI/2017/1.

40. It should also be recalled that mere disagreements on work performance or on other work related issues is normally not considered harassment. The conduct the Applicant alleged even if true, is not considered harassment within the meaning of ST/SGB/2008/5. Consequently, the Administration had a legitimate basis not to proceed with an investigation into these matters.

41. Finally, the ACS followed up on the Applicant's allegation that Mr. C performed recruitment irregularities in the selection exercise leading to the appointment of Mr. L (confidentially anonymized). To the extent that she alleged that Mr. C pursued the creation of this post in order to make her role redundant, there was no indication, in the information the Applicant submitted supporting this claim or in the documentation supporting the selection exercise, that this was the case or that an investigation into this would lead to a disciplinary case.

42. In fact, the Chief of the Talent Management Center (Chief TMC), UNON/HRMS wrote in response to this branch of the complaint as follows. In reviewing the below recruitment case, we have noted the following:

1. It was a roster selection and all RM (i.e., rostered) candidates had been evaluated which were checked before changing the status of the JO to "NO CR required." Therefore, no panel report was prepared, only a selection memorandum which is attached to this email for reference.
2. Mr L. meets all the requirements and the desirables specified in the JO.
3. The classification was approved on 26 December 2018 and the JO, as well as the evaluation criteria, match the description of the job.¹⁷

¹⁷ Reply, annex E.

43. The Chief TMC further stated “from a recruitment perspective, we do not see any concern with the integrity of the selection process or out of the ordinary for this roster selection”.¹⁸

44. To the extent that the Applicant seeks an investigation into alleged irregularities as a disciplinary matter, the jurisprudence of this Tribunal is to the effect that “even if it had been in the [a]pplicant’s interests to take action on this issue, the decision to conduct such an investigation is the privilege of the Organization itself”.¹⁹

45. In the case of *Nadeau*, 2017-UNAT-733, the Applicant filed a complaint to the Under-Secretary-General for Internal Oversight Services (“USG, OIOS”) against his first reporting officer Ms. B (anonymized) pursuant to ST/SGB/2008/5. Therein, he claimed, *inter alia*, that Ms. B had not responded to his e-mails regarding his interest in training or his perceived conflicts of interest and he took issue with her assignment of cases and the general work environment. The UNAT held that:

As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action. The 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. Only in particular situations, i.e. in a case of a 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 under Article 2(1)(a) of the UNDT Statute and Article 2 of the Statute of the Appeals Tribunal. We take this opportunity to clarify that the discretion of the Administration can also be confined in the opposite direction. There 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.

46. Furthermore, the Appeals Tribunal found that an investigation may only be undertaken when there are sufficient grounds or “reasons to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be

¹⁸ Ibid.

¹⁹ *Ostensson* UNDT/2010/121.

imposed". Lacking such grounds, the Appeals Tribunal 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.

47. In conclusion, the Tribunal rejects this application.

JUDGMENT

48. The application is hereby dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 16th day of November 2021

Entered in the Register on this 16th day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi