



Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Dorota Banaszewska, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests several decisions or actions in relation to the Administration’s handling of her complaint of sexual harassment by her former supervisors under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), including:

- a. The Administration’s failure to take appropriate action in relation to her complaint;
- b. The Administration’s decision not to provide her with the information on the specific actions taken with respect to her former supervisors, to the extent required by sec. 5.18(c) of ST/SGB/2008/5;
- c. Undue delays in the investigation, in the initiation and conducting of a disciplinary process, and in taking the final decision on imposition of disciplinary sanctions against her former supervisors; and
- d. The Administration’s failure to take appropriate action to protect her from sexual harassment in her workplace environment and to remedy the harm suffered.

Facts and procedural background

2. On 14 February 2018, the Applicant joined the Regional Section for Latin America and the Caribbean (“RSLAC”), UNODC, as a P-3 fixed-term appointment holder.

3. According to the Applicant, sometime in March 2018, she was sexually harassed by her first reporting officer (“FRO”) and her second reporting officer (“SRO”).

4. In July 2018, the Applicant reached out to the Chief of Human Resources, UNODC, to report the sexual harassment by her FRO and SRO, seek assistance and support and request her reassignment.

5. In August 2018, the Applicant was placed on certified sick leave for around two months.

6. In October 2018, upon her return from sick leave, the Applicant was reassigned to the Field Operations Management Support Section (“FOMSS”). The Applicant’s new FRO and SRO for the 2018-2019 performance evaluation period was the Chief, FOMSS.

7. On 6 December 2018, the Applicant filed with the Office of Internal Oversight Services (“OIOS”) a complaint of sexual harassment against her former supervisors.

8. According to the Applicant, following her complaint, no action was taken by the UNODC Administration to effectively protect her. Neither her former FRO nor her former SRO was reassigned or placed on administrative leave. Her former SRO acted as the Applicant’s “additional supervisor” until the end of her 2018-2019 performance evaluation period.

9. On 28 December 2018, OIOS informed the Applicant that it had initiated an investigation into her complaint.

10. In July 2019, OIOS transmitted two investigation reports concerning the Applicant’s two former supervisors to the Office of Human Resources for appropriate action.

11. In August 2019, the Applicant was assigned to the Division of Treaty Affairs where she is currently working.

12. Following a review of the investigation reports, disciplinary processes were initiated against the Applicant’s two supervisors by two allegations of misconduct memoranda, both dated 16 December 2019.

13. Upon review of the entire dossier, including the staff members’ comments, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) decided to impose disciplinary measures on the Applicant’s former FRO and SRO, and additional administrative measures on her

former SRO. Both of them were informed of the decisions by letters dated 11 May 2020.

14. By letter dated 13 May 2020, the Assistant Secretary-General for Human Resources Management (“ASG/OHR”) informed the Applicant of the outcome of the investigation and the actions taken pursuant to sec. 5.18(c) of ST/SGB/2008/5. Specifically, with respect to the action taken, the ASG/OHR informed the Applicant that the USG/DMSPC had decided to impose disciplinary sanctions on both staff members respectively and that, in addition, the USG/DMSPC had decided to take administrative action in relation to her former SRO.

15. On 4 June 2020, the Applicant reached out to the ASG/OHR to request the reasons for the delays in the investigation. She also expressed her disappointment in the Administration’s lack of appropriate action following her complaint, including the lack of prompt reaction by the ASG/OHR following the OIOS reports and the lack of specific information on the actions taken by the Administration with respect to her former supervisors.

16. On 11 June 2020, the Applicant requested management evaluation of the Administration’s decision not to provide her with the information on the specific actions taken with respect to her former supervisors.

17. By letter dated 10 July 2020, the USG/DMSPC responded to said request by informing the Applicant that the Secretary-General had decided to uphold the above-mentioned contested decision.

18. On 8 October 2020, the Applicant filed the present application. In her application, the Applicant submitted two requests:

- a. A request for leave to adduce evidence with respect to harm she suffered as a result of treatment by the Administration; and
- b. A request to be granted anonymity.

19. On 3 November 2020, the Respondent filed a motion for an extension of ten days to file his reply.

20. On 4 November 2020, the Tribunal granted the motion and instructed the Respondent to file his reply by 19 November 2020.

21. On 19 November 2020, the Respondent filed his reply. In his reply, the Respondent reciprocally submitted two requests:

a. A request for leave to adduce additional evidence, should the Applicant's request for leave to adduce evidence be granted; and

b. A request for anonymity for the two staff members implicated in the present case.

22. On 25 September 2021, the present case was assigned to the undersigned Judge.

23. By Order No. 174 (GVA/2021) of 18 November 2021, the Tribunal granted both parties' requests for anonymity.

24. By Order No. 175 (GVA/2021) of 22 November 2021, the Tribunal rejected the parties' requests to adduce additional evidence and instructed the parties to file their respective closing submission, which they did on 6 December 2021.

Parties' submissions

25. The Applicant's principal contentions are:

a. The matter before the Tribunal is receivable in its entirety because all the issues contained in her application are immanently connected; in the alternative, the Tribunal has competence to directly hear all the issues she raised applying staff rule 10.3(c) *mutatis mutandis* to her situation;

b. The Administration failed to take all appropriate action and remedial action and did not act in accordance with its duty of care;

c. The undue delays in both the investigation and the subsequent disciplinary proceedings against her supervisors violate her right as a staff member to be treated with dignity and respect, and to work in an environment free from harassment and abuse; and

d. The Administration breached her contractual rights by its decision not to provide her with the specific information on actions taken with respect to her former supervisors, to the extent required by sec. 5.18(c) of ST/SGB/2008/5:

i. The correct interpretation of sec. 5.18(c) is that it was intended to vest the aggrieved individual with a right to be informed of the specific action taken against the offenders;

ii. It follows from the aim and purpose of sec. 5.18(c), especially the control and protective mechanism which it entails, that the Administration is obliged to provide the Applicant with the specific information she requested; and

iii. The requirements set out in sec. 8.9 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) confirm that the Administration is obliged to provide the aggrieved individual as specific information as possible.

26. The Respondent's principal contentions are:

a. The allegations of breach of duty of care by the Administration towards the Applicant, the alleged delays and alleged failure to take appropriate action were not subject to management evaluation, and as such should not be receivable *ratione materiae*; and

b. The aggrieved individuals are not entitled to be informed of the specific disciplinary and/or administrative measures taken against the alleged offender:

- i. ST/SGB/2008/5 is not intended to vest the aggrieved individual with a right to be informed of the specific sanction taken against another staff member;
- ii. Informing the aggrieved individual that disciplinary action has been taken with no further details strikes a balance between the right of an aggrieved individual and the privacy of the subject staff member, and the confidentiality of the process.

Consideration

Receivability

27. The Respondent objects to the receivability of the following aspects of the application on the grounds that they were not subject to management evaluation:

- a. The Administration's failure to take appropriate action in relation to the Applicant's complaint;
- b. Undue delays in the investigation, in the initiation and conducting of a disciplinary process, and in taking the final decision on imposition of disciplinary sanctions against her former supervisors; and
- c. The Administration's failure to take appropriate action to protect her from sexual harassment in her workplace environment and to remedy the harm suffered.

28. In this respect, the Tribunal recalls that art. 8.1(c) of its Statute provides that an application is receivable if an "applicant has previously submitted the contested administrative decision for management evaluation, where required". This obligation upon the Applicant is further prescribed in staff rule 11.2, which provides in its relevant part that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

29. It follows that an application before the Tribunal without a prior request for management evaluation is only receivable if the contested administrative decision has been taken pursuant to advice from a technical body, as determined by the Secretary-General, or at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process. In all other cases, a request for management evaluation is a legal and jurisdictional requirement of a compulsory nature that cannot be waived, neither by the parties nor by the Tribunal (see, e.g., *Manoharan et al.* 2020-UNAT-992, para. 29; *Diallo* 2019-UNAT-936, para. 27).

30. In the present case, none of the exceptions applies. Requesting management evaluation of the contested administrative decisions was thus a compulsory requirement.

31. The Tribunal notes that in her Request for Management Evaluation dated 11 June 2020, the Applicant unambiguously identified “the decision not to inform [her] about the actions that have been taken, as required by paragraph 5.18(c) of ST/SGB/2008/5” as the decision to be evaluated. However, she did not request management evaluation of the contested decisions outlined at para. 27 above.

32. Moreover, the Tribunal is not persuaded by the Applicant’s submission that the application is receivable in its entirety because all the issues contained in her application are immanently connected. Indeed, the evaluated decision, which is

very specific and is qualified with para. 5.18(c) of ST/SGB/2008/5, is not necessarily immanently connected with the alleged failure to take appropriate actions or the alleged undue delays. Assuming, *arguendo*, that all the issues are immanently connected, this does not waive the requirement of management evaluation of the decisions outlined at para. 27 above. To hold otherwise would defeat the purpose of management evaluation which is to “afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary” (see *Farzin* 2019-UNAT-917, para. 40).

33. The Tribunal also finds that there is no merit in the Applicant’s alternative submission that it has competence to directly hear all the issues she raised by applying staff rule 10.3(c) *mutatis mutandis* to her situation. Staff rule 10.3(c) provides that

[a] staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

34. However, the contested decisions outlined at para. 27 above are not disciplinary or non-disciplinary measures under staff rule 10.2. The Tribunal also wishes to reiterate that it has no jurisdiction to waive requests for management evaluation.

35. Therefore, the Tribunal finds that the elements of the application regarding the contested decisions outlined at para. 27 above are not receivable under art. 8.1(c) of its Statute and staff rule 11.2 (a). Accordingly, the Tribunal will proceed to consider whether the Administration’s decision not to provide the Applicant with information on the specific actions taken with respect to her supervisors is lawful.

Whether the Administration's decision not to provide the Applicant with the information on the specific actions taken with respect to her supervisors is lawful

36. Having reviewed the parties' submissions regarding the decision not to provide the Applicant with the information on the specific actions taken, the Tribunal notes that the main issue is the interpretation of sec. 5.18(c) of ST/SGB/2008/5, which provides as follows (emphasis added):

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

...

(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 and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. 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.***

37. While ST/SGB/2008/5 is not a treaty, the Tribunal recognizes that art. 31(1) of the Vienna Convention on the Law of Treaties sets forth generally accepted rules for interpreting an international document, which refers to interpretation according to the "ordinary meaning" of the terms "in their context and in the light of its object and purpose" (see e.g., UN Administrative Tribunal Judgment No. 942, *Merani* (1999), para. VII; *Avognon et al.* UNDT/2020/151, para. 50). It follows that "when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation" (see, e.g., *Avognon et al.*, para. 50; *Scott* 2012-UNAT-225, para. 28).

38. First, the Tribunal notes that the text of sec. 5.18(c) of ST/SGB/2008/5 clearly states that the aggrieved individual will be informed of "the action taken". The language used in this provision is plain, common and causes no comprehension problems. Indeed, the Applicant has admitted in both her application and closing

submission that sec. 5.18(c) of ST/SGB/2008/5 does not specify *per se* how detailed the information about the action taken should be. Therefore, sec. 5.18(c) of ST/SGB/2008/5 does not provide any textual basis to require the Administration to inform the complainant of the specific actions taken. Accordingly, the Tribunal finds no merit in the Applicant's interpretation that sec. 5.18(c) is intended to vest the aggrieved individual with a right to be informed of the specific action taken against the offenders.

39. Second, the Tribunal is not persuaded by the Applicant's argument that it follows from the aim and purpose of sec. 5.18(c) of ST/SGB/2008/5 that the Administration is obliged to provide the Applicant with the specific information she requested. In this respect, the Tribunal notes that the preamble of ST/SGB/2008/5 sets forth its object, which is to ensure that "all staff members of the Secretariat are treated with dignity and respect". The Appeals Tribunal noted in *Faust* 2016-UNAT-695, para. 48, that:

the special procedural provisions adopted by ST/SGB/2008/5 are purposely conceived to "treat the situation with sensitivity and confidentiality" [...] in order to achieve the main objective clearly stated at the beginning of ST/SGB/2008/5, which advocates dignified and respectful treatment of both the aggrieved individual and the alleged offender.

40. Further, sec. 5.2 of ST/SGB/2008/5 provides contextual support in interpreting sec. 5.18(c), stating that:

All reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of the individuals concerned and ensure confidentiality to the maximum extent possible.

41. Therefore, the Tribunal finds that by requiring the Administration to inform the aggrieved individuals of the action taken with no further details, sec. 5.18(c) of ST/SGB/2008/5 seeks to strike a balance between the right of an aggrieved individual, the privacy of the subject staff member and the confidentiality of the process.

42. Third, the Tribunal is not convinced by the Applicant's submission that the requirements set out in sec. 8.9 of ST/SGB/2017/2/Rev.1 confirm that the Administration is obliged to provide the aggrieved individual as specific information as possible. That section provides that "[c]omplainants will be informed on a confidential basis of any disciplinary sanctions imposed for the retaliatory action". This provision governs disciplinary actions imposed for the retaliatory action, and thus is not comparable to the circumstances of the present case.

43. In addition, the Tribunal notes that "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" (see, e.g., *Nadeau* 2017-UNAT-733, para. 33). Considering that a staff member has no right to compel disciplinary action against another staff member, the Tribunal finds that the Applicant similarly does not have a right to compel the Administration to provide the details of the disciplinary action taken.

44. In light of the foregoing, the Tribunal finds that the decision not to provide the Applicant with the specific information on actions taken with respect to her supervisors is not unlawful and that the Applicant fails to establish that the Administration breached her contractual rights by making such decision.

Remedies

45. In her application, the Applicant requests the Tribunal to order the Administration to provide her with detailed information on the specific actions taken with respect to her supervisors. She further seeks compensation for the moral harm suffered as a result of the Administration's treatment.

46. Having found that the Applicant failed to establish that the Respondent acted in any manner contrary to law, the Tribunal finds no basis for the remedies pleaded for in the application.

47. Therefore, the Tribunal rejects the Applicant's request for remedies.

Conclusion

48. In view of the foregoing, the Tribunal DECIDES to reject the application.

(Signed)

Judge Francis Belle

Dated this 29th day of December 2021

Entered in the Register on this 29th day of December 2021

(Signed)

René M. Vargas M., Registrar, Geneva