



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Yun Hwa Ko, UNFPA

Introduction

1. The Applicant challenges the Respondent's decision to close the investigation into his 7 June 2019 complaint against the Regional Director ("RD"), Arab States Regional Office ("ASRO"), and the Respondent's refusal to provide him with the investigation report.

Procedural History and Submissions

2. The Applicant is a staff member of the United Nations Population Fund ("UNFPA"). He serves as the Organisation's Representative to Libya within the ASRO, holding a fixed term appointment at the P-5 level.

3. On 3 September 2021, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the Respondent's decision to close the investigation into his 7 June 2019 complaint against the RD/ASRO; the Applicant's complaint pertained to sexual exploitation and abuse, sexual and workplace harassment, abuse of authority, favouritism and fraudulent travel requests by the RD.

4. The Applicant further complains about the Respondent's refusal to provide him with the investigation report.

5. The Respondent filed his reply on 8 October 2021. The Respondent's position is that the application is materially not receivable (*ratione materiae*) and "not tenable on the merits." The Respondent further submits that the Applicant has a habit of challenging "routine actions of the Administration that do not affect [his] conditions of employment" and that the Applicant's conduct borders on abuse of process. The Respondent moves the Tribunal to "draw adverse inferences" from the Applicant's conduct.

6. On 24 June 2021, the Applicant received communication from the Office of Audit and Investigation Services ("OAIS") informing him that¹,

¹ See Application.

The evidence was considered by OAIS to be insufficient to substantiate the above reference allegations against [the RD] and OAIS found that the actions described in [your] complaint did not rise to the threshold of harassment and abuse of authority, as defined in sections 3.1,3.2,3.4 and 3.5 of UNFPA Policy on the prohibition of Harassment, sexual harassment, abuse of authority and discrimination. Having concluded its investigation, the matter is now considered closed at the level of OAIS.

7. On 25 June 2021, the Applicant asked OAIS for a copy of the investigation report and its exhibits. He cited the OAIS letter to him which stated that,

The closing of the case does not preclude OAIS from reconsidering this case at any time in the future, including by re-opening the case and initiating further investigation if further details and/or information are subsequently disclosed.

8. The Applicant stated,

... within that context and noting that the alleged offender [RD] was and still actively on duty while investigation was ongoing, legal disputes ongoing in different venues, I need to know the scope and evidences considered in the investigation. This is to be able to assess, and possibly efficiently report, what could be considered “further details and /or information are subsequently disclosed.”

9. On the same day, OAIS replied refusing the request and stated,

Pursuant to our internal framework, closure reports are internal, confidential documents. As the matter has now been closed by OAIS, any further enquiries should be directed to the Legal Unit.

10. In his reply to the application, the Respondent argues that the decision by OAIS carried no direct legal consequences to the Applicant’s terms of appointment or contract of employment. Indeed, his fixed-term appointment has been extended to the end of 2023. The application must therefore fail as not receivable *rationae materiae*.

11. The Tribunal has carefully reviewed the parties’ submissions and determined that this matter is suitable for adjudication on the basis of their written submissions.

Considerations

12. The Applicant challenges the Respondent's decision to close the investigation into his complaint of 7 June 2019, and the decision to deny him access to the investigation report and its attendant annexes.

13. As to the first, the claim is inadmissible because it is a conclusion by OAIS and not by the Administration, who has not yet closed the case definitively. As such, the challenged decision is still preparatory and not final.

14. The first claim is therefore not receivable *ratione materiae*.

15. As to the second claim, it is instead receivable and well-founded. Indeed, then applicable ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) at para. 5.18 provides the right for the complainant and the investigated person to receive the summary report. The same right is acknowledged by UNAT in its case law, where such right is granted to the complainant and not only to the accused staff member.

16. In *Ivanov* 2015-UNAT-572, the Appeals Tribunal stated as follows:

24. Under Section 5.18(a) of ST/SGB/2008/5, if the report of an investigation panel concludes that no prohibited conduct took place, the responsible official will close the case. The responsible official must also inform the alleged offender and the aggrieved individual of the outcome of the case by providing them with a summary of the findings and the conclusions of the investigation.

...25. In this case, a summary of the findings and conclusions of the Investigation Panel was provided to Mr. Ivanov. He disagreed with these findings and sought to have them reviewed. This request was denied.

26. Mr. Ivanov, though entitled to receive a summary of the findings of the investigation report, is not entitled to receive a copy of the full investigation report as he is requesting. His case is closed and he therefore will have to present convincing arguments to show that there were exceptional circumstances which might otherwise have entitled him to the full investigation report. He did not present any argument of exceptional circumstances.

17. In *Masyllkanova* UNDT/2015/088, (as affirmed in 2016-UNAT-662), the right of the complainant to have a summary of the report is recognized too, and it is confirmed that only under exceptional circumstances, to be examined under a case-by-case analysis, the complainant is entitled to have a full report.

18. The Tribunal finds that the right to know the contents of the report, although summarized, is implicit in the right of a staff member to complain against third persons (right already acknowledged in *Belkhabbaz*, UNDT/2021/047 at para. 21) because this right includes the right to know the reasons for which the Administration did not punish the accused person and the right to challenge this decision, founding the claim on specific grounds related to the Administration's assessment of the facts.

19. The UNFPA Disciplinary Framework, while it provides that the alleged victim shall be informed of the status and the outcome of the investigation, excludes an obligation of disclosure by OAIS (12.6.1. "there exists no obligation on the part of OAIS to disclose the details of any investigation"), but not for the Administration, stating in substance that investigators have to refer only to the Administration and not to the complainant.

20. In other terms, the legal framework does not exclude the obligation by the Administration to provide an applicant with the report (although a summary only).

21. In this case, on 25 June 2021 the Applicant requested a copy of the closure report and OAIS replied on the same day that closure reports are internal and confidential documents that cannot be shared.

22. The Applicant has a right to receive the report from the Administration. Therefore, the claim in question is granted, the other (his challenge of the decision to close the investigation) being instead inadmissible.

Conclusion

23. In the light of the foregoing, the application is partially GRANTED.

(Signed)

Judge Francesco Buffa

Dated this 4th day of March 2022

Entered in the Register on this 4th day of March 2022

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi