



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

CAHN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant contests the “failure [of the Office of the United Nations High Commissioner for Human Rights (“OHCHR”)] to timely investigate and take a final decision following a complaint of misconduct made against [him] by his [first reporting officer (“FRO”)]”.

Facts and procedural history

2. The Applicant is a Human Rights Officer (P-4) who has been serving with OHCHR since April 2009.

3. The Applicant’s FRO took up her function as Regional Representative, Regional Office for Europe (“ROE”), OHCHR, in May 2017. The Applicant joined the ROE, OHCHR, in August 2017.

4. On 5 February 2019, the Applicant addressed to OHCHR Senior Management a memorandum alleging *inter alia* harassment and abuse of authority by his FRO.

5. On 4 April 2019, the Applicant’s FRO filed a complaint against the Applicant under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

6. On 9 April 2019, the Chief, Programme Support and Management Services (“PSMS”), OHCHR, appointed a fact-finding panel (“the Panel”) to investigate the Applicant’s allegations in the above-mentioned memorandum. It was later agreed by all concerned that the same fact-finding panel would also investigate the 4 April 2019 complaint of the Applicant’s FRO against the Applicant.

7. On 31 July 2019, the Panel issued its report on the Applicant’s FRO’s complaint (“investigation report”).

8. By letter dated 9 October 2019, the then United Nations High Commissioner for Human Rights (“High Commissioner/OHCHR”) *inter alia* communicated to the Applicant that she concurred with the Panel’s conclusion that, in four out of the six incidents raised by his FRO, the Applicant’s behaviour could amount to misconduct under ST/SGB/2008/5. The then High Commissioner/OHCHR also informed the Applicant that she had decided to refer the investigation report to the Assistant Secretary-General for Human Resources Management (“ASG/HRM”) for possible disciplinary action pursuant to ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process).

9. On 16 April 2020, the Office of Human Resources (“OHR”) informed OHCHR that “[o]n the basis of the evidence on record, [it] considers that the following conduct appears to be substantiated and indicates possible inappropriate/unsatisfactory conduct by the Applicant that could be addressed by OHCHR through administrative and/or managerial action”.

10. On 1 September 2020, the Chief, HRMS/OHCHR informed the Applicant about OHR’s assessment and of OHCHR’s willingness to find an amicable solution to his case. OHCHR and the Applicant’s representative engaged in discussions but without success.

11. On 9 June 2021, the Applicant requested management evaluation of the “failure of the High Commissioner OHCHR to take a decision under para. 5.18 of ST/SGB/2008/5” concerning the Applicant’s FRO’s complaint against him.

12. On 23 July 2021, the Management Evaluation Unit (“MEU”) informed the Applicant that his request was premature and thus not receivable.

13. On 17 October 2021, the Applicant filed the present application.

14. On 17 November 2021, the Respondent filed his reply.

15. By letter dated 7 December 2021, the Applicant’s Counsel communicated to the Tribunal his withdrawal of the Applicant’s representation.

16. By Order No. 10 (GVA/2022) of 24 January 2022, the Tribunal instructed the parties to file their closing submission requesting them *inter alia* to specifically address the issue of the receivability of the application.

17. The parties filed their respective closing submission on 31 January 2022.

Consideration

18. In his closing submission, the Applicant submitted that his complaint, which in his view is jurisprudentially supported by Judgment *Zeid* UNDT/2013/005, concerns:

- a. The length of investigation proceedings without a final decision communicated to him;
- b. The time elapsed from the moment (April 2020) when the Assistant Secretary-General for Human Resources informed the then High Commissioner/OHCHR that there were no grounds for disciplinary proceedings and the moment this was communicated to the Applicant (September 2020); and
- c. OHCHR's infringement of its obligation of bona fides, by concealing malicious acts by it against him.

19. The Tribunal observes that the above-mentioned alleged infringement is a new claim, which was not in the application and is therefore inadmissible. It also notes that in its Judgment *Zeid* 2014-UNAT-401, the Appeals Tribunal vacated this Tribunal's *Zeid* Judgment on which the Applicant relied.

20. In his reply, the Respondent submits that the application is not receivable because no final decision has been taken on the complaint against the Applicant, which makes the application premature. Such was also the response from the MEU to the Applicant's request for management evaluation.

21. As to the timing related to the investigation and the communication of its outcome to the Applicant, the Respondent grounds its justification for not taking any action on the matter mainly because of competing priorities due to the COVID-19 pandemic, parallel litigation in case UNDT/GVA/2020/021 (Cahn) and discussions in view of a possible global settlement of the Applicant's grievances.

22. The Respondent also submitted that "in March 2020, presence at the premises was restricted due to the COVID-19 pandemic, while the offices were kept open virtually, putting considerable strain on the Human Resources of OHCHR and UNOG".

23. The Tribunal notes from the record that the investigation of the Applicant's FRO's complaint was completed and OHR provided its assessment on the case. The process, however, is still ongoing concerning the determination of managerial/administrative action to be taken and the Tribunal notes that in his closing submission, the Respondent confirmed that the matter has not yet been formally closed. Consequently, no final decision on the matter at stake had been taken either at the time of the filing of the application or at the time of filing closing submissions in this case.

24. The Tribunal is aware that UNAT jurisprudence distinguishes cases where there is an implied administrative decision, which the interested person can challenge, from those where there is only "an inordinate delay that presents a sorrowful picture of functioning on the part of the Administration", without a decision, even implicit (see *Auda* 2017-UNAT-786, para. 29; see also *Birya* 2015-UNAT-562).

25. Irregularities in connection with a process, including alleged delay in reaching a final decision, may only be challenged in the context of an application contesting the conclusion of an entire process. Indeed, this final administrative decision, which concludes the compounded administrative process in administering a staff member's complaint, is the only challengeable one and absorbs all the previous preliminary steps.

Conclusion

26. In view of the foregoing, the Tribunal finds that the application is not receivable.

(Signed)

Judge Francesco Buffa

Dated this 8th day of March 2022

Entered in the Register on this 8th day of March 2022

(Signed)

René M. Vargas M., Registrar, Geneva