Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Marisa Maclennan, UNHCR
Louis Lapicerella, UNHCR

Introduction

1. By application filed on 14 March 2021, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision "not to provide [him] with an effective remedy to a harassment, abuse of authority and retaliation complaint".

Facts and procedural history

2. The Applicant joined UNHCR in November 2008. He initially served as a Legal Officer (Human Resources) in Geneva, at the P-3 level. In January 2012, he was reassigned to Sudan as a Senior Protection Officer, and in January 2013 he moved to Nairobi where he worked as a Legal Officer, Private Sector Fundraising. He then went on Special Leave Without Pay ("SLWOP") from 1 July 2013 to 1 July 2015. Upon his return from SLWOP, the Applicant took up a temporary assignment in Rabat, Morocco as a Senior Protection Officer.

3. Following his non-selection, on a fixed-term basis, for the post that he was temporarily encumbering, the Applicant filed a request for management evaluation and formally complained about the Hiring Manager, and his then supervisor. He rejected a subsequent offer by UNHCR to be reconsidered for the post when the selected candidate declined the appointment. Ultimately, without another assignment, his fixed-term contract expired on 31 March 2016, and he separated from UNHCR.

4. The Applicant filed management evaluation requests contesting his non-selection in various recruitments processes, the non-renewal of his contract effective 31 March 2016 and the placement of an annotation in UNHCR's HR management system ("MSRP") on 11 October 2016. These matters were brought before this Tribunal and, in most cases, appealed to the Appeals Tribunal.

5. On 24 January 2019, the Applicant submitted a complaint to the United Nations High Commissioner for Refugees ("High Commissioner"), alleging misconduct and retaliation against him by several senior staff members. In this complaint, the Applicant claimed that he was retaliated against for having challenged two selection processes before his separation and that, once separated, he was the victim of a conspiracy to "blacklist" him from further rehire.

6. On 28 January 2019, the Office of the Inspector General ("IGO"), UNHCR, referred the Applicant's complaint to the Office of Internal Oversight Services ("OIOS") of the UN Secretariat per sec. 3.1.1 of the Memorandum of Understanding between UNHCR and OIOS on Investigations and Inspections ("MOU") since the complaint involved members of UNHCR's Executive Office and in line with the Applicant's request in his complaint.

7. On 22 February 2019, the Applicant sent OIOS additional information.

8. On 25 February 2019, the Applicant was informed that OIOS had declined to investigate the matter.

9. On 27 February 2019, upon query from the Applicant, the High Commissioner's Chef de Cabinet shared the MOU with the Applicant. It was suggested to the Applicant seeking further clarification from the "Head of OIOS, Investigation Division".

10. On 28 February 2019, the Head of OIOS indicated to the Applicant that OIOS would not investigate the complaint, *inter alia,* noting that the Applicant had "a case or cases before the Tribunal, experience dictates that it is not a good idea for [OIOS] to start investigating when the same issues are possibly being considered by [it]. If issues of misconduct are identified by the Tribunal, [it] will highlight them and refer them back."

11. On 4 March 2019, the Applicant requested management evaluation of OIOS' decision not to investigate his complaint.

12. By letter of 29 March 2019, the Management Evaluation Unit informed the Applicant that his request for management evaluation of OIOS' decision was not receivable.

13. On 8 June 2019, the Applicant filed an application before the Tribunal contesting OIOS' decision not to investigate his complaint. This case was registered under Case No. UNDT/NBI/2019/061.

14. On 10 July 2019, the Tribunal issued Judgment *Ross* UNDT/2019/126 disposing of three applications submitted by the Applicant, namely:

a. Case No. UNDT/NBI/2016/054 against the decision not to renew his fixed-term appointment and to separate him from service;

b. Case No. UNDT/NBI/2018/040 against the decision to insert adverse material into his Official Status File ("OSF"); and

c. Case No. UNDT/NBI/2018/083 against the decision to appoint another candidate to the position of Senior Protection Officer in Tunis.

15. The Tribunal dismissed Case No. UNDT/NBI/2016/054 finding that the Applicant had failed to substantiate his claims of a flawed process and improper motives leading to his separation from service. With respect to Case No. UNDT/NBI/2018/040, the Tribunal found that the Administration had failed to follow the proper procedures for the placement of adverse material in the Applicant's OSF and ordered the immediate removal of the annotation contained therein. In relation to the non-selection decision (Case No. UNDT/NBI/2018/083), the Tribunal determined that the decision to exclude the Applicant from the selection process at an early stage had been tainted by procedural error and had been unlawful. The Tribunal awarded the Applicant USD2,000 for moral harm for this error.

16. On 6 September 2019, the Applicant filed an appeal against this Tribunal's judgment in *Ross*, challenging its decision regarding the non-renewal of his fixed-term appointment.

17. On 9 September 2019, the Secretary-General appealed against this Tribunal's judgment in *Ross* contesting its decision in connection with the Applicant's non-selection for the post in Tunis.

18. On 30 September 2020, the Tribunal issued Judgment *Ross* UNDT/2020/173 (Case No. UNDT/NBI/2019/061), finding not receivable the Applicant's appeal of OIOS' decision to not investigate his complaint. The Applicant did not appeal this Judgment.

19. In Judgment *Ross* 2020-UNAT-1000 dated 27 March 2020, the Appeals Tribunal confirmed the Tribunal's finding and found no illegality or ill-intent in the Applicant's separation from service. However, it granted the Secretary-General's appeal and vacated the Tribunal's Judgment concerning its finding on the Applicant's non-selection as it deemed that the challenge of the Applicant's non-selection was -time barred.

20. On 1 October 2020, the Applicant wrote to the Head of OIOS to renew his request that OIOS investigate his complaint given that the Appeals Tribunal had "recently rendered its final decision on the separation and the blacklisting, see UNAT decision number 2020-UNAT-1000".

21. On 12 October 2020, the Head of OIOS replied that the issuance of the judgments did not change OIOS' decision not to proceed with a formal investigation of the matters raised in the Applicant's complaint. In his email, he, *inter alia,* summarized the findings of this Tribunal and of the Appeals Tribunal in the Applicant's cases, and concluded that:

> (a) [His] original decision not to investigate [the Applicant's] complaint was based on a well-founded belief in the difficulties and impracticability's of investigating a matter which is also before the Tribunal and is essentially based on the consideration of the same facts was vindicated by the UNDT (sic).
>
> (b) Neither Tribunal made any mention of misconduct, or possible misconduct by any UNHCR staff members, or recommended accountability measures, which of course had they done so would have required [him] to re-visit [his] earlier decision.

> (c) [The Applicant has] 'obtained relief' with respect to the ill-judged comment appended to [his] official status file and been paid compensation.
>
> […] OIOS will not be investigating any aspect of [the Applicant's] complaints."

22. On 16 October 2020, the Applicant wrote to the High Commissioner and requested that the High Commissioner provide him with "an effective remedy", concluding by stating that "because of the overwhelming evidence you may alternatively decide to recognize that I have been separated and blacklisted in retaliation for having sought justice. In this case you should decide to reinstate and compensate me for the irreparable harm I have sustained."

23. On 22 October 2020, the IGO's Head of Investigation Service responded that he had "taken note of the UNDT/UNAT judgments pertaining to the matter as well as the decision by the Head of the OIOS Investigations Division of 12 October [2020] declining to investigate any aspect of [the Applicant's] complaints and wish to inform [the Applicant] that the IGO will not pursue the matter further and hence considers the matter closed."

24. On 30 October 2020, the Applicant filed a request for management evaluation of the contested decision mentioned in para. 1 above and, *inter alia*, requested that the Deputy High Commissioner ("DHC") of UNHCR be recused from acting as the decision-maker.

25. On 19 November 2020, the Applicant was informed that his request for recusal of the DHC had been considered and that the Assistant High Commissioner for Protection ("AHCP") would be the decision-maker in connection with his request for management evaluation. He was also asked to file the documents that he had withheld from his management evaluation request, which he did on the same day.

26. By letter dated 4 January 2021, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision.

27. On 14 March 2021, the Applicant filed the application mentioned in para. 1 above. In his application, the Applicant also requests the Tribunal to hear the former and the current Heads of the Investigation Service of UNHCR in determining whether the decision to close his case constitutes abuse of authority.

28. On 14 April 2021, the Respondent filed a motion for leave to exceed page limits, suggested in the Tribunal's Practice Direction No. 4, due to the breadth and length of the application which is 27 pages long.

29. On the same day, the Tribunal granted the Respondent's motion to exceed page limits and he filed his 24-page reply.

30. On 27 April 2021, the Applicant filed a motion to expedite the consideration of his case.

31. By Order No. 83 (GVA/2021) of 6 May 2021, the Tribunal denied the Applicant's motion to expedite the consideration of his case.

32. On 13 December 2021, the present case was assigned to the undersigned Judge.

33. By Order No. 22 (GVA/2022) of 16 February 2022, the Tribunal informed the parties of its finding that the matter could be determined without holding a hearing and ordered them to file their respective closing submission, which they did on 23 February 2022.

34. In his closing submission, the Applicant further requested the Tribunal to hold an oral hearing and hear seven witnesses proposed by him.

Parties' submissions

35. The Applicant's principal contentions are:

a. The application is receivable because:

i. There is a close nexus between the employment of the Applicant with UNHCR and the contested decision;

ii. The contested decision affects the Applicant's terms of employment; and

iii. The application is filed within the prescribed time limits.

b. The Respondent violated his obligation to initiate an investigation into the Applicant's complaint;

c. Delaying the investigation for more than two years with the excuse that the Applicant had also appealed abusive and harassing decisions as administrative decisions, and that these matters were pending at the Tribunals, deprived the Applicant of due process;

d. OIOS' decision of 12 October 2020 to close the case was unlawful;

e. The decision to close the case constitutes abuse of authority in itself; and

f. The High Commissioner has failed to ensure that the Applicant is provided with an effective remedy.

36. The Respondent's principal contentions are:

a. The application is not receivable *ratione personae* because none of the matters raised in the complaint can be credibly construed as a breach of the Applicant's rights as a former staff member, and there is no nexus between the former employment and the impugned action;

b. The application is not receivable *ratione materiae* because the Applicant is not contesting a final administrative decision susceptible to challenge; and

c. In any event, UNHCR properly exercised its discretion in its handling of the complaint and acted lawfully in this regard. Notably, the IGO acted properly by referring the matter to OIOS as the Applicant requested and, upon OIOS' decision not to investigate, in exercising its discretion not to pursue the matter further and consider it closed on 22 October 2020.

Consideration

Procedural issue: request for an oral hearing

37. In his closing submission, the Applicant requests the Tribunal to hold an oral hearing and hear seven witnesses proposed by him in the present case. To support his request, the Applicant argues that as the Respondent has until today not investigated his allegations, the only way for him to obtain additional proof is through the examination of witnesses. He further contends that as the key witnesses in this case are either hostile to him or do not want to testify as they are afraid of repercussions themselves, the Applicant is unable to provide written affidavits and thus he needs to be given the possibility to examine these witnesses.

38. The Tribunal recalls that arts. 16.1 and 16.2 of its Rules of Procedure provides that "[t]he judge hearing a case may hold oral hearings" and "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure." In this regard, the Tribunal notes that the present case does not concern an administrative decision imposing a disciplinary measure and that the Tribunal has discretionary authority as to whether to hold an oral hearing (*see*, e.g., *He* 2016-UNAT-686, para. 46; *Ross* 2020-UNAT-1000, para. 55).

39. Moreover, in its Order No. 22 (GVA/2022), the Tribunal made it clear that it is fully informed on the matter and that the case can be determined without holding a hearing. At this stage, there is no further point in holding a hearing to clarify the factual issues raised by the Applicant.

40. Finally, the Tribunal finds that an oral hearing in the present case would not assist in the expeditious and fair disposal of the case, as required by art. 19 of the Tribunal's Rules of Procedure.

41. Accordingly, the Tribunal rejects the Applicant's request for an oral hearing.

Scope of judicial review and the contested decision

42. The Respondent asserts that the application misconstrues the Applicant's cause of action because it uses the thin veil of the alleged failure to investigate his complaint to recontest the lawfulness of, and seek to be compensated for, various matters that have already been determined by the Dispute Tribunal and the Appeals Tribunal. He further argues that the application should be properly understood as an appeal of UNHCR's decision to endorse OIOS' decision to close the Applicant's disciplinary complaint.

43. In this respect, the Tribunal notes that it is well-settled law that it has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see, e.g., *Fasanella* 2017-UNAT-765, para. 20; *Cardwell* 2018-UNAT-876, para. 23).

44. In his application, the Applicant identifies the UNHCR's decision "not to provide [him] with an effective remedy to a harassment, abuse of authority and retaliation complaint" as the contested decision. The Applicant further clarifies that he challenges the fact that UNHCR has until today failed to carry out an investigation into his complaint that his separation from UNHCR was done in retaliation for him having challenged the outcome of two selection processes, and that he was subsequently blacklisted by the very same people who had decided to separate him. In addition, as remedies, the Applicant requests the Tribunal to, *inter alia*, order:

a. That the decision of the High Commissioner not to investigate his complaint was unlawful and violated his right to a prompt and effective remedy and that the High Commissioner breached his duty to act on harassment and abuse of authority allegations;

b. That his separation and the subsequent repeated blacklisting constitute severe harassment and abuse of authority, which was undertaken by Senior Officials of UNHCR in retaliation for the Applicant having sought justice; and

c. That, in the alternative, the Respondent shall carry out an investigation into his complaint within 90 days from the judgment.

45. Accordingly, the Tribunal considers that the Applicant seeks to contest UNHCR's decision not to investigate his complaint of harassment and abuse of authority in relation to his separation from service and the placement of a "consult PER/EX" annotation in his OSF.

46. After closely perusing the parties' submissions, the Tribunal defines the issues to be examined in the present case as follows:

a. Whether the application is receivable *ratione personae*;

b. Whether the application is receivable *ratione materiae*; and

c. If yes, whether the Respondent's handling of the Applicant's complaint and the decision not to formally investigate it were lawful.

Whether the application is receivable ratione personae

47. The Applicant submits that the application is receivable *ratione personae* because there is a close nexus between the contested decision and his former employment with UNHCR.

48. The Respondent contends that the application is not receivable *ratione personae* because none of the matters raised in the complaint can be credibly construed as a breach of the Applicant's rights as a former staff member, and there is no nexus between the former employment and the impugned action.

49. In this respect, the Tribunal recalls that under art. 3.1(b) of its Statute, an application under article 2, paragraph 1 of said Statute may be filed by any former

staff member of the United Nations. Art. 2.1 of the Tribunal's Statute provides in its relevant part that:

> The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
>
> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

50. Art. 3.1(b) of its Statute thus confers upon the Tribunal a limited jurisdiction over applications filed by a former staff member. Indeed, a former staff member has standing to contest an administrative decision before the Tribunal only if there is "a sufficient nexus between the former employment and the contested decision" (see *Arango* 2021-UNAT-1120, para. 28; see also *Shkurtaj* 2011-UNAT-148, para. 29) and that "[a] sufficient nexus exists when a decision has bearing on an applicant's former status as a staff member, specifically when it affects his or her previous contractual rights" (see, e.g., *Arango*, para. 28; *Khan* 2017-UNAT-727, para. 28).

51. In the present case, at the time of the contested decision to not investigate his complaint of harassment and abuse of authority into his separation from service and alleged blacklisting, the Applicant had been separated from service for more than four and a half years and was no longer a staff member in the strict sense. Therefore, for the application to be receivable, the contested decision must have a bearing on the Applicant's status as a former staff member in the sense that it affects his previous contractual rights.

52. In determining whether the contested decision affects the Applicant's previous contractual rights or not, the Tribunal will assess whether any of the matters raised in his complaint can be considered as a breach of his rights as a former staff member under applicable Staff Rules and Regulations. In this respect, the Tribunal notes that UNHCR's Policy on Discrimination, Harassment, Sexual

Harassment and Abuse of Authority (UNHCR/HCP/2014/4) provides in its relevant part that:

> **1. PURPOSE**
>
> This policy has the purpose of ensuring that all UNHCR staff members and affiliate workforce 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.
>
> […]
>
> **2. SCOPE**
>
> This policy applies to UNHCR staff members and affiliate workforce.
>
> […]
>
> **4. OVERALL POLICY**
>
> **4.1 General Principles**
>
> 4.1.2 The Organization has a duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibitive conduct, through preventive measures and the provision of effective remedies when prevention has failed.
>
> […]
>
> **4.2 Duties of UNHCR Personnel**
>
> UNHCR Personnel, including Staff members and Affiliate Workforce, are expected to:
>
> a) maintain a harmonious working environment for other colleagues by behaving in a manner which is free of disrespect, intimidation, hostility, offence and any term of discrimination, harassment, sexual harassment or abuse of authority;
>
> b) not to condone discrimination, harassment, sexual harassment and abuse of authority[.]
>
> **4.6.1 Filing a Complaint**
>
> 4.6.1.1 Any aggrieved individual [including former personnel] may file a formal complaint with the inspector General's Office (IGO).

53. It follows that while it does not prevent a former staff member from filing a formal complaint, UNHCR/HCP/2014/4 essentially seeks to protect the right of UNHCR staff members and its affiliate workforce not to be harassed at work and address prohibited conduct that occurs at workplace among staff members.

54. Turning to the present case, the Tribunal notes that in his complaint of 24 January 2019, the Applicant alleges that he was retaliated against for having challenged two selection processes before his separation and that, once separated, he was the victim of a conspiracy to "blacklist" him from further rehire.

55. First, with respect to the Applicant's complaint of his separation from service, the Tribunal notes that his fixed-term appointment expired naturally under staff rule 9.4 following his refusal to accept an extension of his temporary assignment on 31 March 2016—the same date as the expiration of his fixed-term appointment—and an offer to be recommended for a regular position in Rabat for which he had previously applied (see *Ross* UNDT/2019/126, paras. 72, 73; *Ross* 2020-UNAT-1000, paras. 59-61).

56. Noting that the Applicant sought to claim that his separation from UNHCR was done in retaliation for him having challenged the outcome of two selection processes, the Tribunal recalls that the burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (see, e.g., *El Sadek* 2019-UNAT-900, para. 54; *Nwuke* 2015-UNAT-506, para. 49). However, the Applicant did not present any evidence showing that his separation from service was a result of retaliation for his seeking justice.

57. Without prejudice to the fact that the Applicant bears the burden of proving his allegations of retaliation, the Tribunal further finds no evidence on record leading to establish that the allegations of retaliation were linked to the contested decision. Indeed, both this Tribunal and the Appeals Tribunal found no illegality or ill-intent in the Applicant's separation from service (see *Ross* UNDT/2019/126; *Ross* 2020-UNAT-1000).

58. Moreover, the Applicant's separation from service was not imputable to the Organization. Certainly, it is difficult for the Tribunal "to understand how a staff member, who refuses to accept an extension of his temporary assignment and an offer to be recommended for a regular position, turns around to blame the Organization for not extending the same contract" (see *Ross* UNDT/2019/126, para. 72).

59. The Tribunal thus finds that the Applicant's separation from service arising from a natural expiry of his fixed-term contract could not constitute any prohibited conduct under UNHCR/HCP/2014/4. As a result, whether the Administration took actions or not in relation to the Applicant's complaint of his separation from service has no bearing on his previous contractual rights.

60. Second, turning to the Applicant's complaint of the "consult PER/EX" annotation, the Tribunal observes that a note was first placed in his personnel file on 11 October 2016, around six months after his separation from service, and was subsequently amended in March 2018. Indeed, the evidence on record shows that a note was included in the Applicant's record in the MSRP that reads "Consult PER/EX or the Chief of PAPS before any possible rehire. Action recorded as per the request from […] the Deputy Director of DHRM via email on 11 October 2016". On 19 March 2018, the Administration decided to amend the note to read as follows: "In case of queries or requests for administrative action by the staff member, for purposes of coordination please contact Deputy Director, DHRM".

61. The incident of the "consult PER/EX" annotation occurred over half a year after the Applicant's separation from service. As such, the alleged harassment or abuse of authority in relation to this incident falls out of the scope of UNHCR/HCP/2014/4. Therefore, whether the Administration took actions or not in relation to the Applicant's complaint of the "consult PER/EX" annotation does not affect his previous contractual rights. Indeed, the "consult PER/EX" annotation may have affected the Applicant's interests and his aspiration to establish future contractual rights with the Organization, but not on any existing rights under his previous contract.

62. Accordingly, the Tribunal can only conclude that any actions or inactions taken on the complaint filed by the Applicant in relation to his separation from service and the "consult PER/EX" annotation cannot be considered to have negatively impacted his contractual rights acquired during his previous employment. Indeed, the Applicant was not asserting any right acquired in terms of his previous contract of employment. Consequently, the contested decision had no bearing on his former employment in the sense that it affected any contractual rights he had acquired under it.

63. Considering the foregoing, the Tribunal finds that there is no sufficient nexus between the Applicant's former employment and the contested decision to allow it to entertain the case and, therefore, the application is not receivable *ratione personae*.

Whether the application is receivable ratione materiae

64. Pursuant to art. 2.1 of the Tribunal's Statute, the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member (see, e.g., *Lee* 2014-UNAT-481, para. 49).

65. It follows that the Tribunal may only review an administrative decision that has an adverse impact on the Applicant's contractual rights. Having found that the contested decision does not adversely impact the Applicant's contractual rights acquired during his previous employment, the Tribunal further concludes that the application is also not receivable *ratione materiae*.

Conclusion

66. In view of the foregoing, the Tribunal **DECIDES** to reject the application as not receivable.

(*Signed*)
Judge Teresa Bravo
Dated this 29th day of March 2022

Entered in the Register on this 29th day of March 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva