



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

NASTASE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Kong Leong Toh, UNOPS

Introduction

1. The Applicant, a former staff member of the United Nations Office for Project Services (“UNOPS”), challenges the decision of the Under-Secretary-General for Operational Support (“USG/DOS”) to close his complaint of prohibited conduct against the Chief Infrastructure Operations Section (“CIOS”), United Nations Global Service Centre (“UNGSC”), after a preliminary assessment without opening an investigation.

Facts

2. The Applicant served as a P-3 Information and Communications Technology (“ICT”) Specialist, at UNOPS in Valencia, Spain. In that capacity, he provided services to the Office of Information and Technology (“OICT”), UNGSC, under a Financial Agreement (“FA”).

3. On 22 April 2020, the Applicant received an email from the CIOS notifying him of underperformance issues. The Applicant promptly contested.

4. On 27 April 2020, the Applicant complained about the above-mentioned email to the UNOPS Senior Programme Manager (“UNOPS SPM”), further providing clarification on the Cloud Deployment Team (“CDT”) work orders statistics and the data used by the CIOS in his assessment.

5. On 30 April 2020, the Applicant and the UNOPS SPM met for an online meeting. During this meeting, the Applicant was informed that the CIOS had recommended to institute a Performance Improvement Plan (“PIP”) and to remove him from the CDT.

6. By email dated 11 May 2020, the CIOS notified the Applicant of his lack of performance improvement since the email dated 22 April 2020.

7. On 12 May 2020, the Applicant emailed UNOPS SPM highlighting issues and disagreements with the CIOS’ assessment of his performance.

8. On 20 May 2020, the Applicant and the UNOPS SPM sat for a second online meeting. The Applicant was then informed of his removal from the CDT and of the institution of a PIP as of 1 June 2020. He requested the SPM to review the facts and to reconsider his decision.

9. On 23 May 2020, the UNOPS SPM informed the Applicant that his request was denied. This decision was allegedly taken in consensus by the CIOS alongside UNOPS managers, including the Applicant's primary supervisor.

10. On 22 June 2020, the Applicant filed a complaint with the Office of Internal Oversight Services ("OIOS") pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) against the CIOS. On the same date, OIOS requested additional information.

11. On 15 July 2020, the Applicant replied to OIOS' request.

12. By email dated 28 July 2020, OIOS informed the Applicant that his complaint fell within the scope of ST/SGB/2019/8 and that, as a result, it would refer it to the USG/DOS for review and assessment of the matter.

13. By email dated 6 August 2020, the DOS Alternate Conduct and Discipline Focal Point ("C&D FP") for UNGSC explained to the Applicant about the Organization's policy on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations (ST/SGB/2017/2/Rev.1). The Applicant was informed that his complaint was referred by OIOS to the Head of Entity ("HOE") as a possible prohibited conduct that was being assessed pursuant to ST/SGB/2019/8.

14. The Applicant was further informed that to fully assess whether there were sufficient grounds to warrant a formal fact-finding investigation, he needed to include specific details of his allegations. Such details were missing from the Applicant's initial emails to OIOS dated 22 June and 15 July 2020, which consisted of "issues related to performance management". Accordingly, the Applicant was given an opportunity to provide further explanations.

15. On 10 August 2020, the Applicant provided additional details to the DOS C&D FP for UNGSC.

16. By letter dated 28 August 2020, the USG/DOS informed the Applicant that a preliminary assessment of his allegations against the CIOS revealed no information of prohibited conduct under ST/SGB/2019/8. As a result, the Applicant's complaint was closed without opening a formal investigation.

17. On 18 September 2020, the UNOPS SPM informed the Applicant that his contract would not be renewed beyond 30 November 2020.

18. On 27 October 2020, the Applicant requested management evaluation of the USG/DOS' decision to close his complaint of harassment and abuse of authority without opening an investigation. In his request, the Applicant expressed his concern of being subject to retaliation by the CIOS as a result of a disagreement that arose between them during a recruitment exercise in December 2019.

19. On 3 December 2020, the Management Evaluation Unit ("MEU") upheld the decision of the USG/DOS to close the Applicant's complaint.

20. On 10 December 2020, the Applicant replied to the MEU highlighting alleged inaccuracies in their decision.

21. On 28 February 2021, the Applicant filed an application before this Tribunal contesting the 28 August 2020 decision by the USG/DOS to close his complaint of prohibited conduct against the CIOS under ST/SGB/2019/8.

22. Following requests for extension of time, which the Tribunal granted, the Respondent filed his reply on 22 April 2021.

23. On 11 July 2021, the Applicant filed a motion seeking permission to file an additional written submission and an *ex parte* document.

24. On 10 January 2022, the present case was assigned to the undersigned Judge.

25. By Order No. 20 (GVA/2022), the Tribunal partially granted the Applicant's motion accepting the additional written submission but rejecting the *ex parte* document.

Parties' submissions

26. The Applicant's principal contentions are:

a. The USG/DOS' decision to close the Applicant's complaint against the CIOS under ST/SGB/2019/8 is unlawful for two reasons. First, it disregarded all the evidence provided by the Applicant that the CIOS engaged in prohibited conduct by sending disrespectful and demeaning messages that wrongly assessed the Applicant's performance, and purposefully impacted his career path. Second, because OIOS had already stated that the complaint fell within the framework of harassment and abuse of authority;

b. The CIOS' messages to the Applicant regarding an alleged underperformance were not only disrespectful and demeaning, but they also disregarded the framework of performance management as defined in the UNOPS-OICT Financial Agreement. The CIOS was not the Applicant's direct supervisor;

c. The CIOS used his influence with "UNOPS SPM and with OSD/OICT Chief Technology Operations" to propose and achieve the Applicant's removal from the CDT and to place him under a PIP. Both decisions were taken before the mere existence of a problem was demonstrated or recorded. Explanations, requests for clarifications and answers provided by the Applicant were consistently ignored by direct supervisors who unquestionably accepted the line of action outlined by the CIOS;

d. The MEU decision to uphold the USG/DOS' decision to close the Applicant's complaint contained inaccuracies that distorted and overlooked facts;

e. Both the USG/DOS and the MEU erred in saying the CIOS's actions were mere disagreements on work performance or on other work-related issues; and

f. In the management evaluation request, the Applicant included facts and new context sustaining his increasing concerns of being subject to retaliation following his report against the CIOS in December 2019 regarding possible misconduct of the latter in a UNOPS recruitment exercise. Said retaliation concerns were ignored by the MEU.

27. The Respondent's principal contentions are:

a. The Organization has a degree of discretion on how to conduct a review and assessment of a complaint of prohibited conduct. Only in a case of "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" (*Nadeau 2017-UNAT-733*).

b. The decision of the USG/DOS was lawful. The USG/DOS reviewed the Applicant's complaint, and determined pursuant to sec. 5.6 of ST/AI/2017/1 that the facts described, if proven, did not warrant an investigation;

c. In addition, ST/SGB/2019/8 provides that disagreement on work performance or other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of that bulletin but in the context of performance management. The Respondent submits that the word "normal" is key. In particular, the question of whether the complaint filed shows a "normal disagreement on work performance" or more than that. In this sense, the CIOS' emails are key to identifying if the complaint surpasses mere work disagreements and amounts to prohibited conduct;

d. From the emails of 22 April 2020 and 11 May 2020, the Respondent submits that CIOS was merely stating to the Applicant that the performance measurement tool (i.e., iNeed) showed that he had a performance problem. Nothing more than that. Thus, the emails are well within what can be considered “normal” insofar as “disagreement on work performance or on other work-related issues”. Likewise, the move to put the Applicant on a PIP and to remove him from the CDT constitute normal management of a performance issue;

e. Furthermore, the application is relying heavily on the OIOS email dated 28 July 2020, in which OIOS stated that the complaint fell within the scope of ST/SGB/2019/8 and decided to refer the case to the USG/DOS for a thorough review and assessment. However, this referral does not constitute a decision. In fact, OIOS left it to the USG/DOS to review and assess the Applicant’s complaint pursuant to ST/SGB/2019/8. Thus, the USG/DOS’ decision is not in contradiction with another previous decision. It was incumbent on the USG/DOS to review and assess the matter and to arrive at its own conclusion; and

f. The MEU’s decision is not an administrative decision subject to judicial review by this Tribunal (*Farzin* 2019-UNAT-917). Hence, the references made in the application to the Applicant’s communications with the MEU and the outcome of the management evaluation are not reviewable.

Consideration

28. The Organization has a degree of discretion on how to conduct a review and assessment of a complaint of prohibited conduct (*Oummih* 2015-UNAT-518/Corr.1; *Benfield-Laporte* 2015-UNAT-505). Only in a case of 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 (*Nadeau* 2017-UNAT-733/Corr.1). A fact-finding investigation may only be undertaken if there are “sufficient grounds” or, respectively, “reasons to believe that a staff member has engaged in unsatisfactory conduct” (*Nadeau*). Similarly, a

complaint must have “meaningful indicia” of prohibited conduct (*Osman* 2013-UNAT-301).

29. The Dispute Tribunal has explained that it is the responsible official’s duty to assess whether there is a “reasonable chance” that the alleged facts described in a complaint, if indeed they occurred, would amount to prohibited conduct (*Benfield-Laporte* and *Ostensson* UNDT/2011/050).

30. The complainant has the burden of satisfying the responsible official that there are sufficient grounds to warrant a formal fact-finding investigation (*Parayil* UNDT/2017/055). The Dispute Tribunal does not step into the shoes of the responsible official and substitute its own views (*Omwanda* UNDT/2018/078 and *Kebede* UNDT/2018/018). The judicial review of an administrative decision involves a determination of the validity of the contested decision on grounds of legality, reasonableness and procedural fairness (*Belkhabbaz* 2018-UNAT-873 and *Sanwidi* 2010-UNAT-084).

31. In this regard, the Tribunal notes that, as per established jurisprudence of the United Nations Appeals Tribunal (“UNAT”), the Applicant’s communications and arguments regarding the outcome of his management evaluation are not subject to judicial review by it. Thus, the Applicant’s arguments against the merits of the MEU’s decision will not be addressed and, accordingly, the only matter that needs to be determined is whether the USG/DOS’ decision was lawful.

Whether the contested decision was legal, reasonable and procedurally fair

32. The decision to close a complaint of alleged prohibited conduct is discretionary in nature. The UNAT jurisprudence in this regard provides that:

[W]hen judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal considers whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open

to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General. (*Sanwidi*)

33. Mere disagreements on work performance or on other work-related issues are *normally* not considered prohibited conduct pursuant to sec. 1.1 of ST/SGB/2019/8. The word “normal” is key. As such, it becomes necessary to establish what it means and if, in this case, the situation was in fact normal or not normal insofar as being a simple disagreement over work performance, or more than that.

34. As provided for in sec. 5.5(e) of ST/SGB/2019/8, the USG/DOS reviewed the Applicant's complaint and determined, pursuant to sec. 5.6 of ST/AI/2017/1, that the facts described in the complaint, if proven, did not warrant an investigation.

35. The words “normally not considered prohibited conduct” in sec. 1.1 of ST/SGB/2019/8 cannot be ignored. In particular, the question that should be asked is whether the complaint filed by a staff member shows that it is a normal “disagreement on work performance or on other work-related issues”, or whether the complaint shows more than that.

36. In this case, the conduct of the CIOS, which is the subject of the Applicant's complaint, was well within what can be considered a normal workplace behaviour, whilst the Applicant's response is a normal disagreement over a performance assessment.

37. The emails between the Applicant and the CIOS dated 22 April 2020 and 11 May 2020 reveal that the CIOS was merely stating to the Applicant that the performance measurement tool (i.e., iNeed) showed that the Applicant had a performance problem that he needed to address. The CIOS did not say any more than that.

38. The Applicant does not point to any particular words that the CIOS used that could have been considered demeaning or humiliating. What the Applicant complains about is the substance of the communications: namely, the fact that the CIOS was complaining about his alleged underperformance. Notwithstanding, the fact that the Applicant disagrees with such assessment of his performance, correctly or not, does not change the content of the messages that were the sole subject of his complaint of prohibited conduct.

39. In fact, the Tribunal is of the view that the CIOS' comments were simply assertions that can exist in any work performance disagreement. Any less and there would be no disagreement at all.

40. The Applicant also claims that the CIOS used his influence with the UNOPS SPM and with the Chief Technology Operations ("CTO") to successfully remove him from the CDT and to place him under a PIP. However, such assertion is speculative at best since the Applicant did not provide any evidence in this regard. Notwithstanding, even if true, the UNOPS SPM's actions, supported by the Applicant's primary supervisor, are well within his role and whether he was influenced by the assessments made by the CIOS is not relevant.

41. The Applicant believes that the iNeed tool should not have been used to criticize his performance because it was based on wrong metrics. Be that as it may, the Tribunal is not in a position to review whether the Applicant's complaint about the underperformance assessments made by the CIOS were warranted or not. The judicial review is meant to analyse the legality of the decision by the USG/DOS to close the Applicant's complaint of harassment without opening an investigation. The fact that the Applicant disputes the CIOS' criticism is a matter of disagreement on work performance and not of legality of the foregoing decision.

Whether there were meaningful indicia of harassment in the complaint

42. The Tribunal notes that the Applicant references *Ostensson* UNDT/2011/050 to support his argument that the “underperformance” emails sent by the CIOS constituted harassment. He argues that in said Judgment the Tribunal held that

for the purpose of determining whether specific acts constitute harassment within the meaning of ST/SGB/2008/5, what really matters is that these acts “might reasonably be expected or be perceived to cause offence or humiliation to another person” and that they “tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment”.

43. Accordingly, the Applicant claims that work-related issues are not completely excluded from the scope of application of ST/SGB/2008/5 and believes that his perception of offence and humiliation should have been enough to constitute harassment.

44. However, a broad and generic reading of the above Judgment might have caused a misguided interpretation of the harassment definition, which the Tribunal will now clarify.

45. To determine whether an incident or several incidents constituted harassment, it is necessary to analyse the conduct and the context through the lens of ST/SGB/2019/8, which supersedes the former ST/SGB/2008/5, and its definition of harassment. In its relevant part, ST/SGB/2019/8 provides as follows:

Prohibited conduct

1.1 For the purposes of the present bulletin, discrimination, harassment, including sexual harassment, and abuse of authority shall collectively be referred to as “prohibited conduct”. Disagreement on work performance or on other work-related issues is normally not considered prohibited conduct and is not dealt with under the provisions of the present bulletin but in the context of performance management.

...

Harassment

1.3. Harassment is any unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person, when such conduct interferes with work or creates an intimidating, hostile or offensive work environment.

1.4. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another. Harassment may be directed at one or more persons based on a shared characteristic or trait as set out in section 1.2 above. Harassment normally implies a series of incidents.

46. It follows that for a staff member's behaviour to be punishable as constituting the disciplinary offence of harassment pursuant to ST/SGB/2019/8, the analysis of said behaviour must pass a two-fold test: it must be found "improper and unwelcome" and "might reasonably be expected or be perceived to cause offence or humiliation to another person". Therefore, as recently explained by this Tribunal in *Applicant* UNDT/2022/048, "the test focuses on the conduct itself and requires an objective examination as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person" (*Belkhabbaz* 2018-UNAT-873, para. 76).

47. Accordingly, in determining whether a conduct amounts to harassment, the Tribunal will not give undue weight to the subjective perceptions of the alleged misconduct by an individual such as the victim (*Applicant*, para. 178). In other words, the mere perception of offence or humiliation by the victim is not enough to attach the definition of harassment in ST/SGB/2019/8.

48. Therefore, it is fair to say that, in some instances, work-related issues may cause harassment. However, for that to be the case, those instances need to be objectively analysed in context and reasonably be expected or perceived to cause offence or humiliation by a reasonable and objective third party. As recently provided in *Applicant*, context is essential for assessing whether the comments or actions in question would constitute harassment. In examining whether the Administration has properly determined that the established facts legally amount to

misconduct or not, the Tribunal will consider the circumstances in which a comment was made, or an action was taken (*Applicant*, para. 180).

49. In the Applicant's case, the complaint involved one specific incident, i.e., the "underperformance" emails sent by the CIOS, that later evolved into the Applicant's removal from the CDT and the decision to implement a PIP for him. These two follow-up actions were not taken by the CIOS, against who the Applicant filed the harassment complaint, but rather by the Applicant's supervisors.

50. Having examined the evidence on record, the Tribunal finds that there were no meaningful indicia of harassment in the emails and follow-up actions that were the object of the Applicant's complaint.

51. The CIOS' e-mails to the Applicant state nothing more than a performance issue that needed to be addressed, and the follow-up measures taken by the Applicant's supervisors are well within their managerial and supervisory discretion. The fact that the Applicant does not agree with them, or even the fact that the Applicant perceived said decisions as offensive, does not automatically constitute harassment.

52. Similarly, the fact that the CIOS sent the "underperformance" emails to the Applicant without considering other factors that might have impacted the alleged underperformance, such as the reduction in the size of the Applicant's team, new processes being improved, and the increased amount of work for the team, is not enough to attach the definition of harassment. These are all matters to be resolved under the framework of performance management and development and, by themselves and in due context, do not prove the alleged harassment.

53. Thus, since the Applicant's entire complaint is based on these "underperformance" emails sent by the CIOS and the following managerial decisions taken by the Applicant's supervisors, there is no blatantly clear evidence or meaningful indicia of harassment to support his claim. In lack of such a clear evidence, the USG/DOS' decision not to open an investigation into the complaint was legal and well within its discretionary powers.

Whether the OIOS complaint referral to the USG/DOS should have warranted the opening of a formal fact-finding investigation

54. The Applicant relies on the OIOS' e-mail dated 28 July 2020, which stated that "the complaint falls within the application of ST/SGB/2008/5", to support his understanding that the USG/DOS erred in his decision not to open a formal fact-finding investigation into the complaint.

55. However, such interpretation is of no merit. OIOS' preliminary understanding that the complaint fell within the scope of the ST/SGB/2019/8 did not mean that the USG/DOS had an obligation to open an investigation. From the moment OIOS referred the complaint as "possible prohibited conduct" to the USG/DOS to "thoroughly review and assess the matter", it became the latter's responsibility to determine whether there were sufficient grounds to warrant opening an investigation.

56. The email dated 6 August 2020 shows that the DOS C&D FP for UNGSC, explained the whole process to the Applicant, including by informing him that:

[I]n order to fully assess your complaint to assess whether it is being made in good faith and whether there are "sufficient grounds to warrant a formal fact-finding investigation", you must include specific details of the allegations.

Many such details are missing from your emails to OIOS dated 22 June and 15 July 2020, which consists of issues related to performance management between you and [the CIOS]. It is important to put your allegations in context so that [the Head of Entity] can have a better understanding of what happen[ed] and why you believe the incidents constitute prohibited conduct.

57. Acting on his capacity to determine whether a complaint of prohibited conduct warrants an investigation, the USG/DOS conducted a preliminary assessment of the allegations, concluded that there was no indication of prohibited misconduct under ST/SGB/2019/8, and closed the case. This decision was well within his discretionary power, and there is no evidence on record to suggest that said decision was unlawfully made, that the USG/DOS disrespected due process or did not conduct a thorough assessment of the Applicant's complaint. On the

contrary, the Applicant was given every opportunity to amend his complaint as well as to provide further details and clarifications.

58. Finally, at this juncture, the Tribunal notes that, as highlighted by the Respondent, the case involves the application of legal instruments at different entities (i.e., the UN Secretariat and UNOPS) and that there are no material differences between ST/SGB/2019/8 and UNOPS policies on harassment, abuse of authority and discrimination reflected in sec. 7.7.3 (Manage Formal Reporting of Internal Grievances) of the UNOPS Process and Quality Management System (PQMS).

Whether the USG/DOS' decision is unlawful based on the Applicant's retaliation claims

59. The complaint reported to both OIOS and the USG/DOS never addressed any concerns of retaliation. The Applicant was asked at least twice to amend his complaint by providing specific details of the allegations, but he never mentioned a retaliatory motive behind the CIOS' actions, not until reaching the MEU stage. It was only on his management evaluation request that the Applicant claimed believing that the CIOS's conduct was retaliation for his reporting the CIOS for possible misconduct during a recruitment exercise in December 2019.

60. Thus, the USG/DOS could not have known at the time of the decision that the Applicant was concerned about being subject to retaliation. In this sense, the decision to close the complaint without opening an investigation cannot be rendered illegal based on a new argument raised by the Applicant after said decision had been taken.

61. In reviewing the handling of the Applicant's complaint, the Tribunal finds that the procedures were properly followed, and all relevant considerations were taken into account.

62. The initial complaint as submitted to OIOS was subsequently referred to the USG/DOS as per sec. 5.3 of the ST/AI/2017/1. Following this referral of the complaint by OIOS to the USG/DOS, the Applicant was requested to provide additional documentations to fully assess his allegations. The Administration reviewed those submissions in their entirety and determined that they related to work and performance matters.

Conclusion

63. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 13th day of June 2022

Entered in the Register on this 13th day of June 2022

(Signed)

René M. Vargas M., Registrar, Geneva