



Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

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 “decision not to take any action on [her] complaint of abuse of authority” against the Executive Director (“ED”), Office of Administration of Justice (“OAJ”) and the Principal Registrar (“PR”), OAJ.

Facts

2. By letter of 4 March 2020, the Applicant submitted to the Secretary-General and to the Director, Investigations Division (“ID”), Office of Internal Oversight Services (“OIOS”), a complaint of abuse of authority against the ED, OAJ and the PR, OAJ under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

3. By email dated 22 May 2020, in response to emails from the Applicant dated 13 and 20 May 2020, the Director, ID, OIOS, *inter alia* informed the Applicant that OIOS was reviewing all the material she had submitted and looking into allegations from former UNDT Judge Rowan Downing related to the Applicant’s above-mentioned complaint. In his email, the Director, ID, OIOS, also noted that “what is interpreted as misconduct is not necessarily something that translates into an OIOS investigation”.

4. By email dated 18 June 2020, the Director, ID, OIOS, *inter alia* communicated to the Applicant that OIOS would not investigate her complaint “on the basis that the issues [the Applicant] raised [in her complaint] regarding OAJ personnel fall outside of the misconduct framework and, as such, an OIOS investigation would not be appropriate”.

5. By email dated 13 July 2020, the Applicant wrote to the Secretary-General reminding him that her 4 March 2020 complaint remained unanswered. By email of 14 July 2020, the Under-Secretary-General, Management Strategy, Policy and Compliance (“USG/DMSPC”), replied to the Applicant that she understood “that in accordance with established procedures, OIOS considered the matter and informed [the Applicant] that the case would not be pursued”.

6. On 8 September 2020, the Applicant requested management evaluation of the decision “to take no action on [her] complaint of misconduct”.

7. By email of 16 October 2020, the Management Evaluation Unit referred to the Applicant’s request for management evaluation and informed her that “any recourse that [she wished] to pursue may be addressed to the United Nations Dispute Tribunal in accordance with staff rule 11.4”.

Procedural history

8. On 14 January 2021, the Applicant filed an application:

- a. Contesting the decision referred to in para. 1 above; and
- b. Requesting, as remedies, an Order for the investigation of her complaint by an external investigative body, and compensation for the breach of her due process rights.

9. On 15 February 2021, the Respondent filed his reply, *inter alia* challenging the receivability of the application.

10. On 3 April 2023, the above-mentioned case was assigned to the undersigned Judge.

11. By Order No. 28 (GVA/2023) of 4 April 2023, the Tribunal:

- a. Gave the Applicant an opportunity to file a rejoinder; and
- b. Convoked the parties to a case management discussion (“CMD”).

12. On 18 April 2023, the Applicant filed a rejoinder.

13. On 26 April 2023, a CMD was held with the participation, in person, of the Applicant and Counsel for the Respondent.

14. By Order No. 41 (GVA/2023) of 28 April 2023, the Tribunal ordered the Respondent to file his comments on the receivability arguments raised by the Applicant in her rejoinder.

15. On 5 May 2023, the Respondent filed his response to Order No. 41 (GVA/2023).

Consideration

Receivability

16. The Respondent argues that the application is not receivable *ratione materiae* because the Applicant did not timely request management evaluation of the contested decision, which in his view is the 18 June 2020 email from the Director, ID, OIOS.

17. The Applicant asserts that the contested decision is the 14 July 2020 email from the USG/DMSPC, which makes her 8 September 2020 request for management evaluation timely.

18. She further argues that the Respondent should be stopped from challenging the receivability of her application as he should have done so when she requested management evaluation.

19. The Tribunal finds the Applicant's second argument without merit. Indeed, the Respondent may challenge the receivability of an application at the time of his reply. The Respondent's reply form before this Tribunal (Form UNDT/F13.E) specifically requires in its section I that the Respondent indicate if he contests the receivability of an application. Also, there is no legal provision limiting such challenge to the management evaluation phase, and the practice of the Organization is to clearly indicate in the letters responding to management evaluation requests that the Secretary-General reserves the right to raise the issue of receivability at any subsequent stage.

20. The examination of the receivability question that the Respondent raised will thus turn on answers to two issues:

- a. Whether the 18 June 2020 email from the Director, ID, OIOS, to the Applicant was the relevant administrative decision for purposes of judicial review; and

- b. Who was supposed to communicate the administrative decision to the Applicant.

Whether the 18 June 2020 email from OIOS to the Applicant was the relevant administrative decision.

21. Proceeding from the premise that OIOS is legally and hierarchically independent of the Administration, the Applicant submits that the 18 June 2020 email was a response from OIOS to her direct complaint to them, which did not impact on any final decision the Administration would take on her report of possible prohibited conduct. This proposition is premised on the belief that OIOS is an independent entity whose conclusion was not a decision taken by the Administration.

22. Appellate jurisprudence has clarified that OIOS is part of the Secretariat. In *Koda* 2011-UNAT-130 (paras. 2 and 41-42), the Appeals Tribunal, citing General Assembly resolution 48/218B (Review of the efficiency of the administrative and financial functioning of the United Nations adopted on 29 July 1994), stated that OIOS “operates under the ‘authority’ of the Secretary-General but has ‘operational independence’” (para. 2 and paras. 41-42).

23. Furthermore, in *Koda* the Appeals Tribunal observed that it seemed that “the drafters of [General Assembly resolution 48/218B] sought to both establish the ‘operational independence’ of OIOS and keep it in an administrative framework.” These two features are reflected in paras. 1 and 2 of ST/SGB/273 (Establishment of the Office of Internal Oversight Services).

24. Concerning whether OIOS replies can constitute final administrative decisions, it is relevant to recall the Appeal Tribunal finding in *Comerford-Verzuum* 2012-UNAT-203, para. 36, where an OIOS reply was found to have been the final administrative decision.

25. The fact that the Applicant made two reports, which she admits, namely one to OIOS and one to the Administration, did not create a duty on any other person or office to make a final decision, given that the applicable legal instrument clothes OIOS with the ultimate decision-making role in this regard. Indeed, sec. 5.1 of ST/AI/2017/1 provides that “OIOS retains the ultimate authority to decide which cases it will consider and shall determine whether the information of unsatisfactory conduct received merits any action”.

26. The Applicant’s argument that the Administration failed to acknowledge receipt of her report of possible prohibited conduct is premised on a misinterpretation of sec. 5.4 of ST/SGB/2019/8, which provides as follows:

Possible prohibited conduct shall be reported in accordance with section 4 of ST/AI/2017/1 either to the responsible official, with a copy to [OIOS], or to OIOS. If a report of possible prohibited conduct is made to the responsible official, the responsible official shall forward the report of possible prohibited conduct to OIOS and acknowledge receipt of the report.

27. Sec. 5.4 above makes a distinction between a situation in which a report is only made to the responsible official, and that in which the report is made to both such official and to OIOS as the Applicant did. The requirement that the responsible official forwards a report to OIOS and acknowledges receipt thereof arises when the report is only addressed to the responsible official. There was therefore no failure in the fulfilment of any duty on the part of the Administration.

28. Drawing on UNAT jurisprudence, the Tribunal finds that the 18 June 2020 OIOS email was the final administrative decision that was to be challenged by the Applicant through the mechanism of administrative review, rather than it being replied to as the Applicant did particularly if, as the Applicant argued, she believed that OIOS reasoning was “unreasonable and exceeded its authority”.

Who was supposed to communicate the administrative decision to the Applicant?

29. It is recognised that ST/AI/2017/1 is silent on the process to follow when the preliminary assessment of OIOS results in a decision not to investigate a report of possible prohibited conduct.

30. Given, however, that under sec. 5.4 of ST/SGB/2019/8 even when a report is made to a responsible official said official must forward it to OIOS and acknowledge receipt of it, OIOS is the main actor at the point of receipt of a report. As noted in para. 25 above, OIOS is the ultimate authority to decide which cases to consider and determine what action to take if any.

31. Considering that OIOS may process a report without the responsible officer ever knowing about it if the report was made to OIOS under sec. 5.4 ST/SGB/2019/8, it is only logical that OIOS is the centre from which communication of its decision to the complainant must come.

32. The above is further supported by the fact that the applicable legal framework does not provide for the Secretary-General to be the responsible official. Therefore, the Applicant's 4 March 2020 letter, namely her report of possible prohibited conduct, can only be considered to have been addressed exclusively to OIOS.

33. Consequently, the Tribunal finds that OIOS rightly communicated the 18 June 2020 administrative decision to the Applicant, and since no management evaluation request was sought within the prescribed time limit, the application is not receivable *ratione materiae*.

Conclusion

34. In view of the foregoing, the Tribunal DECIDES to dismiss the application in its entirety.

(Signed)

Judge Margaret Tibulya

Dated this 31st day of May 2023

Entered in the Register on this 31st day of May 2023

(Signed)

René M. Vargas M., Registrar, Geneva