



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/020

Judgment No.: UNDT/2024/036

Date: 19 June 2024

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** New York

**Registrar:** Isaac Endeley

O'MULLANE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Cristian Gimenez Corte

**Counsel for Respondent:**

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant is a Director, at the D-2 level, in the Office of Information and Communications Technology (“OICT”) in the United Nations Secretariat. On 9 July 2023, he filed an application contesting the 10 January 2023 “decisions of the Office of Internal Oversight Services (“OIOS”) to decline to open an investigation into his report of possible harassment and abuse of power against the [United Nations] Controller” (“the Controller”). The Applicant also requests compensation for harm suffered and the referral of his case to the Secretary-General for possible action to enforce accountability against the Controller.

2. On 9 August 2023, the Respondent filed a reply challenging the receivability of the application on the basis that the contested decision is not reviewable by the Tribunal. The Respondent also submitted that even if the application were receivable, it should be rejected because it lacks merit.

3. This case was assigned to the undersigned Judge on 1 April 2024.

4. On 3 April 2024, the Tribunal conducted a case management discussion (“CMD”) with the parties and their legal representatives.

5. The following issues were discussed at the CMD: the Respondent’s request to have the receivability of the application determined as a preliminary matter; the Applicant’s oral request for interim measures pending proceedings; the Applicant’s oral motion for the joinder of Cases No. UNDT/NY/2023/019 and No. UNDT/NY/2023/020; and the Applicant’s request for a hearing.

6. By Order No. 042 (NY/2024) of 4 April 2024, the Tribunal granted the Respondent’s motion on determining the receivability of the application as a preliminary matter. The Tribunal also informed the parties that the other issues would be addressed after the question of receivability was resolved.

7. The Tribunal considers that this case is sufficiently informed. There is therefore no need for an oral hearing, and for the parties' closing submissions.

8. For the reasons set out below, the application is dismissed.

### **Facts**

9. The Applicant joined the United Nations in August 1996. He holds a continuing appointment, at the D-2 level. At the time of filing the application, he was the Director of the Operations Support Division ("OSD"), within OICT. Following the management reform introduced by the Secretary-General on 1 January 2019, budget and financial management for OICT became centralized and was placed under the Enterprise Programme Management Section ("EPMS") which reported directly to the Chief Information Technology Officer ("CITO"), at the Assistant Secretary-General level. This resulted in the Applicant no longer having the responsibility to manage OICT's budgetary and financial issues.

10. Amid rumors of a large deficit in OICT's finances estimated to be in the millions of dollars, a new CITO was appointed in August 2021 (see *O'Mullane* UNDT/2024/025, para. 7) and various efforts were made to address the budget deficit. The acts of harassment and abuse of authority attributed to the United Nations Controller and forming the basis of the Applicant's complaint to OIOS reportedly arose in the context of those efforts.

11. Subsequent to the filing of two separate applications on 9 July 2023 (namely Case No. UNDT/NY/2023/019 and the present case), the Applicant filed a motion on 26 September 2023 in Case No. UNDT/NY/2023/019 (but not in the present case) requesting the Tribunal to order interim measures preventing the Controller and the CITO from taking "any further retaliatory actions against him". The Applicant alleged that following the filing of the two applications mentioned above, the Controller and the CITO had taken retaliatory measures against him. He stated that he "[feared] continued retaliation by the Respondent unless the Tribunal [issued] a protective and preventive order".

12. By Order No. 097 (NY/2023), the Tribunal noted that the acts of retaliation alleged by the Applicant occurred in the context of a proposed internal restructuring of OICT, whereby the Applicant was being reassigned from one Division within OICT to another, still at the D-2 level. In rejecting the motion for interim measures, the Tribunal observed that the restructuring discussions had been initiated long before the Applicant filed the applications. Therefore, it was unlikely that the proposed reassignment of the Applicant was in retaliation for his filing of the applications.

### **Considerations**

#### *Receivability as a preliminary matter*

13. Under the Appeals Tribunal's jurisprudence, the Dispute Tribunal is required to satisfy itself that an application is receivable pursuant to art. 8 of its Statute (see, for instance, *O'Neill* 2011-UNAT-182, as affirmed in *Christensen* 2013-UNAT-335, and *Barud* 2020-UNAT-998). The Appeals Tribunal has also held that the Dispute Tribunal may consider the receivability of an application as a preliminary matter before reviewing the merits of the case (see, for instance, *Pellet* 2010-UNAT-073).

14. The Applicant simultaneously filed two separate applications on 9 July 2023. In the first application, registered under Case No. UNDT/NY/2023/019, the Applicant contested the decision by OIOS to decline to open an investigation into his report of prohibited conduct against the Controller for possible noncompliance with United Nations financial rules and regulations. In that case, the Tribunal found that the Organization, not the Applicant, was the aggrieved party in any alleged misconduct with respect to any staff member's possible noncompliance with United Nations financial rules and regulations. The Tribunal also found that the Applicant had not cited any regulations or rules which afforded him a right to compel the Administration to conduct an investigation. Accordingly, the Tribunal dismissed that application as not receivable (see *O'Mullane* UNDT/2024/025).

15. In the present application, registered under Case No. UNDT/NY/2023/020, the Applicant contests the decision by OIOS to decline to open an investigation into his report of possible harassment and abuse of authority against the Controller. The Applicant alleges, among other things, that the Controller has engaged in a “clear pattern of harassment”, including “unsubstantiated accusations of financial wrongdoing”, which have “irreversibly damaged [the Applicant’s] unblemished reputation built over 26 years of service in the United Nations”. The Applicant further asserts that the OIOS decision “violates his rights as a staff member of the [United Nations] Secretariat to be treated with dignity and respect, and to be allowed to carry out his work in an environment free of any form of discrimination, harassment, and abuse of authority”.

16. In the reply, the Respondent submitted that the application is not receivable because the contested decision by OIOS “had no direct effect on the Applicant, had no external legal effect, and did not adversely affect the Applicant’s contractual employment rights”.

17. The Appeals Tribunal has held that the investigation of management and administrative practices or of disciplinary cases is usually a matter within the discretion of the Administration. (See, for instance, *Benfield-Laporte* 2015-UNAT-505, para. 37 and *Abboud* 2010-UNAT-100, para. 34).

18. It is now established that a staff member has no right to compel the Organization to conduct an investigation, **unless such a right is granted by the Staff Regulations and Rules of the United Nations** (emphasis added) (See, for instance, *Nwuke* 2010-UNAT-099, paras. 3, 28, 30 and 36; *Ross* 2023-UNAT-1336, para. 24).

19. It is worth noting that the Applicant’s claim is rooted in the provisions of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), and that he seeks to enforce his rights as a staff member of the United Nations Secretariat to be treated with dignity and respect, and to be allowed to

carry out his work in an environment free of any form of discrimination, harassment, and abuse of authority.

20. Based on the foregoing, the argument that the Applicant has no right to compel the Organization to conduct an investigation is not valid and must fail. Accordingly, the Tribunal finds that the application is receivable and will proceed to examine it on the merits.

*The parties' submissions on the merits of the case*

21. The Applicant's contentions may be summarized as follows:

a. On 1 January 2019, following the management reform, the Applicant assumed the role of Director of the Operations Support Division ("OSD") within the "new enlarged OICT" and he "ceased having visibility, oversight and responsibility to manage the [Office's] budgetary and financial issues".

b. In August 2021, a new Chief Information Technology Officer ("CITO"), at the Assistant Secretary-General level, joined OICT. As part of his induction, the new CITO received a briefing from the Controller, who advised him that the Applicant was "not to be trusted" because he "had resisted efforts" by the Controller to get a clear picture of OICT's finances.

c. Although the Applicant no longer had the authority to manage OICT's budgetary and financial issues following the management reform, the Controller "kept making offensive comments" against him. Specifically, at a meeting conducted virtually on 14 April 2022, the Controller stated publicly that the Applicant and others were resisting all efforts to get to the bottom of the financial picture at OICT. In May 2022, a "senior [United Nations] official" informed the Applicant that the Controller had once again said "very bad things" about him at a meeting. Further, in November 2022, the Applicant "received information" that the Controller had also "debriefed a Director and a Member State delegate in a similar vein". These public comments by the

Controller have “irreversibly damaged an unblemished reputation built over 26 years of service in the United Nations” and have affected the Applicant’s health and wellbeing.

d. Despite having visibility and oversight over OICT’s finances, the Controller has refused to assume any responsibility for the mismanagement and instead seems to “point publicly to someone else as being untrustworthy and blocking his access to the picture of OICT’s finances”. In light of this “clear pattern of harassment”, on 7 November 2022 the Applicant filed a complaint with OIOS regarding possible prohibited conduct by the Controller.

e. In early December 2022 (and again on 5 February 2023), the CITO informed the Applicant of his intention to reassign the Applicant to different functions within OICT and still at the D-2 level. The Applicant opposed the move, noting that it could be “interpreted as an act of retaliation” for filing a complaint against the Controller.

22. The Respondent’s submissions may be summarized as follows:

a. “The contested decision was lawful and constituted a reasonable exercise of OIOS’s discretion under sections 5.1 and 5.5 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and section 1.1 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority)” (emphasis omitted).

b. As per the jurisprudence of the Appeals Tribunal, “a decision not to investigate allegations of misconduct is not a reviewable administrative decision, because it does not produce direct legal consequences on a staff member’s rights under a contract of employment” (references omitted). In the case at hand, the Controller’s alleged comments “did not adversely affect the Applicant’s contractual employment rights”.

c. The Organization has discretion on how to conduct a review and how to assess 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’”. ST/AI/2017/1 lists the factors that the responsible official may consider in undertaking a preliminary assessment of a report of unsatisfactory conduct. OIOS retains the authority to decide which cases to investigate and it “reasonably exercised its discretion” when it undertook a preliminary assessment of the Applicant’s allegations against the Controller and declined to open an investigation.

d. As stipulated in sec. 1.1 of ST/SGB/2019/8, disagreements over work performance or work-related issues are normally not considered prohibited conduct and should be dealt with in the context of performance management. The comments allegedly made by the Controller are directly related to his observations about the performance of the Applicant’s duties. Therefore, OIOS “reasonably concluded that the Applicant’s allegations, even if true, were unlikely to amount to misconduct” and that opening an investigation into those allegations “was unlikely to reveal sufficient evidence to further pursue the matter as a disciplinary case”. OIOS took the view that the allegations amounted to “a management issue where an informal process would be more appropriate”.

e. Pursuant to art. 10.5 of its Statute, “the Dispute Tribunal may only order either rescission or compensation”. The Dispute Tribunal does not have the authority to reverse the contested decision or to order OIOS to open an investigation into possible prohibited conduct against the Controller. The Applicant has not produced any evidence to establish that the contested decision was unlawful or that he has suffered any harm as a result of it. Therefore, he is not entitled to any compensation. Moreover, “there was no



breach of the Organization's legal framework which would render referral appropriate".

### *Scope of judicial review*

23. The Appeals Tribunal has held that when reviewing the validity of the Administration's exercise of discretion in administrative matters, the role of the Dispute Tribunal is to determine whether the contested decision is legal, rational, procedurally correct, and proportionate. This means reviewing whether relevant matters have been ignored or irrelevant matters considered, and whether the decision is absurd or perverse. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration (see, for instance, *Barbulescu* 2023-UNAT-1392, para. 54; *Kanbar* 2021-UNAT-1082, para. 30; *Sanwidi* 2010-UNAT-084, para. 42).

24. The Tribunal notes that in declining to open an investigation, OIOS stated that the Applicant's complaint of prohibited conduct was regulated by the Secretary-General's Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority). Section 1 of ST/SGB/2019/8 identifies harassment and abuse of authority as forms of "prohibited conduct" and defines them, respectively, as follows (emphasis in the original):

#### *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.

...

*Abuse of authority*

1.8 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses their influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation, working conditions or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

...

25. Moreover, sec. 5.4 of ST/SGB/2019/8 sets out the modalities for the reporting of possible prohibited conduct to OIOS:

5.4 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 the Office of Internal Oversight Services (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.

26. The Tribunal further notes that OIOS stated that in deciding not to open an investigation into the Applicant's complaint, it relied on the criteria established in sec. 5.5 of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). This provision reads as follows:

5.5 In undertaking the preliminary assessment, the following factors may be considered:

(a) Whether the unsatisfactory conduct is a matter that could amount to misconduct;

(b) Whether the provision of the information of unsatisfactory conduct is made in good faith and is sufficiently detailed that it may form the basis for an investigation;

(c) Whether there is a likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case;

(d) Whether an informal resolution process would be more appropriate in the circumstances;

(e) Any other factor(s) reasonable in the circumstances.

27. Noting that OIOS did not dismiss the report of possible prohibited conduct out of hand, but reviewed not only the remarks attributed to the Controller, but also the circumstances under which those remarks were reportedly made, in keeping with Tribunal jurisprudence that even if the Administration decides not to conduct an investigation, it is “required to examine the information received in a fair and balanced manner” (*Kamugisha* UNDT/2017/021, para. 36), the Tribunal finds no fault with the manner in which OIOS handled the Applicant’s complaint in this case.

28. The Controller is responsible for managing the Organization’s budget and finances, and OIOS noted that the remarks occurred “in the context of concerns regarding the handling of financial and budgetary matters” in OICT. After a preliminary assessment of the complaint in light of the criteria set forth in sec. 5.5 of ST/AI/2017/1, OIOS determined that it was “unlikely that the remarks would rise to the level of misconduct warranting disciplinary action”. It also considered that “an informal resolution process would be more appropriate in the circumstances” and encouraged the Applicant to pursue “the alternate dispute resolution procedures set out in section of ST/SGB/2019/8”, including possible recourse to the Office of the United Nations Ombudsman and Mediation Services.

29. The Tribunal recalls that as part of the management reform of January 2019, the Organization’s leadership expressed a desire to achieve savings in many areas, including expenditures within OICT, where the Applicant holds a Director-level position. The comments attributed to the Controller are directly related to his subjective observations about the performance of the Applicant’s duties in connection with the management of OICT’s financial and budgetary resources, which are within the Controller’s portfolio. As provided in sec. 1.1 of ST/SGB/2019/8, disagreements over work performance or work-related issues are normally not considered prohibited conduct and should be dealt with in the context of performance management. Therefore, the Tribunal finds that it was reasonable for OIOS to determine that the Controller’s alleged comments did not amount to prohibited conduct and that this was

essentially a work-related matter that could be resolved through other processes than a formal investigation.

30. The Tribunal further notes that, as stipulated in sec. 5.1 of ST/AI/2017/1, “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”. There is no indication that in making the contested decision, OIOS ignored any relevant factors or took into consideration any irrelevant factors. Additionally, pursuant to sec. 5.6(b) of ST/AI/2017/1, upon conclusion of a preliminary assessment OIOS has the authority to decide not to initiate an investigation. Given the circumstances of this case, as detailed above, the Tribunal finds that the decision to decline to open an investigation into the Applicant’s report of possible harassment and abuse of authority against the Controller was a reasonable exercise of the Administration’s discretion. Accordingly, the Tribunal finds that the contested decision was lawful.

31. Having found that the contested decision was lawful, the Tribunal cannot order any compensation. Therefore, the Applicant’s request for compensation stands to be dismissed. (*Ovcharenko* 2024-UNAT-1439, para. 51; *Banaj* 2023-UNAT-1357, para. 118).

32. Similarly, as the decision by OIOS not to open an investigation is found to be a lawful exercise of the Administration’s discretion, there is no basis for the referral of this case to the Secretary-General for possible action to enforce accountability against the Controller.

33. The Tribunal also recalls that the Applicant requested a hearing in this case. However, as the Tribunal has already determined, based on the parties’ written submissions, that the contested decision was lawful, there is no need for a hearing.

34. Further, as reiterated in Order No. 042 (NY/2024), the Applicant’s request for interim protective measures pending proceedings in this case had already been given

full consideration and resolved through Order No. 097 (NY/2023). Therefore, the Applicant's oral motion made at the CMD is moot.

35. Finally, the Applicant's oral motion for the joinder of his two cases is now moot as Case No. UNDT/NY/2023/019 was already adjudicated separately via Judgment No. UNDT/2024/025.

**Conclusion**

36. The application is dismissed.

*(Signed)*

Judge Margaret Tibulya

Dated this 19<sup>th</sup> day of June 2024

Entered in the Register on this 19<sup>th</sup> day of June 2024

*(Signed)*

Isaac Endeley, Registrar, New York