



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/035

Order No.: 24 (NY/2021)

Date: 17 March 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MONNIER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON RESPONDENT'S MOTION ON
PRODUCTION OF DOCUMENTS**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jonathan Croft, ALD/OHR, UN Secretariat

Miryoung An, ALD/OHR, UN Secretariat

Introduction

1. The Applicant in this case challenges the Administration's decision not to pursue his complaint of harassment against his supervisor.

2. By Order No. 19 (NY/2021) of 3 March 2021, the Tribunal directed the Respondent to file a copy of the investigation report on the allegations of misconduct raised by the Applicant. The Tribunal afforded the Respondent the opportunity to redact the report to preserve its confidentiality as required and gave the Applicant the chance to submit observations upon receipt of the report.

3. On 9 March 2021, the Respondent filed a motion in response to Order No. 19 (NY/2021) stating that the Applicant is not entitled to have access to the investigation report and that its disclosure would violate the confidentiality of the matter. The Respondent filed the full investigation report on an *ex parte* basis which was not disclosed to the Applicant.

Consideration

4. The Respondent alleges that the individuals involved in the investigation, which followed the Applicant's complaint of misconduct, have a legitimate expectation that the confidentiality of the process is respected. Moreover, he argues that the Organization has an interest in limiting the dissemination of investigative materials as it may "inflare a situation by providing access to confidential information". This would, in turn, hinder the Organization's legitimate goal of furthering a productive work environment.

5. The Respondent further states that in the present case, the procedure set out in ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority) were duly followed and that under neither of those

administrative issuances, does the Applicant have a right to receive the investigation report.

6. The Respondent further refers to *Ivanov* 2015-UNAT-572 (para. 26), where the Appeals Tribunal stated that complainants are not entitled to receive a copy of the full investigation report unless they present convincing arguments to show that there were exceptional circumstances which might otherwise have entitled them to the full report.

7. The Respondent avers that the Applicant has not shown any exceptional circumstances and therefore has no right to receive the investigation report. He claims that the Applicant merely refuses to accept the responsible official's decision while having adduced no evidence supporting a reasonable perception or inference that the investigators or the decision-maker were biased against him.

8. The Respondent further recalls that in a system of administration of justice governed by law, the presumption of innocence must be respected. When the Administration decided not to initiate a disciplinary process in this case, it did so based on the investigation and supporting documentation. The Respondent also argues that the Applicant's allegations of bias are unfounded.

9. From the outset, the Tribunal recalls that Order No. 19 (NY/2021) does not direct the Respondent to submit the full investigation report but rather affords him the opportunity to redact the report as he deems fit to safeguard legitimate confidentiality concerns.

10. The Tribunal is aware that neither ST/SGB/2008/5 nor ST/AI/2017/1 provide for the complainant to receive a copy of the report. The Tribunal also acknowledges that under *Ivanov*, the Applicant is not entitled to receive a copy of the full investigation report except where he or she can show exceptional circumstances.

11. The Tribunal further acknowledges that the decision to initiate a disciplinary process is within the discretion of the Administration (see, for instance, *Abboud* 2010-UNAT-100, para. 34).

12. This notwithstanding, the Tribunal is also guided by the Appeals Tribunal's well-established case law concerning the judicial review of the Administration's exercise of its discretionary power. In this sense, in *Obdeijn* 2012-UNAT-201 (paras. 33-36), the Appeals Tribunal recalled that the Administration must act fairly, justly and transparently in dealing with its staff members. It established that a staff member has a right to be informed of the reasons underlying an administrative decision affecting him or her to allow the staff member to seek judicial review of the decision. The Appeals Tribunal concluded that the Administration's obligation to state the reasons for an administrative decision does not stem from the regulatory framework but rather is inherent to the Tribunal's power to review the validity of an administrative decision, the functioning of the internal administration system and the principle of accountability of managers.

13. In *Sanwidi* 2010-UNAT-084 (para. 40), the Appeals Tribunal established that in reviewing the Administration's use of its discretionary power, the Dispute Tribunal is not to consider the correctness of the decision, but rather whether such decision was legal, rational, procedurally correct and proportionate. In doing so, the Dispute Tribunal should consider whether relevant matters had been ignored and irrelevant matters considered and could examine whether the decision was absurd or perverse.

14. It follows that in order to be able to form an appeal against an adverse administrative decision, the staff member must be sufficiently informed of the reasons underlying the decision. A decision not to pursue disciplinary charges following an investigation into allegations of misconduct is not different from any other exercise of the Administration's discretionary power. Therefore, to allow for the judicial review of a decision not to instigate disciplinary charges, a staff member must be provided with sufficient information of the reasons underlying such decision. Absent such information, a complainant would be *de facto* deprived of his or her right of access to justice.

15. While a decision not to initiate disciplinary proceedings against a staff member following an investigation is not different from other instances of exercise of the

Administration's discretion in terms of its judicial review, as stated above, it presents legitimate confidentiality concerns.

16. In this regard, the Tribunal finds that the Respondent's argument that the staff member accused of harassment has a right to the presumption of innocence is misplaced. Indeed, this staff member enjoys a right to be presumed innocent and to due process in case the disciplinary proceedings are instigated against him. However, the matter under review here is not whether the subject of the complaint committed misconduct, but whether the Administration lawfully exercised its discretion in deciding not to initiate disciplinary proceedings against him.

17. Therefore, when reviewing this decision, the Tribunal must balance the legitimate rights to confidentiality of the individuals involved in the investigation, including the subject of the complaint, the Administration's interest in keeping disciplinary matters confidential and the Applicant's right to seek judicial review of the decision.

18. The Tribunal reviewed the letter from Assistant Secretary-General for Human Resources ("ASG/OHRM") of 14 February 2020 informing the Applicant of the outcome of the investigation. The ASG/OHRM informs the Applicant that the Office of Investigation and Oversight Services ("OIOS") conducted an investigation following his complaint. She states that the investigation "included statements from [the Applicant] and [his] former supervisor and multiple staff members". The letter further provides that OIOS found that there was insufficient evidence to substantiate the Applicant's report and that the Applicant's testimony with respect to alleged unwelcome sexual conduct lacked credibility and was not "sufficiently supported by evidence". The letter further provided that the Applicant's supervisor's statements were found to be more credible than those of the Applicant.

19. Based on this scant explanation and lack of detail, the Tribunal is not satisfied that the Applicant had been provided sufficient information to allow him to appeal the decision.

20. The Tribunal notes that the Management Evaluation Unit (“MEU”) provided some additional details in its 2 May 2020 determination.

21. The MEU stated that the Administration found that some of the Applicant’s claims were “speculative and not corroborated by the evidence” and gave the example of the Applicant’s claim that his former supervisor’s mention of the Applicant’s “less than perfect relationship at home” was a veiled communication of his availability for a liaison with the Applicant.

22. The MEU further stated that “some” of the Applicant’s allegations were not supported by the record and gave the example of an allegation concerning a travel deviation in 2014 and an allegation that the Applicant’s supervisor invited him for lunch during a trip, which the MEU stated could not be corroborated.

23. The MEU also informed the Applicant that the Administration found that a 2016 report of potential conflict of interest involving the Applicant may have contributed to the deterioration of the Applicant’s relationship with the colleague who made the report and with his former supervisor. The MEU further stated that an issue of reported overtime in 2017 may have also contributed to the difficult relationship between the Applicant and his former supervisor.

24. The MEU finally stated that the evidence gathered by the investigation tended to support the Applicant’s former supervisor’s credibility over that of the Applicant’s.

25. The Tribunal is not persuaded that this additional information, obtained at the management evaluation stage, was sufficient to allow the Applicant to form an appeal of the decision not to pursue disciplinary action at the completion of the investigation. This information does not allow the Applicant to make an informed argument of whether relevant matters were ignored, and irrelevant matters considered or whether the decision was absurd or perverse.

26. To remediate this lack of detail while preserving the confidentiality of the investigation, the Tribunal is of the view that the Respondent must either provide the

Applicant with a sufficiently detailed summary of the findings of the investigation or disclose to the Applicant a redacted version of the investigation report.

27. In light of the above,

IT IS ORDERED THAT:

28. By **4:00 p.m. on Monday, 5 April 2021**, the Respondent shall submit into evidence one of the following:

- a. A sufficiently detailed summary of the findings of the investigation into the Applicant's allegations of misconduct, or;
- b. A redacted version of the investigation report.

29. By **4:00 p.m. on Tuesday, 13 April 2021**, the Applicant may submit observations to the reply and the evidence submitted by the Respondent. The submission shall not exceed five pages, using Times New Roman, font 12 and 1.5 line spacing;

30. Upon receipt of the above-mentioned submissions, the Tribunal shall provide any further instructions.

(Signed)

Judge Joelle Adda

Dated this 17th day of March 2021