



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Camila Nkwenti Fuomene, UNEP

Isabel Martinez, UNEP

Introduction

1. On 22 March 2021, the Applicant, a former staff member of the United Nations Environment Programme (“UNEP”), appealed the Administration’s 18 October 2020 decision to endorse the determination of the Ethics Office of the United Nations that no retaliation was established following the Applicant’s request for protection against retaliation.

2. On 21 April 2021, the Respondent replied that the application is without merit.

Consideration

3. The Applicant requests the disclosure of additional evidence.

a. Request for disclosure of the investigation report

4. The Applicant requests the disclosure of the investigation report by the Office of Internal Oversight Services (“OIOS”) dated 19 October 2020 upon which the Ethics Office relied to reach its determination.

5. The Respondent opposes the request for disclosure of the OIOS report alleging that “it is apparent that the [Ethics Office] recommendations are grounded in facts and are rational, coherent, cogent and complete. The Applicant did not present arguments or evidence that demonstrate otherwise or that prove that either OIOS or [the Ethics Office] failed to exercise their independent mandate neutrally and without bias”.

6. The Respondent cites a judgment “*Ivanov*, UNDT/NY/2014/039 (para. 27)” in which, the Respondent claims, the Dispute Tribunal found that an aggrieved individual must present exceptional circumstances to justify the production of an investigation report. Even if the current case is not a harassment case, the Respondent avers that it clearly results that the Applicant has not presented sufficient evidence to

question OIOS's findings, or any exceptional circumstances within the meaning of the cited jurisprudence.

7. The Tribunal notes that the Ethics Office's 19 November 2020 determination concludes, pursuant to sec. 8.4 of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) ("the policy"), that no retaliation was established. This determination was based upon OIOS' report dated 19 October 2020.

8. The Applicant challenges the lawfulness of the contested decision on several grounds. In particular, she alleges that OIOS failed to interview her in the course of the investigation, that OIOS relied on uncorroborated hearsay evidence and that the investigation was unduly delayed.

9. The Tribunal further notes that the 19 November 2020 determination provides some detail of the OIOS findings. However, the Tribunal does not deem this information sufficient to allow the Applicant to mount an informed appeal, nor does it permit the Tribunal to determine whether the contested administrative decision was taken in compliance with the applicable procedure.

10. The Tribunal understands that the Respondent refers in fact to *Ivanov* UNDT/2014/117 (para. 54), where the Dispute Tribunal found that the decision to provide an aggrieved individual with a copy of an investigation report requires the identification of exceptional circumstances.

11. The Tribunal observes that in *Ivanov*, the applicant requested access to a report of an investigation conducted under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority). Section 5.18(a) of this bulletin stated that when no prohibited conduct is established, the responsible official provides the aggrieved individual with a summary of the findings and conclusions of the investigation.

12. The current case, however, is governed by ST/SGB/2017/2/Rev.1 which provides, in sec. 7.2, that the Ethics Office maintains the confidentiality of all communications received from complainants and from all relevant parties but may be required to cooperate with requests for information from, among others, the Dispute Tribunal.

13. The Tribunal recalls that ST/SGB/2008/5 governs the investigation into allegations of prohibited conduct by an individual staff member who is presumed innocent until proven guilty of any charged misconduct by clear and convincing evidence. Under this framework, therefore, the burden of proving that the alleged offender has committed the alleged prohibited conduct lies with the Administration.

14. Under ST/SGB/2017/2/Rev.1, however, once the Ethics Office has found a *prima facie* case of retaliation under sec. 8.1 of the policy, under sec. 8.4, the burden of proof shifts to the Administration to prove by clear and convincing evidence that no such retaliation existed.

15. Therefore, under this framework, contrary to ST/SGB/2008/5, it is not the responsibility of an individual staff member that is being looked into, but rather that of the Organization as a legal person. Any ensuing misconduct in the form of retaliation by an individual staff member will have to be addressed in accordance with the applicable framework for establishing misconduct in full respect to the concerned staff member's presumption of innocence.

16. The regimes of ST/SGB/2008/5 and ST/SGB/2017/2/Rev.1 being distinct, the Tribunal is not persuaded that the limitations placed on the aggrieved individual's access to an investigation report issued under ST/SGB/2008/5 apply in the context of ST/SGB/2017/2/Rev.1.

17. Nonetheless, the Tribunal is very mindful of the need to protect the confidentiality of the work of the Ethics Office and recalls that the submissions to the Tribunal are confidential. Moreover, should the Respondent deem that the report contains sensitive information pertaining to individuals not involved in this litigation,

he may choose to file a redacted version of the report to be disclosed to the Applicant along with an *ex parte* unredacted version of the report for the Tribunal's review.

b. Allegations of undue delay in the investigation

18. The Applicant alleges that the investigation was unduly delayed. To review this ground of appeal, the Tribunal deems it appropriate to peruse the correspondence between the Ethics Office and OIOS concerning OIOS's decision of 6 January 2020 not to pursue its investigation of retaliation in this case and the Ethics Office's ensuing request that the investigation be completed.

19. In light thereof,

IT IS ORDERED THAT:

20. By **4:00 p.m. on Tuesday, 7 September 2021**, the Respondent shall file the following documents:

(a) The 19 October 2020 investigation report. Should the Respondent deem it necessary to protect sensitive information pertaining to individuals not involved in this litigation, he may choose to file a redacted version of the report for transmission to the Applicant along with an *ex parte* version for the Tribunal's review; and

(b) All correspondence between the Ethics Office and OIOS following OIOS' decision not to continue the investigation into the Applicant's retaliation complaint.

21. By **4:00 p.m. on Tuesday, 21 September 2021**, the Applicant may submit observations with respect to the newly submitted evidence. The submission shall not exceed five pages, using Times New Roman, font 12 and 1.5 line spacing.

22. Upon receipt of the Applicant's submissions, the Tribunal will issue any further instructions on case management.

(Signed)

Judge Joelle Adda

Dated this 27th day of August 2021