

Case No.: UNDT/NBI/2024/035
Judgment No.: UNDT/2024/073
Date: 7 October 2024

PCO was more likely to be a product of his management style than an instrument of discrimination or harassment.

7. On 1 May 2023, the Applicant filed an application before the United Nations Dispute Tribunal, which was registered as Case No. UNDT/NBI/2023/042, largely challenging the decision to not establish a fact-finding panel with respect to his 23 September 2022 Complaint.

8. On 16 May 2023, following the filing of the application, the RO decided to establish the fact-finding panel. The RO however, limited the scope of the investigation to the following three allegations:

- a. The PCO forced the Applicant to work from the office during Covid while other staff were working remotely;
- b. The PCO informed the Applicant of a change in his reporting lines while he was on sick leave; and,
- c. The PCO stopped all communications with the Applicant following the Applicant's return from sick leave.

9. On 9 August 2023, the Applicant was interviewed by the fact-finding panel.

10. On 7 November 2023, the RO informed the Applicant of the findings of the fact-finding panel, indicating that there was insufficient evidence to substantiate any of the three allegations against the PCO. The RO decided to close the case pursuant to Section 5.5(h)(ii) of ST/SGB/2019/8 and Section 7.4 of ST/AI/2017/1.

11. On 26 November 2023, the Applicant requested a copy of the fact-finding panel's investigation report from the RO. On 29 November 2023, the RO replied to the Applicant indicating that he had already provided [the Applicant] with a statement of the outcome of the fact-finding panel in his memo dated 7 November 2023.

12. By Judgment No. *Castelli* UNDT/2023/130 issued on 28 November 2023, Case No. UNDT/NBI/2023/042 was dismissed on the ground that it had become moot since the fact-finding panel had been established.

13. On 5 January 2024, the Applicant requested management evaluation of the contested decisions. On 19 February 2024, the Management Advice and Evaluation Section upheld the contested decisions.

14. On 19 May 2024, the Applicant filed the application mentioned in para. 1

15. The Respondent filed a reply on 19 June 2024. He contends that the application has no merit, and that the contested decisions were lawful, rational and procedurally correct under ST/SGB/2019/8 and ST/AI/2017/1.

16. By Order No. 80 (NBI/2024), the Duty Judge instructed the Applicant to, *inter alia*, file a rejoinder.

17. The Applicant filed his rejoinder on 24 July 2024, in which he indicated that he had resigned from UNFIL effective 30 June 2024. He submits that he resigned due to workplace harassment that he experienced and UNIFIL's lack of genuine interest in properly addressing the matter.

18. On 5 August 2024 the case was assigned to the undersigned judge.

19. On 3 September 2024, the Respondent filed a motion for leave to file additional evidence and additional submissions in response to the Applicant's rejoinder. The Respondent highlights that the Applicant did not resign due to the reasons stated in his rejoinder but rather because UNIFIL did not approve his request for outside activity to work for a Swiss Airport Authority while on special leave.

20. On 9 September 2024, the Applicant filed a response to the Respondent's motion for leave to file additional evidence, which included a motion to strike the Respondent's said motion and an urgent motion to vacate and reschedule the 13 September 2024 deadline for the parties to file their closing submissions.

21. By Order No. 124 (NBI/2024) issued on 10 September 2024, the Tribunal:
- a. Rejected the Respondent's motion for leave to file additional evidence and additional submissions in response to the Applicant's rejoinder;
 - b. Granted the Applicant's motion to strike the annexes R/4 to R/15 to the Respondent's motion from the record; and
 - c. Rejected the Applicant's motion to vacate and reschedule the 13 September 2024 deadline for the parties to file their closing submissions.
22. On 13 September 2024 the parties filed their closing submissions.

Submissions

Applicant's submissions

23. The Applicant submits that he has a right under section 5.6 of ST/SGB/2019/8, in conjunction with Chapter XI of the staff regulations and staff rules, to contest the conduct and closing of an investigation on his complaint where

change in the budget, not providing the Applicant with meaningful tasks, and offering unsolicited support for a job opening so that the Applicant would leave UNIFIL. By narrowing the fact-finding panel's investigation in this way, the RO seemingly removed its ability to consider all of the alleged behaviour, the cumulative effect of all the alleged behaviour, and to appreciate the proper context in which the PCO's conduct occurred.

26. In addition, the Applicant submits that the RO's 16 May 2023 decision misrepresented, in part, the complaint. One of the three allegations included in the

29. Further, in line with the above, the Applicant emphasizes that in order to dispel all doubt as to whether the RO acted in a proper and transparent manner in closing the complaint, the Applicant seeks the disclosure of the fact-finding panel's investigation report. This would serve to definitively address the lingering doubt as to what the fact-finding panel actually found in its investigation report. The Applicant is entitled to know, once and for all, whether his complaint was properly investigated or not.

30. As remedies, the Applicant requests:

- a. The disclosure, with appropriate redactions, of the fact-finding panel's investigation report and its attachments/annexes;
- b. Establishment of a new fact-finding panel and an order that it considers and investigates the entirety of the Applicant's 23 September 2022 complaint; and

The Applicant's due process rights as set forth in ST/SGB/2019/8 and ST/AI/2017/1 were respected. The Applicant was interviewed by the Panel and given an opportunity to provide his version of events. The RO informed the Applicant about the outcome of his complaint and provided him with a summary of the Panel's report.

34. The Respondent emphasizes that in this case, the RO's memorandum of 7 November 2023 to the Applicant contained a relevant, accurate and complete summary of the findings in the Panel's report. ST/SGB/2019/8 does not require the Administration to disclose the Panel's report to the Applicant. Further, under section 4.7 of ST/AI/2017/1, staff members are not entitled to information about an investigation or action taken, unless expressly provided for in the present instruction or other administrative issuances.

35. Further, the Respondent seeks to rely on the established jurisprudence of this Tribunal (UNDT-2022-008, para. 40), affirmed on appeal (*Cahn*, 2023-UNAT-1329). In *Cahn*, the Tribunal explained that:

requiring the Organization to inform the aggrieved individual of the final action taken on a complaint seeks to strike a balance between the right of an aggrieved individual, the right to privacy of the alleged offender and the need for sensitivity and confidentiality of the process.

36. Considering the foregoing, the Administration met its obligation to inform the Applicant about the outcome of his complaint, while balancing the aforementioned rights and needs. The Applicant has not provided any evidence or basis for his belief that the RO withheld any information from him to warrant disclosure of the Panel's report. The Applicant has also not demonstrated exceptional circumstances that would entitle him to a copy of the Panel's report. Under the circumstances, the Applicant is not entitled to receive a copy of the Panel's report.

37. In relation to the closure of the Applicant's complaint, the Respondent maintains that the RO acted in accordance with the procedures of ST/SGB/2019/8

and ST/AI/2017/1, taking into account all relevant considerations in reaching its decision under section 7.4 of ST/AI/2017/1 to close the Applicant's complaint.

38. On the Applicant's claim that there was delay in handling his complaint, the Respondent refutes that contention. He asserts that the RO complied with all of the timelines set forth in ST/SGB/2019/8.

39. Regarding the Applicant's claim on the RO limiting the number of allegations to only three, the Respondent submits that the RO's decision to request that the Panel focus its investigation on three specific allegations was lawful under section 5.6 (a) of ST/AI/2017/1.³⁴ The Administration has a degree of discretion as to how to conduct an assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations.

40. The Respondent underlines that in the 16 May 2023 memorandum, the RO informed the Applicant about the Panel's terms of reference ("TORs"), including the specific allegations to be investigated. The Applicant did not contest the TORs at that time. Nor did he contest the Panel's TORs in his management evaluation request. In any event, the Applicant suffered no harm. The Panel ultimately reviewed the Applicant's entire complaint, examined the voluminous record on file and interviewed 13 witnesses.

41. On the Applicant's concern that the PCO was informed of the allegations

Consideration

43. The Applicant firstly challenges the decision to not disclose to him to reportn of (t)1the fac

b. There was insufficient evidence to substantiate the allegation that Mr. J was “involved in informing [the Applicant] about the changes in the reporting lines while [the Applicant] w[as] on sick leave.”

c. There was insufficient evidence to substantiate the allegation that PCO “stopped all communication with [the Applicant] following [the Applicant’s] return from sick leave.”

46. Having so said, Section 5.5. of the Secretary-General’s Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) stipulates that

The preliminary assessment of a report of possible prohibited conduct, investigations of possible prohibited conduct and action taken subsequent to an investigation shall accord with the procedures set out in sections 5 to 12 of ST/AI/2017/1 and with the following additional requirements:

(i) The affected individual and the alleged offender shall be informed on a strictly confidential basis of the outcome of the matter, as follows:

(j) At the request of the affected individual or the offender or alleged offender, the Assistant Secretary-General for Human Resources may provide a statement on the outcome of the matter, which the affected individual or the offender or alleged offender may disclose to third parties, subject to staff regulation 1.2 (i). The statement shall respect the confidentiality of the process and preserve the privacy of those involved

47. Section 5.6 of the said Secretary-General’s Bulletin ST/SGB/2019/8 stipulates that:

[w]here an affected individual or alleged offender has grounds to believe that the procedure followed in respect of the handling of a formal report of prohibited conduct was improper, upon being informed of the outcome of the matter ... the affected individual or alleged offender may contest the matter.

48. The Tribunal finds that the right to know the contents of the report, although summarized, is implicit in the right of a staff member to complain against third persons (right already acknowledged in *Belkhabbaz*, UNDT/2021/047 at para. 21) because this right includes the right to know the reasons for which the Administration did not punish the accused person and the right to challenge this

decision, founding the claim on specific grounds related to the Administration's assessment of the facts.

49. In other terms, the mentioned rule provides the right for the complainant to receive the summary report of the investigation.

50. The same right is acknowledged by the United Nations Appeals Tribunal ("UNAT") in its case law, where such right is granted to the complainant and not only to the accused staff member.

51. In *Ivanov* 2015-UNAT-572, the Appeals Tribunal stated as follows:

24. Under Section 5.18(a) of ST/SGB/2008/5, if the report of an investigation panel concludes that no prohibited conduct took place, the responsible official will close the case. The responsible official must also inform the alleged offender and the aggrieved individual of the outcome of the case by providing them with a summary of the findings and the conclusions of the investigation.

...25. In this case, a summary of the findings and conclusions of the Investigation Panel was provided to Mr. Ivanov. He disagreed with these findings and sought to have them reviewed. This request was denied.

26. Mr. Ivanov, though entitled to receive a summary of the findings of the investigation report, is not entitled to receive a copy of the full investigation report as he is requesting. His case is closed and he

54. In its *Adorna* (UNDT/2010/205) and *Haydar* (UNDT/2012/201) judgments, the Tribunal considered that a decision to transmit an investigation report must be taken on a case-by-case basis, in particular, when the complainant raises exceptional circumstances in support of his request.

55. Following *Nikolic*, UNDT/2019/006, para. 33,

l'exercice d'un tel pouvoir discrétionnaire n'étant pas absolu, il peut être examinée au cas par cas selon certains critères comme, par exemple, si les raisons à l'appui d'une demande de partage d'un rapport sont raisonnables ou s'il y a des circonstances exceptionnelles justifiant un tel partage.

56. The Applicant recalls that “exceptional circumstances” in his case occurred, as one can argue considering the following cumulatively:

57. UN violates its confidentiality obligations to a complainant, (2) a complaint is handled by an individual with a close personal relationship with the alleged offender, (3) the Complaint is initially dismissed without the convening of a fact-finding panel, (4) only for that initial decision to be rescinded upon the filing of a UNDT case, (5) then for the convened fact-finding panel to be hamstrung by the narrowing its investigative ambit without any explanation ever been proffered, (6) then for some of the allegations to be misrepresented to the fact-finding panel such that the outcome on those allegations would be a foregone conclusion, (7) only for the complainant to be personally and expressly assured by the factfinding panel that his whole Complaint would be investigated, (8) then for this assurance to be seemingly contradicted by the information imparted in the closing of the Complaint, and (9) when more than one year and eight months have elapsed since the Complaint was filed and the matter has yet to be definitively resolved. Not only have these tainted the entire investigative and disciplinary process so as to warrant the empanelling of a new fact-finding panel, but they also warrant the disclosure of the investigation report to the Applicant.

58. These allegations call for an exception to the Administration's duty under section 10.1 of ST/AI/2017/1 to maintain confidentiality of the report or to rebut the presumption of regularity.

59. In sum, the Applicant has a right to receive the report in full, with reasonable redactions, from the Administration. Therefore, the claim in question is granted.

63. Having in mind the Applicant's criticism of the recalled decision, it has to be put beforehand that it is not for the Tribunal to make an investigation on the allegations nor to evaluate the merit of the assessment of the facts made by the administration.

64. The Tribunal is not vested with the authority to conduct a fresh investigation into the complaint. 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, or to substitute its own decision for that of the Secretary-General. Instead, it's for the Tribunal to verify if the challenged decision was lawful or not.

65. In *Raschdorf*, 2023-UNAT-1343, para. 41 (see also *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 23; *Nouinouv. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 47; *Likukela*, 2017-UNAT-737, para. 28), UNAT stressed that:

When 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 UNDT can consider 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 Dispute Tribunal to substitute its own decision for that of the Secretary-General.

66. The Tribunal also recalls that, in cases of harassment and abuse of authority, it is not vested with the authority to conduct a fresh investigation into the initial complaint (see *Messinger* 2011-UNAT-123, para. 27). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own decision for that of the Administration (see, e.g., *Sanwidi* 2010-UNAT-084, para. 40). Indeed, as the Appeals Tribunal held in *Sanwidi*:

proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate.

During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

67. However, the Tribunal may “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” (see, *Sanwidi*, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see, *Belkhabbaz* 2018-UNAT-873, para. 80). “When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision” (see, *Belkhabbaz*, para. 80).

68. The Tribunal highlights that the Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and whether to undertake an investigation regarding all or some of the allegations.

69. Pursuant to Section 5.5 of ST/AI/2017/1, in undertaking a preliminary assessment of a report of unsatisfactory conduct, the responsible official may consider the following factors: (a) whether the Applicant's allegations of unsatisfactory conduct 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; and (d) whether an informal resolution process would be more appropriate in the circumstances.

70. Applying these principles to the case at hand, the Tribunal is of the view that the (second) challenged decision was not lawful under section 5.6 (a) of ST/AI/2017/1.

71. Indeed, in the case no specific reasons were given with regard to the limitation of the investigation, so that the narrowing of the fact-finding panel's investigation remained without explications.

72. An examination of the facts show, indeed, that relevant facts were not adequately considered.

73. Apart the change of the Applicant's reporting lines while he was on sick leave in the aftermath of Beirut Port explosion (which was soon revoked by the Administration), the Applicant alleges to have suffered a gradual isolation and side lining and recalls the following facts: the reduction of regular meetings between the Applicant and his FRO for a period of 3-4 months; the Applicant FRO's refusal to meet him unless medically cleared; the lack to allow the Applicant alternative working arrangements (AWA) in force for other personnel; the exclusion from attendance to enlarged Mission Leadership Team (e-MLT) meetings; the lack in 2022 of sharing information by code cable disseminated to all the Applicant's colleagues except him; the lack of commendation by the FRO for activity well performed; the obstruction of attendance to activity of the Pension Fund matters; adding an additional level of management without informing the Applicant notwithstanding the changes in his reporting lines; and finally the alleged pressure aimed at forcing the Applicant out of UNIFIL. In sum, as the Applicant stresses, detailed multiple episodes of possible prohibited conduct, provided with 17 pages of complaint and 49 annexes, have been ignored by the Administration.

74. All these facts, which should not be brought into the realm of a mere disagreement on work performance and on a normal work relationship- have not been investigated at all, and, moreover, no reasons were provided at all by the Administration for this omission (with the exception of a quick generic justification of them as a whole, as a result of the FRO's managerial style, although with the

with the aim to choose the one which is more adherent to the interests protected by the rules.

82. In *Ostensson* UNDT/2011/050, quoted in *Benfield-Laporte* UNDT/2013/162, para 44, the Dispute Tribunal made the following considerations on the definition of sufficient grounds to start an investigation:

the impact of section 5.14 would be defeated if the duty to conduct a formal fact-finding investigation were reduced to cases where prohibited conduct has already been proven. On the contrary, the very purpose of a fact-finding investigation is to establish whether or not the alleged prohibited conduct took place. Therefore, the requirement that there should be “sufficient grounds” to warrant a formal fact-finding investigation’ may not be too narrowly interpreted. (...) [A] factfinding investigation ought to be initiated if the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the bulletin.

83. While under the current regulatory framework, the standard for establishing a fact-finding panel is of ‘sufficient ground’ (which replaced the ‘reason to believe’ standard), the reasoning afforded by UNDT remains valid, since the discretionally of the decision-maker is bound by the context of the alleged misconduct. The role of the decision-maker in applying the standards and to determine whether to call for an investigation or not are ultimately aimed at ensuring that the Organization

when the accused person is the FRO of the complainant, may compromise the peacefulness of the working environment, exposing the latter to possible acts of retaliation or abuse of power by the superordinate worker.

86. Of course, the Tribunal has no clue of such a concrete risk in the case at hand, but it is convinced that a proper investigation, or at least a motivated limitation of it, could have solved any doubt on the fairness of the Administration's behaviour. The Tribunal notes that while the Applicant's FRO was promptly informed of the complaint prior to the investigation process starting, a concession not foreseen by the rules, the Applicant was not even given the opportunity to be heard before the setting of the investigation (with the limitation of its scope) nor had the possibility to provide further explanations, and this entailed a procedural unfairness.

87. The decision to close the case is, therefore, to be rescinded, being unlawful.

88. It is worth recalling that, in *Abboud* 2010-UNAT-100, UNAT held that the circumstances of the allegation of unsatisfactory conduct created an obligation on the part of the Respondent to initiate a preliminary investigation. With reference to the Administration's obligation to take disciplinary action against a third party, UNAT, instead, endorsed the jurisprudence of the former United Nations Administrative Tribunal in Judgment No. 1086, *Fayache* (2003) by holding that:

As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action against another party. Additionally, in *Ryan* UNDT/2010/174, the Applicant requested that disciplinary proceedings be initiated against the persons allegedly responsible for acts of harassment and discrimination against him. The Dispute Tribunal held that "it is not for the Tribunal to order the Secretary-General to take the initiative of instituting disciplinary proceedings against a staff member.

89. The Administration will, therefore, assess the facts indicated in the complaint and take the consequential determinations in order to convene, or not, a formal fact-finding panel or to extend, or not, the investigative tasks of the panel already appointed.

90. No damages cannot be allotted to the Applicant, owing to a lack of evidence of specific economic or moral harm, directly arising from the challenged administrative decisions.

Conclusion

91. In view of the foregoing, the application is GRANTED and the challenged decisions are rescinded.

92. The Respondent is hereby directed to assess the facts indicated in the complaint and take the consequential reasoned determinations -to be communicated to the Applicant-in order to convene or not, a formal fact-finding panel; or to extend, or not, the investigative tasks of the panel already appointed.

(Signed)

Judge Francesco Buffa

Dated this 7th day of October 2024

Entered in the Register on this 7th day of October 2024

(Signed)

Wanda L. Carter, Officer-in-Charge, Nairobi