



Case No.: UNDT/GVA/2012/063

Judgment No.: UNDT/2012/203

Date: 21 December 2012

Introduction

1. The Applicant, a former staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), “assert[s] that the procedures in referring [a fact-finding Panel Report] to the Assistant Secretary-General for Human Resources Management were incorrect and challenge[s] the decisions taken by the Registrar of ICTY.”

2. The Applicant requests the Tribunal:

a. To determine that the Registrar of ICTY (“the Registrar”) failed to apply the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) when referring the matter concerning her to the Assistant Secretary-General, Office of Human Resources Management (“OHRM”), without conducting a separate formal investigation with due notice to her and without considering alternative methods of solution provided for in ST/SGB/2008/5;

b. To determine that the Registrar acted improperly and failed to exercise his discretion as he referred the matter concerning her to the Assistant Secretary-General, OHRM, without observing her right to due process provided for in ST/SGB/2008/5;

c. To order the production of documents on which the decision to refer the matter concerning her to the Assistant Secretary-General, OHRM was based;

d. To award her compensation for emotional anxiety and moral distress.

Facts

3. In June 2011, the Registrar appointed a fact-finding panel (“the Panel”), under ST/SGB/2008/5, to investigate a third-party complaint on alleged prohibited conduct by a staff member under the Applicant’s supervision.

4. The Panel submitted its investigation report to the Registrar, as the responsible officer, on 13 September 2011; it found, inter alia, that the Applicant may have failed to fulfill her obligations as a manager pursuant to section 3.2 of ST/SGB/2008/5 by not taking all appropriate measures to promote a harmonious work environment.

5. On 21 October 2011, the Registrar informed the Applicant about the Panel's findings concerning her, and his determination that her conduct amounted to possible misconduct. He further advised her that he had referred the matter to the Assistant Secretary-General, OHRM for disciplinary action.

6. Subsequently and at several occasions, the Applicant asked the Registrar for further information and documents concerning the allegations against her, in particular, a copy of the initial complaint of the third party in June 2011, the investigation report, the memorandum referring the matter to the Assistant Secretary-General, OHRM, and the response from the United Nations Headquarters.

7. By memorandum dated 1 March 2012, the Registrar informed the Applicant that the Assistant Secretary-General, OHRM, decided not to pursue disciplinary proceedings against her on the basis of the investigation report. The Registrar confirmed to the Applicant that the matter was closed and that no related information was contained in her ICTY Human Resources file.

8. On 30 April 2012, the Applicant requested management evaluation of the decisions taken by the Registrar reflected in his 1 March 2012 memorandum to her, namely confirming to her that the matter was closed and that no related information related to it was contained in her ICTY Human Resources file, and "implicitly ... denying ... [her] repeated oral and written requests for

10. On 30 July 2012, the Applicant filed the present application.

11. On 11 October 2012, the Tribunal held an oral hearing that the Applicant attended in person, and Counsel for the Respondent by videoconference.

Parties' submissions

12. The Applicant's principal contentions are:

- a. The challenged decisions are subject to judicial review by the Dispute Tribunal under its Statute. The procedural errors of the Registrar and the ensuing referral to the Assistant Secretary-General, OHRM, affect the Applicant's rights by entailing possible disciplinary measures. These rights include the right to due process during the conduct of the proceedings. e e etooh en

13. The Respondent's principal contentions are:

a. The application is not receivable pursuant to article 2.1(a) of the Statute of the Dispute Tribunal. The referral of the case to the Assistant Secretary-General, OHRM does not constitute an administrative decision as it does not produce direct legal consequences in the legal order. It is a preliminary step before the actual disciplinary pro

d.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of Ombudsman, under conditions specified by the Secretary-General.

17. Section 5.20 of ST/SGB/2008/5 specifically provides for a right to appeal an alleged procedural irregularity during the preliminary investigation. Any alleged procedural flaw concerning the preliminary investigation has to be challenged pursuant to Chapter XI of the Staff Rules. Thus, a staff member who wants to challenge the proceedings of a preliminary investigation pursuant to section 5.20 of ST/SGB/2008/5 has to observe the provisions set out in staff rule 11.2. Further, it follows from the provisions quoted above that the preliminary investigation under ST/SGB/2008/5 has been established as an independent part of any disciplinary process. Therefore, measures taken on the basis of ST/SGB/2008/5 must not be considered as preliminary decisions that cannot be contested. On the contrary, section 5.20 of ST/SGB/2008/5 urges the concerned person to take appropriate action pursuant to Chapter XI of the Staff Rules.

18. By referring the matter concerning the Applicant to the Assistant Secretary-General, OHRM, pursuant to section 5.18(c) of ST/SGB/2008/5, the Registrar completed the preliminary investigation phase. On 21 October 2011, the Registrar informed the Applicant about this determination.

19. The Applicant had to observe the time-limits under staff rule 11.2(a) and (c) with regard to the 21 October 2011 decision to refer her case to the Assistant Secretary-General, OHRM. As per staff rule 11.2(c), the Applicant had until 20 December 2011 to submit a request for management evaluation. However, she did not do so until 30 April 2012, that is approximately over 4 months later.

20. Article 8.3 of the Tribunal's Statute stipulates that "[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation". In this respect, the Appeals Tribunal has consistently held that:

[T]he UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review. Tim

did not, however, address the Applicant's requests

