



UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. The Applicant, a former staff member at the P-4 level in the Investigations Division in the Office of Internal Oversight Services (“ID/OIOS”), filed an application on 7 April 2014 contesting the decision dated 6 February 2014 of the Under-Secretary-General for Management (“USG/DM”) to close the investigation concerning the Applicant’s complaint of prohibited conduct based on the 27 January 2014 Report of the Fact-Finding Panel (“FFP”) established under ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority).

2. The Applicant requests the Tribunal to overturn the decision of the USG to close the investigation and have his complaint being investigated *de novo*. The Applicant also requests that the Tribunal makes a finding that there is a *facie* case of retaliation against him in the *trouf* of his end of cycle appraisal dated

6. On 11 March 2013, the Applicant submitted a complaint to the Director, ID/OIOS against four of his colleagues, including his First Reporting Officer (“FRO”) and Second Reporting Officer (“SRO”), alleging harassment and abuse of authority. The Applicant claimed *inter alia*, that there were no credible performance shortcomings warranting the imposition of the PIP, which constituted, in his view, an abuse of authority. The Applicant further submitted that the pressure exercised over him to accept and sign the PIP amounted to harassment.
7. By email dated 13 May 2013, the Applicant requested that his supervisor be temporarily relieved of any responsibilities as his FRO pending (a) resolution of the disciplinary actions against him and the Applicant’s SRO and (b) resolution of the outstanding questions relating to the PIP for which the Applicant’s FRO was requested to provide written answers.
8. On 16 July 2013, after receiving his performance appraisal for 2012-2013, the Applicant prepared a document entitled “Integrated Rebuttal of End-of-Cycle Appraisal for 1-Apr-2012 to 31-Mar-2013” which was submitted on 23 July 2013.
9. By confidential letter dated 23 July 2013 to the Secretary-General, the Applicant made a complaint under ST/SGB/2008/5.
10. By email dated 30 July 2013, the Director of the Office of the Chef de Cabinet

a request for management evaluation of the contested decision before the Management Evaluation Unit (“MEU”) prior to filing the application and, in any event, that it should be dismissed on the merits.

17. Following Order No. 118 (NY/2014) dated 14 May 2014, the Applicant filed on 16 June 2014 comments to the Respondent’s reply.

18. On 15 May 2014, the Applicant filed a request for management evaluation of the USG/DM’s decision of 6 May 2014.

19. On 13 June 2014, the MEU informed the Applicant that it was encountering delays in processing cases but that a management evaluation of the decision he contested would be provided as soon as possible.

20. On 25 July 2014, the Chef de Cabinet communicated the outcome of the request of 15 May 2014 for management evaluation of the decision of 6 May 2014.

21. By Order No. 149 (NY/2014) dated 17 June 2014, the Tribunal informed the parties that the case would join the queue of pending cases and would be assigned to a Judge for consideration on its merits in due course.

22. The case was assigned to the assigned judge on 2 July 2014.

23. By Order No. 306 (NY/2014) dated 7 November 2014, the Tribunal directed the Respondent to file a copy of the management evaluation decision in response to the Applicant’s request filed on 15 May 2014. The parties were further instructed to inform the Tribunal if the present application was filed within the deadline established in art. 8.1(d) of the Dispute Tribunal’s Statute and to attend a Case Management Discussion (“CMD”) on 17 December 2014.

24. On 28 November 2014, the parties filed their submissions in response to Order No. 306 (NY/2014).

25. On 17 December 2014, the parties made a CMD whereby both parties concluded that the receivability of the application could be determined by the Tribunal based on the submissions already before it.

26. By Order No. 345 (NY/2014) dated 18 December 2014, the Tribunal stated that the receivability of the application would be decided on the papers before it as a preliminary matter.

27. On 24 March 2015 the New York Registry of the Dispute Tribunal received an email from the Respondent, followed by formal notification on 30 March 2015, informing the Tribunal that Ms. Stéphan Cochard and Ms. Kara Nottingham of the Human Resources Legal Unit, United Nations Office in Geneva ("UNOG"), had taken over the representation of the Respondent in the present case and in Case No. UNDT/NY/2014/017 (Gallo). The Tribunal notes that similar e-mails and notifications were filed on 24 March 2015 in two of the other Applicant's cases registered before the Tribunal (Case Nos. UNDT/NY/2015/013 and UNDT/2015/014). In response to Order Nos. 51 and 52 (NY/2015) dated 30 March 2015, Order Nos. 61 and 62 (NY/2015) dated 10 April 2015, issued in Case Nos. UNDT/NY/2015/013 and UNDT/2015/014, the Applicant made submissions on 6 and 16 April 2015, which incorporated the present case and Case No. UNDT/2014/017, by reference on the same page. However, the Applicant made no direct filing in the present case.

28. On 23 April 2015, by Order Nos. 67 and 68 (NY/2015), respectively issued in Case Nos. UNDT/2015/013 and UNDT/2015/014, the Tribunal ordered that Ms. Cochard and Ms. Nottingham, as Counsel for the Respondent of record, be

granted access to all filings in these cases in the New York Registry of the Dispute Tribunal.

29. By Order No. 70 (NY/2015) dated 28 April 2015 issued in Case No. UNDT/2014/017, the Tribunal took act of notification of change of Counsel in that case, since there was no reason to depart from Order Nos. 67 and 68 (NY/2015).

30. The Tribunal notes that, at the end of the CMD held on 17 December 2014, the parties agreed that the receivability of the application could be determined by the Tribunal based on the submissions already filed before it on this legal issue. By Order No. 345 (NY/2014) issued on 18 December 2014, the Tribunal decided that it would determine the receivability of the present case on the basis of the parties' submissions filed before it. Therefore, the present case no further acts of representation were requested by a party or by the Tribunal after 19 December 2014 and no further submissions were made.

31. The Tribunal is of the view that a change of Counsel made by any party and notified to the Tribunal can only be taken into account in cases where the proceedings before the Tribunal are still pending. Consequently, the Respondent's change of Counsel can have effects only in the above mentioned pending cases - UNDT/NY/2014/017, UNDT/NY/2015/013 and UNDT/NY/2015/014, where the proceedings are still ongoing, but not the present one where the debates were closed before 24 March 2015.

Applicant's submissions

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

- a. On 15 November 2013, the FFP failed to complete the interview with everything that was pertinent to the original complaint and it was agreed that

the Applicant will be recalled for further interview. The Applicant was never recalled for an interview and the remainder of the information was never considered, including the fact that he required to take medical leave for stress from 28 May to 25 June 2013. The Panel interviewed all four subjects in the original complaint, plus four additional witnesses, but the Applicant was not given the opportunity to propose witnesses;

b. Both the Panel and the responsible official failed to exercise their mandate and to investigate not only the original complaint but also the handling of the original complaint by the USG/OIOS and the harassment that continued after 11 March 2013, which included the Applicant's performance appraisal. They also failed to investigate the legitimacy of the PIP and the validity of the decision to impose it. The question of why, if the Applicant genuinely had "performance shortcomings", OIOS did not insist to implement a PIP was not addressed;

c. The Applicant also stated that both the Panel and the responsible official failed to consider the preexisting toxic working environment described in Judgment No. UNDT/2013/36 published a couple of weeks before the Panel issued its report, and appear to have failed to consider the abuse of the mediation process and the evidence of the hostility.

33. The Applicant stated on 16 June 2014, in response to the Respondent's contentions on receivability, that the application was receivable for the following reasons:

a. The application does not relate to an administrative decision affecting the Applicant's rights under his terms and conditions of appointment or impacting on the rights of any other staff members. The Applicant was

therefore correct in filing his application before the Tribunal given that the case would not have been receivable before the MEU;

b. The application relates to a decision following the completion of a disciplinary process. In that regard, the Applicant followed the advice of the MEU on the Organization's intranet, *Seek*, that staff members may file an application directly to the Tribunal. Further, "[i]t is irrational that a decision not to impose a disciplinary measure should be subject to any different evaluation procedure from a decision to do so". Since there is no requirement to seek management evaluation, art. 8.1(d)(ii) of the Tribunal's Statute applies and the application is receivable as it was made within 90 calendar days of the Applicant's receipt of the contested decision of 6 February 2014;

c. It is irrational to request the MEU to review the decision of the USG/DM to whom the MEU directly reports. The Applicant would be denied, in these circumstances, an impartial, independent, fair, responsible or objective evaluation of the contested decision.

Respondent's submissions

34. The Respondent's principal contentions

c. Requesting management evaluation of the contested decision is mandatory. The Applicant's belated request for management evaluation, which was also time-barred, has no impact on the present proceedings: the Applicant cannot retroactively comply with staff rule 11.2 and

his office. His claims, to the contrary, are without merit. The investigation was conducted properly and/or the factual findings of the Panel were based on a sound investigative process.

Consideration

Applicable law

36. Staff rule 11.2 (Management evaluation) as published in ST/SGB/2014/2 (Staff Regulations and Staff Rules) states that (emphasis added):

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a) shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 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 the Ombudsman, under conditions specified by the Secretary-General.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending

efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

37.

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

...

5.20 Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

Findings

39. Article 2.1(a) of the State provides for the Tribunal's competence to hear and pass judgment on an application filed by an individual to appeal an administrative decision alleged to be in non-compliance with the terms of appointment or the contract of employment.

40. Pursuant to art. 8.1 of the Dispute Tribunal's Statute read together with staff rule 11.2(a), an applicant must, as a mandatory first step, request management evaluation of the contested decision before filing an application with the Dispute Tribunal (*Planas* 2010-UNAT-049; *Adjani et al.* 2011-UNAT-108) The purpose of

such management evaluation is primarily to allow the management to review, and possibly correct, an administrative decision which a concerned individual wishes to challenge, and thereby avoid unnecessary litigation before the Dispute Tribunal (*Kratschmer* UNDT/2012/148).

41. The deadline to file a request for management evaluation is mandatory and has important consequences upon the receivability of the application before the Tribunal. The Staff Rules and the jurisprudence of both the Dispute Tribunal and the United Nations Appeals Tribunal (“Appeals Tribunal”) have consistently stressed the importance of compliance with statutory deadlines (*Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069, *Christensen* 2012-UNAT-218, *Odio-Benito* UNDT/2011/019 and *Larkin* UNDT/2011/028). Time-limits exist for reasons of certainty and expeditious disposal of disputes in the workplace and an individual may by his own action or inaction forfeit his right

a disciplinary process when the advice staff members is that they may file an application directly to the Tribunal” (emphasis in original). He also mentioned that a decision not to impose a disciplinary measure should be subject to the same evaluation procedure as the decision to impose a disciplinary measure and that in the present case, since the MEU reports directly to the USG/DM, an independent, responsible, fair and impartial review of a decision made by their own superior was not possible.

48. The Tribunal notes that, in the present case, the Applicant is contesting “the decision to accept the report of a finding panel to investigate a complaint of prohibited conduct under ST/SGB/2008/5” made on 6 February 2013. It results that the contested decision is an administrative decision which is subjected to the requirement of MEU’s review according to the mandatory rules from art. 5.20 of ST/SGB/2008/5 and it does not fall under the exemption of staff rule 11.2(b). The Tribunal finds that the Applicant erred in considering that the contested decision is having a disciplinary nature and is exempted from MEU’s review. There is no evidence that the contested decision was the result of any disciplinary proceedings and such an argument is without merit. As stated in *many* 2015-UNAT-521, an applicant “cannot evade the statutory obligation of requesting management evaluation by characterizing the disputed decision as a disciplinary matter” (paras.11-12).

49. The Tribunal further notes that, as confirmed by both parties, the Applicant received notification of the contested administrative decision on 10 February 2014.

50. The jurisprudence of the Tribunal clearly states that the Tribunal does not have jurisdiction to waive the deadline for the filing of requests for management evaluation with the MEU. Consequently, considering that the Tribunal does not have the authority to waive the 60-day time limit in staff rule 11.2(c), any request for management evaluation of the contested decision made on 6 February 2014 and

Case No. UNDT/NY/2014/027

Judgment No. UNDT/2015/036

58. The Tribunal concludes that the Applicant timely followed the mandatory procedural step to request management evaluation prior to filing an application before the Tribunal, only for the administrative decision from 6 May 2014 and not for the decision from 6 February 2014.

59. The Tribunal is competent to review its own jurisdiction in accordance with art. 2.6 of its Statute and the Tribunal finds that, in the absence of a prior request for management evaluation of the contested decision from 6 February 2014, it has no competence to review it. Consequently, the application is to be rejected as not receivable and none of the submissions on mer