

Introduction

1. The Applicant, a former Investigator at the P-4 level with the Office of Internal Oversight Services (“OIOS”), contests the decision of the Under-Secretary-General (“USG”) of OIOS to establish a fact-finding panel to investigate a complaint of prohibited conduct against him under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The Applicant seeks an order by the Tribunal overturning the decision made by the USG/OIOS on 31 January 2014 to appoint a panel under ST/SGB/2008/5 to investigate the alleged prohibited conduct on 14 January 2014. Furthermore, he requests, in the absence of such finding by the Ethics Office, the Tribunal to find that there exists a *prima facie* case of retaliation against the Applicant, in the form of his end of cycle appraisal dated 26 June 2013 and the series of complaints made against him in the period from 14 March 2013 to 31 January 2014, following on from the protected act of the report of misconduct he made on 11 March 2013. Finally, he asks the Tribunal to remove the panel members from the fact-finding investigation on the grounds that the appointment of any OIOS staff member to any investigative panel established to investigate alleged misconduct by any other OIOS staff member, by definition, carries the inherent risk of a perceived conflict of interests.

3. The Respondent claims that the application is not receivable *ratione materiae* as it does not concern a final administrative decision under art. 2.1(a) of the Dispute Tribunal’s Statute, but a preliminary step in the process of investigating a third party complaint against the Applicant.

4. With the consent of the parties, in Order No. 70 (NY/2015) dated 28 April 2015, the Tribunal determined that the preliminary issue of receivability *rationae materiae* was to be decided on the papers before it.

to take one of the courses of action specified in Section 5.18 therein.

25. The Respondent's contentions on receivability may be summarised as follows:

a. The decision to appoint a fact-finding panel does not constitute a final administrative decision for the purposes of art. 2.1(a) of the Dispute Tribunal's Statute and in accordance with the former United Nations Administrative Tribunal's definition in Judgment No. 1157, *Andronov* (2003). This definition has been endorsed by the Dispute Tribunal and Appeals Tribunal on various occasions (see, for instance, *Tabari* 2010-UNAT-030; *Schook* 2010-UNAT-03; and *Gehr* UNDT/2011/178);

b. The contested decision to appoint a fact-finding panel under ST/SGB/2008/5 does not produce direct legal consequences for the Applicant—it cannot be characterised as a final administrative decision and was only a preparatory step in investigating the complaint under ST/SGB/2008/5;

c. The appointment of a fact-finding panel is a preliminary step in the formal procedures to investigate a third party complaint of prohibited conduct under ST/SGB/2008/5. If a formal fact-finding panel has been appointed and an investigation has been initiated, the Applicant may only challenge a final administrative decision which results from the conclusions of the investigation report pursuant to sec. 5.18(c) of ST/SGB/2008/5. This constitutes the conclusion of the formal procedures and a final (contestable) administrative decision. It is not until the process is completed or abandoned that the subject of an investigation has a decision that affects the terms of his or her contract in accordance with art. 2.1(a) of the Tribunal's Statute;

d. Similarly, all of the steps in an ongoing selection process prior to the final selection decision are qualified as a preparatory decision which are

one of a series of steps which lead to a final (contestable) administrative decision (*Ishak* 2011-UNAT-152, para. 29). In this connection, the Appeals Tribunal has held that issues such as the “composition of the rebuttal panel can only be challenged in the context of an appeal against the outcome of that process, but cannot alone be the subject of [an] application to the UNDT” (*Gehr* 2013-UNAT-313)”;

e. Similarly, the Appeals Tribunal in *Nguyen-Kropp & Postica* 2015-UNAT-509, paras. 34 and 35, provided that:

... Initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2.1 of its Statute.

... From the foregoing, we hold that the [Dispute Tribunal] erred on a question of law and exceeded its competence in accepting [the Applicants’] applications as receivable.

f. This holding is controlling and directly applicable in the present case, as the Applicant is similarly contesting the decision to appoint a fact-finding panel to investigate a complaint of prohibited conduct under ST/SGB/2008/5 lodged against him.

26. The Applicant’s contentions on receivability may be summarised as follows:

a. The Tribunal has jurisdiction *rationae materiae*. Unlike the grounds considered in *Nguyen-Kropp & Postica* UNAT-2015-509, the present application challenged a decision under ST/SGB/2008/5, which provides, at sec. 5.20, that:

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.

b. The Tribunal also has jurisdiction *rationae temporis*. Staff rule 11.2 requires that matters are first referred to the MEU. The Applicant applied to the MEU on 4 February 2014 and received a response from it on 10 March 2014;

c. Staff rule 11.4 further requires that an application against a contested administrative7p4ed

notwithstanding the egregious misconduct recorded therein; and (ii) sought to have the Applicant suspended, prior to the appointment of the panel, for making a satirical comment on the judgment because, in her own words: “I feel particularly strongly that a clear message needs to be sent that this behavior is inappropriate for anyone at any level and that it will not be condoned or ignored”;

g. The decision was tainted by bad faith from the outset. The alleged misconduct for which the Applicant was investigated was tied to the findings in *Nguyen-Kropp & Postica* UNDT/2013/176, in which the USG/OIOS’s own conduct was implicated. The attempt to have the Applicant placed on administrative leave calls into question just what the actual desired objective of the contested decision was.

Consideration

Receivability rationae temporis

27. The present application was filed on 20 March 2014, within 90 days of the receipt by the Applicant of the 10 March 2014 management evaluation response. It is therefore receivable *rationae temporis*.

Receivability rationae materiae

28. Article 2.1(a) of the Dispute Tribunal’s Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-USve-US

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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.

5.19 Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

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.

30. Staff rule 11.4(a) states that:

A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

31. It follows from the documents filed by the parties that, on 16 January 2014, the Applicant's first reporting officer sent a report to the Director of the Investigations Division, OIOS, which served as a request for disciplinary proceedings against the Applicant. On 17 January, the report was sent to

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finalised, including the issuance of the final administrative decision by the decision-maker. This interpretation is in line with the content of staff rule 11.4(a) which states that an application against a contested administrative decision may be filed with the Dispute Tribunal.

40. In *Nguyen-Kropp & Postica* 2015-UNAT-509, the Appeals Tribunal held that:

31. ... Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

32. This accords with another general principle that tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

...

34. Initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute.

41. The findings of the Appeals Tribunal are binding for the Dispute Tribunal and they are applicable in similar cases (*Igbinedion* 2014-UNAT-410, paras. 23- 25, *Zeid* 2014-UNAT-401, para. 22, and *Hepworth* 2015-UNAT-503, para. 40).

42. As results from the above considerations, the contested decision in the present case is a decision to initiate an investigation by appointing a fact-finding panel, and this decision is not a final decision but the first step in the investigative process under ST/SGB/2008/5. Therefore, the contested decision is not an administrative decision capable of being appealed before the Tribunal and the findings of the Appeal Tribunal indicated in para. 14 are fully applicable in this case.

(Signed)

Hafida Lahiouel, Registrar, New York