
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/043

Judgment No.: UNDT/2020/002

Date: 10 January 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

Introduction

1. On 7 May 2017, the Applicant, a former staff member working with the United Nations-African Union Hybrid Operation in Darfur (“UNAMID”) filed an application before the Dispute Tribunal contesting the following decisions:

- a. The decision to place an adverse note in his Official Status File (“OSF”).
- b. The decision to deny him his right to defend himself, to due process and to work, by withholding the disciplinary process that the Secretary-

in-Charge of the Humanitarian and Protection Strategy Unit, a position he held until August 2014.¹

4. On 25 March 2014, OIOS received, from the Office of Legal Affairs (“OLA”) at UNAMID, a report of possid

harassment, and abuse of authority). Accordingly, the ASG/DFS approved the placement of a Note in the Official Status File (OSF) of the Applicant.⁶

9. On 9 January 2017, the Applicant was notified of the placement of the Note in his OSF pursuant to ST/AI/292 (Filing of adverse material in personnel records).⁷ On 25 January 2017, the Applicant, in a letter sent to the ASG/OHRM challenged the placement of the Note in his OSF and stated that the investigation conducted by OIOS had major legal, procedural and factual flaws.⁸

10. On 14 February 2017, the Applicant requested for management evaluation of the contested decision.⁹ The Applicant received the response on 5 April 2017.¹⁰

Submissions

Receivability

Respondent's submissions~~10~~

leading to an administrative decision, and as such does not directly affect the legal rights of a staff member.

14. The Applicant was separated from service previously for a prior matter in which he was found to have engaged in misconduct. The Note merely indicates that a matter was unresolved at a time when the Applicant was no longer a staff member.

15. Providing the Note to the Applicant served to provide notice to the Applicant of the placement of the Note, and also afforded an opportunity for the Applicant to provide comments which could be included with the Note. This accorded with the requirements of ST/AI/292 regarding the placement of information that may be considered adverse on a staff member's OSF.

16. The Note conveys no decision and explicitly provides for the possibility of further review of the matter should the Applicant rejoin the Organization. The Note is not in any way a ban on his employment and it in no way conveys any finding as to whether he engaged in misconduct. The Note states that OHRM should be contacted if the Applicant rejoins the Organization. The Note does not state that OHRM should be contacted if the Applicant applies to join the Organization or is being considered for a position. Accordingly, the Applicant's contentions that the placement of the Note constitutes the placement of adverse material carrying direct legal consequences is incorrect and misplaced at this juncture as he is being specifically informed that no decision has been taken on the matter.

Applicants submissions

17. The Note placed in the Applicant's OSF constitutes a unilateral decision taken by the Administration in a precise individual case - individual administrative act-, which produces direct legal consequences to the legal order, affecting a former staff member's terms and conditions of appointment.

18. The Secretary-General took the decision pursuant to ST/AI/292 and this constitutes adverse material related to the conduct attributed to the Applicant.

19. The Secretary-General's decision to place an adverse Note in his OSF as a preliminary decision within the already initiated disciplinary process contravened then applicable ST/AI/371/Amend.1 (Revised disciplinary measures and procedures).

20. The placement of the Note has become an additional worrisome deterrent to the Applicant's search for a job in his professional field. Despite the assertion by the Respondent that the OIOS investigation report has not been physically placed in his OSF, it is obvious that the Administrative Law Section OHRM will refer to it in case of an inquiry from a prospective employer. In order to avoid pernicious and irreversible consequences to his reputation and compromise future job opportunities within the United Nations Common System, the Applicant has been forced not to apply for a number of posts that have become available. The Applicant has suffered similar concerns in the case of applications out of the United Nations Common System.

Merits

Applicants submissions

21. The Applicant submits that the decision to place a Note in his OSF is arbitrary, constitutes a violation of his fundamental rights and a denial of justice, and, importantly, inappropriately attempts to avoid accountability on the part of the Respondent.

22. By way of remedy, the Applicant requests the Tribunal to order that: (a) the Note placed in his OSF and all other possible negative materials relating to him be

28. Article 2(1)(a) of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) To appeal an administrative decision that is alleged to be in non-

such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.

34. As indicated earlier in this judgment the Applicant does not dispute that the Respondent complied with ST/AI/292 to the letter. He concedes that the Respondent acted within the law.

35. The Applicant however feels that although the Respondent acted within the regulatory framework prevailing at the time, the Tribunal should still find that the placing of the Note was arbitrary and that it has direct legal consequences on his contract or terms of employment in that among other grievances, he is barred from ever getting re-employed within the United Nations system.

36. This however is not provided as a consideration under the relevant administrative issuance. The Applicant's conclusions are also contrary to the objective for which the Note was placed, which was to record that the Applicant separated from service and at the time of separation, a matter had not been resolved and that the Administrative Law Section should be contacted in the event that the Applicant should become re-employed with the United Nations Common System in the future.

37. The Respondent's right to place a Note in a OSF and the obligation to allow the staff member including former staff member to make written comments on the Note if he or she wishes derives from the principle that:

The Secretary -General clearly has authority to administer the Organization's records, including those of former staff members, and to ensure they reflect the staff member's performance and conduct during his or her period of employment. This authority does not lapse upon the staff member's separation from service...to conclude otherwise would mean that the conduct by a staff member in his or her last days o-16(r)-0.0 358.8 309-27(vi)17(c)3(e)

in administrative matters by simply resigning or otherwise separating from the Organization.¹²

38. This UNAT precedent is clear and illustrative of the intention of ST/AI/292. It is intended to allow the Secretary-General to manage records, properly manage investigations and discipline and record a reflection of a staff member's performance and conduct during employment. A staff member including a former staff member has an opportunity to set the record straight through placing of his or her own comments in the OSF.

39. The Applicant's right under ST/AI/292 was exercised by placing his comments in his OSF. It is therefore not correct to allege that "[he]has already exposed in detail (his emphasis) every element about the applicability of ST/AI/292" to mean that "The Note de facto bans the Applicant from re-employment with the Organization and from working with International Organizations of the UN Common System".

40. On that basis, the application on the first issue is not receivable as it does not disclose any administrative decision that has any direct legal consequences on the Applicant's contract or a term of his employment.

- (ii) The alleged failure of the Respondent to afford the Applicant his due process rights in the manner that he handled the allegations of misconduct regarding four complaints filed against the Applicant

41. The Applicant does not dispute that the disciscaverlyp0(f)32(r)-7(pr)8(Tm [() TJ ET Q

open for the Tribunal to reach findings of fact and make legal pronouncements on

Entered in the Register on this 10th day of January 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi