
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/008

Judgment No.: UNDT/2021/124

Date: 27 October 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. On 22 March 2021, the Applicant, a staff member of the Secretariat for the Convention on Biological Diversity (“SCBD”) of the United Nations Environment Programme (“UNEP”), appealed the Administration’s determination that no retaliation had been established following her request for protection against retaliation.
2. On 21 April 2021, the Respondent replied that the application is without merit.
3. For the reasons provided below, the Tribunal finds that the contested decision is unlawful and grants the application in part.

Relevant facts

4. On 7 June 2019, in application of ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), the Applicant submitted a request for protection against retaliation to the Ethics Office. The Applicant alleged that the then Executive Secretary of the SCBD (“Executive Secretary”) had retaliated against her after she had cooperated with a fact-finding panel investigation into some other allegations of misconduct by the Executive Secretary (“the retaliation complaint”).
5. On 18 June 2019, the Applicant filed a separate complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) referring to many of the same incidents identified as retaliation in her 7 June 2019 complaint (“the harassment complaint”).
6. On 27 August 2019, the Ethics Office notified the Applicant that it had found a *prima facie* case of retaliation with respect to some of the Applicant’s allegations, which it had referred to the Office of Internal Oversight Services (“OIOS”) for investigation.

7. On 18 September 2019, OIOS informed the Ethics Office that a fact-finding panel had been convened to investigate the Applicant's harassment complaint. OIOS stated that given the overlap between the inquiries into the harassment complaint and the retaliation complaint, OIOS had decided to temporarily suspend the investigation into the retaliation complaint pending the outcome of the fact-finding panel investigation.

8. On 3 October 2019, the Ethics Office responded to OIOS that it was not of the view that a suspension of the retaliation investigation was warranted.

9. On 30 November 2019, the Executive Secretary separated from the Organization.

10. On 6 January 2020, OIOS advised the Ethics Office that since the Executive Secretary had separated from the Organization in November 2019, the Applicant did07(the)22()-89(E)-8

Considerations

Scope of the application

15. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

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20. Therefore, all allegations concerning matters that the Ethics Office did not find to have raised a *prima facie* case of retaliation fall outside the scope of this case and will therefore not be addressed.

Allegations predating the protected activity

21. Section 1.4 of ST/SGB/2017/2/Rev.2 defines retaliation as “any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened or taken for the purpose of punishing, intimidating or injuring an individual because that individual engaged in an activity protected by the present policy ...”.

22. By way of consequence, the alleged retaliatory act can only have taken place after the complainant’s engagement in a protected activity.

23. The Ethics Office determined that the Applicant’s cooperation with a fact-finding panel as of 14 January 2019 constituted a protected activity. Therefore, any retaliatory act in the sense of ST/SGB/2017/2/Rev.1 may only have occurred after that date.

24. Accordingly, the Tribunal will not review any allegations with respect to events prior to 14 January 2019.

Allegations concerning the Applicant’s protection during the investigation

25. The Applicant alleges that the Administration failed to take preventative action against the continuing retaliation following the Ethics Office’s *prima facie* finding.

26. The Tribunal notes that any interim measures recommended by the Ethics Office and their implementation by the Administration under sec. 8.3 of ST/SGB/2017/2/Rev.1 are also not within the scope of the present case. Any action or inaction of the Administration following an Ethics Office recommendation in this respect should have been challenged individually at the appropriate time.

Submission to the Chair of the Ethics Panel of the United Nations

27. As stated above, the Alternate Chair of the Ethics Panel is only competent to review preliminary determinations by the Ethics Office.

28. Therefore, the Applicant did not follow the correct procedure when she sought review of the 18 December 2020 decision through the Alternate Chair of the Ethics Panel of the United Nations, as the Ethics Office explained to her in an email dated 21 December 2020.

Allegations pertaining to the Applicant's 18 June 2019 complaint of harassment

29. Throughout the application and the submissions to the Alternate Chair of the Ethics Panel and the Management Evaluation Unit, the Applicant regularly refers to matters that pertain to her 18 June 2019 complaint pursuant to ST/SGB/2008/5.

30. The Administration's handling s

33. With respect to the procedural irregularities, the Applicant contends that OIOS did n

40. On 3 October 2019, the Ethics Office responded to OIOS that it was not of the view that a suspension of the retaliation investigation was warranted. After this response, there is no evidence that OIOS took any investigative action in this matter until it contacted the Ethics Office again on 6 January 2020 to inform that it would

47. Finally, after the Ethics Office rejected the termination of the retaliation investigation in January 2020, there is also no evidence of any justification for the subsequent nine-month delay in completing the investigation.

48. Given these circumstances, even if the 120-day deadline to complete a retaliation investigation is not mandatory, the Tribunal cannot but conclude that the delays and unjustified attempts to suspend or terminate the investigation in this case constitute an egregious

54. In *Thiombiano* 2020-UNAT-978 (para. 34), the Appeals Tribunal recalled its long

She was explained and advised by [a treating physician] on multiple occasions that there is a direct and casual psychosomatic relationship between mentally (psychologically and emotionally) stressed out mind set and aggravating, worsening or developing of full range of different debilitating physical conditions and dysfunctions (including but not limited to which she was treated medically at our facility).

72. Accordingly, the Tribunal is not satisfied that the compensation requested by the Applicant is commensurate to the established illegality.

73. In the Tribunal's view, an award of USD5,000, coupled with the redressing effect of this judgment, constitutes a just compensation for the harm caused by the unlawful decision.

Conclusion

74. In light of the foregoing, the Tribunal DECIDES that:

- a. The Application is granted in part;
- b. The Applicant is awarded compensation in the amount of USD5,000 for the violation of her right to have her complaint of retaliation properly handled;
- c. The Applicant is awarded compensation in the amount of USD5,000 for the harm caused by the unlawful administrative decision.

