Judgment No. 2018-UNAT-868

[redacted]

Counsel for Mr. Sarwar: George G. Irving

Counsel for Secretary-General: Stéphanie Cartier

9. On 20 October 2014, Mr. Sarwar submitted a formal complaint of harassment, discriminatory treatment and abuse of authority against his FRO and SRO, pursuant to the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

10. On 30 October 2014, the Director, DSPD, DESA, addressed a letter to Mr. Sarwar conveying the decision not to grant him a continuing appointment and to separate him from service upon the expiration of his fixed-term appointment on 30 November 2014. The letter stated that the decision had been based on the reports of the rebuttal panels for the past two e-Performance cycles, which determined that Mr. Sarwar's service only partially met expectations.

11. On 7 November 2014, Mr. Sarwar requested management evaluation of the decision to separate him from service.

12. By letter dated 4 December 2014, the Under-Secretary-General of the Department of Management (USG/DM) informed Mr. Sarwar that the Secretary-General had decided to uphold the decision to separate him from service.

13. On 7 December 2014, Mr. Sarwar was separated from service upon the expiration of his fixed-term appointment.[1]

14. On 26 December 2014, following a review of Mr. Sarwar's complaint of 20 October 2014 under ST/SGB/2008/5, the USG/DESA convened a fact-finding panel (Investigation Panel) to conduct an investigation into Mr. Sarwar's complaint. The Investigation Panel composed of two investigators from the roster of trained investigators maintained by the Office of Human Resources Management (OHRM).

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[1] On 12 February 2015, Mr. Sarwar filed an application before the UNDT, contesting, *inter alia*, the decision to separate him from service upon the expiration of his fixed-term appointment on grounds of unsatisfactory performance. On 28 September 2016, the UNDT issued a judgment on Mr. Sarwar's application challenging the decision to separate Mr. Sarwar from service. The said judgment was subsequently vacated by this Tribunal. In particular, this Tribunal found that "there [was] nothing on record to suggest that the standards and performance expectations to which Mr. Sarwar was held were manifestly unfair" and that "there [was] no basis for holding the decision to separate Mr. Sarwar from service as unlawful." As set out in more detail below, the impugned Judgment relates to the decision to close Mr. Sarwar's complaint of harassment and abuse of authority pursuant to ST/SGB/2008/5

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negatively influenced his career. The UNDT also found that there had been procedural irregularities in connection with the process under ST/SGB/2008/5. In particular, the UNDT noted that there had been unlawful procedural delay with respect to reviewing and investigating Mr. Sarwar's complaint. The UNDT rescinded the contested decision to close the matter underlying Mr. Sarwar's formal complaint, and held that there was no need for a new investigation as Mr. Sarwar was found to be the victim of harassment and abuse of authority by his FRO and SRO. In addition, the UNDT awarded compensation of one year's net base salary as moral damag2 moral d.8(s)26.8(m) [illegible]

particular circumstances of the case. Mr. Sarwar had filed a medical note dated 2 June 2014 suggesting that he take a one-week leave, another medical note which states that on 6 November 2014, he was "stressed at work, can't concentrate", and another medical note by another doctor, who Mr. Sarwar said was his brother, stating that Mr. Sarwar had been treated for generalized anxiety and depression from January 2015 to June 2015. Mr. Sarwar became aware of the decision to close his complaint on 26 February 2016. Therefore, any moral harm allegedly sustained before that day cannot be directly attributable to the decision to close his complaint, since it was either unknown to Mr. Sarwar or it had not yet been taken. Rather, the UNDT's award of compensation appears to be directly

29. Contrary to the Secretary-General's assertion, Mr. Sarwar submits that the UNDT carefully and correctly limited its task to reviewing the alleged facts in order to determine if they are established and to considering if the established facts can be regarded as acts of discrimination, harassment and abuse of authority. Specifically, the UNDT, after reviewing the evidence that was presented to the Investigation Panel, considered that the findings and recommendations/conclusions made by the Investigation Panel were not supported by the evidence and therefore incorrect. In doing so, the UNDT did not usurp the role of the Investigation Panel, but rather provided a proper judicial review of the evidence against the legal requirements. To suggest that this amounts to an unauthorized *de novo* investigation is to deny staff members of any judicial remedy should they feel the rejection of a complaint is improper. By attempting to confine the role of judicial review to the issue as to whether the *pro forma* procedural requirements for handling a complaint were followed, the Secretary-General is in fact trying to suppress a conclusion he does not like and unreasonably limit access to justice.

30. As for the procedural delay, Mr. Sarwar submits that he became increasingly disturbed by the cursory manner in which his complaint was treated, initially by the lack of any remedial efforts and later by the unconscionable delay in light of his professional dislocation. In particular, the submission of the investigation report, which is normally expected within three months, took twice as long. The Secretary-General's categorization of "voluminous documentary evidence" is intentionally misleading as Mr. Sarwar was expected to produce the documentation at issue and there is little evidence of any real analysis of the documentation. The Secretary-General's claim of "error" in sending a confidential report to an invalid e-mail address is likewise disingenuous. The Investigation Panel had no trouble in contacting Mr. Sarwar and they knew the correct contacts and those of his counsel. There was no follow up to ensure receipt of the investigation report and no response to Mr. Sarwar's inquiries until the lack of response had been brought to the Tribunal's attention.

31. With respect to the lack of a second interview, Mr. Sarwar notes that the fact that the Chair of the Investigation Panel had stressed that it was an initial interview and that they would speak with Mr. Sarwar again was not contested by the Secretary-General in the proceedings and was therefore admitted. It is thus not open to the Secretary-General to raise this matter on appeal. Mr. Sarwar had proceeded with the requested interview only a few days after arriving in the United Kingdom with no access to his files or records. The failure to provide Mr. Sarwar with

an opportunity to rebut the information provided by his supervisors and the neglect to interview anyone from the rebuttal panels reflects a failure of justice which the UNDT was correct to cite along with other substantive irregularities.

32. Mr. Sarwar further submits that the UNDT correctly identified the harassing behavior and the consequences of the Organization's failure to address the problem, following which it carefully assessed the quantum of damages in accordance with the Appeals Tribunal's standard of proof. In fact, moral damages are the only remedy available in cases of breach of a staff member's right to a proper working environment, violation of his right to due process, and the right not to be subjected to harassment and abuse of authority. In the present case, the offensive and humiliating conduct of Mr. Sarwar's supervisors and peers directly led to the ending of Mr. Sarwar's United Nations career. The UNDT carefully weighed the psychological impact of the mistreatment Mr. Sarwar received while employed, as well as the damage from violation of his due process rights arising from the failure to address his

35. Mr. Sarwar submits in his answer to the appeal that it was not a matter of *res judicata* since the UNDT examined his claims of harassment and abuse of authority "in terms of how his work and career were managed by his FRO and SRO" and that "[i]n this respect, the two rebuttal reports that covered the initial two years of service were highly relevant."

36. The UNDT considered that Mr. Sarwar was subjected to harassment and abuse of authority from both his FRO and SRO and that he had no real chance to improve his performance.[8] Indeed, Mr. Sarwar's harassment complaint related to the assessment of his performance by his FRO and SRO. We note that, in the case of *Sarwar*, this Tribunal concluded that: "There can be no denying that Mr. Sarwar was acquainted with what was expected of him, was properly assessed in numerous assignments, was afforded an opportunity to improve and failed to do so in key performance areas, thus demonstrating his unsuitability for the position."[9] In this regard, we agree with the Secretary-General that the UNDT erred in law by re-opening a matter that had already been the subject of a final judgment of this Tribunal. -Nw[1g.131TJ-35.Even if(Ge)66(h.9(d taTTw[(th)) of 5.dh17o-4.8(]TJ-200Tw[(th))