



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

IVANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Joseph Grinblat

Counsel for Respondent:

Introduction

1. The Applicant, a Population Affairs Officer in the Population and Development Section (“PDS”), Population Division, in the Department of Economic and Social Affairs (“DESA”), contests the 8 January 2013 decision of the Under-Secretary-General, DESA (“USG/DESA”) to take no action on his complaint for defamation and harassment.

2. The Applicant requests the Tribunal to find that his due process rights were breached and that it order that a copy of the report from the Investigation Panel be produced to him. Further, the Applicant seeks damages equal to at least one year’s net base salary to compensate him for the violations of his due process rights and for mental stress and suffering. The Applicant also requests the Tribunal to find that he has been victim of defamation by his supervisor which, according to him, constituted harassment pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and recommend that the USG/DESA and the Under-Secretary-General, Management (“USG/DM”) take appropriate measures against his supervisor.

Relevant factual and procedural background

3. On 5 January 2012, the Applicant submitted a complaint to the USG/DESA in which he requested that an investigation be conducted into the alleged defamatory language contained in a 28 October 2011 memorandum received by the USG/DESA from the Applicant’s supervisor, then Chief, PDS, DESA. In response to a 20 January 2012 follow-up email, the USG/DESA acknowledged receipt of the Applicant’s request on 10 February 2012.

4. On 29 March 2012, the Applicant contacted the then USG/DM and requested her to order that an investigation be conducted into his allegations.

5. On 12 April 2012, the Executive Officer, DESA, recommended that the USG/DESA convene a panel to investigate the allegations set out in the complaint (“the Investigation Panel”). The USG/DESA, appointed the Investigation Panel the following day.

6. On 26 November 2012, the Investigation Panel submitted its detailed report to the then USG/DESA. By memorandum dated 8 January 2013, the Executive Officer, DESA, informed the Applicant of the conclusions of the Investigation Panel’s report into his allegations that he was the victim of harassment and abuse of authority from his supervisor. The memorandum stated that: the content of the 28 October 2011 memorandum did not meet the definitioi n 2

including the question of the non-receivability of the application as argued by the Respondent, present agreed facts in chronological order, and inform it as to whether the parties were amenable to resolve the matter informally. On 27 June 2013, the parties filed their joint response to Order No. 137.

14. On 29 January 2014, the undersigned Judge was assigned to the present case.

15. On 31 July 2014, the Tribunal, by Order No. 217 (NY/2014), ordered the parties to file a jointly-signed statement indicating whether either party required the production of new documents and whether there were reasons that an oral hearing should be held. On 7 August 2014, the parties filed a joint submission in response to Order No. 217 indicating that a hearing was not needed.

16. On 11 August 2014, the Tribunal, by Order No. 234 (NY/2014), considered the Applicant's request to receive a copy of the complete investigation report relating to the present matter and determined that it was not a preliminary issue. Rather, it formed part of the remedies requested in the application. In the same order the Tribunal rejected the Applicant's request to receive a copy of documents related to a separate investigation conducted by the same Investigation Panel that handled the present matter but which did not concern the Applicant's allegations. Further, the Tribunal ordered the parties to file their closing submissions by 15 August 2014.

17. On 15 August 2014, the Applicant filed a submission in response to Order No. 234 reiterating the requests previously addressed by Order No. 234. That same day, by Order No. 243 (NY/2014), the Tribunal informed the Applicant that these requests had already been addressed by Order No. 234 and ordered the parties to file their closing submissions, as previously indicated, by 15 August 2014.

18. On 15 August 2014, the Respondent duly filed his closing submissions submitting that the review of the Applicant's complaint and the investigation were properly conducted and noting that there was a delay in completing the investigation due to difficulties in scheduling interviews. This delay was recognized by the USG/DESA who awarded the Applicant USD1,000 in compensation and

the Respondent stated that there was no basis for any additional award. The Respondent further stated that the Applicant correctly received a summary of the investigation report in accordance with ST/SGB/2008/5 and was not entitled to a full copy of the investigation report.

19. On 18 August 2014, the Applicant filed his closing submissions in response to Orders No. 234 and 243 stating that his request for the full report of the Investigation Panel was a preliminary issue and that once he received a copy of the report he would

than those forming the basis of his complaint and the memorandum is in no way an attempt to malign the Applicant's character. It is a confidential communication informing the USG/DESA of a number of serious issues arising in her department. It could not have been an instrument of harassment since it was not intended for release to the Applicant. Also, defamation would normally refer to statements of a public nature, and the Investigation Panel found no evidence that the matters raised in the memorandum had been raised or discussed publicly.

d. In accordance with sec. 5.18, the Applicant is not entitled to receive a copy of the full investigation report, but rather only a summary and conclusion of its findings.

Considerations

Receivability

22. The Applicant received the contested decision on 16 January 2013 and requested management evaluation on 31 January 2013. On 19 March 2013, he was informed that the Secretary-General had decided to endorse the MEU's recommendations regarding the lawfulness of the decision to take no further action in response to the Applicant's complaint of defamation and harassment, including the refusal to provide him with a copy of the full investigation report. The present application was filed on 15 April 2013, within 90 days from 19 March 2013 and meets all the receivability requirements of art. 2 of the Dispute Tribunal's Statute and art. 7(a) of its Rules of Procedure.

Applicable law

23. ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) provides in sec. 1.2 that:

It is also the duty of staff members to cooperate with duly authorized audits and investigations. ...

24. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) addresses the procedures that are to be followed upon management receiving a formal complaint or report on harassment and abuse of authority by a staff member:

Section 1

Definitions

...

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provision of this policy but in the context of performance management.

...

Section 2

General principles

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

2.3 In their interactions with others, all staff members are expected to act with tolerance, sensitivity and respect for differences. Any form of prohibited conduct in the workplace or in connection with work is a violation of these principles and may lead to disciplinary action, whether the prohibited conduct takes place in the workplace, in the course of official travel or an official mission, or in other settings in which it may have an impact on the workplace.

2.4 The present bulletin shall apply to all staff of the Secretariat. Complaints of prohibited conduct may be made by any staff member, consultant, contractor, gratis personnel, including interns, and any other person who may have been subject to prohibited conduct on the part of a staff member in a work-related situation.

Section 3

Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

...

Section 5

Corrective measures

5.1 Individuals who believe they are victims of prohibited conduct are encouraged to deal with the problem as early as possible after it has occurred. The aggrieved individual may opt for an informal or a formal process, as explained below. Regardless of the choice made, the aggrieved individual is encouraged to keep a written record of events, noting dates, places, a description of what happened and the names of any witnesses and of anyone who may have information concerning the incident or situation at issue.

5.2 All reports and allegations of prohibited conduct shall be handled with sensitivity in order to protect the privacy of the individuals concerned and ensure confidentiality to the maximum extent possible.

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

...

Formal procedures

5.11 In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or

5.13 The complaint or report should describe the alleged incident(s) of prohibited conduct in detail and any additional evidence and information relevant to the matter should be submitted. The complaint or report should include:

- (a) The name of the alleged offender;
- (b) Date(s) and location(s) of incident(s);
- (c) Description of incident(s);
- (d) Names of witnesses, if any;
- (e) Names of persons who are aware of incident(s), if any;
- (f) Any other relevant information, including documentary evidence if available;
- (g) Date of submission and signature of the aggrieved individual or third party making the report.

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.15. At the beginning of the fact-finding investigation, the panel shall inform the alleged offender of the nature of the allegation(s) against him or her. In order to preserve the integrity of the process, information that may undermine the conduct of the fact-finding investigation or result in intimidation or retaliation shall not be disclosed to the alleged offender at that point. This may include the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender, and any other individuals who may have relevant information about the conduct alleged.

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no

later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(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 on 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.

25. The Tribunal considers that seeing that secs. 5.14–5.18 use the terms “will”

26. In accordance with the mandatory provisions of sec. 5.14, upon receiving a formal complaint or report, the responsible official has the following obligations:

a. To promptly review the complaint in order to assess if the complaint has been made in good faith and if there are sufficient grounds to warrant a formal fact-finding investigation;

b. Should there be sufficient grounds for a formal fact-finding investigation, to promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

27. In accordance with secs. 5.15–5.17 of ST/SGB/2008/5, the Investigation Panel has the following obligations:

a. Inform the alleged offender of the nature of the allegations against him or her and remind him or her of the policy introduced by ST/SGB/2005/21

28. The Tribunal considers that an aggrieved individual who submits a complaint

to be able to conduct the proceedings and finalization of its report within three months. Further, in accordance with sec. 1.2 from ST/SGB/2005/21, staff members involved in the proceedings have the obligation to fully cooperate with the Investigation Panel without delaying the investigation and, if necessary, they have to adjust their schedule (including leave) with the Administration's support.

41. In his closing submission the Respondent stated that “[p]ursuant to sec. 5.17 the investigation report shall “normally” be submitted to the decision-maker within [three] months of the filing of the complaint. There was a delay in the investigation due to work related difficulties in scheduling interviews”.

42. Section 5.17 explicitly states that the investigation report is to be submitted, normally, no later than three months from

the delays indisputably violated the specific deadlines contained in secs. 5.14 and 5.17 requiring the investigation process to be concluded within three months. In *Hersh* 2014-UNAT-433, the Appeals Tribunal reaffirmed that a breach of a due process right entitles an applicant to compensation.

47.

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member. It is available for inspection by the staff member once a year before the annual promotion review and in other circumstances specified in the administrative instruction ST/AI/108 on application to the staff member's personnel officer.

6. It is noted, however, that some organizational units, for their own convenience, maintain files on individual staff members which contain copies of documents in the official status file and correspondence internal to the organizational unit concerned. Such files may be kept only as working files for a limited period of time and shall not include any material reflecting unfavorably on a staff member's performance or conduct that has not been brought to his or her attention and communicated to the Office of Personnel Services.

57. It results that adverse material related to a staff member's character, reputation, conduct, performance or career can only be included together with the staff member comments, if any, in the confidential file, official status file or in the working file after the entire document has been presented to the staff member for comments. Consequently, the summary of .f25c:sn and cinclstios (reflecting)JTJ-185205 -1.725

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Conclusion

66. In the light of the foregoing, the Tribunal DECIDES

a. The appeal is granted in part.

b. The Respondent is to pay compensation in the amount of USD2,300 constituting of:

(i) USD1,000 for the delay in having the Applicant's complaint promptly reviewed and assessed by the responsible official; and

(ii) USD1,300 for the delay by the Investigation Panel in completing its investigation report.

c. All other grounds of appeal are rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 25

Signed)