
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/022

Judgment No.: UNDT/2016/199

Date: 3 November 2016

Original: English

Before: Judge

Introduction

1. On 5 June 2016, the Applicant, a former Senior Programme Officer at the P-5 level in the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, filed an application contesting the decision issued on 17 December 2015 by the Assistant Secretary-General for Human Resources (ASG/OHRM) not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) on 3 June 2015 against the Under-Secretary-General of OHRLLS () and a Director in

2. He requests the following remedies:

(a) As a matter of urgency, the UN should conduct a comprehensive investigation on allegations of racial discrimination, abuse of authority, harassment and threats in [the OHRLLS], including the racial discrimination incidents against African staff members, the selection process of new staff members and panel members. This investigation should be coordinated by [the Office of the Ombudsman], and possibly with the participation of designated experts from Member States. At the conclusion of the investigation, appropriate measures should be taken to address identified issues, including designate African staff members at decision-making level of the office;

(b) The United Nations Dispute Tribunal is requested to accept the present complaint as receivable and that it has merit^{150Uept}

(c) The United Nations Dispute Tribunal is requested to re-consider disciplinary measures taken against me, in particular the unlawful and harsh dismissal, and reinstate separation indemnity and compensation for loss of employment, for the rest of years, before my retirement date (31/03/2019 or 31/03/2022), the loss of physical integrity and health, as documented by several days of sick-leave.

3. In his reply, the Respondent opposes the application in its entirety and denies all claims, allegations and assertions made by the Applicant.

Relevant factual and procedural history

4. alleged
misconduct was underway, the Applicant sent a letter to the Secretary-General
-based discrimination experienced by some staff members in
st others, the Applicant alleged that the Director had maliciously
initiated the investigation against him. The Applicant stated that he had reported his
concerns to the USG/OHRLLS, but had not receT1 024d7(USG/)aBT1 0 90not 0 9005

8. On 3 September 2015, the ASG/OHRM requested the USG/OHRLLS and the Director to provide their c

18 September 2015, the Tribunal referred another separate case, also filed by the

complaint under ST/SGB/2008/5 was suspended pending attempts to reach a global informal settlement.

9. On 21 September 2015, the USG/OHRLLS and the Director provided their to the ASG/OHRM.

10. By memorandum dated 25 September 2015, the Applicant submitted his comments on the allegations of misconduct stating, *inter alia*, that:

The OIOS report has assessed thoroughly the various submissions for education grant claims. [The Applicant] accepts that the P-41 Form submitted for [JN] for 2010-2011 was false as well as the one submitted for [K and K] for the first term 2011-2012 .

The Applicant sincerely apologize[s] for these two false submissions. [He] accept the responsibility on the account of oversight and/or negligence.

11. On 30 November 2015, the Applicant received a letter from

13. On 15 February 2016, the Applicant requested management evaluation of the decision not to investigate his complaint, i.e. the impugned decision.

14. On 8 March 2016, the Under-Secretary-General for Management informed the Applicant of the decision to uphold the decision not to investigate his complaint.

15. On 5 June 2016, the Applicant filed the application to the Dispute Tribunal contesting the ASG/OHRM decision not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 on 3 June 2015 against the USG/OHRLLS.

16. On 6 June 2016, the Registry transmitted the application to the Respondent, who was notified that the deadline for filing his reply was on 7 July 2016.

17. On 6 June 2016, the case was assigned to the undersigned Judge.

18. On 14 June 2016, the Respondent filed his reply, submitting that the application is without merit because the procedural issues invoked by the Applicant regarding the contested decision do not constitute violations of ST/SGB/2008/5 and the remainder of his contentions are in part not receivable and in part without merit.

19. By Order No. 194 (NY/2016) dated 10 August 2016, the Tribunal ordered the Respondent to file the comments and documents provided to the MEU by OHRM by 26 August 2016, the Applicant to file his comments thereon, if any, by 9 September 2016, and the parties to file their closing submissions by 26 September 2016.

decisions and he is well outside of the statutory time limits for contesting them;

- v. The Applicant's submissions regarding complaints filed with the OIOS and/or the Ethics Office are not receivable, as they have not been the subject of a request for management evaluation.

Consideration

Applicable law

24. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides, in the relevant part, as follows:

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.

5.14 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

27. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae and ratione materiae

28. The Tribunal notes that the Applicant is a former Senior Programme Officer at the P-5 level in the OHRLLS and therefore the application is receivable *ratione personae*.

29. The Applicant is challenging the decision issued on 17 December 2015 by the ASG/OHRM not to investigate his complaint of discrimination filed under the provisions of ST/SGB/2008/5 on 3 June 2015 against the USG/OHRLLS. It is uncontested that the Applicant requested a management evaluation review on 15 February 2016, within 60 days from the date of notification and the application is receivable *ratione materiae*.

Receivability ratione temporis

30. Pursuant to mandatory provisions of art. 8.1(d) of the Dispute Statute (1), for an application to be receivable it must be filed within the applicable deadlines, which in cases like the present one, where a management evaluation of the contested decision is [] calendar days [as] of the [] .

31. The Tribunal notes that the contested decision challenged by the Applicant was communicated to him on 17 December 2015. Therefore, pursuant to art. [] an appeal against this decision was to be filed within 90 days from the date of communication of the response to the management evaluation request of 8 March 2016, notably by 8 June 2016. It

results that the application submitted on 5 June 2016 was filed within the mandatory time limit and is receivable *ratione temporis*.

32. The Tribunal concludes that it has jurisdiction over the contested decision in the present case.

Were the relevant procedural requirements of sec. 5 of ST/SGB/2008/5 complied with?

33. urisprudence, the

35. The Tribunal notes that, according to the mandatory provisions in sec. 5.2 and sec. 5.14 of ST/SGB/2008/5, after having received the formal complaint, the responsible official has the following obligations:

a. To handle with sensitivity all the allegations in order to protect the privacy of all concerned individuals and ensure confidentiality to the maximum extent possible; and

b. To promptly review the complaint in order 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.

36. Regarding the first step of the formal procedure, the responsible official is to review whether the complaint appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact finding investigation. The review which undertaken promptly requires only a (careful) examination of the complaint itself that should not involve a complex activity and/or analysis of the entire dossier based on evidence or comments received from the alleged offenders.

37. As clearly results from secs. 5.15-5.16, at the beginning of the investigation only the fact-finding panel has the competence to inform the alleged offender(s) of the nature of the allegation(s) against him or her. In order to preserve the information that may otherwise undermine the conduct of the fact-finding investigation or result in intimidation or retaliation, the panel disclosed it to the alleged offender(s) at that point, which may include the names of witnesses or particular details of incidents. Furthermore, all persons interviewed by be reminded of the policy

introduced by ST/SGB/2005/21 (PrdTJETBT7BTh 374.71 7BT1 0 0 1 99.384 192.8t12o 0 1 99.384 1

