Case No.:	UNDT/NY/2010/036/ UNAT/1685
Judgment No.:	UNDT/2011/116
Date:	28 June 2011

The Applicant attempts to demonstrate that, when considered in the aggregate, the actions of the Respondent show a pattern of unfair treatment against the Applicant by the Organization.

Procedural background

7. On 12 February 2007, the Applicant addressed a request to the Secretary-General for administrative review of the handling and disposition of the OHRM Complaint.

8. The Chief of the Administrative Law Unit (a) on 16 March 2007 provided the Applicant with a copy of the Investigation Panel report, and (b) on 19 March 2007 provided the Applicant with a response to the Applicant's request for administrative review.

9. Having requested and received an extension of the time limit for the filing of his statement of appeal to 31 May 2007, the Applicant's Counsel filed such a statement with the Joint Appeals Board ("JAB") on 15 May 2007.

10. The Respondent replied on 13 July 2007; the Applicant submitted his Observations on the Respondent's Reply on 8 October 2007; the Respondent submitted his Comments on the Applicant's Observations on 1 November 2007; and the Applicant submitted further Observations on the Respondent's Comments on 11 December 2007.

11. On 15 September 2008, the JAB adopted its Report No. 2005 in relation to the Applicant's statement of appeal, recommending that the Applicant be compensated in the amount of three months' gross salary for the Organization's failure to protect his interests.

12. By letter dated 11 December 2008, the Deputy Secretary-General transmitted a copy of the JAB report to the Applicant, stating that the Secretary-General had decided not to accept the JAB recommendation.

13. On 27 April 2009, the Applicant filed an application with the former United Nations Administrative Tribunal against the Secretary-General's decision that was notified to him on 11 December 2008. On 30 October 2009, the former Administrative Tribunal received the Respondent's reply.

14. On 1 January 2010, following the dissolution of the former Administrative Tribunal, the case was transferred to the Dispute Tribunal.

15. The Respondent raised issues of receivability of the application with respect to two decisions on the grounds of time-bar, namely: (1) the 31 October 2005 relocation of the Applicant from DC-2 to DC-1 following receipt of the External Complaint and during the period of the initial investigation and fact-finding; and (2) the 8 May 2006 decision to reassign the Applicant to different functions within the Organization during the same period of time. In Order No. 14 (NY/2011) of 19 January 2011, the Tribunal recognised that if those two decisions were analysed as stand-alone decisions, they would have raised issues of receivability of the application from a time-bar perspective (para. 17), but that this was

> not a fair and just way in which to interpret the matter before it. The decision under review is the handling of the complaint against the Applicant. The Tribunal considers that this necessarily entails how the Applicant was treated and whether he was treated fairly, which is supported by the wording of his request for review and appeal documents. There appears to be a direct link between the two decisions … and the sexual harassment complaint: the record shows that the decisions were taken as part of the Organization's reaction to the complaint.

The Tribunal ordered that the two decisions should be considered as relevant evidence to the appeal (para. 21 of the above-mentioned Order).

Facts

16. Paragraphs 2–16 of the JAB report describe facts that have been agreed upon

17. The Applicant, a permanent staff member, joined the Organization in 1983. On 31 October 2006, the Applicant tendered his resignation from the position of Senior Social Affairs Officer and Chief of the Social Analysis and Policy Section, DSPD, DESA. On 12 January 2007, the Applicant was separated from service with the Organization.

18. From 31 July 2004 (following the Applicant's transfer from the Economic Commission for Latin America and the Caribbean ("ECLAC") to the United Nations Headquarters ("UNHQ")) through 31 December 2004, the Applicant was the Complainant's direct supervisor in DSPD. On 1 January 2005, the Complainant was transferred to another section in DSPD.

19. In April 2005, the Applicant began an intimate relationship with the Complainant, which ended in August 2005.

20. On 17 October 2005, the Applicant received an order fr

30. On 8 February 2006, OHRM advised the Applicant and the Complainant of the composition of the Investigation Panel assembled under ST/AI/379, para. 9, and ST/AI/371, para. 2.

31. On 15 February 2006, the Applicant informed the USG/DESA that the charges against him had been dismissed on 10 January 2006 by the Court "in the interest of justice". The Applicant also provided a letter from his attorney regarding

36. On 10 August 2006, the Applicant was informed that his re-assignment to DPADM would be extended for another three months.

37. On 13 October 2006, the Applicant informed the USG/DESA of his intention to take early retirement effective 31 December 2006 because of "the unfairness and discrimination [he] experienced in this past year".

38. On 1 November 2006, the Investigation Panel issued its report, noting that it had been unable to find conclusive evidence of intimidating or harassing behaviour

9. Upon receipt of a complaint from the aggrieved staff member pursuant to paragraph 8, or upon receipt of a report of sexual harassment from an appropriate official pursuant to paragraph 7, the Office of Human Resources Management will promptly conduct at Headquarters the initial investigation and fact-finding provided for in administrative instruction ST/AI/371 on revised disciplinary measures and procedures. At all other duty stations, the Assistant Secretary-General for Human Resources Management shall designate an official who will conduct the initial investigation and fact-finding and report directly to him or her.

10. The alleged offender shall receive a copy of the complaint submitted in accordance with paragraph 8 above, or a written version of the report submitted to the Assistant Secretary-General for Human Resources Management under paragraph 7. He or she shall be given an opportunity to answer the allegations in writing and to produce evidence to the contrary. At the same time, he or she shall be informed of his or her right to the advice of another staff member or retired staff member to assist in his or her response. If no response is submitted, the matter shall nevertheless proceed.

11. After completion of the initial investigation and fact-finding, the Assistant Secretary-General for Human Resources Management shall, in accordance with paragraph 8 of ST/AI/37l, proceed as follows:

> (a) Should the facts as a result of the initial investigation not appear to indicate that misconduct has occurred, decide that the case should be closed; or
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> (b) Should the facts appear to indicate that misconduct has occurred, refer the matter to a joint disciplinary committee for advice; or
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> (c) Should the evidence clearly indicate that misconduct has occurred and that the seriousness of the misconduct warrants immediate separation from service, recommend to the Secretary-General that the alleged harasser be summarily dismissed.

12. The alleged harasser and the aggrieved individual shall be informed promptly of the course of action decided upon by the Assistant Secretary-General for Human Resources Management.

Applicant's submissions

43. The Applicant's principal contentions may be summarised as follows:

a. Whilst decisions regarding disciplinary matters are subject to the discretionary authority of the Secretary-General, discretionary authority is not absolute and must function within the requirements of due process. The Applicant argues that "[a] distinction should be drawn between the duty to investigate charges of harassment in good faith, and allowing the administrative machinery of the Organization to be misused to pursue a personal agenda";

b. The forced relocation from DC-2 to DC-1 was both arbitrary and unwarranted, since the temporary order of protection issued by the Court was "limited to only threats and acts of harassment and specifically excluded from its terms the requirements of the workplace"; the External Complaint involved private conduct outside work, and no *prima facie* basis existed for assuming that a response from the Organization was required, particularly since the Applicant did not supervise the Complainant and had no contact with her following the filing of the External Complaint;

c. The OHRM Complaint constituted "unproven allegations by another individual…" and was conduct of a personal nature that took place entirely outside the workplace (thus exempting it from ST/AI/379); the Applicant cites the former United Nations Administrative Tribunal Judgment No. 1004, *Capote* (2001), a case involving an allegation arising from a dispute between two staff members over the failure to meet financial obligations, which was dismissed on the grounds that the Organization should not use its administrative procedures to involve itself in personal disputes between staff members;

d. The Applicant was the object of the Respondent's unarticulated "zero tolerance" policy towards sexual harassment and abuse; the Applicant cites the former United Nations Administrative Tribunal Judgment No. 1404, *Coggon* (2008), which overturned a reprimand and awarded compensation for the violation of the staff member's rights in a similar "misapplication of the zero tolerance policy";

e. The Organization was increasingly preoccupied with the morale of DSPD, which was not the fault of the Applicant;

f. The filing of the OHRM Complaint did not mean that sexual harassment had, in fact, occurred; the Applicant refers to the "problem of subjectivity", as outlined in the former United Nations Administrative Tribunal Judgment No. 707, *Belas-Gianou* (1995):

> IX. A belief in good faith that one has been the victim of sexual harassment, however strongly held, does not automatically mean, without more, that sexual harassment occurred. If it did, no need would exist for ST/AI/379 or any similar instruction. Sexual harassment would become self-defined by anyone claiming in good faith to be a victim;

g. OHRM withheld the OHRM Complaint from the Applicant and failed to apprise the Applicant of the basis for the allegations against him, contrary to ST/AI/379, para 10; the Applicant was not allowed to respond to the OHRM Complaint in any detail; the Applicant never saw the OHRM Complaint and only received a copy of it after commencing his appeal in this case; the Applicant was "left to guess at what the [OHRM Complaint] contained" (Applicant's Closing Statement, para. 17);

h. The Organization exhibited a lack of even-handedness and impartiality (i) by failing to affirm the Applicant's presumption of innocence pending the outcome of the External Complaint, and (ii) by failing to

preserve the Applicant's professional reputation as Chief of the Section;

i. OHRM failed to provide the Applicant with a copy of the Investigation Panel report, as required by ST/AI/379, para. 10, until after the Applicant initiated his appeal; the Applicant only received a copy of the Investigation Panel report on 16 March 2007—a year and four months after the charges were filed—contrary to the former United Nations Administrative Tribunal Judgment No. 1943, *Mink* (2002):

> VI. … In paragraph 12 of ST/AI/379, however, it is stipulated that "[t]he alleged harasser and the aggrieved individual shall be informed promptly of the course of action decided upon by the Assistant Secretary-General for Human Resource Management". The Tribunal does not agree with the Respondent's contention that this language denies the Applicant a right of access to the report: the provisions of the Administrative Instruction are a minimum guarantee to prompt information regarding the outcome rather than a limit on the rights to information of either party. Further, in the instant case, it is important to note that the Applicant's supervisor did receive a copy of the report;

j. The process by which the Applicant's section in DESA was disbanded and reabsorbed in March 2006 "calls into question the requirement of fundamental fairness";

k. The Investigation Panel did not find evidence of any sexual or other type of harassment by the Applicant at the workplace, and OHRM could have perceived this from the outset and could have recommended some other course of action instead of "bringing formal allegations and sanctioning the Applicant's *de facto* suspension". OHRM was "derelict in its duties" by waiting nearly three months to start the initial investigation and by taking over a year for the Investigation Panel to complete its work;

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Nations Administrative Tribunal Judgment No. 1359, *Perez-Soto* (2008));

b. All evidence adduced at the substantive hearing demonstrated that the USG/DESA and the DESA Executive Officer attempted to balance the considerations of the Applicant, the Complainant and the workplace when taking the decisions in this case; the action taken by the Organization was reasonable under the circumstances, in the interests of staff safety and security, and well within the Secretary-General's

Secretary-General is surely bound to conduct promptly such reasonable investigations as the situation calls for" (para. VIII)) and Judgment No. 707, *Belas-Gianou* (1995) ([the Tribunal] "is sensitive to claims of sexual harassment and has made clear the responsibility of the Organization to address them promptly and effectively" (para. IX));

h. The fact that the Applicant was ultimately exonerated by the Investigation Panel does not mean that it was improper to investigate him, and officials within DESA could not have anticipated the Investigation Panel's ultimate findings before their work had begun;

i. The Applicant's due process rights were fully respected; the Applicant was never prejudiced in presenting his defence to the OHRM Complaint; the Applicant received a full and fair opportunity to present his case; the Applicant was informed of the Complainant's claims; the Applicant prepared a comprehensive and extensive description of his relationship with the Complainant, including affidavits from witnesses; the Applicant had the advice of counsel, who reviewed his submission;

j. Even if the Respondent erred in not providing a copy of the OHRM Complaint to the Applicant, the Applicant has not demonstrated any

m. The Applicant is not entitled to require the Organization to initiate an investigation of the Complainant (see the former United Nations

the External Complaint, the Executive Officer and the ASG/DESA immediately consulted with OHRM, DSS, and the Office of Legal Affairs as to the best course of action. The decision to relocate the Applicant from DC-2 to DC-1 was taken on a consultative basis at the managerial level; these persons thought the decision was the best and fairest course of action under the circumstances.

48. The Executive Officer testified about the context in which DSPD found itself after the External Complaint and the OHRM Complaint were filed—DSPD was extremely divided between staff members who supported the Applicant and those who supported the Complainant.

49. The Executive Officer did not recall a restructuring in the DSPD in 2006, but said that DESA was restructuring "everything" at that time.

50. At some point, a decision was taken to use the expertise of the Applicant in DPADM and an assignment relevant to the Applicant's expertise was formulated, in consultation with his new Director. The Applicant was given terms of reference for his new position. The Applicant's reassignment of functions from DSPD to DPADM was strictly an internal arrangement within the managerial prerogative of the USG/DESA. According to the Executive Officer, the Applicant's reassignment would not have impacted his reputation, because such reassignments were being stressed for mobility purposes and because the reassignment was within a department in the same duty station, i.e., New York.

51. On the issue of why the Investigation Panel took so long to complete its work, the Executive Officer stated that people are generally very busy and that they have limited resources.

Testimony of the ASG/DESA

52. The ASG/DESA explained that he was asked by the then USG to deal with the matter of sexual harassment allegations against the Applicant. As a relative newcomer to the Organization, the ASG/DESA was concerned about due process and

about ensuring that everything was done correctly. The ASG/DESA asked his colleagues to explore options, and they decided that both the Applicant and the Complainant should be physically separated. The Applicant was relocated from DC-2 to DC-1, and the Complainant was asked to move also (although the Complainant later prevailed on a suspension of action of this decision).

56. The Dispute Tribunal will give due deference to such relocation and reassignment decisions, unless they are illegal, irrational or procedurally flawed, or in exceptional cases, where a measure is disproportionate (*Doleh* 2010-UNAT-025, para. 20; *Hallal* UNDT/2010/046, para. 59).

57. The Tribunal will only interfere where the Applicant meets his burden with regard to such decisions being based on a mistake of fact, a lack of due process, or if it is arbitrary or motivated by prejudice or other extraneous factors (see the former United Nations Administrative Tribunal Judgment No. 707, *Belas-Gianou* (1995), para. XVI).

58. The Tribunal was convinced by the testimony of both the ASG/DESA and the Executive Officer that they took a difficult decision in good faith with regard to moving the Applicant from DC-2 to DC-1 and reassigning him to different functions within the Organization. The reassignment was effectuated, both as part of the restructuring of DSPD and as an effort to fully utilise the Applicant's talents. Further, these decisions were taken in the context of assessing safety and security in the workplace, and a difficult balance has to be maintained in such situations. The Tribunal is convinced that the Administration acted reasonably and with due regard to the rights of both the Applicant and the Complainant in light of the information with which it was presented at the time.

59. The Applicant has not met his burden in proving that the decisions were based on a mistake of fact, a lack of due process, or that they were arbitrary or motivated by prejudice or other extraneous factors.

60. The Tribunal finds that the decisions to relocate the Applicant from DC-2 to DC-1 and to reassign him from DSPD to DPADM did not constitute a denial of the Applicant's due process rights.

Was the Organization required, during the investigation under ST/AI/379, para. 9, to show the Applicant a copy of the OHRM Complaint?

61. Under ST/AI/379, paras. 9 and 10, upon receipt of a complaint of sexual harassment from a staff member, OHRM is required to promptly conduct an initial investigation and fact-finding, as provided for in ST/AI/371 (Revised Disciplinary Measures and Procedures). The alleged offender "shall" receive a copy of the complaint, and he/she shall be "given an opportunity to answer the allegations in writing and to produce evidence to the contrary", as well as the right to the advice of another staff member to assist in his/her response.

62. The established facts in this case indicate that the Applicant did not receive a copy of the OHRM Complaint, either when the Investigation Panel began its work or during the course of the investigation and fact-finding thereafter.

63. The Tribunal has examined the requirements of ST/AI/379, para. 10, against the totality of the evidence before it. As stated by the Respondent, the evidence before the Tribunal demonstrates that the Applicant was not prejudiced in presenting his defence to the OHRM Complaint. To the contrary, the Security Officer, DSS, took a statement from the Applicant on 20 December 2005 and the Applicant himself submitted a fi474 s /.0004en-paeg documentthatrebuitted the aleaplain1 see, para.33 aboves).

relocate the Complainant was not implemented with respect to her. The Administration made decisions to treat both parties equally and the Applicant did not file a request for suspension of action to prevent the relocation decision from being implemented as to him. While the decision was not implemented in the case of the Complainant, the Administration cannot be held responsible for the fact that the Applicant did not file a similar request for suspension of action of the relocation decision. The Organization, thus, took clear steps to treat both the Applicant and the Complainant in an equal manner.

75. Based on the witness testimony, the Tribunal is convinced that the decisions to relocate and to reassign the Applicant were reasonable and proportionate in the particular circumstances of the case and that there is no evidence of illegality, irrationality or procedural impropriety to warrant the Tribunal's intervention in these

Organization. However, the Applicant did not submit such a request, which was a decision solely of his own making and which was not the result of any due process violation by the Organization.

79. The six-week period between the completion of the Panel's report and the communication of the decision of the ASG, whilst far from expedient, is not evident of an unreasonable delay

80. The Tribunal finds that the Applicant's due process rights were not violated due to the fact that the Applicant was not informed of the outcome of the initial investigation when the Investigation Panel issued its report on 1 November 2006.

Were the Applicant's due process rights violated due to the fact that the Investigation Panel took over twelve months to complete its work and issue a report?

81. The Tribunal heard testimony from the Applicant as to the harm that was caused to his mental and physical health by the stress and delay in being communicated the outcome of the investigation. The Tribunal accepts that the situation had an effect on the Applicant, causing him genuine stress which, in turn, had health implications. However, the Tribunal does not accept that the harm caused to the Applicant was a result of a violation of any of the Applicant's rights, but rather a very real result of the unfortunate circumstances of being investigated, a duty which the Respondent was obliged to carry out, and of awaiting the outcome of the investigation.

82. The length of time that the process took, from start to finish, was, by any standards, long. It was not, however, unreasonably long, in view of the seriousness of the allegations. The Tribunal accepts that, while the External Complaint was ultimately dismissed and the case closed, this did not preclude the Organization from continuing with its own investigatory process under ST/AI/379.

83. The Tribunal finds that the Applicant's due process rights were not violated due to the fact that the Investigation Panel took over twelve months to complete its work and issue a report.

Did the cumulative actions of the Organization constitute a de facto *suspension of the Applicant in this case?*

84. Since the Tribunal has found that all of the decisions taken with regard to the handling of the OHRM Complaint met the requirements of due process, the Applicant's suggestion that the Organization's actions constituted a *de facto* suspension has no merit.

85. The Tribunal finds that the actions of the Organization in handling the OHRM Complaint, both individually and in the aggregate, meet the requirements of due process.

The Applicant's treatment surrounding his decision to resign

86. The Applicant has stated that he had no other choice but to resign. He goes as far as to say that the Respondent destroyed his career. The Tribunal is not convinced that the Applicant had no other choice but to resign. There was no evidence of any intention on the part of the Respondent to separate the Applicant or pressure him to resign. To the contrary, the Executive Officer stated that early retirement is always accepted and, when posed the question as to what she would have done had the Applicant changed his mind about resigning, she stated that there were mechanisms that would have allowed her to reverse the Applicant's resignation and that, within a reasonable period of time, that is something the management would do: "we would bend over backwards". She explained that the Administration did have cases where people simply changed their minds.

87. The Tribunal emphasises that this is not a case of constructive dismissal and that the separation was the result of a choice by the Applicant. If it were made in haste or under pressure, then there is some indication that the Administration would have considered reversing the decision, had the Applicant approached them.

Conclusion

88. The Tribunal finds that, for all of the foregoing reasons, the Applicant's due process rights were observed by the Organization in its handling of the OHRM Complaint.

89. Therefore, the Application is rejected in its entirety.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 28th day of June 2011

Entered in the Register on this 28th day of June 2011

(*Signed*)

Santiago Villalpando, Registrar, New York