

INTRODUCTION

1. The Applicant filed an application on 19 July 2017 contesting what she

once again invite the Applicant to attend. The Applicant, her Counsel and Counsel for the Respondent participated by telephone.

6. A hearing was conducted in the UNDT Courtroom in New York from 9th to the 11th October 2018. Counsel for the parties were present in the Courtroom. The Applicant participated by video link and telephone. Apart from the Applicant, the following witnesses gave evidence: Ms. Bintou Keita, former Deputy Joint Special Representative (DJSR) Protection and Officer-in-Charge, UNAMID; Mr. Saifullah Malik, Chief, Conduct and Discipline Team (CDT), UNAMID and Mr. Seth Odame, Security Officer, Special Investigation Unit, UNAMID.

7. Upon consideration of the documents and the evidence the Tribunal decided that this was an appropriate case in which to invoke Article 10.4 of the Statute of the United Nations Dispute Tribunal (UNDT) to seek the concurrence of the Secretary-General to remand the case for institution or correction of the required procedure.

8. Given the action taken as a result of the referral to the Secretary-General under article 10.4 of the UNDT Statute, the Tribunal, having taken into account the views of the parties, has decided that it was not necessary, in this Judgment, to deal with the respective contentions of the parties on the receivability of the claim.

FINDINGS OF FACT

The Tribunal finds the following facts proven on the basis of the documents, including responses to the Tribunal's Orders and the oral evidence:

9. On 24 February 2016, the Applicant reported an incident which took place at about 16:20hrs that day. She alleged that when she confronted the alleged perpetrator, at about 18:30hrs that day he apologized and asked her not to file a complaint against him. She reported the incident to the UNAMID Special Investigations Unit (SIU) on the same day and provided a voluntary statement.

10. On 25 February 2016, the Applicant sought advice from the Staff Counsellor.

Case No. UNDT/NBI/2017/063

Judgment No. UNDT/2019/120

29. Article 10.4 of the UNDT Statute provides:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

30. The UNDT Statute and Rules of Procedure do not set out a prescribed procedure to be followed to give effect to the underlying purpose of Article 10.4. However, Article 36.1 of the Rules of Procedure provides that:

All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

31. The Tribunal considered that a referral under Article 10.4 of the Tribunal's Statute falls outside the adversarial process, and is directed to the Secretary-General in his/her independent capacity as the Chief Administrative Officer of the United Nations and not as the Respondent in the case. Accordingly, the undersigned Judge considered it appropriate to approach the Secretary-General directly and not through Counsel who represents the Secretary-General as the Respondent in this case.

32. The Tribunal considered that such an approach would: (i) avoid any risk of a perception of actual or potential bias; (ii) protect the integrity of the Tribunal; and (iii) serve to preserve confidence in the Organization's policies and procedures and the Secretary-General's personal commitment to ensuring zero tolerance of sexual harassment, responding rapidly to allegations, supporting victims through their trauma and ensuring commitment and accountability for all concerned in the process.

33. Accordingly, on 29 November 2018, the Tribunal referred the matter to the Secretary-General under Article 10.4 of the UNDT Statute and sought his

concurrence to remand the case for institution or correction of the required procedure.

34. On the same day, by Order No. 184 (NBI/2018), the Tribunal notified the parties that:

1. It is appropriate to stay proceedings while the matter is under consideration by the Secretary-General.

2. On receipt of the response of the Secretary-General, the Tribunal will issue either an Order remanding the case, in accordance with article 10.4 of the Statute, or issue a Judgment on the merits.

35. On 21 January 2019, the Tribunal obtained the concurrence of the Secretary-General that the case be remanded for institution or correction of the required procedure under Article 10.4 of the UNDT Statute. Accordingly, the case was formally remanded by Order No. 023 (NBI/2019) including an Order that the Applicant be paid two months' net base salary under Article 10.4 of the UNDT Statute which makes provision for the Tribunal to order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by procedural delay, which is not to exceed the equivalent of three months' net base salary.

CONSIDERATIONS

36. The issues for determination are:

a. Were there procedural delays which in the particular circumstances of this case were unjustified?

b. Was there

of successive Secretaries General to a commitment and policy of zero tolerance towards such prohibited conduct.

Were there procedural delays which in the particular circumstances of this case were unjustified?

37. The Secretary-General's bulletin on Prohibition of d ET Q8yG2(r)8(c)3(2l)17(i)17(r)

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* (emphasis added).

39. ST/SGB/2008/5 provides in paragraph 5.18 that 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 t

was not contacted by the investigators to seek clarification or further information

was a significant failure given the fact that the Applicant had always maintained, and continues to do so, that there were no witnesses to the alleged incident.

48. The Tribunal finds that for reasons explained above, that there was a failure on the part both of those responsible for the investigation and the OiC ASG/OHRM, who reviewed the investigation report, to recognize that there was a breach of due process when the Applicant was not provided with the opportunity of rebutting the evidence given by a person who stated that he was a witness to the events in question.

Was the manner in which the administration handled this complaint inconsistent with the provisions of ST/SGB/2008/5 and ST/AI/371...the letter and spirit of the Organization's policy for protecting staff members from sexual abuse and harassment and the pronouncements of successive Secretaries General to a commitment and policy of zero tolerance towards such prohibited conduct.

49. In all the circumstances, the Tribunal finds that there was a failure to act in full accordance with both the letter and spirit of the Organization's policy and the published commitments of successive Secretary-Generals to a policy of zero tolerance of sexual harassment and/or assault.

50. Given this finding, the Tribunal considers that irrespective of whether there is a legal obligation under any administrative issuance, including ST/SGB/2008/5, to provide feedback to a complainant, it is good administration to do so particularly in cases of this kind. Failure to do so, without good cause, calls into question the commitment of those involved in the process and, unless remedied, will undermine the very policy on prohibited conduct that the Organization is determined to enforce.

CONCLUSION

51. In order to uphold the laudable principles and objective of ST/SGB/2008/5, and the zero-tolerance policy of the Organization and the commitment of the Secretary-General to tackle prohibited conduct, the Tribunal

considered it appropriate to refer the case to the S-G under Article 10.4 of the Statute by Order 023 (NBI/2019).

52. The Secretary-General has taken appropriate action, following his