
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/030

Judgment No.: UNDT/2021/049

Date: 3 May 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Camila Nkwenti, UNEP

Thomas Deleuil, UNEP

Introduction

1. The Applicant, a staff member of the Secretariat of the Convention on
in Montreal, Canada, contests the

decision

[(Prohibition of discrimination, harassment, including sexual harassment, and abuse of
authority)]

2. For the reasons stated below, the application is rejected.

Facts

3. On 23 April 2018, the Applicant joined CBD as the Head of Administrative, Finance, and Conference Services Division. The Applicant directly reported to the Executive Secretary of CBD.

4. On 14 January 2019, the Applicant was interviewed by the fact-finding panel established as part of an investigation of allegations of harassment and abuse of authority made by another CBD staff member against the Executive Secretary of CBD. The Applicant was interviewed again on 31 January 2019 and 26 February 2019.

5. On 20 February 2019, by email, the Executive Secretary informed the Applicant that she would report to a new first reporting officer and that the Executive Secretary would act as her second reporting officer. The Applicant considered the change of reporting lines as retaliatory acts against her for participating in the interviews by the fact-finding panel.

6. In March 2019, the Applicant requested a conversation with the Director of the Corporate Services Division of the United Nations Environment Programme UNEP . According to the Applicant, she informed the Director of the Corporate

Services Division of the issues she was having with the Executive Secretary and
requested the Office of OIOS

18. In an email dated 3 February 2020, the Acting Executive Secretary explained to the Applicant that since the former Executive Secretary had resigned, no rationale existed for conducting a full investigation and that have to work jointly on ensuring that your working conditions are what they should be in a norm the former reporting lines and functions had already been restored, and since the former Executive Secretary was considered clo

19. On 4 February 2020, the Applicant responded to the Acting Executive Secretary that her legal representative would reach out to her.

20. On 13 March 2020, the Applicant submitted a request for management evaluation

accountability for engaging in prohibited conduct and without taking any action to

21. On 8 June 2020, the Applicant was notified that following the management evaluation, the contested decision was upheld.

22. On 27 June 2020, the Acting Executive Secretary informed the Applicant that a performance evaluation for 2018-2019 had been completed by her previous supervisor with a

Consideration

23.

power to individualize and define the administrative decision challenged by a party and

Appeal

Fasanella 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

24. ion
to address [her] complaint under ST/SGB/2008/5 or to address the effects of
the Applicant refers to the memorandum of
21 January 2020 from the ASG/OHR to the Applicant concerning
handling of her complaint. In this memorandum,

Therefore, the ASG/OHR
recommended to the Acting Executive Secretary seek to informally resolve her

25. At the outset, the Tribunal notes that the Applicant raises allegations of

5.6 Upon conclusion of the preliminary assessment, the responsible official shall decide to either:

- (a) Initiate an investigation of all or part of the matters raised in the information about unsatisfactory conduct; or
- (b) Not initiate an investigation.

5.7 In cases where the responsible official decides not to initiate an investigation, the responsible Official should decide either to close the matter without further action or to:

- (a) Take managerial action, without prior consultation with the staff member; and/or
- (b) Issue a written or oral reprimand, provided the staff member has had the prior opportunity to comment in writing on the facts and circumstances, in accordance with staff rule 10.2 (c).

30. The jurisprudence of the Appeals Tribunal has further clarified that the Organization has a degree of discretion how to conduct a review and assessment of a complaint of prohibited conduct (see for instance, *Oummih* 2015-UNAT-518/Corr.1 and *Benfield-Laporte* 2015-UNAT-505). The judicial review of an administrative decision involves a determination of the validity of the contested decision on grounds of legality, reasonableness and procedural fairness (see for instance, *Belkhabbaz* 2018-UNAT-873 and *Sanwidi* 2010-UNAT-084).

31. The Applicant claims that she was denied the satisfaction of having her complaint be investigated or any conclusion be made regarding her complaint .

32. The Applicant further claims that although the memorandum of 21 January 2020 encouraged CBD to engage in informal efforts to address her concerns, she has received no communication on any informal efforts from the Respondent. She claims that she made a written offer to discuss an informal resolution, and yet the Respondent did not respond and did not recognize the moral damages she suffered from the extended period of harassment and abuse of authority. The Applicant claims that she suffered significant harm from the stress, which warranted compensation for the

substantive violations of her contractual rights as well as from moral damages she suffered from the extended period of harassment and abuse of authority.

33. In response, the Respondent submits that the appropriate action was taken to complaint in a timely manner. Specifically, the Respondent points out that under sec. 5.5 of ST/AI/2017/1, in undertaking the preliminary assessment of a complaint resolution process would be more . In this case, the ASG/OHR recommended informal resolution given the resignation of the sole subject of the complaint filed by the Applicant.

34. The Respondent also submits that under sec. 5.5(e) of ST/SGB/2019/8, the responsible official shall make the determination within three months of receipt of the a responsible official on 17 October 2019 and the responsible official informed of her decision on 21 January 2020, the complaint was handled within the requisite time limits.

35. The Respondent further submits that an investigation and a disciplinary process are not obligatory under ST/SGB/2019/8 and that the responsible official has the discretion to take into consideration whether an informal resolution would be more appropriate than an investigation under the circumstances.

36. The Respondent also argues that no right arises to seek monetary or other compensation under the applicable legal framework.

37. The Tribunal notes that the Applicant filed a complaint of possible prohibited conduct to the ASG/OHR, with a copy to OIOS, on 18 June 2019. ID/OIOS referred to the ASG/OHR on 19 October 2019. Accordingly, the ASG/OHR was tasked with making the decision to initiate or not to initiate an investigation following a preliminary assessment under sec. 5.6 of ST/AI/2017/1.

38. Under sec. 5.5 of ST/AI/2017/1, the responsible official may undertake a preliminary assessment considering various factors. In this case, the ASG/OHR

decided not to initiate an investigation because due to the resignation of the alleged harasser, there was no longer any reason for the Applicant to fear further harassment, abuse of authority or retaliation.

39. The Tribunal finds that this decision margin of appreciation and was a reasonable exercise of discretion. Under the applicable legal framework, the Applicant is not entitled to force the Administration to investigate her complaint. To the contrary, the responsible official is provided with a discretion to initiate or not to initiate an investigation under the applicable legal framework.

40. As the Appeals Tribunal held in *Sanwidi*, when s exercise of discreti it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him , but its role is to determine whether the contested decision was legal, reasonable, and procedurally fair.

41. The Tribunal finds that the ASG/OHR reasonably decided not to investigate the The decision was also procedurally compliant as the ASG/OHR notified the Applicant of the decision in about three months as required by the applicable legal framework.

42. In the memorandum of 21 January 2020, the ASG/OHR recommended to the Acting Executive Secretary, CBD to seek to informally resolve the complaint. It appears that this recommendation caused confusion. On the one hand, as stated in her email of 3 February 2020 to the Applicant, the Acting Executive Secretary understood that an e have to work jointly on ensuring that [the working conditions are what they should be in a normal United Nations reporting lines and functions were restored and the former Executive Secretary was no longer in the office, the Acting Executive Secretary considered that the matter was resolved and could be closed. On the other hand, the Applicant considered that she should be compensated for harm she suffered due to the harassment as part of an informal resolution.

