



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

A faint, grayscale background image of a cityscape with a prominent bridge, likely the Golden Gate Bridge, is visible behind the text.

Michaud
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Martha Halfeld
Case No.:	2016-1038
Date:	14 July 2017
Registrar:	Weicheng Lin

JUDGE

6. By letter dated 10 January 2014, Mr. Michaud was informed by the Chief, Investigations Branch, DOS, UNFPA, that DOS had been tasked by OAI to conduct a preliminary assessment and investigation into allegations that on various occasions between September 2012 and August 2013 he had engaged in improper and unwelcome conduct that caused offense and humiliation to the complainant, including: sexual advances to and inappropriate comments about the complainant during the mission to Afghanistan in September/October 2012; repeated sexually inappropriate comments in the context of salary payments to the complainant; and the use of offensive statements relating to ethnicity and religion during a second mission to Afghanistan in April 2013.

7. The letter informed Mr. Michaud that his conduct could be construed as sexual harassment and abuse of authority within the meaning of UNDP User Guide on Workplace Harassment and Abuse of Authority and that accordingly an investigation was to be conducted in accordance with the UNDP Legal Framework, the UNDP User Guide on Workplace Harassment and Abuse of Authority and OAI Investigation Guidelines. He was further informed of his right to be interviewed and to provide documentation, statements or other evidence in support of any explanation he might want to give. He was invited to identify any witnesses that might have knowledge of the facts at issue. He was further informed that in the event of the investigation producing adequate evidence that misconduct had occurred, DOS would issue an investigation report to which he would be given an opportunity to respond.

8. The Office of Audit and Investigation Services (OAIS) of the UNFPA conducted its investigation between January and July 2014. The scope of its investigation went beyond the harassment allegations and examined also alleged breaches of standards by Mr. Michaud in conducting investigations. The findings in relation to the latter conduct are not relevant to this appeal which is concerned exclusively with the allegations of harassment.

9. The OAIS conducted 16 interviews with various witnesses. Mr. Michaud was interviewed on 16 January 2014. On 1 April 2014, Mr. Michaud was provided with the draft investigation report. He submitted an extensive response to the draft report on 24 June 2014.

10. The OAIS issued its final report on 24 July 2014. It found inter alia that: i) there was conclusive evidence that Mr. Michaud had engaged in sexual harassment towards the complainant on three occasions during the OAI mission to Afghanistan between 5 and 21 September 2012; ii) there was a high likelihood that Mr. Michaud engaged in

The undisputed evidence shows that you made inappropriate comments of a personal nature in emails exchanged with [the complainant] on 5 and 21 September 2012.

With respect to your claims of due process violations by OAIS, I would like to highlight that, as explained in my letter to you on 6 March 2015, you were exonerated of allegations of misconduct. The decision to issue you a written reprimand was

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Submissions

Mr. Michaud's Appeal

31. Mr. Michaud first challenges several UNDT case management decisions. He claims that the UNDT erred in deciding the case on the papers without holding an oral hearing and without ordering the parties to produce an agreed statement of facts. This, he contends, led to the UNDT being subject to misleading and erroneous assertions based on unproved assertions made on papers. He added that the UNDT's case management decisions generally gave the perception that the Judge of the UNDT had already made up his mind before considering the evidence.

32. He further submits that the written reprimand was unlawfully issued because his due process rights were violated during the OAIIS investigation. He alleges, inter alia, that his right to assistance under the UNDP Legal Framework by denying him the right to have a legal representative present when interacting with the investigators and his right to be informed of the allegations and to obtain prior access to charges and evidence and early disclosure were all violated during his interview. He maintains that, based on established jurisprudence, he should

35. Based on the foregoing, Mr. Michaud requests 24 months' net base salary for harm to his career and contractual rights; and an additional 12 months' net base salary for anxiety, stress and moral suffering, considering, in particular, that the 6 March 2015 "exoneration letter" did not rectify the damages caused by the investigation. He further asks for all documents and references to the investigation and the 6 March 2015 letters of reprimand to be expunged from his official status file and requests an award of costs for "abusive procedures".

The Secretary-General's Answer

36. The Secretary-General submits that the UNDT correctly determined that the investigation had been conducted, and the reprimand issued, in accordance with Mr. Michaud's due process rights. Mr. Michaud's submissions on appeal merely repeat the arguments made before the UNDT and do not point to a specific ground of appeal in the form of an error of law, procedure or fact resulting in a manifestly unreasonable decision. The decision to reprimand Mr. Michaud was not taken on the basis of the investigation report; instead it was based solely on Mr. Michaud's own e-mails which he admitted having sent to the complainant.

37. Even assuming, *arguendo*, that the investigation and the ensuing report are material to determining the lawfulness of the reprimand, Mr. Michaud's claims of due process violations are in any event unfounded. Firstly, Mr. Michaud does not have a right to a legal representative in terms of the UNDP Legal Framework. Moreover, the allegations against him and the evidence supporting those allegations were fully disclosed in accordance with the UNDP Legal Framework. He was properly informed of the allegations after the opening of the investigation because disclosure at an earlier stage could have jeopardized the investigation.

38. Regarding the alleged conflicts of interest at UNFPA/DOS, the UNDT correctly held that Mr. Michaud had failed to demonstrate any ulterior motives in the investigation. Mr. Michaud did not raise any concerns about the employment histories of the complainant and her counsel in his 19 March 2015 response letter to the reprimand.

finding of harassment but rather on the finding that he had admitted to have sent the 5 and 21 September 2012 e-mails containing comments which were considered to be inconsistent with the required level of professionalism. Moreover, the UNDT correctly found that the rules on issuance of reprimands set out in Staff Rule 10.2(c) were respected, given that Mr. Michaud was provided with many opportunities to comment on the facts and circumstances of the two September 2012 e-mails.

40. Moreover, Mr. Michaud has not demonstrated any impropriety in the UNDT's case management, especially in light of the Appeals Tribunal's consistent jurisprudence that it will not interfere lightly with the UNDT's broad discretion in the management of its cases. In particular, the UNDT could reasonably decide not to hold an oral hearing because it was not obligatory in a case of a non-disciplinary nature.

41. Lastly, the Secretary-General maintains that Mr. Michaud has failed to establish any basis for compensation and that he merely repeats arguments that did not succeed before the UNDT instead of demonstrating a reversible error. In addition, there is no support for his allegation of abusive procedures, so that costs are not warranted.

Considerations

Preliminary matters - request for an oral hearing and motion to adduce additional evidence

42. Mr. Michaud requests an oral hearing. We do not find that an oral hearing would assist in the expeditious and fair disposal of the case within the meaning of Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure. The factual and legal issues are straightforward and have been fully ventilated on the papers. For those reasons, the request for an oral hearing is denied.

43. Mr. Michaud also requests the Appeals Tribunal to accept additional evidence (in terms of Article 2(5) of the Appeals Tribunal Statute) in the form of an affidavit by him aimed at clarifying the facts and circumstances related to the reprimand. The relevant e-mails he claims do not constitute established evidence supported by sworn testimony. The evidence he seeks to lead relates to the context in which the e-mails were made in the hope of showing that the complainant was not offended.

44. Article 2(5) of the Appeals Tribunal Statute provides:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. ... The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

45. The Secretary-General maintains that Mr. Michaud has not provided any argument establishing exceptional circumstances. Moreover, the averments contained in the affidavit were clearly known to Mr. Michaud at the time of the UNDT hearing and therefore should have been presented at that Tribunal. Mr. Michaud offers no explanation for his failure to do so. The Secretary-General asks for the motion to be dismissed, or, if the motion is granted, to be given sufficient time to respond to the additional evidence and pleadings.

46. The Secretary-General is correct. The evidence sought to be admitted in the appeal proceedings is merely an elaboration of the

immaterial to the issuance of the reprimand, and did not have direct legal consequences; and, furthermore, Mr. Michaud did not file a request for management evaluation of the referral of the investigation to OAS, meaning that it was not receivable in terms of Article 8(1)(c) of the Statute of the UNDT.

50. Before an administrative decision can be held to be in non-compliance with the contract of employment of a staff member it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. A decision to initiate an investigation, in itself, ordinarily, will not immediately affect the rights of a staff member nor be of direct legal effect. Judicial review is concentrated pragmatically on the more important administrative decisions and thus avoids allowing challenges to preliminary or intermediate decisions. Where a decision requires several steps to be taken by different authorities, but only the last of which is directed at the staff member, the earlier decisions or actions lack direct effect, and only the last decision may be taken to the Dispute f-15.4 bun.486162 t1only thoy

to review under Article 2(1) of the UNDT Statute and the UNDT was therefore correct to hold the appeal in relation to the investigation not receivable *ratione materiae* .

52. It is common cause that Mr. Michaud did not file a request for management evaluation of the referral of the investigation to OAI. The UNDT accordingly also did not err in its finding that the appeal was not receivable in terms of Article 8(1)(c) of the Statute of the UNDT.

53. In consequence, the only substantive issue for appeal is whether the administrative decision to impose a disciplinary or administrative measure in the form of a written reprimand was lawful, reasonable and in accordance with due process.

54. Both Staff Rule 10.2(b)(i) and Paragraph 82 of Chapter III of the UNDP Legal Framework are empowering provisions authorising the imposition of a written reprimand in circumstances where the staff member is guilty of poor judgment. There is therefore no question about the strict legality of the decision to issue a reprimand.

55. Mr. Michaud complained though that he was not afforded due process before the decision to issue a reprimand was taken. The issue of the reprimand materially and adversely affected his rights and was of direct legal effect in that the letter of reprimand explicitly states that it may be referred to in the future. The reprimand is a potential impediment to his career advancement. In the circumstances, Mr. Michaud was entitled to a procedurally fair decision. The Secretary-General submitted that Mr. Michaud had many opportunities to comment on the facts and circumstances of the two e-mails. It is common cause that as part of the OAI investigation, he was interviewed at length about the e-mails, he was provided a transcript of his interview and made detailed representations. That, the Secretary-General maintained, was sufficient, and the UNDT agreed.

56. Procedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him. In this case, the Administration avoided further disciplinary proceedings but acted in a limited way on the undisputed evidence of the e-mails, which it knew had been canvassed with Mr. Michaud. The e-mails speak for themselves.

57. The only questions for determination by the Administration, therefore, were whether the e-mails constituted poor judgment by a senior manager tasked with responsibility in the UNDP for investigating misconduct, and, if so, a reprimand should follow. Mr. Michaud knew that the Administration regarded the e-mails as constituting bad judgment or misconduct and what the possible consequences might be. He had ample opportunity to respond, and did so. The defence he has consistently advanced is a denial of any intent to harass and a claim that the complainant did not take offence to the exchange which was intended as light-hearted, harmless banter in the context of a close working relationship.

58. Thus, Mr. Michaud was fully apprised of the allegations and had an opportunity to make representations putting forward his defence. His various accounts and elaborations of his defence at different stages of the proceedings have added little to its essential nature. He has struggled, however, to accept the conclusion that it might not be adequate to exculpate him. The UNDT was accordingly correct in finding that there had been no due process violation.

59. As regards the question of legal representation, paragraph 66 of the UNDP Legal Framework expressly provides that persons subject to investigation have no right to legal counsel during interviews but may be assisted by a staff or family member.

60. This is also one of those cases where the so-called “no difference” principle may find application. A lack or a deficiency in due process will be no bar to a fair or reasonable administrative decision or disciplinary action should it appear at a later stage.

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