

Introduction

1. The Applicant, a Security Officer with the Security and Safety Service , , contests two decisions:

(a) The issuance of a Performance Notice to him as a result of an incident in which he prematurely closed a security gate, grazing the rear bumper of a motor vehicle which was leaving an underground car park. He submits that the adverse record was placed on file without respecting his right to due process; and

(b) The decision of the Under-Secretary-General for Safety and Security , notified to the Applicant on 1 August 2014, to refer his complaint of harassment and discrimination back to the SSS because the USG/DSS considered that it did not warrant a formal fact-finding investigation but that it raised issues related to performance.

2. The Applicant submitted a further general claim of denial of equal and fair treatment, which he agreed is coterminous with the above two claims. A number of other claims made by the Applicant in his initial application were withdrawn during the course of the proceedings.

3. In a submission dated 30 October 2015, after the hearing on the merits, the Applicant stated that when his previous two-year contract expired in August 2014, he was given a six-month extension rather than a further two-year extension. He alleged that this was as a result of the Performance Notice. This decision should have been contested at the time of the contract renewal. It did not form part of the proceedings.

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4. Accordingly, the Tribunal finds that the decisions properly before it in this case are the two decisions identified in para. 1 above.

Relevant factual background

Performance Notice

5. By interoffice memorandum dated 27 February 2014, the Applicant reported to Mr. Bryan Black, the Assistant Chief, SSS, that while on duty that day at Post 103, a car had been hit by the security gate while exiting the Post, the

came to a stop at the traffic light just outside of the gate. The second vehicle followed and came to a stop directly behind. The second vehicle did not clear the gate completely. The gate remained in the open position for approximately one minute. With both vehicles still stopped at the red light, the gate could be seen closing. The light changes to green and both vehicles drove forward, but not before the closing gate graze the rear bumper of the Lexus.

The Report notes that Officer James requested that the driver of the vehicle provide an estimate of the cost of repairs, but no estimate was ever submitted. The investigation concluded that the

recommended that the Applicant be reminded to exercise more care when operating the barrier and electronic controls, and that the case be marked closed pending further developments.

8. By interoffice memorandum dated 27 June 2014, Mr. Bong, Chief, SSS, informed Mr. Black as follows:

The investigation determined that the accident occurred due to negligence by Officer Omwanda. He was inattentive and did not ensure that the path of the gate was cleared before closing it.

Due to his negligence, Officer Omwanda will receive a Performance Notice from his supervisor and be re-trained on the use of stinger barrier operations and until this training occurs, he is not to be assigned to a post requiring barrier operations.

9. At a hearing on the merits on 18 September 2015, Inspector Donald Patterson testified that he prepared a Performance Notice dated 1 July 2014 to issue to the Applicant. The Performance Notice was produced by the Respondent during the hearing. The document includes a summary of the circumstances in which a Performance Notice should be issued, stating:

Issued for negligent performance, or behavior pattern that warrants greater than just counselling, but less than the more serious

-Performance Report.

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outside the purview of the SGB and will be addressed by the Security and Safety

Procedural background

19. The application was filed on 28 September 2014 and the reply on 29 October 2014.

20. The case was assigned to the undersigned Judge on 20 July 2015.

21. A _____ was held on 4 August 2015. The parties agreed that it would be useful to engage in discussions to explore the possibility of achieving an amicable alternative resolution of this dispute.

22. On 5 August 2015, with the consent of the parties, the Tribunal ordered a stay of proceedings until 13 August 2015 to enable the parties to engage in discussions. On 13 August 2015, the parties informed the Tribunal that they had been unable to reach a resolution.

23. A number of further orders were issued and three more CMDs were held (on 25 August 2015, 16 September 2015, and 18 September 2015) by the Tribunal to clarify and narrow the issues in dispute and to determine the most appropriate way to resolve these matters.

24. A hearing on the merits was held over two days to accommodate the availability of witnesses. On 18 September 2015, Senior Security Officer Lenworth James and Inspector Donald Patterson gave evidence. On 1 October 2015, Mr. Peter Drennan and Mr. David Bongi gave evidence. The Applicant listened to the proceedings on both days via telephone link from Nairobi, Kenya. The parties agreed that it was not necessary for the Applicant, who was on sick leave, to give evidence. Counsel for the Applicant was given leave to consult his client at any stage of the hearing.

15.1 Staff members having received the rating of

15.7 The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

29. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides:

Section 1

Definitions

1.1 Discrimination is any unfair treatment or arbitrary distinction based on a ethnic origin, sexual orientation, disability, age, language, social origin or other status.

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

Section 3

Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment,

were not affected by the decision to issue the Performance Notice, it is not

42. At the hearing, Counsel for the Applicant read aloud the following extract

to Mr. Drennan on 9 July 2014:

I have several documented records of harassment by supervisors since 2010 until today and I intend to use them to prove the maltreatment I have experienced under these supervisors. When other officers, whose names I will soon give as references, caused accidents at Posts 2, 3, and 103 with the barriers no action was taken against them. Why has Asst. Chief Black, Insp. Patterson and the Investigation Unit decided to discriminate against me?

43. Mr. Drennan was then asked whether, based on this extract, he may have had a ground to warrant a fact-finding investigation. He stated that he stood by his earlier statement that, based on the information before him, he reached the

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information. Nor were sufficient details, as required under ST/SGB/2008/5, included in the email exchanges between the Applicant and Mr. Bonggi, which were forwarded to Mr. Drennan. In these circumstances, the Tribunal finds that it was open to Mr. Drennan to request more information from the Applicant, which he did not do. Whether this failure amounts to an error of law will depend not on what the Tribunal may itself have done in these circumstances but on what any reasonable head of department would have considered appropriate to have done given the overall spirit and intent of the policy under ST/SGB/2008/5.

46. A reasonable head of department would have noted the serious nature of the allegations being presented and that they could amount to allegations of a breach of ST/SGB/2008/5. Consideration would then have been given to the practical reality of workplace interactions and the reasonability and feasibility of requiring the complainant to provide particulars and evidence to one of the senior managers against whom the allegations had been made. A reasonable head of department would have taken full account of the reason why the complaint, indicating that further particulars would be provided, was being made directly to him or her and not, as in this case, to the Chief. The head of department was required under sec. 5.14 of ST/SGB/2008/5 to consider two matters: first, whether the allegations were made in good faith and second, whether there were sufficient grounds to warrant a fact-finding investigation. At no time was it suggested that the Applicant was not acting in good faith. The remaining question is whether it was reasonable and consistent with the policy to conclude, in the circumstances of this case, that a fact-finding enquiry was not warranted.

47. In accordance with sec. 3.2 of ST/SGB/2008/5, Mr. Drennan, as a senior manager, has a duty to take all appropriate measures to ensure a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. The email from the Applicant dated 9 July 2014 placed Mr. Drennan on

there had been a serious breach of ST/SGB/2008/5 and that the matters about which he was concerned were appropriately addressed to Mr. Drennan in accordance with sec. 5.11 of ST/SGB/2008/5. The Applicant put forward serious allegations of discrimination, disparity of treatment and ongoing harassment and stated that he had documented records to support such allegations. He also stated that he was willing to provide such evidence to an independent and impartial investigation team.

48. Given that the Applicant was alleging that Mr. Bongi was himself one of those who had engaged in prohibited conduct, it would appear inconsistent with the letter and spirit of ST/SGB/2008/5 for Mr. Drennan to have referred the matter to the Chief. Given the circumstances, the Tribunal considers that Mr. Drennan should have asked the Applicant to provide such evidence to enable him to determine whether there were sufficient grounds to warrant a formal fact-finding investigation. If the Applicant failed to provide the information that he claimed he had, that may have cast some doubt on the legitimacy of the allegations and raised a question as to whether he was acting in good faith.

49. The Tribunal takes into account that it is for the head of department to exercise a judgment as to whether to call for a fact-finding investigation. So long as the head of department exercises his or her discretion in a lawful manner, taking into account relevant factors and disregarding irrelevant considerations, and provided that in all the circumstances the decision was not irrational or perverse, given the overarching policy considerations under ST/SGB/2008/5, the Tribunal will not interfere. However, the clear policy guidance is that the decision-maker must have regard to the difficult and sensitive nature of such allegations, including the reluctance of those who believe that they have been subjected to conduct in breach of the policy to take those issues up directly with the person whom they consider to be the wrongdoer. The Tribunal considers that, having received allegations of harassment and discrimination, and having

58. , made in the absence of any enquiry, that there were insufficient grounds to warrant the establishment of a fact-finding investigation is rescinded.

59. Should the Applicant wish to resubmit his complaint to the Head of Department, he shall provide Mr. Drennan with the necessary information and particulars within 30 days of the date of this judgment.

60. Mr. Drennan shall consider any submission from the Applicant in accordance with ST/SGB/2008/5 and provide a response to the Applicant.

61. Failure on the part of the Applicant to submit the necessary particulars within 30 days of the promulgation of this judgment will entitle Mr. Drennan to close the file.

62. The Respondent is ordered to pay to the Applicant the sum of USD3,000. The amount shall be paid with interest at the United States prime rate with effect from the date that this Judgment becomes executable until payment of the said amount. An additional five per cent shall be added to the United States prime rate 60 days from the date this Judgment becomes executable.

Observation

63. Given the fact that the Applicant is on long-term sick leave the Respondent may, if the Applicant consents, consider that, in the circumstances of this case, it may well be in the interest of the Applicant, the DSS and the