
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/062

Judgment No.: UNDT/2017/007

Date: 1 February 2017

Original:

Introduction

1. The Applicant, a former Principal Officer at the D-1 level in the Department applications pertaining to a complaint he submitted on 19 April 2012 to Mr. Shaaban Muhammad Shaaban, the then Under-Secretary-General, DGACM, alleging that Mr. Franz Baumann, then Assistant Secretary-General, DGACM, had engaged in conduct prohibited under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The present j Mr. Tegegnetwork Gettu, the then USG/DGACM, dated 8 September 2015, based on the report of a second fact- without taking any further action. The Applicant seeks rescission of the decision to close his case or, in the alternative, an order that the report of the second FFP be

The Applicant also seeks compensation for the inordinate delay in the investigation of his complaint and the violation of his right to due process. Finally, he seeks protection from exposure to any form of prohibited conduct through preventive measures and provision of effective remedies when prevention has failed.

3. s report on the investigation and the records of the investigation, the investigation of his complaint, was duly filed under Case No. UNDT/NY/2015/035 and is addressed in Judgment *Auda* UNDT/2017/006.

4. lack merit and that the Applicant has not identified any procedural irregularities in

the conduct of the fact-finding investigation or in the determination by Mr. Gettu to close the case against Mr. Baumann.

Facts

5. The Applicant submitted a complaint by email dated 19 April 2012 to Mr. Shaaban, alleging that Mr. Baumann had engaged in prohibited conduct under ST/SGB/2008/5. Specifically, the Applicant submitted the following allegations:

- a. In a meeting held on 29 September 2011, Mr. Baumann stated that
a

13.

and determine the facts of the complaint of harassment, and to prepare a detailed

Conclusion

The second panel concluded, after reviewing all the evidence, that the working relationship between yourself and Mr. Baumann was especially difficult following your elevation to the post of Chief, [Office of the USG and ASG], with a different reporting line to the USG/[DGACM].

On your specific complaint, the Panel observed that your

the first FFP investigation. The Tribunal noted that the reasons for ending the work of the first FFP were uncontested. The Tribunal also noted that the settlement discussions were not a matter for adjudication as they have no probative value in relation to the substantive issues before the Tribunal. The Tribunal also reminded the parties that, in these types of cases, the Tribunal is not expected to conduct a de novo review and is not to assume the functions of an investigative body in accordance with *Messinger* 2011-UNAT-123.

The motion of 27 September 2016

39. Also on 27 September 2016, the Applicant filed a motion stating, *inter alia*, that, upon his information and belief, the second FFP was constituted improperly as it was comprised of two consultants who were not members of DGACM and one panel member who was not listed on the OHRM roster of trained investigators. The Applicant requested the Tribunal to find, *inter alia*, that the panel was fraught with significant procedural irregularities and their investigation was conducted in a manner that violated the explicit provisions of the ST/SGB/2008/5.

40. On 28 September 2016, the Respondent replied arguing that the Applicant was informed of the composition of the second FFP on 27 March 2015 and did not contest it at that time nor before the MEU and that the claim is meritless, as ST/SGB/2008/5 provides that panel members may include individuals from the OHRM roster.

41. By Order No. 225 (NY/2016) dated 28 September 2016, the Tribunal scheduled a one-day hearing on the merits for 6 October 2016 and directed the parties to file further submissions in preparation for the hearing, including a joint list of agreed-upon witnesses.

42. By Order No. 226 (NY/2016) dated 28 September 2016, the Tribunal, *inter alia*, directed the parties to not file any further motions

otion for the recusal of the undersigned Judge

45.

the Dispute Tribunal for Recusal of the Case Judge.

the proceedings pending consideration of the request by the President of the Dispute Tribunal.

46. On 2 December 2016, by Order No. 267 (NY/2016), the President of the Tribunal dismissed the A

47. On 6 December 2016, by Order No. 273 (NY/2016), the Tribunal ordered the parties to attend a hearing in both cases on 12 January 2017 and ordered that parties shall ensure their availability also for Friday, 13 January 2017, should a

The further request for postponement of hearing and appearance of additional witnesses

48. On 5 January 2017, the Applicant requested a postponement of the hearing, stating:

The Applicant has been summoned to serve as juror in the New York Supreme Court at 9:00a.m. on Monday 9 January 2017. The Applicant is obliged to serve on the date scheduled given that the jury service has already previously been postponed twice. The Applicant may therefore not be available for the hearing on 12 January 2017. Given a previously scheduled leave through the end of the month of January 2017, the Applicant requests postponement of the hearing until Thursday 9 and Friday 10 February 2017.

49. The Applicant further requested that Ms. MS and Mr. Gettu be called as

the Dispute Tribunal Order [No.] 233 (NY/2016) in which the Tribunal agreed to

the New York Supreme Court on 12 and 13 January 2017, and if so, provide

second motion for the recusal of the undersigned Judge

53. On 10 January 2017, the Applicant filed two motions, one in response to Order No. 2 (NY/2017),

58. ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides in relevant part (emphasis added):

annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

Section 5

Corrective measures

5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. If that is the case, the responsible office shall promptly appoint a panel of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the Office of Human Resources Management roster.

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other 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*

ASG/DGACM, as he agreed with the report of the second FFP which concluded that no prohibited conduct took place. The Applicant asserts that Mr. Gettu erred when he

ST/SGB/2008/5 and that he erred when he decided to close the case pursuant to sec. 5.18 of ST/SGB/2008/5. The Applicant contends that the investigation into his complaint was flawed as it suffered delay, lacked confidentiality and breached due process in relation to the witnesses interviewed and the lack of integrity of the investigation

addressed in *Auda* UNDT/2017/006. Each of the other issues will be considered in turn.

Was the investigation into the complaint against the former ASG/DGACM flawed?

Witnesses

60. The Applicant alleges that the procedure set forth in ST/SGB/2008/5 was not followed because the second FFP did not interview all of the witnesses that he had identified for the first FFP and it did not provide him with an opportunity to identify new witnesses.

61. The Respondent submits that a fact-finding panel has the discretion to determine how to conduct the investigation of a complaint. After carefully reviewing the records of the investigation conducted by the first FFP, the second FFP determined that further interviews were required with the Applicant and six of the other 14 witnesses interviewed by the first FFP, as well as interviews with the subject of the complaint and an additional two witnesses. The second FFP reasonably concluded that the statements of other witnesses interviewed by the first FFP contained sufficient information for the purposes of the investigation. During his interview with the second FFP, the Applicant was invited to submit a list of witnesses in support of his complaint and did not name any new witnesses.

Case No.

65. In *Masykanova*, the Tribunal distinguished the case of *Flores*, which concerned the rights of the subject of an investigation rather than the rights of a complainant. In *Flores*, the Appeals Trib

Ms. Flores provided the names of witnesses in her response to the charges and that

(*Flores* 2015-UNAT-525, para. 24). The Appeals Trib

the Dispute Tribunal, again, in *Masykanova* stated t

Integrity of the investigation

66. The Applicant claims that the course of the investigation departed significantly from that set out under ST/SGB/2005/8. In particular, he submits that the Administration failed to safeguard the integrity and confidentiality of the investigation when records from the first FFP were submitted to Ms. AL, the Special Assistant to the USG/DGACM, who had before served for a long time as a Special Assistant to Mr.

67. The Respondent submits that the integrity of the investigation was maintained and no information was disclosed to Mr. Baumann, which could have undermined the investigation or resulted in intimidation or retaliation. The Applicant has not presented any evidence that the limited role played by the Special Assistant in transferring the records of the investigation interfered with or influenced the outcome of the investigation.

68. During her evidence adduced at the hearing, Ms. AL stated that she had acted as the Special Assistant to Mr. Baumann but that her role in relation to supporting the investigation was administrative in nature. She stated that she had been instructed

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85. The Tribunal takes note of the number of cases in which verbally abusive staff members are disciplined. In the present case, the conclusion reached by the second FFP that the abusive or offensive language used by the second most senior official in DGACM did not rise to the level of misconduct and that no managerial action was recommended may appear absurd, excessive or arbitrary when comparing how it was handled in the information circulars which discuss similar allegations. The allegations against the former ASG/DGACM were found substantiated but they benefited from exculpatory circumstances.

86. The second FFP had indeed found that there seems to be no doubt that some of the language admittedly used by Mr. Baumann and cited by the Applicant would not be considered appropriate among colleagues in an international organization. The second FFP report had found that it would certainly be considered offensive when used out of context, in public or widely circulated to other members of the staff in written form. The second FFP stated that the use of terms such as , , and can be viewed as offensive and would not normally be considered appropriate, in particular, from a senior staff member. The issue, according to the second FFP, was whether the use of any of these words bordered on being abusive and whether, when Applicant constituted harassment as defined under ST/SGB/2005/5. The second FFP concluded that this was not the case and that the conduct of Mr. Baumann did not amount to misconduct. No findings were made regarding whether the conduct amounted to abuse of authority and no managerial action was recommended, which the Applicant indicated was a cause for concern.

87. The Tribunal notes that sec. 5.17 of ST/SGB/2008/5 does not appear to authorize a FFP to draw legal conclusions or legally characterize the facts. In fact, the provision limits the authority of the FFP to the preparation of a detailed report, giving a full account of the facts that they have ascertained in the process. However,

the Tribunal must also take into consideration the valid exercise of the discretion of the administration when reviewing an investigation report and the facts substantiated administration exercised its discretion. Before making a determination as to whether this discretion was properly exercised, the Tribunal must also consider whether it was reasonable for Mr. Gettu to base his decision on the basis of an investigation process which this

88. The Tribunal found, in the companion case decided in *Auda* UNDT/2017/006, that the delay in handling the complaint against Mr. Baumann and the repetitive lack

status of the investigation into his complaint, which spanned several years, were serious breaches of his fundamental due process and human rights. In this companion case, the Tribunal also found that the involvement of Ms. AL, the Special Assistant who previously served as a special assistant to Mr. Baumann, the subject of the investigation, in identifying investigation panel members and providing support to the second FFP was not consistent with her status as a witness in the investigation. As

written statement to the first FFP was found missing by the second FFP after she handed over questions than it answers, thus, constituting a serious procedural breach.

89. Mr. Gettu had a duty as the decision-maker, when reviewing the investigative report, to also assess the procedure leading to the preparation of the report. Mr. Gettu was obliged to review the investigative process holistically, including both fact-finding panels, as Mr. Gettu, himself, tasked the second FF the

of responses regarding the status of the investigation due to the Applicant and the conflicting role Ms. AL played as serious breaches of procedural fairness tainting the entire process.

90. Overall, the Tribunal, as a trier of fact, finds that the circumstances of the present case demonstrate that the decision to close the case of the A complaint against Mr. Baumann was improper, as it was based on an investigation process tainted by serious breaches of procedural fairness. The Tribunal is of the view that, in accordance with the jurisprudence of the Tribunals on procedural breaches vitiating an investigation process (which can be compared to the extrapolated criminal procedure theory of the fruit of the poisonous tree), a responsible official cannot make a proper determination and decision under ST/SGB/2008/5 on the basis of an investigation report that was tainted by serious procedural breaches. Having found that the decision to close the case was improper because it was tainted by procedural irregularities, there is no need for the Tribunal to determine whether Mr. [redacted] acceptance of the context excuse was a proper exercise of discretion.

91. For the reasons above, the Tribunal concludes that the Applicant has succeeded in showing that the decision to close the case of his complaint against Mr. Baumann was tainted by procedural irregularities and was, thus, improper.

Relief

92. The Applicant seeks rescission of the decision to close the case of

damage *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated that (footnotes omitted):

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and

Orders

100. In view of the foregoing, the TRIBUNAL DECIDES:

- a. The application succeeds.
- b. The Applicant is awarded the sum of USD5,000 as compensation for harm resulting from the procedural fairness breaches in connection with the second investigation into his complaint under ST/SGB/2008/5.
- c. The sums above shall bear interest at the U.S. Prime Rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 1st day of February 2017

Entered in the Register on this 1st day of February 2017

(Signed)

Hafida Lahiouel, Registrar, New York