

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. On 23 August 2017, the Applicant, a Senior Medical Officer in the Medical Services Division (MSD), Department of Management (DM) in New York, filed an application contesting what he considered to be an implied decision by the Under-Secretary- not to formally respond to his complaint and failing to establish a fact-finding panel pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The Respondent contends that the application is not receivable because the Applicant failed to request management evaluation within the period of 60 days from notification of the decision and, if the Tribunal were to find the claim receivable, it is without merit.

3. The case was reassigned to the undersigned judge on 1 April 2019.

4. Given the huge volume of documents, the number of factual issues to be explored in relation to the substantive merits of the claim, the lapse of time since June 2013 when the Applicant first considered that he had cause to complain about prohibited conduct and the deleterious effect of further avoidable delay on the

proceedings and judicial economy, the Tribunal decided that in the particular circumstances of this case there should be a preliminary hearing to determine the issue of receivability. The preliminary hearing was held on 6 May 2019.

Facts relevant to receivability

5. The following relevant facts were adduced from the record and the oral evidence provided at the preliminary hearing at which the Applicant and Mr. , the then Director of the Office of the USG/DM, gave evidence.

wish to work in New York in close proximity of the Medical Director. In the circumstances, CS put forward a number of proposals during the 5 July 2015 phone call to the Applicant for an alternative resolution of the dispute which included a posting to a senior position in other field missions or an agreed separation on suitable terms.

10. On 19 November 2015, CS and the Applicant had a meeting in person in New York. At this meeting, CS's evidence was that he made the Applicant aware that his complaint was considered in accordance with the office procedures and that he reviewed the complaint and advised the USG/DM that there were insufficient grounds to warrant a fact-finding investigation and that the USG/DM agreed. He was left to inform the Applicant in accordance with the normal office procedures. CS further clarified that the USG/DM had a busy work schedule and delegated responsibility for reviewing complaints to him as the Director of the Office of the USG/DM.

11. The Tribunal finds on the basis of the Applicant's evidence that he was expecting to see the USG/DM or to hear directly from him. During the preliminary hearing, the Applicant was adamant that he should have heard from the USG/DM and not from CS notwithstanding that he was the Director of the Office of the USG/DM. CS's response to the Applicant in cross examination was that he had made the Applicant aware that the USG/DM and CS had reviewed the case.

12. The Applicant's version of events is not entirely inconsistent with CS's evidence. He said that until July 2015 he had frequent contact with CS and told him that he never had a response from the responsible official. He said that action was not going to be taken against the Medical Director and that the complaint was reviewed with the legal office. The Applicant expressed his exasperation saying that he could not believe what he was being told and that he needed to hear it from the USG/DM as the responsible official. He asked CS to pass on a message to the USG/DM that he wished to meet him to discuss the complaint.

13. The Applicant said that in November 2015, CS offered to send him a response in writing. He refused this offer because CS was not the responsible official and he wanted to hear directly from the USG/DM, who, as the responsible official under ST/SGB/2008/5, should be contacting him directly with his decision. The Applicant made it clear that he was still waiting to hear from the USG/DM and that he wanted to discuss his complaint with the USG/DM. The Applicant stated that CS responded by saying that the USG was very busy.

14. On 5 May 2016, the Applicant submitted to the Ethics Office a request for protection against retaliation by the Medical Director.

15. On 26 August 2016, the Ethics Office denied the request for protection and informed the Applicant that his claim did

formal fact-finding investigation is a matter within the discretion of the responsible official (*Nwuke* 2010-UNAT-099).

25. An examination to determine the question when did the Applicant receive notification of the contested decision will require factual findings based preferably on the availability of a written notification, failing which the Tribunal will examine any available contemporaneous documentary record or other persuasive written evidence together with any relevant oral evidence. In the absence of a written decision and a contemporaneous record evidencing the decision, as in this case, the Tribunal is left with no alternative but to rely on any credible oral testimony of the Applicant and the responsible official and/or a senior official acting on behalf of and with the consent of the responsible official. It will generally be unsatisfactory, in such circumstances, to decide the issue of notification solely on documents, particularly if they are created for the purpose of the proceedings in question or documents the authenticity and/or the relevance of which could reasonably be called into question. A hearing will normally be considered obligatory where there is no persuasive and/or credible contemporaneous record.

26. By Order No. 69 (NY/2019) dated 24 April 2019, the Tribunal ordered the production of contemporaneous documents recording the Applicant's complaint being received and considered by the USG/DM, together with the USG/DM's instructions to the Director of the Office of the USG/DM to communicate the decision to not

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particular date. Ideally, irrespective of whether it is mandated by the Staff Rules or not, the decision is best communicated in writing. Not only would this be in conformity with good administrative practice, but it will best serve the interests of a just and expeditious consideration and determination of any formal complaint.

36. The Tribunal finds

Tribunal does not have jurisdiction to consider the respective contentions of the parties on the merits of the case.

Conclusion

37. It is the Judgment of the Tribunal that the claim is not receivable. The application is rejected.

(Signed)

Judge Goolam Meeran

Dated this 14th day of May 2019

Entered in the Register on this 14th day of May 2019

(Signed)

Nerea Suero Fontecha, Registrar