



JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. On 8 July 2008, Samer Abboud (Abboud) was interviewed by a five-member panel for a P-5 position in the Department for General Assembly and Conference Management (DGACM). Abboud subsequently complained that one of the panel members, the Special Assistant (SA) of the Under-Secretary-General for Department for General Assembly and Conference Management (USG/DGACM), had behaved inappropriately and requested an investigation into the SA's conduct. The USG/DGACM refused to undertake a preliminary investigation.
2. Abboud filed an application before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging the decision of the USG/DGACM. The UNDT rescinded the decision of the USG/DGACM not to order an investigation of the SA. While acknowledging that Abboud had not suffered any economic loss, the UNDT determined that the violation of Abboud's right to a fair consideration of his request for an investigation entitled him to compensation in the amount of USD 20,000.
3. Abboud appeals the UNDT Judgment. The Appeals Tribunal holds that the circumstances of the allegation of unsatisfact

argued with other panel members; showed an intimidating posture; created a tense and unsettling atmosphere; asked hypothetical questions; and asked investigation-like questions about issues that had already been answered. Since the SA was copied on the e-mail, he provided his comments. On 10 July 2008, Abboud was informed that the matter should be referred to the Head of the Department, the USG/DGACM, Shaaban Muhammad Shaaban (Shaaban), which Abboud immediately did.

5. On 10 July 2008, the USG/DGACM asked the PCO to provide comments in writing regarding Abboud's allegations. The PCO provided his comments the same day. On 11 July 2008, the USG/DGACM requested a second panel member, Ms. Janet Beswick, to provide comments on the allegations, which she did on 14 July 2008.

6. On 14 July 2008, Abboud sent an e-mail to the Under-Secretary-General of the Department of Management (USG/DM), copied to Shaaban, requesting that the entire process of investigation be transferred from DGACM to DM so as to ensure the highest possible objective and impartial outcome of the investigation," basing his request on the nature of relationship that exists between any USG/ASG and his/her Special Assistant, and since getting to the bottom of the matter might require widening the scope of staff to be interviewed by the investigation panel."

7. By memorandum dated 15 July 2008 to the USG/DM, the USG/DGACM described Abboud's reference to the relationship between any USG/ASG and his/her SA as a blatant slanderous accusation against all USGs/ASGs as it questions their integrity and impartiality, which is objectionable and unacceptable." He further stated that he found NO reason to believe that the [SA] [had] engaged in unsatisfactory conduct, and thus [had] decided NOT to undertake a preliminary investigation." In conclusion, the USG/DGACM requested that the case be closed as far as the [staff member's] allegations are concerned. As far as the slanderous accusations and aspersions that the [staff member] casts on all USGs/ASGs and on DGACM, I formally request that you deal with them in accordance with the relevant disciplinary measures and procedures."

8. On 15 July 2010, the USG/DGACM requested the three remaining panel members to provide their comments on Abboud's allegations in writing. He specified that he would decide in light of the comments made by [a]ll Panel members, whether to set up an official investigation panel." The SA and Mr. Raja Abboud provided their written

comments on 16 July 2008. Ms. Tavares-Walsh also provided her written comments on 16 July and, upon the USG/DGACM's request of 16 July, provided further details on 17 July 2008. On 17 July 2008, the USG/DGACM forwarded the comments of all the panel members to the Officer-in-Charge, OHRM.

9. On 21 July 2008, Abboud e-mailed the USG/DGACM, bringing to his attention that he had received no information as to how far the case had proceeded. The USG/DGACM replied the same day that the matter had been referred to the USG/DM. On 30 July 2008, Abboud e-mailed the ASG/OHRM complaining that nothing appeared to have happened with his complaint and requesting an urgent meeting. The same day, the ASG/OHRM e-mailed Abboud that the USG/DGACM had decided not to undertake a preliminary investigation. On 27 August 2008, Abboud requested a suspension of action and an administrative review of the decision not to undertake a preliminary investigation. The decision was confirmed and, on 30 November 2008, Abboud filed an application with the Joint Appeals Board (JAB). After the abolition of the JAB on 1 July 2009, the case was transferred to the UNDT.

10. On 6 January 2010, the UNDT issued its Judgment No. UNDT/2010/001 on the merits of the case. In order to determine whether the USG/DGACM erred in deciding not to undertake a preliminary investigation, the UNDT first elaborated on the applicable test under section 1 of ST/AI/371 (Revised disciplinary procedures):

4. As per sec 2 of ST/AI/371, the crucial question for Mr Shaaban to determine was whether there is "reason to believe...[that the SA] has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed." The "reason to believe" must be more than mere speculation or suspicion: it must be reasonable and based on facts sufficiently well founded –though of course not necessarily proved –to rationally incline the mind of an objective and reasonable decision-maker to the belief that the staff member has engaged in the relevant conduct. ... Whether there is "reason to believe" the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. ..It is not necessary that the official believes that the particular impugned conduct occurred or that it amounts to misconduct. ..[E]ssentially, the task of the official is to determine whether, in substance, there are circumstances which give rise to a reason to believe (or expect) that a "succeeding formal" investigation might, not necessarily will, disclose relevant misconduct.

5. ...

The mere fact that otherwise apparently reliable witnesses give completely contradictory accounts about the relevant facts will not mean that there is no reason to believe that the impugned conduct did not occur. To the contrary, if there is an apparently reliable witness who says that it did occur, there will almost invariably be

THE UNITED N

and had transferred responsibility for deciding whether there should be a preliminary investigation of the SA's conduct to OHRM.

16. The UNDT found that it was impossible to accept that any competent and objective decision-maker could have decided on this material alone that there was no reason to believe that the SA had not conducted himself unsatisfactorily. It found that the only reasonable explanation for the USG/DGACM's decision of 15 July 2008 was that he wanted to pre-empt the requested transfer to the Department of Management and decide the matter himself. The USG/DGACM received, on 16 July, the comments of the four other members of the panel. On 17 July, the Executive Officer of DGACM sent to the then acting chief of the Administrative Law Unit what were described as "the updated comments of DGACM to the statement of appeal made to the Joint Appeals Board." The comments stated that the USG/DGACM had sought information from all the panel members "upon receiving the complaint" and "carefully reviewed" the responses of all panel members. The UNDT found that this was not true, because at the date of his decision on 15 July 2008, he had reviewed only two. The UNDT held that it was evident from the comments made by three of the panel members that they were in a position to give further information about the SA's behaviour and "every reason to believe that the information was likely to be critical rather than supportive." The USG/DGACM should have sought more specific information. There was more than sufficient evidence to raise a reasonable suspicion that the SA's behaviour was not at all what it should have been. The UNDT concluded:

I regret that I have concluded that Mr Shaaban is an unreliable witness in respect of every important issue of fact that is not independently corroborated, although I do not go so far, I should say in fairness, as to conclude that he was actively dishonest. Having paid close attention to his testimony at the time and carefully reread the transcript I must say, however, that I am left with the powerful impression that he was not concerned to tell the truth but thought, rather than being a witness obliged to tell the truth, he could enter into a self-justifying negotiation and state as fact what was no more than a mixture of surmise and self-serving argument. At the conclusion of the evidence, I informed counsel for the respondent, in substance, that I did not think Mr. Shaaban's honesty was in issue so much as his reliability. After having carefully reviewed the evidence in light of the submissions of both parties, reread the transcripts several times and listened again to the way in which he gave evidence, I have reluctantly concluded that my initial inclination to explain away the unsatisfactory aspects of his testimony as mere unreliability was mistaken.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2010-UNAT-100

THE UNITED NATIONS APPEALS TRIBUNAL

33. In the instant case, Abboud seeks an order to compel the Administration to undertake a preliminary investigation into the allegedly inappropriate behaviour of one of the panel members during the Appellant's interview for a P-5 position. The panel member's behaviour, however, had no impact on the outcome of the promotion process.

34. As a general principle, the instigation of disciplinary charges against a staff member is the privilege of the Organization itself, and it is not legally possible to compel the Administration to take disciplinary action against another part.¹

35. Article (2)(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, as well as the Bulletins, and Administrative Instructions issued by the Secretary-General. These include ST/SGB/2008/5 and ST/AI/371.

36. Paragraph 2.1 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides that "every staff member has a right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse." Paragraph 2.2 adds that [t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct."

37. Paragraph 5.3 adds: 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."

38. And Paragraph 5.17 provides: The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving full account of the facts they have ascertained in the process and attaching documentary evidence. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report."

39. ST/AI/371 in its amended version was not in force until 11 May 2010. Nonetheless, both the former and the amended

THE U

46. The procedure by which the USG/DGACM reached the impugned decision was therefore flawed, but as the UNDT found this did not create any economic loss. The UNDT awarded damages acknowledging that Abboud had suffered no economic loss and that no actual damage existed. The UNDT Judgment explains that the matter is incommensurable, that it is not a case of punitive damage and that there is no intent to punish the Organization, that damages are awarded because the request for an investigation was treated with unseemly disdain, subject to insult, patronizing comments and retaliatory threats.

47. Article 11 of the UNDT Statute establishes that [t]he judgments of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based.”

48. In the instant case, the UNDT awarded damages –a relief which Abboud had not requested - without stating the facts and law underlying this decision. The Appeals Tribunal therefore vacates the award of damages.

Judgment

49. For the foregoing reasons, we grant the appeal in part and rescind the UNDT Judgment to the extent that it awards damages to Abboud.

Dated this 29th day of December 2010.

Original and authoritative version: English

(Signed)

Judge Weinberg de Roca,
Presiding
Buenos Aires, Argentina

(Signed)

Judge Courtial
Paris, France

(Signed)

Judge Painter
Cincinnati, United States

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar