

UNITED NATIONS DISPUTE TRIBUNAL

No.:

CND/2016/200

18 November 2016

Judge Goolam Meeran

Nairobi

Abena Kwakye-Berko

AWE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

## **Introduction**

1. The Applicant is a Resident Auditor in the Office of Internal Oversight Services (OIOS). He serves at the P-4 level, and is based in Bamako, Mali.

## **The Applications and Procedural History**

2. At the material time, the Applicant was the OIOS Chief Resident Auditor at the United Nations Assistance Mission for Iraq (UNAMI).

3. On 1 December 2015, the Applicant filed an Application (UNDT/NBI/2015/177) contending that the Respondent's decision, following the outcome of the investigation of his allegations pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority), was flawed in that it failed to grant him an effective remedy

6. By Order No. 425 (NBI/2016), a case management discussion (CMD) took place on 15 September 2016 to discuss the claims and issues raised in these separate claims and to deal with the Respondent's motion for combined proceedings, which was being resisted by the Applicant who also filed a motion for disclosure of the reports of the FFP.

7. On 19 September 2016, the Tribunal issued Order No. 435 (NBI/2016) requiring both parties to disclose relevant documents. The Respondent's motion for consolidation of the Applicant's two cases was also granted.

8. The parties complied with the Order, as directed, and the relevant documents were filed on 27 September 2016.

9. On 26 October 2016, the Tribunal issued Order No. 464 (NBI/2016) requiring further particulars from the Respondent with particular reference to the complaint against the CMS.

10. The Tribunal reviewed the Respondent's response to Order No. 464 (NBI/2016) and found that although there were common questions of background facts relating to both cases, the decisions taken in each were not identical. Moreover, the applicable legal principles and issues appear potentially to be sufficiently different such that the order for combip BT /F1 11.28 307( )95-112(f)167tombc(n)9(t')33(b)-

## **Background Facts**

12.No

18. On 3 March 2014, the Applicant complained of abuse of authority and harassment on the part of Mr. Rutgers and Ms. Yasin, under section 5.11 of ST/SGB/2008/5. The complaint was addressed to the former Under-Secretary-General, Department of Field Support (USG/DFS) with a copy to the Assistant Secretary-General, Office of Human Resource Management (ASG/OHRM). He did not complain to the SRSG because he was present at the SMM at which the derogatory statements were made.

19. On 17 April 2014, the complaint was referred by ASG/OHRM to SRSG Mladenov for his consideration and further action.

20.

Prior to that, the Applicant was to have received a *verbatim* copy of his statement for his review and subsequent signature.

27. On 11 November 2014, the Applicant wrote to the Panel to enquire into the status of the investigation and noted that he was yet to receive a copy of his statement. The Panel responded that their report was still pending, but sent him a

35. On 20 February 2015, the FFP provided SRSG Mladenov with its initial Investigation Report.

36. The Respondent submits that between 20 February 2015 and 20 March 2015, the Mission's Conduct and Discipline Unit conferred with DFS and the Ethics Office regarding the potential conflict of interest in that SRSG Mladenov, who was to decide on further action following the Panel's findings, was also a witness in the FFP's investigations.

37. On 4 March 2015, the Secretary of the FFP informed the Applicant that its Report had been submitted to the SRSG. On 22 March 2015, SRSG Kubis was appointed to succeed SRSG Mladenov as Head of Mission.

38. SRSG Kubis received the Panel's Report on 24 March 2015.

39. The relevant paragraphs of the FFP's summary of their findings appear at paragraph 67 under "Considerations".

40. On 21 May 2015, SRSG Kubis informed the Applicant and the USG/DFS of the outcome of the investigation. The memorandum detailing the Panel's findings was dated 23 April 2015.

41. The Applicant was informed that as a result of the Panel's findings, a letter of reprimand had been placed in Mr. Rutger's Official Personnel File. With regard to Ms. Yasin, the matter was referred to the USG/DFS because she was no longer assigned to UNAMI.

42. On 9 June 2015, the USG/DFS acknowledged receipt of SRSG Kubis' referral. The USG/DFS determined that the complexity of the case required the involvement of an expert trained in dealing with complaints of this nature.

43. On 15 June 2015, the matter was forwarded to the USG of the Department of Peacekeeping Operations (USG/DPKO).

44. On 15 July 2015, the Applicant sought management evaluation of the SRSG's decision with regard to Ms. Yasin. The Applicant was specifically challenging the SRSG's decision to refer the matter to



53. The preamble to the Bulletin indicates that its purpose is to ensure that “all staff members of the Secretariat are treated with dignity and respect and are aware of their role, and responsibilities, in maintaining a work place free of any form of discrimination, harassment, including sexual harassment, and abuse of authority...”. The Bulletin protects staff members against the various forms of prohibited conduct.

54. The allegations in this case concern harassment and abuse of authority as defined in section 1.2 and 1.4 respectively.

55. Sections 1.2 and 1.4 of the Bulletin provide:

1.2 Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, o(n)31(.1(o)-32(r)19.04 662.88 29981 y20(y)31( 2e)-24( 333.84 3727( )-133(H)-

intimidation, hostility, offence and any form of prohibited conduct.

57. Managers and supervisors also have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the Bulletin “may be considered a breach of duty which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate”.

58. Section 5.11 deals with the requirements for filing a complaint and Section 5.14 makes provision for the steps to be taken upon receipt of a formal complaint



minutes and/or to write to all recipients of the minutes withdrawing the damaging allegations against the Applicant taken together support a finding of harm which will endure as long as no steps are taken to restore the damage to the Applicant's reputation and professional standing.

67. Sections 5.18(b) and (c) of the Bulletin specifically provides that:

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counseling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the *responsible official shall* refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of

circulating the minutes of the meeting in which such remarks has

ST/SGB/2008/5. The Applicant is entitled to an award of compensation for this procedural error.

72. The underlying policy recognises the crucial function of the ASG/OHRM who is vested with the authority, and has the experience and expertise, to give effect to the Organization's disciplinary procedures in an objective, detached and consistent manner.

73. It is settled law that taking disciplinary action is a prerogative of the Secretary-General and not that of the affected staff member.<sup>1</sup> This function has been delegated to the ASG/OHRM and it is not for the responsible officials to ignore the clear duty placed on them by section 5.18(c) to refer a case to the ASG where the allegations have been proven to be well founded and the conduct in question amounts to possible misconduct. It is for the Organization to take the next steps in the process, under the guidance and responsibility of the ASG/OHRM, and not for individual managers to purport to exercise a discretion which they do not have under section 5.18(c).

74. The Administration failed to draw a distinction between action, if any, to be taken against an alleged offender following a re 1 133.2tin] TJ ET Q -24(l)22(e)-24(g)313(a)-3(i)-20(l)2

abuse of authority was well founded. It would also have been abundantly clear that the Applicant had suffered harm and the obvious step of withdrawing, amending or expunging the offending minutes and notifying all recipients, has still not taken place. There is no logical or acceptable explanation for this continuing delay which has nothing to do with the situation in Iraq.

### *Compensation*

76. The Appeals Tribunal has consistently ruled that

The Dispute Tribunal has an unquestioned discretion and authority to quantify and order compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.<sup>2</sup>

A Tribunal may award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury.<sup>3</sup>

77. The stress and moral injury occasioned here stems from the “unsubstantiated derogatory remarks” made against the Applicant by the Chief of Staff, who quite plainly should have known better. The records clearly shows that those comments by Mr. Rutgers on 22 January 2014 were made in the presence of the senior-most managers in the Mission, including Ms Yasin, the CMS, and then recorded and circulated as minutes to several people. The Fact Finding

While the Applicant has requested that the senior management meeting minutes be expunged, he has not cited any staff rule or regulation requiring the Organization to do so or any evidence that he suffered ongoing harm or any harm at all from the failure to expunge the minutes.

79. Much later, and only in response to a specific question from the Tribunal, the Respondent submitted:

As a sign of good faith and to address the Applicant's ongoing concerns about the meeting minutes, the mission is ready and willing to amend and recirculate the Senior Management Meeting notes of 21 January 2014 to the original recipients if the Applicant wishes.

80. Good faith would have been properly demonstrated if the minutes were expunged following Mr. Rutger's apology to the Applicant. To continue to fail to do so to date, two years later, after many of the recipients have left the Mission shows little regard for the reputation of the Applicant and little understanding of the gravity of the Applicant's complaint and the Panel's findings. Such conduct is wholly inconsistent with the values of the Organisation and the policy and principles underpinning the protection afforded to staff members under ST/SGB/2008/5.

81. The Applicant has complained of humiliation and disrespectful treatment by the Mission's senior management team, which has resulted in him suffering and continuing to suffer injury to his dignity, character and personal and professional reputation.

82. That injury was compounded by delays in the investigation and reporting processes and the continuing damage to the Applicant's personal and professional standing and reputation as an auditor.

83. The Tribunal finds that the Applicant's claim is well founded and that he suffered damage to his reputation and professional standing exacerbated by the continuing and unacceptable delay in affording him the relief to which he is entitled. The Applicant is entitled to compensation for the harm suffered, such



