
Case No.: UNDT/NY/2011/004

Judgment No.: UNDT/2013/029

Date: 22 February 2013



Introduction

1. On 12 January 2011, the Applicant, a Senior Investigator at the P-5 level with the Investigations Division of the Office of Internal Oversight Services (“OIOS”), filed an application in which he identified the contested administrative decision as the decision to commence what is described as “a secret and retaliatory investigation” against him.

2. By the reply dated 13 February 2011, the Respondent submits that the application is not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal in that the Applicant’s appeal is time-barred and in that it does not concern a contestable administrative decision.

3. This case was assigned to the undersigned Judge in October 2012. Given the need to clarify the confusion arising from the fact that the Applicant has brought two separate applications (in addition to this case, the Applicant also has Case No. UNDT/NY/2011/055 pending), which appear to be linked with two other separate applications by his co-worker Ms. Nguyen-Kropp (UNDT/NY/2010/107 and UNDT/NY/2011/054), it was decided to have a joint case management discussion with all the parties, who were being represented by the same counsel. It was common ground that, in the interests of judicial and administrative economy, consideration should be given to combining all four cases subject to the issue of receiveability being determined first in this case (and in *Nguyen-Kropp* UNDT/NY/2010/107).

4. Although there are broad similarities between the cases brought by the two applicants, there are also certain distinct differences which necessitate separate judgments on the preliminary issue of receiveability.

receivability in this case and *Nguyen-Kropp* UNDT/NY/2010/107. The Applicant was to file and serve a response. Both parties complied with the order, although after a short delay because of the problems following Hurricane Sandy in New York.

Findings of facts

5. In the amended reply regarding receivability, dated 6 November 2012, the Respondent provided a chronology of facts, which is set out below (the same

regarding procedural and investigative irregularities in an investigation conducted by the Applicants that was submitted to the USG/OIOS; (d) a memorandum dated 9 April 2010 from the USG/OIOS to Ms. Angela Kane, the then Under-Secretary-General for Management [“USG/DM”] to arrange for an entity external to OIOS to undertake an investigation into the report of possible misconduct by the Applicants submitted by PPS and a subsequent memorandum dated 6 May 2010 from the USG/OIOS to the USG/DM about the reasons for her request that the investigation into possible misconduct by the Applicants be conducted under the auspices of the USG/DM. The Alleged Retaliation Letters included an extensive quote of the 6 May 2010 memorandum. The Alleged Retaliation Letters also contained information about the efforts by DM officials to obtain the assistance from outside entities to undertake the investigation requested by the USG/OIOS, referring, in particular, to a request for assistance made to the World Bank and, allegedly, the European Bank for Reconstruction and Development [“EBRD”] (as set out in the Ethics Office’s comments on the applications in cases UNDT/NY/2011/054 and UNDT/NY/2011/055, the Respondent maintains that the EBRD did not receive the PPS documentation disclosing the names of the Applicants).

... By a letter dated 23 August 2010 ... [C]ounsel for the Applicants submitted a second letter to the Ethics Office attaching a copy of the 9 April 2010 memorandum from the USG/OIOS to the USG/DM together with, inter alia, a copy of the report of misconduct dated 25 March 2010 prepared by PPS. The letter noted that the Applicants had not “officially been provided a copy of” this material.

... By a letter dated 4 October 2010 ... [C]ounsel for the Applicants requested management evaluation of the following matters: (a) the failure of the Ethics Office to respond to the Applicants['] letters dated 30 July 2010 and 2 August 2010 within 45 days; (b) the failure by DM and OIOS to protect one of the Applicants from retaliation by not taking all appropriate interim measures; (c) the dissemination of information relating to the report of possible misconduct by the Applicants to possible external investigating entities, including the World Bank and OLAF without first seeking the input of the Applicants; (d) the decision by the USG/OIOS to request PPS to investigate the Note to File; and (e) the removal of the Note to File from the supporting documentation underlying an investigation undertaken by the Applicants.

... By letters dated 4 November 2010 ... the Management Evaluation Unit [“MEU”] responded to the Applicants stating that, for

launch a case by requesting a management evaluation (*Appleton* Order No. 289 (NY/2010));

d. Section 2 of ST/AI/371 (Revised disciplinary measures and procedures), in effect in April 2010, provided that the Head of Office shall undertake an investigation “where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed”. In the exercise of her discretion and on the grounds set out in the 25 March 2010 PPS memorandum, the USG/OIOS considered that she had before her sufficient information to require the commencement of an investigation under the terms of ST/AI/371. No internal regulation stipulates that the subject of a report of misconduct be consulted or advised of the matter. The requirements of fairness are maintained because a staff member, who is the subject of an investigation, is provided with adequate opportunity to answer the allegations against him or her during the course of the investigation (which occurred in the present case during their respective interviews with the investigator as well as by the investigator providing the Applicants the opportunity to provide comments on the draft investigative details);

e. On 30 July 2010, the Applicant was fully aware of the terms of Ms. Ahlenius’ decision to undertake an investigation and the basis upon which she had made this decision. It was made without Ms. Ahlenius first seeking the Applicant’s comments. Nevertheless, the Applicant did not file a request for management evaluation until 4 October 2010, more than sixty calendar days after she had received notice of this decision;

f. The notification, dated 30 December 2010, from Ms. Kane to the Applicant implemented the 9 April 2010 decision by Ms. Ahlenius to

conduct an investigation and does not constitute a new administrative decision regarding this matter;

be undertaken and its commencement, the Applicant did not indicate in his application that he considered that decision to investigate to be abandoned. Rather, he indicated that he considered the undertaking of the investigation to be imminent. Furthermore, he was informed on 30 December 2010 that a second investigation was, in fact, commenced. Thus, the procedure set out in ST/AI/371/Amend.1 continues. Until a final decision is taken, such as the decision to close the matter following completion of the investigation or a decision to impose an administrative or disciplinary measure, there is no administrative decision that may be contested before the Tribunal;

Applicant's submissions

7. The Applicant's contentions may be summarized as follows:
 - a. There was no decision taken by Ms. Ahlenius to initiate an external investigation. Ms. Ahlenius' recommended that the Department of Management refer the case to an external, independent expert, who would conduct a preliminary fact-finding inquiry. She specifically noted in her request that "the Department of Management is best suited to administer such cases". The Department of Management undertook to determine whether investigators from other international organizations would carry out such an investigation. It was the very act of "the shopping around" for investigators that was the subject of the Applicant's complaint to the Ethics Office, alleging that this activity damaged her reputation irrevocably;
 - b. The Applicant did not receive "notice," either verbally or in writing, of the decision to initiate an investigation until 4 January 2011, when he received the memorandum dated 30 December 2010 signed by Ms. Kane. The actual decision to initiate the investigation, therefore, was taken by Ms. Kane in December, 2010, and not by Ms. Ahlenius. Prior to that time, the Applicant

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), *shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.*

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which *the staff member received notification of the administrative decision to be contested.*

9. Paragraph 2 of ST/AI/371/Amend.1, which amends ST/AI/371 and which took effect on 11 May 2010, provides as follows regarding the initiation of an investigation that may possibly lead to disciplinary measures (emphasis added):

Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *an* investigation.

10. The original para. 2 in ST/AI/371 stated that (emphasis added):

Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *a preliminary* investigation.

11.

As an administrative process, investigations follow prescribed steps defined by the employer's obligations towards the employee to ensure procedural fairness. As a first step, the investigation process generally commences with a report of possible misconduct. The intake of matters for investigation requires a methodical and consistent approach for receiving, recording, screening, and assigning matters for investigations ... The intake also serves as a foundation for and, to a certain extent, initiates the next step of investigation planning.

The investigation process continues with the steps of planning and preparation ... These steps include both formal and informal actions designed to ensure effective disposition of the investigation, as well as to support post-investigation management action. The steps of planning and preparation are, therefore, critical to the effective execution of investigation responsibilities.

The execution of an investigation plan is the culmination of technical expertise in methods and techniques, as well as competence in the organizational requirements for the administrative process thl13stratinrep.15 Tc.164.3(epa

the decision to investigate the Applicant had clearly already been taken. It had just not yet been notified to the Applicant. The Respondent cannot now rely on his own default to deny the Applicant recourse to a judicial determination on the merits of the claim.

16. On the available documentary evidence, the Respondent has therefore failed to establish that the Applicant's request for management evaluation was not filed in a proper and timely manner. Consequently, the Tribunal finds that the claim is not time-barred.

Is the alleged decision to undertake a "secret and retaliatory" a contestable administrative decision?

17. The Respondent's contention is effectively that initiating an investigation is merely a step in the investigative process and not a separate administrative decision which the Tribunal is competent to review. The Statute of the Dispute Tribunal defines the jurisdiction and powers of the Tribunal and its art. 2.1(a) defines the type of administrative decision that the Tribunal may review as:

... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

18. Nothing in this definition appears to limit the Tribunal's authority in terms of considering an application from a staff member who wishes to appeal an administrative decision to launch a disciplinary investigation into her affairs, which, in addition to being procedurally flawed, may also be tainted by bad faith and/or ulterior motives. That the Tribunal may review such an application was also confirmed by the Appeals Tribunal in *Nwuke* 2010-UNAT-099 in which it stated that "a possible disciplinary procedure" would concern the rights of "the accused staff member" (para. 29).

19. Accordingly, the Tribunal finds that the contested administrative decision is an appealable administrative decision.

Conclusion

20. The Applicant's appeal against the decision to conduct an alleged "secret and retaliatory" investigation is receivable.

(Signed)

Judge Goolam Meeran

Dated this 22nd day of February 2013

Entered in the Register on this 22nd day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York