



Case No.: UNDT/NY/2010/107

Judgment No.: UNDT/2013/028

Date: 22 February 2013

Introduction

1. The Applicant is an Investigator at the P-3 level with the Investigations Division of the Office of Internal Oversight Services (“OIOS”). She was transferred temporarily to the Inspection and Evaluation Division in New York, but is apparently now working in Vienna. On 28 December 2010, she filed an application in which she identified the contested administrative decisions as: (a) the “conduct [of] a secret and retaliatory investigation” against her and (b) the denial of her request to be granted “an appropriate transfer or paid administrative leave”.

2. On 5 January 2011, the Applicant submitted an amendment to her application in which she added new facts in support of her initial application stating that by memorandum dated 30 December 2010 from Ms. Angela Kane, the then Under-Secretary-General for Management (“USG/DM”), she was placed under formal investigation. The Applicant received this memorandum by an email of 4 January 2011 from Ms. Kane’s office.

3. By reply dated 1 February 2011, the Respondent submits that the application is not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal and contends, in regard to the initiation of an investigation against the Applicant, that the Applicant’s appeal is time-barred and that it does not concern a contestable administrative decision. The Respondent contends that the claim in relation to the alleged denial of her request to be granted an appropriate transfer or paid administrative leave is moot as the Applicant has been granted appropriate interim relief.

4. 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/2011/054 pending), which appear to be linked with two other separate

applications by her co-worker Mr. Postica (UNDT/NY/2011/004 and UNDT/NY/2011/055), it was decided to have a joint case management discussion with all the involved parties, who were being represented by the same Counsel on each side. It was common ground that, in the

concerning an investigation into possible misconduct by the Applicants ...

... On 14 July 2010, one of the Applicants, who was then on leave from his position in the OIOS at the United Nations and working at OLAF, held a meeting with senior officials of OLAF and “detailed” to them “the nature of the allegations made against him” ...

... Counsel for the Applicants submitted separate requests for action by the Ethics Office under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) on 30 July 2010 and 2 August 2010 ... In the submissions to the Ethics Office, an account was set out of the following matters: (a) the request by Ms. Inga-Britt Ahlenius, the then Under-Secretary

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 various reasons, the matters raised were not subject to review by the MEU. With regard to an investigation into possible misconduct by the Applicants, the letters from MEU stated that “there is no ongoing investigation involving you at the Department of Management’s behest at this time”.

... Although there is no requirement in the internal policies to provide notice of a decision to launch an investigation to the subjects thereof, by memoranda dated 30 December 2010 from the USG/DM ..., nonetheless, and in light of the statements set out in the letters from the MEU about there being no-ongoing investigation as at

b. The complaint is time-barred because more than 60 days prior to the date of their Counsel's letter requesting management evaluation, namely on 4 October 2010, the Applicants were fully aware of the terms of the decision to initiate an investigation into their possible misconduct, which they regarded as being retaliatory;

c. Although the requirement for a written notice of a decision set out in staff rule 111.2(a) was relied on by the Appeals Tribunal in their decision overturning the Dispute Tribunal's decision that an appeal was time-barred (*Schook* 2010-UNAT-013). Other decisions of the Dispute Tribunal have clearly accepted that an inferred decision was sufficient for a staff member to 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

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;

g. ST/AI/371/Amend.1 (Revised disciplinary measures and procedures), ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) set out procedures to be followed in relation to the matters covered by these administrative issuances. The individual steps of these procedures do not give rise to a decision that affects the term and conditions of a staff member's appointment unless and until the Administration has complete

m. According to OIOS, after one week of paid leave, the Applicant reported for duty on 18 October 2010 and assumed her assignment with the Investigation Evaluation Division. She was provided office space on the opposite end of the floor, far away from where staff of the Investigations Division is located. She has not expressed to the OIOS, including her current supervisor, any concern with regard to the interim relief arrangements in place, other than indicating preference for a private office within the Investigation Evaluation Division (located in closer proximity to the Investigations Division, which was and remains unavailable). Accordingly, this aspect of the Application should be dismissed.

Applicant's submissions

8. In her submissions regarding the receivability of her application, the Applicant only comments on the question whether her appeal against the decision to conduct an alleged "secret and retaliatory" investigation is time-barred. She fails to address the Respondent's additional contentions that there was not an appealable administrative decision or that she was allegedly not granted an appropriate transfer or paid administrative leave.

9. The Applicant's submissions may be summarized as follows:

a. There was no decision taken by Ms. Ahlenius to initiate an external investigation. Ms. Ahlenius' recommended that DM refer the case to an external, independent expert, who would conduct a preliminary fact-finding inquiry. She specifically noted in her request that "[DM] is best suited to administer such cases". DM undertook to determine whether investigators from other international organizations would carry out such an investigation. It was this very act of the "shopping around" for investigators that was the subject of the Applicant's complaint to the Ethics Office, alleging that this

b. The Applicant did not receive “notice,” either verbally or in writing, of the decision to initiate an investigation until 4 January 2011, when she received memorandum dated 30 December 2010 signed by Ms. Kane. Therefore, the actual decision to initiate the investigation was taken by Ms. Kane in December 2010, and not by Ms. Ahlenius. Prior to that time, the Applicant had only received the documents in question informally from Mr. Postica, who had, in turn, received them informally from an anonymous source. In fact, at no time did the Administration notify her that a decision had been taken to conduct an investigation or that they were engaging in efforts to enlist several external investigative bodies. She was only informed that the investigation was about to begin two days after she filed an application with the Tribunal;

c. The deadline in staff rule 11.2(c) plainly requires that an official “notification of the administrative decision” must be communicated by the decision-making unit to the staff member. No fair or practical reading of the rule would allow a prejudicial triggering of the deadline simply because the staff member has learned of the apparent decision through unofficial sources and rumours rather than the official decision making unit. In interpreting and applying staff rule 11.2(c), the Tribunal must be guided by a fair and practical reading of the rule’s language and intent (*Schook* 2010-UNAT-013);

d. The Applicant was officially informed in writing on two occasions that there was no investigation pending against her. On 8 October 2010, the Ethics Office sent her a letter in which it was indicated that: “while we are aware that the former USG of OIOS referred a matter to the Department of Management for investigation, we can confirm that to the best of our knowledge, there is no ongoing investigation involving [the Applicant] at the Department of Management’s behest at this time”. In addition, on 12 October 2010,

the Applicant met with officials from the Ethics Office, who confirmed that there was no investigation of Mr. Postica or herself. The MEU, at no point, informed the Applicant that her request

The conclusion of an investigation is not the final step. Rather the conclusion is the point where a decision is made that either:

- x there is sufficient factual information to make recommendations about the reported possible misconduct; or
- x the matter can no longer be effectively pursued and must be closed.

As with the decision at intake on whether an investigation is to be initiated, the decision of how and when to close the investigation is discretionary and must take into account the interests of the Organization and the requirement

on 4 January 2011 did not constitute a new administrative decision regarding the matter as Ms. Ahlenius had already made the decision to initiate an investigation against the Applicant on 9 April 2010. By this line of argument, there was no requirement for the Applicant to request a second management evaluation. The only issue is whether the request made to the MEU, on 4 October 2010, was within the 60 days of receipt of notification of the impugned decisions, as required pursuant to staff rule 11.2(c).

15. The entire process regarding the Applicant being investigated for perceived misconduct constitutes one and the same investigation, which started from its launch on 9 April 2010 by Ms. Ahlenius. This follows from ST/AI/371/Amend.1, the applicable Administrative Instruction at the time of the request for the management evaluation on 4 October 2010, and the OIOS Investigations Manual, which both, as opposed to ST/AI/371, clearly only refers to a single investigation when a staff member is being investigated for a possible disciplinary matter and not several independent investigations, such as, for instance, a “preliminary” investigation followed by an independent “actual” investigation, as the Respondent appears to contend. The Tribunal notes, at the time when the Applicant filed her request for management evaluation, ST/AI/371/Amend.1 had already come into effect.

16. Accordingly, it does not follow that the claim is time-barred and therefore not receivable. If that were the case, the Tribunal would in effect be condoning any practice whereby the Administration conducts investigations in secret and denies the staff member the right of challenging such due process violations by sheltering behind the argument that, in the absence of receipt of notification and a request for management evaluation and irrespective of the harm inflicted on the staff member, the claim was not receivable.

17. It is clear that, at some point, the Administration went beyond a mere consideration as to whether a disciplinary investigation was appropriate when it

sought suitable independent investigators to conduct an investigation and identifying the Applicant. The Respondent submits that this occurred on 9 April 2010 when Ms. Ahlenius launched the investigation. The fact that the Applicant first heard the rumour in or about 14 July 2010, but did not request management evaluation until 4 October 2010 does not necessarily mean that the request for management evaluation is time-barred. It was prudent on her part to wait for notification of the decision. It did not come. The rumours continued and increased in intensity until a point was reached when she decided that in order to protect her rights she should take the first step in the procedure for challenging the fact of her being secretly investigated for possible misconduct. When she did so on 4 October 2010, the response of the MEU, by letter dated 4 November 2010, was that there was no “ongoing” investigation, based on the information received from the Ethics Office. This was, in light of the Respondent’s reply in this case, clearly not correct—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.

18. 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?

19. 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

Conclusion

24. 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