



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

YAVUZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, HRMS, UNOG

Introduction

1. The Applicant, a former staff member with the United Nations Economic Commission for Europe (“UNECE”), contests the decision not to investigate his complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

Facts and procedural background

2. On 4 May 2017, the Applicant was appointed as Economic Affairs Officer (P-3), Agricultural Quality Standards Unit, Market Access Section, Division of Economic Cooperation and Trade (“DECT”), UNECE, on a one-year fixed-term appointment. The Unit where he worked was composed of a GS-5 Assistant, a P-4 who acted as the Applicant’s first reporting officer (“FRO”) and a P-5 who acted as the Applicant’s second reporting officer (“SRO”).

3. According to the Applicant’s submissions, on 18 May 2017, when his FRO saw him speaking with a colleague at a celebration in the Division, she called him over and told him not to speak to the colleague, using derogatory language towards that colleague. A few weeks later, the Applicant was invited for lunch by this same colleague but, when he mentioned it to his FRO, she slammed her hand heavily on the table several times and shouted “No Korkut! No Korkut! I need your loyalty! I need your loyalty!”. She then went on to describe how the concerned colleague and another colleague, again using derogatory language when she referred to the latter, were trying to take their jobs, referencing to the Agricultural Quality Standards Unit.

4. Still according to the Applicant’s submissions, in early August 2017, when he was discussing with his FRO the formulation of several emails he had prepared, she told him to “use [his] brain”. The Applicant took issue with such language being used against him and the FRO’s response was allegedly to tell him that this was “a stupid remark”. This was followed a couple of days later by a meeting with the Applicant’s FRO and SRO when he was accused of having bad feelings towards his FRO and his teamwork and skills were criticized. The Applicant raised the fact that he found his FRO’s attitude and insulting behaviour

problematic. In response, the Applicant was informed that he should be grateful to his FRO who had been instrumental in the decision to select him for the position.

5. This allegedly marked the beginning of a pattern (not specifically described by the Applicant) of aggressive criticism and demeaning language used towards the Applicant by his FRO, which continued throughout his time in the Unit. The Applicant sought to address this problem through direct discussion with his FRO and in writing but without success.

6. On 9 October 2017, the Applicant allegedly met with his SRO to discuss the harassment he believed he had been subject to. His SRO suggested that the perceived insults were the result of a cultural clash and that this was normal in the United Nations.

7. On 16 October 2017, the Applicant met with the then Executive Officer at UNECE to discuss the situation. The Applicant expressed his opinion that his FRO and SRO had already decided to try to end his employment. The then Executive Officer advised the Applicant to contact the Staff Coordinating Council, the Ombudsman, the Deputy Executive Secretary (“DES”), UNECE, and the Executive Secretary, UNECE. The Applicant subsequently contacted the Staff Coordinating Council, the Ombudsman and the DES.

8. The Applicant’s mid-term review, on 9 November 2017, was conducted in an allegedly hostile environment with the Applicant being informed by his FRO that he had completed only 20% of the tasks assigned to him and that he did not deserve his salary. The Applicant was also informed that he would be placed on a performance improvement plan (“PIP”).

9. On 21 December 2017, 17 January 2018, and 8 February 2018, the Applicant met with his FRO and SRO to discuss his progress in meeting his PIP targets.

10. On 22 December 2017, the Applicant recalls having met with the DES, UNECE, to inform him of the situation. The DES told the Applicant that he was following the situation closely, and later indicated that the Applicant would be given the opportunity to work for a different supervisor to ensure an objective assessment of his performance.

11. By email of 2 March 2018, the DES, UNECE, advised the representative of the Staff Coordinating Council as follows:

I have clear understanding with both my ES [Executive Secretary] and also EO [Executive Office] that [the Applicant] will be given a chance to work under another supervisor. However, we will have to deal with it once the period of the PIP ends, as we need to do it by the book and respect the PAS process.

I actually informally explained this to [the Applicant] and asked him to wait till the PIP period ends. But of course it is understandable that he is very worried.

In my assessment of the situation it is irrelevant whether his current supervisors will fail him on PIP or not.

For me there is no evidence of underperformance on his side, rather interpersonal problems and most likely lack of proper management/instruction.

12. The DES continued to monitor the situation and indicated in an email of 7 March 2018 to the Staff Coordinating Council that he understood that “[the Applicant’s] supervisors are maltreating [him]”.

13. From 15 March 2018, the Applicant was on sick leave. Having been informed of the Applicant’s leave, the DES, UNECE, indicated on the same day that he would be arranging an appropriate solution upon return of the Executive Secretary and the then Executive Officer, UNECE.

14. At the end of the Applicant’s performance cycle in May 2018, the Applicant’s performance was rated as “partially meets expectations”. The Applicant challenged the performance rating before a Rebuttal Panel under the procedure set out in ST/AI/2010/5 (Performance Management and Development

System) and, on 19 December 2018, the Rebuttal Panel decided to maintain the Applicant's performance rating.

15. On 26 December 2018, the Applicant filed a complaint of harassment and abuse of authority under ST/SGB/2008/5 against the FRO, the SRO, “[a]ll UNECE senior managers who were aware of the harassment and abuse ... but failed to observe their responsibilities under said bulletin” and “[a]ll relevant UNECE and UNOG Human Resources staff who rejected, or played a role in the rejection of [his] applications to receive a Carte de Legitimation”.

16. On 25 January 2019, the Applicant was informed that he would be separated for performance reasons at the expiration of his appointment on 31 January 2019. The Applicant's appointment was then extended until 31 May 2019 pending management evaluation of the decision to separate him from service as a result of the Applicant's request for suspension of action, which was granted by the Tribunal's Order No. 4 (GVA/2019) of 6 February 2019.

17. On 4 April 2019, the Applicant filed addendums to his complaint and further complaints.

18. On 31 May 2019, the Applicant was separated from service.

19. On 15 July 2019, the Applicant received a memo from the Assistant Secretary-General for Human Resources (“ASG/OHR”), informing him of the decision not to investigate his complaint.

20. On 19 July 2019, the Applicant filed an application, which was registered under Case No. UNDT/GVA/2019/048, challenging the decision not to renew his fixed-term appointment for performance reasons.

21. On 13 September 2019, the Applicant contested the decision not to investigate his FRO and SRO by way of management evaluation.

22. By letter dated 31 October 2019, the Applicant was informed of the outcome of his request for management evaluation, which upheld the contested decision mentioned in para. 1 above.

23. On 30 January 2020, the Applicant filed the present application before the Tribunal challenging the contested decision mentioned in para. 1 above.

24. On 4 March 2020, the Respondent filed his reply.

25. On 13 April 2021, the present case was assigned to the undersigned Judge.

26. By Judgment *Yavuz* UNDT/2021/062 dated 31 May 2021, the undersigned Judge rescinded the decision not to renew the Applicant's fixed-term appointment, ordered his reinstatement, and set compensation in lieu under art. 10.5 of the Tribunal's Statute to three months of net-base salary.

27. In the Tribunal's view, the Organization "failed to manage or evaluate the Applicant's performance in a fair and objective manner and did not consider the Applicant's more recent satisfactory performance". The Tribunal therefore found "incoherent to neglect the more recent good performance results of a staff member when the Organization examined whether to renew a contract based on unsatisfactory performance" (see *Yavuz*, para. 65).

28. By Order No. 146 (GVA/2021) of 28 September 2021, the Tribunal found that the matter could be determined on the papers without holding a hearing and ordered the parties to file their respective closing submission, which they did on 8 October 2021.

Parties' submissions

29. The Applicant's principal contentions are:

a. The decision-maker considered an irrelevant factor, UNECE's contention that "the central issue [in the Applicant's complaint was] disagreement on work performance":

i. The presence or otherwise of a disagreement on work performance was an irrelevant consideration;

ii. The Applicant's allegation contained in his complaint plainly extended beyond a simple disagreement as to whether his performance was satisfactory; and

iii. The Applicant's allegation was of a systematic attempt to misrepresent his performance in order to secure his separation from the organization. This falls squarely within the definition of abuse of authority contained in ST/SGB/2008/5;

b. The decision does not correspond with the facts, fails to take into account relevant factors and takes into account irrelevant factors in relation to the Rebuttal Panel report;

c. The Management Evaluation Unit ("MEU") misapplied the definition of harassment and abuse of authority; and

d. The MEU imposed an inappropriate burden of proof on the Applicant. Also, to require the Applicant to prove misconduct in order to trigger an investigation was unlawful.

30. The Respondent's principal contentions are:

a. The contested decision was legal because there were insufficient grounds to initiate an investigation;

b. The Applicant's complaint falls squarely in the realm of disagreements on work performance and does not disclose possible prohibited conduct under ST/SGB/2008/5 or manifestly does not constitute possible misconduct; and

c. The reasons relied upon by the MEU are irrelevant to the matter at hand because a recommendation by the MEU does not have the status of an appealable administrative decision.

Consideration

31. In the present case, the Applicant contested the decision not to investigate his complaint under ST/SGB/2008/5.

Scope of judicial review

32. As a preliminary matter, it is noted that the Applicant submitted a complaint against several individuals. In her letter of 15 July 2019, the ASG/OHR informed the Applicant that there were insufficient grounds to warrant a formal fact finding against any of those individuals. However, the Applicant only challenged the dismissal of his complaint against his FRO and SRO by way of management evaluation.

33. Recalling the general requirement of staff rule 11.2(a) that a staff member wishing to formally contest an administrative decision must submit a request for a management evaluation as a first step, the Tribunal will limit its scope of judicial review to the decision not to investigate the Applicant's complaint against his FRO and SRO.

34. Moreover, the Tribunal recalls that "the Administration's response to a request for management evaluation is not a reviewable decision" (see *Nwuke* 2016-UNAT-697, para. 20). This means that the Tribunal does not have jurisdiction to consider appeals against the MEU's responses to the Applicant's request for management evaluation. Therefore, the Tribunal will not adjudicate the Applicant's arguments against the MEU's responses to his request for management evaluation.

35. With respect to the standard of review, the Tribunal recalls that it is not vested with the competence to conduct a fresh investigation into the complaint (see *Luvai* 2014-UNAT-417, para. 58; *Messinger* 2011-UNAT-123, para. 25). The Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations (see, e.g., *Oummih* 2015-UNAT-518, para. 31; *Nadeau* 2017-UNAT-733, para. 33). It is not the Tribunal's role to substitute its judgment for that of the responsible official in the exercise of

his or her discretion under ST/SGB/2008/5 (see, e.g., *Masyllkanova* UNDT/2015/088, para. 67; *Sanwidi* 2010-UNAT-084). However, the Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation a staff member had a right to an investigation (see *Nwuke* 2010-UNAT-099, para. 40).

Whether the decision not to investigate is lawful

36. In determining whether the decision not to investigate is lawful, the Tribunal recalls that a staff member has no right to compel the Administration to conduct an investigation unless such right is granted by its Regulations and Rules (see *Nwuke* 2010-UNAT-099, para. 5). There are situations where the only possible and lawful decision of the Administration is to deny a staff member's quest to undertake a fact-finding investigation against another staff member (see *Nadeau*, para. 33). This follows directly from ST/SGB/2008/5 which reads in relevant parts as follows:

Formal procedures

...

5.14 Upon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation.

37. Under this provision, a fact-finding investigation may only be undertaken if there are "sufficient grounds", i.e., the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of the Bulletin (see *Ostensson* UNDT/2011/050, para. 30). Consequently, if there are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 can have a negative impact on the staff member concerned (see *Nadeau*, para. 34).

38. Accordingly, it is the responsible official's duty to assess whether there is at least a "reasonable chance" that the alleged facts described in the complaint would

amount to prohibited conduct. It is worth pointing out that there is no requirement that prohibited conduct be proven since the very purpose of a fact-finding investigation is to establish whether or not the alleged prohibited conduct took place (see *Ostensson*, para. 30).

39. The term “prohibit conduct” refers to discrimination, harassment and abuse of authority, the definition of which can be found in section 1 of ST/SGB/2008/5:

1.1 Discrimination is any unfair treatment or arbitrary distinction based on a person’s race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

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, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

[...]

1.4 Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

40. In his complaint, the Applicant presented numerous incidents to support his allegation that his FRO and SRO “persistently and systematically harassed [him],

abused [him], and failed to observe their responsibilities both under ST/SGB/2008/5 and ST/AI/2010/5”. He alleged, *inter alia*,

- a. Instances of “moving the goal posts” in performance management to manufacture criticism and deliberate misrepresentation of his performance;
- b. Instances of “harsh criticism without explanation” against him, as well as the use of mocking tone and language that was designed to humiliate him; and
- c. Instances of disparaging oral remarks made by the FRO towards him, as well as comments concerning his alleged inability to accept supervision by a female.

41. After a careful examination of all the elements on file, the Tribunal finds that the principle reason for the conflict and discomfort that arose between the Applicant and his supervisors related to his work performance. Indeed, the Applicant’s complaint against his FRO and SRO primarily relates to his disagreement about the normal exercise of managerial authority in respect of his work performance and on the measures taken to improve his performance. Indeed, the Applicant neither alleged nor showed any trace of harassment or abuse of authority out of the above-mentioned domain.

42. While some actions from the Applicant’s supervisors may have not been exemplary, as the Respondent admits, the record did not justify initiating an investigation into an issue that was principally a performance management matter.

43. In this respect, the Tribunal recalls that disagreements on work performance or other work-related issues in themselves normally do not constitute harassment under sec. 1.2 of ST/SGB/2008/5 and are not dealt with under the provisions of this Bulletin, but in the context of performance management.

44. Moreover, the incidents described by the Applicant do not fall under any of the examples of “abuse of authority” specifically mentioned in sec. 1.4 of ST/SGB/2008/5.

45. By Judgment *Yavuz* UNDT/2021/062, adjudicating Case No. UNDT/GVA/2019/048, the Tribunal, among other prevailing considerations, found that the Applicant's performance was not managed or evaluated in a fair and objective manner. However, this does not amount to the Applicant being subjected to prohibited conduct such as abuse of authority as defined under the Bulletin.

46. Under sec. 1.4 of ST/SGB/2008/5, abuse of authority is the improper use of a position of influence, power or authority against another person, for instance, to improperly influence a staff member's career. No doubt that improperly influencing a staff member's performance evaluation by his supervisor(s) could amount to "abuse of authority" (see, e.g., *Sarwar* UNDT/2018/005, paras. 99 and 106-107; *Gakumba* UNDT/2012/192, para. 109; *Belkhabbaz* UNDT/2018/016/Corr.1, paras. 181, 182), but this does not include the simple wrong evaluation of a staff member committed in good faith and without any improper will to damage him/her and without deliberate discrimination (see ILOAT Judgment 3185, para. 5.b).

47. Indeed, one thing is the wrong use of managerial powers—in the present case, the wrong evaluation of performance that is an objective situation (connected to the results)—and another thing is the abuse of authority in performance evaluation (an abusive performance evaluation), which requires something more, that is the scope of harm and damage, or at least the awareness of the unfairness of the performance evaluation in its completion of it.

48. In *Yavuz*, this Tribunal assessed the use of managerial powers and found in favour of the Applicant based on other prevailing evaluations (see para. 65 of that Judgment). With respect to assessing abuse of authority in performance evaluation, this Tribunal considers that an incorrect or deficient evaluation (even if the outcome is objectively conditioned by some contrasts between the parties) is not a deliberately harmful evaluation.

49. In the context where the FRO, the SRO and a Rebuttal Panel made a concurring evaluation, there is no room for a finding of abuse. At most, one could find an objective wrong evaluation.

50. This Tribunal found the Applicant's performance evaluation objectively unfair as it was influenced by the contrasts between the FRO, SRO and the Applicant. However, the FRO and SRO were acting in good faith, convinced of performing their duties to the best of their abilities, with no proven intention to abuse their position and/or deliberately underestimating or, worse, harming the staff member. The Applicant's supervisors followed the performance evaluation process and no sign of discrimination or abuse of authority emerges from the record, although the outcome of the performance evaluation was objectively unfair (see UNAdT Judgment No. 1430, *Waite* (2009), para. VI).

51. There is no evidence, either, of the supervisors conveying dissatisfaction to the Applicant in an improper way, for instance in front of the Applicant's colleagues or using informal means and meetings with others, out of a direct interaction with the staff member under examination (see, *mutatis mutandis*, *Assale* 2015-UNAT-534, para. 17). In the absence of evidence of bias or collusion or sheer neglect of duty on the part of managers, the Tribunal will not attribute improper motives to the FRO and the SRO.

52. It is in general true that the burden of proof or test to be applied to the question of whether a complaint should be investigated must be lower than the burden of proof or test to be applied to prove a case of unlawful separation, as the Applicant argues. The Tribunal finds, however, that, although the threshold to initiate an investigation under ST/SGB/2008/5 is low, the Applicant's case does not reach that level either. The Applicant does not show any trace of discrimination, harassment, or abuse of authority in the present case, but mere normal exercise of managerial powers by his FRO and SRO, which remains irrelevant if the outcome of the managers' evaluation is found objectively wrong for other purposes as it was the case.

53. As to the various incidents alleged in the present case and complained of by the Applicant, the Tribunal finds that these incidents, even if true, singularly and globally considered do not disclose any possible prohibited conduct under ST/SGB/2008/5 by his FRO or SRO, but reflect the different positions of the contrasting persons in the hierarchy, and do not overcome the limits of ordinary contrasts in a work relationship, although sometimes expressed in a harsh and impolite way by a supervisor.

54. Given the above, the Tribunal already clarified in *Benfield-LaPorte* that:

the concept of ‘abuse of authority’ cannot be understood to cover each and every case of impolite and awkward behaviour. Also in this area, different standards based on various cultural backgrounds do exist. Interpreting ‘abuse of authority’ too broadly could open the door to a wave of complaints related to minor incidents; this certainly is not the objective of ST/SGB/2008/5. It could also lead to the effect that pure criticism of –for instance– performance might be perceived as a possible lack of respect and damage to the staff member’s dignity. Such a broad interpretation would even be counterproductive to an efficient prosecution of the types of conduct ST/SGB/2008/5 wishes to prevent and condemn. (see *Benfield-LaPorte* UNDT/2013/162, para. 49)

55. Finally, the Tribunal recalls that the Administration has a degree of discretion as to how to conduct a review and assessment of a complaint in order to decide whether an investigation should be initiated, and may decide whether to undertake an investigation regarding all or some of the allegations (see, e.g., *Oummih*, para. 31; *Nadeau*, para. 33). The Tribunal has the task to only review the validity of the contested decision on grounds of legality, reasonableness and procedural fairness (see *Sanwidi*). In the present case, the scrutiny of the contested decision leads to the conclusion that the evaluation by the Administration was proper.

56. Consequently, the Tribunal finds that the decision not to initiate an investigation is not unlawful.

Conclusion

57. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

Judge Francesco Buffa

(Signed)

Dated this 8th day of November 2021

Entered in the Register on this 8th day of November 2021

(Signed)

René M. Vargas M., Registrar, Geneva